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LIMITED LIABILITY PARTNERSHIP

633 WEST FIFTH STREET
LOS ANGELES, CALIFORNIA 90071-2007

TELEPHONE: (1-213) 620-7700
FACSIMILE: (1-213) 687-0758

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Thomas E Lauria (*pro hac vice* pending)
Jerry R. Bloom (State Bar No. 138873)
Brian L. Holman (State Bar No. 094603)
J. Christopher Shore (*pro hac vice* pending)
WHITE & CASE LLP
633 West Fifth Street, Suite 1900
Los Angeles, California 90071-2007
Telephone: (213) 620-7700
Facsimile: (213) 687-0758

Attorneys for Wadham Energy LP

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In Re: PACIFIC GAS & ELECTRIC COMPANY, a California corporation, Debtor. Federal I.D. No. 94-074260	CASE NO. 01-30923 DM THE HONORABLE DENNIS MONTALI CHAPTER 11 CASE **NOTICE OF MOTION AND MOTION BY WADHAM ENERGY LP FOR ENTRY OF AN ORDER ON AN EMERGENCY BASIS (i)(A) COMPELLING THE DEBTOR TO ASSUME OR REJECT WADHAM'S POWER PURCHASE AGREEMENT ON OR BEFORE JUNE 1, 2001, AND (B) REQUIRING THE DEBTOR TO PAY FAIR MARKET VALUE IN ADVANCE FOR ALL ELECTRICITY DELIVERED BY WADHAM PENDING ASSUMPTION OR REJECTION OF ITS POWER PURCHASE AGREEMENT; OR, IN THE ALTERNATIVE, (ii) GRANTING WADHAM RELIEF FROM THE AUTOMATIC STAY TO ALLOW WADHAM TO SUSPEND PERFORMANCE UNDER ITS POWER PURCHASE AGREEMENT WITH THE DEBTOR PENDING ASSUMPTION OR REJECTION THEREOF** Date: May 10, 2001 Time: 1:30 p.m. Place: 235 Pine Street, 22nd Floor, San Francisco, California

PLEASE TAKE NOTICE that on May 10, 2001, at 1:30 p.m. or as soon thereafter as the matter may be heard in the Courtroom of the Honorable Dennis Montali, located at 235 Pine Street, 22nd Floor, San Francisco, California, Wadham Energy LP ("Wadham") will and hereby does move (the "Motion"), pursuant to sections 105(a), 362(d)(1) and 365(d)(2) of Title 11 of the United States Code (11 U.S.C. § 101 et seq.) (the "Bankruptcy Code") and Rules 2002, 4001, 9006 and 9007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and B.L.R. 4001, for entry of an order on an emergency basis (i) compelling Pacific Gas & Electric Company (the "Debtor") to (a) assume or reject the Power Purchase Agreement between Wadham and the Debtor, dated November 1984, (the "PPA") on or before June 1, 2001, and (b) pay fair market value in advance for all electricity supplied to the Debtor by Wadham pending assumption or rejection of the PPA; or, alternatively (ii) granting Wadham relief from the automatic stay to allow it to suspend performance under the PPA and sell electricity to third parties at market rates until the Debtor assumes or rejects the PPA.

This Motion is based on the allegations contained herein, the accompanying Consolidated Memorandum of Points and Authorities, the accompanying Declaration of Alex A. Sugaoka (the "Sugaoka Declaration"), the records and files of this chapter 11 case and any admissible evidence presented to this Court in connection with the hearing on this Motion.

PLEASE TAKE FURTHER NOTICE that pursuant to the Court's Order Shortening Time, any opposition to the requested relief is to be filed and served on Wadham by May 7, 2001.

OVERVIEW

1. Wadham owns and operates a 26.5 megawatt electric generation plant (the "Facility") in Williams, California. The Facility was conceived, designed, built and financed on the basis of the Debtor's 15-year obligation to purchase electricity from Wadham pursuant to the PPA. Indeed, the viability of Wadham's operations during the last 12 years have at all times been, and currently are, dependent on the revenue from the PPA. Any prolonged failure of the Debtor to pay for electricity, such as occurred prepetition, materially compromises Wadham's ability to continue operating the Facility and producing electricity.

2. During the four months prior to the commencement of this chapter 11 case, the Debtor elected not to pay Wadham for electricity and electric capacity as required by the PPA and instead first curtailed, and then stopped making altogether, payments due under the PPA. As of April 6, 2001 (the "Petition Date"), the Debtor had withheld approximately $7.7 million in payments owed under the PPA, even though Wadham had dutifully performed all of its obligations thereunder, had produced electricity and had delivered that electricity to the Debtor.

3. The Debtor's non-payment of this $7.7 million has brought Wadham to the brink of financial ruin. Given Wadham's current inability to meet its substantial operating expenses, to complete essential maintenance work required to keep the Facility functioning and to satisfy its long-term interest and principal obligations to its lender -- all directly and proximately caused by Debtor's prepetition defaults under the PPA -- Wadham may need to seek protection under chapter 11 without prompt relief from this Court as requested herein.

4. To ensure not only Wadham's own existence, but also that of the PPA, Wadham either needs (a) the Debtor to honor <u>all</u> of its obligations under the PPA (past and prospective), or (b) to be free to sell its electricity at current market prices (which substantially exceed the contract price provided by the PPA). If there is any delay in the Court providing this ultimate relief, Wadham needs interim permission to sell its electricity at current market prices and terms to the Debtor or to third parties.

5. To be clear, Wadham is not requesting that the Court invalidate or otherwise abrogate the PPA; to the contrary, the relief sought herein likely is necessary to preserve the PPA. Under such circumstances, fixing June 1, 2001, as the date by which the Debtor must obtain an order approving an assumption or rejection of the PPA constitutes a "reasonable" period within which to make this decision. In addition, unless the Court requires the Debtor to pay fair market value for electricity in advance of delivery pending its decision on assumption or rejection or allows Wadham temporary relief from the PPA so that it can enter into short-term arrangements for the sale of electricity to solvent buyers willing to pay fair market value, as a practical matter, there may be no effective PPA for the Debtor to assume or reject. Given the magnitude of the Debtor's past

defaults -- which have had the effect of stripping virtually all of Wadham's cash, current assets and working capital -- the Debtor's April 11 directive that Wadham supply it with electricity and capacity on credit at rates that are significantly below fair market value, without replenishing Wadham's finances, is simply a non-sequitur. In fact, such rates may be insufficient to maintain Wadham's operations. The Debtor must either cure its past defaults (via an assumption of the PPA) or allow Wadham to generate its own cure by selling electricity at fair market value (via a rejection).

6. While a debtor's decision to assume or reject an executory contract need not ordinarily be expedited, the current situation is anything but ordinary. The Debtor's conscious decision to hoard cash by accepting four months of deliveries from Wadham without making payment therefor has created an unworkable and potentially disastrous situation for Wadham. Without this Court's immediate intervention as requested herein, Wadham may be unable to replenish its already diminished cash reserves and the Debtor may lose a potentially valuable asset in the form of the PPA.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this Motion and the issues raised hereby pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), (D), (G), and (M).

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1409.

FACTUAL BACKGROUND

9. The relief sought herein is premised on the following allegations, which are supported by and set forth in greater detail in the accompanying Sugaoka Declaration:

A. Background

10. The Wadham Facility is a small power production facility that is a "qualified facility" under the Public Utilities Regulatory Policies Act of 1978 (16 U.S.C. § 824a-3 et seq.) ("PURPA"); it burns rice hulls to produce electricity and by-products. (Sugaoka Decl., ¶ 3.) The by-products are sold to the steel industry. (Id.) The Facility is capable of generating approximately 26.5

megawatts of electricity, which is sufficient to meet the power needs of about 26,500 homes in California. (Id.)

B. Wadham's Contractual Relationship With the Debtor.

11. Wadham supplies power to the Debtor pursuant to the PPA, which has approximately three years of its original 15-year term remaining. As with most "qualified facilities," Wadham is dependent upon revenue from a single utility (in this case, the Debtor) which is the sole purchaser of its electricity. (Id. ¶ 6.) About 95% of Wadham's revenue comes from electricity sales to the Debtor, while the remaining 5% comes from Wadham's sale of by-products to the steel industry. (Id.) Such revenues are used to transport rice hulls for use as fuel to run the Facility and pay the other costs associated with the operating and financing of the Facility.

12. In 1984, Wadham entered into the PPA with the Debtor (Id., ¶ 7.) In compliance with the avoided cost requirements under PURPA, the PPA provides for energy payments based on the Debtor's avoided cost at the time of delivery. (Id.) Although PURPA pricing based on avoided cost has remained the controlling principle, the method of calculating the avoided cost of energy has changed over the years. (Id., ¶¶ 8 & 9.) From December 1996 until March 2001, the California Public Utility Commission (the "CPUC") set avoided cost from time to time based on a formula that reflected the monthly adjustment of natural gas prices at the California border. (Id.) Under this formula, the avoided cost for the Debtor's purchases was based on a simple average of the border prices at Malin, Oregon (the northernmost entry point for gas into California) and Topock, Arizona (one of the southerly entry points). (Id.)

13. The CPUC's March 27, 2001 decision materially modified the historic formula for setting the avoided cost of energy and reset the Debtor's payment obligations under the PPA at a level that is significantly reduced and less than the market price for energy. (Id., ¶ 9.)

C. The Debtor's Breach of the PPA and the Effect on Wadham

14. Without explanation or justification, the Debtor paid only 15% of the amount due under the PPA for December 2000 and January 2001, and made no payments for February 2001 or

March 2001. (Id., ¶ 11.) The current outstanding payment obligation owed by the Debtor to Wadham for the four-month prepetition period exceeds $7.7 million. (Id.)

15. The Debtor's breaches of the PPA have devastated Wadham's business. As a consequence, Wadham is now exposed to the risk of foreclosure and may soon require the protection of chapter 11 to preserve its assets and business. (Id., ¶¶ 12-15.)

16. Wadham's cash is now substantially exhausted. (Id., ¶ 16.) The current balance in Wadham's unrestricted accounts is about $100,000. (Id.) Wadham lacks adequate cash to satisfy its obligations in the absence of assumption of the PPA by the Debtor or the ability to sell energy and capacity to third parties. (Id.)

THE DEBTOR SHOULD BE COMPELLED TO ASSUME OR REJECT THE PPA BY JUNE 1, 2001

17. As set forth further in the accompanying Consolidated Memorandum, section 365(d)(2) of the Bankruptcy Code provides that "the trustee may assume or reject an executory contract . . . at any time before confirmation of a plan, but the court, on the request of any party to such contract . . . may order the trustee to determine within a reasonable period of time whether to assume or reject such contract . . ." 11 U.S.C. § 365(d)(2).

18. What constitutes a "reasonable time" is left to the bankruptcy court's discretion in light of the circumstances of the case, including:

> The nature of the interests at stake, the balance of the hurt to the litigants, the good to be achieved, the safeguards afforded those litigants, and whether the action to be taken is so in derogation of Congress' scheme that the court may be said to be arbitrary.

19. In this case, the Debtor's prepetition default is not simply substantial; it is devastating for Wadham. As catalogued in the accompanying Sugaoka Declaration by the General Manager of Wadham's Asset Manager, the Debtor's prepetition defaults have stripped Wadham of virtually all of its cash and have created a precarious situation whereby the amounts that the Debtor now seeks to pay Wadham for power are insufficient to service, much less satisfy, the debt created by the Debtor's prepetition breaches. (Sugaoka Decl., ¶ 19.)

20. Wadham has no resources with which to make payments to its lender. Moreover, it may not be able to maintain operations in the foreseeable future absent this Court's intervention (or the intervention of another bankruptcy court which may soon be presiding over Wadham's chapter 11 case if the relief requested herein is denied). (Id., ¶ 15.)

21. Wadham has only two primary sources of revenue -- the PPA and sales to the steel industry of ash by-products generated by the Facility. (Id., ¶ 6.) On the other side of the ledger, Wadham has obligations to its employees, its rice hull suppliers, and its lender in addition to normal operational expenses. (Id., ¶¶ 5, 6.)

22. After the Debtor arbitrarily turned off Wadham's cash flow, Wadham still continued operations, incurring huge obligations. Without revenue from the Debtor, Wadham's cash position became increasingly precarious.

23. Based on current cash usage rates, Wadham will have current payables exceeding available cash as of April 30, 2001. (Id., ¶ 16.)

24. As a direct result of the Debtor's failure to pay Wadham for delivered electricity over the four month period preceding the commencement of this chapter 11 case and the Debtor's failure to take any meaningful remedial action since, Wadham now languishes in a new form of "debtor's prison:" the Debtor is unwilling to provide Wadham with the relief it needs to meet its obligations, and the PPA prevents Wadham from accessing the market to otherwise meet its obligations.

25. Absent relief, Wadham's only remedy may be to commence its own chapter 11 case and to seek relief therein regarding the PPA in order to freely sell its electricity at a fair market price.

26. Under such circumstances, Wadham is entitled to an order from this Court directing the Debtor to promptly assume or reject the PPA.

THE DEBTOR SHOULD BE COMPELLED TO PAY IN ADVANCE THE FAIR MARKET VALUE OF ELECTRICITY PENDING ITS ASSUMPTION OR REJECTION OF THE PPA

27. On April 11, 2001, the Debtor sent Wadham a unilateral directive purporting to require that Wadham deliver energy and contract capacity (i) at the rates established in the PPA or even at a lower rate pending certain unspecified contingencies and (ii) on credit terms allowing for at least fifteen days of credit every month. (Sugaoka Dec. at Ex. E.)

28. Wadham may not have the wherewithal to perform on these terms in light of the extent of the Debtor's prepetition defaults. Moreover, the Bankruptcy Code does not entitle the Debtor to performance on the terms which it seeks.

29. First, no party, including Wadham, can be forced to extend credit to the Debtor, at least without the Debtor's assumption of the agreement that contemplates the provision of credit. If the Debtor wishes to obtain credit from a third party, its rights and those of its proposed lender are controlled by section 364 of the Bankruptcy Code. No provision is found therein (or anywhere else in the Bankruptcy Code) that could in any way be construed to give the Debtor the power to compel a proposed lender to extend credit against its will.

30. Yet, that is precisely the result that will pertain here if Wadham is able to maintain operations and the Debtor is not required to pay for electricity in advance. Wadham's Facility is directly connected to the Debtor's power grid. When the Facility generates electricity, it is immediately delivered to the Debtor, which, in turn, pays for it later under the PPA.

31. Thus, absent an enforceable agreement regarding credit terms, and absent the protections of section 364 of the Bankruptcy Code, the mere fact of Wadham's postpetition operation results in an involuntary extension of credit to the Debtor -- unless the Debtor is ordered to pay Wadham in advance.

32. If Wadham were to continue to supply electricity to the Debtor at current market prices, the Debtor would be incurring additional indebtedness to Wadham at the rate of

$160,000 per day. In the first fifteen days of each month (the credit terms sought in the Debtor's April 11 directive), Wadham's exposure would thus be approximately $2.4 million.

33. Wadham has already been damaged enough by the Debtor's failure to meet its payments and thus cannot be forced to extend further credit to the Debtor at this time. Accordingly, deliveries should be pre-paid by the Debtor.

34. Second, as set forth in the accompanying Consolidated Memorandum, pending the Debtor's decision to assume or reject the PPA, the Debtor is obligated to pay for the reasonable value of Wadham's postpetition deliveries. Absent the Debtor's assumption of the PPA, it is clear that the reasonable value of the electricity provided by Wadham to the Debtor is not the price contemplated by the PPA, which reflects a long-term commitment to purchase electricity. In fact, the PPA price is significantly less than the fair market value of electricity delivered on a short-term basis, and may not cover Wadham's cost of operation and does not cover Wadham's debt requirements. (Sugaoka Decl., ¶ 9.)

35. The Bankruptcy Code does not permit the Debtor to withhold the $7.7 million it owes Wadham, refuse to make a prompt decision to assume or reject the PPA, and then add insult to injury by compelling delivery of Wadham's power at prices far below market value.

36. Therefore, if the Debtor elects to receive electricity from Wadham pending its decision to assume or reject, it should pay in advance the fair market value for such electricity.

ALTERNATIVELY, THE AUTOMATIC STAY SHOULD BE LIFTED TO PERMIT WADHAM'S SUSPENSION OF PERFORMANCE UNDER THE PPA PENDING THE DEBTOR'S DECISION TO ASSUME OR REJECT THE PPA

37. As an alternative to the relief requested above, the Court should grant relief from the automatic stay to permit Wadham to suspend its performance under the PPA pending the Debtor's assumption or rejection thereof, and permit Wadham to sell electricity to creditworthy third parties.

38. Such relief from the automatic stay is warranted under section 362(d)(1) which provides that "on request of a party in interest . . . the court shall grant relief from the stay

provided under subsection (a) of this section . . . for cause, including the lack of adequate protection of an interest in property of such party in interest." 11 U.S.C. § 362(d)(1).

39. Here, "cause" clearly exists for relief from the stay. If Wadham is not permitted to sell at market price, Wadham may be irreversibly harmed. Because of the Debtor's material payment breaches under the PPA, Wadham has depleted its working capital to the point where it lacks the resources to make payments to its lender. (Sugaoka Decl., ¶ 16.)

40. The Debtor's April 11 demand to pay the rates under the PPA, which may have been sufficient to keep Wadham in business under other circumstances, is entirely insufficient now that Wadham's resources have been depleted by the Debtor's past defaults. As things currently stand, the Debtor's proposal for postpetition payments pending assumption or rejection will only aggravate Wadham's dire financial situation and could result in the bankruptcy of Wadham. Consequently, the Debtor could lose the PPA (which would likely be rejected in Wadham's bankruptcy).

41. By comparison, all constituencies will actually be benefited by Wadham's suspension. Wadham will be able to continue operations, produce electricity and mitigate its damages. The Debtor will have the ability to purchase electricity from Wadham either by assuming the PPA (which will be preserved by Wadham's ongoing viability) and curing its defaults or by paying market price for postpetition electricity delivered by Wadham.

CONCLUSION

42. For all the foregoing reasons, Wadham requests that this Court enter an order (i) granting Wadham's motion to compel the Debtor promptly to assume or reject the PPA and directing the Debtor to pay to Wadham market price in advance for electricity delivered to it in the interim; or (ii) granting Wadham relief from the automatic stay to allow it to suspend

performance under the PPA until such time that the Debtor elects to assume or reject the PPA; and (iii) granting such other and further relief as the Court deems just.

