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UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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 27, 2002 Time: 1:30 p.m. Place: 235 Pine Street, 22nd Floor San Francisco, California Judge: Hon. Dennis Montali

PG&E'S OPPOSITION TO JOINT MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS AND THE CALIFORNIA PUBLIC UTILITIES COMMISSION FOR AN ORDER APPROVING (1) PROCEDURES FOR RESOLICITATION OF PREFERENCES CONCERNING COMPETING PLANS OF REORGANIZATION FOR THE DEBTOR, (2) SUPPLEMENTAL DISCLOSURES IN CONNECTION THEREWITH, AND (3) PROPOSED FORM OF BALLOT

[SUPPORTING DECLARATION OF JAMES L. LOPES FILED CONCURRENTLY]

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INTRODUCTION AND SUMMARY OF ARGUMENT

Pacific Gas and Electric Company (the "Debtor") and the co-proponent of its plan of reorganization, PG&E Corporation (the "Parent," and together with the Debtor, "PG&E"), jointly submit this Opposition (the "Opposition") to the Joint Motion of the Official Committee of Unsecured Creditors ("OCC") and the California Public Utilities Commission ("CPUC" and, collectively with the OCC, "Movants") for an Order Approving (1) Procedures for Resolicitation of Preferences Concerning Competing Plans of Reorganization for the Debtor, (2) Supplemental Disclosures in Connection Therewith, and (3) Proposed Form of Ballot (the "Resolicitation Motion").

The Resolicitation Motion, which seeks "resolicitation of all creditor and interest holder preferences regardless of how such creditors voted on the Plans[1] [of reorganization proposed by PG&E and the CPUC]" (id. at 4:13-14) should be denied because it violates controlling bankruptcy law, which provides that only creditors and equity security holders who have voted to accept two competing plans may express their preference for one of those plans. See Fed. R. Bankr. P. 3018(c).[2] There is a sound and practical reason for this limitation—it is only in this context, i.e., where a creditor or equity holder has voted to accept both plans, that information regarding which plan such creditor or equity holder prefers is in any way relevant and useful. Where creditors and equity holders—or in this case, the vast majority of creditors and equity holders—have voted to reject one of two plans and to accept the other plan, those votes are a clear, undeniable expression of the creditors' and equity holders' preference for the one plan accepted. A resolicitation of "preferences" in this context, therefore, becomes irrelevant and could lead to confusion and contradictory data.

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[1] Capitalized terms not defined herein have the meaning ascribed to them in the Plans.

[2] Indeed, consistent with Rule 3018(c), the Movants expressly agreed to this limitation pursuant to the solicitation and voting procedures established (in response to the joint motion by PG&E and the CPUC, with the concurrence of the OCC) by this Court's May 20, 2002 Order (Docket No. 6614) (the "Solicitation Order"): "a preference will only be counted if the creditor or equity security holder votes to accept both Plans [or, in certain cases is deemed to have voted to accept both Plans]." Id. at 9:15-19

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Accordingly, if there is to be a resolicitation of preferences, which in the context of this case would be an expensive and pointless exercise given the voting results, only those classes that have voted to accept both Plans should be entitled to express a preference for one of the Plans. A solicitation of preferences from all creditors, including those that previously voted to reject one or both of the Plans, would completely eviscerate the voting process.[3] Indeed, at bottom, that is the goal of the Resolicitation Motion. Under the guise of a resolicitation of preferences, Movants again seek what this Court has twice denied – a resolicitation of votes.

Simply because the seven classes which voted to reject the CPUC Plan are subject to the cramdown provisions of Section 1129(b) of the Bankruptcy Code does not mean that their rejecting votes can or should be ignored when determining the preference of creditors and equity holders under Section 1129(c) of the Bankruptcy Code. Likewise, the fact that all but one of the voting classes voted to accept the PG&E Plan should not be overlooked when the Court considers creditor and equity holder preference under Section 1129(c). Indeed, courts which have addressed the preference of creditors issue in the competing plan context have first looked to the voting results to determine such preference. See In re Greate Bay Hotel & Casino, 251 B.R. 213 (Bankr. D.N.J. 2000); In re Treasure Bay Corp., 212 B.R. 520 (S.D. Miss. 1997). Movants, however, would have this Court ignore the voting results in this case—as proposed by Movants, creditors and equity holders who have already voted on one or both of the Plans, but who now fail to return the new so-called "preference ballot," would not be counted in determining preferences of creditors and equity holders, leading to the potential disenfranchisement of creditors and equity holders.

At the very least, the preference solicitation proposed by Movants undoubtedly would result in widespread creditor and equity holder confusion. Creditors and equity

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[3] Similarly, a resolicitation of preferences from all creditors who previously voted to accept both Plans, regardless of which class they are in, likewise would result in the minority of accepting creditors within a non-accepting class having more voting power than the majority of creditors in that class who have voted to reject one of the Plans if the prior voting results were discounted or nullified.

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holders whose preferences were rightly not solicited previously will wonder why their preferences are now being solicited and what impact such preferences might have on their prior votes. The result will be a muddled and contradictory record.

Furthermore, as a practical matter, as the CPUC and the Court have both recognized, the major parties in interest are capable of expressing (and have continued to express) their "preferences" regarding the competing Plans by their filings and arguments submitted to this Court. For example financial creditors who hold a large block (aggregating approximately $2 billion) of Class 5 General Unsecured Claims expressly continue to support the PG&E Plan and oppose the CPUC Plan, even in its most recently amended form. Thus, the Resolicitation Motion serves no legitimate or practical purpose and should be denied.

