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7 PACIFIC GAS AND ELECTRIC COMPANY

8  
9 UNITED STATES BANKRUPTCY COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN FRANCISCO DIVISION

12 In re

13 PACIFIC GAS AND ELECTRIC  
14 COMPANY, a California corporation,

15 Debtor.

16 Federal I.D. No. 94-0742640  
17

Case No. 01-30923 DM

Chapter 11 Case

Date: March 5, 2004

Time: 1:30 p.m.

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

Judge: Hon. Dennis Montali

18  
19 **DECLARATION OF KERMIT KUBITZ IN SUPPORT OF**  
20 **DEBTOR'S MOTION FOR EXTENSION OF TIME TO OBJECT TO CERTAIN**  
21 **PROOFS OF CLAIM AND FOR RELATED RELIEF**

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HOWARD  
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1 I, Kermit R. Kubitz, declare as follows:

2 1. I am an attorney at law employed by Pacific Gas & Electric Company ("PG&E").  
3 I have been employed by PG&E since 1974. This declaration is submitted in support of  
4 PG&E's Motion For Extension Of Time To Object To Certain Proofs Of Claim And For  
5 Related Relief (the "Motion").<sup>1</sup> Except as otherwise indicated herein, the facts stated in this  
6 declaration are based on my personal knowledge of PG&E's general operations and  
7 practices and policies, and upon my review of their respective records concerning the  
8 matters stated herein. If called as a witness, I could and would testify competently to the  
9 facts stated herein.

10 2. As an attorney at PG&E, I have responsibility for legal issues pertaining to tariffs  
11 and rate-schedules filed with the Federal Regulatory Energy Commission ("FERC"), which  
12 relate to costs associated with wholesale procurement and transmission of electricity from  
13 the California Power Exchange Corporation (the "PX") and the California Independent  
14 System Operator Corporation (the "ISO"). I have worked on FERC, PX and ISO matters  
15 since prior to the inception of the restructured wholesale electricity market in 1998, and have  
16 extensive familiarity with matters pertaining to FERC tariffs, as well as FERC's proceedings  
17 involving the PX and the ISO. I have had responsibility for reviewing and presenting to  
18 FERC PG&E's position on tariff amendments, market reports, and investigations by the ISO  
19 and PX. As part of my job responsibilities I have reviewed and participated in various  
20 proceedings before FERC, including certain proceedings discussed below.

21 1. **The FERC Refund Proceedings**

22 3. In response to the unprecedented increase in wholesale electricity prices during  
23 2000 and 2001, FERC held, on November 1, 2000, that prices in the California electric  
24 power markets were not just and reasonable. *San Diego Gas & Elec. Co. v. Sellers of*  
25 *Energy*, 93 F.E.R.C. (CCH) ¶61,121 at 61,349-61,350 (Nov. 1, 2000). In addition, on  
26

27 <sup>1</sup> Capitalized terms not defined herein have the meaning ascribed to them in the  
28 Motion.

1 July 25, 2001, FERC held that buyers would be entitled to refunds for power purchased in  
2 such markets from October 2, 2000 through June 20, 2001. *San Diego Gas & Elec. Co. v.*  
3 *Sellers of Energy*, 96 F.E.R.C. (CCH) ¶61,120 at 61,513-61,514 (July 25, 2001). The  
4 amount of refunds was left to be determined in subsequent FERC proceedings. On  
5 December 12, 2002, a FERC administrative law judge ("ALJ") issued an initial decision (the  
6 "December 12 Order") finding that energy sellers had overcharged the utilities, the State of  
7 California and other buyers from October 2, 2000 through June 20, 2001 by approximately  
8 \$1.8 billion. *San Diego Gas & Elec. Co. v. Sellers of Energy*, 101 F.E.R.C. ¶63,026  
9 (December 12, 2002).

