No. 17-1224

IN THE

United States Court of Appeals

FOR THE FEDERAL CIRCUIT

LAND OF LINCOLN MUTUAL HEALTH INSURANCE COMPANY

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

On appeal from the United States Court of Federal Claims, Case No. 16-744C, Judge Charles F. Lettow

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MOTION OF PLAINTIFF-APPELLANT LAND OF LINCOLN TO SUBMIT RELATED APPEALS TO THE SAME PANEL FOR ARGUMENT AND DECISION

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CERTIFICATE OF INTEREST

1. The full name of every party represented by me is:

LAND OF LINCOLN MUTUAL HEALTH INSURANCE COMPANY

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

JENNIFER HAMMER, ACTING DIRECTOR OF THE ILLINOIS DEPARTMENT OF INSURANCE, AS STATUTORY LIQUIDATOR OF LAND OF LINCOLN MUTUAL HEALTH INSURANCE COMPANY

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party represented by me are:

NONE

4. The names of all law firms and the principals or associates that appeared for the party now represented by me in the trial court or are expected to appear in this Court are:

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MOTION OF PLAINTIFF-APPELLANT LAND OF LINCOLN TO SUBMIT RELATED APPEALS TO THE SAME PANEL FOR ARGUMENT AND DECISION

Pursuant to Federal Circuit Rules 27 and 34, plaintiff-appellant Land of Lincoln Mutual Health Insurance Company ("Land of Lincoln") respectfully requests that this Court submit the above-captioned case, *Land of Lincoln Mutual Health Insurance Co. v. United States*, No. 17-1224 (Fed. Cir.), for disposition to the same panel that will decide the pending case, *Moda Health Plan, Inc. v. United States*, No. 17-1994 (Fed. Cir.), and that a joint oral argument be held before the same panel in both cases.

Land of Lincoln has consulted with counsel for Moda, the appellee in the *Moda* appeal, which consents to this motion and has filed a similar motion in its appeal. Moda's counsel consulted with respect to both motions with counsel for the United States, which is the appellee in the *Land of Lincoln* appeal and the appellant in the *Moda* appeal. The Government does not consent and indicates it will oppose this motion.

Sound judicial decision-making and judicial efficiency would be advanced by assigning a single panel to hear simultaneously and decide both cases, a practice this Court has previously employed in similar circumstances.

DISCUSSION

Section 1342 of the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 ("ACA"), set forth a straightforward arrangement: if a health insurer would voluntarily agree to provide "Qualified Health Plans" through the "Health Benefit Exchanges" established by the ACA, the Government would make a "Risk Corridor" payment to the insurer covering a statutorily-defined portion of any losses the insurer suffered during each of the first three years of ACA operations. However, the Government has paid Qualified Health Plan insurers less than 6% of the amounts owed for 2014 and 2015 under that statutory formula.

The appeals in *Moda Health* and *Land of Lincoln* involve substantially similar legal questions, including: (1) whether the Government breached statutory or regulatory obligations to Qualified Health Plan issuers by failing to make full Risk Corridor payments; and (2) whether the Government breached an implied contractual obligation to Qualified Health Plan issuers by failing to make such Risk Corridor payments.

Moda Health and *Land of Lincoln* are two of at least 22 cases brought in the Court of Federal Claims raising these issues,[1] and they are the only two cases to

[1] *See Health Republic Ins. Co. v. United States*, No. 16-259C; *First Priority Life Ins. Co. v. United States*, No. 16-587C; *Blue Cross and Blue Shield of North Carolina v. United States*, No. 16-651C (Griggsby, J.); *Moda Health Plan, Inc. v.* (continued...)

have reached the Federal Circuit to date. The two CFC judges deciding *Moda Health* and *Land of Lincoln* came to conflicting conclusions. Judge Charles F. Lettow held that the Government was not required, by either statute or contract, to make full, annual Risk Corridor payments to insurers, *Land of Lincoln Mut. Health Ins. Co. v United States*, 129 Fed. Cl. 81 (2016), and entered final judgment in favor of the Government. Judge Thomas C. Wheeler held that the Government was both statutorily and contractually obligated to make full, annual Risk Corridors payments, and entered final judgment in favor of Moda. *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436 (2017); *Moda Health Plan, Inc. v. United States*, No. 16-649C (Fed. Cl. Mar. 2, 2017) (Order and Entry of Judgment).

