

50-275/323

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PACIFIC GAS AND ELECTRIC COMPANY

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9 UNITED STATES BANKRUPTCY COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN FRANCISCO DIVISION

12 In re  
13 PACIFIC GAS AND ELECTRIC  
COMPANY, a California corporation,  
14 Debtor.  
15 Federal I.D. No. 94-0742640

Case No. 01 30923 DM  
Chapter 11 Case  
Date: December 21, 2001  
Time: 1:30 p.m.  
Place: 235 Pine Street, 22nd Floor  
San Francisco, California

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19 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEBTOR'S  
20 MOTION FOR AUTHORITY TO COMPROMISE CLAIMS BETWEEN ESTATE AND  
21 VARIOUS QUALIFYING FACILITIES  
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1 Pacific Gas and Electric Company ("PG&E" or "Debtor"), the debtor and debtor  
2 in possession in the above-captioned Chapter 11 case, seeks the Court's authorization to  
3 enter into a form of "Supplemental Agreement" which resolves potential disputes between  
4 PG&E and various Qualifying Facilities ("QFs").

#### 6 FACTUAL BACKGROUND

7 During July and August 2001, PG&E, with the Court's approval, has entered into  
8 approximately 200 agreements to assume Power Purchase Agreements ("PPAs") between  
9 PG&E and various Qualifying Facilities ("QFs"). See Declaration of Johns S. Pappas In  
10 Support Of Debtor's Motion For (1) Authority To Compromise Claims Between Estate And  
11 Various Qualifying Facilities; And (2) Authority To Enter Into Supplemental Agreements  
12 ("Pappas Decl.") ¶2. The "Assumption Agreements" between PG&E and the QFs generally  
13 provided that, *inter alia*: (a) PG&E would assume the QFs' PPAs pursuant to 11 U.S.C.  
14 Section 365(b)(1) and (d)(2) and Rules 6006 and 9019 of the Federal Rules of Bankruptcy  
15 Procedure; (b) the QFs would waive certain potential administrative and pre-petition claims;  
16 and (c) PG&E would pay prepetition defaults (defined in the Assumption Agreements as  
17 "Prepetition Payables") in an agreed amount per the terms specified in the Assumption  
18 Agreements. *Id.*

19 Although the Assumption Agreements specified that interest was to be paid on  
20 the Prepetition Payables, the Assumption Agreements did not specify a rate of interest. *Id.*  
21 ¶3. Rather, most Assumption Agreements provided that the parties would negotiate the rate  
22 of interest in good faith, and that if the parties could not agree, they would bring their  
23 dispute to the Court for a determination of the rate of interest.<sup>1</sup> *Id.* The Assumption  
24 Agreements also required PG&E to pay the prepetition default either upon the "Effective  
25 Date" as defined in its Plan of Reorganization, or by installments beginning July 2003 with  
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27 <sup>1</sup>Most, but not all, Assumption Agreements contained these terms. For some QFs  
28 whose Prepetition Payables were less than \$10,000, however, the Agreements might have  
provided for an accelerated payment without interest.

1 the balance due on the Effective Date.

2 In recent weeks, PG&E and various qualifying facilities have engaged in  
3 negotiations with respect to the rate and payment of interest under the Assumption  
4 Agreements. Pappas Decl. ¶4. Those negotiations resulted in an agreement (documented in  
5 these certain "Supplemental Agreements") with respect to the rate and payment schedule of  
6 interest between PG&E and two groups of Qualifying Facilities—i.e., the Calpine group  
7 ("Calpine") and the GWF group ("GWF"). *Id.*; Exs. A & B.

8 The Supplemental Agreements include the following general terms<sup>2</sup>:

- 9 (a) The outstanding principal balance of the Prepetition Payables<sup>3</sup> shall bear  
10 interest at a rate of five percent (5%) per annum (the "Interest Rate") from  
11 the respective due dates of the principal amounts set forth on Attachment B  
12 to the Assumption Agreements, until paid;
- 13 (b) All accrued prepetition and postpetition interest due on the Prepetition  
14 Payables shall be paid on or before December 31, 2001, and thereafter, all  
15 accrued interest on the outstanding unpaid principal amount of the  
16 Prepetition Payables shall be payable monthly in arrears on the declining  
17 balance of the Prepetition Payables until the Prepetition Payables have been  
18 paid in full;
- 19 (c) Notwithstanding the terms of any plan of reorganization filed by PG&E or  
20 by any other party in the Bankruptcy Case, PG&E shall pay the outstanding  
21 principal balance of the of the Prepetition Payables in twelve (12) equal  
22 monthly installments on the last day of each month commencing  
23 December 31, 2001 and continuing on the last day of each month thereafter  
24 until paid in full; and

25  
26 <sup>2</sup>The terms of the two Agreements, though substantially similar, are not identical.  
They do, however, call for the same rate of interest and the same general payment schedule.