10 4. On March 26, 2003, FERC confirmed most of the ALJ's findings in the  
11 December 12 Order, but modified the refund methodology in part. *San Diego Gas &*  
12 *Electric Company et al.*, 102 F.E.R.C. ¶61,317 (2003) (the "March 26 Order"). On  
13 October 16, 2003, FERC issued an order affirming, in most respects, the March 26 Order.  
14 *San Diego Gas & Electric Company et al.*, 105 F.E.R.C. ¶61,066 (2003) (the "October 16  
15 Order"). The exact calculation of the refunds to be paid by the power sellers will not be  
16 determined until the ISO and PX complete compliance filings to implement the changes  
17 required pursuant to the December 12 Order, the March 26 Order and the October 16 Order.  
18 Pursuant to the October 16 Order, the ISO and the PX were given a period of five months  
19 (i.e., until approximately March 16, 2004) to complete such compliance filings. Such  
20 compliance filings by the ISO and PX are expected to be subject to a number of challenges  
21 by interested parties. FERC is then expected to make determinations regarding the amounts  
22 owed to and owing by relevant parties, resulting in ascertainment of the Allowed amounts of  
23 ISO, PX and Generator Claims. That process is not expected to be completed until at least  
24 the latter part of 2004, as discussed below.

25 5. As a preliminary step to complete its compliance filings, the ISO must process  
26 certain preliminary reruns of the relevant data. In a request for rehearing that the ISO filed  
27 on December 15, 2003 in the preliminary rerun proceeding, the ISO advised FERC that  
28 neither the preliminary rerun nor the refund rerun deadlines established by FERC are likely

1 to be met. In its request for rehearing, the ISO stated that its anticipated suspension of rerun  
2 activity would further prolong the ISO's schedule for completing preliminary reruns. ISO  
3 Request for Rehearing in Docket No. ER03-746-003, at p. 8. The ISO also noted in its  
4 December 15, 2003 request for rehearing that it had previously advised the FERC that it  
5 would not be able to meet the FERC's five-month deadline for completing the refund  
6 proceeding rerun. *Id.* (citing ISO Request for Rehearing in Docket No. EL00-95, *et al.*, filed  
7 November 17, 2003, at pp. 18-19).

8 6. On February 3, 2004, FERC issued an order on clarification and rehearing on  
9 preliminary rerun issues in Docket No. ER03-746-003. *California Independent System*  
10 *Operator Corp.*, 106 FERC ¶ 61,099 (2004). In addition to clarifying issues relating to  
11 certain preliminary rerun issues, that order also granted the ISO's request to defer a  
12 compliance filing due to the "delayed completion of the preparatory re-runs." *Id.* at ¶ 20.  
13 FERC required the ISO to begin filing monthly status reports of the preparatory re-runs. As  
14 especially relevant here, FERC further required the ISO to report "on a monthly basis the  
15 dates that it expects to complete both the preparatory re-runs and settlements and billing  
16 process for calculating refunds." *Id.* at ¶ 21.

17 7. Given that the preparatory reruns must be completed to provide a baseline for the  
18 refund reruns, it is now apparent that the refund reruns will not be completed by March  
19 2004, as originally contemplated by FERC. Even when completed, however, this does not  
20 end the process, since the PX, in turn, uses the ISO's rerun data to undertake its own reruns,  
21 which are expected to take an additional one or two months. Furthermore, each rerun may  
22 give rise to additional disputes by market participants that would trigger dispute resolution  
23 procedures under the ISO and/or the PX tariffs. Any such disputes could further delay  
24 having final rerun numbers.

25 8. Once the final reruns are completed and compliance filings are made by the ISO  
26 and PX with FERC, a comment period will be available, after which FERC would rule on  
27 the compliance filing. Interested parties may (and are likely to) seek rehearing of FERC's  
28 ruling. This process is anticipated to take several additional months.

