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6  
7 IN THE UNITED STATES BANKRUPTCY COURT  
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
9 SAN FRANCISCO DIVISION

10 In re

11 PACIFIC GAS AND ELECTRIC CO.,  
12 Debtor.

Case No. 01-30923

Chapter 11

R.S. No. \_\_\_\_\_

13 Date: July 18, 2001

14 Time: 1:30 p.m.

15 Place: 22<sup>nd</sup> Floor

235 Pine Street

San Francisco, CA

16 Judge: Hon. Dennis Montali

17 **NOTICE OF MOTION AND MOTION BY MODESTO**  
18 **IRRIGATION DISTRICT FOR RELIEF FROM AUTOMATIC STAY**

19 **TO THE DEBTOR, THE UNITED STATES TRUSTEE, ALL CREDITORS WHO HAVE**  
20 **REQUESTED SPECIAL NOTICE, ANY OFFICIAL COMMITTEES APPOINTED HEREIN,**  
21 **OR THEIR RESPECTIVE COUNSEL OF RECORD:**

22 PLEASE TAKE NOTICE that on July 18, 2001, at 1:30 p.m., or as soon thereafter as  
23 counsel can be heard, in the Courtroom of the Honorable Dennis Montali, United States Bankruptcy  
24 Judge, United States Bankruptcy Court for the Northern District of California, San Francisco  
25 Division, 235 Pine Street, 22<sup>nd</sup> Floor, San Francisco, California, MODESTO IRRIGATION  
26 DISTRICT ("MID"), a creditor of PACIFIC GAS AND ELECTRIC COMPANY, the debtor herein  
27 (the "Debtor"), will, and hereby does, move the above-entitled Court for relief from the automatic  
28 stay provisions of 11 U.S.C. § 362, based upon the motion and memorandum set forth hereinbelow  
and the supporting declaration of Maxwell M. Blecher, and pursuant to the provisions of

1 Section 362(d)(1) of the United States Bankruptcy Code, for entry of an order granting the relief set  
2 forth hereinbelow, including relief from the automatic stay provisions of Section 362(a) of the  
3 Bankruptcy Code for the limited purpose of permitting and authorizing MID to prosecute an appeal  
4 now pending before the United States Court of Appeals for the Ninth Circuit, in which the Debtor is  
5 the appellee.

6 The motion is based upon this notice, the memorandum contained herein, the declaration of  
7 Maxwell M. Blecher (the "Supporting Declaration") filed and served concurrently herewith, the  
8 record of this Court and all other evidence or argument as may be properly presented by MID with  
9 respect to this motion. Pursuant to the provisions of Rule 4001-1(a) of the above-entitled Court's  
10 Local Rules, the Debtor is hereby advised to appear personally or by counsel at the hearing  
11 referenced hereinabove.

12 **MOTION AND RELIEF REQUESTED**

13 **TO THE HONORABLE DENNIS MONTALI, UNITED STATES BANKRUPTCY JUDGE,**  
14 **UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF**  
15 **CALIFORNIA, AT SAN FRANCISCO, CALIFORNIA:**

16 **COMES NOW**, MID, which, by this motion, moves the above-entitled Court, pursuant to the  
17 provisions of Section 362(d)(1) of the Bankruptcy Code, for an order of the Court granting the  
18 following relief, substantially in the form of order attached hereto as **Exhibit "A"**:

19 1. Terminating the automatic stay provisions of Section 362(a) of the Bankruptcy  
20 Code to the extent necessary to permit and authorize MID to prosecute the appeal now  
21 pending before the United States Court of Appeals for the Ninth Circuit and entitled *Modesto*  
22 *Irrigation District v. Pacific Gas And Electric Company, et al.*, No. 99-17069 (the "Pending  
23 Appeal"), including any requests for, and prosecution of, rehearing or certiorari review, but  
24 not including the prosecution of a trial of the underlying action in the event of remand; and

25 2. Such other and further relief as the Court may deem proper under the  
26 circumstances.

27 MID respectfully submits that the requested relief is warranted and appropriate for the reasons  
28 set forth below, particularly the following: First, the Pending Appeal must be resolved in order to

1 resolve the Debtor's chapter 11 case, and inasmuch as the Debtor is ably represented and able to  
2 proceed in defending against the Pending Appeal, there is no undue prejudice to the Debtor, and  
3 hence no reason to delay, the continued prosecution of the appeal. Second, as set forth below, it is  
4 MID's understanding that the Debtor will consent to, and supports the entry of, the relief requested  
5 herein.

