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15 **UNITED STATES BANKRUPTCY COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**
17 **SAN FRANCISCO DIVISION**

18 In re
19 PACIFIC GAS AND ELECTRIC
20 COMPANY, a California corporation,
21 Debtor.

No. 01-30923 DM

Chapter 11 Case

Date: July 18, 2001

Time: 9:30 a.m.

Place: 235 Pine St., 22nd Floor
San Francisco, California

Judge: Hon. Dennis Montali

23 Federal I.D. No. 94-0742640

24 **NOTICE OF JOINT MOTION AND JOINT MOTION OF DEBTOR AND**
25 **OFFICIAL CREDITORS COMMITTEE FOR ORDER ESTABLISHING**
26 **PROCEDURES FOR INTERIM (1) COMPENSATION AND REIMBURSEMENT OF**
27 **EXPENSES OF PROFESSIONALS EMPLOYED AT EXPENSE OF BANKRUPTCY**
28 **ESTATE AND (2) REIMBURSEMENT OF EXPENSES OF COMMITTEE MEMBERS;**
MEMORANDUM OF POINTS AND AUTHORITIES;
DECLARATION OF DINYAR B. MISTRY IN SUPPORT THEREOF

NOTICE OF JOINT MOTION, MPA ISO RE INTERIM COMPENSATION

Add: Kids Oge Mail Center

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1 **TO THE HONORABLE DENNIS MONTALI, UNITED STATES BANKRUPTCY**
2 **JUDGE, ALL PARTIES IN INTEREST AND THEIR COUNSEL OF RECORD:**

3 **NOTICE OF MOTION AND MOTION**

4 **PLEASE TAKE NOTICE** that on July 18, 2001, at 9:30 a.m., or as soon
5 thereafter as the matter may be heard in the courtroom of the Honorable Dennis Montali, United
6 States Bankruptcy Judge, located at 235 Pine Street, 22nd Floor, San Francisco, California,
7 Pacific Gas and Electric Company, the debtor and debtor in possession in the above-captioned
8 chapter 11 case ("Debtor"), and the Official Committee of Unsecured Creditors (the
9 "Committee," and together with the Debtor, "Movants"), will and hereby do move the Court for
10 entry of an order granting the following relief (the "Motion"):

11 a. On a monthly basis, professionals employed at the expense of the
12 Debtor's bankruptcy estate who have not received a retainer or have fully expended any
13 retainers received (other than those Non-Bankruptcy Counsel identified in the Amended
14 Application For Authority To Employ And To Continue The Employment Of Special
15 Counsel To Debtor In Possession On Non-Bankruptcy Matters filed on June 22, 2001 by
16 the Debtor herein) shall file with the Court and serve on (i) the Office of the United
17 States Trustee (the "OUST"), (ii) counsel to the Committee, and (iii) the Debtor and its
18 bankruptcy counsel, an exhibit including complete time sheet entries (subject to redaction
19 to preserve privileged or confidential information, if appropriate), an exhibit detailing all
20 costs, and a cover sheet summarizing the requests for compensation and reimbursement
21 of expenses, each as more fully described in the attached memorandum of points and
22 authorities.

23 b. Unless the Debtor, the Committee or the OUST files an objection
24 to the requested payment within ten (10) days of service and requests a hearing thereon,
25 the Debtor shall be authorized and directed to pay, on an interim basis, 90% of the fees
26 and 100% of the costs incurred and requested by such professional. If an objection is
27 filed, the Debtor shall be authorized to pay, with respect to any undisputed portion, 90%
28 of the fees and 100% of the expenses requested.

1 c. Any and all such payments made by the Debtor shall be interim in
2 nature and shall be subject to approval of the Court after notice and a hearing (i) on an
3 interim basis pursuant to Bankruptcy Code Section 331, upon an application filed
4 requesting such approval, at which time the professionals may request receipt of their
5 10% holdback in fees, and (ii) on a final basis at such appropriate time set by the Court.