United States, No. 16-649C; *Land of Lincoln Mutual Health Ins. Co. v. United States*, No. 16-744C; *Maine Cmty. Health Options v. United States*, No. 16-967C; *New Mexico Health Connections v. United States*, No. 16-1199C; *BCBSM, Inc. v. United States,* No. 16-1253C; *Blue Cross of Idaho Health Service, Inc. v. United States*, No. 16-1384C; *Minuteman Health Inc. v. United States*, No. 16-1418C; *Montana Health COOP v. United States*, No. 16-1427C; *Alliant Health Plans, Inc. v. United States*, No. 16-1491C; *Blue Cross and Blue Shield of South Carolina v. United States*, No. 16-1501C; *Neighborhood Health Plan, Inc. v. United States*, No. 16-1659C; *Health Net, Inc. v. United States*, No. 16-1722C; *HPHC Ins. Co., Inc. v United States*, No. 17-87C; *Medica Health Plans v. United States*, No. 17-94C; *Blue Cross and Blue Shield of Kansas City v. United States*, No. 17-95C; *Molina Healthcare of California, Inc. v. United States*, No. 17-97C; *Sanford Health Plan v. United States*, No. 17-cv-357C; *Blue Cross Blue Shield of Alabama v. United States*, No. 17-cv-347; *Blue Cross and Blue Shield of Tennessee*, No. 17-cv-00348.

The United States has taken the position that this Court's decision in *Land of Lincoln* "is expected to control the disposition of" all Risk Corridor cases.[2] In closely analogous circumstances, this Court has assigned related appeals to a single panel for argument and decision.

In *Pacific Gas and Electric Co. v. United States*, No. 07-5046 (Fed. Cir.), the Government moved to submit related "spent nuclear fuels" appeals to the same panel for argument and decision. Defendant-Appellee's Motion to Submit Related Appeals to the Same Panel for Purposes of Argument and Decision (Nov. 6, 2007) (Exh. 1 hereto). The Government explained that multiple pending cases involved "claims for damages arising from an alleged partial breach by the United States Department of Energy ('DOE') of the 'Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste' ('Standard Contract')."Id. at 2. "One of the central issues" in all of the cases was how damages should be calculated with regard to spent nuclear fuel after 1998, given that the Standard Contract "does not specify a specific speed or rate at which DOE must continue that acceptance after January 31, 1998." *Id.* at 2-3.

In resolving this question, the Court of Federal Claims judges had "announced conflicting interpretations of the government's obligations under the

[2] Def.'s Mot. for a 42-Day Extension of Time in Which to File the Appellee's Brief, Dkt. No. 91, at 2, *Land of Lincoln*, No. 17-1224.

Standard Contract, and reached conflicting conclusions concerning the overlapping legal issues that arose in connection with determining the foreseeability, causation and reasonableness of the utility's damages." *Id.* at 4 (citations and quotation marks omitted). The Government argued that assigning the same panel to hear and decide three pending appeals raising these issues —

> would result in significant efficiencies for the Court, given that many of the background facts related to contract formation and performance for each appeal are identical, and coordinated treatment will allow a single panel to study and digest these background events and facts and to bring that knowledge to bear in both cases, while avoiding the need for two separate panels to undertake this significant task.

Id. (citation and quotation marks omitted). Moreover, "having the same panel hear all of the appeals that involve this issue will help to ensure that the Court speaks with a uniform voice on these initial appeals in the [spent nuclear fuels] damages matters," and "likely will determine a common legal framework that will be applicable to numerous cases pending in the trial court." *Id.* at 4-5 (citation and quotation marks omitted).

This Court agreed with the Government and granted its motion to submit the cases to a single panel for argument and decision. *See* Order, *Pacific Gas and Elec. Co. v. United States*, No. 07-5046 (Fed. Cir. Nov. 16, 2007)(Exh. 2 hereto). While this Court did not set forth its reasoning, it was apparently not persuaded by the plaintiff-appellant's opposition, which argued *inter alia* that "there are

significant differences in the case" and that adding additional briefing and record evidence would unnecessarily complicate and delay the appeals, *see* Pl.-Appellant's Opposition to Defendant-Appellee's Motion to Submit Appeals to the Same Panel for Purposes of Argument and Decision, at 2, *Pacific Gas and Electric Co. v. United States*, No. 07-5046 (Nov. 9, 2007)(Exh. 3 hereto).