Dated this 30 day of April, 2001.

Respectfully Submitted,

WHITE & CASE, LLP

By Brian L. Holman
Brian L. Holman
Attorneys for Wadham Energy LP

Thomas E. Lauria (*pro hac vice* pending)
Jerry R. Bloom (State Bar No. 138873)
Brian L. Holman (State Bar No. 094603)
J. Christopher Shore (*pro hac vice* pending)
WHITE & CASE LLP
633 West Fifth Street, Suite 1900
Los Angeles, California 90071-2007
Telephone: (213) 620-7700
Facsimile: (213) 687-0758

Attorneys for Wadham Energy LP

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In Re: PACIFIC GAS & ELECTRIC COMPANY, a California corporation, Debtor. Federal I.D. No. 94-074260	CASE NO. 01-30923 DM THE HONORABLE DENNIS MONTALI CHAPTER 11 CASE **DECLARATION OF ALEX A. SUGAOKA IN SUPPORT OF WADHAM ENERGY LP'S EMERGENCY MOTION FOR AN ORDER (i) (A) COMPELLING THE DEBTOR TO ASSUME OR REJECT WADHAM'S POWER PURCHASE AGREEMENT WITH THE DEBTOR ON OR BEFORE JUNE 1, 2001, AND (B) REQUIRING THE DEBTOR TO PAY FAIR MARKET VALUE IN ADVANCE FOR ALL ELECTRICITY DELIVERED BY WADHAM PENDING ASSUMPTION OR REJECTION OF ITS POWER PURCHASE AGREEMENT; OR, IN THE ALTERNATIVE, (ii) GRANTING WADHAM RELIEF FROM THE AUTOMATIC STAY TO ALLOW IT TO SUSPEND PERFORMANCE UNDER ITS POWER PURCHASE AGREEMENT WITH THE DEBTOR PENDING ASSUMPTION OR REJECTION THEREOF** Date: May 10, 2001 Time: 1:30 p.m. Place: 235 Pine Street, 22nd Floor, San Francisco, California

I, Alex A. Sugaoka, declare and say:

1. I am the General Manager of the Asset Manager (UAE Energy Operations Corp.) for Wadham Energy LP ("Wadham"). I make this declaration in support of Wadham's emergency motion for entry of an order (i)(A) compelling the Debtor to assume or reject the Power Purchase Agreement between Wadham and the Debtor, dated November 1984, (the "PPA") on or before June 1, 2001, and (B) compelling the Debtor to pay fair market value in advance for electricity delivered to it by Wadham pending assumption or rejection of the PPA; or (ii) granting Wadham relief from the automatic stay to allow Wadham to suspend performance under the PPA pending assumption or rejection. I have personal knowledge as to the matters described in this declaration, and I am competent to testify on these matters.

2. Wadham is structured as a single purpose company. It owns a plant in Williams, California which burns rice hulls to produce electricity (the "Facility"). The nature of its business operations is such that its operating revenues are limited to sales of energy and capacity to Pacific Gas and Electric Company (the "Debtor") and sales of by-products to the steel industry. As described in greater detail below, Wadham is presently operating in a precarious cash shortfall situation as a direct result of the Debtor's refusal to pay in full for four months of electricity which Wadham delivered and the Debtor accepted and used. Unless immediate action is taken by this Court, Wadham's increasing financial distress may compel Wadham to file its own bankruptcy petition.

<u>Background</u>

3. Wadham is a small power production renewable energy facility, producing electric energy from a waste product from the rice industry (the excess hulls from the rice millers). Wadham is a "qualifying facility" or "QF" as defined by the Public Utilities Regulatory Policies Act of 1978 ("PURPA"), as amended, 16 U.S.C. 824a-3, <u>et seq</u>., and the regulations enacted thereunder, which entitles it to receive certain protections and exemptions under PURPA (<u>e.g.</u>, exemption from certain state and federal utility regulations).

4. As a QF, Wadham is an important source of clean, reliable electricity, recycling

waste products that otherwise would potentially be disposed of in landfills. Under PURPA, my understanding is that a QF such as Wadham is entitled to receive the electric utility's full avoided cost for electricity, which is generally the incremental cost of operation that the utility would have paid to generate the electricity itself or buy from a third party for the last megawatt hour of electricity generated at any given time, but for the QF providing the power. These costs of operation are generally referred to as the Avoided Costs (the "Avoided Costs").

5. The major components of Wadham's costs of operation include (1) the costs to transport (i.e. truck) its fuel (i.e. rice hulls) to the Facility, (2) the costs of labor to run the Facility, which consist of at least 32 site personnel and (3) maintenance expenditures to address the day-to-day and overhaul costs for the extensive system needed to store, process, burn and generate electricity from rice hulls. The Facility generates 26.5 megawatts of electrical power, an amount which is sufficient to meet the power needs of about 26,500 homes in California.

6. Wadham is dependent upon revenue from the Debtor because it is the only purchaser of Wadham's electricity. Such revenue constitutes approximately 95% of Wadham's total monthly revenue. The remaining revenues are derived from the sales of rice hull ash by-products to the steel industry. Thus, Wadham's operation is funded from, and dependent on, the revenue from the Debtor, such that any major default under the PPA seriously jeopardizes Wadham's ability to continue supplying power and its saleable by-products.

The PPA

7. In 1984, Wadham entered into a Power Purchase Agreement (the "PPA") with a term expiring in 2004 to sell the electricity generated by its facility to the Debtor pursuant to the form of standard offer contracts that the California Public Utilities Commission (the "CPUC") had adopted in 1982. Attached to my declaration as Exhibit A is a true and correct copy of the PPA. In compliance with PURPA, the PPA provides for energy payments based on the Debtor's "Avoided Costs" at the time of delivery. See PPA, Ex. A, Article 4.

8. My understanding is that although the PURPA pricing benchmark of Avoided Costs remains the controlling federal standard on parties to the PPA, the method of calculating the avoided cost of energy in California has changed throughout the years. From 1996 until 2001, pricing

was based on a formula (the "Transition Formula") which included a component for the price of natural gas (the "Natural Gas Component") which averaged the monthly indices for natural gas prices at Malin, Oregon, the northerly intake for California (the "Malin Gas Price"), and at Topock, Arizona, the primary southerly intake for California (the "Topock Gas Price"). Attached to my declaration as Exhibit B is a true and correct copy of the CPUC's December 1996 Decision setting forth the Transition Formula, Dec. No. 96-12-028. Although Wadham does not use gas to generate its electricity, the Debtor paid Wadham, like other QFs, based on the Transition Formula.

9. The March 27, 2001 decision of the CPUC (the "Wood Decision"), which became effective April 1, 2001, eliminated the Transition Formula and instead determined that the Natural Gas Component of the Avoided Cost formula shall be based solely on the Malin Gas Price rather than the average of the Malin Gas Price and Topock Gas Price (The "Wood Decision Formula"). Attached to my declaration as Exhibit C is a true and correct copy of the Wood Decision. Due to the increasing disparity between the Topock Gas Price and the Malin Gas Price over the past year, the Debtor is paying less to QFs, including Wadham, as a result of the Wood Decision than it would have paid under the Transition Formula. Currently, the Wood Decision Formula stipulates electric pricing that is significantly less than market prices. In April 2001, "all-in" prices under the PPA were approximately $100/MWh.

10. It is my understanding that several QFs and a trade association known as the California Cogeneration Council ("CCC") have filed a petition with FERC to have the Wood Decision reviewed (the "CCC Petition"). A true and correct copy of the CCC Petition is attached to my declaration as Exhibit D. There is no assurance that there will be any action forthcoming from FERC in the near term.

The Debtor's Breach of the PPA and the Resulting Effect on Wadham

11. The Debtor's failure to pay for the electricity that Wadham provided to it between December 2000 and March 2001 has created serious liquidity and bankruptcy risks for Wadham. The Debtor paid only 15% of the amounts owing for December 2000 and January 2001, and paid nothing for February or March 2001. As outlined in the table below, through March 31, 2001, the Debtor owes Wadham at least $7.7 million excluding interest on account of its prepetition defaults, with

no prospect of payment of this claim in sight.

Billing		Payment		
Period	Amount	Period	Amount	Ending Balance
WADHAM ENERGY LP ACCOUNTS RECEIVABLE FROM PG&E				
Dec-00	$2,961,094			
Jan-01	$2,422,684			
Feb-01	$1,990,260	Feb-01	$444,064[1]	
Mar-01	$1,242,000	Mar-01	$375,416[2]	
Total	$8,616,038		$819,480	**$7,796,558**

12. Wadham is incurring a cash liquidity squeeze, as a direct result of the Debtor's prepetition breaches, that may induce bankruptcy. The Facility is due for major overhaul work on the turbine (the primary machinery producing electricity) in 2001. This work requires substantial capital in addition to the typical operating, fuel and capital expenses. In the absence of prompt relief from this Court, Wadham may not be able to complete this essential work.

13. Wadham is at risk with respect to its performance on key long-term fuel contracts with terms that are commensurate with its PPA with the Debtor. Wadham is responsible for paying for transportation services to move rice hulls from its contract mills twenty-four hours a day, seven days a week. If Wadham's liquidity problems continue, Wadham may breach its long-term fuel contracts and the contracts may be abrogated, which could effectively eliminate Wadham's ability to operate economically going forward.

14. Wadham is also at risk with respect to payments on interest on its long-term tax-exempt debt. If Wadham's liquidity problems continue, Wadham may default on its obligations and the bonds may be prematurely called.

15. Wadham is also at risk of default on its principal payment obligations with its lender. The lender has rescinded and forborne on principal payment obligations beginning in the fourth

[1] Represents partial payment for December 2000.
[2] Represents partial payment for January 2001.

quarter of 2000. Foreclosure and bankruptcy are material risks unless Wadham performs on the outstanding principal obligations. Payment of Wadham's past and going-forward principal obligations is impossible unless the Debtor pays Wadham the amounts past due or unless Wadham is permitted to sell its electricity at market price.

16. As a result of the non-payment of the amounts due from the Debtor, the current balance in Wadham's unrestricted accounts is about $100,000. Wadham lacks adequate cash to continue to operate economically. Based on current usage rates, Wadham will have current payables exceeding available cash as of April 30, 2001.

The Debtor's Postpetition Plans

17. It is not at all clear what amounts the Debtor intends to pay to Wadham for its electricity on a go forward basis. Additionally, the Debtor has not provided adequate assurances showing any ability to pay any amounts to Wadham. Even if the Debtor pays under the Wood Formula, it is questionable whether it will be enough to address Wadham's cash liquidity problem. Finally, Wadham does not have any assurance that the Debtor could make up either the historical or go forward amounts that would become due and owing to Wadham if FERC (or some other entity) acts to alter the impact of the Wood Decision.

18. On April 11, 2001, the Debtor sent Wadham a unilateral directive purporting to require that Wadham deliver energy and contract capacity to the Debtor (i) at the rates established in the PPA or even at a lower rate, pending certain unspecified contingencies and (ii) on credit terms allowing for at least 15 days of credit each month. A true and correct copy of the April 11 directive is attached hereto as Exhibit E.

19. If Wadham were to supply power to the Debtor at market price, the Debtor would be indebted to Wadham at the rate of about $160,000 per day. In the first fifteen days of each month (the credit sought), Wadham's exposure would be approximately $2.4 million. The amounts that Debtor seeks to pay Wadham for power are insufficient to service debt going forward, much less satisfy the debt created by Debtor's prepetition breaches. Moreover, the credit terms upon which Debtor seeks to pay Wadham would also create additional exposure for Wadham that would further exacerbate Wadham's liquidity problems.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Dated this 30 day of April, 2001, at San Ramon, California.

Alex A. Sugaoka

Thomas E Lauria (*pro hac vice* pending)
Jerry R. Bloom (State Bar No. 138873)
Brian L. Holman (State Bar No. 094603)
J. Christopher Shore (*pro hac vice* pending)
WHITE & CASE LLP
633 West Fifth Street, Suite 1900
Los Angeles, California 90071-2007
Telephone: (213) 620-7700
Facsimile: (213) 687-0758

Attorneys for KES-Kingsburg LP

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In Re: PACIFIC GAS & ELECTRIC COMPANY, a California corporation, Debtor. Federal I.D. No. 94-074260	CASE NO. 01-30923 DM THE HONORABLE DENNIS MONTALI CHAPTER 11 CASE **NOTICE OF MOTION AND MOTION BY KES-KINGSBURG LP FOR ENTRY OF AN ORDER ON AN EMERGENCY BASIS (i) (A) COMPELLING THE DEBTOR TO ASSUME OR REJECT KINGSBURG'S POWER PURCHASE AGREEMENT ON OR BEFORE JUNE 1, 2001, AND (B) REQUIRING THE DEBTOR TO PAY FAIR MARKET VALUE IN ADVANCE FOR ALL ELECTRICITY DELIVERED BY KINGSBURG PENDING ASSUMPTION OR REJECTION OF ITS POWER PURCHASE AGREEMENT; OR, IN THE ALTERNATIVE, (ii) GRANTING KINGSBURG RELIEF FROM THE AUTOMATIC STAY TO ALLOW IT TO SUSPEND PERFORMANCE UNDER THE POWER PURCHASE AGREEMENT WITH THE DEBTOR PENDING ASSUMPTION OR REJECTION THEREOF** Date: May 10, 2001 Time: 1:30 p.m. Place: 235 Pine Street, 22nd Floor, San Francisco, California

PLEASE TAKE NOTICE that on May 10, 2001, at 1:30 p.m. or as soon thereafter as the matter may be heard in the Courtroom of the Honorable Dennis Montali, located at 235 Pine Street, 22nd Floor, San Francisco, California, KES-Kingsburg LP ("Kingsburg") will and hereby does move (the "Motion"), pursuant to sections 105(a), 362(d)(1) and 365(d)(2) of Title 11 of the United States Code (11 U.S.C. § 101 et seq.) (the "Bankruptcy Code") and Rules 2002, 4001, 9006 and 9007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and B.L.R. 4001, for entry of an order on an emergency basis (i) compelling Pacific Gas & Electric Company (the "Debtor") to (a) assume or reject the Power Purchase Agreement between Kingsburg and the Debtor, dated October 1987, (the "PPA") on or before June 1, 2001, and (b) pay fair market value in advance for all electricity supplied to the Debtor by Kingsburg pending assumption or rejection of the PPA; or, alternatively (ii) granting Kingsburg relief from the automatic stay to allow it to suspend performance under the PPA and sell electricity to third parties at market rates until the Debtor assumes or rejects the PPA.

This Motion is based on the allegations contained herein, the accompanying Consolidated Memorandum of Points and Authorities, the accompanying Declaration of James Hinrichs (the "Hinrichs Declaration"), the records and files of this chapter 11 case and any admissible evidence presented to this Court in connection with the hearing on this Motion.

PLEASE TAKE FURTHER NOTICE that pursuant to the Court's Order Shortening Time, any opposition to the requested relief is to be filed and served on Kingsburg by May 7, 2001.

OVERVIEW

1. Kingsburg leases and operates a 34.5 megawatt electric generation plant (the "Facility") in Fresno County, California. The Facility was conceived, designed, built and financed on the basis of the Debtor's 30-year obligation to purchase electricity from Kingsburg pursuant to the PPA. Indeed, the viability of Kingsburg's operations during its 12 years of existence have at all times been, and currently are, dependent on the revenue from the PPA. Any prolonged failure of the Debtor to pay for electricity, such as occurred prepetition, materially compromises Kingsburg's ability to continue operating the Facility and producing electricity.

2. During the four months prior to the commencement of this chapter 11 case, the Debtor elected not to pay Kingsburg for electricity and electric capacity as required by the PPA and instead first curtailed, and then stopped making altogether, payments due under the PPA. As of April 6, 2001 (the "Petition Date"), the Debtor had withheld approximately $10.3 million in payments owed under the PPA, even though Kingsburg had dutifully performed all of its obligations thereunder, had produced the required levels of electricity and had delivered that electricity to the Debtor.

3. The Debtor's non-payment of this $10.3 million has had grave effects on Kingsburg. Most importantly, having been stripped of its cash flow and subject to a new energy pricing formula (the CPUC's March 27, 2001 Wood Decision), Kingsburg would have been subjected to significant losses provided it even had the financial ability to fund the purchase of natural gas, and, on April 1, 2001, was therefore forced to discontinue operations. Given Kingsburg's projected defaults on its arrangements with its lenders, suppliers and other creditors -- all directly and proximately caused by Debtor's prepetition defaults under the PPA -- Kingsburg will only be able to operate at absolutely minimum levels for the peak May through September season and not thereafter unless this Court grants prompt relief as requested herein. In the absence of prompt relief, Kingsburg will have little choice but ultimately to seek protection itself under chapter 11.

4. In order to avoid bankruptcy and to resume full operations, Kingsburg either needs (a) the Debtor to honor <u>all</u> of its obligations under the PPA (past and prospective), or (b) to be free to sell its electricity at current market prices (which substantially exceed the contract price provided by the PPA). If there is any delay in the Court providing this ultimate relief, Kingsburg needs interim permission to sell its electricity at current market prices and terms to the Debtor or to third parties.

5. To be clear, Kingsburg is not requesting that the Court invalidate or otherwise abrogate the PPA; to the contrary, the relief sought herein is necessary to <u>preserve</u> the PPA. Under such circumstances, fixing June 1, 2001, as the date by which the Debtor must obtain an order approving an assumption or rejection of the PPA constitutes a "reasonable" period within

which to make this decision. In addition, unless the Court requires the Debtor to pay fair market value for electricity in advance of delivery pending its decision on assumption or rejection or allows Kingsburg temporary relief from the PPA so that it can enter into short-term arrangements for the sale of electricity to solvent buyers willing to pay fair market value, as a practical matter, there will be no PPA for the Debtor to assume or reject. Given the magnitude of the Debtor's past defaults -- which have had the effect of forcing Kingsburg to discontinue operations -- the Debtor's April 11 directive that Kingsburg supply it with electricity and capacity on credit at rates that are significantly below fair market value, without replenishing Kingsburg's finances, is simply a non-sequitur. In fact, such rates are insufficient to support Kingsburg's operations going forward. The Debtor must either cure its past defaults (via an assumption of the PPA) or allow Kingsburg to generate its own cure by selling electricity at fair market value (via a rejection). If such relief is not to be provided immediately, Kingsburg needs interim access to creditworthy buyers and market-based pricing to reestablish credit with its gas suppliers and to satisfy its own past due obligations.

