

50-275/323

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12 PACIFIC GAS AND ELECTRIC COMPANY

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

16 In re

Case No. 01-30923 DM

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

Chapter 11 Case

19 Debtor.

20 Date: November 21, 2003
21 Time: 1:30 p.m.
22 Place: 235 Pine Street, 22nd Floor
23 San Francisco, California
24 Judge: Hon. Dennis Montali

25 Federal I.D. No. 94-0742640

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

[SUPPORTING DECLARATION OF MICHAEL J. DONNELLY
FILED SEPARATELY]

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21 [SUPPORTING DECLARATION OF MICHAEL J. DONNELLY
22 FILED SEPARATELY]
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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.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 Pacific Gas and Electric Company ("PG&E" or the "Debtor"), the debtor and
3 debtor in possession in the above-captioned Chapter 11 case, requests authority to incur
4 expenses in connection with the implementation of the Plan jointly proposed by PG&E, its
5 parent corporation, PG&E Corporation ("Parent"), and the Official Committee of Unsecured
6 Creditors (the "Committee"). This request is made pursuant to Bankruptcy Code Section
7 363(b)(1).

8 I.

9 FACTUAL BACKGROUND¹

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

15 The principal source of funding for the payment of allowed claims under the Plan
16 will be the issuance and sale by the Reorganized Debtor of New Money Notes (as defined in
17 the Plan) in the original principal amount of up to approximately \$8.7 billion, subject to
18 adjustment. In addition, the Plan provides for the reinstatement of certain indebtedness. The
19 Plan also provides for the Reorganized Debtor to establish one or more credit facilities and
20 one or more customer accounts receivable financing programs for the purpose of (i) funding
21 operating expenses and seasonal fluctuations in working capital; (ii) providing letters of
22 credit or other forms of credit support and (iii) to the extent the Reorganized Debtor deems
23 appropriate or necessary, to perform the Reorganized Debtor's obligations under the Plan.
24 See Plan §7.2-7.3.

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

26
27 ¹The evidentiary basis and support for the facts set forth in this Motion are contained
28 in the Declaration of Michael J. Donnelly filed concurrently herewith.

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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.

13 **II.**
14 **CATEGORIES OF IMPLEMENTATION FINANCINGS THAT MUST BE**
15 **STRUCTURED AND ARRANGED PRIOR TO THE EFFECTIVE DATE**

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

24 **A. New Money Notes.**

25 Pursuant to Section 7.2 of the Plan, on or before the Effective Date PG&E will
26 sell and issue new debt securities (the “New Money Notes”) in an original principal amount
27 of up to approximately \$8.7 billion, subject to adjustment, for the primary purpose of
28 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

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

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

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

6 **III.**
7 **IMPLEMENTATION EXPENSES RELATING TO FINANCINGS THAT MUST BE**
8 **INCURRED PRIOR TO THE EFFECTIVE DATE**

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

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

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

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

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

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

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

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

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

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

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

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(... continued)

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

25 ³PG&E previously obtained approval to pay certain printer's costs relating to the
26 registration statement filing with the SEC (see Motion for Authority to Pay Filing Fee and
27 Printer's Costs in Connection with the Filing of Registration Statement with the Securities
28 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
10 **IV.**
PAYMENT OF FEES INCURRED IS APPROPRIATE PURSUANT TO
BANKRUPTCY CODE SECTION 363(b)(1)
11

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.⁴

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 Nexon
20 JANET A. NEXON

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

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

27 ⁴As 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.