

1 JAMES L. LOPES (No. 63678)
2 JANET A. NEXON (No. 104747)
3 BARBARA GORDON (No. 52424)
4 HOWARD, RICE, NEMEROVSKI, CANADY,
5 FALK & RABKIN
6 A Professional Corporation
7 Three Embarcadero Center, 7th Floor
8 San Francisco, California 94111-4024
9 Telephone: 415/434-1600
10 Facsimile: 415/217-5910

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

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

16 In re

17 PACIFIC GAS AND ELECTRIC
18 COMPANY, a California corporation,

19 Debtor.

Case No. 01-30923 DM

Chapter 11 Case

[No Hearing Scheduled]

20 Federal I.D. No. 94-0742640

21 EX PARTE APPLICATION FOR ORDER AUTHORIZING
22 SETTLEMENT AND WITHDRAWAL OF CLAIM OF LAGUNA
23 IRRIGATION DISTRICT AND MEMORANDUM OF POINTS AND
24 AUTHORITIES IN SUPPORT THEREOF

25 [DECLARATION OF DAVID E. RUBIN IN SUPPORT OF
26 APPLICATION FILED SEPARATELY]
27
28

BKRP01

1 Pacific Gas and Electric Company ("PG&E"), the debtor and debtor in possession
2 in the above-captioned Chapter 11 case, hereby applies to this Court for approval of a
3 settlement (the "Settlement") with Laguna Irrigation District ("Laguna") of civil actions
4 filed by and against PG&E and withdrawal of all claims filed by Laguna in this Chapter 11
5 case, as explained in more detail below. The terms of the Settlement are described herein
6 and in the Declaration of David E. Rubin in Support of PG&E's Ex Parte Application for
7 Order Authorizing Settlement and Withdrawal of Claim of Laguna Irrigation District and
8 Memorandum of Points and Authorities in Support Thereof, filed concurrently herewith.

9 The Settlement provides for resolution of (a) Laguna's antitrust action against
10 PG&E (Laguna Irrigation District v. PG&E, United States District Court for the Eastern
11 District of California Case No. CIVF-00 5967 AWI SMS); (b) Laguna's eminent domain
12 action against PG&E (Laguna Irrigation District v. PG&E, Kings County Superior Court
13 Case No. 99C0952); and (c) PG&E's breach of contract action against Laguna (PG&E v.
14 Laguna Irrigation District, San Francisco Superior Court Case No. CGC-02-406259)
15 (collectively, the "Litigation"). Under the Settlement, among other terms, the parties shall
16 dismiss their respective lawsuits, Laguna shall pay PG&E up to \$1 million, and Laguna shall
17 withdraw all Claims.

18 This Application is brought pursuant to Rule 9019 of the Federal Rules of
19 Bankruptcy Procedure and is based on the grounds that the proposed Settlement is fair and
20 equitable and in the best interests of the bankruptcy estate. In light of (1) the terms of the
21 Settlement requiring prompt approval, (2) the noticing of this Application to the United
22 States Trustee and the Official Committee of Unsecured Creditors (the "Committee"), and
23 (3) the Committee's pre-review of this Application and its signature below evidencing that it
24 has no objection to the granting of the relief requested, this Application is being submitted,
25 ex parte, without scheduling a hearing. PG&E submits that there has been sufficient notice
26 and opportunity for a hearing as is appropriate under the particular circumstances.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 PG&E seeks Court approval of the proposed Settlement described in the
3 Settlement Agreement attached as Exhibit A to the Declaration of David E. Rubin ("Rubin
4 Declaration"), which provides among other things for the release of all Claims by Laguna,
5 the payment of up to \$1 million to PG&E, and dismissal of the Litigation between Laguna
6 and PG&E.

7 **I.**

8 **FACTUAL BACKGROUND¹**

9 The following is a summary of the events leading up to the Litigation and the
10 terms of the Settlement and is only intended as a brief overview of relevant facts.

11 **A. Statement of Facts.**

12 Commencing in 1996, Laguna sought to become a public power enterprise by (a)
13 contracting with Power Exchange Corporation ("PXC") to utilize PXC's Control Area
14 Transmission Service Agreement and installing service drops from PG&E's distribution
15 lines to selected customers (the "Service Drop Plan"), (b) suing PG&E in eminent domain to
16 condemn certain of PG&E's electric distribution facilities and (c) entering into an Energy
17 Service Provider Service Agreement ("ESP Agreement") with PG&E to permit Laguna to
18 sell power to Direct Access customers. PG&E questioned the legality of Laguna's Service
19 Drop Plan, and refused to proceed with Laguna's interconnection request pending the
20 resolution of the objections that PG&E filed with the Federal Energy Regulatory
21 Commission ("FERC"). Laguna subsequently sued PG&E in Fresno Federal District Court
22 for alleged antitrust and tortious conduct (the "Antitrust Case").

