

50-2751323

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2 JANET A. NEXON (No. 104747)  
3 BARBARA GORDON (No. 52424)  
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PACIFIC GAS AND ELECTRIC COMPANY**

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

**In re**

Case No. 01-30923 DM

PACIFIC GAS AND ELECTRIC  
COMPANY, a California corporation,

Chapter 11 Case

**Debtor.**

Date: November 21, 2003

Time: 1:30 p.m.

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

Judge: Hon. Dennis Montali

Federal I.D. No. 94-0742640

**NOTICE OF MOTION AND MOTION FOR AUTHORITY TO INCUR PLAN  
IMPLEMENTATION EXPENSES IN CONNECTION WITH CERTAIN FINANCINGS;  
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

[SUPPORTING DECLARATION OF MICHAEL J. DONNELLY  
FILED SEPARATELY]

BKRPO

**MOTION FOR AUTHORITY TO INCUR IMPLEMENTATION EXPENSES**

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

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MOTION FOR AUTHORITY TO INCUR IMPLEMENTATION EXPENSES

HOWARD  
RICE  
NEMEROVSKI  
CANADY  
FALK  
& RABKIN  
A Professional Corporation

1 PLEASE TAKE NOTICE that on November 21, 2003 at 1:30 p.m., or as soon  
2 thereafter as the matter may be heard, in the Courtroom of the Honorable Dennis Montali,  
3 located at 235 Pine Street, 22nd Floor, San Francisco, California, Pacific Gas and Electric  
4 Company, the debtor and debtor in possession in the above-captioned Chapter 11 case  
5 ("PG&E" or the "Debtor"), will and hereby does move the Court for entry of an order  
6 authorizing PG&E to incur implementation expenses of up to approximately \$15 million (the  
7 "Motion") in connection with the planning and preparation for the financings and  
8 reinstatement of obligations contemplated pursuant to the Plan of Reorganization under  
9 Chapter 11 of the Bankruptcy Code for Pacific Gas and Electric Company proposed by  
10 Pacific Gas and Electric Company, PG&E Corporation and the Official Committee of  
11 Unsecured Creditors Dated July 31, 2003 (the "Plan").

12 This Motion is based on this Notice of Motion and Motion, the accompanying  
13 Memorandum of Points and Authorities, the Declaration of Michael J. Donnelly filed  
14 concurrently herewith, the record of this case and any evidence presented at or prior to the  
15 hearing on this Motion.

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

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

Pacific Gas and Electric Company (“PG&E” or the “Debtor”), the debtor and debtor in possession in the above-captioned Chapter 11 case, requests authority to incur expenses in connection with the implementation of the Plan jointly proposed by PG&E, its parent corporation, PG&E Corporation (“Parent”), and the Official Committee of Unsecured Creditors (the “Committee”). This request is made pursuant to Bankruptcy Code Section 363(b)(1).

I.

## FACTUAL BACKGROUND<sup>1</sup>

On July 31, 2003, PG&E filed the Plan, which provides for payment in full of all allowed claims and enables the Debtor to emerge from Chapter 11 with a financially sound and sustainable business. The Disclosure Statement for the Plan (the "Disclosure Statement") was approved by the Court on July 31, 2003. The confirmation hearing is scheduled to commence on November 10, 2003.

The principal source of funding for the payment of allowed claims under the Plan will be the issuance and sale by the Reorganized Debtor of New Money Notes (as defined in the Plan) in the original principal amount of up to approximately \$8.7 billion, subject to adjustment. In addition, the Plan provides for the reinstatement of certain indebtedness. The Plan also provides for the Reorganized Debtor to establish one or more credit facilities and one or more customer accounts receivable financing programs for the purpose of (i) funding operating expenses and seasonal fluctuations in working capital; (ii) providing letters of credit or other forms of credit support and (iii) to the extent the Reorganized Debtor deems appropriate or necessary, to perform the Reorganized Debtor's obligations under the Plan.

Section 8.2 of the Plan provides that it is a condition precedent to the Plan that

<sup>1</sup>The evidentiary basis and support for the facts set forth in this Motion are contained in the Declaration of Michael J. Donnelly filed concurrently herewith.

1 "all actions, documents and agreements necessary to implement the Plan shall have been  
2 effected or executed." Further, the Effective Date must have occurred on or before March  
3 31, 2004. Plan §8.2. These conditions precedent require the efforts described below to  
4 commence immediately so that the Debtor will be in a position to issue the New Money  
5 Notes, access the above-referenced credit facilities and customer accounts receivable  
6 programs and reinstate certain indebtedness on the Effective Date.