6 d. All interim applications must comply with Bankruptcy Code
7 Sections 330 and 331, Federal Rule of Bankruptcy Procedure 2016, the Local Bankruptcy
8 Rules and the U.S. Trustee Guidelines. The Debtor's counsel shall be responsible for
9 scheduling hearings on interim fee applications, and shall provide at least forty-five days
10 notice to all other professionals of the date scheduled by the Court on interim fee
11 hearings.

12 e. On a monthly basis, members of the Committee may seek
13 reimbursement of expenses incurred in connection with their performance of the duties of
14 the Committee, pursuant to Bankruptcy Code Section 503(b)(3)(F), by submitting a cost
15 exhibit (as described in the attached memorandum of points and authorities) to Counsel
16 for the Committee, the Debtor and its counsel, and the OUST. Counsel for the
17 Committee shall prepare a monthly summary of such Committee member cost exhibits,
18 file such summary with the Court, and serve a copy on the Debtor and its counsel and the
19 OUST. Ten days after the filing by Committee counsel of the summary with the Court,
20 and unless the Debtor or the OUST has objected to and sought a hearing on a Committee
21 member's expense reimbursement request, the Debtor shall be authorized and directed to
22 pay 100% of the requested expense reimbursement. At the time that the Court holds
23 hearings on final fee applications of professionals employed at the expense of the estate,
24 the Court will also hold hearings on final applications of Committee members for
25 allowance and approval of all expense reimbursements.

26 This Motion is based on this Notice of Motion and Motion, the attached
27 Memorandum Of Points And Authorities, the declaration of Dinyar B. Mistry, and upon such
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1 further oral and written evidence as may be presented to the Court by Movants at or prior to the
2 hearing on the Motion.

3 **PLEASE TAKE FURTHER NOTICE** that pursuant to Rule 9014-1(c)(2) of the
4 Bankruptcy Local Rules for the Northern District of California, any written opposition to the
5 Motion and the relief requested therein must be filed with the Bankruptcy Court and served upon
6 Movants at least five (5) days prior to the scheduled hearing date. If there is no timely objection
7 to the requested relief, the Court may enter an order granting such relief without further hearing.
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10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 Pacific Gas and Electric Company, debtor and debtor in possession (“Debtor”),
12 and the Official Committee of Unsecured Creditors (“Committee,” and together with the Debtor,
13 “Movants”) hereby respectfully submit this memorandum of points and authorities in support of
14 their motion for an order authorizing the Debtor to (i) pay professionals employed at the expense
15 of the estate on a monthly and interim basis under procedures comparable to those established in
16 other large chapter 11 cases, and (ii) reimburse Committee members on a monthly interim basis
17 for expenses incurred in performing the duties of the Committee (“Motion”).

18 The Debtor commenced this chapter 11 case on April 6, 2001. On or about April
19 10, 2001, the OUST appointed the Committee. The Debtor and the Committee have since
20 employed legal, accounting and investment banking professionals to assist them in this chapter
21 11 case, and approval of the engagements are either pending before the Court or have been
22 approved. Movants submit this Motion in order to establish reasonable procedures that will
23 (1) allow the Court and the Office of the United States Trustee (“OUST”) to more effectively
24 monitor the professional fees and Committee expenses incurred in this chapter 11 case, (2) avoid
25 having professionals finance the chapter 11 case, and (3) coordinate the filing and review of
26 interim applications for compensation and reimbursement of expenses.

27 Bankruptcy Code Section 331 authorizes professionals to apply for approval of
28 compensation once every 120 days, or more often if the court permits. Movants believe that it is

1 necessary and appropriate to establish procedures for paying and monitoring, on a monthly basis,
2 the interim compensation and reimbursement of expenses due professionals from the bankruptcy
3 estate. Movants request entry of an order authorizing the following procedures:

4 1. On a monthly basis, professionals (the "Professionals") employed at the
5 expense of the Debtor's bankruptcy estate who have not received a retainer or have fully
6 expended any retainers received (other than those Non-Bankruptcy Counsel identified in the
7 Amended Application For Authority To Employ And To Continue The Employment Of Special
8 Counsel To Debtor In Possession On Non-Bankruptcy Matters filed on June 22, 2001 by the
9 Debtor herein) shall file with the Court and serve on (i) the OUST, (ii) counsel to the Committee,
10 and (iii) the Debtor and its bankruptcy counsel, an exhibit including complete time sheet entries
11 (subject to redaction to preserve privileged or confidential information, if appropriate), an exhibit
12 detailing all costs , and a cover sheet summarizing the requests for compensation and
13 reimbursement of expenses.