27 <sup>3</sup>In Calpine's Supplemental Agreement, the Prepetition Payables are netted against  
28 certain Prepetition Receivables owed PG&E by the QFs prior to the calculation of accrued  
interest.

1 (d) If the Plan Effective Date of any plan confirmed in the case shall occur  
2 before the Prepetition Payables and all interest accrued thereon has been  
3 paid in full, the remaining balance of the Prepetition Payables and all  
4 interest accrued thereon shall be paid on such Plan Effective Date. (Pappas  
5 Decl. ¶5; Exs. A & B)

6 In addition to Calpine and GWF, several other QFs have approached PG&E  
7 about entering into Supplemental Agreements on the same general terms to resolve the issue  
8 of the rate of interest on the Prepetition Payables. *Id.* ¶7. Indeed, PG&E anticipates that a  
9 number of QFs will seek to enter into Supplemental Agreements with identical rates of  
10 interest and payment schedules. *Id.*

## 12 ARGUMENT

### 13 I.

14 THE COMPROMISES REACHED IN THE SUPPLEMENTAL AGREEMENTS ARE  
15 FAIR AND EQUITABLE AND SHOULD BE AUTHORIZED PURSUANT TO  
BANKRUPTCY RULE 9019.

#### 16 A. Bankruptcy Law Favors Compromise.

17 Federal Rule of Bankruptcy Procedure 9019(a) provides that “[o]n motion by the  
18 trustee and after notice and a hearing, the court may approve a compromise or settlement.”<sup>4</sup>  
19 Indeed, Bankruptcy law favors compromises which are considered “a normal part of the  
20 process of reorganization.” Protective Comm. for Indep. Stockholders of TMT Trailer Ferry  
21 Inc. v. Anderson, 390 U.S. 414, 424 (1968). The Bankruptcy Court accordingly has great

23 <sup>4</sup>Although the statute specifies the “trustee,” it is clear it also encompasses  
24 compromises entered into by debtors in possession. See 11 U.S.C. §1107 (“Subject to any  
25 limitations on a trustee serving in a case under this chapter, and to such limitations or  
26 conditions as the court prescribes, a debtor in possession shall have all the rights, other than  
27 the right to compensation under section 330 of this title, and powers, and shall perform all  
28 the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of  
this title, of a trustee serving in a case under this chapter”); Wells Fargo Bank, N.A. v.  
Guy F. Atkinson Co. (In re Guy F. Atkinson Co.), 242 B.R. 497, 501 (9th Cir. 1999) (“Thus,  
the rule, read in combination with [11 U.S.C.] §1107, allows either the trustee or the debtor  
in possession to propose settlements to the court for approval or, with prior court  
authorization, to settle and compromise classes of claims”).

1 latitude in approving compromise agreements. See Martin v. Kane (In re A & C Props.),  
2 784 F.2d 1377, 1380-81 (9th Cir. 1986). The Court's discretion is not, however, unlimited.  
3 See Arden v. Motel Partners (In re Arden), 176 F.3d 1226, 1228 (9th Cir. 1999). The Court  
4 may approve a compromise only if its "fair and equitable." Protective Comm. for Indep.  
5 Stockholders of TMT Trailer Ferry Inc., 390 U.S. at 424. In evaluating any proposed  
6 compromise, the Court must consider the following factors:

7 (a) The probability of success in the litigation; (b) the difficulties, if  
8 any, to be encountered in the matter of collection; (c) the complexity  
9 of the litigation involved, and the expense, inconvenience and delay  
10 necessarily attending it; (d) the paramount interest of the creditors and  
11 a proper deference to their reasonable views in the premises.  
12 (Woodson v. Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610,  
13 620 (9th Cir. 1988) (quoting In re A&C Props., 784 F.2d at 1381))

14 Courts weigh these factors to determine whether the compromise is in the best interests of  
15 the estate. See A & C Props., 784 F.2d at 1382 (court must "weigh certain factors to  
16 determine whether the compromise is in the best interest of the bankrupt estate").

17 **B. The Factors Favor The Approval Of The Compromises Reached In The**  
18 **Supplemental Agreements.**

19 The A&C Properties factors weigh in favor of authorization of the compromises  
20 reached in the Supplemental Agreements.