1 9. Based on the foregoing, FERC is not expected to make determinations regarding  
2 the amounts owed to and owing by relevant parties, resulting in ascertainment of the  
3 Allowed amounts of ISO, PX and Generator Claims until the latter part of 2004 at the  
4 earliest, and quite possibly not until 2005. Since it is my understanding that most, if not  
5 virtually all of the issues which might otherwise be the subject of PG&E's objections to  
6 these Claims are likely to be resolved through FERC's ruling in the FERC Refund  
7 Proceedings, in my view, it is appropriate to extend the time for objecting to the ISO, PX  
8 and Generator Claims until such Claims become Allowed pursuant to the Plan (*i.e.*, on the  
9 date designated by FERC when payments are to be made on account of ISO, PX and  
10 Generator Claims pursuant to an unstayed order in the FERC Refund Proceedings, or if no  
11 date is designated in such order, 45 days after the issuance of such order, provided such  
12 order has not been stayed).

13 **2. The Scheduling Coordinator Services Tariff Proceeding**

14 10. Several creditors have filed claims related to the Scheduling Coordinator Services  
15 ("SCS") Tariff proceeding pending before FERC (collectively, the "SCS Related Claims").  
16 PG&E commenced the SCS Tariff proceeding at FERC in November 1999 (FERC Docket  
17 No. ER00-565-000, et al.). Under the SCS Tariff, PG&E proposes to pass-through charges  
18 that PG&E receives from the ISO. PG&E incurs these charges in its role as a scheduling  
19 coordinator pursuant to the provisions of the FERC-approved ISO Tariff. In January 2000,  
20 FERC accepted PG&E's filing, but held hearings in abeyance pending the outcome of a  
21 related proceeding. *Pacific Gas and Electric Co.*, 90 FERC ¶ 61,010 (2000). FERC  
22 reactivated this proceeding in May 2003. *Pacific Gas and Electric Co.*, 103 FERC ¶ 61,180  
23 (2003). Since that time, the SCS Tariff proceeding has been bifurcated by the Presiding  
24 Administrative Law Judge. Phase 1 of the proceeding addresses liability issues and Phase 2  
25 addresses cost allocation issues. A two-week hearing on Phase 1 was conducted between  
26 January 6 and 15, 2004. The parties are currently briefing various issues raised during that  
27 hearing and an Initial Decision is expected to be issued by April 19, 2004. Phase 2 is  
28 scheduled to commence in April 2004 and hearings are expected to begin in December 2004

1 and will likely last three to four weeks. An Initial Decision in Phase 2 is not expected to be  
2 issued until Spring 2005, and a FERC order in this proceeding will likely not be issued  
3 before late 2005 or early 2006.

4 11. Since most of the issues which might otherwise be the subject of PG&E's  
5 objections to the SCS Related Claims are likely to be resolved through FERC's ruling in the  
6 SCS Tariff proceeding, in my view, it is appropriate to extend the time for objecting to such  
7 Claims until 45 days after FERC's issuance of an order in that proceeding, provided such  
8 order has not been stayed. (Such extension is analogous to the treatment for ISO, PX and  
9 Generator Claims discussed above.)

10 3. The California-Oregon Transmission Project Proceeding

11 12. PG&E has been involved in an ongoing dispute with the ISO as to whether the  
12 ISO may properly charge PG&E for certain ISO-incurred costs associated with transmission  
13 schedules that flow over the California-Oregon Transmission Project ("COTP"). Under the  
14 ISO Tariff, the ISO only has FERC approval to charge for schedules that flow over  
15 transmission facilities that are under the ISO's operational control. The COTP is *not* under  
16 ISO operational control and never has been. PG&E paid approximately \$14 million in  
17 COTP-related ISO charges before realizing that the ISO was surreptitiously charging PG&E  
18 for such amounts. Once PG&E discovered that the ISO was including these charges,  
19 inappropriately, in invoices to PG&E, PG&E disputed them and initiated arbitration under  
20 the ISO Tariff's alternative dispute resolution ("ADR") provisions. PG&E prevailed in that  
21 arbitration, obtaining an arbitrator's award that directed the ISO to return the amounts  
22 inappropriately collected from PG&E. Pursuant to the ADR provisions under the ISO  
23 Tariff, the ISO "appealed" the arbitration award to FERC, seeking to reverse the decision as  
24 to the \$14 million already paid by PG&E, *and* asserting that PG&E owes an additional \$36  
25 million of COTP-related charges. That appeal has been fully briefed and is currently  
26 pending at FERC. It is not known when FERC might issue its decision in this proceeding.  
27 The ISO has filed a claim against PG&E relating to the additional COTP-related amounts  
28 that it alleges are owed to it by PG&E (the "ISO COTP Claim").