This Court has also utilized single panel resolution in other comparable cases, *see, e.g., Prati v. United States*, 2009 WL 1754622, Nos. 2008-5117, 2008-5129 (Fed. Cir. June 17, 2009) (*sua sponte* ordering that two appeals be treated as companion cases and referred to the same merits panel for argument, where the cases were among more than 50 appeals regarding the IRS assessment of a penalty, the disposition of which the Government argued were controlled by a recently-decided Federal Circuit case); *In re Anderson*, Dkt. No. 13 at 2, No. 16-1156 (Fed. Cir. Jan. 26, 2016)(Exh 4 hereto) (consolidated two related appeals from the Patent and Trademark Office over the objection of the appellant, when (1) "the prior art and arguments at issue between the appeals overlap substantially" and (2) "consolidation of the cases will conserve party and judicial resources").

The arguments advanced in favor of single panel resolution in *Pacific Gas* apply equally here. As in *Pacific Gas*, these two appeals involve common legal issues, whose consolidated resolution will result in significant efficiencies. As in *Pacific Gas*, the CFC judges in *Moda Health* and *Land of Lincoln* "reached

conflicting conclusions concerning the overlapping legal issues," so that having the same Federal Circuit panel resolve those issues "will help to ensure that the Court speaks with a uniform voice on these initial appeals" and facilitate the development of "a common legal framework that will be applicable to numerous cases pending in the trial court." Exh. 1 at 4-5.

Moreover, additional factors not present in *Pacific Gas* also support joint resolution here. First, unlike in *Pacific Gas*, neither *Moda Health* nor *Land of Lincoln* requires the review of lengthy trial records that might delay resolution of either case.

Second, the United States has put the *Moda Health* CFC decision front-and-center in the *Land of Lincoln* appeal. The *Land of Lincoln* CFC decision relied heavily on two legal conclusions: (1) that the case is premature because Risk Corridor payments are not due until sometime in late 2017 or early 2018; and (2) that deference is owed to HHS's post-hoc interpretation of Section 1342 of the ACA. *See* 129 Fed. Cl. at 81. But the United States' appellee brief in *Land of Lincoln* largely abandons these positions, stating with respect to the former that "the practical significance of this timing issue may be overtaken by the passage of time while the litigation is pending," and with respect to the latter that "the government has not claimed that HHS is owed deference" on its interpretation of

Section 1342. Brief for Appellee at 40, 57, *Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 2017-1224 (Apr. 24, 2017).

The United States instead devotes much of its *Land of Lincoln* appellee brief to an attack on the reasoning of the CFC decision in *Moda Health*. *Id.* at 30-40, 56. Hearing the two cases together will thus advance judicial decision making on what are now the salient, overlapping legal issues.

Including *Moda Health* would also promote "a common legal framework" by avoiding any interstices presented by a specific insurer's financial circumstances. In its *Land of Lincoln* appellee brief, the United States contends that the magnitude of a given plaintiff's claim for Risk Corridor payments reflect its "individually calculated business risks" and "business judgment," implying that Land of Lincoln is responsible for the financial harm it suffered as a result of the Government's failure to make full Risk Corridor payments, which transformed the company from a brand new Consumer Operated and Oriented Plan ("CO-OP") capitalized through provisions of the ACA to an insurer under state receivership. It would be helpful for the Federal Circuit panel also to have before it Moda's claims, given that Moda is a going concern and operated as a private insurance business for decades before the ACA was enacted.

Joint resolution of the two appeals would also avoid one potential pitfall to the prompt and efficient resolution of the legal questions presented. The CFC

decided *Land of Lincoln* via the plaintiff's motion for judgment on the administrative record under RCFC 52.1, *Land of Lincoln Mut. Health Ins. Co.*, 129 Fed. Cl. at 101-03, 108, 114. Some amici have argued that the absence of a prior "proceedings before an agency" rendered RCFC 52.1 procedures inapplicable, especially given that the plaintiff's claims neither arise under the Administrative Procedure Act ("APA") nor trigger APA legal standards.[3] These issues are not presented in *Moda Health*, which was resolved on summary judgment.

Consolidating the two cases before a single panel will not result in significant delay. Briefing in *Land of Lincoln* is scheduled for completion by May 22, 2017, while briefing in *Moda Health* is scheduled to be completed by September 5, 2017. A joint oral argument could be scheduled for a date soon thereafter. Any modest delay that may be caused in *Land of Lincoln* will be far outweighed by the value of having these cases heard together. And, the only party directly affected by such a delay is movant here, Land of Lincoln, that has also consented to the joint argument requested in Moda's motion.

For the foregoing reasons, Land of Lincoln respectfully requests that this Court grant its motion to submit its appeal and the *Moda* appeal to the same panel for oral argument and decision.

