

50-245/323

1 JAMES L. LOPES (No. 63678)
2 JANET A. NEXON (No. 104747)
3 JULIE B. LANDAU (No. 162038)
4 HOWARD, RICE, NEMEROVSKI, CANADY,
5 FALK & RABKIN
6 A Professional Corporation
7 Three Embarcadero Center, 7th Floor
8 San Francisco, California 94111-4065
9 Telephone: 415/434-1600
10 Facsimile: 415/217-5910

11 Attorneys for Debtor and Debtor in Possession
12 PACIFIC GAS AND ELECTRIC COMPANY

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

16 In re
17 PACIFIC GAS AND ELECTRIC
18 COMPANY, a California corporation,
19 Debtor.
20 Federal I.D. No. 94-0742640

21 Case No. 01-30923 DM
22 Chapter 11 Case
23 Date: June 13, 2002
24 Time: 1:30 p.m.
25 Place: 235 Pine Street, 22nd Floor
26 San Francisco, California

HOWARD
RICE
NEMEROVSKI
CANADY
FALK
& RABKIN
A Professional Corporation

27 NOTICE OF MOTION AND MOTION FOR AUTHORIZATION TO INCUR
28 ADDITIONAL EXPENSES RELATED TO PERMITS; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT THEREOF

[SUPPORTING DECLARATION OF MICHAEL SCHONHERR
FILED SEPARATELY]

Asst Add: Kids General Center

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Pacific Gas and Electric Company, the debtor and debtor in possession in the
3 above-captioned Chapter 11 case (“PG&E”), requests an order authorizing PG&E to incur
4 additional expenses related to permits as described below, outside of the ordinary course of
5 business pursuant to Bankruptcy Code Section 363(b)(1). These expenses are in addition to
6 those covered in PG&E’s prior Motion for Order Authorizing Expenditures related to
7 Permits and Franchises (the “Permit and Franchise Motion”), filed on April 19, 2002 and
8 approved by the Court after hearing conducted on May 9, 2002.

9
10 **I. FACTUAL BACKGROUND¹**

11 PG&E filed a voluntary petition for relief under Chapter 11 of the Bankruptcy
12 Code on April 6, 2001. A trustee has not been appointed, and PG&E continues to function
13 as a debtor-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

14 PG&E is an investor-owned utility providing gas and electric services to more
15 than 4.5 million customers in central and northern California serving a total population of
16 about 13 million. PG&E employs over 19,000 people and has in excess of 30,000 trade
17 creditors.

18 On April 19, 2002, PG&E, together with its parent corporation, PG&E
19 Corporation, filed its Plan of Reorganization (as amended from time to time, the “Plan”).
20 The Court-approved Disclosure Statement for the Plan, along with the Plan, will be
21 distributed to creditors for voting on June 17, 2002.

22 The Plan generally provides for the creation of three new companies, ETrans
23 LLC, GTrans LLC and Electric Generation LLC (collectively, the “New Entities”), whereby
24 PG&E will separate its operations into four lines of business based on PG&E’s historical
25 functions. Accordingly, the Reorganized Debtor will continue the retail gas and electric
26

27 ¹ The evidentiary basis and support for the facts set forth in this Motion is contained in
28 the Declaration of Michael Schonherr filed concurrently herewith.

1 distribution business, ETrans will operate the electric transmission business, GTrans will
2 operate the interstate gas transmission business, and Electric Generation will operate the
3 electric generation business.

4
5 **A. Description of Permits and Permit Application Process.**

6 PG&E holds tens of thousands of operating and land occupancy permits, licenses
7 and related governmental entitlements from local, state and federal government agencies.
8 Approximately 15,000 of these permits, licenses and entitlements (collectively, "Permits")
9 must be transferred or reissued² to the New Entities in order for the New Entities to conduct
10 business operations in accordance with applicable laws, rules and regulations.³

11 The Plan contemplates that PG&E will follow established application procedures
12 for the transfer of Permits under applicable local, state or federal law. Many Permit transfers
13 will involve ministerial review by the applicable government agency, which typically takes
14 several weeks to process following receipt of appropriate documentation. Other Permit
15 transfers will involve discretionary review and approval by the government agency, which
16 varies by agency but typically requires from one to six months to process following receipt
17 of appropriate documentation.⁴

18 PG&E is mindful of the fact that some government agencies will be receiving an
19 influx of Permit applications, which may stretch agency resources. Thus, in assessing the
20 potential time periods required for completion of the Permit transfers, PG&E is assuming
21 that typical time periods for processing applications may be extended, particularly for
22 agencies receiving multiple applications.

23
24 ²For ease of reference, the transfer or reissuance of permits is referred to hereafter as
25 "transfer".