Even if the Court were otherwise inclined to authorize limited preference resolicitation, it in no event should approve the CPUC's so-called "Supplemental Disclosures,"[4] which are seriously flawed in many significant respects. In addition to being materially misleading through factual misstatements and omissions, the Supplemental Disclosures constitute a one-sided "advocacy" piece arguing strongly for support of the CPUC Plan, rather than an objective discussion of the material changes to the CPUC Plan and PG&E Plan and a fair summary of material relevant developments since the prior voting solicitation. Instead of complying with the Court's direction to work with PG&E to provide "ample opportunity to review the adequacy of, what for convenience, I'm going to call the preference disclosure,"[5] the Movants made no effort to consult with PG&E regarding the

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[4]The Resolicitation Motion (at 5:8-16) lists the following items as part of the "Supplemental Disclosures": (1) financial models prepared by UBS Warburg LLC; (2) UBS Warburg's presentation made to the rating agencies; (3) the OCC's analysis of the [CPUC Plan]; and (4) a summary of significant events since the approval of the CPUC's original disclosure statement. While items 1, 3 and 4 are attached to the Resolicitation Motion as exhibits, item (2) has not been provided by the Movants as part of the Resolicitation Motion. Obviously, PG&E and other interested parties must be provided adequate opportunity to review and respond to any proposed element of the Supplemental Disclosures prior to the Court's consideration and potential approval thereof.

[5] Official Transcript of September 20, 2002 hearing ("9/20/02 Tr.") (attached as Exhibit 1 to the accompanying Declaration of James L. Lopes in Support of the Opposition (continued . . .)

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Supplemental Disclosures in the subsequent period of almost two months before filing the Resolicitation Motion.

The biased Supplemental Disclosures contain misleading information regarding, inter alia, the OCC's changed role in this case with respect to the competing Plans, the Reorganization Agreement, the treatment of equity security interests, the financial feasibility of the CPUC Plan, the District Court's preemption ruling, the Ninth Circuit's decision in the Southern California Edison v. Lynch case and a number of other matters. The Supplemental Disclosures also omit material information regarding events that have occurred since the CPUC's original disclosure statement was approved, including communications from rating agencies indicating that the Debtor itself and at least some of the securities under the CPUC Plan would not be investment grade; objections by a major creditor group to the CPUC Plan; the testimony and trial briefs by the parties on the feasibility and legal issues associated with the CPUC Plan; and the U.S. District Court's rejection of the CPUC's motion to dismiss and motion for summary judgment against PG&E's multi-billion dollar filed rate doctrine claim, which the CPUC Plan would force PG&E to release and dismiss with prejudice. At a minimum, the Court should require that the Supplemental Disclosures be substantially revised such that the Court determines them to be objective, accurate and complete.

Likewise, the resolicitation procedures proposed by the Movants, including providing only the CPUC Plan (and not the PG&E Plan) in the materials to be distributed to creditors, are improper and should be rejected in favor of fair, even-handed procedures. Similarly, the proposed form of preference ballot must be tailored to the recipients, including separate ballot forms for beneficial and nominee holders (i.e., master ballots) of publicly held securities issued by the Debtor.

FACTUAL BACKGROUND

On June 17, 2002, a solicitation process began in which PG&E and the CPUC sought acceptances of their respective Plans from the creditors and equity interest holders in

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(. . . continued)
("Lopes Decl.")), at 82:22-24.

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this case. The balloting process was conceived and executed in a thoughtful manner subject to a joint motion by PG&E and the CPUC,[6] with the concurrence of the OCC, and approved by this Court.[7] As part of this process, and in accordance with Rule 3018(c), only creditors and equity interest holders who voted to accept both the CPUC Plan and the PG&E Plan were given the opportunity to indicate a preference for one plan or the other.

On July 29, 2002, shortly before the voting period ended, the CPUC filed an application with this Court alleging that PG&E and its third-party solicitor improperly solicited votes, and seeking a temporary restraining order to prohibit the continuing solicitation of votes, an order to require the distribution of corrective materials, an order extending the deadline for creditors to vote on the competing plans of reorganization and an order allowing creditors and equity holders to recast their ballots.[8] At a hearing on August 5, 2002, the Court rejected the CPUC's request.[9]

On September 12, 2002, the Balloting Agent filed its certification[10] of the votes on the competing Plans.[11] The PG&E Plan won the overwhelming support of 9 of the 10

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[6]Motion by PG&E and the CPUC for Order (i) Approving Notices of Non-Voting Status, Notices to Parties to Executory Contracts and Notice to State Agencies; and (ii) Approving Voting Solicitation Procedures, Form of Voting Ballots, Voting Timetable, and Tabulation Procedures Regarding Plans of Reorganization, filed on May 6, 2002 (Docket No. 6369) (the "Solicitation Motion").

[7]Order Granting Motion by PG&E and the CPUC for Order (i) Approving Notices of Non-Voting Status, Notices to Parties to Executory Contracts and Notice to State Agencies; and (ii) Approving Voting Solicitation Procedures, Forms of Voting Ballots, Voting Timetable, and Tabulation Procedures, filed on May 20, 2002 (Docket No. 6614) (the "Solicitation Order").

[8]See Complaint for Injunctive Relief; Application for Temporary Restraining Order and Order to Show Cause Re: Preliminary Injunction and related documents (Docket Nos. 1-8 in Adversary No. 02-3203).

[9]Order Denying the CPUC's Application for a Temporary Restraining Order and Order to Show Cause Re: Preliminary Injunction Concerning Voting Solicitation (Docket No. 15 in Adversary No. 02-3203) ("Order Denying Revoting").

[10]Amended and Restated Certification of Jane Sullivan with Respect to the Tabulation of Votes on the PG&E Plan and CPUC Plan (Docket No. 10108) ("Vote Certification").

[11]Pursuant to the Solicitation Order, preferences were solicited, tabulated by the Voting Agent, and are properly part of the record, but are still confidential.

Classes that voted on that Plan (all except Class 7).[12] The CPUC Plan was rejected by 7 of the 8 Classes that voted on that Plan (all except Class 4e).

On September 3, 2002, after gaining the support of the OCC for its Plan, the CPUC, along with the OCC, sought a revote on their now joint Plan,[13] arguing that the OCC support, along with certain changes made to the CPUC Plan, necessitated a new vote. This proposed new vote was not for all creditors and equity interest holders, but only those that previously voted against the CPUC Plan or voted for both Plans and preferred the PG&E Plan. At the September 20, 2002 hearing thereon, that motion was denied.[14] In denying the motion, the Court indicated that it would consider a further motion by the Movants to resolicit preferences only.

