

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,

and

THE CITY OF SANTA CLARA, CALIFORNIA and
PACIFIC GAS AND ELECTRIC COMPANY

Intervenors.

**BRIEF FOR INTERVENOR
PACIFIC GAS AND ELECTRIC COMPANY**

David A. Repka, Esq.
WINSTON & STRAWN LLP
1400 L Street, N.W.
Washington, D.C. 20005
(202) 371-5726

September 10, 2004

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Northern California Power Agency,)
Petitioner,)
v.)
U.S. Nuclear Regulatory Commission and)
United State of America) No. 03-1038
Respondents,)
and)
City of Santa Clara, California,)
Pacific Gas and Electric Company)
Intervenors)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*

All parties, intervenors, and *amici* appearing in the agency proceeding below and in this Court are listed in the Brief for Petitioner.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Pacific Gas and Electric Company ("PG&E") hereby files this Disclosure Statement.

PG&E is a corporation organized under the laws of the State of California, with its principal executive offices in San Francisco, California. PG&E is an operating public utility engaged principally in the business of providing electricity and natural gas distribution and transmission services throughout most of Northern and Central California. Effective January 1, 1997, PG&E and its subsidiaries became subsidiaries of Pacific Gas and Electric Corporation, an energy-based holding company organized under the laws of the State of California, with its

principal executive offices in San Francisco, California. Pacific Gas and Electric Corporation, PG&E's parent, is the only publicly held corporation owning ten percent or more of PG&E's stock.

B. Ruling Under Review

Pacific Gas and Electric Co. (Diablo Canyon Power Plant, Units 1 and 2), CLI-03-02, 57 NRC 19 (Feb. 14, 2003).

C. Related Cases

Related cases appear in the Brief for Petitioner.

TABLE OF CONTENTS

JURISDICTION 1

STATEMENT OF THE ISSUES..... 1

STATUTES AND REGULATIONS..... 2

STATEMENT OF THE CASE..... 2

SUMMARY OF ARGUMENT 5

ARGUMENT 6

 I. STANDARD OF REVIEW 6

 II. THE NRC ORDER SHOULD NOT BE VACATED 7

 A. NCPA CANNOT BE HARMED BY THE NRC ORDER..... 7

 B. *U.S. BANCORP* REFLECTS AN EQUITABLE EXCEPTION THAT
 APPLIES IN THE PRESENT CASE 10

CONCLUSION..... 15

TABLE OF AUTHORITIES

FEDERAL CASES

<i>A. L. Mechling Barge Lines, Inc. v. United States</i> , 368 U.S. 324 (1961).....	5, 6, 10
<i>Am. Family Life Assurance Co. of Columbus v. Fed. Communications Comm'n</i> , 129 F.3d 625 (D.C. Cir. 1997).....	10, 14
<i>Atlanta Gas Light Co. v. Fed. Energy Reg. Comm'n</i> , 140 F.3d 1392 (11th Cir. 1998)	10, 13
<i>Columbian Rope Co. v. West</i> , 142 F.3d 1313 (D.C. Cir. 1998).....	10, 13
<i>Fed. Deposit Ins. Corp. v. O'Donnell</i> , 136 B.R. 585 (Bankr. D.D.C. 1991)	11
<i>Humphreys v. Drug Enforcement Admin.</i> , 105 F.3d 112 (3rd Cir. 1996).....	6
<i>Karcher v. May</i> , 484 U.S. 72 (1987).....	7
* <i>Mahoney v. Babbitt</i> , 113 F.3d 219 (D.C. Cir. 1997).....	7, 8, 9
<i>National Black Police Ass'n v. District of Columbia</i> , 108 F.3d 346 (D.C. Cir. 1997).....	7, 12
<i>Pharmachemie B.V. v. Barr Labs., Inc.</i> , 276 F.3d 627 (D.C. Cir. 2002).....	14
<i>Sanders v. United States</i> , 373 U.S. 1 (1963).....	15
<i>Stoll v. Gottlieb</i> , 305 U.S. 165 (1938).....	11

* Authorities chiefly relied upon are marked with an asterisk.

