

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

50-275/323

In re:
PACIFIC GAS AND ELECTRIC CO.

Bankruptcy No.: 01-30923
R.S. No.:
Hearing Date: February 27, 2003
Time: 1:30 PM

Relief From Stay Cover Sheet

Instructions: Complete caption and Section A for all motions. Complete Section B for mobile homes, motor vehicles, and personal property. Complete Section C for real property. Utilize Section D as necessary. If moving party is not a secured creditor, briefly summarize the nature of the motion in Section D.

A Date Petition Filed: April 6, 2001
Prior hearings on this obligation: None.

Chapter: 11
Last Date to File §523/§727 Complaints:

B Description of personal property collateral (e.g. 1983 Ford Taurus): N/A

Secured Creditor _____ or lessor _____

Fair market value: \$ _____

Source of value: _____

Contract Balance: \$ _____

Pre-Petition Default \$ _____

Monthly Payment: \$ _____

No. of Months: _____

Insurance Advance: \$ _____

:Post-Petition Default: \$ _____

No. of months: _____

C Description of real property collateral (e.g. single family residence, Oakland, CA.): N/A

Fair market value: \$ _____

Source of value: \$ _____

If appraisal, date: _____

Moving Party's position (first trust deed, second, abstract, etc.): N/A

Approx. Bal: \$ _____

Pre-Petition Default: \$ _____

As of (date): _____

No. of months: _____

No. payment: _____

Post-Petition Default: \$ _____

Notice of Default (date): _____

No. of months: _____

Notice of Trustee's Sale: _____

Advances Senior Liens: \$ _____

Specify name and status of other liens and encumbrances, if known (e.g. trust deeds, tax liens, etc.): N/A

Position	Amount	No. Payment	Defaults
1 st Trust Deed:			
2 nd Trust Deed			
_____:			
_____:			
_____:			

(Total)

(Total)

D Other pertinent information: Movant seeks relief from the stay to prosecute lawsuit pending in the United States District Court for the Northern District of California.

Dated: January 27, 2003

Signature
MIRIAM KHATIBLOU
Attorney for Movant,
Modesto Irrigation District

A001
Add: *[Signature]*
Ogc mailer

1 GOLDBERG, STINNETT, MEYERS & DAVIS
A Professional Corporation
2 MERLE C. MEYERS, ESQ., CA Bar #66849
MIRIAM KHATIBLOU, ESQ., CA Bar #178584
3 44 Montgomery Street, Suite 2900
San Francisco, California 94104
4 Telephone: (415) 362-5045
Facsimile: (415) 362-2392

5 Attorneys for Movant,
6 Modesto Irrigation District

7
8 IN THE UNITED STATES BANKRUPTCY COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11
12 In re
13 PACIFIC GAS AND ELECTRIC CO.,

14
15
16 Debtor.

Case No. 01-30923

Chapter 11

R.S. No.

Date: February 27, 2003

Time: 1:30 p.m.

Place: 22nd Floor
235 Pine Street
San Francisco, CA

Judge: The Honorable Dennis Montali

17
18
19 **NOTICE OF MOTION AND MOTION OF MODESTO IRRIGATION DISTRICT**
20 **FOR RELIEF FROM THE AUTOMATIC STAY TO PROSECUTE CIVIL ACTION**

21
22 TO THE DEBTOR, THE UNITED STATES TRUSTEE, ALL CREDITORS WHO HAVE
23 REQUESTED SPECIAL NOTICE, ANY OFFICIAL COMMITTEES APPOINTED HEREIN,
OR THEIR RESPECTIVE COUNSEL OF RECORD:

24 PLEASE TAKE NOTICE that on February 27, 2003, at 1:30 p.m., or as soon thereafter as
25 counsel can be heard, in the Courtroom of the Honorable Dennis Montali, United States Bankruptcy
26 Judge, United States Bankruptcy Court for the Northern District of California, San Francisco
27 Division, 235 Pine Street, 22nd Floor, San Francisco, California, MODESTO IRRIGATION
28 DISTRICT ("MID"), a creditor of PACIFIC GAS AND ELECTRIC COMPANY, the debtor herein

(the "Debtor"), will, and hereby does, move the above-entitled Court for entry of an order granting relief from the automatic stay provisions of 11 U.S.C. § 362(a) for the limited purpose of permitting MID to prosecute its anti-trust civil action against the Debtor, which civil action is currently pending in the United States District Court for the Northern District of California San Francisco Division, to a conclusion, so as to liquidate, but not yet collect, its claim against the Debtor.