1 13. Since most, if not virtually all of the issues which might otherwise be the subject  
2 of PG&E's objections to the ISO COTP Claim are likely to be resolved through FERC's  
3 ruling in the COTP proceeding, in my view, it is appropriate to extend the time for objecting  
4 to such Claim until 45 days after FERC's issuance of an order in that proceeding, provided  
5 such order has not been stayed. (Such extension is analogous to the treatment for ISO, PX  
6 and Generator Claims discussed above.)

7 **4. The PX Chargeback Proceeding**

8 14. As discussed in PG&E's Omnibus Objection To PX Charge-Back Claims filed  
9 herein on January 28, 2003 (Docket No. 11912), on April 6, 2001, FERC issued an order  
10 rescinding certain "PX chargebacks" imposed by the PX on its market participants, finding  
11 that the PX chargeback methodology led to unjust and unreasonable results. Certain  
12 requests for rehearing of that order were filed, which are still pending. In subsequent orders,  
13 FERC has denied requests by certain market participants to obtain the return of chargeback  
14 amounts, stating that certain issues are still pending on rehearing, and that nothing should be  
15 done until FERC issues further orders, as other proceedings may impact the appropriate  
16 resolution.

17 15. Pursuant to this Court's April 28, 2003 Order Overruling Debtor's Omnibus  
18 Objection To PX Charge-Back Claims Without Prejudice (Docket No. 12647), this Court  
19 overruled, without prejudice, PG&E's omnibus objection to claims based on PX  
20 chargebacks (collectively, the "PX Chargeback Claims"), essentially finding that such  
21 objection was premature because the subject claims could be impacted by FERC's ruling in  
22 the above-discussed proceedings. Although FERC has not indicated when it expects to issue  
23 a ruling with respect to the issues pending on rehearing, PG&E expects that such ruling will  
24 be issued by FERC as part of the resolution of the FERC Refund Proceedings.

25 16. Accordingly, in my view, it is appropriate to extend the time for objecting to PX  
26 Chargeback Claims until 45 days after FERC's issuance of an order regarding the issues  
27 pending on rehearing in the PX chargeback proceeding, provided such order has not been  
28 stayed. (Such extension is analogous to the treatment for ISO, PX and Generator Claims

1 discussed above.)

2 17. The Debtor also requests that the requested extension of the time to object to ISO,  
3 PX and Generator Claims also apply to certain Claims which are expected to be affected by  
4 the resolution of the FERC Refund Proceedings (collectively, the "FERC Refund Proceeding  
5 Related Claims"). These include various Claims whose amount is necessarily based on the  
6 appropriate "Market Mitigated Clearing Prices" ("MMCP") which are the subject of the  
7 FERC Refunds Proceedings, as described below.

8 **5. RMR Claims**

9 18. Several claims have been filed against PG&E based on amounts allegedly due  
10 under the claimants' respective Reliability Must Run ("RMR") Agreements (collectively, the  
11 "RMR Claims"). Generally speaking, RMR Agreements provide that, when called upon by  
12 the ISO, the RMR owner will make energy available in order to maintain acceptable voltage  
13 and line loads in the transmission grid. Pursuant to the RMR Agreements and applicable  
14 ISO Tariffs, RMR owners bill the ISO for their RMR services; the ISO reviews such bills  
15 and if it accepts them, invoices the transmission-owning utility (here, PG&E) by posting the  
16 invoices on the secure ISO website.