7 PG&E previously filed an ex parte application and obtained an order authorizing  
8 miscellaneous implementation expenses in a sum not to exceed \$600,000 relating to certain  
9 financing expenses including initial fees and costs of indenture trustees, consisting of  
10 trustees' counsel fees and related expenses, and the fees and costs of certain consultants.  
11 This implementation motion now covers additional financing expenses in the sum of  
12 approximately \$15 million.

II.

## CATEGORIES OF IMPLEMENTATION FINANCINGS THAT MUST BE STRUCTURED AND ARRANGED PRIOR TO THE EFFECTIVE DATE

In order to implement the Plan, certain expenses related to the various financings and reinstatement of debt must be paid by PG&E, as the issuer or borrower. Since the financings described herein and the reinstatement of debt are expected to take place on or before the Effective Date of the Plan, or must be structured and arranged before the Effective Date, work must commence, and certain fees and costs necessary to implement the financings and reinstatement of debt must be incurred, well before the Effective Date of the Plan. The categories of new or reinstated debt obligations and credit facilities or devices that are to be in place prior to the Effective Date may include the following:

#### A. New Money Notes.

Pursuant to Section 7.2 of the Plan, on or before the Effective Date PG&E will  
sell and issue new debt securities (the “New Money Notes”) in an original principal amount  
of up to approximately \$8.7 billion, subject to adjustment, for the primary purpose of  
satisfying allowed claims.

1           These notes would be issued in maturities of up to thirty (30) years from  
2 issuance, depending upon market conditions on the date of issuance and PG&E's need or  
3 desire to stagger maturities. It is anticipated that some or all of these New Money Notes  
4 would be issued pursuant to a registration statement filed with the Securities and Exchange  
5 Commission (the "Registration Statement").

6           B. Pollution Control Bonds.

7           PG&E currently has outstanding obligations with respect to various series of  
8 Pollution Control Bonds ("PC Bonds"). The tax-exempt status of the PC Bonds offers lower  
9 cost financing than other indebtedness of comparable maturity. PG&E has determined that it  
10 must take certain actions on or prior to the Effective Date in order to preserve the benefits of  
11 the low-cost tax exempt financing afforded by the PC Bonds. Due to the current structure of  
12 the obligations and their treatment under the Plan, it may be necessary for certain actions to  
13 be taken with respect to the PC Bonds in various classes of claims, including the following:

14           1. Class 4a – Mortgage Backed PC Bonds. Under Section 4.7 of the  
15 Plan, the Mortgage-Backed PC Bonds will be redeemed, or purchased in lieu of redemption,  
16 if any of the New Money Notes are secured. In order to give PG&E the ability to preserve  
17 the benefits of the lower cost Mortgage-Backed PC Bond financing by purchasing the  
18 Mortgage-Backed PC Bonds in lieu of redemption, before the Effective Date certain  
19 amendments must be approved by the Bond Trustee and the California Pollution Control  
20 Financing Authority. In addition, prior to the Effective Date, PG&E may determine to  
21 arrange a bridge loan and subsequent refinancing for such transaction which must be  
22 appropriately documented.

23           2. Class 4b – MBIA-insured PC Bonds. Under Section 4.9 of the Plan, if  
24 any of the New Money Notes are secured, MBIA, the bond insurer, will receive a contingent  
25 note as additional security for PG&E's obligations under its reimbursement agreement with  
26 MBIA. The possible conveyance of this security and any necessary documentation must be  
27 arranged with MBIA before the Effective Date.

28           3. Class 4d - Letter of Credit Backed PC Bonds. Under Section 4.10 of

MOTION FOR AUTHORITY TO INCUR IMPLEMENTATION EXPENSES

1 the Plan, these bonds will remain outstanding in the public markets if the necessary credit  
2 support is available on the Effective Date. If such credit support is not available, these  
3 bonds will be purchased and either subsequently credit-enhanced and remarketed or  
4 refunded on or after the Effective Date. Prior to the Effective Date, new credit support or a  
5 bridge loan and subsequent refinancing must be arranged and documented in order to  
6 complete these transactions.