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[3] *See* Br. of Amicus Health Republic Ins. Co. in Supp. of Pl.-App., Dkt. No. 69, at 8-18, *Land of Lincoln*, No. 17-1224 (Fed. Cir. Feb. 2, 2017).

Dated: May 11, 2017

Respectfully Submitted,

s/ Daniel P. Albers

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Counsel for Plaintiff Land of Lincoln Mutual Insurance Company

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 11th day of May 2017, a copy of the foregoing was filed electronically. As I understand, pursuant to RCFC Appendix E, V.12.(c), the Court's Notice of Electronic Filing satisfies the service requirement of RCFC 5 and the proof of service requirement of RCFC 5.3 via operation of the Court's electronic filing system.

s/ Daniel P. Albers
Daniel P. Albers

ADDENDUM

TABLE OF CONTENTS

EXHIBIT 1

ORIGINAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PACIFIC GAS AND ELECTRIC CO.,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	2007-5046
	)	
UNITED STATES,	)	
	)	
Defendant-Appellee.	)	

DEFENDANT-APPELLEE'S MOTION TO
SUBMIT RELATED APPEALS TO THE SAME
PANEL FOR PURPOSES OF ARGUMENT AND DECISION

Pursuant to Rules 27 and 34 of the Rules of this Court, defendant-appellee, the United States, respectfully requests that the Court submit this case for oral argument and disposition to the same panel that will decide the appeal in Sacramento Municipal Utility District v. United States, Nos. 2007-5052, -5097 (Fed. Cir.). We filed a motion in Sacramento Municipal on November 1, 2007, requesting that the Court submit that case and this case to the same panel for oral argument. Counsel for plaintiff-appellant in this case informed us last week of her expectation that the plaintiffs with related appeals before this Court would be conferring regarding this request, but we have not yet been informed of their position.

Previously, by order dated March 15, 2007, this Court granted the plaintiff-appellant's unopposed motion to submit this case to the same panel that will decide the related consolidated appeal in Yankee Atomic Electric Co. v. United States, Nos. 2007-5025, -5031 (Fed. Cir.). Legal issues on appeal in Sacramento Municipal are virtually identical to those in the Pacific Gas and Yankee Atomic appeals, and, for the same reasons that the Pacific Gas and Yankee Atomic

appeals were assigned to the same merits panel, it would be appropriate and in the interests of judicial efficiency if they are considered and decided by the same merits panel.

DISCUSSION

The Sacramento Municipal, Pacific Gas, and Yankee Atomic cases all involve claims for damages arising from an alleged partial breach by the United States Department of Energy ("DOE") of the "Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste" ("Standard Contract"), the terms of which are published at 10 C.F.R. § 961.11. In 1983, in accordance with its obligations under the Nuclear Waste Policy Act ("NWPA"), 42 U.S.C. § 10222(a), DOE entered into a standardized contract with the individual owners and generators of spent nuclear fuel ("SNF") that was created as a result of domestic commercial nuclear power generation, including the plaintiffs in all of these appeals. Pursuant to that standardized contract, DOE was to begin SNF acceptance from the nuclear industry by January 31, 1998. Because it lacks a facility in which to store the SNF, DOE has not yet been able to begin that acceptance.

Since 1998, numerous contract holders have filed lawsuits in the United States Court of Federal Claims seeking damages as a result of DOE's delay in beginning SNF acceptance. At the present time, 58 cases alleging a partial breach of the Standard Contract are pending in either this Court or the Court of Federal Claims, through which, according to industry reports, the nuclear utilities are collectively seeking approximately $50 billion in damages.

One of the central issues in the Sacramento Municipal, Pacific Gas, and Yankee Atomic appeals, as well as in other SNF cases that have been tried before the Court of Federal Claims but that are not yet before this Court, relates to the scope of DOE's contractual obligations with

regard to SNF acceptance after 1998. Specifically, although the Standard Contract provides that DOE will begin SNF acceptance from the nuclear industry by January 31, 1998, it does not specify a specific speed or rate at which DOE must continue that acceptance after January 31, 1998.

This issue is crucial to any causation and damages analysis: under this Court's precedent, "[t]o derive the proper amount for the damages award, the costs resulting from the breach must be reduced by the costs, if any, that the plaintiffs would have experienced absent a breach." Bluebonnet Sav. Bank, F.S.B. v. United States, 339 F.3d 1341, 1345 (Fed. Cir. 2003). This rule "sets the ceiling for damages . . ., because the non-breaching party is 'not entitled to be put in a better position by the record than if the [breaching party] had fully performed the contract.'" Rumsfeld v. Applied Cos., 325 F.3d 1328, 1336 (Fed. Cir. 2003) (quoting Miller v. Robertson, 266 U.S. 243, 260 (1924)) (emphasis added).

