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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
17 PACIFIC GAS AND ELECTRIC
18 COMPANY, a California corporation,
19 Debtor.
20 Federal I.D. No. 94-0742640

Case No. 01 30923 DM

Chapter 11 Case

Date: January 16, 2004

Time: 1:30 p.m.

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

Judge: Hon. Dennis Montali

21 PROOF OF SERVICE BY MAIL FOR NOTICE OF MOTION AND MOTION FOR
22 ORDER AUTHORIZING THE DEBTOR TO SETTLE CLAIM NO. 13377 FILED BY
23 THE PRESIDIO TRUST; AND DECLARATION OF GRANT GUERRA IN SUPPORT OF
24 MOTION FOR ORDER AUTHORIZING THE DEBTOR TO SETTLE CLAIM NO. 13377
25 FILED BY THE PRESIDIO TRUST

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PROOF OF SERVICE BY MAIL

I am employed in the City of San Francisco, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is San Francisco Legal Copy, 100 California St., Suite P-10, San Francisco, California 94111.

I am readily familiar with the practice for collection and processing of documents for mailing with the United States Postal Service of San Francisco Legal Copy, and that practice is that the documents are deposited with the United States Postal Service with postage fully prepaid the same day as the day of collection in the ordinary course of business.

On December 22, 2003, I served the following document(s) described as:

- 1) NOTICE OF MOTION AND MOTION FOR ORDER AUTHORIZING THE DEBTOR TO SETTLE CLAIM NO. 13377 FILED BY THE PRESIDIO TRUST; AND
- 2) DECLARATION OF GRANT GUERRA IN SUPPORT OF MOTION FOR ORDER AUTHORIZING THE DEBTOR TO SETTLE CLAIM NO. 13377 FILED BY THE PRESIDIO TRUST

on the persons listed below by placing the document(s) for deposit in the United States Postal Service through the regular mail collection process at San Francisco Legal Copy, located at 100 California St., Suite P-10, San Francisco, California 94111, to be served by mail addressed as follows:

Please See Attached Mailing List

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on December 22, 2003.



SAN FRANCISCO LEGAL COPY

**HOWARD
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NEMEROVSKI
CANADY
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& RABIN**
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8 UNITED STATES BANKRUPTCY COURT
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12 In re

13 PACIFIC GAS AND ELECTRIC
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15 Federal I.D. No. 94-0742640
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18 NOTICE OF MOTION AND MOTION FOR ORDER AUTHORIZING THE DEBTOR TO
19 SETTLE CLAIM NO. 13377 FILED BY THE PRESIDIO TRUST; SUPPORTING
20 MEMORANDUM OF POINTS AND AUTHORITIES

21 [DECLARATION OF GRANT GUERRA IN SUPPORT THEREOF FILED
SEPARATELY]
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1 **NOTICE OF MOTION AND MOTION**

2 **PLEASE TAKE NOTICE** that on January 16, 2004 at 1:30 p.m., or as soon
3 thereafter as the matter may be heard, in the Courtroom of the Honorable Dennis Montali,
4 located at 235 Pine Street, 22nd Floor, San Francisco, California, Pacific Gas and Electric
5 Company, the debtor and debtor in possession in the above-captioned Chapter 11 case (the
6 "Debtor" or "PG&E"), will and hereby does move the Court for entry of an Order
7 Authorizing Pacific Gas And Electric Company To Settle Claim No. 13377 Filed By The
8 Presidio Trust (the "Motion").

9 By this Motion, PG&E seeks the Court's approval of a certain Settlement
10 Agreement And Mutual Release Of Claims (the "Settlement Agreement") which resolves a
11 claim (Claim No. 13377) filed by The Presidio Trust (the "Trust") (the "Claim"), and related
12 issues against PG&E arising out of various service contracts and certain easements and
13 licenses located in a portion of the former Presidio of San Francisco Army Base (the
14 "Presidio").

15 This Motion is brought pursuant to Rule 9019 of the Federal Rules of Bankruptcy
16 Procedure and is based on the grounds that the proposed Settlement Agreement is fair and
17 equitable and in the best interests of the bankruptcy estate. This Motion is based on this
18 Notice Of Motion And Motion, the accompanying Memorandum Of Points And Authorities
19 in support thereof, the supporting Declaration Of Grant Guerra submitted concurrently
20 herewith, the record of this case, and any admissible evidence presented to the Court prior to
21 or at the hearing on this Motion.