6. While a debtor's decision to assume or reject an executory contract need not ordinarily be expedited, the current situation is anything but ordinary. The Debtor's conscious decision to hoard cash by accepting four months of deliveries from Kingsburg without making payment therefor has created an unworkable situation for Kingsburg. Without this Court's immediate intervention as requested herein, Kingsburg may be unable to replenish its already diminished cash reserves, the Debtor may lose a potentially valuable asset in the form of the PPA, and the California power grid may be short another 34.5 megawatts of electricity, as it heads into the summer months.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this Motion and the issues raised hereby pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), (D), (G), and (M).

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1409.

FACTUAL BACKGROUND

9. The relief sought herein is premised on the following allegations, which are supported by and set forth in greater detail in the accompanying Hinrichs Declaration:

A. Background of Cogeneration.

10. "Cogeneration" is a term used in the energy industry to describe a single process which produces two useful forms of energy (i.e., electricity and thermal energy). Recognizing the inherent efficiencies of such processes, Congress enacted the Public Utilities Regulatory Policies Act of 1978 (16 U.S.C. § 824a-3 et seq.) ("PURPA") to incentivize the construction, operation and financing of cogeneration facilities.

11. The Kingsburg Facility is a "qualified facility" under PURPA; it burns natural gas to produce electricity and thermal energy. (Hinrichs Dec., ¶ 3.) The thermal energy is sold to Sun-Maid Growers ("Sun-Maid") pursuant to an Energy Service Agreement. (Id., ¶ 2.) The Facility is capable of generating approximately 34.5 megawatts of electricity, which is sufficient to meet the power needs of about 34,500 homes in California. (Id., ¶ 5.)

B. Kingsburg's Contractual Relationship With the Debtor.

12. Kingsburg supplies power to the Debtor pursuant to the PPA, which has approximately 17 years of its original 30-year term remaining. As with most "qualified facilities," Kingsburg is dependent upon revenue from a single utility (in this case, the Debtor) which is the sole purchaser of its electricity. (Id. ¶ 6.) About 99% of Kingsburg's revenue comes from electricity sales to the Debtor. (Id.) Such revenues and are used to purchase natural gas (the single largest cost of production) to run the Facility and to pay the other costs associated with the operation and financing of the Facility.

13. In 1987, Kingsburg's predecessor-in-interest entered into the PPA with the Debtor (Id., ¶ 7.) In compliance with the avoided cost requirements under PURPA, the PPA provides for energy payments based on the Debtor's avoided cost at the time of delivery. (Id.) Although PURPA pricing based on avoided cost has remained the controlling principle, the method of calculating avoided cost has changed over the years. (Id., ¶¶ 8 & 9.) Up until March 2001, the California Public Utility Commission (the "CPUC") set avoided cost from time to time based on a formula that reflected the

monthly adjustment of natural gas prices at the California border. (Id.) Under this formula, the avoided cost for the Debtor's purchases was based on a simple average of the border prices at Malin, Oregon (the northernmost entry point for gas into California) and Topock, Arizona (one of the southerly entry points). (Id.)

14. Over the past year, the fuel gas price environment and fundamental gas price assumptions upon which Kingsburg had been operating for the previous 12 years began to change dramatically. The natural gas prices Kingsburg relies on to produce electricity (i.e., "Topock Gas Price") soared to historic levels. (Id., ¶ 11.) Under the PPA's avoided cost formula, the energy payments to which Kingsburg was entitled also rose necessarily to reflect these increases in fuel costs. This "linked" pricing relationship was, however, materially changed by the CPUC's March 27, 2001 decision, which modified the historic formula for setting avoided cost and reset the Debtor's payment obligations under the PPA at a significantly reduced level. (Id., ¶ 14.)

C. The Debtor's Breach of the PPA and the Effect on Kingsburg

15. Without explanation or justification, the Debtor paid only 15% of the amount due under the PPA for December 2000 and January 2001, and made no payments for February or March 2001. (Id., ¶ 16.) The current outstanding payment obligation owed by the Debtor to Kingsburg for the four-month prepetition period exceeds \$10.3 million. (Id.)

16. The Debtor's breaches of the PPA have devastated Kingsburg's business. Kingsburg presently owes about \$4,400,000 to its gas supplier, Sempra Energy Trading ("Sempra"), for gas provided in the months of December 2000 through March 2001. (Id., ¶ 17.)

17. Kingsburg has also defaulted on a \$60,000 community service payment and may soon default on its California property tax obligations and its lease payment to GE Capital. As a consequence, Kingsburg is now exposed to the risk of foreclosure and may soon require the protection of chapter 11 to preserve its assets and business. (Id., ¶ 18.)

18. Kingsburg was forced to shut down the Facility on April 1, 2001, when it was unable to become current on outstanding gas invoices or to provide assurances of payment in the near future. (Id., ¶ 19.) Kingsburg's cash is now substantially reduced. (Id.)

THE DEBTOR SHOULD BE COMPELLED
TO ASSUME OR REJECT THE PPA BY JUNE 1, 2001

19. As set forth further in the accompanying Consolidated Memorandum, section 365(d)(2) of the Bankruptcy Code provides that "the trustee may assume or reject an executory contract . . . at any time before confirmation of a plan, but the court, on the request of any party to such contract . . . may order the trustee to determine within a reasonable period of time whether to assume or reject such contract . . ." 11 U.S.C. § 365(d)(2).

20. What constitutes a "reasonable time" is left to the bankruptcy court's discretion in light of the circumstances of the case, including:

> The nature of the interests at stake, the balance of the hurt to the litigants, the good to be achieved, the safeguards afforded those litigants, and whether the action to be taken is so in derogation of Congress' scheme that the court may be said to be arbitrary.

21. In this case, the Debtor's prepetition default is not simply substantial; it is devastating for Kingsburg. As catalogued in the accompanying Hinrichs Declaration, the General Manager of Kingsburg's Managing General Partner, the Debtor's prepetition defaults have severely reduced Kingsburg's working capital and have created a precarious situation whereby the amounts that the Debtor now seeks to pay Kingsburg for power are insufficient to service, much less satisfy, the debt created by the Debtor's prepetition breaches. (Hinrichs Dec., ¶ 23.)

22. Kingsburg has no resources with which to make payments to creditors, and is currently not operating, and will operate only partially this summer provided the Debtor makes timely or prepaid energy and capacity payments. Moreover, Kingsburg may ultimately not be able to sustain operations absent this Court's intervention (or the intervention of another bankruptcy court which may soon be presiding over Kingsburg's chapter 11 case if the relief requested herein is denied). (Id., ¶ 2.)

23. Kingsburg has only two primary sources of revenue -- the PPA and its Energy Service Agreement with Sun-Maid for the thermal energy generated by the Facility. (Id., ¶ 6.) On the other side of the ledger, Kingsburg has obligations to, among other creditors, its

natural gas supplier, and its lessor, GE Capital, in addition to normal operational expenses. (Id., ¶¶ 16-18.)

24. After the Debtor arbitrarily turned off Kingsburg's cash flow, Kingsburg still continued to buy and convert natural gas and incur obligations to its other creditors. During this period, without revenue from the Debtor, Kingsburg's unpaid obligations skyrocketed, including a $4.4 million unpaid obligation to Sempra, which in April 2001 sought adequate assurance of payment prior to delivering gas. For that reason, combined with the economic imbalance created by the Wood Decision, Kingsburg came off-line on April 1, 2001. (Id., ¶¶ 17-19.)

25. As a direct result of the Debtor's failure to pay Kingsburg for delivered electricity over the four month period preceding the commencement of this chapter 11 case and the Debtor's failure to take any meaningful remedial action since, Kingsburg now languishes in a new form of "debtor's prison:" the Debtor is unwilling to provide Kingsburg with the relief it needs to operate, and the PPA prevents Kingsburg from accessing the market to otherwise meet its operating requirements.

26. Absent relief, Kingsburg faces the prospect of foreclosure by its creditors. To avoid this outcome and to return to full capacity operation, Kingsburg's only remedy may be to commence its own chapter 11 case and to seek relief therein regarding the PPA in order to freely sell its electricity at a fair market price.

27. Under such circumstances, Kingsburg is entitled to an order from this Court directing the Debtor to promptly assume or reject the PPA.

THE DEBTOR SHOULD BE COMPELLED TO PAY IN ADVANCE THE FAIR MARKET VALUE OF ELECTRICITY PENDING ITS ASSUMPTION OR REJECTION OF THE PPA

28. On April 11, 2001, the Debtor sent Kingsburg a directive purporting to require that Kingsburg deliver energy and contract capacity (i) at the rates established in the PPA or even at a lower rate pending certain unspecified contingencies and (ii) on credit terms allowing for at least fifteen days of credit every month. (Hinrichs Dec. at Ex. G.)

29. Kingsburg does not have the wherewithal to perform on these terms in light of the extent of the Debtor's prepetition defaults. Moreover, the Bankruptcy Code does not entitle the Debtor to performance on the terms which it seeks.

30. First, no party, including Kingsburg, can be forced to extend credit to the Debtor, at least without the Debtor's assumption of the agreement that contemplates the provision of credit. If the Debtor wishes to obtain credit from a third party, its rights and those of its proposed lender are controlled by section 364 of the Bankruptcy Code. No provision is found therein (or anywhere else in the Bankruptcy Code) that could in any way be construed to give the Debtor the power to compel a proposed lender to extend credit against its will.

31. Yet, that is precisely the result that will pertain here if Kingsburg is able to resume operations and the Debtor is not required to pay for electricity in advance. Kingsburg's Facility is directly connected to the Debtor's power grid. When the Facility generates electricity, it is immediately delivered to the Debtor, which, in turn, pays for it later under the PPA.

32. Thus, absent an enforceable agreement regarding credit terms, and absent the protections of section 364 of the Bankruptcy Code, the mere fact of Kingsburg's postpetition operation results in an involuntary extension of credit to the Debtor -- unless the Debtor is ordered to pay Kingsburg in advance.

33. If Kingsburg were to come back online and supply electricity to the Debtor at current Short-Run Avoided Cost ("SRAC") prices, the Debtor would be incurring additional indebtedness to Kingsburg at the rate of $80,000 per week day. In the first fifteen days of each

month (the credit terms sought in the Debtor's April 11 directive), Kingsburg's exposure would thus be approximately $885,000.

34. Kingsburg has already been damaged enough by the Debtor's failure to meet its payments and thus cannot be forced to extend further credit to the Debtor at this time. Accordingly, deliveries should be pre-paid by the Debtor.

35. Second, as set forth in the accompanying Consolidated Memorandum, pending the Debtor's decision to assume or reject the PPA, the Debtor is obligated to pay for the reasonable value of Kingsburg's postpetition deliveries. Absent the Debtor's assumption of the PPA, it is clear that the reasonable value of the electricity provided by Kingsburg to the Debtor is not the price contemplated by the PPA, which reflects a long term commitment to purchase electricity. (Hinrichs Dec., ¶ 23.) In fact, the PPA price is significantly less than the fair market value of electricity delivered on a short-term basis, and does not cover Kingsburg's cost of operations. (Id., ¶ 15.)

36. The Bankruptcy Code does not permit the Debtor to withhold the $10.3 million it owes Kingsburg, refuse to make a prompt decision to assume or reject the PPA, and then add insult to injury by compelling delivery of Kingsburg's power at prices far below market value.

37. Therefore, if the Debtor elects to receive electricity from Kingsburg pending its decision to assume or reject, it should pay in advance the fair market value for such electricity.

ALTERNATIVELY, THE AUTOMATIC STAY SHOULD BE LIFTED TO PERMIT KINGSBURG'S SUSPENSION OF PERFORMANCE UNDER THE PPA PENDING THE DEBTOR'S DECISION TO ASSUME OR REJECT THE PPA

38. As an alternative to the relief requested above, the Court should grant relief from the automatic stay to permit Kingsburg to suspend its performance under the PPA pending the Debtor's assumption or rejection thereof, and permit Kingsburg to sell electricity to creditworthy third parties.

39. Such relief from the automatic stay is warranted under section 362(d)(1) which provides that "on request of a party in interest . . . the court shall grant relief from the stay provided under subsection (a) of this section . . . for cause, including the lack of adequate protection of an interest in property of such party in interest." 11 U.S.C. § 362(d)(1).

40. Here, "cause" clearly exists for relief from the stay. There is no doubt that, unless Kingsburg is permitted to sell at market price, Kingsburg, the Debtor, and California electricity consumers will all be irreversibly harmed. Because of the Debtor's material payment breaches under the PPA, Kingsburg has depleted its working capital to the point where it lacks the wherewithal to make payments to its creditors and thus to resume full operations. (Hinrichs Dec., ¶ 23.)

41. The Debtor's April 11 directive to pay the rates under the PPA, which may have been sufficient to keep Kingsburg in business under other circumstances, is entirely insufficient now that Kingsburg's resources will soon be depleted by the Debtor's past defaults. As things currently stand, the Debtor's proposal for postpetition payments pending assumption or rejection will only aggravate Kingsburg's dire financial situation and would most likely result in the bankruptcy of Kingsburg. Consequently, the Debtor will lose the PPA (which would likely be rejected in Kingsburg's bankruptcy) and California may be deprived of yet another power producer for the critical summer months and the current power crisis will only worsen.

42. By comparison, all constituencies will actually be benefited by Kingsburg's suspension. Kingsburg will be able to resume full operations, produce electricity and mitigate its damages. The Debtor will have the ability to purchase electricity from Kingsburg either by assuming the PPA (which will be preserved by Kingsburg's ongoing viability) and curing its defaults or by paying market price for postpetition electricity delivered by Kingsburg. Importantly, California will have available an additional 34.5 megawatts of standard capacity.

CONCLUSION

43. For all the foregoing reasons, Kingsburg requests that this Court enter an order (i) granting Kingsburg's motion to compel the Debtor to promptly assume or reject the PPA and directing the Debtor to pay to Kingsburg market price in advance for electricity delivered to it in the interim; or (ii) granting Kingsburg relief from the automatic stay to allow it to suspend

performance under the PPA until such time that the Debtor elects to assume or reject the PPA; and (iii) granting such other and further relief as the Court deems just.

Dated this 30 day of April, 2001.

Respectfully Submitted,

WHITE & CASE, LLP

By Brian L. Holman
Brian L. Holman
Attorneys for KES-Kingsburg LP

Thomas E. Lauria (*pro hac vice* pending)
Jerry R. Bloom (State Bar No. 138873)
Brian L. Holman (State Bar No. 094603)
J. Christopher Shore (*pro hac vice* pending)
WHITE & CASE LLP
633 West Fifth Street, Suite 1900
Los Angeles, California 90071-2007
Telephone: (213) 620-7700
Facsimile: (213) 687-0758

Attorneys for KES-Kingsburg LP

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In Re:	Case No. 01-30923 DM
PACIFIC GAS & ELECTRIC COMPANY, a California corporation,	THE HONORABLE DENNIS MONTALI
	CHAPTER 11 CASE
Debtor.	**DECLARATION OF JAMES HINRICHS IN SUPPORT OF KES-KINGSBURG LP'S EMERGENCY MOTION FOR AN ORDER (i)(A) COMPELLING THE DEBTOR TO ASSUME OR REJECT KINGSBURG'S POWER PURCHASE AGREEMENT WITH THE DEBTOR ON OR BEFORE JUNE 1, 2001, AND (2) REQUIRING THE DEBTOR TO PAY FAIR MARKET VALUE IN ADVANCE FOR ALL ELECTRICITY DELIVERED BY KINGSBURG PENDING ASSUMPTION OR REJECTION OF ITS POWER PURCHASE AGREEMENT; OR, IN THE ALTERNATIVE, (ii) GRANTING KINGSBURG RELIEF FROM THE AUTOMATIC STAY TO ALLOW IT TO SUSPEND PERFORMANCE UNDER ITS POWER PURCHASE AGREEMENT WITH THE DEBTOR PENDING ASSUMPTION OR REJECTION THEREOF**
Federal I.D. No. 94-074260	Date: May 10, 2001 Time: 1:30 p.m. Place: 235 Pine Street, 22nd Floor, San Francisco, California

I, James Hinrichs, declare and say:

1. I am the General Manager for the Managing General Partner (PurEnergy, LLC) of KES-Kingsburg LP ("Kingsburg"). I make this declaration in support of Kingsburg's emergency motion for entry of an order (i)(A) compelling the Debtor to assume or reject the Power Purchase Agreement between Kingsburg's predecessor, Kingsburg Cogen, and the Debtor, dated October 1987, (the "PPA") on or before June 1, 2001, and (B) compelling the Debtor to pay fair market value in advance for electricity delivered to it by Kingsburg pending assumption or rejection of the PPA; or (ii) granting Kingsburg relief from the automatic stay to allow Kingsburg to suspend performance under the PPA pending assumption or rejection. I have personal knowledge as to the matters described in this declaration, and I am competent to testify on these matters.

2. Kingsburg leases and operates a plant in Fresno County, California (the "Facility") which burns natural gas to produce electricity and thermal energy. Kingsburg's operating revenues are limited to sales of electricity to Pacific Gas and Electric Company (the "Debtor") and sales of thermal energy to Sun-Maid Growers ("Sun-Maid") pursuant to an Energy Service Agreement. As described in greater detail below, Kingsburg presently is not operating as a direct result of the Debtor's refusal to pay in full for four months of electricity which Kingsburg delivered and the Debtor accepted and used. Unless this situation is remedied immediately, Kingsburg's increasing financial distress will ultimately compel Kingsburg to file its own bankruptcy petition.

<u>Background</u>

3. Kingsburg is a cogeneration facility which produces both electrical and thermal energy. Kingsburg is a "qualifying facility" or "QF", as defined by the Public Utilities Regulatory Policies Act of 1978 ("PURPA"), as amended, 16 U.S.C. 824a-3, et seq., enacted by Congress during the mid-1970 national energy crisis to encourage the development of cogeneration. As a QF, Kingsburg is entitled to certain protections and exemptions under PURPA (e.g., exemption from certain state and federal utility regulations).

4. QF-generated power accounts for approximately one-third or 10,000 megawatts (i.e., the power needs of about 10,000,000 private homes) of California's total electrical capacity and represents an important source of clean, reliable electricity. Under PURPA, a QF, such as Kingsburg, is entitled to receive the utility's full avoided cost for electricity, which is generally understood to be the cost that the utility would have paid to generate the electricity itself or buy from a third party, but for the QF providing the electricity (e.g., the costs of fuel and transportation, operating and maintenance expenses, emission offsets, etc.). These costs are generally referred to as the avoided costs (the "Avoided Costs"). For Kingsburg, a major component of Avoided Costs is the price of natural gas.