7       4. Class 4f – Prior Bond Claims. As described more fully in Section  
8 4.12 of the Plan, either PG&E will pay off, or PG&E or its assignee will purchase, the  
9 outstanding reimbursement obligations related to the Prior Bonds. Prior to the Effective  
10 Date, a bridge loan and/or refunding must be arranged and documented.

11       C. Credit Facilities.

12           Pursuant to Section 7.3 of the Plan, as of the Effective Date, PG&E shall  
13 establish one or more credit facilities for the purpose of (i) funding operating expenses and  
14 seasonal fluctuations in working capital (ii) providing letters of credit or other forms of  
15 credit support, and (iii) to the extent necessary or appropriate, to perform the Reorganized  
16 Debtor's obligations under the Plan. These facilities may be secured in whole or in part, and  
17 may include revolving and term loan credit facilities. The Reorganized Debtor may also  
18 establish one or more customer accounts receivable financing programs for the same  
19 purpose.

20       D. Other Potential Facilities.

21       1. Class 3b (PC-Related Mortgage Bonds). As described more fully in  
22 Sections 4.6 and 4.7 of the Plan, the PC-Related Mortgage Bonds back the Mortgage Backed  
23 PC Bonds, which are classified in Class 4a. If the Class 4a bonds remain outstanding, the  
24 Class 3b bonds will be replaced with New Mortgage Bonds issued pursuant to the new  
25 mortgage indenture. Prior to the Effective Date, the new mortgage indenture and New  
26 Mortgage Bonds must be arranged and documented.

27       2. Structured Letters of Credit. It may be more efficient to supplement or  
28 substitute traditional letters of credit with cash collateralized letters of credit, where such

collateral is funded by a debt placement. Before the Effective Date these financings and the letters of credit would have to be structured and arranged.

3. Other Credit Devices. In addition, the Reorganized Debtor may be required to arrange for other credit devices, such as surety bonds and credit insurance (which may be secured in whole or in part).

III.

## **IMPLEMENTATION EXPENSES RELATING TO FINANCINGS THAT MUST BE INCURRED PRIOR TO THE EFFECTIVE DATE**

The expenses set forth below are associated with the analysis, compilation and presentation of complex due diligence materials and negotiating, drafting and reviewing documents related to the financings, reinstatement of debt and related activities described above. The brief summaries herein are not intended to describe the entire scope of the services. The fees and cost estimates set forth herein are based on PG&E's estimates of the scope of the services and costs and, as such, are difficult to estimate in advance.

Accordingly, PG&E requests the ability to re-allocate the expenses among the categories below, as necessary.

PG&E anticipates incurring the following categories of expenses (all amounts are approximate):

A. Counsel Fees (Estimate—\$6,000,000). This category includes (i) bank counsel fees and costs for negotiating and drafting agreements with respect to the facilities described above, and due diligence review; (ii) bond counsel fees and costs for negotiating and drafting documentation for the PC Bond amendments; (iii) trustees' counsel fees and costs related to the preparation of the new mortgage indenture, PC Bond amendments and new debt issuances, including the New Money Notes; (iv) underwriters' counsel in connection with drafting an indenture and due diligence for offerings of debt issuances (other than the New Money Notes which are issued pursuant to the Registration Statement).<sup>2</sup>

<sup>2</sup>PG&E previously obtained approval to pay underwriters' counsel fees relating to the New Money Notes (see Motion for Authority to Pay Fees of Designated Underwriters' (continued . . .))

which may be necessary or appropriate in connection with the debt facilities described in the Plan; (v) counsel to credit providers in connection with drafting amendments and other documents related to PC Bonds and (vi) opinion counsel for foreign banks.

B. Trustee Related Expenses (Estimate—\$200,000). Fees and costs related to indenture trustees include acceptance fees and administrative service fees related to the new debt offerings described above and to PC Bond document amendments; out of pocket expenses for overnight mail, couriers, outside fax services, conference call services and similar services; and escrow fees and fees for documentation and servicing of escrow accounts.

C. CPUC Fees (Estimate—\$1,950,000). The Debtor expects to incur substantial fees required by CPUC regulations in connection with new debt financings.

D. Banks (Estimate—\$3,500,000). The Debtor expects to incur fees and expenses of various financial institutions, including commitment fees to reserve the lenders' commitments from the time of the syndication process until closing, and fees and expenses relating to disclosure documentation, as well as expenses relating to the syndication process, and costs for "road shows," including travel and meeting room rentals.

