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Commercial Litigation Branch
Civil Division
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Date: 5-21-01

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NOTE: FYI, attached are pleadings in which PG&E sought ex parte relief to assume a contract providing for disposal of nuclear waste. The court granted the motion.

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FILED

MAY 17 2001

KEENAN G. CASADY, CLERK
 UNITED STATES BANKRUPTCY COURT
 SAN FRANCISCO, CA

12 UNITED STATES BANKRUPTCY COURT
 13 NORTHERN DISTRICT OF CALIFORNIA
 14 SAN FRANCISCO DIVISION

15 In re
 16 PACIFIC GAS AND ELECTRIC
 17 COMPANY, a California corporation,
 18 Debtor.

No. 01-30923 DM

Chapter 11 Case

[No Hearing Required]

19 Federal LD. No. 94-0742640

HOWARD
 RICE
 NEMEROVSKI
 CANADY
 FALK
 RABKIN

A Registered Attorney

20 DEBTOR'S EX PARTE APPLICATION FOR ORDER APPROVING
 21 ASSUMPTION OF EXECUTORY CONTRACT
 22 FOR DISPOSAL OF NUCLEAR WASTE

23 INTRODUCTION

24 Pacific Gas and Electric Company, debtor and debtor in possession herein
 25 ("PG&E"), hereby seeks an order of this Court approving the assumption of an executory
 26 contract for the disposal of nuclear waste between PG&E and Chem-Nuclear Systems, LLC
 27 ("Chem-Nuclear"), dated December 16, 1992, as amended (the "Contract") a copy of which
 28 is attached as Exhibit A to the Declaration of Lawrence Womack filed herewith (the
 "Womack Declaration"). This Application is made on an ex parte basis due to the exigency
 of the circumstances, as described below. The Creditors' Committee has approved this
 Application, as shown by the signature of its counsel below, and Chem-Nuclear has

DEBTOR'S EX PARTE APPL FOR ORDER APPROV. ASSUMPTION OF EXEC. CONTRACT No. 01-30923

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1 consented to the assumption of the Contract, as evidenced by the letter from Chem-Nuclear
2 dated May 9, 2001, attached to the Womack Declaration as Exhibit C.

3 I.
4 FACTUAL BACKGROUND

5 PG&E commenced this Chapter 11 case by filing a voluntary petition on April 6,
6 2001. PG&E continues to manage and operate its property as a debtor in possession pursuant
7 to Sections 1107 and 1108 of the Bankruptcy Code.

8 The Contract is an executory contract for the disposal of low-level radioactive
9 nuclear waste ("LLW"). Pursuant to the Contract, Chem-Nuclear has agreed to accept and
10 store LLW at a site in Barnwell, South Carolina, in exchange for payment from PG&E based
11 on the volume of LLW delivered to the Barnwell site. Chem-Nuclear operates the Barnwell
12 site under contract with the State of South Carolina. PG&E has determined that it is
13 necessary and prudent to assume the Contract to provide for the storage at Barnwell of LLW
14 from the Diablo Canyon Nuclear Power Plant ("DCPP").

15 PG&E is the owner and operator of DCPP, which is located in San Luis Obispo
16 County near the town of Avila Beach. DCPP is a two-unit facility with a combined electric
17 output of approximately 2200 megawatts. Operation of DCPP requires the treatment of
18 radioactive liquids from plant systems, resulting in the generation of low-level radioactive
19 spent filters and ion exchange media. Some of these secondary wastes are often high in
20 activity, with filters constituting Class C Low Level Waste, and higher activity spent ion
21 exchange media constituting Class B Low Level Waste. Maintenance on radioactive plant
22 systems results in the generation of radioactive contamination control materials and garments,
23 or dry active wastes. These dry active wastes are generally classified as Class A Low Level
24 Waste. Womack Declaration ¶2.

25 Under the Low Level Waste Policy Act as amended (42 U.S.C. §§2021 *et seq.*)
26 (the "Act"), disposal of LLW from nuclear power plants and other LLW waste generators is
27 the responsibility of the individual states. Pursuant to the Act, states are authorized to enter
28

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1 into multi-state compacts to jointly promote disposal of LLW. Pursuant to California Health
2 and Safety Code §§115250 et seq., California entered into such a compact in 1987 with
3 Arizona, North Dakota and South Dakota, called the Southwestern Compact. However, no
4 LLW disposal facility for the Southwestern Compact has been sited or put into operation to
5 dispose of LLW. Consequently, PG&E has been forced to ship its LLW to facilities outside
6 the Southwestern Compact. *Id.* ¶3.