14 2. The monthly time sheet exhibit shall state (a) the total time expended by
15 the Professional for the month (showing the hours for each of the subcategories established under
16 the U.S. Trustee Guidelines), (b) the names of the specific individuals who performed services
17 and their aggregate hours for the month, (c) the hourly billing rate for each such individual, and
18 (d) the total amount sought by the Professional for that month.

19 3. The monthly cost exhibit shall show the detail of all expenses incurred by
20 the Professional during the month, in categories as required by the U.S. Trustee Guidelines.

21 4. The cover sheet shall state the total amount of fees and expenses sought by
22 the Professional for that month.

23 5. Unless the Debtor, the Committee or the OUST files an objection to the
24 requested payment within ten (10) days of service and requests a hearing thereon, the Debtor
25 shall be authorized and directed to pay, on an interim basis, 90% of the fees and 100% of the
26 costs incurred and requested by such Professional. If an objection is filed, the Debtor shall be
27 authorized to pay, with respect to any undisputed portion, 90% of the fees and 100% of the
28 expenses requested.

1 6. Any and all payments made by the Debtor under these procedures shall be
2 interim in nature and shall be subject to approval of the Court after notice and a hearing (i) on an
3 interim basis pursuant to Bankruptcy Code Section 331, upon an application filed requesting
4 such approval, at which time the Professionals may request receipt of their 10% holdback in fees,
5 and on a final basis at such appropriate time set by the Court.

6 7. All interim applications must comply with Bankruptcy Code Sections 330
7 and 331, Federal Rule of Bankruptcy Procedure 2016, the Local Bankruptcy Rules and the U.S.
8 Trustee Guidelines. The Debtor's counsel shall be responsible for scheduling hearings on
9 interim fee applications every six months, and shall provide at least forty-five days notice to all
10 other Professionals of the date scheduled by the Court on interim fee hearings.

11 8. As to any Professionals employed at the expense of the estate, but
12 compensated on a monthly flat fee rather than an hourly basis, such Professional shall submit the
13 cover sheet, cost exhibit and fee exhibits in the same manner as Professionals paid on an hourly
14 basis, and shall be compensated in accordance with the procedures described above. However,
15 the fee exhibit shall name the individuals who performed services that month, and, in summary
16 fashion, the nature of the services performed. The number of hours and billing rates will not be
17 included.

18 9. On a monthly and interim basis, members of the Committee may seek
19 reimbursement of expenses incurred in connection with their performance of the duties of the
20 Committee, pursuant to Bankruptcy Code Section 503(b)(3)(F), by submitting a cost exhibit (as
21 described above) to Counsel for the Committee, the Debtor and its counsel, and the OUST.
22 Counsel for the Committee shall prepare a monthly summary of such Committee member cost
23 exhibits, file such summary with the Court, and serve a copy on the Debtor and its counsel and
24 the OUST. Ten days after the filing by Committee counsel of the summary with the Court, and
25 unless the Debtor or the OUST has objected to and sought a hearing on a Committee member's
26 expense reimbursement request, the Debtor shall be authorized and directed to pay 100% of the
27 requested expense reimbursement, on an interim basis. At the time that the Court holds hearings
28 on final fee applications of Professionals employed at the expense of the estate, the Court will

1 also hold hearings on final applications of Committee members for allowance and approval of all
2 expense reimbursements.