26 ³The New Entities could begin operations without a small portion of these Permits,
27 which involve non-essential activities.

28 ⁴ If any Permits are denied by government agencies or cannot be issued on a timely
basis, PG&E reserves the right to seek relief from the Court pursuant to Bankruptcy Code
Section 1142(b) or other applicable bankruptcy law.

1 **B. Necessity for the Additional Permit Work.**

2 This Motion seeks approval for certain expenses related to the transfer of the
3 Permits to the New Entities (the "Permit Work"). This Motion supplements PG&E's
4 previous Permit and Franchise Motion, which focused on expenses related to the transfer of
5 Permits issued by *local government agencies* (as well as expenses related to obtaining new
6 franchises). This Motion focuses on expenses related to the transfer of Permits issued by
7 *state and federal government agencies*, which comprise the majority of the Permits to be
8 transferred to the New Entities.⁵ The contractors described below have specialized expertise
9 and experience in dealing with government entitlement issues and will handle, in addition to
10 the state and federal government Permit transfers, the more complex local government
11 Permit transfers as well.

12
13 **C. Description of Permit Work to be Performed by Contractors.**

14 The contractors described below (the "Contractors") will assist PG&E with the
15 process of transferring Permits to the New Entities. Although PG&E maintains internal
16 expertise in this area, the volume and timing of the Permit Work requires substantial outside
17 assistance. The Contractors will perform the Permit Work at the direction of and under the
18 supervision of PG&E.

19 The Contractors have previously worked for PG&E, are familiar with PG&E's
20 unique permit issues and possess significant experience and understanding of the local, state
21 and federal processes. The Contractors who will perform this work are as follows:

- 22 •CH2M-Hill, Inc.
23 •EDAW, Inc.
24 •Essex Environmental
25 •Matrix Environmental Planning
26 •Dinwiddie & Associates

27 Specifically, the work to be performed by each of the Contractors will include: (i)

28

⁵ There are in excess of 6,100 federal agency Permits and in excess of 6,700 state
agency Permits to be transferred to the New Entities.

1 contact with agency staff to conduct "pre-application" meetings to discuss and confirm
2 transfer requirements such as form and content of applications, key contacts and supporting
3 documentation required for the transfer process; (ii) analysis and assembly of necessary
4 supporting documentation; (iii) preparation and submission of applications for the transfer of
5 Permits; (iv) coordination and resolution of agency inquiries relating to the transfer process;
6 and (v) negotiations with agencies as necessary.

7 Each of the Contractors will perform the functions described above. However,
8 the work will be divided among the Contractors according to their availability and also
9 according to government agency focus. For example, one Contractor may handle the
10 transfer of Permits issued by certain federal agencies such as the United States Forest
11 Service (covering over 2,000 Permits), while another Contractor may handle the transfer of
12 Permits issued by the California Department of Motor Vehicles (covering over 1,200
13 Permits).

14 In addition to the Contractors, PG&E anticipates hiring independent contractors
15 to perform similar functions. These individuals will be hired on a temporary basis through
16 Corestaff Services, Inc. ("Corestaff"), and will also have familiarity with PG&E's unique
17 permit issues and experience with government agency application processes. The number of
18 additional staff required will depend on the ability of the Contractors to fully staff projects as
19 well as the scope and complexities of the Permit Work as the process advances. For
20 example, one individual (a retired PG&E employee) has been chosen to lead the process of
21 transferring Permits issued by the California Department of Transportation. PG&E
22 contemplates that additional individuals will be similarly employed on an as-needed basis.

23 PG&E requests approval to pay the Contractors (including any individuals
24 employed by Corestaff) approximately \$7 million, over the period beginning May 2002 and
25 continuing to the Effective Date (as defined in the Plan) or such earlier date on which the
26 Permit Work has been completed. PG&E will pay the Contractors on a monthly basis as
27 work is completed, based on monthly billings by the Contractors (except for individuals
28 employed by Corestaff, who will be paid on a weekly basis, based on the number of hours

1 worked).

2 PG&E believes that the Contractors and Corestaff employees are not
3 “professional persons” under the Bankruptcy Code due both to the nature of the services to
4 be provided and their limited role in connection with PG&E’s reorganization proceeding.
5 See In re That’s Entertainment Mktg. Group, Inc., 168 B.R. 226, 230 (N.D. Cal. 1994); see
6 also In re Saybrook Mfg. Co., Inc., 108 B.R. 366, 368-369 (Bankr. M.D. Ga. 1989) (in
7 determining whether a person is a professional for purposes of Section 327, courts consider
8 not only the nature of the services provided but also how central the services are to the
9 reorganization proceeding). Although the Permit Work is related to implementation of the
10 Plan, PG&E believes that the Permit Work should not be considered “central” to the Chapter
11 11 case or the Plan proceedings.