7 The Southwestern Low Level Radioactive Waste Compact Commission
8 ("SWCC") has granted export petitions for off-site processing and disposal of LLW. PG&E
9 has requested and obtained permission from the SWCC to export its LLW from California for
10 ultimate disposal at either Envirocare of Utah (Class A waste) or Barnwell, South Carolina
11 (Class A, B and C waste) for the calendar year 2001. *Id.* ¶4.

12 A refueling outage for DCP Unit 2 is currently underway. PG&E expects some
13 high activity dry waste to be generated during this refueling outage which is suitable for
14 disposal at Barnwell only. *Id.* ¶7. PG&E plans to ship this material, along with similar
15 material from a refueling outage during the fall of 2000, for burial at Barnwell in early June
16 2001, pursuant to the Contract. *Id.* No alternative disposal sites are available to PG&E for
17 this material.

18 II. 19 DISCUSSION

20 Section 365 of the Bankruptcy Code governs the treatment of executory contracts.
21 By this Application, PG&E asks the Court to enter an order pursuant to Section 365(a),
22 authorizing PG&E to assume the Contract.

23 A. Assumption of the Contract Should Be Permitted 24 Under the Business Judgment Test

25 The widely accepted test for determining whether a debtor in possession should be
26 authorized to assume or reject an executory contract is the business judgment test. See, e.g.,
27 Robertson v. Pierce (In re Chi-Feng Huan), 23 B.R. 798, 800 (B.A.P. 9th Cir. 1982)(citations
28

1 omitted). PG&E's determination to assume the contract is a sound business decision, as
2 described herein.

3 As an operator of a nuclear power plant, PG&E must have access to sites for
4 disposal of nuclear wastes generated by such operations to satisfy its obligations under
5 federal and state law and regulations, and to safeguard the health and safety of its power plant
6 workers and the community at large. At this time, the Barnwell burial site is the only higher
7 activity (Class B and C) disposal site to which PG&E currently has access. Womack
8 Declaration ¶5. PG&E's access to that site is dependent on its timely performance under the
9 Contract. See id. ¶9.

10 In addition, assumption of the Contract will assure PG&E the maximum amount
11 of access volume for the storage of its LLW at the Barnwell facility in the coming years.
12 Access volume for a waste generator is determined based on the volume of waste stored by
13 such entity during the prior 12 month period. It was PG&E's expectation that the planned
14 June 2001 disposal of its waste would be combined with waste from the 2000 refueling
15 outage to determine its allowed access volume for July 2001 through June 2002 at Barnwell.
16 The increased access volume that this disposal will afford PG&E is critical, because PG&E
17 expects to generate a Class C container of filters in the second half of 2001 and two high
18 activity ion exchange media containers (Class B) in 2002 in preparation for another spring
19 refueling outage, which it will need to dispose of at Barnwell. Id. ¶8.

20 Further, access to Barnwell for "out of compact" waste will be available on a
21 decreasing scale over the next eight years, as South Carolina has joined the new Atlantic
22 Compact (South Carolina, Connecticut, and New Jersey) to ultimately bar import of LLW
23 within eight years. The access volume over this period available to PG&E will be based on
24 the volume of waste and the fees paid over the prior 12 month period, and it is essential that
25 PG&E use its volume allocation to maintain its ability to dispose of LLW in the future. Id.
26 ¶8. As set forth above, PG&E is planning to ship waste to Barnwell for disposal in June,
27 2001. Delay in this shipment will decrease any future disposal volume allocation (for 2002
28 and beyond) granted to PG&E. Id. ¶10. Moreover, PG&E will be unable to obtain a new

1 disposal contract for the July 2001 – June 2002 contract year. *Id.*

2 Should PG&E fail to assume the Contract, it would be forced to place the higher
3 activity waste into on-site storage. PG&E conducted storage of LLW on-site from mid-1994
4 to mid-1995, when access to Barnwell was lost temporarily. Five high activity containers
5 were placed in storage over that time period and were subsequently removed and buried in
6 1995, when access to Barnwell was reinstated. That experience demonstrated that on-site
7 storage increases the work load and radiation exposure to plant personnel since the containers
8 have to be inspected during storage and handled an additional time (placed in storage and
9 later placed in a shipping cask). *Id.* ¶11.