* <i>U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship</i> , 513 U.S. 18 (1994).....	5, 6, 7, 10, 12, 14, 15
<i>United States v. Garde</i> , 848 F.2d 1307 (D.C. Cir. 1988).....	12
* <i>United States v. Munsingwear, Inc.</i> , 340 U.S. 36 (1950).....	5, 6, 7, 10, 14

FEDERAL STATUTES

Atomic Energy Act, 42 U.S.C. § 2135.c (2000).....	3, 8, 9
---	---------

GLOSSARY

AEA Atomic Energy Act
DCPP..... Diablo Canyon Power Plant, Units 1 and 2
NCPA..... Northern California Power Agency
NRC Nuclear Regulatory Commission
PG&E..... Pacific Gas and Electric Company
Stanislaus Stanislaus Nuclear Plant

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Northern California Power Agency, Petitioner,)	
)	
v.)	
)	
U.S. Nuclear Regulatory Commission and United State of America Respondents,)	No. 03-1038
)	
and)	
)	
City of Santa Clara, California, Pacific Gas and Electric Company Intervenors)	
)	

BRIEF FOR INTERVENOR PACIFIC GAS AND ELECTRIC COMPANY

Jurisdiction

Intervenor Pacific Gas and Electric Company (“PG&E”) generally agrees with the recitation of procedural history and jurisdiction in Petitioner Northern California Power Agency’s (“NCPA”) Brief, at 1-3, and Respondents the U.S. Nuclear Regulatory Commission’s (“NRC”) and the United States’s Brief, at 1.

Statement of the Issues

PG&E agrees with NCPA’s statement of the issues (Pet. Br. at 3): whether the agency order challenged by NCPA, having become moot while this appeal was pending, should be vacated.

PG&E also agrees with the NRC and the United States that this case raises an additional question (Resp. Br. at 1): whether this Court, having already issued its mandate,

retains jurisdiction to vacate the agency order. While PG&E supports the NRC's and the United States's position on this issue, this issue is not further discussed below.

Statutes and Regulations

All applicable statutes and regulations are contained in the Brief for Petitioner.

Statement of the Case

Apart from the rhetoric and certain specific exceptions noted below, PG&E agrees with NCPA's Statement of the Case, Pet. Br. at 4-18. The course of the proceedings before the NRC are not in dispute. A brief summary follows.

Due to the dysfunction of the electricity market in California during the period from mid-2000 to early 2001, PG&E was forced to file in April 2001 for protection and reorganization under Chapter 11 of the United States Bankruptcy Code. Subsequently, PG&E filed in the bankruptcy proceeding a comprehensive plan of reorganization that involved the disaggregation of PG&E's businesses into four successor companies. On November 30, 2001, as one of several regulatory actions required to support the plan of reorganization, PG&E filed an application with the NRC to transfer and amend its operating licenses for the Diablo Canyon Power Plant, Units 1 and 2 ("DCPP"). NRC action would have been necessary to transfer ownership and operating authority to two of the successor companies. PG&E did not propose to "remove ... successor corporations" from the NRC licenses as suggested by NCPA (Pet. Br. at 8). Rather, PG&E proposed to amend the licenses to name the two proposed successor companies as the new owner and the new operator of DCPP. PG&E also proposed to retain reorganized PG&E (the electric utility successor) as an NRC licensee and to designate PG&E and two other successor companies as licensees to implement certain antitrust license conditions included in the DCPP operating licenses. The antitrust licensees would have been the entities

with the assets and businesses such that they would have been capable of implementing the actions required by the antitrust conditions. This approach would have retained the antitrust conditions, substantively unchanged. However, retention of the antitrust conditions was not necessary for implementation of the PG&E proposed plan of reorganization or the NRC license transfers. Obviously, if the antitrust conditions were not included in the transferred licenses, no antitrust licensees (*i.e.*, no successors with responsibilities for compliance with the antitrust conditions) would be necessary.