MID previously obtained relief from the automatic stay in order to prosecute an appeal before the Ninth Circuit Court of Appeals from an order of the District Court dismissing MID's complaint against the Debtor in such civil action. Since obtaining such relief, MID has successfully prosecuted its appeal and obtained a reversal of such dismissal. MID now seeks the ability to complete its litigation in the District Court and to resolve its case that has been pending since 1998. However, MID does not seek by way of this motion the ability to enforce or collect its monetary claim, as determined by such litigation.

This motion is based upon this notice, the memorandum contained herein, the declaration of Maxwell M. Blecher (the "Supporting Declaration") filed and served concurrently herewith, the record of this Court and all other evidence or argument as may be properly presented by MID with respect to this motion. Pursuant to the provisions of Rule 4001-1(a) of the above-entitled Court's Local Rules, the Debtor is hereby advised to appear personally or by counsel at the hearing referenced hereinabove.

I. RELIEF REQUESTED

By this motion, MID moves the above-entitled Court, pursuant to the provisions of Section 362(d)(1) of the Bankruptcy Code, for an order of the Court granting the following relief, substantially in the form of order attached hereto as Exhibit "A":

1. Terminating the automatic stay provisions of Section 362(a) of the Bankruptcy Code to the extent necessary to permit MID to prosecute its claims against the Debtor, now pending before the United States District Court for the Northern District of California and entitled *Modesto Irrigation District v. Pacific Gas & Electric and Dynegy Power Services, Inc.*, No. C-98-3009-MHP (the "District Court Case") for the limited purpose of liquidating MID's claims, *provided* that should MID obtain a favorable monetary judgment against the

Debtor, it will not seek to enforce said judgment against the Debtor or property of the estate without a further order of the Bankruptcy Court or as permitted by a confirmed plan of reorganization; and

2. Such other and further relief as the Court may deem proper under the circumstances.

MID respectfully submits that the requested relief is warranted and appropriate for the reasons set forth below, particularly the following: First, now that the Court of Appeals has reversed the earlier dismissal of MID's claims in the District Court Case, MID should be permitted to proceed to prosecute the litigation, so as to resolve its claim against the Debtor as soon as practicable, particularly in light of the fact that the claim has been pending for more than four years. Second, permitting MID to proceed to prosecute its claim at this time will not unduly or unfairly affect or prejudice the Debtor, or delay the administration of its chapter 11 case, given the clear need to liquidate MID's claim in any event and the Debtor's stated intention to do so pursuant to its proposed plan of reorganization. And finally, public policy and judicial economy favors the requested relief in order to ensure a timely adjudication of the District Court Case.

For these reasons, MID submits that the automatic stay provisions of Section 362(a) of the Bankruptcy Code should be terminated so as to permit MID to proceed with the prosecution of its claims against the Debtor in the District Court Case.

II. MEMORANDUM OF POINTS AND AUTHORITIES

A. Factual Background

The record of the above-entitled Court, together with the accompanying Supporting Declaration, establishes the following pertinent facts:

On August 3, 1998, MID, a California irrigation district which provides electricity and other services to industrial, commercial and residential customers in the greater Modesto, California area, commenced an action, the District Court Case, against the Debtor and others in the United States District Court for the Northern District of California, entitled *Modesto Irrigation District v. Pacific Gas & Electric and Dynegy Power Services, Inc.*, No. C-98-3009-MHP, seeking, *inter alia*, a monetary judgment and injunctive relief under the Sherman Antitrust Act for damages arising out of

1 the Debtor's refusal to interconnect transmission lines with MID at a designated substation in
2 Pittsburg, California. MID's original complaint was dismissed upon a motion of the defendants, and
3 an amended complaint was filed by MID on March 4, 1999. The defendants, including the Debtor
4 through retained counsel, Heller, Ehrman, White & McAuliffe, then moved to dismiss the action a
5 second time, asserting, *inter alia*, that the amended complaint failed to properly allege a conspiracy
6 and that, in any event, the defendants' conduct was protected by the *Noerr-Pennington* doctrine
7 which immunizes efforts to prevent competition by involving governmental or regulatory processes.