5. Kingsburg burns natural gas as its sole fuel for production to produce electric and thermal energy. The Facility generates a total of 34.5 megawatts of electrical power, an amount which is sufficient to meet the power needs of about 34,500 homes in California.

6. The Debtor is the sole purchaser of Kingsburg's electricity. Indeed, revenue from the Debtor constitutes in excess of 99% of Kingsburg's total monthly revenue. (The remaining revenues are derived from Sun-Maid, which purchases thermal energy from Kingsburg). As such, Kingsburg's entire operations are funded from, and depend on, revenues from the Debtor. Any major default under the PPA therefore seriously jeopardizes Kingsburg's ability to continue supplying electrical and thermal energy.

<u>The PPA</u>

7. In 1987, Kingsburg's predecessor in interest, Kingsburg Cogen, entered into a thirty year Power Purchase Agreement (the "PPA") to sell the electricity generated by its facility to the Debtor pursuant to a standard offer contract that the California Public Utilities Commission (the "CPUC") adopted in 1982. Attached to my declaration as Exhibit A is a true and correct copy of the PPA. In compliance with PURPA, the PPA provides for capacity payments and energy payments based on the Debtor's Avoided Costs at the time of delivery. <u>See</u> PPA, Ex. A, Article 4.

8. Although the PURPA pricing benchmark of Avoided Costs remains the controlling federal standard on parties to the PPA, the method of calculating the Avoided Costs of energy in California has changed throughout the years. Initially, the utilities' (e.g. the Debtor) payments for energy were based upon the forecasted Avoided Costs established for each three-month period and

no adjustments were made at the end of the period, even if actual fuel and other price-setting components differed from the forecast. To refine the details of this calculation in keeping with PURPA's mandates, the CPUC replaced this three-month Avoided Costs posting with a monthly posting for the utilities. Later, the CPUC adopted an index for calculating the energy component of the price. This methodology used the cost of the avoided fuel, natural gas for example, at a known supply location plus transportation costs to California and was consistently applied for a number of years.

9. In 1996, California adopted electricity deregulation, which resulted in utilities such as the Debtor selling off much of their own gas-fired generation. Consequently, a new method had to be devised to determine Avoided Costs because the Debtor and the state's other utilities would no longer own or operate gas-fired generation facilities. The deregulation legislation (Assembly Bill 1890, codified as Public Utilities Code § 390) included a requirement that the CPUC adopt an interim formula to reflect the monthly adjustment of natural gas prices at the California border. After lengthy negotiations among the QFs, the utilities and the CPUC, the CPUC adopted a transition formula in December 1996 (the "Transition Formula"). Attached to my declaration as Exhibit B is a true and correct copy of the CPUC's Decision setting forth the Transition Formula, Dec. No. 96-12-028. For the Debtor, the Transition Formula included a component for the price of natural gas (the "Natural Gas Component") based on a simple average of the monthly indices for natural gas prices at Malin, Oregon, the northerly intake for California (the "Malin Gas Price"), and at Topock, Arizona, the primary southerly intake for California (the "Topock Gas Price"). The PPA avoided energy cost pricing methodology automatically incorporated this new formula, including the Natural Gas Component which was based upon this average of the Malin Gas Price and the Topock Gas Price.

10. The prices of the natural gas that Kingsburg relies on to produce electrical and thermal energy are based upon the Topock Gas Price. Kingsburg's reliance on Topock pricing is typical of QFs located in the Southern California area. Between December of 1996 and December of 2000, the Malin Gas Price and the Topock Gas Price were roughly equivalent. Therefore, the gas prices used to calculate Kingsburg's revenues and expenses also were roughly equivalent. To the extent that the prices varied, the Transition Formula acted to moderate the difference by averaging the Topock and Malin pricing systems and therefore bore some relationship to Kingsburg's actual costs.

11. Beginning in December of 2000, the fuel gas price environment and fundamental gas price assumptions upon which Kingsburg had been operating for the previous 12 years began to change dramatically. First, Topock Gas Prices began to soar to historic levels. By December of 2000, the Topock Gas Prices had quintupled from their January 2000 levels. The Topock Gas Prices during 2001 have so far not retreated to historical price levels, and the forward gas-price strips indicate that these gas price indices are likely to stay robust for the rest of 2001, if not longer.

12. Beginning in December of 2000 there also began to be a disparity between the Topock Gas Price and the Malin Gas Price such that neither the Topock Gas Price nor the Malin Gas Price approximated each other. In March of 2001 for example, the Malin Gas Price was $8.4667 per MMBtu and the Topock Gas Price was $12.740 per MMBtu.

13. The CPUC's March 27, 2001 Wood Decision, which became effective April 1, 2001, held that the Natural Gas Component of the Avoided Cost formula shall be based solely on the Malin Gas Price rather than the average of the Malin Gas Price and Topock Gas Price (The "Wood Decision Formula"). Attached to my declaration as Exhibit C is a true and correct copy of the Wood Decision. Due to the increasing disparity between the Topock Gas Price and the Malin Gas Price over the past year, the Debtor is paying less to QFs, including Kingsburg, as a result of the Wood Decision than it would have paid under the Transition Formula. Currently, the Wood Decision formula stipulates electric pricing that is significantly less than market prices.

14. Thus, the Avoided Cost Formula changed by the Wood Decision, which is based solely on the Malin Gas Price, no longer yields anything close to the Debtor's true "Avoided Cost," as mandated by PURPA. Kingsburg could not purchase gas at Topock April 2001 prices and operate under the Wood Decision Formula without incurring substantial economic losses that would be commercially unsustainable, and would eventually lead to bankruptcy of the Kingsburg project. Several QFs and the California Cogeneration Council ("CCC"), of which Kingsburg is a member, have filed a petition with FERC to have the Wood Decision reviewed (the "CCC Petition"). A true and correct copy of the CCC Petition is attached to my declaration as Exhibit D. There is no assurance that there will be any decision forthcoming from FERC in the near term.

15. As a result of the rising Topock Gas Price, combined with the Wood Decision which keys energy revenues from the Debtor solely to the Malin Gas Price, and the above described disparity between the Topock Gas Price and the Malin Gas Price, Kingsburg is forced to buy high (i.e., by purchasing gas at the Topock Gas Price) and sell low with significant resulting losses. This disparity between Avoided Cost posting and associated pricing forced Kingsburg to shut down for the month of April 2001 to avoid financial losses.

The Debtor's Breach of the PPA and the Resulting Effect on Kingsburg

16. The Debtor's failure to pay for the electricity that Kingsburg provided to it between December of 2000 and the present had devastating effects on Kingsburg. As outlined in the table below, the Debtor paid only 15% of the amounts owing for December 2000 and January 2001 and nothing for February or March 2001. Currently, the Debtor owes Kingsburg $10,359,900.19 excluding interest, on account of its prepetition defaults with no prospect of payment of this claim in sight.

KES-Kingsburg, L.P. - Amounts Owed By PG&E

Month Generated	Amount	Paid	Difference	Date Paid
December	$6,716,298.09	$1,007,444.71	$5,708,853.38	02/08/2001
January	$3,732,550.14	$578,545.27	$3,154,004.87	03/08/2001
February	$1,134,591.86	$0.00	$1,134,591.86	
March	$362,450.08	$0.00	$362,450.08	
Total	$11,945,890.17	$1,585,989.98	**$10,359,900.19**	

17. The Debtor's breaches of the PPA have devastated Kingsburg. Kingsburg presently owes about $4,400,000 to its gas supplier, Sempra Energy Trading ("Sempra") for gas provided in the months of December 2000 through March 2001. Kingsburg is also at risk for substantial third party claims from Sempra and from Sun-Maid. Continued non-operation will only exacerbate its risk with Sempra and Sun-Maid. Further, Kingsburg continues to incur site labor and associated costs for the Facility.

18. Kingsburg is in default on a community service payment of $60,000. Without prompt relief from this Court, Kingsburg ultimately will be in default on its lease payments and property taxes and thus is at risk of foreclosure and bankruptcy.

19. Kingsburg was forced to shut down its plant on April 1, 2001 as Kingsburg was unable to become current on outstanding gas invoices or provide assurances of payment in the near future. Assurances could not be provided to Sempra as a direct result of the Debtor's inability to perform on then current defaults or provide assurances of payment going-forward. Cash is now substantially reduced.

The Debtor's Postpetition Plans

20. It is not at all clear what amounts the Debtor intends to pay to Kingsburg for its electricity going forward. The Debtor has not provided a budget or any other evidence of an ability to pay any amounts to Kingsburg. Publicly, the Debtor's officials have stated that they intend to make payments to QFs for future electricity supplies, but only "to the extent they are included in the Company's rates." As I understand the Debtor's rates, that means the Debtor may pay the QFs even less than the amounts due using the Wood Decision Formula. The Debtor's statements filed with the federal Securities and Exchange Commission, as reported in the news media and on their public conference call conducted Friday, April 6, 2001, indicate the Debtor may not pay the QFs the full Wood Decision Formula for the delivered electricity. Finally, Kingsburg does not have any assurance that the Debtor could make up either the historical or going forward amounts that would become due and owing to the Kingsburg if FERC (or some other entity) reverses the Wood Decision.

21. The Debtor has defaulted on payments owed not only to Kingsburg but also to many other cogeneration companies. Before the Debtor's bankruptcy filing, its massive breaches of the QFs' contracts, combined with similar defaults by Southern California Edison ("Edison"), prompted several QFs to bring lawsuits seeking legal remedies to the intolerable situation. In one such case, Salton Sea Power Generation L.P. v. Southern California Edison, ("CalEnergy Case"), QFs obtained a legal ruling that they are entitled to suspend their contracts with Edison and sell power on the open market. Attached to my declaration as Exhibit E is a true and correct copy of the order in the CalEnergy Case. Prior to the Debtor's bankruptcy filing, several other QFs filed similar actions against the Debtor seeking

suspension of their contracts with the Debtor. Attached as Exhibit F is a petition Ridgewood Power LLC filed with FERC to suspend its PPA and permit sales on the open market though October 2001.

22. On April 11, 2001, the Debtor sent Kingsburg a unilateral directive purporting to require that Kingsburg deliver electricity and contract capacity to the Debtor (i) at the rates established in the PPA or even at a lower rate, pending certain unspecified contingencies and (ii) on credit terms allowing for at least 15 days of credit each month. A true and correct copy of the directive is attached hereto as Exhibit G.

23. If Kingsburg were to come back online and supply power to the Debtor at the Short-Run Avoided Cost ("SRAC") market rates, the Debtor would be indebted to Kingsburg at the rate of about $80,000 per weekday (Kingsburg will not operate during off-peak periods because energy revenue from the Debtor will not cover variable costs). In the first 15 days of each month (the credit sought), Kingsburg's exposure would be approximately $885,000. The amounts that Debtor seeks to pay Kingsburg for power are insufficient to fully service, much less satisfy, the debt created by Debtor's prepetition breaches. Moreover, the credit terms upon which Debtor seeks to pay Kingsburg may also render Kingsburg unable to perform in light of Debtor's prepetition defaults because Kingsburg may be unable to provide the assurances of payment required by its creditors to resume operations.

I declare under penalty of perjury under the laws of the United States and the state of California that the foregoing is true and correct.

Dated this ____ day of April, 2001, at San Diego, California.

James Hinrichs

James Hinrichs

Thomas E Lauria (*pro hac vice* pending)
Jerry R. Bloom (State Bar No. 138873)
Brian L. Holman (State Bar No. 094603)
J. Christopher Shore (*pro hac vice* pending)
WHITE & CASE LLP
633 West Fifth Street, Suite 1900
Los Angeles, California 90071-2007
Telephone: (213) 620-7700
Facsimile: (213) 687-0758

Attorneys for Oildale Energy LLC

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In Re: PACIFIC GAS & ELECTRIC COMPANY, a California corporation, Debtor. Federal I.D. No. 94-074260	CASE NO. 01-30923 DM THE HONORABLE DENNIS MONTALI CHAPTER 11 CASE **NOTICE OF MOTION AND MOTION BY OILDALE ENERGY LLC FOR ENTRY OF AN ORDER ON AN EMERGENCY BASIS (i)(A) COMPELLING THE DEBTOR TO ASSUME OR REJECT OILDALE'S POWER PURCHASE AGREEMENT ON OR BEFORE JUNE 1, 2001, AND (B) REQUIRING THE DEBTOR TO PAY FAIR MARKET VALUE IN ADVANCE FOR ALL ELECTRICITY DELIVERED BY OILDALE PENDING ASSUMPTION OR REJECTION OF ITS POWER PURCHASE AGREEMENT; OR, IN THE ALTERNATIVE, (ii) GRANTING OILDALE RELIEF FROM THE AUTOMATIC STAY TO ALLOW IT TO SUSPEND PERFORMANCE UNDER ITS POWER PURCHASE AGREEMENT WITH THE DEBTOR PENDING ASSUMPTION OR REJECTION THEREOF** Date: May 10, 2001 Time: 1:30 p.m. Place: 235 Pine Street, 22nd Floor, San Francisco, California

PLEASE TAKE NOTICE that on May 10, 2001, at 1:30 p.m. or as soon thereafter as the matter may be heard in the Courtroom of the Honorable Dennis Montali, located at 235 Pine Street, 22nd Floor, San Francisco, California, Oildale Energy LLC ("Oildale") will and hereby does move (the "Motion"), pursuant to sections 105(a), 362(d)(1) and 365(d)(2) of Title 11 of the United States Code (11 U.S.C. § 101 et seq.) (the "Bankruptcy Code") and Rules 2002, 4001, 9006 and 9007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and B.L.R. 4001, for entry of an order on an emergency basis (i) compelling Pacific Gas & Electric Company (the "Debtor") to (a) assume or reject the Power Purchase Agreement between Oildale and the Debtor, dated March 1985, (the "PPA") on or before June 1, 2001, and (b) pay fair market value in advance for all electricity supplied to the Debtor by Oildale pending assumption or rejection of the PPA; or, alternatively (ii) granting Oildale relief from the automatic stay to allow it to suspend performance under the PPA and sell electricity to third parties at market rates until the Debtor assumes or rejects the PPA.

This Motion is based on the allegations contained herein, the accompanying Consolidated Memorandum of Points and Authorities, the accompanying Declaration of Alex A. Sugaoka (the "Sugaoka Declaration"), the records and files of this chapter 11 case and any admissible evidence presented to this Court in connection with the hearing on this Motion.

PLEASE TAKE FURTHER NOTICE that pursuant to the Court's Order Shortening Time, any opposition to the requested relief is to be filed and served on Oildale by May 7, 2001.

OVERVIEW

1. Oildale owns and operates a 40 megawatt electric generation plant (the "Facility") in Oildale, California. The Facility was conceived, designed, built and financed on the basis of the Debtor's 30-year obligation to purchase electricity from Oildale pursuant to the PPA. Indeed, the viability of Oildale's operations during its 15 years of existence have at all times been, and currently are, dependent on the revenue from the PPA. Any prolonged failure of the Debtor to pay for electricity, such as occurred prepetition, materially compromises Oildale's ability to continue operating the Facility and producing electricity.

2. During the four months prior to the commencement of this chapter 11 case, the Debtor elected not to pay Oildale for energy and capacity as required by the PPA and instead first curtailed, and then stopped making altogether, payments due under the PPA. As of April 6, 2001 (the "Petition Date"), the Debtor had withheld approximately $10.5 million in payments owed under the PPA, even though Oildale had dutifully performed all of its obligations thereunder, had produced the required levels of electricity and had delivered that electricity to the Debtor.

3. The Debtor's non-payment of this $10.5 million has brought Oildale to the brink of financial ruin. Most importantly, having been stripped of its primary source of revenue, Oildale was unable to fund the purchase of natural gas, and, on February 6, 2001, was forced to discontinue operations. Since that date, Oildale has only been able to produce electricity for ten days. Given Oildale's current inability to meet its obligations to its lenders, gas suppliers and other creditors -- all directly and proximately caused by Debtor's prepetition defaults under the PPA -- the only hope of reviving Oildale's operations without itself seeking protection under chapter 11 is prompt relief from this Court as requested herein.

4. In order to recommence operations, thereby preserving not only Oildale's own existence, but also that of the PPA, Oildale either needs (a) the Debtor to honor <u>all</u> of its obligations under the PPA (past and prospective), or (b) to be free to sell its electricity at current market prices (which substantially exceed the contract price provided by the PPA). If there is any delay in the Court providing this ultimate relief, Oildale needs interim permission to sell its electricity at current market prices and terms to the Debtor or third parties.

5. To be clear, Oildale is not requesting that the Court invalidate or otherwise abrogate the PPA; to the contrary, the relief sought herein is necessary to preserve the PPA. Under such circumstances, fixing June 1, 2001, as the date by which the Debtor must obtain an order approving an assumption or rejection of the PPA constitutes a "reasonable" period within which to make this decision. In addition, unless the Court requires the Debtor to pay fair market value for electricity in advance of delivery pending its decision on assumption or rejection or allows Oildale temporary relief from the PPA so that it can enter into short-term arrangements for the sale of electricity to solvent buyers willing to pay fair market value, as a practical matter, there will be no

PPA for the Debtor to assume or reject. Given the magnitude of the Debtor's past defaults -- which have had the effect of forcing Oildale to discontinue operations -- the Debtor's April 11 directive that Oildale supply it with energy and capacity on credit at rates that are significantly below fair market value, without replenishing Oildale's finances, is simply a non-sequitur. In fact, such rates are insufficient to restart Oildale's operations. The Debtor must either cure its past defaults (via an assumption of the PPA) or allow Oildale to generate its own cure by selling electricity at fair market value (via a rejection). If such relief is not to be provided immediately, Oildale needs interim access to creditworthy buyers and market-based pricing to reestablish credit with its gas supplier and to satisfy its own past due obligations.

6. While a debtor's decision to assume or reject an executory contract need not ordinarily be expedited, the current situation is anything but ordinary. The Debtor's conscious decision to hoard cash by accepting four months of deliveries from Oildale without making payment therefor has created an unworkable and soon to be disastrous situation for Oildale. Without this Court's immediate intervention as requested herein, Oildale may be unable to replenish its already diminished cash reserves, the Debtor may lose a potentially valuable asset in the form of the PPA, and the California power grid may be short another 40 megawatts of electricity, as it heads into the summer months.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this Motion and the issues raised hereby pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), (D), (G), and (M).