3 **Applicable Legal Authority for Relief Requested in Motion**

4 **A. Professional Fees and Expenses**

5 In enacting the provisions of the Bankruptcy Code that relate to compensation of
6 professionals employed at the expense of the bankruptcy estate, Congress adopted the principle
7 that “[p]rofessionals in bankruptcy cases are entitled to be paid on a comparable basis to other
8 privately retained counsel, both in terms of timeliness and amount of payment.” In re
9 Commercial Consortium of California, 135 B.R. 120, 123 (Bankr. C.D. Cal. 1991) (citing and
10 relying on Burgess v. Klenske (In re Manoa Fin. Co., Inc.), 853 F.2d 687, 690 (9th Cir. 1988), In
11 re Nucorp Energy, Inc., 764 F.2d 655, 658-59 (9th Cir. 1985), and First Nat’l Bank of Chicago v.
12 Comm. of Creditors Holding Unsecured Claims (In re Powerine Oil Co.), 71 B.R. 767, 770
13 (B.A.P. 9th Cir. 1986)). Section 331 of the Bankruptcy Code provides for the payment of
14 interim compensation for professionals retained by debtors-in-possession and creditors
15 committees:

16 A trustee, an examiner, a debtor’s attorney, or any professional person employed
17 under section 327 or 1103 of this title may apply to the court not more than once
18 every 120 days after an order for relief in a case under this title, or more often if
19 the court permits, for such compensation for services rendered before the date of
20 such an application or reimbursement for expenses incurred before such date as is
21 provided under section 330 of this title. After notice and a hearing, the court may
22 allow and disburse to such applicant such compensation or reimbursement. 11
23 U.S.C. § 331.

24 The legislative history of the Bankruptcy Code illustrates the intent of Congress that interim
25 compensation be provided on a sufficiently regular basis to ensure the adequacy of such
26 compensation:

27 The court may permit more frequent applications if the circumstances warrant,
28 such as in very large cases where the legal work is extensive and merits more
frequent payments. The court is authorized to allow and order disbursement to

1 the applicant of compensation and reimbursement that is otherwise allowable
2 under section 330. H.R. Rep. No. 95-595, 95th Cong., 1st Sess., at 330 (1977).

3 The Bankruptcy Appellate Panel for the Ninth Circuit (the "BAP") has made clear
4 that monthly interim payments to professionals employed in large cases are reasonable and
5 appropriate. In U.S. Trustee v. Knudsen Corp. (In re Knudsen Corp.), 84 B.R. 668, 672 (B.A.P.
6 9th Cir. 1988) ("Knudsen"), the BAP observed that "the problem, arising especially in large
7 cases, [is] that when counsel must wait an extended period for payment, counsel is essentially
8 compelled to finance the reorganization. This result is improper and may discourage qualified
9 practitioners from participating in bankruptcy cases; a result that is clearly contrary to
10 Congressional intent." Id. See also In re Heritage Mall Assocs., 184 B.R. 128, 134 (Bankr. D.
11 Or. 1995) (noting the same problem); In re County of Orange, 179 B.R. 195, 198 n.5 (Bankr.
12 C.D. Cal. 1995) (same).

13 The Bankruptcy Court for the Central District of California addressed the issue of
14 monthly compensation of professionals in In re Commercial Consortium of California, 135 B.R.
15 120, 123 (Bankr. C.D. Cal. 1991). The court noted that the essential purpose of Bankruptcy
16 Code Section 331 is to relieve professionals of the burden of financing lengthy bankruptcy
17 proceedings, and that payments every 120 days may not now be sufficient to fulfill that purpose.
18 Id. The court said:

19 In 1978, when the Code was enacted, attorneys customarily billed their clients on
20 a quarterly basis. Times have changed. Lawyers now run their practices in a
21 more business-like fashion. Computerization has simplified and speeded the
22 billing process. As widely documented in the legal press, the billing cycle has
23 shifted to monthly statements. The 120-day provision of Section 331, intended to
24 be a help to lawyers in 1978, has become a straight-jacket for the lawyers of the
25 '90s. Thus, even payments every 120 days no longer compensate bankruptcy
26 attorneys on a fully equivalent basis with their non-bankruptcy colleagues. Id. at
27 123-24.
28

1 The court therefore recognized that more frequent payments are “commonly
2 authorized in large cases involving extensive legal work” in order “to help avoid
3 undue delays in payment.” Id. at 124, 127.