21 To begin with, the Supplemental Agreements compromise an ongoing dispute  
22 between the parties on terms more favorable than PG&E might have received if this Court  
23 had to resolve the parties' interest rate dispute. It is clear that if the parties had failed to  
24 reach a compromise and instead litigated the interest rate issue before this Court, they would  
25 likely have advocated for widely divergent interest rates. In light of the large amounts owed  
26 the compromising QFs in Prepetition Payables, the consequences of an award of interest at a  
27 rate even just slightly higher than that agreed on in the Supplemental Agreements could have  
28 involved the payment of additional millions of estate dollars. More specifically, the  
Supplemental Agreements with Calpine and GWF resolve approximately one-third of the

1 approximately \$1 billion in outstanding QF Prepetition Payables. Accordingly, a Court  
2 determination in favor of an interest rate greater than five percent (5%) would have a  
3 significant impact on the estate.

4 Additionally, litigation of the interest rate dispute before this Court would  
5 certainly have involved considerable expense, inconvenience and delay. This is particularly  
6 true since it is unlikely that each QF would have made the exact same legal and factual  
7 arguments and sought the exact same interest rate. Accordingly, the Supplemental  
8 Agreements allow the estate, the QFs and the Court to avoid protracted litigation over the  
9 issue of the proper rate of interest, and to put the funds that would otherwise have been used  
10 for litigation to other uses.

11 Finally, the compromises reached in the Supplemental Agreements not only  
12 benefit the estate and the QFs, they also benefit all creditors to the extent that they preserve  
13 estate assets by: i) providing for an interest rate which is favorable to the estate by any  
14 objective measure; and ii) avoiding the cost of additional litigation.

15 Accordingly, the A & C Properties factors weigh in favor of approving the  
16 compromises reached in the Supplemental Agreements.

17  
18 II.

19 THE COURT SHOULD AUTHORIZE PG&E TO COMPROMISE SIMILAR QF CLAIMS  
20 ON THE SAME TERMS WITHOUT FURTHER NOTICE OR HEARING.

21 Pursuant to Bankruptcy Rule 9019(b), after notice and hearing, the “court may fix  
22 a class or classes of controversies and authorize the trustee to compromise or settle any  
23 controversies within such class or classes without further hearing or notice.” See also In re  
24 Guy F. Atkinson Co., 242 B.R. at 501; Boyd v. North End Auto Sales, Inc. (In re Check  
25 Reporting Servs., Inc.), 137 B.R. 653, 656 (Bankr. W.D. Mich. 1992) (“This court has  
26 previously authorized settlement of several classes of claims in this chapter 11 pursuant to  
27 Fed. R. Bankr. P. 9019(b)”).

28 Pursuant to the authority granted it by this Court, PG&E entered into

1 approximately 200 Assumption Agreements, the vast majority of which reserved the issue of  
2 interest rate and payment. In the event that PG&E and the QFs party to such Assumption  
3 Agreements cannot agree on an interest rate and payment scheme, they will likely expend  
4 considerable time and resources in multiple actions by individual QFs to litigate that issue  
5 before this Court. Accordingly, entering into Supplemental Agreements with other QFs on  
6 substantially similar terms as either Calpine or GWF is in the best interests of the estate, the  
7 QFs and the Court. In addition, such Supplemental Agreements eliminate the risk to the  
8 estate that the Court might award a higher rate of interest.

9 Accordingly, PG&E requests that the Court authorize it to enter into  
10 supplemental agreements with QFs on substantially similar terms as the Supplemental  
11 Agreements, between the filing of this motion and the hearing thereon, set for December 21,  
12 2001, provided that PG&E inform the Court and interested parties at the hearing of the  
13 identity of each such settling QF and the aggregate amount of prepetition payables to be paid  
14 under the terms set forth in the Supplemental Agreement.

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15  
16 CONCLUSION

17 For all of the foregoing reasons, PG&E respectfully requests that this Court grant  
18 the Motion and enter and order authorizing PG&E to (1) compromise its claims against both  
19 Calpine and GWF as provided by the terms of the Supplemental Agreements; and (2) enter  
20 into substantially identical Supplemental Agreements with other QFs without further notice  
21 and hearing.

22 DATED: December 7, 2001.

23 Respectfully,

24 HOWARD, RICE, NEMEROVSKI, CANADY,  
25 FALK & RABKIN  
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26 By:   
WILLIAM J. LAFFERTY

27 Attorneys for Debtor and Debtor in Possession  
28 PACIFIC GAS AND ELECTRIC COMPANY