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1409.

FACTUAL BACKGROUND

9. The relief sought herein is premised on the following allegations, which are supported by and set forth in greater detail in the accompanying Sugaoka Declaration:

A. Background of Cogeneration.

10. "Cogeneration" is a term used in the energy industry to describe a single process which produces two useful forms of energy (i.e., electrical and thermal energy). Recognizing the

inherent efficiencies of such processes, Congress enacted the Public Utilities Regulatory Policies Act of 1978 (16 U.S.C. § 824a-3 et seq.) ("PURPA") to incentivize the construction, operation and financing of cogeneration facilities.

11. The Oildale Facility is a "qualified facility" under PURPA; as a cogeneration facility, it burns natural gas to produce electrical and thermal energy. (Sugaoka Dec., ¶ 3.) The thermal energy is sold to a nearby refinery as its primary source of energy for its refinery operation. (Id. ¶ 5.) The Facility is capable of generating approximately 40 megawatts of electricity, which is sufficient to meet the power needs of about 40,000 homes in California. (Id.)

B. Oildale's Contractual Relationship With the Debtor.

12. Oildale supplies power to the Debtor pursuant to the PPA, which has approximately one-half of its original 30-year term remaining. As with most "qualified facilities," Oildale is dependent upon revenue from a single utility (in this case, the Debtor) which is the sole purchaser of its electricity. (Id. ¶ 6.) About 85% of Oildale's revenue comes from electricity sales to the Debtor, while the remaining 15% comes from Oildale's thermal energy host. (Id.) Such revenues are used to purchase natural gas (the single largest cost of production) as fuel to run the Facility and to pay the other costs associated with the operation and financing of the Facility.

13. In 1985, Oildale entered into the PPA with the Debtor (Id., ¶ 7.) In compliance with the avoided cost requirements under PURPA, the PPA provides for energy payments based on the Debtor's avoided cost at the time of delivery. (Id.) Although PURPA pricing based on avoided cost has remained the controlling principle, the method of calculating the avoided cost of energy has changed over the years. (Id., ¶¶ 8-9.) From December 1996 until March 2001, the California Public Utility Commission (the "CPUC") set the avoided cost of energy from time to time based on a formula that reflected the monthly adjustment of natural gas prices at the California border. (Id.) Under this formula, the Debtor's avoided cost of energy was based on a simple average of the border prices at Malin, Oregon (the northernmost entry point for gas into California) and Topock, Arizona (one of the southerly entry points). (Id.)

14. Over the past year, the fuel gas price environment and fundamental gas price assumptions upon which Oildale had been operating for the previous 15 years began to change

dramatically. The natural gas prices Oildale relies on to produce electricity (i.e., "Topock Gas Price") soared to historic levels. (Id., ¶ 11.) Under the PPA's avoided cost formula, the energy payments to which Oildale was entitled also rose necessarily to reflect these increases in fuel costs. This "linked" pricing relationship was, however, materially changed by the CPUC's March 27, 2001 decision, which modified the historic formula for setting avoided cost and reset the Debtor's payment obligations under the PPA at a significantly reduced level. (Id., ¶ 13-15.)

C. The Debtor's Breach of the PPA and the Effect on Oildale

15. Without explanation or justification, the Debtor paid only 15% of the amount due under the PPA for December 2000 and January 2001, and made no payments for February or March. (Id., ¶ 16.) The current outstanding payment obligation owed by PG&E to Oildale for the four-month prepetition period exceeds $10.5 million. (Id.)

16. The Debtor's breaches of the PPA have devastated Oildale's business. Oildale presently owes about $7,167,000 to its gas supplier, Duke Energy Fuels ("Duke"), for gas provided in the months of December 2000 through February 2001 and has failed to provide Duke with a letter-of-credit of $5,379,000 as stipulated by Oildale's gas purchase agreement with Duke. Duke has notified Oildale of its defaults and has threatened cancellation. (Id.)

17. Oildale has also defaulted on its $2,500,000 outstanding working capital loan, its senior debt financing and its California property tax obligations. As a consequence, Oildale is now exposed to the risk of foreclosure and may soon require the protection of chapter 11 to preserve its assets and business. (Id., ¶ 18.)

18. Oildale was forced to shut down the Facility on February 6, 2001, when it was unable to purchase additional gas required for the Facility's operation. (Id., ¶ 19.) Oildale's cash is now substantially exhausted. (Id.) The current balance in Oildale's unrestricted accounts is about $250,000. (Id.) Oildale lacks adequate cash or credit to pay for or assure payment for future gas deliveries to restart operations in the absence of assumption of the PPA by the Debtor or the ability to sell electricity and capacity to third parties (Id..) Further, since Oildale shut down operations, Oildale's thermal host laid off 31 of its employees and commenced its own chapter 11 case on April 23, purportedly in large part due to its inability to obtain thermal energy from Oildale (Id. ¶ 17.)

THE DEBTOR SHOULD BE COMPELLED
TO ASSUME OR REJECT THE PPA BY JUNE 1, 2001

19. As set forth further in the accompanying Consolidated Memorandum, section 365(d)(2) of the Bankruptcy Code provides that "the trustee may assume or reject an executory contract . . . at any time before confirmation of a plan, but the court, on the request of any party to such contract . . . may order the trustee to determine within a reasonable period of time whether to assume or reject such contract . . ." 11 U.S.C. § 365(d)(2).

20. What constitutes a "reasonable time" is left to the bankruptcy court's discretion in light of the circumstances of the case, including:

> The nature of the interests at stake, the balance of the hurt to the litigants, the good to be achieved, the safeguards afforded those litigants, and whether the action to be taken is so in derogation of Congress' scheme that the court may be said to be arbitrary.

21. In this case, the Debtor's prepetition default is not simply substantial; it is devastating for Oildale. As catalogued in the accompanying Sugaoka Declaration by the General Manager of Oildale's Asset Manager, the Debtor's prepetition defaults have stripped Oildale of virtually all of its cash and have created a precarious situation whereby the amounts that the Debtor now seeks to pay Oildale for power are insufficient to service, much less satisfy, the debt created by the Debtor's prepetition breaches. (Sugaoka Dec., ¶ 22.)

22. Oildale has no resources with which to make payments to creditors, and is currently not operating. Moreover, it will not be able to operate again in the foreseeable future absent this Court's intervention (or the intervention of another bankruptcy court which most likely will soon be presiding over Oildale's Chapter 11 case if the relief requested herein is denied). (Id., ¶ 2.)

23. Oildale has only two primary sources of revenue -- the PPA and a thermal host contract concerning sales of thermal energy generated by the Facility. (Id.,¶ 6.) On the other side of the ledger, Oildale has obligations to, among other creditors, its natural gas supplier, and its lenders in addition to normal operational expenses. (Id., ¶ 17-18.)

24. On February 6, 2001, Duke shut off the gas, forcing Oildale to shut down the Facility. Oildale was unable to become current on outstanding gas invoices or provide assurances of payment in the near future. Assurances could not be provided directly due to the Debtor's inability to perform on then-current defaults or provide assurances of payment going forward. As a result, Oildale's unpaid obligations skyrocketed, including a $7.1 million unpaid obligation to Duke.

25. Based on current cash usage rates, Oildale's remaining unrestricted cash will run out on May 15, 2001. (Id., ¶ 19.)

26. As a direct result of the Debtor's failure to pay Oildale for delivered electricity over the four month period preceding the commencement of this chapter 11 case and the Debtor's failure to take any meaningful remedial action since, Oildale now languishes in a new form of "debtor's prison:" the Debtor is unwilling to provide Oildale with the relief it needs to operate, and the PPA prevents Oildale from accessing the market to otherwise meet its operating requirements.

27. Absent relief, Oildale faces the prospect of a permanent shut-down and foreclosure by its secured lenders. To avoid this outcome and to return to operation, Oildale's only remedy may be to commence its own chapter 11 case and to seek relief therein regarding the PPA in order to freely sell its electricity at a fair market price.

28. Under such circumstances, Oildale is entitled to an order from this Court directing the Debtor to promptly assume or reject the PPA.

THE DEBTOR SHOULD BE COMPELLED TO PAY IN ADVANCE THE FAIR MARKET VALUE OF ELECTRICITY PENDING ITS ASSUMPTION OR REJECTION OF THE PPA

29. On April 11, 2001, the Debtor sent Oildale a unilateral directive purporting to require that Oildale deliver energy and contract capacity (i) at the rates established in the PPA or even at a lower rate pending certain unspecified contingencies and (ii) on credit terms allowing for at least fifteen days of credit every month. (Sugaoka Dec. at Ex. E.)

30. Oildale does not have the wherewithal to perform on these terms in light of the extent of the Debtor's prepetition defaults. Moreover, the Bankruptcy Code does not entitle the Debtor to performance on the terms which it seeks.

31. First, no party, including Oildale, can be forced to extend credit to the Debtor, at least without the Debtor's assumption of the agreement that contemplates the provision of credit. If the Debtor wishes to obtain credit from a third party, its rights and those of its proposed lender are controlled by section 364 of the Bankruptcy Code. No provision is found therein (or anywhere else in the Bankruptcy Code) that could in any way be construed to give the Debtor the power to compel a proposed lender to extend credit against its will.

32. Yet, that is precisely the result that will pertain here if Oildale is able to resume operations and the Debtor is not required to pay for electricity in advance. Oildale's Facility is directly connected to the Debtor's power grid. When the Facility generates electricity, it is immediately delivered to the Debtor, which, in turn, pays for it later under the PPA.

33. Thus, absent an enforceable agreement regarding credit terms, and absent the protections of section 364 of the Bankruptcy Code, the mere fact of Oildale's postpetition operation results in an involuntary extension of credit to the Debtor -- unless the Debtor is ordered to pay Oildale in advance.

34. If Oildale were to come back online and supply electricity to the Debtor at current market prices, the Debtor would be incurring additional indebtedness to Oildale at the rate

of $240,000 per day. In the first fifteen days of each month (the credit terms sought in the Debtor's April 11 directive), Oildale's exposure would thus be approximately $3.6 million.

35. Oildale has already been damaged enough by the Debtor's failure to meet its payments and thus cannot be forced to extend further credit to the Debtor at this time. Accordingly, deliveries should be pre-paid by the Debtor.

36. Second, as set forth in the accompanying Consolidated Memorandum, pending the Debtor's decision to assume or reject the PPA, the Debtor is obligated to pay for the reasonable value of Oildale's postpetition deliveries. Absent the Debtor's assumption of the PPA, it is clear that the reasonable value of the electricity provided by Oildale to the Debtor is not the price contemplated by the PPA, which reflects a long term commitment to purchase electricity. In fact, the PPA price is significantly less than the fair market value of electricity delivered on a short-term basis, and does not cover Oildale's cost of operations. (Sugaoka Dec., ¶ 15.)

37. The Bankruptcy Code does not permit the Debtor to withhold the $10.5 million it owes Oildale, refuse to make a prompt decision to assume or reject the PPA, and then add insult to injury by compelling delivery of Oildale's power at prices far below market value.

38. Therefore, if the Debtor elects to receive electricity from Oildale pending its decision to assume or reject, it should pay in advance the fair market value for such electricity.

ALTERNATIVELY, THE AUTOMATIC STAY SHOULD BE LIFTED TO PERMIT OILDALE'S SUSPENSION OF PERFORMANCE UNDER THE PPA PENDING THE DEBTOR'S DECISION TO ASSUME OR REJECT THE PPA

39. As an alternative to the relief requested above, the Court should grant relief from the automatic stay to permit Oildale to suspend its performance under the PPA pending the Debtor's assumption or rejection thereof, and permit Oildale to sell electricity to creditworthy third parties.

40. Such relief from the automatic stay is warranted under section 362(d)(1) which provides that "on request of a party in interest . . . the court shall grant relief from the stay provided under subsection (a) of this section . . . for cause, including the lack of adequate protection of an interest in property of such party in interest." 11 U.S.C. § 362(d)(1).

41. Here, "cause" clearly exists for relief from the stay. There is no doubt that, unless Oildale is permitted to sell at market price, Oildale, the Debtor, and California electricity consumers will all be irreversibly harmed. Because of the Debtor's material payment breaches under the PPA, Oildale has depleted its working capital to the point where it lacks the wherewithal to purchase gas needed for the operation of the Facility. (Sugaoka Dec., ¶ 17-19.) The Facility has been shut down and cannot be reopened on the basis of the Debtor's unilateral offer to pay contract price (or less) on terms. (Id., 19.)

42. The Debtor's April 11 demand to pay the rates under the PPA, which may have been sufficient to keep Oildale in business under other circumstances, is entirely insufficient now that Oildale's resources have been depleted by the Debtor's past defaults. As things currently stand, the Debtor's proposal for postpetition payments pending assumption or rejection will only aggravate Oildale's dire financial situation and would most likely result in the bankruptcy of Oildale. Consequently, the Debtor will lose the PPA (which would likely be rejected in Oildale's bankruptcy) and California may be deprived of yet another power producer for the critical summer months and the current power crisis will only worsen.

43. By comparison, all constituencies will actually be benefited by Oildale's suspension. Oildale will be able to resume operations, produce electricity and mitigate its damages. The Debtor will have the ability to purchase electricity from Oildale either by assuming the PPA (which will be preserved by Oildale's ongoing viability) and curing its defaults or by paying market price for postpetition electricity delivered by Oildale. Importantly, California will have available an additional 40 megawatts of standard capacity.

CONCLUSION

44. For all the foregoing reasons, Oildale requests that this Court enter an order (i) granting Oildale's motion to compel the Debtor to promptly assume or reject the PPA and directing the Debtor to pay to Oildale market price in advance for electricity delivered to it in the interim; or (ii) granting Oildale relief from the automatic stay to allow it to suspend

performance under the PPA until such time that the Debtor elects to assume or reject the PPA; and (iii) granting such other and further relief as the Court deems just.

Dated this 30 day of April, 2001.

Respectfully Submitted,

WHITE & CASE LLP

By Brian L Holman

Brian L. Holman
Attorneys for Oildale Energy LLC

Thomas E Lauria (*pro hac vice* pending)
Jerry R. Bloom (State Bar No. 138873)
Brian L. Holman (State Bar No. 094603)
J. Christopher Shore (*pro hac vice* pending)
WHITE & CASE LLP
633 West Fifth Street, Suite 1900
Los Angeles, California 90071-2007
Telephone: (213) 620-7700
Facsimile: (213) 687-0758

Attorneys for Oildale Energy LLC

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In Re: PACIFIC GAS & ELECTRIC COMPANY, a California corporation, Debtor. Federal I.D. No. 94-074260	Case No. 01-30923 DM THE HONORABLE DENNIS MONTALI CHAPTER 11 CASE **DECLARATION OF ALEX A. SUGAOKA IN SUPPORT OF OILDALE ENERGY LLC'S EMERGENCY MOTION FOR AN ORDER (i)(A) COMPELLING THE DEBTOR TO ASSUME OR REJECT OILDALE'S POWER PURCHASE AGREEMENT WITH THE DEBTOR ON OR BEFORE JUNE 1, 2001, AND (B) REQUIRING THE DEBTOR TO PAY FAIR MARKET VALUE IN ADVANCE FOR ALL ELECTRICITY DELIVERED BY OILDALE PENDING ASSUMPTION OR REJECTION OF ITS POWER PURCHASE AGREEMENT; OR, IN THE ALTERNATIVE (ii) GRANTING OILDALE RELIEF FROM THE AUTOMATIC STAY TO ALLOW IT TO SUSPEND PERFORMANCE UNDER ITS POWER PURCHASE AGREEMENT WITH THE DEBTOR PENDING ASSUMPTION OR REJECTION THEREOF** Date: May 10, 2001 Time: 1:30 p.m. Place: 235 Pine Street, 22nd Floor, San Francisco, California

I, Alex A. Sugaoka, declare and say:

1. I am the General Manager of the Asset Manager (UAE Energy Operations Corp.) for Oildale Energy LLC ("Oildale"). I make this declaration in support of Oildale's emergency motion for entry of an order (i)(A) compelling the Debtor to assume or reject the Power Purchase Agreement between Oildale and the Debtor, dated March 1985, (the "PPA") on or before June 1, 2001, and (B) compelling the Debtor to pay fair market value in advance for electricity delivered to it by Oildale pending assumption or rejection of the PPA; or (ii) granting Oildale relief from the automatic stay to allow Oildale to suspend performance under the PPA pending assumption or rejection. I have personal knowledge as to the matters described in this declaration, and I am competent to testify on these matters.

2. Oildale is structured as a single purpose company. It owns a plant in Oildale, California (the "Facility") which burns natural gas to produce electrical and thermal energy. The nature of its business operations is such that its operating revenues are limited to sales of energy and capacity to Pacific Gas and Electric Company (the "Debtor") and sales of thermal energy to a local refinery which serves as Oildale's thermal energy host. As described in greater detail below, Oildale presently is not operating as a direct result of the Debtor's refusal to pay in full for four months of electricity which Oildale delivered and the Debtor accepted and used. Unless this situation is remedied immediately, Oildale will remain shut down for the foreseeable future, depriving California consumers of another source of much needed electricity. Further, unless prompt action is taken by this Court, Oildale's increasing financial distress will most likely compel Oildale to file its own bankruptcy petition.

Background

3. Oildale is a cogeneration facility, producing both electrical energy and some other form of useful energy, such as thermal energy. Oildale is a "qualifying facility" or "QF" as defined by the Public Utilities Regulatory Policies Act of 1978 ("PURPA"), as amended, 16 U.S.C. 824a-3, et seq., and the regulations enacted thereunder, which entitles it to receive certain protections and exemptions under PURPA (e.g., exemption from certain state and federal utility regulations).

4. As a QF, Oildale is an important source of clean, reliable electricity. Under PURPA, my understanding is that a QF such as Oildale is entitled to receive the electric utility's full avoided cost for electricity, which is generally the incremental cost of operation that the utility would have paid to generate the electricity itself or buy from a third party for the last megawatt hour of electricity generated at any given time, but for the QF providing the power. These costs of operation are generally referred to as the Avoided Costs (the "Avoided Costs").

5. The major component of Oildale's costs of operation is the price of natural gas, which constitutes over 80% of Oildale's operating expenses. Oildale burns natural gas as its sole fuel to produce thermal energy and electricity. The thermal energy is sold to a nearby refinery as its primary source of energy for its refinery process. The Facility generates a total of 40 megawatts of electricity, an amount which is sufficient to meet the power needs of about 40,000 homes in California.