12
13 **D. Current Need for Approval of the Permit Work.**

14 The Permit Work is essential to the implementation of the Plan. PG&E believes
15 that it could take several months to complete the Permit Work necessary to enable the New
16 Entities to operate their respective businesses. The timing for Permit transfers will vary, in
17 part, due to factors over which PG&E has no control, such as the exercise of an agency’s
18 discretion in processing Permit applications, or the ability of certain agencies to process a
19 substantial number of applications at the same time. Therefore, the Permit Work must begin
20 well in advance of confirmation of the Plan, given the volume of work involved and the
21 potential time period required for completion of this work.

22 To the extent that subsequent events demonstrate that the Permit Work will not
23 be necessary, the work can be terminated immediately. PG&E’s standard contractual
24 provisions in place with the Contractors and Corestaff do not guarantee future work or any
25 minimum amount of revenue. PG&E also maintains the right to terminate the contracts at
26 any time without cause, in which case PG&E is liable only for work performed to the date of
27 termination plus costs reasonably incurred by the Contractors in terminating any work in
28 progress.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

II.
THE PERMIT EXPENSES SHOULD BE APPROVED
PURSUANT TO SECTION 363(b)(1) OF THE BANKRUPTCY CODE

PG&E seeks approval for the expenses described above (the "Permit Expenses") as a use of estate property that is outside of the ordinary course of business under Bankruptcy Code Section 363(b)(1). Since the Permit Work relates to implementation of the Plan, PG&E believes that the purpose and scope of the expenditure may be characterized as outside of the ordinary course of business and therefore requires Court approval.

The Court has considerable discretion in approving a request pursuant to Section 363(b)(1) of the Bankruptcy Code ("[t]he trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate"). See In re Montgomery Ward Holding Corp., 242 B.R. 147, 153 (D. Del. 1999) (affirming the bankruptcy court's decision to approve expenditure for employee incentive programs, noting that bankruptcy court has considerable discretion in approving a Section 363(b) motion).

In determining whether to authorize a transaction under Section 363(b)(1), courts require a debtor to show that a sound business purpose justifies such actions, applying the business judgment test. See, e.g., Stephens Indus., Inc. v. McClung, 789 F.2d 386, 389-90 (6th Cir. 1986); Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983); see also 3 Lawrence P. King, Collier on Bankruptcy ¶363.02[1][g] (15th ed. rev. 1998).

Once the debtor has articulated a rational business justification, a presumption attaches that the decision was made "on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the [debtor]." See, e.g., Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.), 147 B.R. 650, 656 (S.D.N.Y. 1992) (citing Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985)).

Here, sound business justifications exist for approval of the Permit Expenses. The New Entities will require approximately 15,000 Permits in order to commence business operations. The Permit transfers will involve months of planning, documentation and

1 potential negotiations between PG&E and various government agencies, as well as
2 processing time for the government agencies, which may exceed typical processing time
3 given the volume of applications to be received by certain agencies. Therefore, this process
4 cannot be delayed until after Plan confirmation without jeopardizing PG&E's ability to
5 timely implement the Plan.

6 Also, PG&E is solvent and has sufficient cash to pay the Permit Expenses
7 without causing any detriment to its creditors.⁶ Thus, while there is the possibility that the
8 Plan will not be confirmed and therefore the Permit Work will become unnecessary, this
9 does not justify denial of the expenditure. See Montgomery Ward, 242 B.R. at 154 (no
10 requirement for debtor to show a successful prospect of reorganization in order to justify
11 expenditure request under Section 365(b)(1)). It is sufficient that PG&E currently has sound
12 business reasons for the expenditure. In a case of this size and complexity, it is simply not
13 possible to wait until Plan confirmation to begin all of the work necessary to implement the
14 Plan. Therefore, in requesting approval for the Permit Expenses, PG&E has attempted to
15 strike a balance between being prepared to implement the Plan on a timely basis and being
16 prepared to terminate the Permit Work should the work prove unnecessary.

HOWARD
RICE
NEMEROVSKI
CANADY
FALK
& RABKIN
A Professional Corporation

27 ⁶As reflected in PG&E's March 2002 Monthly Operating Report, PG&E held more
28 than \$4.5 billion in cash reserves as of March 31, 2002.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

For all of the foregoing reasons, PG&E respectfully requests that the Court approve the Permit Expenses and grant such other and further relief as may be just and appropriate.

DATED: May 23, 2002

Respectfully,

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

By: Julie Landau
JULIE B. LANDAU

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

HOWARD
RICE
NEMEROVSKI
CANADY
FALK
& RABKIN
A Professional Corporation

WD 051502/1-1419905/994767/v1