8 On August 20, 1999, the District Court entered an order (the "Dismissal Order") granting the
9 defendants' motion to dismiss without leave to amend, based upon the District Court's finding that
10 MID, as plaintiff, had (1) failed to allege a conspiracy under Section 1 of the Sherman Act (although
11 MID had in fact properly alleged such a conspiracy under Section 2 of the Sherman Act), (2) failed to
12 adequately allege antitrust injury (i.e., harm to consumers), and (3) failed to negate the defendants'
13 assertion of protection under the *Noerr-Pennington* doctrine.

14 MID thereafter timely initiated and prosecuted an appeal of the Dismissal Order. The appeal
15 was fully briefed, and oral argument on the appeal took place before the United States Court of
16 Appeals for the Ninth Circuit in San Francisco, California on March 15, 2001. At the conclusion of
17 argument, the Court of Appeals took the matter under submission. On April 6, 2001, the Debtor
18 commenced its within chapter 11 case, triggering the automatic stay provisions of Section 362(a) of
19 the Bankruptcy Code. On the basis of that stay, on May 7, 2001, the Court of Appeals suspended
20 consideration of the appeal and invited the parties to seek relief from that stay, stating the following:

21 The appeal is withdrawn from submission because of the automatic stay resulting from
22 Pacific Gas & Electric Company's bankruptcy filing. Each of the parties is requested
to advise this court if relief from the stay is obtained.

23 As a result, the appeal was suspended and the issues underlying that appeal remained unresolved,
24 although the parties had fully briefed and argued the matter to the Court of Appeals.

25 Following the commencement of the Debtor's chapter 11 case, MID sought relief from the
26 automatic stay in order to permit the appeal before the Court of Appeals to proceed, and on July 18,
27 2001, such relief was granted pursuant to an order of the Bankruptcy Court. That order, as requested,
28

1 permitted prosecution of the appeal but not further prosecution of the District Court Case without
2 further order of the Bankruptcy Court.

3 On December 6, 2002, the Ninth Circuit Court of Appeals issued its order reversing the
4 Dismissal Order and ruling (a) that FERC did not have exclusive jurisdiction over the claims being
5 asserted; (b) that the Debtor had not established that its refusal to deal was incidental to its petitioning
6 activity, and that, accordingly, its conduct was not protected by the *Noerr Pennington* doctrine; (c)
7 that MID's complaint adequately alleged collusive activity; and (d) that the complaint adequately
8 alleged "antitrust injury." The Court of Appeals remanded the case to the District Court for trial.

9 On or about April 19, 2002, the Debtor filed a proposed plan of reorganization (the "Debtor's
10 Plan"). Although the Debtor's Plan has not been confirmed and a competing creditor's plan has also
11 been proposed, the terms of the Debtor's Plan are instructive for purposes of this motion. For
12 example, Section 4.17 of the Debtor's Plan provides that "Pending Litigation Claims" (a term that
13 includes MID's antitrust claims in the District Court Case) will "be satisfied in full in the ordinary
14 course of business at such time and in such manner ... the Reorganized Debtor ... is obligated to
15 satisfy such Allowed Claim under applicable law." (Debtor's Plan, § 4.17(a)). Further, the Debtor's
16 Plan provides that "all ... Pending Litigation ... Claims shall be determined, resolved, or adjudicated,
17 as the case may be, in a manner as if the Chapter 11 Case had not been commenced ..." (Debtor's
18 Plan § 4.17(b)). The Debtor's Plan further provides that –

19 Subject to the foregoing, all ... Pending Litigation and Tort Claims shall be
20 determined and liquidated under applicable non-bankruptcy law in the administrative
21 or judicial tribunal in which they are pending as of the Effective Date or, if no such
22 action is pending on the Effective Date, in any administrative or judicial tribunal of
23 appropriate jurisdiction (other than the Bankruptcy Court). To effectuate the
24 foregoing, the entry of the Confirmation Order shall, effective as of the Effective Date,
constitute a modification of any stay or injunction under the Bankruptcy Code that
would otherwise preclude the determination, resolution or adjudication of any ...
Pending Litigation Claims.