6. Oildale is dependent upon revenue from the Debtor because it is the only purchaser of Oildale's electricity. Such revenue constitutes approximately 85% of Oildale's total monthly revenue. The remaining revenues are derived from the local refinery, which purchases thermal energy from Oildale, serving as Oildale's thermal host. Thus, Oildale's entire operation is funded from, and dependent on, the revenue from the Debtor, such that any major default under the PPA seriously jeopardizes Oildale's ability to supply electrical and thermal energy.

<u>The PPA</u>

7. In 1985, Oildale entered into a Power Purchase Agreement (the "PPA") with a term expiring in 2015 to sell the electricity generated by its facility to the Debtor pursuant to a standard offer contract that the California Public Utilities Commission (the "CPUC") had adopted in 1982. Attached to my declaration as Exhibit A is a true and correct copy of the PPA. In compliance with PURPA, the PPA provides for energy payments based on the Debtor's "Avoided Costs" at the time of delivery. <u>See</u> PPA, Ex. A, Article 4.

8. My understanding is that although the PURPA pricing benchmark of Avoided Costs remains the controlling federal standard on parties to the PPA, the method of calculating the avoided costs of energy in California has changed throughout the years. Initially, the utilities (<u>e.g.</u> the Debtor) would set energy prices based upon the forecasted Avoided Costs for a three month period and

no adjustments were made at the end of the period, even if actual fuel gas and other price setting components differed from the forecast. To refine the details of this calculation in keeping with PURPA's mandates, the CPUC replaced this three month Avoided Cost energy posting with a monthly posting. Later, the CPUC adopted an index for calculating the energy component of the price. This methodology used the cost of the avoided fuel, natural gas for example, at a known supply location plus transportation costs to California and was consistently applied for a number of years.

9. In 1996, California adopted electricity deregulation, which resulted in utilities such as the Debtor selling off much of their own gas-fired generation. The deregulation legislation (Assembly Bill 1890, codified as Public Utilities Code § 390) included a requirement that the CPUC adopt an interim formula to reflect the monthly adjustment of natural gas prices at the California border. After lengthy negotiations among the QFs, the utilities and the CPUC, the CPUC adopted a transition formula in December 1996 (the "Transition Formula"). Attached to my declaration as Exhibit B is a true and correct copy of the CPUC's Decision setting forth the Transition Formula, Dec. No. 96-12-028. For the Debtor, the Transition Formula included a component for the price of natural gas (the "Natural Gas Component") based on a simple average of the monthly indices for natural gas prices at Malin, Oregon, the northerly intake for California (the "Malin Gas Price"), and at Topock, Arizona, the primary southerly intake for California (the "Topock Gas Price"). The energy pricing formula in Oildale's PPA automatically allowed for incorporation of this new formula, including the Natural Gas Component which was based upon this average of the Malin Gas Price and the Topock Gas Price.

10. The prices of the natural gas that Oildale relies on to produce thermal energy and electricity are based upon a long-term contract with prices adjusted on a monthly basis in accordance with the Topock Gas Price. Gas priced for delivery to QFs in the Southern California area (which includes Oildale) has typically been based on the Topock Gas Price. Since the Transition Formula was adopted in 1996, the Topock Gas Price has tended to be higher than the Malin Gas Price, although the disparity was not substantial until recent months. The Transition Formula moderated the difference between the Topock Gas Price and the Malin Gas Prices by using the average of the prices. Therefore, the difference between the gas prices used to calculate Oildale's revenues and expenses was insubstantial up until recent months.

11. In the past year, the fuel gas price environment and fundamental gas price assumptions upon which Oildale had been operating for the previous 15 years began to change dramatically. First, the prices of the natural gas that were based upon the Topock Gas Price began to soar to historic levels. By mid-year 2000, the Topock Gas Price had doubled when compared to the January 2000 Topock Gas Price. By December of 2000, the Topock Gas Price had quintupled from its January 2000 level. The Topock Gas Price during 2001 has so far not retreated to historical price levels, and the forward fuel-gas-price strips indicate that these gas price indices are likely to stay robust for the rest of 2001, if not longer. Therefore, Oildale's costs of operation have increased substantially in direct correlation with the gas prices.

12. As the Topock Gas Price began to rise in June of 2000, there began to be a significant disparity between the Topock Gas Price and the Malin Gas Price. This disparity began widening dramatically especially in January of 2001 such that neither the Topock Gas Price nor the Malin Gas Price approximated each other. In March of 2001 for example, the Malin Gas Price was $8.4667 per MMBtu and the Topock Gas Price was $12.740 per MMBtu. Oildale was able to continue providing clean, reliable energy to the Debtor during part of this period only because the Transition Formula took into account Topock pricing.

13. The March 27, 2001 decision of the CPUC (the "Wood Decision"), which became effective April 1, 2001, held that the Natural Gas Component of the Avoided Cost formula shall be based solely on the Malin Gas Price rather than the average of the Malin Gas Price and Topock Gas Price (The "Wood Decision Formula"). Attached to my declaration as Exhibit C is a true and correct copy of the Wood Decision.

14. Thus, the Avoided Cost Formula changed by the Wood Decision no longer yields anything close to the Debtor's true "Avoided Cost" as mandated by PURPA. If Oildale were to purchase gas at Topock March 2001 prices and operate under the Wood Decision Formula, Oildale would be operating at a daily economic loss. That is to say that Oildale's total revenues would be less than the corresponding operating expenses such as fuel, labor and maintenance. Such operations would be commercially unsustainable, eventually leading to bankruptcy of the Oildale project. It is my understanding that several QFs and a trade association known as the California Cogeneration Council

("CCC") have filed a petition with FERC to have the Wood Decision reviewed (the "CCC Petition"). A true and correct copy of the CCC Petition is attached to my declaration as Exhibit D. There is no assurance that there will be any action forthcoming from FERC in the near term.

15. The combined effect of the rising Topock Gas Price, the Wood Decision which keys energy revenues from the Debtor solely to the Malin Gas Price, and the above described disparity between the Topock Gas Price and the Malin Gas Price is that Oildale is forced to buy high (i.e., by purchasing gas at the Topock Gas Price) and sell low with significant resulting losses. Currently, the Wood Decision Formula stipulates electric pricing which is significantly less than market prices. Payment under the Wood Decision Formula would not even support operating expenses, notwithstanding Oildale's debt obligations. In April 2001, "all-in" prices under the PPA were approximately $100/MWh.

The Debtor's Breach of the PPA and the Resulting Effect on Oildale

16. The Debtor's failure to pay for the electricity that Oildale provided to it between December of 2000 and March 31, 2001 has brought financial ruin on Oildale. The Debtor paid only 15% of the amounts owing for December 2000 and January 2001, and has paid nothing for February or March 2001. As outlined in the table below, through March 31, 2001, the Debtor owes Oildale at least $10,522,581, excluding interest and possibly some capacity payments, on account of its prepetition defaults with no prospect of payment of this claim in sight.

OILDALE ACCOUNTS RECEIVABLE FROM PG&E				
Billing		Payment		
Period	Amount	Period	Amount	Ending Balance
Dec-00	$4,992,472			
Jan-01	$5,249,945	Jan-01	$549,097[1]	
Feb-01	$687,967	Feb-01	$199,699[1]	
Mar-01	$1,154,659	Mar-01	$813,666[2]	
Total	$12,085,043		$1,562,462	**$10,522,581**

17. Oildale presently owes about $7,167,000 to its gas supplier, Duke Energy Fuels ("Duke") for gas provided in the months of December 2000 through March 2001. Duke has sent to Oildale a default and potential cancellation letter. Oildale is also in default under its agreement with Duke for not providing a letter-of-credit of $5,379,000 as stipulated by the gas supply agreement with Duke for credit support for gas deliveries. Therefore, Oildale's cash obligations for gas supply alone are over $12 million. Oildale is also at risk for substantial third party claims from Duke. Continued non-operation exacerbates its risk with Duke and the local refinery. The local refinery has also been economically affected by Oildale's lack of operation and has recently laid off 31 hourly workers from its refinery primarily due to Oildale's lack of operation and, on April 23, was forced to declare bankruptcy itself.

18. Oildale is in default on its $2,500,000 outstanding working capital loan. Oildale is also in default on its senior debt loan and property taxes and is at risk of foreclosure and bankruptcy.

19. Oildale was forced to shut down its plant on February 6, 2001 as Oildale was unable to become current on outstanding gas invoices or provide assurances of payment in the near future. Assurances could not be provided to Duke directly due to the Debtor's inability to perform

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1 Refers to partial payment on December 2000 billing.

2 Refers to partial payment on January 2001 billing.

on then-current defaults or provide assurances of payment going forward. Oildale operated for 10 days in March primarily using cash from the Debtor's 15% payment for January energy deliverables to pre-pay for gas supplies. Cash is now substantially exhausted. The current balance in Oildale's unrestricted accounts is about $250,000 and is projected to run out on May 15, 2001. Oildale lacks adequate cash or credit to pay for or assure Duke of payment for future gas deliveries to restart operations.

The Debtor's Postpetition Plans

20. It is not at all clear what amounts the Debtor intends to pay to Oildale for its electricity on a go forward basis. Additionally, the Debtor has not provided adequate assurances showing any ability to pay any amounts to Oildale. Even if the Debtor pays under the Wood Formula, it is not enough to support Oildale's variable costs of operation or to keep Oildale operating economically. Finally, Oildale does not have any assurance that the Debtor could make up either the historical or go forward amounts that would become due and owing to Oildale if FERC (or some other entity) acts to alter the impact of the Wood Decision.

21. On April 11, 2001, the Debtor sent Oildale a unilateral directive requiring that Oildale deliver energy and contract capacity to the Debtor (i) at the rates established in the PPA or even at a lower rate, pending certain unspecified contingencies and (ii) on credit terms allowing for at least 15 days of credit each month. A true and correct copy of the April 11 directive is attached hereto as Exhibit E.

22. If Oildale were to come back online and supply power to the Debtor at market prices, the Debtor would be indebted to Oildale at the rate of about $240,000 per day. In the first 15 days of each month (the credit sought), Oildale's exposure would be approximately $3.6 million. The amounts that Debtor seeks to pay Oildale for electricity are insufficient to cover the costs of fuel and other operating expenses such as labor and maintenance, much less satisfy the debt going forward or that created by Debtor's prepetition breaches. Moreover, the credit terms upon which Debtor seeks to pay Oildale would also render Oildale unable to perform in light of Debtor's prepetition defaults because Oildale would be unable to provide the assurances of payment required by its creditors to resume operations.

I declare under penalty of perjury under the laws of the United States and the state of California that the foregoing is true and correct.

Dated this 30 day of April, 2001, at San Ramon, California.

Alex A. Sugaoka

Alex A. Sugaoka

Thomas E Lauria (*pro hac vice* pending)
Jerry R. Bloom (State Bar No. 138873)
Brian L. Holman (State Bar No. 094603)
J. Christopher Shore (*pro hac vice* pending)
WHITE & CASE LLP
633 West Fifth Street, Suite 1900
Los Angeles, California 90071-2007
Telephone: (213) 620-7700
Facsimile: (213) 687-0758

Attorneys for Oildale Energy LLC, Wadham Energy LP, and KES-Kingsburg LP

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re PACIFIC GAS & ELECTRIC COMPANY, a California corporation, Debtor. Federal I.D. No. 94-074260	Case No. 01-30923 DM THE HONORABLE DENNIS MONTALI CHAPTER 11 CASE **CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE EMERGENCY MOTIONS OF OILDALE ENERGY LLC, WADHAM ENERGY LP, AND KES-KINGSBURG, LP FOR ENTRY OF AN ORDER (i)(A) COMPELLING THE DEBTOR TO ASSUME OR REJECT EACH MOVANT'S POWER PURCHASE AGREEMENT WITH THE DEBTOR ON OR BEFORE JUNE 1, 2001, AND (B) REQUIRING THE DEBTOR TO PAY FAIR MARKET VALUE IN ADVANCE FOR ALL ELECTRICITY DELIVERED BY THE MOVANTS PENDING ASSUMPTION OR REJECTION OF THEIR POWER PURCHASE AGREEMENTS OR, IN THE ALTERNATIVE, (ii) GRANTING THE MOVANTS RELIEF FROM THE AUTOMATIC STAY TO SUSPEND PERFORMANCE UNDER THEIR POWER PURCHASE AGREEMENTS WITH THE DEBTOR PENDING ASSUMPTION OR REJECTION THEREOF** Date: May 10, 2001 Time: 1:30 p.m. Place: 235 Pine Street, 22nd Floor San Francisco, CA

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STATUTES

Oildale Energy LLC ("Oildale"), Wadham Energy LP ("Wadham"), and KES-Kingsburg LP ("Kingsburg," and collectively with Oildale and Wadham, the "Movants") respectfully submit this consolidated memorandum of points and authorities in support of their respective separate motions for entry of an order (i)(A) compelling the Debtor to obtain an order authorizing the assumption or rejection of their power purchase agreements by June 1, 2001, and (B) directing the Debtor to pay fair market value in advance for all electricity the Movants deliver to the Debtor prior to the assumption or rejection of their power purchase agreements, or (ii) in the alternative to the foregoing relief, granting the Movants relief from the automatic stay to suspend their performance under the power purchase agreements pending assumption or rejection and authorizing them to sell electricity to third parties during such period of time (collectively, the "Motions").

PRELIMINARY STATEMENT

The Movants operate power plants, commonly referred to as "qualified facilities" or "QFs," that (a) in the case of Oildale and Kingsburg, produce two types of energy by burning natural gas: (1) electricity, which they sell to Pacific Gas & Electric Company ("PG&E" or the "Debtor") under long-term power purchase agreements, commonly referred to as "PPAs," and (2) thermal energy, which they sell to nearby thermal hosts, and (b) in the case of Wadham, burns rice hulls to produce electricity and usable by-products. Historically, the relationship between the QFs and PG&E was one of mutual dependence. Pursuant to its QF contracts, PG&E received a reliable source of approximately 4,500 megawatts of electrical capacity (which comprises approximately 33% of its total capacity, or enough electricity to power approximately 4.5 million California homes). Concomitantly, the QFs received from PG&E a long-term commitment to purchase their electric power production, which has supported the QFs' operations and financing.

Over the past year, however, this balanced relationship was thrown into a state of near-total chaos as energy costs unexpectedly sky-rocketed without matching adjustments to the rates PG&E charges its customers. Faced with ever-mounting losses from operations and a shortage of electricity, PG&E became unable (or unwilling) to provide uninterrupted electrical service to the public. Sporadic brown-outs followed as California plunged into an all-out energy crisis. The state was forced to step in to fill the gaps by purchasing electricity which was then delivered to the public through PG&E's power grid.

Without explanation, PG&E then turned on its QFs. Even though the PPAs entitle PG&E to purchase electricity at prices that are currently substantially below market, in December 2000 PG&E chose to curtail and then terminate altogether payments to the QFs. Unable to access alternative purchasers of their electricity, the QFs (perhaps naively) fully upheld their end of the bargain by continuing to produce and deliver electricity to PG&E to the extent they were able to do so without receiving payment. Through this strategy of accepting the QFs' electricity production but not paying for it, by April 6, 2001 (the "Petition Date"), PG&E had built a substantial war chest including nearly $1.0 billion which it had withheld from its QFs.

The result has been near devastation to the QF community. Of the 9,000 megawatts of electric capacity provided by QFs in the State of California, on the date hereof, approximately 3,000 megawatts was off-line, unable to operate as a direct result of the tactics employed by PG&E and Southern California Edison (which has also accepted electricity from the QFs without making payment therefor). Financial defaults loom for many QFs and individual QF bankruptcies appear ready to breakout across the state.

To make matters worse, shortly after commencing its chapter 11 case, PG&E issued a unilateral directive to the QFs pursuant to which the QFs were informed that (1) they were to continue providing electricity to PG&E under their PPAs, (2) the QFs would be paid the contract rate as recently reset by the California Public Utility Commission (or <u>less</u>, if required by the exigencies of PG&E's situation), (3) payments would be made 15 days in arrears, and (4) the foregoing rules of engagement would continue indefinitely on a month-to-month basis, until further notice. In short, not only would PG&E oblige itself of the favorable pricing provided by the QFs' long-term PPAs, without reaffirming PG&E's long-term commitment to the QFs, but also the QFs were to be compelled, against their will, to increase their exposure to PG&E's insolvency by extending new postpetition credit to PG&E -- without an enforceable agreement to extend such credit, and without any of the protections afforded by section 364 of the Bankruptcy Code.

This Court must serve as the throttle on the Debtor's pernicious behavior. Failure to do so would be inconsistent with what should be the primary objective of all concerned: making sure that California has as much electrical capacity on line during the high-use summer months as is available. Simply put, the Debtor cannot "have its cake and eat it, too." The Debtor cannot receive on an indefinite basis the full benefits of PPAs that were priced and structured on the Debtor's long-term commitment to purchase power, without reaffirming its long-term commitment and curing its defaults. The Debtor's scheme unfairly exposes the QFs to the prospect of losing billions of dollars in the aggregate while energy prices remain at all-time highs, without the ability to recoup such losses when energy prices normalize in the future. Presumably, the moment that happens, the Debtor will announce that the PPAs are burdensome and reject them, forcing the QFs to sell at then-market prices, with little or no profit to offset the previously-incurred losses. The Debtor's scheme also provides the Debtor with the improper windfall of long-term pricing (with built-in credit terms) -- without having to be party to an enforceable long-term contract.

These results are simply not sanctioned by the Bankruptcy Code. Pending assumption or rejection of the PPAs, the Debtor must pay the fair market value of the electricity delivered by the QFs without credit terms (i.e., payment must be made in advance), unless a QF otherwise agrees.

Beyond being legally untenable, the Debtor's scheme is impossible from a practical perspective. Many of the QFs, including the Movants, do not have the wherewithal to operate on the terms dictated by the Debtor. Ultimately, they will be forced to cease operations (if they have not already done so) and to seek their own bankruptcy protection. The results: inoperative electrical capacity critically needed in the State of California; doubtlessly, a proliferation of litigation; massive claims by the QFs against the Debtor's estate; and the vitiation of the PPAs as to which the Debtor purportedly seeks to reserve its right to assume or reject.