Almost two months later, on November 7, 2002, the OCC and the CPUC filed the Resolicitation Motion, ostensibly seeking to resolicit preferences only, but in reality seeking to obtain by the "backdoor" the relief denied by this Court in the Order Denying Revoting and the Order Denying Resolicitation, i.e., an opportunity to resolicit creditors and equity holders that previously rejected the CPUC Plan. The Motion seeks to obtain the "preference" vote from all voting creditors, regardless of how they voted on the Plans. Such a procedure is, of course, contrary to bankruptcy law, as well as the previous orders of this Court, including the Solicitation Order and the Order Denying Resolicitation, and is also contrary to the position previously taken by Movants with respect to the Solicitation Motion.

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[12]No votes at all were registered in one Class (Class 3b) for the PG&E Plan.

[13]Joint Motion of the California Public Utilities Commission and the Official Committee of Unsecured Creditors for an Order (1) Authorizing the Resolicitation of Votes and Preferences for Movants' Amended Plan of Reorganization for the Debtor, (2) Approving Movants' Supplemental Disclosures in Connection Therewith, (3) Approving Movants' Proposed Form of Ballot, and (4) Authorizing Inclusion of the Official Committee of Unsecured Creditors' Revised Report and Recommendations in the Solicitation Package (Docket No. 9981) (the "Prior Resolicitation Motion").

[14]Order Denying, in Part, the Joint Motion of the California Public Utilities Commission and the Official Committee of Unsecured Creditors for an Order (1) Authorizing the Resolicitation of Votes and Preferences For Movants' Amended Plan of Reorganization for the Debtor, etc., filed on October 21, 2002 (Docket No. 10645) (the "Order Denying Resolicitation").

It is clear that the Movants continue to be displeased with the results of the voting on the CPUC Plan and are again asking this Court for "another bite at the apple" to resolicit votes on both Plans. This additional bite should be denied as the relief sought by the Resolicitation Motion is not allowed under bankruptcy law and would contravene this Court's prior rulings.

I.

THE RELIEF REQUESTED BY THE MOVANTS IS AT ODDS WITH BANKRUPTCY LAW AND THIS COURT'S PRIOR RULING AND WOULD SERVE NO LEGITIMATE PURPOSE

A. Bankruptcy Code Section 1129(c)

Bankruptcy Code Section 1129(c) provides that a bankruptcy court can only confirm one Chapter 11 plan and, if more than one plan meets the requirements of Section 1129, the court shall determine which plan to confirm. In making that determination, the court shall consider the preferences of creditors and equity security holders.[15]

As discussed below, the resolicitation of the preferences of all voting creditors and equity holders as sought by the CPUC is at odds with bankruptcy law and unnecessary. It is contrary to bankruptcy law because Federal Rule of Bankruptcy Procedure 3018(c) permits only those creditors that have already voted to accept both plans to express a preference. It is unnecessary because, in considering the preferences of creditors and equity security holders, relevant case law requires that a court look first to the initial votes for or against the plans of reorganization. Given the overwhelming support for PG&E's Plan in the prior voting, creditor preference is already resoundingly clear and a resolicitation of voter preferences would be pointless.

B. Movants' Request To Resolicit All Creditors And Equity Holders Violates Bankruptcy Rule 3018(c), Which Only Allows Preferences To Be Expressed By Creditors And Equity Holders That Vote To Accept More Than One Plan

If a creditor votes in favor of one plan and against another, its preference is clear.

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[15] PG&E refers to Pacific Gas & Electric Company's Response to the Court's July 12, 2002 Order for Further Briefing in Connection with Plan Confirmation Hearing, filed July 29, 2002 (Docket No. 9295), at pp. 6-12, for a more thorough discussion of Section 1129(c).

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Thus, it is only makes sense for creditors who vote in favor of more than one plan to be entitled to express a preference. Following this undeniable logic, Federal Rule of Bankruptcy Procedure 3018(c) provides that only those creditors who vote in favor of more than one plan are entitled to express a preference among the plans so accepted:

> "If more than one plan is transmitted . . . and if acceptances are filed for more than one plan, the creditor or equity security holder may indicate a preference or preferences among the plans so accepted." (Fed. R. Bankr. P. 3018(c) (emphasis added))

Thus, the only time when a creditor or equity security holder is permitted to express a preference among competing plans is when that creditor or equity security holder has voted to accept both plans. See In re Media Central, Inc., 89 B.R. 685, 689 (Bankr. E.D. Tenn. 1988). Citing to Rule 3018(c), the Media Central court explained: "[b]ecause more than one plan may be sent to creditors and equity security holders for their vote, the ballot makes provision for creditors and equity security holders to express their preference among plans they have accepted." Id. (emphasis added).

This rule has been unchallenged before the Movants' resolicitation efforts. In fact, the Solicitation Motion filed jointly by PG&E and the CPUC (with the OCC's concurrence) acknowledged the dictate of Rule 3018(c) and provided that preference votes would be sought only from those creditors and equity holders that accepted both plans:

> "For the purposes of tabulating the preferences of those PG&E and CPUC Classes entitled to express a preference, a preference will only be counted if the creditor or equity security holder votes in favor of both Plans and expresses a preference for only one of the Plans." (Solicitation Motion at 25:13-16)

Accordingly, the ballots only authorized a preference to be expressed when a creditor or equity security holder voted to accept both Plans, and the Court's Solicitation Order provided:

> "For the purposes of tabulating the preferences of those PG&E and CPUC Classes entitled to express a preference, a preference will only be counted if the creditor or equity security holder votes to accept both Plans (or, in the case of a holder of a Claim in Class 3 or 4a under the CPUC Plan, such creditor is deemed to have voted to accept the CPUC Plan and votes to accept the PG&E Plan), and expresses a preference for only one of the Plans." (Solicitation Order at 9:14-19)

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None of the briefs filed by parties (including the CPUC and the OCC) discussing Section 1129(c) issues in response to the Court's July 12, 2002 Order for Further Briefing (Docket No. 8744) questioned these requirements and limitations with respect to the expression of voter preference. Nor have the Movants provided any authority supporting their contention that creditors and equity holders who rejected one or both of the Plans are now entitled to express a preference regarding the competing Plans.

