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50-275/323

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
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In re PACIFIC GAS AND ELECTRIC COMPANY, a California corporation, Debtor. Federal I.D. No. 94-0742640	Case No. 01-30923 DM Chapter 11 Case Date: November 14, 2002 Time: 9:30 a.m. Place: 235 Pine Street, 22nd Floor San Francisco, California Judge: Hon. Dennis Montali

DEBTOR'S NOTICE OF MOTION AND MOTION FOR ORDER AUTHORIZING DEBTOR TO PAY REFUNDS TO CUSTOMERS FOR PRE- AND POST-PETITION ELECTRIC TARIFF RULE 20-B POLE REMOVAL COSTS; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

[DECLARATION OF ROCCO COLICCHIA IN SUPPORT HEREOF FILED SEPARATELY]

A001 Add: Rick Orr Mail Center

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on November 14, 2002, at 9:30 a.m., or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable Dennis Montali, located at 235 Pine Street, 22nd Floor, San Francisco, California, Pacific Gas and Electric Company, the debtor and debtor in possession in the above-captioned Chapter 11 case ("PG&E" or the "Debtor"), will and hereby does move the Court for entry of an order authorizing PG&E to refund to customers certain pole removal costs assessed under the California Public Utilities Commission ("CPUC") Electric Tariff Rule 20—Replacement of Overhead With Underground Electric Facilities ("Rule 20"), in accordance with the CPUC's March 6, 2002 Resolution E-3757, as modified by the June 6, 2002 Order Modifying Resolution E-3757 And Denying Rehearing Of The Resolution As Modified (the "Motion").

This Motion is made pursuant to Section 105(a) of the United States Bankruptcy Code (11 U.S.C.§105(a)) and is based on the facts and law set forth herein (including the accompanying Memorandum of Points and Authorities beginning on the next page), the Declaration of Rocco Colicchia in Support of Motion for Order Authorizing Debtor to Pay Refunds to Customers for Tariff Rule 20-B Removal Costs filed concurrently herewith, the record of this case, and any evidence presented at or prior to the hearing on this Motion.

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

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Pacific Gas and Electric Company ("PG&E" or the "Debtor") hereby moves this Court for an order authorizing PG&E to pay refunds to customers of certain pole removal costs assessed under the California Public Utilities Commission ("CPUC") Electric Tariff Rule 20—Replacement of Overhead With Underground Electric Facilities ("Rule 20") in accordance with the California Public Utilities Commission's ("CPUC") March 6, 2002 Resolution E-3757, as modified by the June 6, 2002 Order Modifying Resolution E-3757 And Denying Rehearing Of The Resolution As Modified (collectively, the "Resolution"), in an aggregate amount $3,509,644.13 (including interest pursuant to the Resolution).

I.

FACTUAL BACKGROUND[1]

An ongoing PG&E project is the conversion of electric service from overhead to underground facilities. This involves removing old overhead facilities, including poles, wires, transformers, and switches, and installing new underground electric service facilities. Under Rule 20-B, PG&E will replace its existing overhead electric facilities with underground electric facilities along public streets and roads or other locations mutually agreed upon when requested by an applicant if a number of conditions are met. Among these Rule 20-B conditions, applicants must agree to transfer ownership of facilities installed by the applicant such as pads, vaults, conduits, and substructures, in good condition, to PG&E and must pay a nonrefundable sum equal to the excess, if any, of the estimated costs of completing the underground system and building a new equivalent overhead system. An additional Rule 20-B condition is that the area to be undergrounded must include both sides of a street for at least one block or 600 feet, whichever is the lesser, and all existing overhead

[1]The evidentiary basis and support for the facts set forth in this Motion are contained in the Declaration of Rocco Colicchia in support hereof filed concurrently herewith (the "Colicchia Declaration").

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communication and electric distribution facilities within the area must be removed.[2]

From 1968 to approximately 1995, PG&E paid for the costs of removing these overhead facilities, including the poles. Beginning in approximately 1995, PG&E reviewed Rule 20-B and determined that the Rule authorized PG&E to charge customers for the pole removal costs when converting to underground electric service. Accordingly, at that time, PG&E began charging customers for these costs.

On March 6, 2002, the CPUC issued the Resolution, ordering electric utilities to charge removal costs, including pole removal costs, to their underground conversion program budgeted allocations, rather than to their customers.[3] The Resolution orders all charges for pole, line, and equipment removal from customers requesting undergrounding of overhead electric service to be identified and returned to such customers with interest within 180 days of the effective date of the Resolution (March 6, 2002).[4] See Resolution at 10. The CPUC ordered that interest payments be based on the commercial paper rate, and should begin from the time the customers affected by Tariff Rule 20-B service started paying for the removal of overhead poles, lines and facilities. See Resolution at 10. Once the CPUC issued the Resolution, PG&E stopped charging customers for such pole removal costs.

