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Attorneys for CALIFORNIA INDEPENDENT SYSTEM
OPERATOR CORPORATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re

PACIFIC GAS AND ELECTRIC
COMPANY, a California corporation,

Debtor

Tax Identification Number 94-0742640

Case No. 01-30923-DM

Chapter 11

Date: August 30, 2001
Time: 10:00 a.m.
Place: 235 Pine Street, 22nd Floor
San Francisco, CA
Judge: Hon. Dennis Montali

**NOTICE OF MOTION AND MOTION TO MODIFY ORDER DIRECTING
PRODUCTION OF DOCUMENTS TO ISO/PX MARKET PARTICIPANTS PURSUANT
TO FEDERAL BANKRUPTCY RULE 2004 AND PROTECTIVE ORDER RESPECTING
CONFIDENTIALITY OF DOCUMENTS**

PLEASE TAKE NOTICE that the California Independent System Operator Corporation
(the "ISO") hereby moves (the "Motion") the Court pursuant to Federal Rule of Civil Procedure
60(b)(6), made applicable through Federal Bankruptcy Rule 9024, for entry of an order modifying
the Order Directing Production Of Documents To ISO/PX Market Participants Pursuant To
Federal Bankruptcy Rule 2004 And Protective Order Respecting Confidentiality Of Documents

CASE NO. 01-30923 DM
Not. Of Mot. & Mot. To Modify Order Directing
Production Of Documents & Protective Order

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1 entered July 11, 2001 (the "Order"), to establish procedures for production of documents set forth
2 in Item J. of Exhibit "A" to the Order.

3 The ISO requests that the Court modify the Order by adding at the end of the first
4 sentence of paragraph number 1 (page 1 at line 27) the following: "except that data and
5 documents responsive to Item J need not be produced to Market Participants. The Court will
6 reconsider the terms and conditions under which Market Participants may have access to that
7 information if Debtor states to the Court that it intends to make use of that information in this
8 Bankruptcy proceeding."

9 As an alternative, the ISO requests that the following limitations be imposed on access to
10 data produced in response to Item J to Market Participants:

11 1. Only Outside Counsel¹ who have made an appearance as counsel of record for a
12 Market Participant ("Bankruptcy Outside Counsel") may have direct access to those documents
13 and information produced in response to Item J of Exhibit "A" to the Order (referred to herein as
14 the "Bid Data").

15 2. Subsequent disclosure of the Bid Data shall be made only to Bankruptcy Outside
16 Counsel, or such financial advisors, consultants, experts and other professionals (and any
17 assistants or clerical employees working under their direct supervision)(collectively, the
18 "Bankruptcy Outside Professionals"), retained by the Market Participant, for use solely in
19 connection with this bankruptcy case. Bankruptcy Outside Professionals shall not use or disclose
20 the Bid Data for any purpose other than proceedings in this bankruptcy case.

21 3. Access to the Bid Data shall be granted to Bankruptcy Outside Counsel as follows:

22 a. Bankruptcy Outside Counsel receiving the Bid Data shall be required to
23 maintain a written record of all persons, whether on the staff of Bankruptcy Outside Counsel or
24 their independent consultants, who access or review the Bid Data, with the exception of persons
25 whose role is purely clerical. This record shall be provided to counsel for the ISO.

26 b. The Bid Data (which will be produced on a CD) shall be stored in a secure
27

28 ¹ All capitalized terms herein, where applicable, shall have the same meanings as in the Order, unless they are within a quotation from the ISO Tariff, in which case the Tariff definition applies.

1 place within the office of Bankruptcy Outside Counsel, and shall not be stored or transmitted
2 where it may be accessible via the Internet.

3 4. Bankruptcy Outside Professionals shall not disclose the Bid Data to any third
4 party, including their client Market Participants, absent further order of the Bankruptcy Court.

5 5. All other terms of the Order shall remain in full force and effect, except to the
6 extent inconsistent with the above modifications, which would be controlling.