C. Resolicitation Of Preferences Is Unnecessary Because Creditors And Equity Security Holders Have Already Expressed Their Strong Preference For The PG&E Plan Over The CPUC Plan Based On Their Overwhelming Acceptance Of The PG&E Plan And Overwhelming Rejection Of The CPUC Plan

In examining creditor and equity security holder preference as a factor in determining which competing plan to confirm under Bankruptcy Code Section 1129(c), a court must focus first on the votes of creditors and equity holders to accept and reject each plan. See Fed. R. Bankr. P. 3018(c); In re Greate Bay Hotel & Casino, 251 B.R. 213, 245-46 (Bankr. D.N.J. 2000); In re Treasure Bay Corp., 212 B.R. 520 (S.D. Miss. 1997).

"The preferences of creditors is reflected in the voting results." In re Greate Bay Hotel & Casino, 251 B.R. at 245. In Greate Bay, the court examined the votes to accept or reject the competing plans to determine creditor preference. Similarly, in Treasure Bay, once the court examined the creditors' votes to accept or reject the competing plans, any further analysis of creditor preference was unnecessary:

> "The creditors have voted overwhelmingly in favor of the debtors' plan. The Santa Fe amended plan has been accepted by two impaired classes of claims and rejected by all others. The debtors' plan has been accepted by all but one class of impaired claims . . . . Considering the preferences of the creditors and equity security holders, the court finds that even if the Santa Fe amended plan were confirmable, the debtors' plan is preferable. (Treasure Bay, 212 B.R. at 548)

Treasure Bay and Greate Bay demonstrate that creditor and equity holder votes to accept or reject competing plans of reorganization are the most important evidence of creditor and equity holder preference. It is these votes that must be taken into account before considering the preference expression of creditors and equity holders is even

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necessary.

Here, creditors and equity holders have already provided a clear indication of their strong preference for the PG&E Plan over the CPUC Plan based on their votes to accept the PG&E Plan and to reject the CPUC Plan by an overwhelming margin. Moreover, preferences have already been solicited from the small number of creditors who voted to accept both Plans. Resolicitation of preferences, particularly as to those entitled to re-express their preference (i.e., creditors that have accepted both Plans), would be a pointless exercise. Indeed, the Movants acknowledge that a resolicitation of preference limited to those creditors who voted in favor of both competing Plans would be "completely meaningless" in view of the fact that the vast majority of creditors and equity security holders voted to accept the PG&E Plan (9 of the 10 voting Classes) and to reject the CPUC Plan (7 out of 8 Classes)[16]:

> "given the lopsided voting results in this Case, such a limited resolicitation would render completely meaningless any resolicitation of votes." (Id. at 3 n. 2)
>
> "requir[ing] that a creditor vote to accept both competing plans as a prerequisite to such creditor's ability to express a preference for one plan . . . , given the lopsided voting results . . . would . . . render any preference resolicitation a mere exercise in futility." (Id. at 5:2-6)

Since, pursuant to controlling bankruptcy law and this Court's prior order, any resolicitation of preference must be limited to creditors who voted in favor of both

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[16]While neither Section 1129(c) nor Rule 3018(c) expressly discusses preference in terms of classes, the reported case law reflects that courts consider creditor preference based on the aggregate preferences expressed by each class, similar to how voting results are assessed. See, e.g., In re Greate Bay Hotel & Casino, 251 B.R. 213, 245-46 (Bankr. D.N.J. 2000); In re Treasure Bay Corp., 212 B.R. 520 (S.D. Miss. 1997). Likewise, the Solicitation Motion (at 25:13-15) and Solicitation Order (at 9:14-15) provide for "tabulating the preferences of those PG&E and CPUC Classes entitled to express a preference." Based on the Court's Order Denying Resolicitation, rejecting Movants' request for creditors and equity holders to revote on the Plans, it would be futile to allow anyone but those in a Class that accepted both Plans to be resolicited regarding preference. Allowing creditors and equity holders in nonaccepting Classes who individually voted to accept both Plans to express a preference would be a meaningless exercise, because even if such parties somehow preferred the CPUC Plan over the PG&E Plan, this could not reverse the voting results in such Classes accepting the PG&E Plan and rejecting the CPUC Plan.

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competing Plans, and the Movants themselves acknowledge that such resolicitation is pointless based on the overwhelming voting results in favor of the PG&E Plan, the Court should deny the Resolicitation Motion.

D. Resolicitation Of Creditor Preference On The Competing Plans Would Result In Significant Confusion In Multiple Respects Without Any Corresponding Benefit

The requested preference resolicitation would doubtlessly result in widespread confusion on many levels without any identifiable benefit. Among other things, the relief requested by the Resolicitation Motion risks creating a contradictory record regarding the preferences of creditors with respect to the competing Plans. If the Movants' hopes are realized and a creditor that voted in favor of the PG&E Plan and against the CPUC Plan (thereby clearly preferring the PG&E Plan over the CPUC Plan) could nevertheless express a preference for the CPUC Plan through the resolicitation, this would result in a contradictory record. If this actually occurred, there is no guidance proffered as to how the Court should or could evaluate such a contradictory and confusing record in considering the preferences of creditors and equity security holders as required by Section 1129(c), particularly in view of the fact that there is no legal basis for the Court to nullify or discount the previous votes of creditors and equity security holders.

Furthermore, because the Court has previously determined that creditors and equity security holders will not be allowed to revote on the Plans, there presumably would be misunderstanding regarding what is being asked of them through the preference resolicitation. The purpose of such resolicitation of preference will not be readily apparent to many creditors, particularly those that are relatively unsophisticated. For example, creditors whose preferences were not previously solicited because they rejected one or both of the Plans are likely to be confused as to why their "preference" is being solicited now. Creditors also are likely to be confused regarding the impact that such a "preference" expression might have on their previous vote.[17]

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[17] Indeed, in denying the Prior Resolicitation Motion, the Court stated its view that (continued . . .)