17 19. The market reruns that the ISO is required to undertake in connection with the  
18 FERC Refund Proceedings (as discussed above) will affect the "Scheduling Coordinator  
19 Credits" ("SC Credits") on the RMR owners' respective invoices, thereby necessarily  
20 impacting the amount of the RMR Claims. In particular, the RMR Agreements provide that  
21 either "[a]ny amounts received by or due to Owner's Scheduling Coordinator for Billable  
22 MWh and Ancillary Services Delivered in Nonmarket Transactions shall be subtracted from  
23 the amount otherwise due under each RMR invoice" (*id.* § 9.1(e)), or "[a]ll amounts  
24 received by or due to Owner's Scheduling Coordinator in connection with Market  
25 Transactions and Nonmarket Transactions during the Billing Month ('Scheduling  
26 Coordinator Revenues') shall be subtracted from the amount otherwise due under each RMR  
27  
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1 Invoice" (*id.* § 9.1(f)).<sup>2</sup>

2 20. Thus, the amounts due to the Owner's Scheduling Coordinator are based on the  
3 applicable MMCP for electricity and ancillary services. Pursuant to FERC's March 26  
4 Order discussed above, the ISO's market reruns in connection with the FERC Refund  
5 Proceedings are expected to result in changes to the applicable MMCP, thereby changing the  
6 amount of the SC Credits on the RMR Owners' invoices, and, consequently, the amount  
7 owed with respect to the RMR Claims.

8 21. Accordingly, in my view it is appropriate to extend the time for objecting to the  
9 RMR Claims attached hereto consistent with the requested extension of time to object to  
10 ISO, PX and Generator Claims (*i.e.*, on the date designated by FERC when payments are to  
11 be made on account of ISO, PX and Generator Claims pursuant to an unstayed order in the  
12 FERC Refund Proceedings, or if no date is designated in such order, 45 days after the  
13 issuance of such order, provided such order has not been stayed).

14 **6. Claims For Imbalance Energy And Emergency Services**

15 22. Various claims have been filed against PG&E for "Imbalance Energy," "Energy  
16 Sales to PG&E," "Emergency Services" and similar amounts (collectively "Imbalance  
17 Energy Claims"). Imbalance Energy refers to energy sold to PG&E by power sellers, which  
18 PG&E in turn sold into the ISO's imbalance energy market following the collapse of the PX  
19 and the markets it operated in mid-January 2001. The Imbalance Energy Claims are based  
20 on energy prices that FERC has determined were not just and reasonable in connection with  
21 the FERC Refund Proceedings, and has ruled that the appropriate MMCP should be applied  
22 to such Imbalance Energy sales. Specifically, in item 5.O. (included in the "Proposed  
23 Finding Summarily Adopted") of its March 26 Order, FERC stated:

24 "The CAISO should mitigate capacity charges for ancillary services or other non-  
25 energy charges by applying the MMCP to sales of imbalance energy and ancillary  
26 service sales and their attendant charge types."

27 <sup>2</sup> Section 9.1(e) applies if the Unit operates under "Condition 1," while Section 9.1(f)  
28 applies if the Unit operates under "Condition 2" pursuant to the RMR Agreement.

1           23. Pursuant to FERC's March 26 Order, the ISO's market reruns in connection with  
2 the FERC Refund Proceedings are expected to result in changes to the applicable MMCP,  
3 thereby changing the amount owed with respect to the Imbalance Energy Claims.  
4 Accordingly, in my view it is appropriate to extend the time for objecting to the Imbalance  
5 Energy Claims consistent with the requested extension of time to object to ISO, PX and  
6 Generator Claims (*i.e.*, on the date designated by FERC when payments are to be made on  
7 account of ISO, PX and Generator Claims pursuant to an unstayed order in the FERC  
8 Refund Proceedings, or if no date is designated in such order, 45 days after the issuance of  
9 such order, provided such order has not been stayed).