10 In addition, delay in radioactive waste disposal generally results in increased cost.
11 Disposal prices for high activity radioactive waste usually increase over time. Even if the
12 disposal costs should decrease, other regulatory changes that occur during the storage period
13 are likely to increase the total cost. For example, it is expected that the NRC will soon adopt
14 revised international shipping rules. If adopted, these rules could bar the use of the existing
15 fleet of Type B shipping casks in late 2002. If PG&E does not regain access to Barnwell for
16 direct burial by 2002, and thus cannot ship high activity resin in the first quarter of 2002, the
17 transportation costs to ship this waste in new Type B casks at some future date will
18 dramatically increase. *Id.* ¶12.

19 Accordingly, PG&E's assumption of the Contract is based on a sound business
20 decision and is necessary for a successful reorganization.

21 B. PG&E Has the Ability to Cure Arrearages Under the Contract
22 And Provide Adequate Assurance of Future Performance In
23 Compliance with Section 365(b) of the Bankruptcy Code.

24 Section 365(b)(1) of the Bankruptcy Code provides that, in order to assume an
25 executory contract, the debtor in possession must provide adequate assurance that it will cure
26 any defaults and that the contract will be performed in the future. 11 U.S.C. §365(b)(A)-(C).
27 In this case, the amount necessary to cure the existing defaults under the Contract is
28

1 \$174,062.34. Womack Declaration ¶13. The cost to PG&E of performance under the
2 Contract for the remainder of the term is approximately \$60,000. Id. PG&E's revenue, based
3 on its rate setting and collection structure, has averaged approximately \$9.23 billion per
4 annum from 1998 to 2000, and it has over \$2 billion in cash reserves. Id. It is clearly capable
5 of curing arrearages and performing under the Contract for the remaining term thereof.

6 WHEREFORE, PG&E respectfully requests that this Court enter its Order
7 approving PG&E's assumption of the Contract.

8 DATED: May 17, 2001

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10 FALK & RABKIN
11 A Professional Corporation

12 By: Janet A. Nexon
13 JANET A. NEXON

14 Attorneys for Debtor and Debtor In Possession
15 PACIFIC GAS AND ELECTRIC COMPANY

16 HOWARD
17 RICE
18 NEMEROVSKI
19 CANADY
20 FALK
21 & RABKIN
22 A Professional Corporation

23 APPROVED BY CREDITORS' COMMITTEE:

24 MILBANK, TWEED, HADLEY & McCLOY

25 By: Robert J. Moore
26 Attorneys for Official Creditors' Committee
27
28

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 COMPANY, a California corporation,

No. 01-30923 DM

Chapter 11 Case

[No Hearing Set]

13 Debtor.

HOWARD
 RICE
 NEMEROVSKI
 CANADY
 FALK
 & RABKIN

Attorneys for Debtor

14 Federal I.D. No. 94-0742640

16 DECLARATION OF LAWRENCE F. WOMACK IN SUPPORT OF
 17 EX PARTE APPLICATION FOR ORDER APPROVING ASSUMPTION OF
EXECUTORY CONTRACT FOR DISPOSAL OF NUCLEAR WASTE

18 I, Lawrence F. Womack, declare as follows:

19 1. I am Vice President, Nuclear Services, of Pacific Gas and Electric Company
 20 ("Debtor" or "PG&E"), a position I have held since January 1, 1995. I have been an
 21 employee of PG&E since 1978 and have held various management positions in nuclear and
 22 non-nuclear engineering, operations, and support services. I make this declaration in support
 23 of PG&E's Ex Parte Application for Order Authorizing Assumption of Executory Contract
 24 for Disposal of Low Level Radioactive Waste. This declaration is based on my personal
 25 knowledge of PG&E's nuclear operations and financial position. If called as a witness, I
 26 could and would testify competently to the facts stated herein.

27 Diablo Canyon Nuclear Power Plant Operations

28 2. PG&E is the owner and operator of the Diablo Canyon Nuclear Power Plant

1 ("DCPP") located on the Pacific coastline in San Luis Obispo County near the town of Avila
2 Beach. DCPP is a two-unit facility with a combined electric output of approximately
3 2200Mw. Operation of the two units requires the treatment of radioactive liquids from plant
4 systems. The treatment of these liquids results in the generation of low level radioactive
5 spent filters and ion exchange media. Some of these secondary wastes are often high in
6 activity, with filters constituting Class C Low Level Waste, and higher activity spent ion
7 exchange media constituting Class B Low Level Waste. Maintenance on radioactive plant
8 systems results in the generation of radioactive contamination control materials and garments.
9 These dry active wastes are generally classified as Class A Low Level Waste.