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Because of such confusion, and because many creditors may feel that they have clearly expressed their position regarding the Plans during the previous balloting process, there is a possibility that a relatively small amount of new preference expressions will be received, so that such responses may not be representative of creditors' actual preferences regarding the competing Plans. Again, there is no guidance proffered as to how the Court should or could consider a smaller number of new preference votes, as compared to the large number of votes to accept the PG&E Plan and reject the CPUC Plan.

Moreover, as a practical matter, as the CPUC itself has recognized, the major parties in interest are capable of expressing (and have continued to express) their "preferences" regarding the competing Plans by their filings and arguments submitted to this Court.[18] As the CPUC's counsel argued to this Court in seeking approval of the Solicitation Motion:

> "the parties that really care will find their way to this courtroom and express a preference in connection with the confirmation hearings . . . . [T]hose that are really significantly affected and have a strong preference I think will be heard in the confirmation process." (May 15, 2002 Official Transcript (copies of relevant pages attached as Exhibit 2 to Lopes Decl.), at 49:13-19)

The Court has also acknowledged this point. See 9/20/02 Tr. at 55:16-24 (where the Court responded "I know that well" to the statement by PG&E's counsel that "there are very sophisticated creditors in this case who are owed a lot of money and can very easily make their preferences known to this Court").

In fact, financial creditors who hold a large block (aggregating approximately $2 billion) of Class 5 General Unsecured Claims expressly continue to support the PG&E Plan and oppose the CPUC Plan, even in its most recently amended form. See Trial Brief of Certain Financial Creditors in Opposition to CPUC and OCC Plan, filed by certain Financial

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(. . . continued)
revoting does not "justif[y]the confusion and the expense that will follow with a re-solicitation." (9/20/02 Tr. at 81:4-8)

[18]Further, creditors and interest holders can seek to change their votes on the Plans under Federal Rule of Bankruptcy Procedure 3018(a).

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Creditors on November 15; 2002 (Docket No. 11061).[19]

Based on the foregoing, the proposed resolicitation of preferences will be a confusing exercise having little or no impact on the Court's determination under Section 1129(c) as to which Plan to confirm.

E. The Resolicitation Motion Is A Thinly Disguised Attempt By Movants To Again Seek The Relief That This Court Has Repeatedly Denied—Revoting By All Voting Creditors And Equity Security Holders On The Competing Plans

The Resolicitation Motion requests relief that the law and the Court's Solicitation Order do not allow: a resolicitation of the preferences of all voting creditors and equity interest holders, even those who did not vote to accept either or both Plans. Thus, the Movants are seeking relief that the Court previously denied (pursuant to the Order Denying Revoting and Order Denying Resolicitation) by the "backdoor," i.e., an opportunity to resolicit creditors and equity holders that previously rejected the CPUC Plan. Indeed, the Movants make no secret of their intent to run an "end run" around the Order Denying Revoting:

> "A new resolicitation of preferences will help neutralize any harm resulting from PG&E's alleged improper solicitation of votes." (Resolicitation Motion, at 5:23-24)

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[19]In addition to widespread confusion, the resolicitation of creditor preference would likely result in unnecessary cost and delay, and would not be completed within the time frame previously directed by the Court. Based on the Voting Agent's estimate of the minimum time needed for the simplest form of resolicitation, the resolicitation, reballoting and vote tabulation process would minimally require approximately two and one-half months from the time supplemental disclosures and ballots are approved by the Court, and could be substantially more. See Declaration of Jane Sullivan regarding the Prior Resolicitation Motion, filed September 17, 2002 (Docket No. 10220) ("Sullivan Declaration"), Ex. A, at 1; Declaration of David M. Kelly in support of PG&E's opposition to the Prior Resolicitation Motion, filed September 17, 2002 (Docket No. 10218) ("Kelly Declaration") ¶¶8-9. Allowing for even a relatively short time to cure the pervasive defects in the Supplemental Disclosures, as discussed below, the results of such resolicited preferences would apparently not be available to the Court until at least late February 2003, while the confirmation hearings are expected to be concluded by January 2003. Consequently, the anticipated timing of the preference resolicitation contravenes the Court's direction that such results "come in certainly by the time we realistically []think the confirmation trial will be ended." 9/20/02 Tr. at 82:14-15. The total printing, mailing and voting agent costs of such preference resolicitation are likely to exceed $1 million, based on the cost of the original solicitation, balloting and vote tabulations. See Kelly Declaration ¶¶3-7.

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The Court should not allow the Movants to defeat its prior rulings and have yet one more bite at the apple. Having rejected Movants' request for all creditors and equity holders to revote pursuant to the Order Denying Resolicitation, it would not be appropriate for the Court to allow such resolicited preferences to potentially contradict the prior voting results on the Plans. It is also improper for Movants to seek through the Resolicitation Motion the relief at issue in the adversary proceeding brought by the CPUC regarding voting solicitation (see n. 8 above and accompanying text) without making any showing that such relief is warranted, particularly in view of the fact that the CPUC has failed to actively pursue that case since the Order Denying Revoting.

II.

EVEN IF THIS COURT WERE INCLINED TO ALLOW PREFERENCE RESOLICITATION, IT SHOULD REJECT THE MOVANTS' ONE-SIDED PROPOSED SUPPLEMENTAL DISCLOSURES, WHICH ARE INACCURATE, MISLEADING AND OMIT CRUCIAL MATERIAL INFORMATION, AS WELL AS THEIR FLAWED RESOLICITATION PROCEDURES

A. Movants' One-Sided Proposed Supplemental Disclosures Are Inaccurate, Misleading And Omit Crucial Material Information

If, notwithstanding the foregoing, this Court is inclined to allow any type of resolicitation of creditor preference, it should reject the obviously biased Supplemental Disclosures, which are replete with misleading and inaccurate information, and omit crucial material information regarding the changes to the Plans and other pertinent developments since the prior voting.

At a minimum, as directed by the Court at the September 20, 2002 hearing denying the Prior Resolicitation Motion, PG&E's input is necessary[20] and the Court should ensure that any supplemental disclosures are objective, accurate and reasonably complete, consistent with the policies underlying approval of a disclosure statement under Section 1125. Rather than complying with the Court's direction and consulting with PG&E to craft

[20] See (9/20/02 Tr. at 82:20-24) (Court's direction for Movants to work with PG&E to provide "ample opportunity to review the adequacy of, what for convenience, I'm going to call the preference disclosure").