22 **PLEASE TAKE FURTHER NOTICE** that pursuant to Rule 9014-1(c)(2) of the
23 Bankruptcy Local Rules of the United States District Court for the Northern District of
24 California, any opposition to the Motion and the relief requested herein must be filed with
25 the Bankruptcy Court and served upon appropriate parties (including counsel for PG&E) at
26 least five (5) days prior to the scheduled hearing date. If there is no timely objection to
27 the requested relief as described in this paragraph, the Court may enter an order granting
28 such relief without further hearing.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 FACTUAL BACKGROUND

3 The Trust has administrative jurisdiction pursuant to federal law (16 U.S.C.
4 §460bb) over a portion of the Presidio denoted as Area B in Title I of Public Law 104-333
5 ("Area B"), legal title to which is held by the United States of America. Area B was
6 previously under the administrative jurisdiction of the National Park Service (the "NPS") of
7 the United States Department of the Interior ("DOI") from October 1, 1994 to June 30, 1998,
8 and during all relevant prior periods, under the administrative jurisdiction of the United
9 States Army (the "Army") until September 30, 1994. Prior to the Trust assuming
10 administrative jurisdiction over Area B, the Debtor entered into various contracts and
11 obtained certain easements and licenses involving Area B in whole or in part. Additionally,
12 PG&E was engaged by the Trust's predecessor, the NPS, to upgrade a 4 kilovolt ("kV")
13 electric distribution system on Area B to 12 kV. Disputes have arisen between the Trust and
14 PG&E over such contracts, easements, licenses and the upgrade project, including the rights
15 and obligations to which the Trust may have succeeded.

16 I.

17 SUMMARY AND STATUS OF THE CLAIM

18 On February 17, 2003, the Trust filed the Claim against the Debtor in the amount
19 of \$2,445,813.10, based on an allegation that PG&E had impermissibly used a corridor (the
20 "Fiber Optic Corridor") of land within the Presidio, a substantial portion of which corridor is
21 now within the boundaries of Area B, for the purpose of installing, using, and maintaining a
22 fiber optic telecommunications cable and related facilities. On March 28, 2003, PG&E filed
23 an objection (the "Objection") to the Trust's Claim as being untimely. See Notice of
24 Debtor's Fifth Omnibus Objection and Fifth Omnibus Objection to Late-Filed Claims
25 (Docket No. 12475). The hearing on PG&E's Objection is currently scheduled for
26 December 22, 2003. The Debtor and the Trust have jointly requested that the Court take
27 such hearing off of the Court's calendar in anticipation of seeking the Court's approval of
28 the Settlement Agreement.

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II.

THE SETTLEMENT AGREEMENT TERMS

Since filing the Objection, PG&E has conducted negotiations with the Trust to resolve the Claim and other disputes relating to various contracts, licenses and easements relating to Area B or other areas in the Presidio under the Trust's administrative jurisdiction. Declaration of Grant Guerra In Support Of Motion For Order Authorizing PG&E To Settle Claim No. 13377 By The Presidio Trust ("Guerra Decl.") ¶2. On December 17, 2003, the Debtor and the Trust (collectively, the "Parties") finalized and executed the Settlement Agreement,¹ subject to this Court's approval, the terms of which are summarized below. Id. A true and correct copy of the Settlement Agreement is attached as Exhibit A to the Guerra Declaration.²

Under the terms of the proposed Settlement Agreement, the Trust agrees to withdraw the Claim and represents that it has not assigned or transferred any part of the Claim and has not filed or asserted any other claim against PG&E or its bankruptcy estate. Id. at ¶3. The Trust also agrees not to file or assert any claim in the future that arose prior to the execution of the Settlement Agreement, is eventually discharged by a confirmed plan in PG&E's bankruptcy case, and is related to the subject matter of the Settlement Agreement. Id. The proposed Settlement Agreement also contains broad mutual releases. Id. In addition, pursuant to the proposed Settlement Agreement, the Parties have agreed to settle certain disputes (described below) involving various agreements, licenses and easements relating to Area B or portions of the Presidio under the Trust's administrative jurisdiction.