To avoid such a disastrous outcome, the Court should either (1) compel the Debtor to (a) promptly assume or reject the PPAs, and (b) pending such assumption or rejection, pay fair market value in advance for all electricity delivered postpetition by the Movants, or (2) in the alternative, lift the automatic stay so that the Movants may suspend performance under the PPAs and sell electricity to third parties at market pending the Debtor's assumption or rejection thereof. In addition, in either event, the Debtor should be ordered to pay immediately as an administrative expense under section 503(b) of the Bankruptcy Code the difference between contract price and fair market value for all electricity delivered by QFs from the commencement of this chapter 11 case until the entry of orders on the Motions. Such relief will:

- permit the QFs to resume and/or sustain operations during this Chapter 11 case;
- maximize the amount of electrical capacity available in the State of California;
- limit (or perhaps even eliminate) the further build-up of QF claims against the Debtor's estate;
- permit this Court to retain centralized control over the issues that exist or may arise between the Debtor and the QFs (promoting judicial efficiency and ensuring a consistent outcome with respect to all QFs); and
- preserve the viability of the PPAs pending the Debtor's decision to assume or reject them.

STATEMENT OF FACTS

As noted above, this consolidated memorandum is submitted in support of three motions brought by three separate QFs: Oildale, Wadham, and Kingsburg. Each Motion is supported by the declaration of an officer or representative of the individual Movant setting forth the facts germane to each Motion.[1]

Oildale is a single purpose limited liability company formed for the purpose of owning and operating a 40 megawatt ("MW") cogeneration facility in Oildale, California (the

[1] Those declarations are as follows: (i) Declaration of Alex A. Sugaoka, dated April 30, 2001, submitted in support of Oildale's motion ("Oildale Dec."), (ii) Declaration of Alex A. Sugaoka, dated April 30, 2001, submitted in support of Wadham's motion ("Wadham Dec.); and (iii) Declaration of James Hinrichs, dated April 30, 2001 submitted in support of Kingsburg's motion ("Kingsburg Dec.").

"Oildale Facility"), which burns natural gas to produce electricity and thermal energy. (Oildale Dec. ¶¶ 2, 3, 5). Wadham is a single purpose limited partnership formed for the purpose of owning and operating a 26.5 MW facility in Williams, California, which burns rice hulls to produce electricity. (Wadham Dec. ¶¶ 2, 3, 5). Kingsburg is a special purpose limited partnership formed for the purpose of leasing and operating a 34.5 MW facility in Fresno County, California, which burns natural gas to produce electricity and thermal energy. (Kingsburg Dec. ¶¶ 2, 3, 5). Each of the Movants' facilities is a "qualifying facility" as defined in the Public Utilities Regulatory Policies Act of 1978, as amended, 16 U.S.C. § 824(a)(3), et seq. ("PURPA").

Each Movant is a counterparty to a PPA with PG&E, which is attached as Exhibit A to the relevant declaration. The PPAs run for terms of between fifteen years (in the case of Wadham) and thirty years (in the case of Kingsburg and Oildale), with the first PPA (Wadham) set to expire in 2004 and the last (Kingsburg) in 2019. Pursuant to the PPAs, the Movants are required to provide a specified amount of electricity to PG&E at certain times of the year and are entitled to "put" power to PG&E at other times. In consideration for the QFs' annual commitment to deliver electricity and the actual deliveries thereof, the Movants are entitled to a package of compensation consisting generally of a "capacity" payment and an "energy" payment. The former is set at a stipulated amount in each PPA, and the latter is set at PG&E's "Short Run Avoided Cost," or "SRAC," as that rate is set by the California Public Utilities Commission (the "CPUC") from time to time. "All-in" prices under the Movants' PPAs were approximately $100/MWh in April 2001. (E.g., Oildale Dec. ¶ 15).

Each Movant's sole or primary source of income is its PPA with PG&E. Accordingly, the viability of the Movants' operations (and their ability to generate electricity) is now, and has always been, dependent on the Debtor fulfilling its obligations under the PPAs. In addition, each Movant has financed the development, construction and operation of its facility with third-party financing based on and structured around the Movant's PPA. Thus, the failure of the Debtor to pay for delivered electricity as contemplated by the PPA not only jeopardizes the operation of each Movant's facility, but also it exposes each Movant to the potential exercise of remedies by its lenders, and concomitantly, the prospect of bankruptcy.

Beginning with electricity delivered in December 2000, PG&E elected not to pay what it owed for energy and capacity delivered by QFs (including the Movants), first paying a small fraction of the amount due and then stopping payment entirely. As a consequence, as of the Petition Date, PG&E had accrued debts to the Movants in the following amounts:

Oildale	$10,522,581
Wadham	$ 7,796,588
Kingsburg	$10,359,900

Notably, despite PG&E's material defaults, the Movants continued to purchase fuel, convert that fuel to electricity and deliver that electricity to PG&E -- unless and until their own financial condition dictated otherwise. As a result, the Movants soon found themselves in the unsavory position of having incurred material obligations related to the operation of their facilities, but having no income stream available to make payments associated with those obligations. E.g., Oildale Dec. ¶¶ 16-19).

The Debtor's prepetition defaults have decimated the business operations of the Movants. Oildale and Kingsburg, both of which are leveraged projects specifically structured around cash flow from the PPAs, are currently shut down and, absent relief as requested in the Motions, may well be compelled to obtain bankruptcy protection in the near future. (Oildale Dec. ¶ 2; Kingsburg Dec. ¶ 2). Wadham has been able to remain marginally operational, but is also at risk of bankruptcy: its unrestricted cash reserves have dwindled down to only $100,000 and it will not be able to meet its debt service obligations to its lender. (Wadham Dec. ¶¶ 15-16). Notably, the problems being suffered by the Movants are indicative of the current condition of the overall California QF industry. Of the approximately 9,000 MW of QF capacity in California, as of the date of the Motion, approximately 3,000 MW is shut down and not operating. Without a sensible remedy, the loss of capacity will continue to increase -- precisely as the high-demand summer season comes into full swing.[2]

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[2] In addition, PG&E's defaults are beginning to have a "ripple effect" throughout California. For example, the purchaser of Oildale's thermal energy has just filed for chapter 11 protection

(continued...)

In that regard, the Debtor's postpetition conduct with respect to the QFs is either calculated to insure the further deterioration of QF power deliveries or reflective of gross and wanton negligence on the Debtor's part. By letter dated April 11, 2001 (the "April Directive") and addressed to all of the Debtor's QFs, the Debtor unilaterally notified the QFs that (1) they would be required to continue delivering electricity under their PPAs, (2) they would be paid the contract rate (as per the CPUC's March 27, 2001 rate-setting decision) for such deliveries (which rate reflects a material discount to market), or an even further reduced amount, if the Debtor's circumstances require, (3) payment would be made 15 days in arrears, and (4) the arrangement would be continued on a month-to-month basis, pending further notice from the Debtor. Juxtaposed against the fact that the Debtor had withheld approximately $1.0 billion in payments to QFs prior to commencing its chapter 11 case, the April 11 Directive makes one thing clear: the Debtor's current scheme, whether the product of malice or ignorance, will only worsen California's energy crisis as an ever-increasing number of QFs are forced to go off-line.

ARGUMENT

I.
THE DEBTOR MUST PAY THE MOVANTS THE REASONABLE VALUE OF THEIR POSTPETITION DELIVERIES MADE PRIOR TO ASSUMPTION OR REJECTION OF THE PPAs

In its April 11 Directive, PG&E has instructed that its QFs, including the Movants, continue delivering electricity and capacity prior to a decision to assume or reject the PPAs. Further, PG&E has stated that it will pay for such deliveries in arrears on a rolling fifteen day basis at the prices purportedly established in the PPAs (unless the Debtor's circumstances cause it to believe it needs to pay a lesser amount). (Oildale Dec. Ex. E). The Debtor's proposal, however, side-steps and fails to address the fundamental legal issue raised by the Debtor's bankruptcy filing vis á vis the QFs and the PPAs: At what price and on what other terms can the Movants and the other QFs be required to perform prior to PG&E's election to assume or reject the PPAs?

(...continued)

purportedly in large part due to its inability to obtain thermal energy from Oildale. Numerous other dependent businesses will be soon to follow as the QFs' conditions worsen.

In National Labor Relations Bd. v. Bildisco and Bildisco, 465 U.S. 513, 104 S. Ct. 1188 (1984), the U.S. Supreme Court answered part of that question as follows:

> If the debtor in possession elects to continue to receive benefits from the other party to an executory contract pending a decision to reject or assume the contract, the debtor-in-possession is obligated to pay for the reasonable value of those services.

Id., 465 U.S. at 531 (emphasis added). See also Matter of Gasmark Ltd., 193 F.3d 371, 374 (5th Cir. 1999); United States v. Consumer Health Servs. of Am., Inc., 108 F.3d 390, 393 (D.C. Cir. 1997). The "reasonable value" rule rests on the premise that, during the stub period prior to assumption or rejection, the parties to an executory contract have no "contract price" per se which governs the purchase or sale of their goods or services. Thus, there is no extant basis upon which the non-debtor party may bring an "action on the price" for postpetition performance. On the other hand, the debtor is clearly not entitled to compel performance and then take the non-debtor's goods or services without compensation, as that would constitute both a due process violation and an unjust enrichment of the debtor. See, e.g. Burlington Northern R.R. Co. v. Dant & Russell, Inc. (In re Dant & Russell, Inc.), 853 F.2d 700, 707 (9th Cir. 1988) ("[T]he debtor-in-possession or trustee's liability for [reasonable value] is not compensatory but rather is founded upon the equitable principle of preventing unjust enrichment."); Continental Energy Assocs. Ltd. P'ship v. Hazleton Fuel Mgmt. Co. (In re Continental Energy Assocs. Ltd. P'ship), 178 B.R. 405, 407 (Bankr. M.D. Pa. 1995) ("While we are concerned about the Fifth Amendment rights of an entity to be compensated for property, the fact that the Debtor is now paying [movant] the contract amount in advance, together with a court commitment that that compensation should be at least as much as determined to be a 'reasonable amount,' suggests that [movants'] Fifth Amendment rights are vigilantly being guarded by this court."). Other courts have emphasized that a central purpose of the "reasonable value" rule is to encourage creditors to supply necessary resources to a debtor postpetition. See In re Western Pac. Airlines, Inc., 1998 Bankr. LEXIS 1964 (Bankr. D. Colo. Dec. 11, 1998) (collecting cases).

To promote these various goals, courts have found and imposed an obligation on a debtor's part to pay for postpetition performance under any executory contract on a quantum meruit basis - - essentially that which the common law would imply where deliveries were requested and made with no agreement in place. See, e.g. S.N.A. Nut Co. v. Haagen-Dazs Co. (In re S.N.A. Nut Co.), 191 B.R. 117 (Bankr. N.D. Ill. 1996) (extending Bildisco analysis to sales contract); In re Providence Tel. Ltd. P'ship d/b/a WSTG-TV 64, 113 B.R. 446, 451 (Bankr. N.D. Ill. 1990) (brokerage agreement); Skeen v. Coca-Cola Bottling Co. (In re Feyline Presents, Inc.), 81 B.R. 623, 626 (Bankr. D. Colo. 1988) (promotion and exclusive rights agreement).

In determining the actual quantum meruit, or "reasonable," value of postpetition performance in the stub period between assumption and rejection, the Ninth Circuit has stated,

> When a lease is ultimately rejected but its interim continuance was an actual and necessary cost and expense of the estate, the allowable administrative expense is valued not according to the terms of the lease, but under an objective worth standard that measures the fair and reasonable value of the lease. The rent reserved in the lease is presumptive evidence of fair and reasonable value, but the presumption may be rebutted by demonstrating that the reasonable worth of the lease differs from the contract rate.
>
> The actual value or benefit conferred on the debtor is not the object of the reasonable worth inquiry. Rather, the fair and reasonable value of the lease upon the open market must control. Fair market value may be determined by expert testimony if, in the discretion of the trial court, it is warranted in the circumstances of a particular case.

Thompson v. IFG Leasing Co. (In re Thompson), 788 F.2d 560, 563 (9th Cir. 1986) (emphasis added) (citations omitted). See also In re Dant & Russell, Inc., 853 F.2d at 707.[3]

Thus, according to the teachings of both Thompson and Dant & Russell, prior to a debtor's decision to assume or reject an executory contract or lease pursuant to section 365, the contract rate does not control where there is a demonstrable divergence between "contract" and "market" rates; under such circumstances, "market" controls. See also Sharon Steel Corp. v. National Fuel Gas Distribution Corp., 872 F.2d 36, 42 (3d Cir. 1989) (discussing interplay between

[3] Notably, section 365(d)(3) (governing payment of rent under non-residential real property leases) was found to be inapplicable in both Thompson and Dant. As such, the level of administrative expense in each (market rate) was determined according to the general principles of section 503(b)(1), not the specific provisions of section 365(d)(3), which explicitly requires payment at the contract rate pending assumption or rejection. See Towers v. Chickering & Gregory (In re Pacific-Atlantic Trading Co.), 27 F.3d 401, 403 (9th Cir. 1993).

contract and market prices during stub period); Collett Ventures, Inc. v. Inexo Oil Co., 1990 U.S. Dist. LEXIS 7444 (W.D. Mo. June 8, 1990) (discussing presumptions and rebutting of presumptions in context of postpetition performance valuations).

The application of a market price over the contract price occurs most frequently in the context of executory contracts involving long-term contractual commitments, such as energy supply contracts like the PPAs in the present case. In these cases, where pricing and other terms are presumably based upon expectations of multi-year performance, the long-term contract rate generally will be found not to reflect accurately the market value of short-term postpetition commitments in the stub period. Almost unanimously, courts which have addressed the postpetition, pre-assumption/rejection status of long-term contracts have jettisoned the contract price in favor of "market value" as the better indicator of the "reasonable value" postpetition performance demanded by the debtor. See e.g., Sharon Steel Corp., 872 F.2d at 43 (debtor was permitted to avoid an over-market contract in the stub period and obtain gas at the price that "other non-contract industrial customers would have paid . . . during the relevant period."); Matter of Washington-St. Tammany Elec. Coop., Inc., 111 B.R. 555 (Bankr. E.D. La. 1989); Peoples Gas Sys., Inc. v. Thatcher Glass Corp. (In re Thatcher Glass Corp.), 59 B.R. 797 (Bankr. D. Conn. 1986).

Notably, the focus on market prices, not contract prices, works both ways -- irrespective of whether a particular executory contract is above or below market, the debtor must pay "market" during the period prior to assumption or rejection. For example, in Thatcher Glass, a case which was cited with approval in Sharon Steel, the debtor had entered into a year-long natural gas contract with a gas distributor. When the debtor sought to compel the distributor to provide gas postpetition at the contract rate, and not the higher rates the distributor had in place for short-term purchases, the distributor sought an order compelling payment at the higher rate. Ultimately, the Court agreed with the distributor:

> If this were any other contract for the bulk purchase of goods, discounted because of minimum purchase requirements, and the contract were rejected by a debtor under bankruptcy law, the reasonable value of the goods delivered prior to rejection would be what the debtor would have to pay for them under market conditions at the time of delivery.
>
> The reasonable value of the natural gas delivered post-petition to Thatcher is what Thatcher would have to pay for it. There is no question but that Thatcher would have to pay at the [short-term] rate for the delivery of gas for less than one year. Thatcher bargained for a reduced rate and got it because, among other conditions, it qualified by promising to purchase an annual minimum volume of natural gas. <u>Thatcher seeks to assume the [long-term rate] and reject the rest of the contract, a practice which has been disallowed by other courts and will not be permitted here</u>.
>
> * * *
>
> The trustee . . . may not blow hot and cold. If he accepts the contract he accepts it cum onere. If he receives the benefits he must adopt the burdens. He cannot accept one and reject the other.

<u>Thatcher Glass</u>, 59 B.R. at 800 (citations omitted) (emphasis provided).

In an even more factually similar case to the matter <u>sub judice</u>, the Bankruptcy Court for the Eastern District of Louisiana established a market-based procedure for determining the "reasonable value" of electricity delivered postpetition by a non-utility generator to a debtor engaged in purchasing and selling wholesale electric power. In that case, the court stated,

> The question remains . . . whether the administrative expenses are to be allowed at the full contractual rate or at some other reasonable or fair market rate. In <u>In re Thatcher Glass</u> and <u>In re Sharon Steel</u>, the courts noted that "reasonable value" involving utility service must take into account any contract rate and the regulated rates charged to customers other than the debtor. In fact, the court in <u>Thatcher Glass</u> found that the contract rate was below the reasonable value of the service when compared to the regulated industrial rate and allowed the higher regulatory rate as an administrative expense. In <u>Sharon Steel</u>, the contract involved required the debtor to take a minimum amount of gas each month and provided a minimum demand charge, which the regulated rate for individual customers did not. Thus, the court in that case allowed the administrative expenses at the regulated rate.
>
> * * *
>
> In this case, the reasonable or fair market value of the service in question is more difficult to determine than in the previously cited cases. The only rates available for comparison to the rate of the Contract are those ostensibly available to debtor on the "free market" outside of the cooperative system. In examining these rates, the court has attempted to review the testimony of the experts without regard to demand or energy charges, but rather in view of the average cost of electricity per kwh.

Washington-St. Tammany, 111 B.R. at 560. In that case, the Court looked first to market prices, compared them to the contract prices, and ultimately found the two somewhat consistent. Thus, the market prices, in and of themselves, were insufficient to overcome the presumption that the contract rate was "reasonable," and the Court allowed an administrative claim at the contract rate.

Based on the foregoing authorities, it is apparent that PG&E may not compel the Movants to perform postpetition with the stipulation that they accept the contract rates set forth in the PPAs. Rather, the Movants are entitled to the "reasonable value" of their deliveries, likely to be measured on a cents/kwh basis, for the period between the Petition Date and the date PG&E elects to assume or reject the PPAs. In that regard, and without becoming overly technical, the Federal Energy Regulatory Commission recently clarified that the provisions of PURPA (and implementing regulations) which requires utilities to purchase electric energy and capacity from QFs at rates equal to the utility's "avoided costs"

> creates no 'right to purchase' in the directly connected utility, nor does it create an obligation on the part of the QF to sell to the directly connected utility. It provides only that the utility obligated to purchase power from a QF may seek, with the QF's consent, to transmit the energy to another utility.

See Public Serv. Co. of New Hampshire v. New Hampshire Elec. Coop., 83 F.E.R.C. ¶ 61,224, 1998 WL 272964 (1998).