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objective, adequate disclosures, the Movants' proposed Supplemental Disclosures constitute a one-sided and misleading "advocacy" piece.

The OCC's role in this is particularly inappropriate. A significant portion of the Supplemental Disclosures consists of the "Committee's Analysis of the Competing Plans" and the Movants' "Conclusion and Recommendation." Such "recommendations" are conspicuously interspersed throughout the Supplemental Disclosures.

Now that the OCC has become a co-proponent of the CPUC Plan, it is entirely inappropriate for the OCC to attempt to obtain Court approval of a "recommendation" to creditors as part of supplemental disclosures that should objectively describe to creditors relevant changes to the Plan and other recent developments. The OCC can no longer lay claim to the official creditors committee's more typical role of a neutral broker, and including the OCC's "recommendation" of its own Plan in any Court-approved solicitation materials would be extremely inappropriate. Thus, the Movants' "analysis" and "recommendations" must be deleted from any Supplemental Disclosures.

Some of the material errors and omissions in the proposed Supplemental Disclosures are discussed below. Such discussion is intended to be illustrative of the seriously defective nature of the Supplemental Disclosures, rather than a thorough critique of all information contained therein.

In addition, the proposed preference resolicitation almost certainly would be based on outdated information about the Plans and other recent material developments, as the matters discussed in the CPUC's proposed Supplemental Disclosures (even ignoring their defective nature, as discussed below) are necessarily a "moving target" based on continued changes to the CPUC Plan and related developments, as the Court has recognized.[21] As the Court stated in denying the Prior Resolicitation Motion:

"I think you've got to close the voting booth at some point and see

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[21] See 9/20/02 Tr. at 83:7-9 ("obviously, having just observed that we have a moving target here, at some point, we have to, you know, meet the deadline, as the journalists might say.")

where you go from there. . . . I think finality is important, and I think a lack of confusion is important." (9/20/02 Tr. at 77:24-25; 80:10-11)

1. Introduction and Background

This section of the Supplemental Disclosures, while discussing several matters related to voting on the Plans, inexplicably lacks any description of the vote tabulation regarding the competing Plans, a recent and very material event. As indicated above, the Vote Certification reflects overwhelming support for the PG&E Plan (which garnered acceptances from 9 of the 10 impaired classes thereunder that voted), and little support for the competing CPUC Plan (which managed to obtain acceptance of only 1 impaired class out of the 8 impaired classes thereunder that voted). See generally Vote Certification, Exs. B, D. These results express the creditors' and equity security holders' clear preference for the PG&E Plan over the CPUC Plan. Any creditors who are being resolicited regarding their preference between the Plans would have to be informed of the results of the voting on the competing Plans, which is surely relevant to the credibility of the Movants' statements concerning the CPUC Plan and its chances of achieving confirmation.

The Movants' failure to adequately describe the Order Denying Resolicitation is likewise misleading. The Supplemental Disclosures merely state in a footnote (at 2 n.2) that "at the September 20, 2002 hearing, the Court also ruled that resolicitation of acceptances and rejections would not be required because both Plans received at least the minimum amount of votes to meet the voting component of the confirmation requirements." The Supplemental Disclosures fail to indicate that the Movants' Prior Resolicitation Motion was denied by the Court, which stated "I don't see a need to have any resolicitation of the creditor universe generally at this point." 9/20/02 Tr. at 78:14-15.

2. Reorganization Agreement

The Supplemental Disclosure's description of the Reorganization Agreement is seriously misleading in a number of significant respects. As stated in the Supplemental Disclosures (at p. 5), the CPUC Plan is expressly conditioned on the CPUC and the Debtor entering into the Reorganization Agreement, a multi-year ratemaking agreement, purporting

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to obligate the CPUC to establish and maintain the Debtor's overall retail electric rates at certain levels for the up-to-30 years that the securities proposed under the CPUC Plan are outstanding. Among other things, the Reorganization Agreement purports to obligate the CPUC to establish and maintain the Debtor's retail electric rates at levels sufficient to "facilitate the Debtor's achievement and maintenance of investment grade ratings." Supplemental Disclosures, at p. 5.

However, the Supplemental Disclosures do not even mention the risks—as discussed in great detail in PG&E's Trial Brief in Opposition in the CPUC Plan filed on November 8, 2002 (Docket No. 10983)—that the CPUC's attempt to bind itself irrevocably to future rates is ultra vires under express provisions of the California Public Utilities Code and case law that make clear that the CPUC has no authority to bind future commissions or to restrict the CPUC's power to fix or revise public utility rates in the future.

Tellingly, nothing in the Supplemental Disclosures discusses any of the foregoing or even mentions the risk that the CPUC lacks the legal authority to enter into the Reorganization Agreement or that it is legally unenforceable, thereby dooming the CPUC Plan. This alone makes the Supplemental Disclosures materially misleading.

In addition, the Supplemental Disclosures fail to indicate that the CPUC's promises in the Reorganization Agreement are apparently illusory. For example, while the Supplemental Disclosures state (at p. 5) that the Reorganization Agreement "requires the [CPUC] to establish retail electric rates for the Debtor's customers sufficient to . . . pay for the Debtor's prudently-incurred costs . . . .," it does not disclose that there is no firm, binding commitment, only vague language that leaves the CPUC free to interpret what costs have been "prudently incurred." In fact, the CPUC's general counsel has testified in this case at the confirmation hearing that the Reorganization Agreement is essentially meaningless, acknowledging that "the [R]eorganization Agreement requires [the] CPUC to do what it is already obligated to do under state law." Transcript of CPUC Plan confirmation hearing, Testimony of Gary Cohen (hereafter "Cohen Tr."), November 18, 2002 (copies of relevant pages attached as Exhibit 3 to Lopes Decl.), at 108:13-17.