Before the trial court in all of these cases, we argued that, for a plaintiff to establish that DOE "caused" its damages, the plaintiff must establish that, had DOE timely performed its contract obligations, the plaintiff would not have incurred the same costs that it was seeking to recover as damages. In a prior motion to coordinate proceedings in the Pacific Gas and Yankee Atomic appeals, dated February 23, 2007, the plaintiff-appellant in Pacific Gas recognized that "[t]he same legal issues are presented in both [the Pacific Gas and Yankee Atomic] appeals," but "were decided in diametrically opposed ways by two Court of Federal Claims judges." Motion, at 2 (Feb. 23, 2007).

In its motion seeking to coordinated the oral argument in the Pacific Gas and Yankee Atomic appeals, the plaintiff-appellant in Pacific Gas stated that, in Pacific Gas, one judge

"established a legal framework for addressing the damages owed to an owner of a nuclear reactor for the government's breach of the Standard Contract," while, in Yankee Atomic, a different judge "established a quite different legal framework for addressing the same issues." Motion, at 3-4 (Feb. 23, 2007). "In doing so," the plaintiff-appellant in Pacific Gas announced, "these two judges announced conflicting interpretations of the government's obligations under the Standard Contract, and reached conflicting conclusions concerning the overlapping legal issues that arose in connection with determining the foreseeability, causation and reasonableness of the utility's damages." Id. at 4. It recognized that "[t]he contract construction adopted by this Court will determine much of both appeals." Id.

The main legal issue in the Sacramento Municipal appeal is precisely the same as in Pacific Gas and Yankee Atomic: the manner in which the trial court must measure foreseeability, causation, and reasonableness of the utility's damages in light of the manner in which the terms of the Standard Contract are drafted. As the plaintiff-appellant represented in Pacific Gas, "[a]ssigning the same panel to hear" these appeals "would result in significant efficiencies for the Court," Motion, at 4 (Feb. 23, 2007), given that "many of the background facts related to contract formation and performance for each appeal are identical, and coordinated treatment will allow a single panel to study and digest these background events and facts and to bring that knowledge to bear in both cases, while avoiding the need for two separate panels to undertake this significant task." Id. at 2-3. In addition, as in Pacific Gas, "having the same panel hear" all of the appeals that involve this issue "will help to ensure that the Court speaks with a uniform voice on these initial appeals in the SNF damages matters, appeals that likely will

determine a common legal framework that will be applicable to numerous cases pending in the trial court." Id. at 4-5.

In addition, none of these appeals has yet to be scheduled for oral argument, but they will all be ready for oral argument within the same time frame. Briefing in the Yankee Atomic appeal was completed on October 9, 2007, and the parties' joint appendix was filed on October 24, 2007. Briefing in the Pacific Gas appeal was completed on September 10, 2007, and the joint appendix was filed on September 17, 2007. The last brief in the Sacramento Municipal appeal is due to be filed on November 8, 2007, and we expect to expedite the filing of the parties' joint appendix. Accordingly, because no oral arguments have yet been scheduled, and because the briefing in all of these appeals is scheduled to close in a similar time frame, this motion should not delay the resolution of any of these appeals.

Originally, counsel for the plaintiff-cross appellant in the Sacramento Municipal appeal suggested to the Government the possibility of requesting that the Court assign that appeal to the same merits panel as the Pacific Gas and Yankee Atomic appeals, and we informed counsel for the plaintiff-cross appellant at that time that we did not oppose that request. However, counsel for the plaintiff-cross appellant in Sacramento Municipal has never filed a motion with the Court seeking that assignment, and we have recently been informed that counsel for the plaintiff-cross appellant in Sacramento Municipal may wish to wait until after it has filed its reply brief in this appeal on November 8, 2007, to decide whether to make such a request. Because of the identical nature of the issues in all of these appeals, and because of the benefits that will result from consideration of these issues by the same merits panel, we respectfully request that the Court join

the oral argument in the Pacific Gas, Yankee Atomic, and Sacramento Municipal appeals before the same merits panel.

CONCLUSION

For these reasons, we respectfully request this Court to grant our motion to submit the Sacramento Municipal, Pacific Gas, and Yankee Atomic appeals to the same panel for oral argument and decision.