10 3. Under the Low Level Waste Policy Act as amended (42 U.S.C. §§2021 et seq.)
11 (the "Act"), disposal of low level radioactive waste ("LLW") from nuclear power plants and
12 other LLW waste generators is the responsibility of the individual states. Pursuant to the Act,
13 states are authorized to enter into multi-state compacts to jointly promote disposal of LLW.
14 California entered into such a compact with Arizona, North Dakota and South Dakota, called
15 the Southwestern Compact, in 1987. California Health and Safety Code §§115250 et seq. To
16 date, no LLW disposal facility for the Southwestern Compact has been sited and put into
17 operation to dispose of LLW from other states as authorized under the Act. Consequently,
18 PG&E has been forced to ship its LLW to facilities outside the Southwestern Compact.

19 4. The Southwestern Low Level Radioactive Waste Compact Commission
20 ("SWCC") has granted export petitions for off-site processing and disposal of LLW. PG&E
21 has requested and obtained permission from the SWCC to export its LLW from California for
22 ultimate disposal at either Envirocare of Utah (Class A waste) or Barnwell, South Carolina
23 (Class A, B and C waste) for the calendar year 2001.

24 5. The Barnwell burial site is the only higher activity (Class B and C) disposal
25 site to which PG&E currently has access. PG&E has permission to ship LLW to Barnwell
26 from July 2000 through June 2001, in amounts which are based on its use of this disposal site
27 in the previous twelve months.
28

1 The Contract

2 6. PG&E and Chem-Nuclear Systems, LLC ("Chem-Nuclear") are parties to a
3 contract for shipment and disposal of LLW, dated as of December 16, 1992, as amended (the
4 "Contract"). A true and correct copy of the Contract is attached hereto as Exhibit A. Chem-
5 Nuclear is the operator of the Barnwell site, pursuant to a contract between Chem-Nuclear
6 and the State of South Carolina. The Contract provides for Chem-Nuclear to accept and store
7 LLW of PG&E at the Barnwell facility. PG&E has determined that it is necessary and
8 prudent to assume the Contract to provide for the storage of LLW from DCP, as explained
9 below.

10 7. A refueling outage for DCP Unit 2 is currently underway. PG&E expects
11 some high activity dry waste to be generated during this refueling outage which is not
12 suitable for disposal at Envirocare. PG&E plans to ship this material, along with similar
13 material from a refueling outage during the fall of 2000, for burial at Barnwell in June 2001,
14 in accordance with the Contract.

15 8. In addition, assumption of the Contract will assure PG&E the maximum
16 amount of access volume for the storage of its LLW at the Barnwell facility in the coming
17 years. Access volume for a waste generator is determined based on the volume of waste
18 stored by such entity during the prior twelve-month period. It was PG&E's expectation that
19 the planned June 2001 disposal of its waste would be combined with waste from the 2000
20 refueling outage to determine its allowed access volume for July 2001 through June 2002 at
21 Barnwell. PG&E expects to generate a Class C container of filters in the second half of 2001
22 and two high activity ion-exchange media containers (Class B) in 2002 in preparation for
23 another spring refueling outage. Further, access to Barnwell for "out of compact" waste will
24 be available on a decreasing scale over the next eight years, as South Carolina has joined the
25 new Atlantic Compact (South Carolina, Connecticut, and New Jersey) to ultimately bar
26 import of LLW within eight years. The access volume over this period available to PG&E
27 will be based on the volume of waste and the fees paid over the prior twelve-month period,
28 and it is essential that PG&E maintain flexibility with respect to its ability to dispose of its

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Attorneys at Law

1 LLW.

2 Arrearages and Payments Due

3 9. Pursuant to the Contract, DCPD shipped containers of high activity ion
4 exchange media to Barnwell for disposal in March 2001. These containers were generated in
5 preparation for the spring 2001 Unit 2 refueling outage. The disposal invoice for one of these
6 containers was paid prior to PG&E's chapter 11 filing. A second invoice, for \$174,062.34,
7 has not been paid. Pursuant to a letter dated May 3, 2001, a true and correct copy of which is
8 attached hereto as Exhibit B, the State of South Carolina has taken the position that continued
9 access by PG&E to the Barnwell site requires payment of the overdue amount. In addition,
10 PG&E has received notification from Duratek, the parent company of Chem-Nuclear, dated
11 April 25, 2001, stating that shipments from PG&E for disposal at Barnwell will not be
12 accepted until the March 2001 invoice for \$174,062.34 is paid.

13 10. As set forth in Paragraph 7, above, PG&E is planning to ship waste to
14 Barnwell for disposal in June, 2001. Delay in this shipment will decrease any future disposal
15 volume allocation (for 2002 and beyond) granted to PG&E. Further, PG&E will be unable to
16 obtain a new disposal contract for the July 2001 - June 2002 contract year.