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Similarly, while the Supplemental Disclosures (at p. 5) state that "the Reorganization Agreement requires the CPUC to establish retail electric rates for the Debtor's customers sufficient to . . . facilitate the Debtor's achievement and maintenance of investment grade ratings," the CPUC's general counsel has testified in this case that this merely requires the CPUC to consider the issue of investment grade ratings as a factor in setting electric rates. Cohen Tr., November 18, 2002 (Lopes Decl. Ex. 3), at 101:3-7.

Based on the foregoing, the discussion of the Reorganization Agreement in the Supplemental Disclosures is extremely misleading and should not be approved.

3. Substitution of Preferred for Common Stock

The proposed Supplemental Disclosures state (at p. 6) that as a result of the substitution of additional debt and preferred stock securities for the common equity securities proposed to be issued under the CPUC Plan, "the Proponents believe that the holders of Class 14 Common Stock Equity Interests no longer are impaired and are presumed to have accepted the Second Amended Plan" and that this "moots certain confirmation objections to the [CPUC's] Original Plan, including certain of [PG&E's] objections."

These assertions are materially misleading, if not utterly erroneous. In fact, PG&E maintains that Class 14 is impaired under the CPUC Plan within the meaning of Section 1124 because the CPUC Plan alters the legal, equitable and/or contractual rights of the holders of Class 14 interests. Among other things, the CPUC Plan improperly transfers the residual value of the PG&E estate which belongs to Class 14 interest holders to or for the benefit of ratepayers, who have no legal entitlement to a distribution from the estate, by, inter alia, (1) abandoning assets valued in the billions of dollars through the release of the "filed rate" litigation and other claims, and (2) confiscating approximately $1.6 billion attributable to PG&E's authorized utility return on investment.

Furthermore, the Supplemental Disclosures do not discuss the significant risks that: (1) the CPUC Plan does not satisfy the "best interest of creditors" test of Section 1129(a)(7), because the Class 14 equity interests would be worth more in a liquidation under

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Chapter 7 than under the CPUC Plan; and (2) the CPUC Plan does not satisfy the "cramdown" requirements of Section 1129(b).

The failure to even mention these issues makes the Supplemental Disclosures materially misleading.

4. Financial Feasibility of the CPUC Plan

The discussion of the financial feasibility in the Supplemental Disclosures is also seriously flawed and objectionable. The Supplemental Disclosures fail to address the significant risks (discussed in great lengths in PG&E's Trial Brief in Opposition to the CPUC Plan) that the financing called for in the CPUC Plan is unattainable and that the CPUC Plan therefore is not feasible. In its most recent incarnation, the CPUC Plan requires the Debtor to issue $8.3 billion in new debt securities and $500 million in new preferred stock securities, and to establish credit facilities totaling $1.9 billion. Despite calling for these massive financings, the Supplemental Disclosures do not even mention that the CPUC Plan fails to address and resolve the fundamental issues impacting the Debtor's creditworthiness: the uncertainty created by the California regulatory environment regarding the Debtor's ability to recover its costs and a reasonable return on equity. Nor do the Supplemental Disclosures discuss the CPUC Plan's inability to return the Debtor to the investment grade rating it had historically enjoyed prior to the California energy crisis.

The Supplemental Disclosures also fail to adequately address the likelihood that the securities offerings called for in the CPUC Plan will receive only sub-investment (or "junk") ratings, and that the Debtor will not be able to complete those offerings.[22] In fact, the indicative ratings and credit assessments that the CPUC has obtained from Fitch Ratings and Standard & Poor's provide "junk" rather than investment grade ratings for at least some (and potentially all) of the securities proposed to be issued under the CPUC Plan, and are based on the satisfaction of a number of conditions, some of which are very unlikely to

[22]The Supplemental Disclosures also do not reveal that the condition precedent to the effectiveness of the CPUC Plan of investment grade ratings for the Debtor and its debt securities (CPUC Plan §8.2(h)), can be waived under the CPUC Plan (id. §8.4).

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occur;[23] in addition, Standard & Poor's "issuer credit rating" of the Debtor itself under the CPUC Plan is "speculative" (i.e., not investment grade). See Lopes Decl. Exs. 5, 6.

The description of a new "regulatory asset" in the Supplemental Disclosures is also inadequate. The Supplemental Disclosures states (at p. 7) that the CPUC Plan:

> "provides the Reorganized Debtor with a $1.75 billion 'regulatory asset' that will increase the Reorganized Debtor's 'rate base' by an equivalent amount. The $1.75 billion 'regulatory asset' will amortize over 10 years, such amortization to be recoverable by the Reorganized Debtor in rates. The amortization will increase the Reorganized Debtor's funds flows by $175 million per year . . . ."

The nature and payment probability of this regulatory asset is not explained in the Supplemental Disclosures. Nor do the Supplemental Disclosures acknowledge that the specific amortization of this regulatory asset is not contained in the CPUC Plan or the Reorganization Agreement.

5. District Court's Decision Regarding Preemption

The Supplemental Disclosures fail to address the significance of the United States District Court's August 30, 2002 decision that PG&E is entitled to rely on the doctrine of express preemption at the confirmation hearing on the PG&E Plan. The CPUC's objection to PG&E's reliance on the express preemption doctrine has been a major basis of the CPUC's opposition to confirmation of the PG&E Plan. By any measure, this ruling materially aids PG&E's confirmation efforts, and failure to fully disclose this significant development renders the Supplemental Disclosures inadequate and misleading.

The Supplemental Disclosures also do not reflect several recent developments in that case, including: (1) on November 14, 2002, the motion for a stay of the District Court decision pending appeal to the Ninth Circuit Court of Appeals was denied by the District Court; and (2) on November 19, 2002, the Ninth Circuit issued an order in the appeal, setting

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[23] For example, "the Standard & Poor's credit assessment is predicated upon the satisfaction of the following conditions: . . . [r]eceipt of a legal opinion from independent California counsel satisfactory in form and substance to Standard & Poor's to the effect that the Reorganization Agreement and the regulations referred to in the preceding paragraph will bind the CPUC through the life of the Securities." Lopes Decl. Ex. 5, at 3.

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a briefing schedule that ends in late December 2002 and requiring that the case be set for hearing as soon as is practicable.