The antitrust license conditions of concern to NCPA had been voluntarily incorporated in the DCPD licenses when the DCPD units were first licensed by the NRC. Those conditions were based on certain commitments originally made by PG&E in connection with PG&E's proposed, but never-completed, Stanislaus Nuclear Plant ("Stanislaus"). App. at 52, 55-56.

In the order at issue here, CLI-03-02, dated February 14, 2003, the NRC concluded that it lacked authority under Section 105.c of the Atomic Energy Act of 1954, as amended ("AEA"), 42 U.S.C. § 2135.c (2000), to transfer the DCPD antitrust conditions to the new entities that would have been created as part of the proposed plan of reorganization. App. at 41-59. The NRC held that the agency's antitrust jurisdiction under the AEA does not give the agency antitrust authority with respect to the licensing of DCPD in order to impose license conditions developed in connection with the proposed licensing of Stanislaus. App. at 56.

NCPA tries to cast doubt upon the integrity of the NRC's order when it argues, in footnote 3 of its brief, that the NRC's analysis is "transparently inapposite." Pet. Br. at 17. It argues that PG&E's application proposed transferring conditions already present in the license, and therefore NRC antitrust jurisdiction clearly existed. PG&E did not dispute the NRC's

jurisdiction to address the disposition of the antitrust conditions in reviewing the license transfer application, and implicitly neither does the NRC. NCPA, however, misunderstands the Commission's analysis in CLI-03-02. The Commission held that the NRC's only antitrust authority derives from Section 105.c of the AEA, which is tied to specific licensing events. The thrust of the NRC's decision in CLI-03-02 is that the licensing of Stanislaus conferred no antitrust authority with respect to DCPD *at any time*, including a DCPD license transfer. App. at 56. Therefore, it could not incorporate those Stanislaus conditions into a transferred DCPD license.

As such, the Commission's February 14, 2003 order addressed significant legal and policy issues associated with the status of the antitrust conditions in the DCPD operating licenses. Ultimately, however, as discussed in PG&E's April 13, 2004 motion in this Court to terminate this proceeding, the PG&E plan of reorganization was not pursued in the Bankruptcy Court and will not be implemented. The Bankruptcy Court ultimately confirmed a separate plan of reorganization for PG&E that did not involve disaggregation of the company and therefore obviated the NRC license transfers discussed in the NRC order. The confirmed plan of reorganization resulted from a comprehensive settlement of the bankruptcy proceeding involving PG&E and the California Public Utilities Commission and other parties in interest. PG&E has since emerged from Chapter 11 bankruptcy, the NRC license transfers (issued subsequent to the NRC order under review) became null and void, and the NRC administrative proceeding has been terminated. PG&E continues to be the owner and operator of DCPD and the Stanislaus antitrust conditions remain in the DCPD licenses. This proceeding was also dismissed as moot.

Summary of Argument

The Supreme Court has stated a general rule that, when an appeal becomes moot, vacatur “clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance.” *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950); see also *A. L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324 (1961). However, the Supreme Court has also clarified that the importance of precedent dictates that the relief of vacatur is an equitable remedy, not an automatic right. *U.S. Bancorp Mortgage Co. v. Bonner Mall P’ship*, 513 U.S. 18 (1994). The present case involves complex facts that do not warrant a straight-forward application of *Munsingwear*. Neither does the present case involve a straight-forward application of the exception to the *Munsingwear* doctrine enunciated in *U.S. Bancorp* that vacatur is inappropriate where the party seeking relief from the judgment below caused the mootness by voluntary action. However, on the spectrum of equities to consider when assessing the request for vacatur, the facts of the present case are closer to the *U.S. Bancorp* exception than to the *Munsingwear* general rule.