25 *Debtor's Plan, § 4.17(b).*

26 Thus, under the terms of the Debtor's Plan, the Debtor intends to allow Pending Litigation
27 Claims, such as MID's antitrust claims in the District Court Case, to proceed through litigation in the
28 courts where they are presently pending, and to satisfy those claims in full once they are fully

1 liquidated and resolved.

2 **B. Discussion**

3 MID submits that based upon the foregoing facts, and under applicable law as set forth below,
4 the relief requested herein should be granted. Under the provisions of Section 362(d)(1) of the
5 Bankruptcy Code, the automatic stay shall be terminated upon request, to the extent of a showing of
6 cause. Section 362(d)(1) provides as follows:

7 (d) On request of a party in interest and after notice and a hearing, the court shall grant
8 relief from the stay provided under subsection (a) of this section, such as by
terminating, annulling, modifying, or conditioning such stay—

9 (1) for cause, including the lack of adequate protection of an interest in
10 property of such party in interest;

11 11 U.S.C. § 362(d)(1). Because there is no clear definition of what constitutes "cause" for purposes
12 of Section 362(d)(1), relief from the stay under this section must be determined on a case-by-case
13 basis. *In re Castlerock Properties*, 781 F.2d 159, 163 (9th Cir.1986) (quoting *In re MacDonald*, 755
14 F.2d 715, 717 (9th Cir.1985)); *In re Tucson Estates, Inc.*, 912 F.2d 1162, 1166 (9th Cir.1990) (citing
15 *In re MacDonald*, 755 F.2d 715, 717 (9th Cir.1985)).

16 In particular, although Congress did not define cause, it intended that the automatic stay
17 should be modified in order to allow litigation involving the debtor to continue in a nonbankruptcy
18 forum under appropriate circumstances. H.R. Rep. No. 95-595, at 341 (1977); S.Rep. No. 95-989, at
19 50 (1978) ("It will often be more appropriate to permit proceedings to continue in their place of
20 origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to
21 their chosen forum and to relieve the bankruptcy court from duties that may be handled elsewhere.").
22 Consistent with Congressional intent, courts have found cause to exist where the party requesting
23 relief from the stay seeks to litigate state law claims in state court. See *In re Castlerock Properties*,
24 781 F.2d at 163; in accord, *Pursifull v. Eakin*, 814 F.2d 1501, 1506 (10th Cir.1987) (cause existed
25 where "the issues involved were matters of state law best decided by state courts").

26 Further, the Bankruptcy Code does not provide unlimited protection for a debtor as the "mere
27 filing of a petition in bankruptcy cannot, in and of itself, erase a plaintiff's claim, their [sic]
28 opportunity to litigate, or the fact that a debtor may be liable to the plaintiff in some amount." *In re*

1 *America West Airlines*, 148 B.R. 920, 923 (Bankr. Ariz. 1993), citing *In re Johnson*, 115 B.R. 634,
2 636 (Bankr. Minn.1989). Thus, the Debtor's filing of its chapter 11 petition is not reason alone to
3 preclude the timely adjudication of MID's antitrust claims.

4 The Ninth Circuit Bankruptcy Appellate Panel has cited with approval the decision in *In re*
5 *America West Airlines*, 148 B.R. 920, 922 (Bankr. Ariz. 1993), which identified various factors that a
6 court may consider in deciding whether cause exists to terminate the stay to allow a creditor to
7 proceed with pending litigation. *In re Santa Clara County Fair Ass'n*, 180 B.R. 564, 567 (9th Cir.
8 BAP 1995). Those factors are:

- 9 1) Whether the litigation causes debtor great prejudice;
- 10 2) Whether a balancing of the respective hardships tips in favor of the debtor or
11 creditor, resulting from denial or granting of the relief;
- 12 3) Whether public policy supports the type or kind of action the Movant is
13 bringing against the Debtor.

14 *In re America West Airlines*, 148 B.R. 920, 922 (Bankr.D.Ariz. 1993) (internal citations omitted). In
15 the *In re America West Airlines* case, the court examined the above factors and concluded that 'cause'
16 existed to enable the movant to proceed with a sexual harassment suit.