## 6 MEMORANDUM OF POINTS AND AUTHORITIES

### 7 I. FACTUAL BACKGROUND

8 The record of the above-entitled Court, together with the accompanying Supporting  
9 Declaration, establish the following pertinent facts:

10 On August 3, 1998, MID, a municipal utility district which provides electricity and other  
11 services to industrial, commercial and residential customers in the greater Modesto area, commenced  
12 an action against the Debtor in the United States District Court for the Northern District of California,  
13 entitled *Modesto Irrigation District v. Pacific Gas & Electric and Dynegy Power Services, Inc.*, No.  
14 C-98-3009-MHP, seeking, *inter alia*, a monetary judgment and injunctive relief under the Sherman  
15 Antitrust Act for damages arising out of the Debtor's refusal to interconnect transmission lines with  
16 MID at a designated substation in Pittsburg, California. MID's original complaint was dismissed on  
17 motion of the defendants, and an amended complaint was filed by MID on March 4, 1999. The  
18 defendants, including the Debtor through retained counsel, Heller, Ehrman, White & McAuliffe, then  
19 moved to dismiss the action a second time, asserting, *inter alia*, that the amended complaint failed to  
20 properly allege a conspiracy and that, in any event, the defendants' conduct was protected by the  
21 *Noerr-Pennington* doctrine which immunizes efforts to prevent competition by involving  
22 governmental or regulatory processes.

23 On August 20, 1999, the District Court granted the defendants' motion to dismiss without  
24 leave to amend, finding that MID, as plaintiff, had (1) failed to allege a conspiracy under Section 1 of  
25 the Sherman Act (although MID had in fact properly alleged such a conspiracy under Section 2 of the  
26 Sherman Act), (2) failed to adequately allege antitrust injury (i.e., harm to consumers), and (3) failed  
27 to negate the defendants' assertion of protection under the *Noerr-Pennington* doctrine.

28 MID thereafter timely filed a notice of appeal of the dismissal of its amended complaint,

1 commencing the Pending Appeal. The Pending Appeal was then fully briefed, and oral argument on  
2 the appeal took place before the United States Court of Appeals for the Ninth Circuit in San  
3 Francisco on March 15, 2001. At the conclusion of argument, the Court of Appeals took the matter  
4 under submission.

5 On April 6, 2001, the Debtor commenced its within chapter 11 case, triggering the automatic  
6 stay provisions of Section 362(a) of the Bankruptcy Code. On the basis of that stay, on May 7, 2001,  
7 the Court of Appeals suspended consideration of the appeal and invited the parties to seek relief from  
8 that stay, stating the following:

9 The appeal is withdrawn from submission because of the automatic stay  
10 resulting from Pacific Gas & Electric Company's bankruptcy filing. Each of the  
11 parties is requested to advise this court if relief from the stay is obtained.

12 *Order*, filed in the Pending Appeal on May 7, 2001.

13 As a result, the Pending Appeal is presently suspended and the issues underlying that appeal  
14 remain unresolved, although the parties have fully briefed and argued the matter to the Court of  
15 Appeals.

## 16 **II. DISCUSSION**

17 MID respectfully submits that the automatic stay should be modified so as to permit the  
18 continued and prompt prosecution and completion of the Pending Appeal. Such completion is in the  
19 best interests of both the Debtor and MID, as it will expediently resolve issues that must be closed in  
20 order to complete the Debtor's chapter 11 case, without undue prejudice to either party. Applicable  
21 law, as described below, supports such relief.

22 Section 362(d)(1) of the Bankruptcy Code provides, in pertinent part, that: "[o]n request of a  
23 party in interest and after notice and a hearing, the court shall grant relief from the stay provided  
24 under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning  
25 such stay for cause . . . ." The use of the word "cause" suggests an intention that the bases for relief  
26 from the stay should be broader than merely lack of adequate protection. 3 *Collier on Bankruptcy* ¶  
27 362.07[3][a] (1997 Rev.). A *prima facie* case for relief from the automatic stay requires a showing  
28 by the movant of "a factual and legal right to the relief that it seeks." *In re Elmira Litho, Inc.*, 174

1 B.R. 892, 902 (Bankr. S.D.N.Y. 1994). A "real party in interest" permitted to seek relief from  
2 automatic stay under this section is, generally, one who, under applicable substantive law, has a legal  
3 right which is sought to be enforced or is a party entitled to bring suit. *In re Comcoach Corp.*, 698  
4 F.2d 571, 573 (2<sup>nd</sup> Cir. 1983).

5 Here, MID's legal right to prosecute its appeal, absent the imposition of the automatic stay in  
6 the Debtor's chapter 11 case, is beyond cavil. Moreover, prosecution of the Pending Appeal must be  
7 permitted at some point, and affects Dynegy Power Services, Inc. as well as MID and the Debtor.  
8 Further delay will only serve to frustrate prompt resolution and to increase attendant expenses for all  
9 parties.

10 The existence of sufficient cause to grant relief from the stay is determined by courts on a  
11 case-by-case basis. *In re MacDonald*, 755 F.2d, 715, 717 (9<sup>th</sup> Cir. 1985). In this case, sufficient  
12 cause for relief from the automatic stay clearly exists: Permitting the parties to continue the  
13 prosecution and defense of the Pending Appeal is in the best interests of both the Debtor and MID  
14 because it will resolve whether MID has stated a claim for relief against the Debtor, and thereby  
15 facilitate the efficient and timely administration of the Debtor's estate. Absent completion of the  
16 Pending Appeal, it will remain uncertain whether MID is a prospective creditor of the Debtor's  
17 estate, and the disputes between the parties with respect to the pending litigation will remain to be  
18 resolved, delaying the administration of the Debtor's estate unnecessarily.