The precedential value in the NRC’s decision lies in its legal and policy analysis, not in its specific factual context. NCPA is not now harmed by the NRC’s decision or its analysis. NCPA will have the opportunity to challenge any future application involving the DCPP antitrust conditions and to seek review of any new NRC decision. The relevant issues will be considered in the specific factual context presented at that time.

Moreover, the mootness of the agency order in this case did not derive from “happenstance;” it derived from a complex bankruptcy proceeding to which PG&E and NCPA were parties. As a result of a settlement in that proceeding, NCPA derived exactly the relief it would have wanted *with respect to the agency proceeding below*. NCPA did not appeal the

Bankruptcy Court's order confirming the settlement of the bankruptcy case and itself filed a motion requesting that this appeal of the NRC order be dismissed as moot. In this situation, NCPA should not be entitled to further equitable relief. Accordingly, the Court should deny NCPA's request for vacatur.

Argument

I. Standard of Review

As stated in NCPA's brief, the parties before the Court all agree that the petition for review of the NRC order below has become moot. Pet. Br. at 18. NCPA seeks vacatur under the general proposition announced by the Supreme Court in *Munsingwear* that vacatur of judgments of lower courts is common where review is prevented by happenstance "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." 340 U.S. at 41. The Supreme Court in *Mechling* has applied the *Munsingwear* principle to "unreviewed administrative orders." *Mechling*, 368 U.S. at 329. *Munsingwear* is not, however, a universal, automatic proposition. The Supreme Court has also held, for example, that a party is not entitled to vacatur if it "caused the mootness by voluntary action." See *U.S. Bancorp*, 513 U.S. at 24. Ultimately, the determination of whether to grant vacatur is an equitable one. *Id.* at 29; see also, *Humphreys v. Drug Enforcement Admin.*, 105 F.3d 112, 114 (3rd Cir. 1996) ("Thus, *Munsingwear* should not be applied blindly, but only after a consideration of the equities and the underlying reasons for mootness"). This determination with respect to vacatur is to be made in the first instance by this Court.

II. The NRC Order Should Not be Vacated

A. NCPA Cannot Be Harmed by the NRC Order

The precedent regarding vacatur relied upon by NCPA generally cites the “standard practice” discussed by the Supreme Court in *Munsingwear*. The Supreme Court explained that a request for vacatur of judgments of lower courts is “commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences.” *Munsingwear*, 340 U.S. at 41. In *U.S. Bancorp*, the “Supreme Court’s latest word on vacatur,” *Mahoney v. Babbitt*, 113 F.3d 219, 221 (D.C. Cir. 1997), the Supreme Court characterized the general rule as providing that vacatur must be decreed for those judgments whose review is, “in the words of *Munsingwear*, “prevented through happenstance;”” that is, ““due to circumstances unattributable to any of the parties.”” *U.S. Bancorp*, 513 U.S. at 23 (citing *Karcher v. May*, 484 U.S. 72, 82, 83 (1987) (quoting *Munsingwear*, 340 U.S. at 40)).

The Supreme Court, however, has also recognized the value of precedent and determined that a precedent “should stand unless a court concludes that the public interest would be served by a vacatur.” *U.S. Bancorp*, 513 U.S. at 26-27 (citations omitted). As characterized by this Court in *National Black Police Ass’n v. District of Columbia*, 108 F.3d 346, 351 (D.C. Cir. 1997), *U.S. Bancorp* stands for the proposition that vacatur is “an equitable remedy, not an automatic right.” In *Mahoney*, this Court also considered *U.S. Bancorp*, which it characterized as holding “that the precedential power of an opinion is a reason arguing against vacatur,” and concluded that “the establishment of precedent argues against vacatur, not in favor of it.” *Mahoney*, 113 F.3d at 222-23. The Court distinguished the “fact-specific elements” of an opinion “essential to preclusive effect, as opposed to the general principles of law” necessary for “precedential effect” of an opinion, the latter of which “poses little risk of prejudice to the

parties.” *Id.* at 224. The Court recognized that vacatur may not always be appropriate, and that circumstances may support a conclusion that the “heavy weight of precedential value greatly exceeds the light, if existent, danger of unfair preclusive effect.” *Id.* Similar to the reasoning in *Mahoney*, “prudence does not compel vacatur,” *id.*, in the present case.

