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50-275/323

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re PACIFIC GAS & ELECTRIC COMPANY, a California corporation, Debtor. Tax I.D. No. 94-0742640	Case No. 01-30923 DM Chapter 11 NOTICE OF MOTION AND MOTION OF THE CITY OF PALO ALTO FOR ORDER DIRECTING PAYMENT OF REASONABLE ATTORNEYS' FEES AND COSTS PURSUANT TO SECTION 503(b)(3)(D), 503(b)(3)(F) AND 503(b)(4), AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES [SUPPORTING DECLARATION OF GRANT KOLLING FILED HEREWITH] Hearing: September 7, 2004 Time: 1:30 p.m. Place: 235 Pine Street San Francisco, California

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TO THE HONORABLE DENNIS MONTALI, UNITED STATES BANKRUPTCY JUDGE, THE OFFICE OF THE UNITED STATES TRUSTEE, THE DEBTOR, AND ALL OTHER PARTIES IN INTEREST:

PLEASE TAKE NOTICE that creditor and party-in-interest The City of Palo Alto hereby moves this Court, pursuant to 11 U.S.C. Section 503(b)(3)(D), 503(b)(3)(F) and 503(b)(4), for an Order Directing Payment of Reasonable Attorneys' Fees and Costs incurred for certain of The City of Palo Alto's activities on or in support of the Official Committee of Unsecured Creditors, as well as The City of Palo Alto's substantial contributions made to this Chapter 11 Case.

PLEASE TAKE FURTHER NOTICE that, pursuant to Bankruptcy Local Rule 9014-1(c)(1) for the United States Bankruptcy Court for the Northern District of California, any opposition to this Motion must be filed and served on appropriate parties (including Palo Alto) at least 14 days before the scheduled hearing date.

PLEASE TAKE FURTHER NOTICE that this Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the Declaration of Grant Kolling, the docketed filings in this case by The City of Palo Alto and other records and files in this Chapter 11 Case, including the transcripts of the various plan confirmation trials and related documents as stated in Exhibit A hereto, (collectively, the "Trial Record"), which are incorporated herein by this reference and for which Palo Alto requests judicial notice, and such additional evidence and arguments as may be presented at or before the hearing on the Motion.

WHEREFORE, The City of Palo Alto respectfully requests that this Court enter an Order authorizing the payment of attorneys' fees incurred by Palo Alto in the amount of $1,726,428.62 and costs in the sum of $175,485.48 and providing for such other relief as the Court deems just and proper. The City of Palo Alto notes that it has not requested all of its fees and costs incurred in this case, having excluded from this Motion those fees and costs which related to the enforcement of The City of Palo Alto's individual claims and interests, including the fees and costs in the antitrust estimation proceeding, and in related proceedings in other forums. However, The City of Palo Alto contends even those excluded activities also substantially benefited the

creditors and the estate, thus making the case for the portion of the fees and costs claimed by The City of Palo Alto here even more deserving.[1]

MEMORANDUM OF POINTS AND AUTHORITIES

The City of Palo Alto ("Palo Alto"), by and through its undersigned counsel, White & Case LLP ("White & Case"), submits this Motion for an Order Directing Payment of Reasonable Attorneys' Fees and Costs Pursuant to Section 503(b)(3)(D), 503(b)(3)(F) and 503(b)(4) of the Bankruptcy Code (the "Motion"). In this Motion, Palo Alto seeks an order allowing reimbursement of a portion of its legal fees and actual and necessary expenses incurred during the period from April 6, 2001 through and including December 22, 2003 (the "Application Period"), both (i) for certain of its activities in the service or support of the Official Committee of Unsecured Creditors (the "Committee"), and (ii) for its substantial contributions to the reorganization of Pacific Gas & Electric Company ("PG&E" or "Debtor") or its estate. *See* Exhibit B (Summary of Fees for Brobeck); Exhibit C (Summary of Expenses for Brobeck); Exhibit D (Summary of Fees for Morgan); and Exhibit E (Summary of Expenses for Morgan). Except as otherwise defined herein, the capitalized terms used in this Motion have the same meanings as they are defined to have in the "Settlement Plan" confirmed by this Court. In support thereof, Palo Alto respectfully represents as follows:

I. JURISDICTION AND VENUE

This Court has jurisdiction over this matter pursuant to 28 U.S.C. Sections 157 and 1334. This matter relates to the administration of the Debtor's bankruptcy estate and is accordingly a core proceeding pursuant to 28 U.S.C. Section 157(b)(2)(A), (B) and (O). Venue of this case is proper in this Court pursuant to 28 U.S.C. Sections 1408 and 1409. The statutory predicate for the relief requested herein is Sections 503(b) and 105 of the Bankruptcy Code.

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[1] These excluded activities enhanced the ability of Palo Alto to litigate against the plans of reorganization that had to be reformed (in the case of the CPUC/Committee Plan) or eliminated (in the case of the PG&E Litigation Plan) in order to clear the way for a successful reorganization. But for the opposition and other activities of Palo Alto in various forums, as well as certain other parallel oppositions of certain other parties, it is likely that PG&E and the CPUC would have continued to litigate for more than either ever could have achieved. What made the ultimate settlement possible was the eventual realization of the futility of each such party's ambition for a more extreme plan. While PG&E and the CPUC each remained convinced that it could defeat the narrower arguments of the other, Palo Alto and others added a broader range of oppositions that made the key difference.