6. Ninth Circuit's Decision in SCE v. Lynch

The Supplemental Disclosures contain materially misleading statements regarding the Ninth Circuit's September 23, 2002 decision in the Southern California Edison v. Lynch case,[24] some of which are demonstrated by the CPUC's own testimony before this Court at the hearing on confirmation of the CPUC Plan. For example, the Supplemental Disclosures state (at p. 13) that "the [Movants] believe that [the Ninth Circuit's opinion] does not stand as an obstacle to confirmation of the [CPUC Plan]." By contrast, the CPUC's general counsel has recently testified in this case that the CPUC Plan cannot be confirmed unless and until the California Supreme Court rules favorably for the CPUC in that case. 11/19/02 Cohen Tr. (copies of relevant pages attached as Exhibit 4 to Lopes Decl.), at 53:7-14.[25]

Furthermore, while the Movants opine in the Supplemental Disclosures (at p. 12) that the issues raised by SCE v. Lynch "impact the feasibility of both Plans," they fail to disclose that PG&E disagrees with this assessment. Likewise, the Supplemental Disclosures do not discuss that SCE v. Lynch threatens the viability of the CPUC Plan (but not the PG&E Plan) based on the illegality of the Reorganization Agreement. Among other things, the Ninth Circuit ruled that a settlement agreement between Southern California Edison and the CPUC in the form of a stipulated judgment must be vacated as void and unenforceable because Article III, Section 3.5 of the California Constitution denied the CPUC authority to agree to a settlement that would require the CPUC not to follow California statutes. That decision also reinforced the general rule (discussed in Section II.A.2 above) that the CPUC may not enter into a "rate agreement" that attempts to bind the CPUC regarding future utility

[24] Southern Cal. Edison Co. v. Lynch, 307 F.3d 794, 808-09 (9th Cir. 2002).

[25] On November 20, 2002, the California Supreme Court scheduled a briefing schedule that runs through April 2003 in this case, with oral argument to follow sometime thereafter. Thus, based on this matter alone, the CPUC Plan realistically cannot be confirmed prior to the Summer of 2003.

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rates.

7. Other Developments Not Discussed In The Supplemental Disclosures

The Supplemental Disclosures do not discuss or even mention recent amendments to the PG&E Plan and recent material events that are expected to enhance the likelihood of the PG&E Plan being confirmed and becoming effective. These include the following:

(1) Modifications dated July 9, 2002 and October 18, 2002 to the PG&E Plan, including improved treatment for Class 3a, Class 4e, Class 6 and priority tax claimants.

(2) On August 2, 2002, PG&E received confirmation from the Internal Revenue Service that the reorganization transactions contemplated by the PG&E Plan constitute a tax-free reorganization.

(3) On October 10, 2002, a FERC administrative law judge issued an initial decision finding that Gen had provided sufficient evidence to provide a basis for a decision regarding whether the 12-year contract under which Gen will resell its power to the Debtor was just and reasonable.

In addition, the Supplemental Disclosures do not discuss or even mention recent judicial and regulatory decisions that are pertinent to confirmation and implementation of the PG&E and CPUC Plans, including the following:

(1) On July 25, 2002 the District Court issued an order in PG&E's Filed Rate Case denying motions by the CPUC and a consumer group to dismiss PG&E's complaint on Eleventh Amendment, Johnson Act, and other jurisdictional grounds, and denying cross-motions for summary judgment, allowing the case to proceed to trial. In rejecting the CPUC's motion to dismiss and motion for summary judgment, the court found that the federal filed rate doctrine applied to the costs incurred by PG&E under federally approved filed rates, and therefore the CPUC may not preclude PG&E from recovering such costs in its retail rates. On October 18, 2002, the District Court issued an order certifying the defendants' appeal of the Eleventh Amendment and Johnson Act rulings as frivolous, and denying their request for a stay of all District Court proceedings pending their immediate

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appeal of those two rulings. Notwithstanding these favorable developments regarding PG&E's filed rate doctrine claims, the Supplemental Disclosures do not disclose that the CPUC Plan would require PG&E to dismiss with prejudice these claims and all other related claims.

(2) CPUC Decision 02-10-062, dated October 24, 2002, which adopts the regulatory framework under which PG&E shall resume full electricity procurement responsibilities on January 1, 2003.

(3) CPUC Decision 02-09-053, dated September 19, 2002, which allocates existing DWR contracts among the utilities and addresses related contract allocation issues.

B. The Resolicitation Procedures Proposed By The Movants Are Flawed, Including The Refusal To Include PG&E's Amended Plan In the Resolicitation Package

The Movants propose to include their Supplemental Disclosures, including a "redlined" version of the CPUC Plan, in the preference resolicitation package. However, the Movants inexplicably propose not to include the amended PG&E Plan, or any version of the PG&E Plan, apparently expecting that creditors will have ready access to the version of the PG&E Plan that they received many months ago. See Supplemental Disclosures, Exhibit B (proposed form of ballot). Such proposed procedures are blatantly unfair and unsupportable. At a minimum, the current version of the PG&E Plan, with all modifications to date, should be provided to creditors.

In addition, if the Court is inclined to allow any type of resolicitation of creditor preferences, the form of ballot should be revised to reflect the Court's ruling on the Resolicitation Motion and tailored to the recipient, including separate ballot forms for beneficial and nominee holders (i.e., master ballots) of publicly held securities issued by the Debtor, similar to the different ballot forms used in the prior vote solicitation. Further, there should be a conspicuous notice in the "box" in which creditors express their preference making it clear that this is not a new vote on the Plans and that their expression of preference will not change their prior voting results on the Plans.

CONCLUSION

For all of the foregoing reasons, the Resolicitation Motion should be denied. Alternatively, if the Court is inclined to grant any relief to Movants, it should (1) limit preference resolicitation to creditors in the one class (Class 4e) that voted to accept both Plans, (2) require that the Supplemental Disclosures be substantially revised such that the Court determines them to be objective, accurate and complete, (3) direct that the form of preference resolicitation ballot be revised, as discussed above, and (4) ensure that the preference resolicitation procedures are fair and even-handed, including requiring inclusion of the most recently modified PG&E Plan.

DATED: November 22, 2002

Respectfully,

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By: _____
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