The NRC took the opportunity in its February 14, 2003 order to announce policy and legal conclusions regarding the NRC’s antitrust authority under Sections 105.c(5) and 105.c(6) of the AEA. In particular, the NRC addressed how that authority would apply to the antitrust conditions in the DCPD licenses in the event of the license transfer proposed at that time. The general policy and legal principles supply important guidance that may be instructive in the future. Conversely, allowing the guidance to stand, unreviewed at this time, could cause no conceivable legal harm to NCPA or any other entity. The Commission’s decision applied by its terms only to the specific facts involving DCPD and the specific license transfer proposed at that time — one that now *will not* go forward. Given that the original PG&E plan of reorganization will not be implemented, and that the associated NRC license transfers will not be implemented, the Commission’s February 14, 2003 order has, and will have, no effect on the DCPD licenses or antitrust conditions.

If PG&E or any other NRC licensee were to make any new proposal to transfer a license, or any other proposal based upon the conclusions announced by the Commission on February 14, 2003, it would need to make a new application to the NRC demonstrating how those legal conclusions apply to the specific proposal and specific facts presented at that time. That application would require NRC approval and would be subject to the NRC’s administrative hearing procedures. The NRC’s decision on a new request — necessarily including both the “legal principles” and the “specific fact elements” involved in that decision — would be subject

to judicial review. The NRC's order that is the subject of the present case, therefore, can directly spawn no legal consequences — to PG&E, NCPA, or anybody else — precisely because that order addresses circumstances mooted by the outcome of the bankruptcy case.¹

Furthermore, NCPA overstates the effect of the NRC order by mischaracterizing the NRC's decision. Pet. Br. at 29. The issue addressed by the NRC in CLI-03-02 was *sui generis* — it was tied to a specific PG&E proposed plan of reorganization pending at the time before the Bankruptcy Court. That proposed reorganization plan was withdrawn. The NRC's decision in CLI-03-02 also was tied to conditions apparently unique to DCPD, because of the peculiar circumstances surrounding the licensing of the Stanislaus plant, the licensing of DCPD, and the adoption of the Stanislaus antitrust conditions in the DCPD license. The NRC order would not, as suggested by NCPA (Pet. Br. at 29), allow any licensee to “shuck off” antitrust conditions simply by transferring its license. The NRC order is very much limited to the facts of the DCPD antitrust conditions that grew out of the licensing of the never-completed Stanislaus plant. PG&E is aware of no other nuclear plant with antitrust license conditions that were developed based upon the licensing of another project.

Nonetheless, the NRC order does have legal and policy precedential value. See *Mahoney*, 113 F.3d at 222-24. The Commission's analysis provides insight into the Commission's view of the scope of the agency's antitrust authority under Sections 105.c(5) and 105.c(6) of the AEA. This Commission guidance should not be treated as the property of a

¹ At most, the NRC may be bound by the legal principles presented in a future application based on new facts. However, policy considerations could dictate a change in position at that time. Moreover, the NRC is in no way bound with respect to the results of its review of a future licensing proposal (that is, the application of legal principles to specific facts). A reviewing court also would not be bound by either agency precedent or the agency's decision.

private litigant such as NCPA, to be automatically vacated upon request. *See U.S. Bancorp*, 513 U.S. at 26-27.