Respectfully submitted,

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Deputy Assistant Attorney General

Jeanne E. Davidson /by HDLJr

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Attorneys for Defendant-Appellee

November 6, 2007

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 6th day of November, 2007, I caused to be served by hand copies of the foregoing "DEFENDANT-APPELLEE'S MOTION TO SUBMIT RELATED APPEALS TO THE SAME PANEL FOR PURPOSES OF ARGUMENT AND DECISION," addressed as follows:

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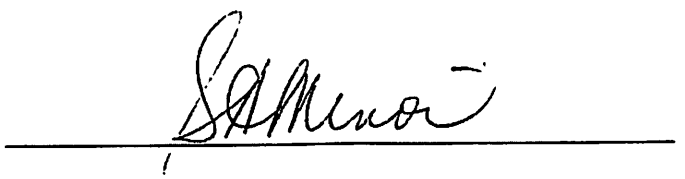

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PACIFIC GAS AND ELECTRIC CO.,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	2007-5046
	)	
UNITED STATES,	)	
	)	
Defendant-Appellee.	)	

ORDER

Upon consideration of defendant-appellee's motion to treat this case as a companion case to Sacramento Municipal Utility District v. United States, Nos. 2007-5052, -5097 (Fed. Cir.), so that it will be heard with that appeal in consecutive oral arguments, and consistent with the Court's prior March 15, 2007, order treating this case as a companion case to Yankee Atomic Electric Co. v. United States, Nos. 2007-5025, -5026, -5027, -5031, -5032, -5033 (Fed. Cir.), as well as other relevant papers, it is

ORDERED that defendant-appellee's motion is allowed, and this appeal, Docket No. 2007-5046, will be treated as a companion case with the Sacramento Municipal and Yankee Atomic appeals.

FOR THE COURT

_____

Dated: _____

cc: Carter G. Phillips, Esq.
Ronald A. Schechter, Esq.
Harold D. Lester, Jr., Esq.

EXHIBIT 2

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

2007-5025, -5031

YANKEE ATOMIC ELECTRIC COMPANY,

Plaintiff-Cross Appellant,

v.

UNITED STATES,

Defendant-Appellant.

2007-5026, -5032

MAINE YANKEE ATOMIC POWER COMPANY,

Plaintiff-Cross Appellant,

v.

UNITED STATES,

Defendant-Appellant.

2007-5027, -5033

CONNECTICUT YANKEE ATOMIC POWER COMPANY,

Plaintiff-Cross Appellant,

v.

UNITED STATES,

Defendant-Appellant.

2007-5046

PACIFIC GAS AND ELECTRIC COMPANY,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

2007-5052, -5097

SACRAMENTO MUNICIPAL UTILITY DISTRICT,

Plaintiff-Cross Appellant,

v.

UNITED STATES,

Defendant-Appellant.

ON MOTION

Before SCHALL, Circuit Judge.

ORDER

The United States moves to have appeals 2007-5046, 2007-5052, and 2007-5097 heard by the same merits panel that hears the other above-captioned appeals. Pacific Gas and Electric Co., Yankee Atomic Electric Company, Maine Yankee Atomic Power Company, and Connecticut Yankee Atomic Power Company oppose. Sacramento Municipal Utility District does not oppose. William D. Peterson moves for leave to intervene in 2007-5025 et al. and "to see and resolve." The United States opposes.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The United States' motion is granted.

(2) Peterson's motions are denied.

NOV 16 2007

Date

Alvin A. Schall
Circuit Judge

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

NOV 16 2007

JAN HORBALY
CLERK

cc: Catherine E. Stetson, Esq.
Harold D. Lester, Esq.
Carter G. Phillips, Esq.
William D. Peterson
s8 Howard N. Cayne, Esq.
Alan J. Lo Re, Esq.