7 **PLEASE TAKE FURTHER NOTICE** that on August 30, 2001, at 10:00 a.m. or as soon
8 thereafter as the matter may be heard in the Courtroom of the Honorable Dennis Montali, located
9 at 235 Pine Street, 22nd Floor, San Francisco, California, a hearing will be held to consider the
10 Motion. Pursuant to Local Bankruptcy Rule 9014-1(c), any opposition to the Motion shall be
11 served on ISO's undersigned counsel of record no later than fourteen (14) days prior to the
12 scheduled hearing date. Any interested party may obtain a full set of the papers in support of the
13 Motion by requesting copies from the ISO's counsel of record.

14 This Motion is based on this Notice of Motion and Motion, the annexed Memorandum of
15 Points and Authorities, the Declaration of Eric Hildebrandt, Ph.D, the record in this case, and
16 such additional argument and evidence presented to this Court at the hearing on this Motion.

17
18 DATED: July 31, 2001

LEVENE, NEALE, BENDER, RANKIN &
BRILL L.L.P.

19
20 By: 
21 Daniel H. Reiss

22 Attorneys for Defendant
23 CALIFORNIA INDEPENDENT SYSTEM
24 OPERATOR CORPORATION

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The California Independent System Operator Corporation (the "ISO") seeks entry of an
4 order modifying the Court's Order Directing Production Of Documents To ISO/PX Market
5 Participants Pursuant To Federal Bankruptcy Rule 2004 And Protective Order Respecting
6 Confidentiality Of Documents entered July 11, 2001 (the "Order") as set forth in the Notice of
7 Motion and Motion annexed hereto. The proposed modification is narrow and seeks only to
8 modify certain of the procedures for production of documents set forth in Item J of Exhibit "A" to
9 the Order. Item J requires production of highly sensitive, confidential proprietary market
10 information held by the ISO due to its unique position as a market intermediary in California's
11 \$50 billion wholesale energy market. The ISO's motion is not for its own gain. Rather, it is
12 necessary to avoid an outright breach of section 20.3.3 of the ISO Tariff and opportunities for
13 gaming the California electric market, which unfettered access to this data, could provide. The
14 proposed modification is tailored to maintain a delicate market balance and ensure fair
15 competition in a market wrought by fierce competition. The proposed modification is in
16 accordance with the express terms and purposes of Federal Bankruptcy Rule 2004. The ISO
17 makes its Motion pursuant to Federal Rule of Civil Procedure 60(b)(6), made applicable through
18 Federal Bankruptcy Rule 9024, which provides that a party may be relieved of from a final order
19 for any "reason justifying relief from operation of the judgment."

20 **II. STATEMENT OF FACTS**

21 **A. Background**

22 The ISO is responsible for controlling and maintaining California's electric power
23 transmission grid and ensuring safe and reliable delivery of power to California. Cal. Public
24 Utility Code § 345. The ISO's operations are conducted pursuant to its Tariff, which is filed with
25 and approved by the Federal Energy Regulatory Commission ("FERC"). (Sections from the
26 Tariff referenced in this brief are collected as Exhibit A to the Declaration of Eric Hildebrandt,
27 submitted concurrently herewith. The Tariff is also available on line, at

28 www.caiso.com/pubinfo/tariffs.)

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Production Of Documents & Protective Order

1 To fulfill its responsibilities, the ISO acquires power whenever necessary to balance
2 energy demand and supply, including through use of Supplemental Energy Bids, submitted up to
3 45 minutes before the hour in which the energy is needed (Tariff § 2.5.22.4.1). It also procures
4 Ancillary Services, which comprise different forms of energy and capacity reserves necessary to
5 maintain the reliability of the Grid. See generally, Tariff, § 2.5.1. To accomplish these critical
6 functions, the ISO operates an Ancillary Services Market and, in real time, utilizes the
7 Supplemental Energy bids from power suppliers to maintain the demand/supply equilibrium. The
8 ISO also purchases “Out of Market” energy from power suppliers outside of this process, when
9 the Supplemental Energy and Ancillary Service bids have been exhausted. E.g., Tariff, § 5.1.3.