B. *U.S. Bancorp* Reflects an Equitable Exception that Applies in the Present Case

The general principle in *Munsingwear* is that a reviewing court should vacate a judgment below, “review of which was prevented through happenstance.” *Munsingwear*, 340 U.S. at 40. The *Munsingwear* “rule” has been applied (1) where the controversy has become moot due to “circumstances unattributable to any of the parties,” *Columbian Rope Co. v. West*, 142 F.3d 1313 (D.C. Cir. 1998); (2) where review is frustrated by “vagaries of circumstance,” *Atlanta Gas Light Co. v. Fed. Energy Reg. Comm’n*, 140 F.3d 1392 (11th Cir. 1998); and/or (3) where mootness results from the unilateral action of the party who prevailed in the lower forum, *Am. Family Life Assurance Co. of Columbus v. Fed. Communications Comm’n*, 129 F.3d 625 (D.C. Cir. 1997) (“*AFLAC*”); *Mechling*, 368 U.S. 324. However, these cases, and the *Munsingwear* rule, are all distinguishable from and inapplicable to the present circumstances.

NCPA intervened in PG&E’s license transfer application proceeding at the NRC, ardently seeking to ensure that the antitrust conditions would remain in the DCPD licenses (*i.e.*, they would be transferred along with the licenses). App. at 153-234. All parties to the NRC proceeding, including NCPA, knew and clearly understood that events in PG&E’s bankruptcy proceeding had a direct correlation to PG&E’s plan of reorganization and the NRC license transfer proceeding. *See* Pet. Br. at 18-19. While NCPA was not a party to the bankruptcy settlement, it was a party in interest in the bankruptcy case. As NCPA asserts, NCPA joined with several other parties in opposing the settlement of that case and voted against confirmation

of the settlement plan of reorganization.² (As NCPA further asserts, its vote against the plan is a matter of public record. PG&E has never disputed this point.) Pet. Br. at 25-26 n.5. However, NCPA chose not to perfect its opposition to the plan by appealing the Bankruptcy Court's decision. Thus, the Bankruptcy Court having entered its order confirming the settlement plan, NCPA became bound by the plan like all other creditors and parties in interest. *See Stoll v. Gottlieb*, 305 U.S. 165 (1938); *see also Fed. Deposit Ins. Corp. v. O'Donnell*, 136 B.R. 585, 588-89 (Bankr. D.D.C. 1991). The new plan of reorganization obligated PG&E to withdraw its NRC license transfer application — effectively settling NCPA's issue in the NRC proceeding, leaving NCPA with the result *at the NRC* that it sought at the outset (*i.e.*, the antitrust conditions remain in the DCPD licenses), and causing NCPA's appeal of the NRC order to this Court to become moot.³ NCPA subsequently filed its own motion to dismiss and clearly did not object to dismissal of this case as moot.

NCPA, in its brief (Pet. Br. at 25), makes much of its vote against the settlement of the bankruptcy case. NCPA does not dispute, however, that it did not appeal the Bankruptcy Court's order confirming the settlement plan of reorganization (making its prior vote against the plan little more than a symbolic act). The more important point, and the one emphasized by PG&E in its prior opposition to the Motion to Vacate in this Court, is that the result of the settlement was one that lead to a *favorable* result for NCPA *in the NRC proceeding on the*

² NCPA's objection to the settlement plan did not raise issues related to the status of the DCPD licenses or the NRC order on the antitrust conditions.

³ Upon reaching a settlement with the parties in the bankruptcy proceeding, the alternative plan of reorganization was submitted for confirmation to the Bankruptcy Court and PG&E requested the NRC hold in abeyance its proceeding pending the outcome of the bankruptcy proceeding. App. at 385. Likewise, NCPA submitted a motion to this Court requesting the briefing schedule of its appeal of the NRC order be held in abeyance as well. Pet. Br. at 18-19.

antitrust license conditions. This is the result that must be considered in assessing the equities of vacatur. NCPA seeks to have its proverbial cake and to eat it too.