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¹PG&E is not attaching copies of the Settlement Agreement to the service copies of the Guerra Declaration because it is too voluminous. However, PG&E will make copies of such document available to anyone being served with this Motion and the Guerra Declaration. Any person served with this Motion and the Guerra Declaration may obtain a copy of the Settlement Agreement by written request by mail to Howard, Rice, Nemerovski, Canady, Falk & Rabkin, Attn: Nathaniel H. Hunt, Three Embarcadero Center, 7th Floor, San Francisco, California 94111-4024, or by e-mail request to nhunt@hrice.com. Additionally, copies of the Settlement Agreement will be available at the hearing on this Motion if the Court or any other person wishes to review it.

28

²The Settlement Agreement mistakenly designated the Claim as Claim No. 13357. The Parties have agreed to correct such typographical error. Guerra Decl. ¶2.

1 Id. at ¶4.

2 **A. The Fiber Optic Arrangement.**

3 In 1986, the Army granted PG&E a license identified as No. DACA05-3-86-543,
4 for the period March 1, 1986 to February 28, 1991, to use the Fiber Optic Corridor, for the
5 purpose of installing, using, and maintaining a fiber optic telecommunications cable and
6 related facilities. PG&E has used the Fiber Optic Corridor for the specified purposes
7 continuously since 1986. After the expiration of the license on February 28, 1991, PG&E
8 and the Army, and subsequently the NPS, which succeeded the Army, entered into
9 negotiations concerning the continued use of the Fiber Optic Corridor to establish an
10 easement. Although PG&E was unable to finalize a comprehensive agreement with either
11 the Army or the NPS, it did, however, obtain an agreement to continue using the Fiber Optic
12 Corridor as a permittee pending final agreement on the easement terms (the "Fiber Optic
13 Arrangement"). The Trust has succeeded to any and all rights and obligations of the NPS
14 and the Army with respect to PG&E in connection with the Fiber Optic Arrangement. The
15 Parties disagree as to the legal effect, enforceability, and interpretation of some or all of the
16 terms of the Fiber Optic Arrangement.

17 Under the terms of the proposed Settlement Agreement, the Parties agree that the
18 Fiber Optic Arrangement and all of its terms and conditions, including all duties and
19 obligations of either Party, shall be terminated. Additionally, pursuant to the proposed
20 Settlement Agreement, PG&E has abandoned the fiber optic equipment and facilities which
21 it installed and used on the Fiber Optic Corridor, and any such equipment and facilities shall
22 be left in place and become the property of the Trust without compensation therefor. The
23 proposed Settlement Agreement also provides that, upon written request by PG&E, the
24 Parties shall promptly enter into good faith negotiations on the terms and conditions for
25 future use of the Fiber Optic Corridor.

26 **B. The Electric Supply Arrangement.**

27 In 1994, the NPS accepted PG&E's technical and cost proposal (the "Electric
28 Supply Arrangement") in response to the NPS's Request for Proposal No.

1 1443RP061094001, Electric Supplier, Presidio, Project Type 92. The Electric Supply
2 Arrangement provides for PG&E to upgrade the existing 4 kV electric distribution system on
3 Area B to 12 kV and to supply electric distribution to the Presidio. The Trust succeeded to
4 any and all rights and obligations of NPS with respect to PG&E in connection with the
5 Electric Supply Arrangement. The Parties disagree as to the legal effect, enforceability, and
6 interpretation of some or all of the terms of the Electric Supply Arrangement, including the
7 obligations of the Parties resulting from the Electric Supply Arrangement and the costs
8 expended by PG&E to engineer the new 12 kV system.

9 Under the terms of the proposed Settlement Agreement, the Parties agree that the
10 Electric Supply Arrangement and all of its terms and conditions, including all duties and
11 obligations of either Party, shall be terminated. Any electric service furnished to the Trust
12 by PG&E shall thereafter be furnished subject to PG&E's applicable tariffs on file with the
13 California Public Utilities Commission (the "Commission") and shall be subject to such
14 changes or modification by the Commission as the Commission may, from time to time,
15 direct in the exercise of its jurisdiction.