10 The ISO is also charged with “monitor[ing] the markets that it administers in order to
11 identify, and where appropriate, institute corrective action to respond to the exercise of market
12 power or other abuses of such markets” Tariff § 2.6. In designing these Markets, FERC
13 established a system which attempts to place market participants and would-be market entrants on
14 an equal footing to promote competition. This endeavor includes the identification of certain
15 categories of highly competitive information and protection of that information from other market
16 participants. Section 20.3.2 of the Tariff establishes 5 categories of confidential information –
17 this is information that market participants give to the ISO, including, of central relevance here:

- 18 (a) individual bids for Supplemental Energy;
- 19 (b) individual Adjustment Bids for Congestion Management
- 20 (c) individual bids for Ancillary Services

21 The Tariff goes on to provide at § 20.3.3 that:

22
23 No Market Participant shall have the right hereunder to receive
24 from the ISO or to review any documents, data or other information
25 from another Market Participant to the extent such documents, data
26 or information is to be treated as in accordance with Section 20.3.2;
27 provided, however, a Market Participant may receive and review
28 composite documents, data, and other information that may be
developed based upon such confidential documents, data, or
information, if the composite document does not disclose such
confidential data or information relating to an individual Market
Participant and provided, however, that the ISO may disclose
information as provided for in its bylaws.

1 See Decl. of E. Hildebrandt, ¶¶ 6, 7.

2 Item J of the Order requires production of just such highly sensitive market data,
3 dissemination of which to Market Participants is squarely prohibited by the Tariff. Hildebrandt
4 Decl., ¶ 6. The Tariff permits production of this information in response to “administrative or
5 judicial proceedings,” but only after notice to Market Participants and entry of appropriate
6 protective orders. Tariff, § 20.3.4(b). In the numerous state and Federal investigations underway
7 into the competitive dysfunctions of the California markets, the ISO has received from FERC, the
8 California Attorney General, the California Public Utility Commission and other governmental
9 bodies, subpoenas for this same bid information. Such confidential data has been provided
10 subject to confidentiality instructions, which prohibit dissemination of the data to Market
11 Participants. Hildebrandt Decl., ¶ 8.

12 As set forth below, the ISO is gravely concerned that the wide dissemination of this bid
13 data contemplated by the Order and its use beyond the boundaries of this proceeding (to which its
14 relevance is, frankly, unclear) poses a substantial risk to the California energy markets. Hence,
15 the ISO respectfully submits that the data responses to Item J should not be disclosed to Market
16 Participants until and unless PG&E discloses that it actually intends to use such data in this
17 proceeding and should be subject, if released, to the additional restrictions set forth above.

18 **B. The Court’s Order Directing Production of Documents to ISO/PX Market**
19 **Participants.**

20 On July 11, 2001, the Court entered its Order Directing Production of Documents to
21 ISO/PX Market Participants Pursuant to Federal Bankruptcy Rule 2004 and Protective Order
22 Respecting Confidentiality of Documents (the “Order”). The Order sets forth procedures
23 pursuant to which the ISO is required to produce the documents set forth on Exhibit “A” of the
24 Order. Exhibit “A” includes the following category of documents to be produced:

25 J. All bid data, including but not limited to, Day-Ahead and Hour-Ahead
26 ancillary services bids, supplemental energy bids, out of market calls and
27 adjustment bids in markets controlled or operated by the ISO or the PX, from
May 1, 2000, through the date of production.

28 Order, Exhibit “A”, p. 4, ¶ J, lines 17 – 20. The data covered by Item J will be referred to herein

1 as “Bid Data.” The Order provides that this data must be produced, not only to counsel for use in
2 this bankruptcy proceeding, but allows it to be used outside of this proceeding in unspecified
3 “administrative proceedings and state and federal litigation.” Order, ¶ 5.E, p. 4, lines 22-24.
4 Such use, which is not permitted by Bankruptcy Rule 2004, substantially broadens distribution of
5 the data and increases the likelihood that it will find its way into inappropriate hands.