EXHIBIT 3

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2007-5046

PACIFIC GAS AND ELECTRIC COMPANY,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

PLAINTIFF-APPELLANT'S OPPOSITION TO DEFENDANT-APPELLEE'S MOTION TO SUBMIT APPEALS TO THE SAME PANEL FOR PURPOSES OF ARGUMENT AND DECISION

Plaintiff-Appellant, Pacific Gas and Electric Co. (PG&E), respectfully requests that this Court deny the United States' motion to submit this case and its three companion cases, *see Yankee Atomic Electric Co. v. United States*, 2007-5025 *et al.*,[1] to the same panel that will decide the appeal in *Sacramento Municipal Utility District v. United States*, Nos. 2007-5052, -5097 (Fed. Cir.) (the *SMUD* appeal). As set forth in n.1, this Court previously ordered the coordinated treatment of this case with the three *Yankee* appeals. Although there is overlap between the issues presented by this appeal, the three *Yankee* appeals, and the

[1] In an Order issued on February 9, 2007, this Court consolidated the appeals in *Yankee Atomic Electric Co. v. United States*, Nos. 2007-5025, -5031; *Maine Yankee Atomic Power Co. v. United States*, Nos. 2007-5026, -5032; and *Connecticut Yankee Atomic Power Co. v. United States*, Nos. 2007-5027, -5033 (Fed. Cir.) ("the *Yankee* appeals")

SMUD appeal, there are also significant differences arising out of lengthy trial records in each case. Adding an additional appeal to the four already before a single panel will pile thousands of additional pages of briefing and record evidence on top of the voluminous materials that already must be addressed on this appeal, necessarily resulting in further delay in the resolution of the legal issues presented. Moreover, the common issues presented have already been thoroughly briefed in this case and the *Yankee* appeals, and the addition of another set of briefs to those already fully presenting the common issues is needlessly cumulative. PG&E joins the Yankees in opposing the addition of *SMUD* to the prodigious task already faced by the panel in these coordinated appeals.

ARGUMENT

This appeal and the three *Yankee* appeals are among the scores of cases that have been filed in the United States Court of Federal Claims involving claims for damages arising from a partial breach by the United States Department of Energy ("DOE") of the "Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste," entered into under the Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10101-10226, and published at 10 C.F.R. § 961.11. The appeal in *SMUD* also arises from the DOE's partial breach of the Standard Contract and raises, *inter alia*, the scope of DOE's obligation to accept spent nuclear fuel after January 1998.

We agree with the United States that the *SMUD* appeal, like this appeal and the three *Yankees* appeals, will require this Court to address the DOE's obligation to accept spent nuclear fuel after January 1998 and to establish a framework for determining the damages arising from the United States' partial breaches of the Standard Contract. But that commonality is not a sufficient reason to add yet another appeal – with another trial transcript, with different collateral issues, and with yet another full set of briefs – to the four already-coordinated, fully-briefed appeals that fulsomely present and brief the common issues.

As the United States notes in its motion (p. 2), there are 58 cases alleging the partial breach of the Standard Contract pending in this case and in the Court of Federal Claims. At some point, this Court will resolve the common issues arising from the DOE's partial breach of its obligations under the Standard Contract. While it was appropriate for the Court to coordinate treatment of the first two appeals to ensure a full presentation of the common contract issues so critical to this appeal as well as those of other utilities whose Standard Contracts were partially breached, for two reasons, it makes no sense to continue adding appeals as lower court cases involving the partial breach of the Standard Contract are resolved.

First, each time another appeal is coordinated with this appeal and the *Yankee* appeals, it adds significantly to the burden on the panel without significant

corresponding benefits. The trial record in this case and the *Yankee* appeals is roughly 8,000 pages; additional hundreds of pages of briefs have been filed. In addition to the common contract and damages issues, each appeal presents its own unique appellate issues. Adding the *SMUD* appeal to the *Yankees* and *PG&E* appeals will require the panel to study thousands of additional pages of record evidence and briefing, addressed not only to the same common issues already briefed by PG&E, the Yankees, the Government, and *amici curiae*, but also to whatever additional individual issues the *SMUD* appeal presents. This would substantially increase the burden on a single panel without sufficient benefit to the Court.

The parties to this appeal and the *Yankee* appeals, including the Government in both cases, have already fully briefed the common issues presented, making the common issue briefing cumulative. (The Government does not identify any argument with respect to the common issues not adequately briefed in this case or in the *Yankees* appeal.) And, the individual issues raised by the *SMUD* appeal could be resolved as efficiently by a different panel, once the panel assigned to this appeal and the *Yankee* appeals resolves the issues arising from the partial breach of the Standard Contract.

Second, adding yet another appeal to these coordinated appeals will further delay their resolution. This appeal and the *Yankee* appeals have been fully briefed

as of October 9, 2007, and the final Joint Appendix was filed October 24, 2007. The final brief in *SMUD* was just filed, and the Joint Appendix has not yet been filed. Numerous cases await guidance from the Court on the common issues related to the partial breach of the Standard Contract; the oral argument of the instant appeal should not be delayed to await coordination with *SMUD* any more than it should be delayed for the parade of other appeals from partial breach cases that will follow after.