4 The BAP in Knudsen held that interim payment procedures substantially identical
5 to those proposed in this Motion are appropriate under the following circumstances:

- 6 a. The case is an unusually large one in which an exceptionally large
7 amount of fees accrue each month;
- 8 b. The court is convinced that waiting an extended period for
9 payment would place an undue hardship on counsel;
- 10 c. The court is satisfied that counsel can respond to any reassessment
11 of fees paid on an interim basis; and
- 12 d. The proposed fee payment procedure is itself the subject of a
13 noticed hearing prior to any payment thereunder.

14 84 B.R. at 672. See also In re Circle K Corp., 191 B.R. 426, 432 (Bankr. D. Ariz. 1996) (an
15 “order that mandates filed monthly statements” and provides for “a 20% hold-back provision and
16 a final application requirement” is “a classic Knudsen order”).

17 Each of the four Knudsen Corp. factors are present in this chapter 11 case. This
18 case involves billions of dollars of assets and liabilities and is truly an “unusually large” case.
19 The great amount of activity that has already occurred in just the first two months of the case
20 evidences that substantial amounts of professional fees are likely to accrue each month. This
21 will place an unusually large and undue burden on the Professionals employed to assist the
22 Debtor and the Committee. Moreover, all of the Professionals proposed for employment to date
23 are experienced bankruptcy professionals who have evidenced their ability to respond
24 appropriately in the event the Court ultimately adjusts the fees paid on a monthly basis. The
25 10% holdback of fees pending interim fee applications will facilitate just such a result, if
26 required. Finally, this Motion and the procedures proposed herein will be the subject of a
27 noticed hearing, as required by Knudsen.

1 The Professionals that would be covered by this Motion already have devoted,
2 and in the future will be required to devote, substantial time, effort, and expense relating to
3 services on behalf of the Debtor and its estate. The absence of a procedure by which the Debtor
4 and its estate may compensate and reimburse the Professionals on a relatively current basis is
5 burdensome to the Professionals, would unfairly compel the Professionals to finance Debtor's
6 Chapter 11 case, and would discourage other professionals from accepting or continuing
7 employment in this case. The Debtor, the OUST and the Committee will better be able to
8 monitor and control the fees and expenses of the Professionals by reviewing, on a monthly basis
9 instead of a 120-day basis, the amounts requested for interim compensation and expense
10 reimbursement.

11 **B. Committee Member's Expenses**

12 Bankruptcy Code Section 503(b)(3)(F) authorizes the payment, as an
13 administrative expense of the estate, of the expenses incurred by members of creditor committees
14 in the performance of the duties of the Committee. First Merchants Acceptance Corp. v. J.C.
15 Bradford & Co., 198 F.3d 394, 398 (3d Cir. 1999); McDow v. Official Committee of Equity Sec.
16 Holders of Criimi Mae Inc., 247 B.R. 146, 150 (D. Md. 1999). Bankruptcy Code Section 503(b)
17 authorizes the Court to allow such claims after notice and a hearing.

18 The procedures proposed in the Motion (i) require the Committee members to
19 submit final applications for allowance of reimbursed expenses, and (ii) contemplate a hearing to
20 consider the applications at the same time that the Court considers final fee applications of
21 Professionals. In the event that the Court makes any adjustment of allowed expense
22 reimbursements at the final hearing, each Committee member has the financial wherewithal to
23 respond appropriately to any such readjustment. Monthly interim payment of such expenses by
24 the Debtor encourages the fullest participation by Committee members in this reorganization
25 case, and allows the Debtor, the OUST and the Committee to monitor on a monthly basis, such
26 expense reimbursements.

27 For all of the foregoing reasons, Movants respectfully request entry of an order
28 granting the Motion and authorizing the procedures set forth herein.

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Dated: June 29, 2001

HOWARD, RICE, NEMEROVSKI, CANADY,
FALK & RABKIN, a Professional Corporation

By: Janet A. Nexon
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