In accordance with the Resolution, PG&E currently owes 230 refunds for Rule 20-B pole removal costs from 1995 to April 6, 2001, totaling $3,509.644.13 (including interest pursuant to the Resolution).[5] PG&E also owes 52 refunds with respect to the post-

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[2]Rule 20 is comprised of three subsections. Under Rule 20-A, PG&E charges ratepayers for the undergrounding of electric facilities where such undergrounding has been determined to be in the general public interest. For example, ratepayers fund undergrounding under Rule 20-A if it is determined that the street or road or right-of-way is extensively used by the general public and carries a heavy volume of pedestrian or vehicular traffic. Rule 20-C provides for undergrounding of electric facilities in those areas to which Rule 20-A or 20-B does not apply.

[3]The CPUC's modification dated June 6, 2002 denied PG&E's application for rehearing and made a few non-substantive textual changes.

[4]PG&E obtained an extension of the 180 days and currently has until January 2, 2003 to provide refunds to Rule 20-B customers who paid pole removal costs.

[5]Attached to the Colicchia Declaration as Exhibit C is a list of all customers who PG&E believes are owed a Rule 20-B refund for pre-petition pole removal costs. The Exhibit sets forth, in alphabetical order, the customer name, the order number, the payment

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petition period, i.e. from the petition date until immediately after the Resolution when PG&E stopped charging customers for pole removal costs. The amount PG&E owes for post-petition pole removal refunds is $700,169.05, and PG&E intends to refund this amount to customers in the ordinary course of business.

II.

DISCUSSION

A. This Court Should Authorize The Debtor to Refund Customers For Pre-Petition Tariff Rule 20-B Pole Removal Costs Pursuant To Section 105(a) Of The Bankruptcy Code And The Court's Inherent Powers.

PG&E requests that this Court authorize PG&E to refund customers for pre-petition Rule 20-B pole removal costs pursuant to Section 105(a) of the Bankruptcy Code and the Court's inherent powers. Section 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 Lawrence P. King, 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 priorities 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 (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

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amount, the interest on the payment amount based on the commercial paper rate applicable at the relevant times, the total refund amount PG&E believes is owed to such customers, and the date that PG&E received payment from such customers.

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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 small businesses that comprise most of the potential Rule 20-B refund recipients. Id. at 370 n.4.

The logic of these cases applies with particular force in the current context. Pursuant to the Resolution, the CPUC ordered that all charges for pole, line, and equipment removal from customers requesting undergrounding of overhead electric service must be identified and returned to such customers with interest within 180 days of the effective date of the Resolution (March 6, 2002).[6] The Debtor's inability to refund amounts to these customers would prevent the Debtor from complying with the Resolution. Moreover, the authorization sought by PG&E would benefit the estate by reducing ongoing interest costs.

Additionally, the amount of money the Debtor requests to refund (i.e. approximately $3.5 million) represents a very small percentage of the Debtor's total assets. The Debtor is solvent and the small amount of money that would be paid would have no effect on the Debtor's ability to reorganize.

Finally, this Court has authorized the payment of a number of pre-petition refunds in this case, including service deposits (see Order Granting Debtor's Emergency Motion For Authority To Refund Pre-Petition Security Deposits To Residential And Non-Residential Customers filed on April 10, 2001 (Docket No. 62)) and main line extension payments (see Order Authorizing Debtor To (1) Assume Executory Main Line Extension Contracts and (2) Pay Outstanding Amounts Due Under Non-Executory Main Line Extension Contracts, filed on March 25 2002 (Docket No. 5547)), in each case in amounts

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[6] As indicated previously, PG&E has obtained an extension of the 180 days and currently has until January 2, 2003 to provide refunds to Rule 20-B customers who paid pole removal costs.

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far exceeding the $3,509,644.13 that the Debtor seeks to refund in connection with this Motion.

In sum, regulatory and equitable considerations mitigate in favor of authorizing the Debtor to refund customers for Rule 20-B pole removal costs. The Debtor therefore requests authority to refund amounts to customers for undergrounding of overhead electric service for all charges for pole, line, and equipment removal from 1995 to April 6, 2001.[7]

III.

CONCLUSION

For the foregoing reasons, PG&E respectfully requests that this Court make and enter an order authorizing PG&E to refund customers for pre-petition and post-petition Tariff Rule 20-B pole removal costs in accordance with the Resolution.

DATED: October 21, 2002.

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By: _____
CEIDE ZAPPARONI

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

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[7]Some of the refund recipients have filed claims and others have not. For administrative ease and in order to resolve the refund issue entirely and comply fully with the CPUC Resolution, PG&E has made no distinction between those refund recipients who have filed claims and those who have not.