17 Under the circumstances of this case, an analysis of the *America West Airlines* factors reveal
18 that cause exists to terminate the automatic stay so as to enable MID to prosecute the District Court
19 Case forthwith.

20 **1. Prosecution Of The District Court Case Will Not Unduly Prejudice The Debtor.**

21 First, prosecution of the District Court Case will not unduly prejudice the Debtor or its estate.
22 MID is informed and understands that since the commencement of the Debtor's chapter 11 case
23 almost two years ago, the Debtor has continued to maintain its operations, prosecute and defend
24 many matters of litigation and retain and pay scores of attorneys and other professionals. It has
25 already retained competent counsel to defend itself in the District Court Case. Prosecution of the
26 District Court Case will not materially alter the Debtor's current litigation conduct generally.

27 More to the point, the Debtor has made it clear in its Proposed Plan that it intends to fully
28 defend all pending litigation, including the District Court Case, upon plan confirmation, and that it

intends to pay all claims adjudicated in that litigation. Thus, resuming its defense of the District Court Case at this time, shortly before plan confirmation, will be entirely consistent with the Debtor's postconfirmation conduct, and will merely facilitate and expedite the resolution of that litigation in the same manner as the Debtor intends immediately after plan confirmation. The fact that resumption of the litigation will occur sooner as a result of termination of the automatic stay will not unduly prejudice the Debtor, given its substantial resources, already shown by its postpetition practice, with which it can continue to direct and compensate attorneys already employed by it to defend the litigation.

Accordingly, because the Debtor will not suffer undue prejudice from the resumption of prosecution of the District Court Case, the first *America West Airlines* factor is fully satisfied in this case, weighing in favor of MID's requested relief.

2. The Balance Of Hardships Weighs in MID's Favor.

Second, the balance of hardships weigh in MID's favor in this matter, further compelling relief from the automatic stay. If MID is not allowed to proceed with the prosecution of the District Court Case, it will be delayed in obtaining redress for conduct of the Debtor which MID believes to have been in violation of antitrust law and significantly harmful to MID and to consumers. That delay will result in a postponement of the eventual resolution, redress and payment of its claim, among other harms to MID.

Delayed resumption of the litigation will necessarily delay the conclusion of that litigation, and the Proposed Plan contemplates payment of MID's litigation claim only once that litigation has been fully completed. Given the complexity and length of process that is typical in all antitrust litigation, it is paramount that the litigation be resumed as soon as possible, so as not to further delay that which will already be prolonged once recommenced.

On the other hand, there is little, if any, harm to the Debtor in the proposed resumption of the District Court Case. The Debtor has already hired able counsel to defend itself in the District Court Case and has shown itself capable of directing and compensating counsel in a multitude of matters throughout the pendency of its case. The Debtor's own Proposed Plan contemplates resumption of the District Court Case, along with all other pending litigation, immediately upon plan confirmation.

1 There is no perceivable harm to the Debtor in resuming that litigation sooner, prior to plan
2 confirmation, and avoiding the delays of the plan confirmation process.

3 Bankruptcy courts have also considered the following factors in determining the relative
4 hardships between a debtor and movant: (1) judicial economy; (2) trial readiness; (3) the resolution
5 of preliminary bankruptcy issues; (4) the creditor's chance of success on the merits; and (5) the cost
6 of defense or other potential burden to the bankruptcy estate and the impact of the litigation on other
7 creditors. *See, In re Curtis*, 40 B.R. 795, 799-800 (Bankr. Utah 1984); *see, also, Sonnox Indus., Inc.*
8 *v. Tri Component Prods. Corp. (In re Sonnox Indus., Inc.)*, 907 F.2d 1280, 1286 (2d Cir.1990); *see,*
9 *also In re America West Airlines, supra* (using a variation of the above factors). Applying these
10 additional factors to the case at hand further support a finding of cause. First, judicial economy will
11 be served by the prosecution of the District Court Case because, as noted above, the litigation has
12 been pending before the District Court since 1998 and would most economically be completed in that
13 court, where such antitrust litigation is traditionally maintained. Second, the Debtor is not the only
14 defendant in the litigation, and delay prolongs the litigation against the other defendant as well.
15 Third, the District Court is more readily familiar with the type of antitrust claims asserted in the
16 District Court Case, based on prior practice and custom, and is therefore in a better position to
17 interpret the statutes at issue, assure uniform application of antitrust laws, and proceed to resolution
18 of the litigation more promptly.