17 11. Should PG&E fail to assume the Contract, it would be forced to place the
18 higher activity waste into on-site storage. PG&E conducted storage of LLW on-site from
19 mid-1994 to mid-1995, when access to Barnwell was lost temporarily. Five high activity
20 containers were placed in storage over that time period and were subsequently removed and
21 buried in 1995, when access to Barnwell was reinstated. That experience demonstrated that
22 on-site storage increases the work load and radiation exposure to plant personnel since the
23 containers have to be inspected during storage and handled an additional time (placed in
24 storage and later placed in a shipping cask).

25 12. In addition, delay in radioactive waste disposal generally results in increased
26 cost. Disposal prices for high activity radioactive waste usually increase over time. Even if
27 the disposal costs should decrease, other regulatory changes that occur during the storage
28 period are likely to increase the total cost. For example, it is expected that the NRC will soon

1 adopt revised international shipping rules. If adopted, these rules could bar the use of the
2 existing fleet of Type B shipping casks in late 2002. If PG&E does not regain access to
3 Barnwell for direct burial by 2002, and thus cannot ship high activity resin in the first quarter
4 of 2002, then the transportation costs to ship this waste in new Type B casks at some future
5 date will dramatically increase.

6 13. As set forth above, the amount necessary to cure the existing defaults under the
7 Contract is \$174,062.34. The cost to PG&E of performance under the Contract for the
8 remainder of the term is approximately \$60,000. PG&E's revenue, based on its rate setting
9 and collection structure, has averaged approximately \$9.23 billion per annum from 1998 to
10 2000, and it has over \$2 billion in cash reserves. It is clearly capable of curing arrearages and
11 performing under the Contract for the remaining term thereof.

12 14. I have been informed by Chem-Nuclear that it consents to the assumption of
13 the Contract. Attached hereto as Exhibit C is a letter from Chem-Nuclear regarding such
14 consent.

15 I declare under penalty of perjury under the laws of the United States of America
16 and the State of California that the foregoing is true and correct. Executed this 10th day of
17 May, 2001, at Avila Beach, California.

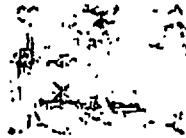
18 

19 LAWRENCE F. WOMACK

20 WD 051001/1-1419901/120/915896/v2

STATE OF SOUTH CAROLINA
State Budget and Control Board
OFFICE OF GENERAL SERVICES

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CHAIRMAN, WAYS AND MEANS COMMITTEE
RICK KELLY
EXECUTIVE DIRECTOR

May 3, 2001

TO WHOM IT MAY CONCERN:

The State of South Carolina owns a disposal facility for low-level radioactive waste that serves nuclear utilities across most of the nation. The South Carolina facility is currently the only disposal facility in the nation that accepts many types of radioactive waste. By continuing to accept waste from California and other states, these states avoid the need to establish their own disposal facilities at great expense to nuclear power plants and other businesses. Development costs for new disposal facilities can exceed \$100 million, not including ongoing operational costs.

The State of South Carolina can only continue to provide these essential disposal services if bills for these services are paid in a timely manner. Pacific Gas and Electric Company (PG&E) is currently overdue on payment of \$174,062.34 for radioactive waste that has already been disposed of in South Carolina soil. I am advised that it may be impractical at this point to retrieve the waste for return to PG&E. Non-payment of disposal bills for radioactive waste is highly unusual because it leads to termination of access by the generator to the disposal facility. Continued access by PG&E to the South Carolina facility depends upon payment of this overdue amount plus any late fee that may be assessed by the disposal site operator prior to June 30, 2001, and timely payment of any future invoices for disposal services.

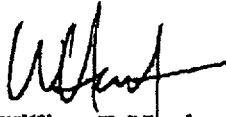
In some instances, nuclear utilities that do not ship waste for proper disposal are able to store waste items on the property where the reactor is located. State and federal regulators, however, have long discouraged this practice for obvious reasons and encourage nuclear power plants to ship waste off site for proper disposal as soon as reasonably possible. In any event, all such waste must eventually be shipped to a licensed radioactive waste disposal site.

Page 2
May 3, 2001

For these reasons, we would encourage the appropriate judicial authority to authorize PG&E to pay in full the overdue payment for radioactive waste disposal. In general, it would also seem reasonable that PG&E be authorized to pay for essential disposal services for radioactive waste that is produced in the course of generating electricity.

If you would like additional information on this matter, please do not hesitate to contact me at 803-737-8037.

Sincerely,



William F. Newberry

Manager

Radioactive Waste Disposal Program