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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

No. 01 30923 DM

Chapter 11 Case

Date: September 16, 2002
Time: 1:30 p.m.
Place: 235 Pine Street, 22nd Floor
San Francisco, California

21 DEBTOR'S NOTICE OF MOTION AND MOTION FOR
22 ORDER AUTHORIZING REFUND OF CERTAIN PROJECT DEPOSITS;
23 SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

24 [DECLARATION OF DAVID W. PHILLIPS IN SUPPORT
25 HEREOF FILED SEPARATELY]

26
27 *A001 Add: oge Mail Center*
28

1 **NOTICE OF MOTION AND MOTION**

2 **PLEASE TAKE NOTICE** that on September 16, 2002, at 1:30 p.m., or as soon
3 thereafter as the matter may be heard, in the Courtroom of the Honorable Dennis Montali,
4 located at 235 Pine Street, 22nd Floor, San Francisco, California, Pacific Gas and Electric
5 Company, the debtor and debtor in possession in the above-captioned Chapter 11 case
6 (“PG&E” or the “Debtor”), will and hereby does move the Court (the “Motion”) for entry of
7 an order authorizing PG&E to refund certain pre-petition project deposits to customers in
8 accordance with PG&E’s project deposit refund policies.

9 This Motion is made pursuant to Section 105(a) of the United States Bankruptcy
10 Code (11 U.S.C.§105(a)), and is based on the facts and law set forth herein (including the
11 accompanying Memorandum of Points and Authorities beginning on the next page), the
12 Declaration of David W. Phillips filed concurrently herewith (hereinafter referred to as the
13 “Phillips Declaration”), the record of this case and any evidence presented at or prior to the
14 hearing on this Motion.

15 **PLEASE TAKE FURTHER NOTICE** that pursuant to Rule 9014-1(c)(2) of the
16 Bankruptcy Local Rules for the Northern District of California, any written opposition to the
17 Motion and the relief requested therein must be filed with the Bankruptcy Court and served
18 upon appropriate parties (including counsel for PG&E, the Office of the United States
19 Trustee and the Official Committee of Unsecured Creditors) at least five (5) days prior to the
20 scheduled hearing date. If there is no timely objection to the requested relief, the Court may
21 enter an order granting such relief without further hearing.
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 INTRODUCTION

3 PG&E hereby moves this Court for an order authorizing PG&E to pay all
4 amounts currently owed to customers pursuant to outstanding pre-petition project deposits,
5 in an aggregate amount of approximately \$3,700,000.

6 I.

7 FACTUAL BACKGROUND¹

8 PG&E performs construction work for its customers that is generally related to
9 the overall provision of gas and electric service (in addition to line extension construction
10 work). For example, PG&E may relocate or rearrange PG&E-owned facilities, such as poles
11 or electric or gas lines, for the convenience of the customer, convert overhead facilities to
12 underground, perform maintenance or construction work on customer-owned facilities if a
13 private contractor is not available, or connect facilities such as streetlights. Because of its
14 expertise and specialized equipment, PG&E is often the first, if not the only, choice for this
15 work.

16 Usually this work requires advance engineering, and PG&E will collect an
17 advance or deposit for the engineering work, on the understanding that the deposit will be
18 returned to the customer at the completion of the engineering work, or credited against any
19 project-related construction work the applicant asks PG&E to do. The advance is also called
20 a "project deposit." The typical advance or project deposit is \$5,000 or less.

21 PG&E currently holds approximately 3,700 outstanding pre-petition project
22 deposits, totaling approximately \$5 million. PG&E estimates that, of that number, 2,880 of
23 the project deposits are for completed projects which are due to be returned to the customer.
24 These project deposits aggregate approximately \$3.7 million. The average amount owed
25 with respect to these project deposits is approximately \$1,300.

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28 ¹The evidentiary basis and support for the facts set forth in this Motion are contained in
the Declaration of David W. Phillips filed concurrently herewith.

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II.
DISCUSSION

This Court Should Authorize Payment Of The Pre-Petition Project
Deposits Pursuant To Section 105(a) And The Court's Inherent Powers.