19 Fourth, the antitrust claims asserted in the District Court Case do not require interpretation of
20 any law or issue within the Bankruptcy Court's expertise, as MID's claims in the District Court Case
21 do not involve any aspect of the Bankruptcy Code. Fifth, as evidenced by the Ninth Circuit Court of
22 Appeals' order reversing the Dismissal Order, MID has alleged claims for antitrust violations that
23 have sufficient merit to overcome the Debtor's dismissal motion and proceed to trial. Under the
24 circumstances, MID should be permitted to proceed to prove its claims as quickly as practicable in
25 order to prevent further harm arising from the Debtor's conduct. And lastly, it is noted that MID
26 seeks relief only for the limited purpose of establishing and quantifying the Debtor's liability, not for
27 the purpose of collecting upon any monetary judgment obtained in the litigation without further
28 Bankruptcy Court authority or approval.

1 Thus, most or all of the factors traditionally considered in determining the balance of harm
2 between a debtor and movant weigh in MID's favor in this case.

3 **3. Public Policy Supports The Relief Requested.**

4 Finally, public policy favors the expeditious consideration of claims asserted in the District
5 Court Case and hence the relief requested herein. MID has asserted several causes of action against
6 the Debtor for violations of Sections 1 and 2 of the Sherman Act. The primary purpose of the
7 Sherman Act is to provide "more effective protection of the public from the evils of restraints on the
8 competitive system." *Shotkin v. General Elec. Co.*, 171 F.2d 236, 238 (10th Cir. 1948). The Tenth
9 Circuit Court of Appeals observed that the Sherman Act was founded upon broad concepts of public
10 policy and "is limited in operative scope and effect to combinations, agreements, or concerts which
11 tend to prejudice the public interest by unduly restricting competition or unduly obstructing the due
12 course of trade, or which because of their evident purpose of inherent nature injuriously restrain trade
13 in the competitive markets. A common form of such combination, agreement, or concert is one
14 having for its purpose or tendency the raising or fixing of prices, or one having for its purpose or
15 tendency the dividing of territories, or one having for its purpose or tendency the apportionment of
16 customers, or one having for its purpose or tendency the controlling or narrowing of outlets in order
17 to raise or maintain prices." *Shotkin v. General Elec. Co.*, *supra*, 171 F.2d at 238. These are the
18 types of damages that MID and the general public have suffered and for which MID seeks redress by
19 way of the District Court Case. Under the circumstances, public policy interests that favor
20 expeditious resolution of antitrust claims alleged under the Sherman Act outweigh any competing
21 policy served by automatic stay in this case.

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

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

III. CONCLUSION

For the foregoing reasons, MID respectfully submits that it is entitled to the relief requested above, substantially in the form of the order attached hereto as Exhibit "A".

DATED: January 27, 2003

GOLDBERG, STONNETT, MEYERS & DAVIS
A Professional Corporation

By: 

Merle C. Meyers, Esq.
Attorneys for Modesto Irrigation District,
Movant

1 **GOLDBERG, STINNETT, MEYERS & DAVIS**
A Professional Corporation
2 **MERLE C. MEYERS, ESQ., CA Bar #66849**
3 **MIRIAM KHATIBLOU, ESQ., CA Bar #178584**
4 **44 Montgomery Street, Suite 2900**
5 **San Francisco, California 94104**
6 **Telephone: (415) 362-5045**
7 **Facsimile: (415) 362-2392**

8 **Attorneys for Movant,**
9 **Modesto Irrigation District**

10 **IN THE UNITED STATES BANKRUPTCY COURT**
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN FRANCISCO DIVISION**

13 **In re**

14 **PACIFIC GAS AND ELECTRIC CO.,**

15 **Debtor.**

Case No. 01-30923

Chapter 11

R.S. No.

Date: February 27, 2003

Time: 1:30 p.m.