NCPA, in its brief (Pet. Br. at 25 n.5), also mischaracterizes PG&E's position in opposition to the Motion to Vacate. NCPA argues that PG&E suggested that it "was 'well pleased' *with the Plan*" of reorganization adopted as a result of the bankruptcy settlement (emphasis added). That was *not* PG&E's argument, and the words in PG&E's opposition to the Motion to Vacate are quite clear. PG&E's point was the very point that NCPA now acknowledges in the body of its brief on the same page where it mischaracterizes PG&E's position. PG&E's point was that NCPA was *well pleased with the impact of the bankruptcy settlement in the NRC context*. As a result of the bankruptcy settlement, the antitrust commitments remain in the DCPD licenses, which was precisely NCPA's objective at the NRC. Having obtained the result it sought at the NRC, NCPA should not now be permitted to "wash[]" away" the "unfavorable outcome" of the NRC order through the use of vacatur. *U.S. Bancorp*, 513 U.S. at 28; compare *National Black Police Ass'n*, 108 F.3d at 351-52; *United States v. Garde*, 848 F.2d 1307, 1310 (D.C. Cir. 1988) (denying vacatur and finding that where a losing party obtains through an effective settlement what it originally sought, and thus moots appellate review, "this court has found it appropriate to depart from [the *Munsingwear*] practice to avoid unfairness to parties who prevailed in the lower court").

In *U.S. Bancorp*, the Court announced one exception to the *Munsingwear* rule and held that "mootness by reason of settlement does not justify vacatur of a judgment under review." *U.S. Bancorp*, 513 U.S. at 29. Admittedly, *U.S. Bancorp* is not directly applicable to the present case because the present case does not involve a settlement *per se* of the NRC proceedings or a settlement between PG&E and NCPA. However, the facts of the present case

are more akin to those in *U.S. Bancorp* than to those in cases where vacatur has been granted. The facts dictate that the Court should apply the principles of *U.S. Bancorp* to deny NCPA's request for vacatur in order to preserve the agency precedent.

In *Columbian Rope Co.*, the vacatur was issued precisely because mootness was "unattributable to any of the parties," *i.e.*, because of the expiration of the contract at issue. *Columbian Rope Co.*, 142 F.3d at 1317-18. Here, PG&E and, albeit to a lesser degree, NCPA, were both factors in the mootness of the NRC case. Most importantly, NCPA wants to vacate the precedent notwithstanding that it did not "lose" anything at the NRC and that it cannot be harmed by the NRC order. NCPA itself wanted this case dismissed as moot, evidencing no interest in further pursuing its appeal.

In *Atlanta Gas Light Co.*, the court held that a *third party*, Atlanta Gas Light Company ("Atlanta Gas"), was entitled to vacatur of certain agency orders because Atlanta Gas's request for review of the agency orders had been "frustrated by the vagaries of circumstance," *i.e.*, the orders were mooted by a settlement to which Atlanta Gas was not a party. *Atlanta Gas Light Co.*, 140 F.3d at 1402-3 (citation omitted). Notably, the court distinguished Atlanta Gas's participation in a global settlement, which settlement did not cause the mootness of the agency orders, and relied upon the fact that "Atlanta Gas was not a party to the settlement which mooted the action." *Id.* at 1403 n.11. Here, while NCPA was not a party to the bankruptcy settlement which caused the mootness of the NRC order, it was not an uninvolved, non-party like Atlanta Gas. Rather, NCPA was an intimately involved party in interest to the bankruptcy proceedings. And, NCPA did not formally appeal the Bankruptcy Court's order confirming the settlement plan which, once confirmed by the Bankruptcy Court, caused the mootness of the NRC order. Again,

NCPA itself also did not seek to pursue its appeal of the NRC order; it filed its own motion to dismiss the appeal as moot.

In *AFLAC*, the case was mooted because the petitioner sold its interests in television stations and dissolved — events more closely akin to the *Munsingwear* general rule requiring vacatur than to the *U.S. Bancorp* exception for cases involving settlements among the parties. In the present situation, PG&E did not sell DCPP and certainly did not unilaterally settle the bankruptcy case or unilaterally cause the mootness of NCPA's appeal.