16 **C. Undocumented Electric Facilities.**

17 The Trust owns and operates the 4 kV electric distribution system serving all
18 areas under the Trust's administrative jurisdiction, with the principal exception of the
19 facilities serving the Wherry Housing/Baker Beach Apartments area (the "Baker Beach
20 Electric Facilities"), which are owned and operated by PG&E. Certain miscellaneous
21 facilities (collectively, the "Undocumented Electric Facilities") that PG&E has previously
22 installed in the Presidio for the distribution of electricity to customers of PG&E (including
23 the Trust) who are located within the Presidio are located on property under the
24 administrative jurisdiction of the Trust, but are not associated with any easement, license,
25 permit, right to use or other grant of permission from the Army, NPS, or the Trust that can
26 be documented by PG&E despite its best efforts to locate and obtain all relevant
27 documentation of such facilities. The Parties desire to document all such facilities and the
28 terms and conditions under which they may continue to be located at the Presidio.

1 Under the terms of the proposed Settlement Agreement, the Parties agree to enter
2 into an Easement for Electric Distribution Facilities, attached to the proposed Settlement
3 Agreement as Exhibit G, for PG&E's continued use and operation of the Baker Beach
4 Electric Facilities and the Undocumented Electric Facilities. In addition, the proposed
5 Settlement Agreement provides that the Parties execute an Agreement for Installation or
6 Allocation of Special Facilities, attached to the proposed Settlement Agreement as Exhibit
7 H, for electric distribution service to the Baker Beach Electric Facilities by PG&E. PG&E
8 shall thereafter maintain the equipment and facilities and provide electric service to the
9 Baker Beach Electric Facilities pursuant to its applicable rate schedules.

10 **D. Natural Gas Easement.**

11 On September 30, 1994, the day before the formal closing of the Presidio, the
12 Army granted to PG&E an Easement for Pipeline Right-of-Way, identified as No. DACA05-
13 2-94-588 (the "Natural Gas Easement"), for installation, operation, and maintenance of pipes
14 and other facilities for distributing natural gas to buildings and other users of natural gas
15 located at the Presidio. The Trust has succeeded to all rights and obligations of the Army
16 with respect to PG&E under the Natural Gas Easement. The Parties desire to revise the
17 Natural Gas Easement to reflect current conditions at the Presidio.

18 Under the terms of the proposed Settlement Agreement, the Parties agree to enter
19 into an Amended and Restated Easement, attached to the proposed Settlement Agreement as
20 Exhibit I, for PG&E's natural gas distribution facilities located within the areas of the
21 Presidio under the Trust's administrative jurisdiction and serving customers of PG&E
22 located at the Presidio.

23 **ARGUMENT**

24 **I.**

25 **THE PROPOSED SETTLEMENT AGREEMENT IS FAIR AND EQUITABLE AND**
26 **IN THE BEST INTERESTS OF THE ESTATE.**

27 "The law favors compromise and not litigation for its own sake . . ." Martin v.
28 Kane (In re A & C Properties), 784 F.2d 1377, 1381 (9th Cir. 1986). Bankruptcy courts

1 have great latitude in approving compromise agreements that are “fair and equitable.”
2 Woodson v. Fireman’s Fund Ins. Co. (In re Woodson), 839 F.2d 610, 620 (9th Cir. 1988).
3 In determining whether a compromise is “in the best interest of the bankrupt estate” (A & C
4 Properties, 784 F.2d at 1382), courts consider the following factors:

5 (a) The probability of success in the litigation; (b) the difficulties, if
6 any, to be encountered in the matter of collection; (c) the complexity
7 of the litigation involved, and the expense, inconvenience and delay
8 necessarily attending it; [and] (d) the paramount interest of the
9 creditors and a proper deference to their reasonable views in the
10 premises. (Id. at 1381)

11 PG&E respectfully submits that these A & C Properties factors weigh in favor of
12 approving the proposed Settlement Agreement, as demonstrated below.³