E. Printing Fees (Estimate—\$550,000). Debtor expects to incur substantial costs for the printing of offering documents.<sup>3</sup>

F. Pollution Control Bond Fees (Estimate—\$600,000). Fees and costs to be incurred in connection with pollution control bonds include application and filing fees, and refundable performance deposit fees.

( . . . continued)

Counsel (Docket No. 13460), approved by Order entered on September 10, 2003 (Docket No. 13605)). The expenses sought herein were not covered in the previous Motion.

<sup>3</sup>PG&E previously obtained approval to pay certain printer's costs relating to the registration statement filing with the SEC (see Motion for Authority to Pay Filing Fee and Printer's Costs in Connection with the Filing of Registration Statement with the Securities and Exchange Commission (Docket No. 13462), approved by Order entered on September 10, 2003 (Docket No. 13606)). The printing expense for which this Motion seeks authorization was not covered in the previous motion.

1                   G. Miscellaneous (Estimate—\$2,200,000).

2                   In each case, the fees and costs that the Debtor expects to incur are difficult to  
3 estimate in advance, and the actual amount incurred in any given category may vary from  
4 the estimates provided, due to variations in the timing of the debt issuances and other  
5 unpredictable factors. Accordingly, PG&E seeks authorization to incur up to an additional  
6 \$2,200,000 in miscellaneous expenses to afford PG&E flexibility to expend greater amounts  
7 in certain categories, without the necessity of obtaining additional Court approval.

8

9                   IV.

10                  **PAYMENT OF FEES INCURRED IS APPROPRIATE PURSUANT TO**  
11                  **BANKRUPTCY CODE SECTION 363(b)(1)**

12                  The Court has considerable discretion in approving a request pursuant to Section  
13 363(b)(1) of the Bankruptcy Code (“[t]he trustee, after notice and a hearing, may use, sell or  
14 lease, other than in the ordinary course of business, property of the estate”). See Dai-Ichi  
15 Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding  
16 Corp.), 242 B.R. 147, 153 (D. Del. 1999) (affirming the bankruptcy court’s decision to  
17 approve expenditure for employee incentive programs, noting that bankruptcy court has  
18 considerable discretion in approving a Section 363(b) motion).

19                  In determining whether to authorize a transaction under Section 363(b)(1), courts  
20 require a debtor to show that a sound business purpose justifies such actions, applying the  
21 business judgment test. See, e.g., Stephens Indus., Inc. v. McClung, 789 F.2d 386, 389-90  
22 (6th Cir. 1986); Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722  
23 F.2d 1063, 1071 (2d Cir. 1983); see also 3 Lawrence P. King, Collier on Bankruptcy  
24 ¶363.02[1][g] (15th ed. rev. 1998).

25                  Once the debtor has articulated a rational business justification, a presumption  
26 attaches that the decision was made “on an informed basis, in good faith and in the honest  
27 belief that the action taken was in the best interests of the [debtor].” See, e.g., Official  
28 Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.),

1 147 B.R. 650, 656 (S.D.N.Y. 1992) (citing Smith v. Van Gorkom, 488 A.2d 858 (Del.  
2 1985)).

3 Sound business justifications support PG&E's request to incur the  
4 implementation expenses described above. These costs must be incurred in order to  
5 undertake the financings that are necessary to implement the Plan. PG&E believes that the  
6 commitment to incur the fees and expenses must be made promptly in order to ensure that  
7 PG&E can timely meet the conditions precedent to the effectiveness of the Plan. Finally,  
8 PG&E is solvent and has sufficient cash to pay these expenses without causing any  
9 detriment to its creditors.<sup>4</sup>

10 **CONCLUSION**

11 For all of the foregoing reasons, PG&E respectfully requests that the Court  
12 approve the request to incur the implementation expenses described above in the total  
13 amount of \$15,000,000, and grant such other and further relief as may be just and  
14 appropriate.

15 DATED: October 31, 2003

16 Respectfully,

17 HOWARD, RICE, NEMEROVSKI, CANADY,  
18 FALK & RABKIN  
A Professional Corporation

19 By: Janet Neson  
20 JANET A. NEXON

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

23  
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26 WD 103103/1-1419995/120/1109512/v4

27 <sup>4</sup>As reflected in PG&E's August 2003 Monthly Operating Report, PG&E held more  
28 than \$4 billion in cash reserves as of August 31, 2003.