Place: 22nd Floor
235 Pine Street
San Francisco, CA

Judge: The Honorable Dennis Montali

18
19 **[PROPOSED FORM OF] ORDER AUTHORIZING RELIEF**
20 **FROM THE AUTOMATIC STAY TO PROSECUTE CIVIL ACTION**

21 On or about January 28, 2003, Modesto Irrigation District, a creditor herein ("MID"), filed its
22 Notice Of Motion And Motion Of Modesto Irrigation District For Relief From Automatic Stay To
23 Prosecute Civil Action (the "Motion"), and served the same upon Pacific Gas And Electric Company,
24 the debtor-in-possession herein (the "Debtor"), among others. The Motion, and any opposition
25 thereto, came on regularly for hearing on February 27, 2003 before the Honorable Dennis Montali,
26 United States Bankruptcy Judge for the United States Bankruptcy Court, Northern District of
27 California, following due and adequate notice pursuant to Fed. R. Bankr. Proc. 4001(a)(1). Based
28 upon based upon the arguments and evidence presented in the Motion, and for good cause shown,

1 NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as
2 follows:

3 1. The Motion is hereby GRANTED in its entirety.

4 2. The automatic stay provisions of Section 362(a) of the Bankruptcy Code are hereby
5 modified to the extent necessary to permit MID to fully prosecute the civil action entitled *Modesto*
6 *Irrigation District v. Pacific Gas & Electric, et al.*, No. 98-3009-MHP, presently pending before the
7 United States District Court for the Northern District of California, provided that such modification
8 of the stay shall not permit the enforcement of any monetary judgment obtained in such civil action,
9 as against the Debtor, absent further order of this Court or as otherwise permitted by the terms of a
10 plan of reorganization confirmed herein or by applicable law.

11 3. This Order is without prejudice to the right of MID to seek further relief from the
12 automatic stay in order to enforce a monetary judgment entered in the civil action, as against the
13 Debtor, pursuant to the provisions of Section 362(d) of the Bankruptcy Code or otherwise, and
14 without prejudice to the right of the Debtor to defend thereagainst.

15 4. The ten-day stay of this Order pursuant to Fed. R. Bankr. Proc. 4001(a)(3) shall be and
16 is hereby waived.

17 DATED: February 27, 2003

18
19 THE HONORABLE DENNIS MONTALI
United States Bankruptcy Judge

1 GOLDBERG, STINNETT, MEYERS & DAVIS
A Professional Corporation
2 MERLE C. MEYERS, ESQ., CA Bar #66849
MIRIAM KHATIBLOU, ESQ., CA Bar #178584
3 44 Montgomery Street, Suite 2900
San Francisco, California 94104
4 Telephone: (415) 362-5045
Facsimile: (415) 362-2392

5 Attorneys for Movant,
6 Modesto Irrigation District

7
8 IN THE UNITED STATES BANKRUPTCY COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11
12 In re

13 PACIFIC GAS AND ELECTRIC CO.,

14
15
16 Debtor.

Case No. 01-30923

Chapter 11

R.S. No.

Date: February 27, 2003

Time: 1:30 p.m.

Place: 22nd Floor
235 Pine Street
San Francisco, CA

Judge: The Honorable Dennis Montali

17
18
19 **DECLARATION OF MAXWELL M. BLECHER**
20 **IN SUPPORT OF MOTION OF MODESTO IRRIGATION DISTRICT**
FOR RELIEF FROM THE AUTOMATIC STAY TO PROSECUTE CIVIL ACTION

21 I, MAXWELL M. BLECHER, declare:

22 1. I am an attorney at law and a principal of Blecher & Collins, A Professional
23 Corporation, litigation counsel for MODESTO IRRIGATION DISTRICT ("MID"), a creditor of
24 PACIFIC GAS AND ELECTRIC COMPANY, the debtor herein (the "Debtor"), and in such
25 capacity, I am personally familiar with each of the facts stated herein, to which I could competently
26 testify if called upon to do so in a court of law.

27 2. On August 3, 1998, MID, a California irrigation district which provides electricity and
28

1 other services to industrial, commercial and residential customers in the greater Modesto, California
2 area, commenced an action, entitled *Modesto Irrigation District v. Pacific Gas & Electric and*
3 *Dynegy Services, Inc.*, No. C-98-3009-MHP (the "District Court Case"), against the Debtor and
4 others in the United States District Court for the Northern District of California, seeking, *inter alia*, a
5 monetary judgment and injunctive relief under the Sherman Antitrust Act for damages arising out of
6 the Debtor's refusal to interconnect transmission lines with MID at a designated substation in
7 Pittsburg, California. MID's original complaint was dismissed upon a motion of the defendants, and
8 an amended complaint was filed by MID on March 4, 1999.