In total, this is not a case where, to use the words of *Munsingwear*, mootness resulted from “happenstance.” While neither party settled the NRC case, the same reasoning in the *U.S. Bancorp* Court's treatment of moot cases that counseled “against extending *Munsingwear* to settlement,” also counsel against extending *Munsingwear* to the present case. *U.S. Bancorp*, 513 U.S. at 24.⁴ To dispose of NCPA's request for vacatur in a manner “most consonant to justice ... in view of the nature and character of the conditions which have caused the case to become moot,” *id.* (citations omitted), this Court should closely examine the facts in the present case and determine that NCPA's participation in the bankruptcy proceedings, and its decisions not to appeal the Bankruptcy Court's order confirming the plan of reorganization (along with its agreement that the NRC order is moot), are tantamount to “voluntary action” which contributed to the mootness of its appeal of the NRC order. *See, e.g., Pharmachemie B.V. v. Barr Labs., Inc.*, 276 F.3d 627, 634 (D.C. Cir. 2002) (failure to appeal a judgment constituted voluntary action that led to mootness). NCPA may not have slept on its rights when it appealed the NRC order; however, NCPA's voluntary action (or inaction) in the bankruptcy proceeding,

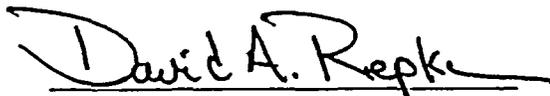
⁴ The Court also observed that the portion of Justice Douglas' opinion in *Munsingwear*, describing the “established practice” for vacatur, was *dictum*. *U.S. Bancorp*, 513 U.S. at 24.

which proceeding caused NCPA's appeal to this court to become moot, resulted in NCPA "surrendering [its] claim to the equitable remedy of vacatur." *U.S. Bancorp*, 513 U.S. at 25. NCPA's "conduct in relation to the matter at hand [should] disentitle [it] to the relief [it] seeks." *Id.* (quoting *Sanders v. United States*, 373 U.S. 1, 17 (1963) (citation omitted)).

Conclusion

For the reasons set forth above, NCPA's Motion to Vacate the order below should be denied.

Respectfully Submitted,



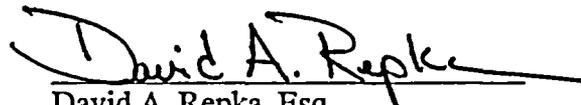
David A. Repka, Esq.
WINSTON & STRAWN LLP
1400 L Street, N.W.
Washington, D.C. 20005

Counsel for Pacific Gas and Electric
Company

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rules of Appellate Procedure 32(a)(7)(C), I hereby certify that Intervenor Pacific Gas and Electric Company's brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(a)(3)(B), and that the number of words in the brief is 4,280, as counted by the Microsoft Word program.

WINSTON & STRAWN LLP
1400 L Street, N.W.
Washington, D.C. 20005


David A. Repka, Esq.

Counsel for Pacific Gas and Electric
Company

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2004 two copies of "BRIEF FOR INTERVENOR PACIFIC GAS AND ELECTRIC COMPANY" were served by first class U.S. mail, postage prepaid, upon the following:

Karen D. Cyr, General Counsel
John F. Cordes, Jr., Solicitor
E. Leo Slaggie, Deputy Solicitor
Grace H. Kim, Attorney
U.S. Nuclear Regulatory Commission
Mail Stop OGC-MS 15 D21
Washington, D.C. 20555

Robert B. Nicholson, Assistant Chief
Robert J. Wiggers, Attorney
Appellate Section
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Robert C. McDiarmid
Ben Finkelstein
Andrea G. Lonian
Spiegel & McDiarmid
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

James D. Pembroke, Esq.
Lisa S. Gast, Esq.
Duncan, Weinberg, Genzer & Pembroke, P.C.
Suite 800
1615 M Street, N.W.
Washington, D.C. 20036-3203


David A. Repka, Esq.

Counsel for Pacific Gas and Electric
Company