10                               7.     QF Claims

11           24. Certain "qualifying facilities" ("QFs") have filed claims against PG&E including  
12 amounts owed under their respective Power Purchase Agreements ("PPAs") which are  
13 calculated based on the "PX day-ahead hourly zonal market clearing price" for a certain  
14 period of time (the "QF Claims Based On PX Pricing").

15           25. Pursuant to FERC's March 26 Order, the ISO and PX market reruns in  
16 connection with the FERC Refund Proceedings are expected to result in changes to the  
17 applicable MMCP, thereby changing the amount owed with respect to the QF Claims Based  
18 On PX Pricing. Specifically, under PG&E's PPA with Midway-Sunset Cogeneration  
19 Company ("Midway"), PG&E was obligated to pay Midway under standard Short Run  
20 Avoided Cost ("SRAC") pricing provisions. During the period covered by this Claim,  
21 Midway bid its output directly into the PX and received payment for its output from the PX  
22 at the PX day-ahead zonal market clearing price. To the extent that Midway's revenues  
23 from the PX were less than the SRAC amount, PG&E was obligated to make up the  
24 difference between the PX and SRAC amounts. To the extent that the PX amount exceeded  
25 the SRAC amount, Midway was obligated to pay this excess to PG&E. Midway's Claim  
26 reflects only the SRAC amount for January 2001 since the PX has not yet paid out any  
27 amounts for January 2001. The precise PX price for this period is uncertain and will not be  
28 finally determined until the FERC Refund Proceedings are resolved.

1 26. Georgia-Pacific Corporation ("Georgia Pacific") is a "Switcher QF." Pursuant to  
2 California Public Utilities Commission ("CPUC") Decision No. 99-11-025, issued on  
3 November 4, 1999, the CPUC approved a PX-based SRAC energy price to be paid to those  
4 QFs that voluntarily elected to receive that price pursuant to California Public Utilities Code  
5 Section 390. That decision authorized QFs, upon appropriate notice to the affected utility, to  
6 begin receiving the PX's day-ahead hourly zonal market clearing price, subject to later true-  
7 up to ensure that "[p]ayment using the interim adopted day-ahead zonal market-clearing  
8 price [] not under-compensate nor over-compensate the QFs, compared to the payments we  
9 may ultimately adopt in the more comprehensive § 390 proceeding." For deliveries from  
10 Switcher QFs, including Georgia Pacific, from January 1, 2001 through January 18, 2001,  
11 PG&E capped energy payments at the FERC-mandated \$150/MWh level. Its Claim  
12 includes \$300,031.31 in sums stemming from the difference between payments made to  
13 Georgia Pacific at the \$150 per MW soft cap, and payments under the January 2001 posted  
14 day-ahead zonal market clearing prices. However, until the FERC Refund Proceedings are  
15 resolved, the proper day-ahead zonal market clearing prices remain undetermined.

16 27. Thus, the Allowed Amount of the QF Claims Based On PX Pricing cannot be  
17 determined until resolution of the FERC Refund Proceedings. Accordingly, in my view it is  
18 appropriate to deem such Claims as Disputed Claims for a period that is consistent with the  
19 extension of time to object to ISO, PX and Generator Claims (*i.e.*, on the date designated by  
20 FERC when payments are to be made on account of ISO, PX and Generator Claims pursuant  
21 to an unstayed order in the FERC Refund Proceedings, or if no date is designated in such

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1 order, 45 days after the issuance of such order, provided such order has not been stayed).

2 I declare under penalty of perjury under the laws of the United States of America  
3 and the State of California that the foregoing is true and correct. Executed this 5<sup>th</sup> day of  
4 February, 2004 at San Francisco, California.

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7 KERMIT R. KUBITZ

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