6 With possession of the Bid Data, a market participant could formulate sophisticated
7 computer models which would enable the user to “game” the energy market, giving the holder of
8 the Bid Data the ability to potentially unduly influence the market in its favor or “beat” the
9 market. This could cause unfair competition and destroy the ability of the ISO to maintain a
10 stable and economically sound energy market. By this Motion, the ISO seeks to reduce, if not
11 eliminate, the potential for the above-mentioned abuses. Hildebrandt Decl., ¶ 10.

12 **III. ARGUMENT**

13 **A. Federal Rule Of Civil Procedure 60(B)(6) Permits The ISO Request To** 14 **Modification Of The Order Regarding The Accessibility, Disclosure And Use** **Of The Bid Data.**

15 Federal Rule of Civil Procedure 60(b)(6), made applicable through Federal Bankruptcy
16 Rule 9024, provides that a party may be relieved from a final order for any “reason justifying
17 relief from operation of the judgment.”

18 Due to its remedial nature, courts have liberally construed Rule 60 to permit a party to
19 vacate or modify an order. In re Kirwan, 164 F. 3d 1175, 1177 (Rule 60 is to be liberally
20 construed to grant relief from judgment to do substantial justice in the absence of fault or
21 prejudice). However, the use of Rule 60(b)(6) to relieve a party from operation of a judgment or
22 to modify same is limited to extraordinary circumstances. In re Straw, 866 F.2d 1167, 1172 (9th
23 Cir. 1989). As discussed above, and in further detail below, the circumstances justifying
24 modification of the Order are extraordinary.

25 **B. Dissemination of the Bid Data Threatens California’s Electricity** 26 **Marketplace.**

27 Under current market conditions in California’s wholesale energy markets, disseminating
28 confidential bidding data to suppliers who should competing against each of other creates an

1 increased risk of anti-competitive outcomes in a number of ways. Hildebrandt Decl., ¶ 10.

2 First, electricity markets are particularly susceptible to manipulation and the exercise of
3 market power. Demand for electricity is highly predictable and highly inelastic (i.e. consumers
4 have limited means of “saying no” to high prices and reducing demand). Available supply,
5 meanwhile, is also highly predictable, due to the wealth of publicly available data on the rated
6 capacity of units, hydro flows and conditions, and imports into California. The combination of
7 these factors makes the wholesale market extremely susceptible to the exercise of market power,
8 as evidenced by outcomes in California’s wholesale energy markets since summer of 2000.
9 Hildebrandt Decl., id.

10 Dissemination of detailed hourly supply and demand data to different suppliers facilitates
11 the exercise market power on a system-wide by individual suppliers under tight supply and
12 demand conditions, when even a single individual suppliers can have a significant impact on price
13 through their bidding behavior (e.g. by bidding significantly above costs high and/or withholding
14 some capacity from the market). The data in question in this case would facilitate the exercise of
15 market power by providing each individual seller with a clear, detailed picture of the impact they
16 may be able to have on market prices under specific supply and load conditions. Ibid.

17 Second, in markets, such as California’s electricity market, with a limited number of
18 major suppliers and highly predicable supply/demand conditions, non-competitive oligopolistic
19 bidding patterns can develop and persist as each different suppliers adjusts and refines their
20 bidding strategies over time in response to observed market prices and trends. The daily and
21 hourly cycles of the wholesale electricity markets provide opportunity for the major suppliers to
22 incrementally “experiment” with different bidding strategies aimed at maximizing profits by
23 increasing market prices, even at the expense of somewhat lower sales or market share.
24 Dissemination of detailed data on each supplier’s historical bidding strategies would further
25 facilitate this form of “implicit collusion” in the future. Ibid.

26 Third, the data at question may also be used by suppliers within the ISO system in order to
27 exercise locational market power, or market power that stems from the need for specific
28 individual plants to be in operation under specific supply and demand conditions in order to

1 ensure local area reliability. Dissemination of detailed data on hourly supply bids – including a
2 record of units dispatched “out-of-sequence” or “out-of-market” by the ISO to meet locational
3 system generation requirements – provides a wealth of data that can be used to facilitate the
4 exercise of locational market power in the future. Ibid.