9 3. The defendants, including the Debtor through retained counsel, Heller, Ehrman, White
10 & McAuliffe, then moved to dismiss the action a second time, asserting, *inter alia*, that the amended
11 complaint failed to properly allege a conspiracy and that, in any event, the defendants' conduct was
12 protected by the *Noerr-Pennington* doctrine which immunizes efforts to prevent competition by
13 involving governmental or regulatory processes.

14 4. On August 20, 1999, the District Court entered an order (the "Dismissal Order")
15 granting the defendants' motion to dismiss without leave to amend, based upon the District Court's
16 finding that MID, as plaintiff, had (1) failed to allege a conspiracy under Section 1 of the Sherman
17 Act (although MID had in fact properly alleged such a conspiracy under Section 2 of the Sherman
18 Act), (2) failed to adequately allege antitrust injury (i.e., harm to consumers), and (3) failed to negate
19 the defendants' assertion of protection under the *Noerr-Pennington* doctrine.

20 5. MID thereafter timely initiated and prosecuted an appeal of the Dismissal Order. The
21 appeal was fully briefed, and oral argument on the appeal took place before the United States Court
22 of Appeals for the Ninth Circuit in San Francisco, California on March 15, 2001. At the conclusion
23 of argument, the Court of Appeals took the matter under submission. On April 6, 2001, the Debtor
24 commenced its within chapter 11 case, triggering the automatic stay provisions of Section 362(a) of
25 the Bankruptcy Code. On the basis of that stay, on May 7, 2001, the Court of Appeals suspended
26 consideration of the appeal and invited the parties to seek relief from that stay, stating the following:

27 The appeal is withdrawn from submission because of the automatic stay resulting from
28 Pacific Gas & Electric Company's bankruptcy filing. Each of the parties is requested

1 to advise this court if relief from the stay is obtained.

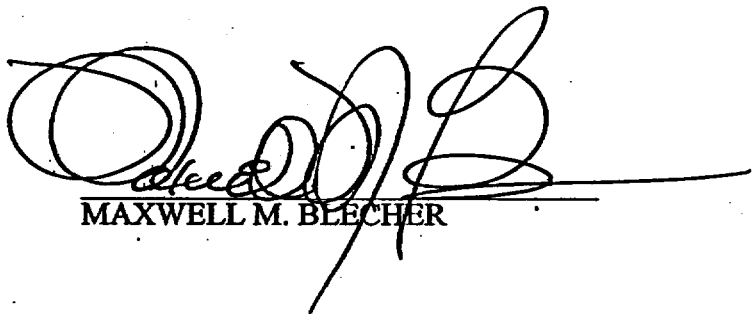
2 6. As a result, the appeal was suspended and the issues underlying that appeal remained
3 unresolved, although the parties had fully briefed and argued the matter to the Court of Appeals.

4 7. Following the commencement of the Debtor's chapter 11 case, MID sought relief from
5 the automatic stay in order to permit the appeal before the Court of Appeals to proceed, and on July
6 18, 2001, such relief was granted pursuant to an order of the Bankruptcy Court. That order, as
7 requested, permitted prosecution of the appeal but not further prosecution of the District Court Case
8 without further order of the Bankruptcy Court.

9 8. On December 6, 2002, the Ninth Circuit Court of Appeals issued its order reversing
10 the Dismissal Order and ruling (a) that FERC did not have exclusive jurisdiction over the claims
11 being asserted; (b) that the Debtor had not established that its refusal to deal was incidental to its
12 petitioning activity, and that, accordingly, its conduct was not protected by the *Noerr Pennington*
13 doctrine; (c) that MID's complaint adequately alleged collusive activity; and (d) that the complaint
14 adequately alleged "antitrust injury." The Court of Appeals remanded the case to the District Court.

15 9. I declare under penalty of perjury that the foregoing is true and correct and that this
16 declaration was executed on January 24, 2003 at Los Angeles, California.

17
18
19
20
21
22
23
24
25
26
27
28



MAXWELL M. BLECHER