23 In 1997, as an alternative means to becoming a public power enterprise, Laguna
24 resolved to condemn certain PG&E electric distribution facilities within the District's
25 borders, and filed an action in eminent domain against PG&E in 1999 (the "Condemnation
26

27 ¹The evidentiary basis and support for the facts set forth in this Application are
28 contained in the Declaration of David E. Rubin filed concurrently herewith.

1 Case"). Laguna amended its complaint in 2000 in an effort to condemn all the PG&E
2 distribution facilities within the District and some outside it.

3 In 1998, as another means of becoming a public power enterprise, Laguna
4 entered into an ESP Agreement with PG&E, by which it agreed to, among other things, (a)
5 generate, purchase, or otherwise procure power for its Direct Access customers, and (b)
6 obtain a Scheduling Coordinator to schedule that Direct Access load with the Independent
7 System Operator ("ISO"). In 2002, PG&E filed suit against Laguna, alleging that Laguna
8 breached the parties' ESP Agreement by, among other things, failing to pay for power and/or
9 schedule load with the ISO (the "ESP Case").

10 **B. Status of the Litigation.**

11 In mid-2002, PG&E and Laguna agreed to stay the Litigation while they
12 negotiated a global settlement. All three cases remain stayed.

13 **C. The Settlement.**

14 Laguna, having spent more than five years and significant financial and other
15 resources attempting to become a public power enterprise, now wishes to restore its fiscal
16 health, exit the electric business, and refocus its efforts on its water enterprise.

17 Both Laguna and PG&E seek to eliminate the risk of potential liability associated
18 with the Litigation and minimize the substantial legal and consulting costs that would be
19 necessarily associated with litigating these cases. The principal terms of the Settlement
20 provide for dismissal of the Litigation and the withdrawal of all claims by Laguna. Laguna
21 shall pay up to \$1 million to PG&E over the next 20 years by payment of \$50,000 per year;
22 however, PG&E will forego the last ten scheduled payments provided Laguna, among other
23 things, timely makes the first ten payments (totaling \$500,000) and refrains from adopting a
24 Resolution of Necessity to condemn any PG&E property (except for rights-of-way necessary
25 for irrigation facilities) during that time.

II.

**THE SETTLEMENT IS FAIR AND EQUITABLE
AND IN THE BEST INTERESTS OF THE ESTATE**

"The law favors compromise and not litigation for its own sake" Martin v. Kane (In re A&C Properties), 784 F.2d 1377, 1381 (9th Cir. 1986). Bankruptcy courts have great latitude in approving compromise agreements that are "fair and equitable." Woodson v. Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610, 620 (9th Cir. 1988). In passing on a proposed compromise, courts consider the following factors:

(a) The probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises. (A&C Properties, 784 F.2d at 1381 (citation omitted))

Bankruptcy courts "weigh certain factors to determine whether the compromise is in the best interest of the bankrupt estate." Id. at 1382. Each of the A&C Properties factors weighs in favor of the Settlement, as demonstrated below.

A. The Probability of Success.

Risk is inherent in litigation and there is substantial money at stake in the three cases at issue here. Moreover, regardless of which side prevails in each of the three cases, PG&E would necessarily incur substantial attorneys' fees to bring these cases to trial, as well as to prosecute possible appeals. Moreover, PG&E would need to dedicate significant time and resources to this Litigation. Given these risks, along with the time and expense involved with preparing the cases for trial and conducting those trials, PG&E believes that the Settlement is favorable and should be approved.

B. The Settlement Benefits the Creditors.

Avoidance of unnecessary litigation will benefit PG&E's creditors by eliminating costs and delay, and instead allowing PG&E's personnel to focus on more critical functions. Moreover, the Settlement will eliminate any risk that PG&E will have to pay any money to Laguna in that it provides for the withdrawal of all claims of Laguna against PG&E. Finally,

1 the Settlement provides a substantial benefit to the estate by eliminating potential liability
2 with the dismissal of the Litigation with prejudice.
3
4

5 **CONCLUSION**

6 Based on all of the factors discussed above, the Settlement is fair and equitable
7 and in the best interests of the estate.

8 For all of the foregoing reasons, PG&E respectfully requests that this Court make
9 and enter its order granting the Application, authorizing PG&E to enter into and
10 consummate the Settlement.

11 DATED: August __, 2003

12 Respectfully,

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

15 By: _____
16 BARBARA GORDON

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

19
20 THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS DOES NOT OBJECT TO
THE FOREGOING APPLICATION OR THE RELIEF REQUESTED THEREIN:

21 MILBANK, TWEED, HADLEY & McCLOY

22
23 DATED: ^{signed} August 4, 2003

24 By: 

25 LORIE A. BALL

26 Attorneys for OFFICIAL COMMITTEE OF
27 UNSECURED CREDITORS