5 In light of the foregoing, extraordinary circumstances exist to permit modification of the
6 Order. In addition, as set forth below, the requested modification is consistent with the express
7 purpose and limitation in Federal Bankruptcy Rule 2004.

8 **C. The Modifications Requested Do Not Impose A Hardship On Market**
9 **Participants and, Are Consistent with the Goals and Purposes of Rule 2004**

10 The Order currently permits dissemination to Outside Counsel for the Market Participants
11 and use of the Responsive Information “exclusively for litigation purposes in connection with this
12 bankruptcy case (including adversary proceedings and claims litigation), administrative
13 proceedings and state and federal litigation” Order, p. 4, ¶ 5E, lines 21-24. The ISO requests
14 that the Bid Data not be disclosed to Market Participants unless PG&E actually makes use of it in
15 this proceeding. In that event, additional restrictions should be placed on the data, so that it is:
16 (1) available only to Outside Counsel who have made appearances in this bankruptcy case, and
17 (2) can be used solely for purposes related to these bankruptcy proceedings. This access and use
18 limitation is in accord with the boundaries set forth in Federal Bankruptcy Rule 2004, which
19 states in pertinent part:

20 The examination of an entity under this rule or of the debtor under § 343 of the
21 Code may relate only to the acts, conduct, or property or to the liabilities and
22 financial condition of the debtor, or to any matter which may affect the
administration of the debtor’s estate, or to the debtor’s right to a discharge.

23 F.R.B.P. 2004(b).

24 As one court has stated:

25 The purpose generally of Rule 2004 is to enable parties in interest to locate assets
26 of the debtor and to make those assets available for creditors of the estate. While
27 the purpose is broad, Rule 2004 is not without limits. The examination of a
witness as to matters having no relationship to the debtor’s affairs or no effect on
the administration of his estate is improper.

28 In re Continental Forge, Co., Inc., 73 B.R. 1005, 1007 (Bankr. W.D. Pa. 1987)(citations omitted).

1 To the extent that PG&E, after review of this data, determines it is relevant in this
2 bankruptcy proceeding, PG&E should be required to explain the use it intends to make of the
3 data, at which point this Court may consider whether additional access by Market Participants is
4 necessary and on what terms.² If it is released to Market Participants, now or later, use should be
5 limited to this bankruptcy proceeding. To the extent that any Market Participant has legitimate
6 need for this data in some other "administrative proceeding or state and federal litigation," as
7 currently allowed by the Order, then that party can and should make use of discovery and
8 disclosure processes in that other litigation; it should not be permitted to "borrow" highly
9 sensitive information, the confidentiality of which is critical to the California market place,
10 without the direct supervision of that other court or administrative body.

11 **IV. CONCLUSION**

12 For the foregoing reasons, the ISO requests that the Court modify the Order by adding at
13 the end of the first sentence of paragraph number 1 (page 1 at line 27) the following: "except that
14 data and documents responsive to Item J need not be produced to Market Participants. The Court
15 will reconsider the terms and conditions under which Market Participants may have access to that
16 information if Debtor states to the Court that it intends to make use of that information in this
17 Bankruptcy proceeding."

18 DATED: July 31, 2001

LEVENE, NEALE, BENDER, RANKIN &
BRILL L.L.P.

19
20 By: 
Daniel H. Reiss

21
22 Attorneys for
23 CALIFORNIA INDEPENDENT SYSTEM
24 OPERATOR CORPORATION
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26
27 ² The potential anti-competitive uses of the data in question are greatly reduced is the data are only released to
28 PG&E, subject to the constraints of the existing protective order. PG&E is a net buyer of energy and ancillary
services (i.e. while PG&E still owns substantial generating resources, purchases needed to meet PG&E load exceed
this supply). As a net buyer, PG&E does not have an incentive to exercise market power to increase overall prices in
California's wholesale market; its incentive is just the opposite.