In sum, it made good sense to treat the initial appeals of cases arising out of the partial breach of the Standard Contract together, to ensure complete and thorough briefing of the important issues that will guide resolution of all future cases involving these same issues. But, there is no reason for delay and further coordination and the massive additional study required of a single panel if an additional record and set of briefs are imposed upon its consideration of the relevant issues.

For these reasons, plaintiff-appellant PG&E requests that the Court deny the Government's motion to submit this case and the *Yankee* appeals to the same panel that will decide the *SMUD* appeal.

Respectfully submitted,

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Dated: November 9, 2007

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2007, a copy of this Motion was served by United States mail, first-class, postage pre-paid, addressed to:

ON BEHALF OF DEFENDANT THE UNITED STATES OF AMERICA:

Harold D. Lester
U.S. DEPARTMENT OF JUSTICE
Civil Division
Commercial Litigation Branch
ATTN: Classification Unit
1100 L Street, NW, 8th Floor
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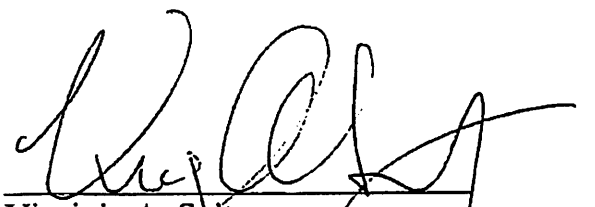

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Pacific Gas &. Electric Company v. United States

No. 07-5046

CERTIFICATE OF INTEREST

Counsel for appellant, Pacific Gas and Electric Company, certifies the following:

1. The full name of every party or amicus represented by me is:

Pacific Gas and Electric Company

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Not applicable

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curia represented by me are:

PG&E Corporation

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency are expected to appear in this court are: Spriggs & Hollingsworth, Greenberg Traurig LLP, Sidley Austin LLP, Jerry Stock, Robert L. Shapiro, David P. Callet, Eric C. Rowe, Carter G. Phillips, Virginia A. Seitz, Ruthanne M. Deutsch.

November9, 2007
Date

Signature of Counsel

Virginia A. Seitz
Printed name of counsel

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2007-5046

PACIFIC GAS AND ELECTRIC COMPANY,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

ORDER

Upon consideration of the Defendant-Appellee's motion to treat this case as a companion case to *Sacramento Municipal Utility District v. United States*, Nos. 2007-5052, -5097 (Fed. Cir.), it is

ORDERED that the motion is denied.

FOR THE COURT:

Dated: _____

Washington, D.C.

_____

cc: Harold D. Lester
Carter G. Phillips

EXHIBIT 4

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

In re: LAWRENCE EVERATT ANDERSON,
Appellant

2016-1156, -1157

Appeals from the United States Patent and Trademark Office, Patent Trial and Appeal Board in Nos. 13/189,505 and 13/214,202.

ON MOTION

PER CURIAM.

ORDER

Lawrence Everatt Anderson moves to vacate this court's order consolidating the above-captioned appeals and for leave to file an opening brief in Appeal No. 2016-1157.

Appeal Nos. 2016-1156 and 2016-1157 were docketed on November 3, 2015. Each concerns a separate patent application regarding "monitoring the flow of vehicular traffic" using at least two transmitters. Both appeals concern independent claims rejected as unpatentable at least in part over US 2007/0208506 A1.

This court's November 20, 2015 order consolidated the appeals and instructed that "one set of briefs should be filed." Mr. Anderson states that he "has no recollection of ever receiving [that order] in the mail." On January 4, 2016, Mr. Anderson attempted to file a separate brief in each appeal. The second brief was rejected as improper.

Mr. Anderson has not given this court any persuasive reason to vacate its prior order. He argues that consolidation is improper because the applications at issue are for "two separate and distinct inventions." Nonetheless, the prior art and arguments at issue between the appeals overlap substantially. Moreover, consolidation of the cases will conserve party and judicial resources.

Accordingly,

IT IS ORDERED THAT:

(1) The motion is denied to the extent that the appeals shall remain consolidated. No later than 28 days from the date of filing of this order, Mr. Anderson may file a single combined opening brief.

(2) The Director of the United States Patent and Trademark Office should calculate her brief due date from the date of filing of the appellant's combined opening brief.

FOR THE COURT

/s/ Daniel E. O'Toole
Daniel E. O'Toole
Clerk of Court

s31