PG&E requests that this Court authorize the payment of all outstanding project deposits pursuant Section 105(a) of the Bankruptcy Code and the Court's inherent powers. Sections 105 authorizes this Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." The purpose of Section 105 is "to assure the bankruptcy court's power to take whatever action is appropriate or necessary in aid of the exercise of their jurisdiction." 2 Collier on Bankruptcy, §105.01 at 105-06 (15th ed. Rev. 2000).

Although payment of pre-petition claims prior to confirmation of a plan in a Chapter 11 case is generally not allowed, Section 105(a) confers the power to authorize payments irrespective of priorities² where circumstances so warrant. See, e.g., Crafts Precision Indus. Inc. v. U. S. Healthcare, Inc. (In re Crafts Precision Indus., Inc.), 244 B.R. 178, 183 (B.A.P. 1st Cir. 2000) (affirming authorization of vacation payments "pursuant to § 105, irrespective of them being non-priority obligations"); In re Equalnet Communications Corp., 258 B.R. 368, 369 n.2 (Bankr. S.D. Tex. 2000) (exceptions to general rule against pre-confirmation payment of pre-petition claims "arise primarily out of common sense and the presence of a legal or factual inevitability of payment"). For instance, pursuant to Section 105(a), courts have authorized immediate redemption of pre-petition retail coupons, the honoring of credit card debits, credits or chargebacks by retail stores, and the issuance of billing credits to retail customers in connection with pre-petition telephone services. See id. at 369. Such claims are allowed to aid reorganization, prevent the loss of the Debtor's customer base, and to prevent "potential harm to . . . 'silent' or unrepresented constituencies" such as the individual customers affected by PG&E's project deposit

²Many of these project deposits may constitute priority claims pursuant to Section 507(a)(6).

1 policies. Id. at 370 n.4.

2 The logic of these cases applies with special force in the current context. The
3 Debtor's continued inability to return the project deposits may impose hardships on the
4 Debtor's customers. Although the amount of money the Debtor requests to pay represents a
5 very small percentage of the Debtor's total assets, the average per customer outstanding
6 project deposit refund amounts to \$1,300. Denying refunds to those customers who happen
7 to qualify for but do not receive refunds prior to the Petition Date may inflict undue hardship
8 and is fundamentally unfair.

9 In addition, the affected customers were required to submit these deposits in
10 connection with what has come to be recognized as a basic necessity in today's economy.
11 See Nunemaker v. P.T.&T. Co., Nos. 8735 & 8770, 1969 WL 18575 at *7, 70 C.P.U.C. 38
12 (Cal. C.P.U.C. Aug. 26, 1969) ("Water, gas, electric and telephone service have come to be
13 regarded largely as public necessities, and they may not be denied even to the impecunious
14 or to the financially irresponsible members of the public."). Customers needing PG&E's
15 engineering and construction services have little choice but to submit deposits and do so
16 with the understanding that their money will be preserved and repaid.

17 Finally, this Court has authorized the return of a number of different types of
18 deposits in this case, including service deposits (see Order Granting Debtor's Emergency
19 Motion For Authority To Refund Pre-Petition Security Deposits To Residential And Non-
20 Residential Customers filed on April 10, 2001 (Docket No. 62)) and main line extension
21 deposits (see Order Authorizing Debtor To (1) Assume Executory Main Line Extension
22 Contracts and (2) Pay Outstanding Amounts Due Under Non-Executory Main Line
23 Extension Contracts, filed on March 25 2002 (Docket No. 5547)), in each case in amounts
24 far exceeding the \$3.7 million in project deposits that Debtor seeks to refund in connection
25 with this Motion.

26 In sum, equitable considerations mitigate in favor of authorizing the Debtor to
27 refund pre-petition project deposits consistent with its project deposit refund policies. The
28 Debtor therefore requests authority to refund all customer project deposits as and when such

1 deposits become refundable consistent with such policies.

3 III.

4 CONCLUSION

5 For all of the foregoing reasons, PG&E respectfully requests that this Court make
6 and enter an order authorizing PG&E to refund pre-petition project deposits to
7 customers consistent with PG&E's project deposit refund policies.

8
9 DATED: August 13, 2002.

10 HOWARD, RICE, NEMEROVSKI, CANADY,
11 FALK & RABKIN
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12 By: Janet A. Nexon
13 JANET A. NEXON

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

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