In light of the foregoing, PG&E's payment at market rates for postpetition pre-assumption/rejection deliveries makes perfect sense. Pursuant to the PPAs, PG&E and its QFs (with the CPUC's supervision) agreed to a pricing and payment structure which accounted for long-term amortization of fixed costs and expenses, such as term debt, which would not have been possible with a shorter contract term. Now, by requesting month-to-month performance, PG&E has effectively curtailed the term of the PPAs from thirty years to thirty days. To require performance at the long-term price, as PG&E directs, would allow PG&E to assume partially, on an interim basis, the benefit of long-term pricing and payment structures, while simultaneously rejecting essential terms which made those structures possible – i.e., the long-term commitment to purchase. Clearly, if PG&E wants the lower price – and there is every reason for PG&E to want electric power at prices which are currently substantially below market – it must assume the PPAs.

It cannot, however, "blow hot and cold" and selectively assume and reject particular provisions in the PPAs.

PG&E's strategy of underpaying the QFs is particularly inappropriate to the extent that it perceives that market prices will fall to more traditional levels over the next few years. In such a case, a delay of assumption or rejection is directly at the expense of the QFs. If PG&E assumes the PPAs, it must cure the prepetition defaults, commit to purchase the QFs' power for the remainder for the PPA's terms and provide adequate assurances of its ability to do so. 11 U.S.C. § 365(b)(1). On the other hand, if it rejects the PPAs, it must immediately commit itself to purchase replacement electricity and capacity at market prices from third parties who will exact market prices and terms. If PG&E is allowed an open-ended period in which it can compel the QFs to deliver energy and capacity at the contract rate while the market is high and the right to reject when the market is low, PG&E gets the best of both worlds -- a month-to-month commitment at a long-term contract rate with the flexibility of being allowed to reject the PPAs at a later date when market prices fall. Nothing in the Bankruptcy Code permits a debtor to restructure its operations on the backs of counterparties to executory contracts. If market prices are currently above contract prices, the counterparties (here, the QFs) are entitled to the benefits of those market prices, not PG&E -- unless and until PG&E assumes the PPAs.

Accordingly, the Court should enter an Order (a) directing the Debtor to pay fair market value for all electricity delivered by the Movants pending assumption or rejection of their PPAs and (b) directing the Debtor to pay immediately to the Movants, as an administrative expense under section 503(b) of the Bankruptcy Code, the difference between fair market value and the contract rate for all electricity delivered to PG&E by the Movants from the Petition Date until the granting of relief on the Motions.

II.

PG&E MUST PAY THE MOVANTS IN ADVANCE FOR THEIR POSTPETITION DELIVERIES OF ELECTRICITY

PG&E's bankruptcy does not give it the right to compel QFs to extend credit involuntarily to the Debtor on a postpetition basis without first assuming their PPAs. The

Bankruptcy Code provides a debtor with numerous special protections it may offer vendors and potential lenders to induce them to agree to extend credit to the Debtor. The Bankruptcy Code, however, includes no applicable mechanism for forcing a third party such as the Movants to extend credit to the debtor against such party's will. Accordingly, while the Debtor can compel the QFs to deliver electricity on a postpetition basis under the PPAs, it cannot force them to do so without prepaying the QFs for the fair market value of such electricity.

The principal policy underlying chapter 11 of the Bankruptcy Code is the promotion of going-concern reorganizations under the theory that going-concern value generally exceeds liquidation value and will thus provide a superior recovery to all constituencies. See United Sav. Ass'n. of Texas v. Timbers of Inwood Forest Assocs. Ltd. (In re Timbers of Inwood Forest Assocs. Ltd.), 808 F.2d 363, 375 (5th Cir. 1987), aff'd, 484 U.S. 365 (1988). Recognizing that access to adequate working capital is paramount to a company's ability to maintain its operations pending reorganization, and recognizing further the natural reticence vendors and lenders may otherwise have in extending credit to a distressed business, Congress armed debtors with an arsenal of tools to encourage or induce third parties to agree to extend credit. At the most basic level, parties who extend postpetition credit to a debtor in the ordinary course of business are afforded administrative priority for their claims, which places their right to repayment ahead of all other unsecured creditors. 11 U.S.C. § 364(a). Section 364 of the Bankruptcy Code then goes on to provide an increasingly tantalizing menu of additional credit incentives such as super-priority administrative claims (11 U.S.C. § 364(c)(1)), senior liens on unencumbered assets (11 U.S.C. § 364(c)(2)), junior liens on encumbered assets (11 U.S.C. § 364(c)(3)), and in certain circumstances, senior liens on encumbered assets (11 U.S.C. § 364(d)(1)). Notably, however, section 364, and indeed the entire Bankruptcy Code, stop short of allowing the debtor to compel a third party to extend credit (subject to two narrow and currently inapplicable exceptions discussed below) - - all of the inducements, incentives and protections are premised on voluntary, agreed-upon extensions of credit. Simply put, Congress has provided no mechanism for the Debtor to compel a QF to extend credit to the Debtor for electricity purchases pending assumption or rejection of the PPAs.

There are two instances under the Bankruptcy Code where a debtor may compel a third party to extend credit postpetition: (1) from a utility under section 366 of the Bankruptcy Code; and (2) from a party to an executory contract that includes financial accumulations, but only after the contract is assumed. The first narrow instance arises under section 366 of the Bankruptcy Code, which compels utilities to provide continuous service to a debtor (on credit) for the first 20 days after the petition date. Furthermore, if adequate assurance of future payment is provided by the debtor within such 20 day period, the utilities' obligation to extend credit continues. Although section 366(b) requires that the debtor provide protection for the utility's postpetition claim, it nevertheless compels the utility to extend credit when the court, not the utility, determines the protection is appropriate. In recognizing this reality, one court even went so far as to observe that adequate assurance of a utility payment by a debtor does not guarantee the payment, it merely requires that the utility is not subject to "an unreasonable risk of future loss." <u>In re George C. Frye Co.</u>, 7 B.R. 856, 858 (Bankr. D. Me. 1980). Of course, this provision was enacted in recognition of the monopoly power enjoyed by utilities and the futility of the reorganization effort if they were left free to "turn out the lights."

The second narrow exception to the rule that the Bankruptcy Code does not compel the extension of credit arises where the debtor assumes an executory contract which includes, but is not dominated by, provisions pursuant to which the non-debtor party is to provide financial accommodations to the debtor. The assumption of such an executory contract has the effect of compelling the nondebtor party to perform its obligations under the contract, including those relating to credit extensions, but only <u>after</u> the debtor cures all defaults and provides adequate assurance of future performance. 11 U.S.C. § 365(b)(1). Although section 365(c)(2) explicitly forbids a debtor from assuming an executory contract to provide the debtor "financial accommodations," (<u>Transamerica Commercial Finance Corp. v. Citibank, N.A. (In re Sun Runner Marine, Inc.)</u>, 945 F.2d 1089, 1093 (9th Cir. 1991); <u>In re Catapult Entm't, Inc.</u>, 165 F.3d 747, 753 (9th Cir. 1999)) courts have determined that this prohibition does not apply to contracts which include, but are not dominated by, provisions to provide financial accommodations to the debtor. <u>Citizens and Southern Nat'l Bank v. Thomas B. Hamilton Co., Inc. (In re Thomas B. Hamilton</u>

Co., Inc.), 969 F.2d 1013, 1019 (11th Cir. 1992). Thus, a debtor can effectively compel the nondebtor party to extend credit by assuming a contract that contains credit terms. With assumption, however, a debtor must first satisfy critical statutorily imposed obligations before it can reap the benefits: the debtor is required to cure its prepetition defaults and provide adequate assurance of future performance (i.e., demonstrate its wherewithal to fulfill its contractual obligations prospectively). 11 U.S.C. § 365(b).

As can thus be seen, Congress has infused the Bankruptcy Code with only two specific provisions that permit a debtor to compel third-parties to extend credit. Neither applies to the present case. Because the Bankruptcy Code is a comprehensive statutory scheme, it must be interpreted according to its plain meaning, as clearly expressing Congress's intent. United States v. Ron Pair Enters., Inc., 489 U.S. 235 (U.S. 1989). Accordingly, in requiring payment in advance, the Movants seek only to limit the Debtor to the rights afforded it under the Bankruptcy Code. If the Debtor wishes to avail itself of the PPAs' credit terms, it must assume the contracts. The Movants cannot be compelled to extend credit to the debtor without first being afforded the statutory protections afforded by section 365(b)(1).

Thus, the Court should enter an Order requiring the Debtor to pay in advance for all deliveries of electricity by the Movants pending assumption or rejection of the PPAs (except as may be otherwise agreed by a Movant).

III. THE COURT SHOULD REQUIRE PG&E TO ASSUME OR REJECT THE MOVANTS' PPAs BY JUNE 1, 2001

The interim stop-gap solution of compelling the Debtor to pay fair market value in advance for postpetition deliveries of electricity is precisely that: interim. Moreover, such relief will not work for all QFs as it fails to address the needs of QFs that have been severely damaged by the Debtor's prepetition payment defaults. QFs in this category, which include the Movants, need additional redress. They need the Court to order the Debtor promptly to assume or reject their PPAs just to be able to resume and sustain operations. In a recent statement reported on the Dow Jones Newswire, the chairwoman of the California Public Utilities Commission ("CPUC") described the plight of these QFs as follows: "We need to take a hard look at whether utilities pay certain QFs that are on the brink of bankruptcy for back payments. Back payments are a critical part of the mix and are key to preventing some QFs from meeting contractual obligations."

In taking a "hard look" at the problems facing the QFs "on the brink of bankruptcy" the Court should maintain its focus on the most important factor in all of this calculus - - the immediate need to bring, and to keep as much electrical generation in California, on-line. For the three QFs at issue, and others like them, the payment of market price in advance may no longer be a viable option. These entities have only one practical option to keep them on-line (and in the case of Oildale and Kingsburg bringing them back on-line for more than the minimal requirements under the PPAs): compel PG&E immediately to assume or reject their contracts. Absent such relief, these projects cannot and will not produce power for the foreseeable future.

Section 365 of the Bankruptcy Code provides the Court with the power to compel PG&E to make its decision to assume or reject the PPAs within a specified period of time:

> In a case under chapter . . . 11 . . . of this title, the trustee may assume or reject an executory contract . . . of the debtor at any time before the confirmation of a plan but the court, on request of any party to such contract . . . may order the trustee to determine within a specified period of time whether to assume or reject such contract. . . .

11 U.S.C. § 365(d)(2) (emphasis added). In effectuating this provision, the general rule is that a court may, in its discretion, compel the debtor to assume or reject an executory contract within a "reasonable time." Theatre Holding Corp. v. Mauro, 681 F.2d 102, 105 (2d Cir. 1982). In exercising its discretion, a court should consider a number of factors including: "[T]he nature of the interests at stake, the balance of the hurt to the litigants, the good to be achieved, the safeguards afforded those litigants, and whether the action to be taken is so in derogation of Congress' scheme that the court may be said to be arbitrary." Matter of Dunes Casino Hotel, 63 B.R. 939, 949 (D. N.J. 1986) (quoting In re GHR Energy Corp., 41 B.R. 668, 676 (Bankr. D. Mass. 1984)).

Notably, in assessing a section 365(d) motion, a court must consider not only the debtor's need for "breathing room" but also the non-debtor party's need for certainty and stability. For example, where the non-debtor party's sole source of income is derived from an executory contract with the debtor (as is the case here), courts have compelled the debtor to assume or reject the contract within a shortened period of time. See In re Taber Farm Assocs., 115 B.R. 455 (Bankr. S.D.N.Y. 1990). Employing a similar analysis, the court in In re Beker Indus. Corp., 64 B.R. 890 (Bankr. S.D.N.Y. 1986), significantly shortened the period in which debtor could decide whether to assume or reject an executory contract. There, the debtor had entered into a series of agreements which required a division of certain fixed and variable costs related to mining operations. In deciding to grant the non-debtor party's motion to compel assumption or rejection of those agreements, the court stated that the non-debtor party "is not expected to incur significant added detriment while those who have an interest in the property or the bankruptcy estate are unable to resolve how to deal with an asset." Id. at 898. The court went on to state that, when the delay between the filing of the petition and the assumption or rejection of an executory contract adds uncertainty and threatens the non-debtor party with additional postpetition costs, sufficient grounds exist for the court to exercise its discretion to compel the debtor to assume or reject the executory contract. In particular, the court indicated that a non-debtor party should not be forced to fund the debtor's bankruptcy. Id. at 899. See also In re Continental Energy Assocs., 178 B.R. at 408 (court protected non-debtor party's constitutional rights by compelling assumption or rejection within thirty days).

Under the foregoing authorities, it is clear that a debtor's "breathing room" is not inviolate and can, under appropriate circumstances, give way to concerns regarding the non-debtor party. It is difficult to conceive of a situation in which the non-debtor party's need for an immediate assumption or rejection is more compelling than that of the QFs here. Oildale and Kingsburg are currently not generating electricity. Wadham may be off-line soon. Significantly, the PPAs basically represent the sole source of income for these projects. To the extent that the Court refuses to condition the Movants' future performance on prepayments at market rates or to excuse the Movants' performance under the PPAs, there is no feasible way for the Debtor to afford the luxury of deliberations extending over weeks, much less months or years. PG&E needs to decide now whether it wants to assume or reject the PPAs and, to that end, the Court should enter an Order requiring the Debtor to obtain an order approving assumption of the Movants' PPAs by June 1, 2001 or else the PPAs will be deemed rejected.

IV.

ALTERNATIVELY, THE COURT SHOULD LIFT THE AUTOMATIC STAY FOR "CAUSE" TO PERMIT THE MOVANTS TO SUSPEND THEIR PPAs PENDING ASSUMPTION OR REJECTION AND CONDUCT THIRD-PARTY SALES DURING THAT SAME TIME PERIOD

Section 362(d) of the Bankruptcy Code provides as follows:

> On request of a party in interest and after notice and a hearing, the Court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay... (1) for cause, including the lack of adequate protection of an interest in property of such party in interest...

11 U.S.C. § 362. A bankruptcy court is thus mandated to lift or modify the automatic stay imposed by section 362(a) of the Bankruptcy Code if "cause" is shown. "Cause" is not defined in the Bankruptcy Code and in fact is determined on a fact-intensive case-by-case basis. See Benedor Corp. v. Conejo Enters., Inc. (In re Conejo Enters., Inc), 96 F.3d 346, 352 (9th Cir. 1996); Tuscon Estates, Inc. v. Christensen (In re Tucson Estates, Inc.), 912 F.2d 1162, 1166 (9th Cir. 1990). Furthermore, bankruptcy courts have broad discretion in making the factual determination of what constitutes cause to lift the stay, since a motion for relief from stay gives rise to a summary proceeding. See Computer Communications, Inc. v. Codex Corp. (In re Computer Communications, Inc.), 824 F.2d 725, 729 (9th Cir. 1987). In summary proceedings, a court's discretion is broadly construed. Packerland Packaging Co., Inc. v. Griffith Brokerage Co. (In re Kemble), 776 F.2d 802, 807 (9th Cir. 1985).

In respect of the present Motions for relief from stay, it is important to note that the Movants are not seeking to terminate the PPAs pursuant to applicable California state law, but rather only to suspend their performance with PG&E pending assumption or rejection. In other words, the Movants seek the right to suspend postpetition performance and enter into third-party sales, while preserving fully the Debtor's right to later assume or reject the PPAs.[4]

In determining whether such relief is warranted, the Court should focus most closely on two factors: (i) the debtor's inability and/or unwillingness to provide assurances for the payment of postpetition administrative claims and (ii) the inherent hardships occasioned by the magnitude of the Debtor's defaults under the PPAs, in both cases, balanced with the overall goals of the Bankruptcy Code. See In re Opelika Mfg. Corp., 66 B.R. 444, 449 (Bankr. N.D. Ill. 1986) (citations omitted). In the present case, the balance of hardships engendered by the Debtor's failure to make past payments clearly favors granting the Movants relief. There can be no dispute here that, in an attempt to stockpile money prepetition, PG&E ran up massive prepetition debts to QFs, forcing the Movants to the edge of financial ruin. With some QFs already off-line and others close to shutting down, the capacity for electricity generation in the State has decreased significantly. Should the Court, however, enter a finding of cause and lift the automatic stay, these QFs may be able to sell power on the open market and, through that income stream, secure financing to keep their operations running. Moreover, the Court should not ignore the "ripple effect" that will occur if relief is not granted to the Movants. As noted above, Oildale's thermal host has filed its own chapter 11 petition, purportedly in large part due to its inability to obtain thermal energy from Oildale. More to the point, should those QFs on the brink file their own chapter 11 petitions, rejection of the PPA in their own bankruptcies would be an immediate option, thereby taking away the possibility that PG&E will ever be able to assume the PPAs in question.

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[4] Under existing Ninth Circuit precedent it is unclear whether the automatic stay even prevents suspension of executory contracts as they are generally not considered "property of the estate" unless and until they are assumed. See Otto Preminger Films, Ltd. v. Qintex Entm't, Inc. (In re Qintex Entertainment, Inc.), 950 F.2d 1492, 1495 (9th Cir. 1991) ("An executory contract does not become an asset of the estate until it is assumed pursuant to § 365 of the Code."); Chbat v. Tleel (In re Tleel), 876 F.2d 769, 770 (9th Cir. 1989) ("Unless and until rights under an executory contract are timely and affirmatively assumed by the trustee, they do not become property of the debtor's estate"); Cheadle v. Appleatchee Riders Ass'n (In re Lovitt), 757 F.2d 1035, 1041 (9th Cir. 1985) ("[E]xecutory contracts ... do not vest in the trustee as of the date of the filing of the bankruptcy petition. They vest only upon the trustee's timely and affirmative act of assumption .... A bankruptcy court has no jurisdiction over assets outside of the bankrupt's estate...").

V.

CONCLUSION

For the foregoing reasons, the Movants respectfully request that this Court enter an order (i) directing PG&E to pay the Movants in cash in advance for all postpetition deliveries pursuant to the PPAs, at rates that are equivalent to the fair market value of the electricity delivered, and (ii) requiring PG&E to obtain an order approving assumption of the PPAs by June 1, 2001 or have the PPAs deemed rejected; or, alternatively, (iii) lifting the automatic stay to allow the Movants to suspend performance under the PPAs and make deliveries to third-party purchasers, and (iv) granting such other and further relief as the Court deems just.

Dated: April 30, 2001.

WHITE & CASE LLP

By: Brian L. Holman
Brian L. Holman
Attorneys for Movants