19 This is particularly so in this case, because continued prosecution of the Pending Appeal will  
20 place almost no additional burden upon the Debtor's estate. The matter has been fully briefed and  
21 argued before the Court of Appeals, and all that is left to occur in the appeal is for the Court of  
22 Appeals to consider and rule upon the matter. By this motion, MID does not seek relief to proceed to  
23 trial in the event of remand, but reserves the right to request such further relief at a later time.

24 Accordingly, cause exists for relief from the automatic stay for cause, and such relief will not  
25 cause any undue prejudice or burden to the Debtor or its estate. That the automatic stay should be  
26 terminated with respect to the Pending Appeal for cause, given the benefit to both the Debtor and  
27 MID in resolving the disputes contained in that appeal promptly, is borne out by applicable decisional  
28 authority. In particular, because prosecution of the appeal will not unduly prejudice the Debtor or its

1 estate, relief from the automatic stay is warranted. *See, In re Larkham*, 31 B.R. 273, 276 (Bankr. Vt.  
2 1983); *In Re South Oakes Furniture*, 167 B.R. 307, 308 (Bankr. M.D. Ga. 1994); *In re Davis*, 91 B.R.  
3 470, 472 (Bankr. N.D. Ill. 1988).

4 The relief sought by MID will not prejudice the Debtor in this case, because the Debtor must  
5 in any event resolve the appeal sooner or later, the Court of Appeals' determination of the appeal will  
6 require little or no further action by the Debtor, and the Debtor is ably represented by counsel in the  
7 matter in any event. Insofar as the Pending Appeal is already under way, that appeal should be  
8 allowed to go forward, and the Debtor will not be prejudiced by completion of that appeal. Delay of  
9 the prosecution of that appeal is not in the interests of the Debtor's estate any more than it is in the  
10 interests of MID, and, conversely, prompt resolution of the appeal will serve the best interests of both  
11 litigants.

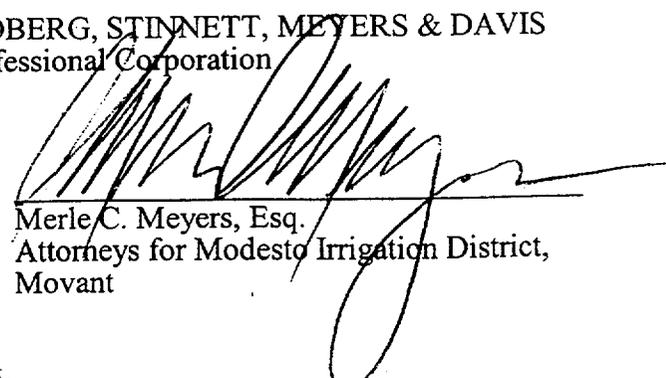
12 In addition, it is MID's understanding, from discussions among counsel, that the Debtor is  
13 amenable to the prompt prosecution of the Pending Appeal and to modification of the automatic stay  
14 in order to permit such prosecution. MID believes that the Debtor will not oppose this motion  
15 accordingly. Therefore, whereas MID believes that sufficient grounds for modification of the  
16 automatic stay exist regardless of the Debtor's position, as set forth above, the Debtor also submits  
17 that the requested relief should be granted on the alternative, additional basis that the Debtor does not  
18 oppose that relief.

19 **III. CONCLUSION**

20 For the foregoing reasons, MID respectfully submits that it is entitled to the relief requested  
21 above, substantially in the form of the order attached hereto as **Exhibit "A"**.

22 DATED: June 24, 2001

23  
24 GOLDBERG, STINNETT, MEYERS & DAVIS  
A Professional Corporation

25  
26 By: 

27 Merle C. Meyers, Esq.  
28 Attorneys for Modesto Irrigation District,  
Movant

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11 PACIFIC GAS AND ELECTRIC CO.,  
12 Debtor.

Case No. 01-30923

Under Chapter 11

R.S. No. \_\_\_\_\_

13  
14  
15 **ORDER GRANTING RELIEF FROM AUTOMATIC STAY**  
**(MODESTO IRRIGATION DISTRICT)**

16 The Notice Of Motion And Motion By Modesto Irrigation District For Relief From  
17 Automatic Stay (the "Motion") filed by MODESTO IRRIGATION DISTRICT ("mid"), came on  
18 regularly for preliminary hearing on July 18, 2001 before the undersigned bankruptcy judge. Merle  
19 C. Meyers, Esq. of Goldberg, Stinnett, Meyers & Davis, A Professional Corporation, appeared on  
20 behalf of MID, and other appearances were made as identified in the record of this Court. Due and  
21 adequate notice of the Motion having been given pursuant to Fed. R. Bankr. Proc. 4001(a)(1); no  
22 opposition having been filed by the Debtor or any party in interest objecting to the relief requested in  
23 the Motion; and based upon the arguments of counsel, the reasons stated by the Court on the record,  
24 and good cause appearing therefor,

25 NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as  
26 follows:

- 27 1. The Motion is hereby GRANTED in its entirety.  
28