13 **A. The Probability of Success is Uncertain.**

14 In a case of this type, the outcome is always uncertain, and the probability of
15 success is difficult to weigh. As set forth in the Objection, PG&E maintains that the Claim,
16 which relates primarily to its use of the Fiber Optic Corridor, is untimely. Guerra Decl. ¶6.
17 Even assuming, arguendo, that the Claim is timely, PG&E denies the alleged wrongdoing
18 that forms the basis of the Claim and disputes the amount of damages alleged in the Claim.
19 Id. PG&E maintains that it did not exceed the scope of its permit to use the Fiber Optic
20 Corridor, but rather used the Fiber Optic Corridor pursuant to a hold-over permit granted by
21 the Army pending negotiation of an easement. Id. Additionally, PG&E takes the position
22 that the amount of the Claim, which purports to assess the value of the Fiber Optic Corridor,
23 grossly exceeds the fair market value for such a right of way. Id. Moreover, the Parties’
24 respective positions on various disputed and unresolved issues, including with respect to the
25 Fiber Optic Arrangement, the Electric Supply Arrangement, the Undocumented Electric
26 Facilities, and the Natural Gas Easement, will be difficult to establish because they are
27 premised upon negotiations, agreements, and contracts which date back as much as thirty-

28 ³The second A & C Properties factor (the difficulty with respect to collecting a settlement) is not applicable here because the proposed Settlement Agreement does not provide for PG&E to collect any monetary sum. Accordingly, PG&E will not discuss such factor.

1 nine years. Id.

2 **B. The Disputed Issues Are Complex And Continued Litigation Would Entail**
3 **Unnecessary Expense, Inconvenience and Delay.**

4 The proposed Settlement Agreement is broad in scope; it resolves several
5 complex issues between the Parties relating to obligations, rights and privileges with respect
6 to land facilities and complex service contracts, dating back as long as thirty-nine years. Id.
7 at ¶5. If the proposed Settlement Agreement is not approved, PG&E intends to continue
8 litigating its Objection to the Claim, and, if necessary, additional objections, at considerable
9 expense and inconvenience to both the Parties and the Court. Id. at ¶7. Litigation of the
10 Claim and various related matters that are resolved under the proposed Settlement
11 Agreement would raise many complex and challenging issues, including: the existence and
12 scope of any land rights held by PG&E in Area B, the ownership interests of the Parties with
13 respect to existing facilities in Area B and the obligations and rights of the Parties under
14 electric and gas distribution service agreements for utility service to Area B. Id. These
15 complex issues are expected to require extensive analysis and testimony and result in
16 protracted and costly litigation. Id. Further, the uncertainty associated with the failure to
17 resolve such complex issues will inconvenience PG&E's ongoing business operations.
18 Based on the foregoing, PG&E believes that the proposed settlement of these disputes is
19 favorable to the Debtor and should be approved. Id. at ¶5.

20 **C. The Proposed Settlement Agreement Benefits the Creditors.**

21 The proposed Settlement Agreement fully resolves the Trust's Claim against the
22 Debtor without the expense, risk and delay inherent in continued litigation. Avoidance of
23 unnecessary litigation will benefit PG&E's creditors by minimizing costs and delay and
24 allowing PG&E's personnel to focus on more critical functions. Id. at ¶8. Moreover, the
25 Trust has agreed to withdraw the Claim against PG&E, thereby eliminating the need to
26 expend further estate resources in litigating PG&E's objections to the Claim. Id.

27 **CONCLUSION**

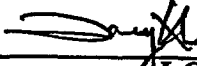
28 Based on all of the factors discussed above, PG&E respectfully submits that the
MOTION FOR ORDER AUTHORIZING PG&E TO SETTLE CLAIM NO. 13377 BY THE PRESIDIO TRUST

1 proposed Settlement Agreement is fair and equitable and in the best interests of the estate.
2 Accordingly, PG&E respectfully requests that this Court grant the Motion and enter an order
3 approving the proposed Settlement Agreement between the Debtor and the Trust.

4 DATED: December 22, 2003.

5 Respectfully,

6 JAMES L. LOPES
7 GARY M. KAPLAN
8 LONG X. DO
9 HOWARD, RICE, NEMEROVSKI, CANADY,
10 FALK & RABKIN
11 A Professional Corporation

12 By: 
LONG X. DO

13 Attorneys for Debtor and Debtor in Possession
14 PACIFIC GAS AND ELECTRIC COMPANY

15 WD 122203/1-1419913/lxd/1121272/v1

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