II. INTRODUCTION

Palo Alto played a unique, important and beneficial role in the reorganization of the Debtor, including its work for, with and parallel to the Committee, as well as in Palo Alto's opposition to the various plans of reorganization and amendments. This Chapter 11 case is unusual, because PG&E is a solvent debtor and a regulated utility which attempted what some describe as a "regulatory jailbreak" with test case litigation,[2] erroneously insisting until almost the end of the multi-year litigation that the PG&E plan of reorganization, as amended prior to the ultimately confirmed "Settlement Plan" (the "PG&E Litigation Plan"), was the only possible plan. For example, the Certain California Counties' Notice of Application And Application For Allowance And Payment of Compensation And Reimbursement of Expenses Under Section 502(B)(3) & (4) (the "Counties 503(b) Application") filed by the Counties of Alameda, Fresno, San Luis Obispo, Siskiyou and Sonoma (the "Counties") on March 18, 2004, provides citations to the record of PG&E's stubborn insistence that no other Plan could be confirmed.[3] PG&E refused to consider any other plan but its own unprecedented PG&E Litigation Plan, until the defeat of that plan was imminent after long and intense litigation. Until the Court ordered the final settlement process, PG&E's response to the objectors' success on an issue was merely unilaterally to amend the PG&E Litigation Plan and continue on with PG&E's resolute litigation. For reasons explained in the "Application of Dynegy Power Marketing, Inc. for Payment of Administrative Expense for its Substantial Contribution In Case" (the "Dynegy Application") filed on July 9, 2004, which is also incorporated herein and for which Palo Alto requests judicial

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[2] The interplay between the jurisdiction of the Bankruptcy Court and Pacific Gas & Electric Company's ("PG&E") regulators with respect to the Debtor's assets, liabilities and operations created special and unique challenges in timely developing a confirmable plan of reorganization that could also become effective within a reasonable time. Indeed, competing plans of reorganization were proposed and amended, and the entire vertical integration of the Debtor, California's largest supplier of electric and gas service, was at risk in many complex ways. PG&E, unhappy with the regulation of the California Public Utilities Commission (the "CPUC"), sought to use Chapter 11 as a strategic tool for advancing its ambitious, yet provocative goals, including deregulation by disaggregation.

[3] *See* Certain California Counties' Notice of Application And Application For Allowance And Payment of Compensation And Reimbursement of Expenses Under Section 502(B)(3) & (4) at 2 (citing to the Confirmation Hearing Transcript, 12-89, 29-46 and the April 19, 2002 Disclosure statement, Section VI(K)(3)). Consistent with prior practice of the objectors to the PG&E Litigation Plan for minimizing duplication, Palo Alto incorporates by reference the Counties 503(b) Application, except insofar as it incorrectly understates both the beneficial role of the Committee and the benefits provided by other objectors, such as Palo Alto. The general thrust of the contributions of the Counties 503(b) Application applies to Palo Alto as well as to the Counties, although Palo Alto also has additional arguments and facts on which to rely. By incorporating by reference such portion of the facts cited by the Counties, Palo Alto offers a foundation on which to advance its individual positions.

reference,[4] the deadlock between CPUC (and the State generally) and PG&E was a classic contest between the immoveable object (the CPUC/State) and the irresistible force (PG&E).

Palo Alto made many substantial contributions to creditors generally in this case, both (a) in its service on and its collaboration with the Committee, and (b) in its plan opposition, resulting in a better and quicker plan than would have otherwise occurred. For example, as summarized in the Declaration of Grant Kolling, Palo Alto provided value in the Debtor's Chapter 11 Case in a number of ways, including, but not limited to (i) creating the dynamic for the ultimate settlement (joining the Committee in recommending the final settlement process); (ii) revealing and proving fatal flaws in the PG&E Litigation Plan; and (iii) Palo Alto's balanced criticisms and defenses of the CPUC/Committee Plan that helped save the Reorganization Agreement, as well as the CPUC/Committee Plan itself. *See* section III.C., *infra*, and the Trial Record of the critical testimony of Tom Lumsden, which was limited on CPUC's direct examination, opened up for Palo Alto in PG&E's cross-examination, and then salvaged with Palo Alto's follow up cross-examination that helped cover the equity cram down hole in the CPUC's case, allowing the CPUC both to reopen its case and to keep the pressure on PG&E to compromise.[5] If Palo Alto were taking a negative approach to the case, as PG&E has argued,[6] Palo Alto would not have saved the CPUC Reorganization Agreement and the CPUC/Committee Plan and could have joined in or incited more and broader CPUC or State challenges to PG&E's economics.

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[4] Palo Alto made similar contributions to Dynegy on and in support of the Committee, apart form Dynegy's unique role in the Class 6 settlements. However, as explained herein, Palo Alto made further contributions in the trial process.

[5] Palo Alto had a choice when the CPUC/Committee Plan and the Reorganization Agreement were in trouble and under vigorous PG&E attacks. Palo Alto could have "piled on" and helped PG&E defeat – as opposed to improve and reform – the CPUC/Committee Plan. Or Palo Alto could do as it did and preserve the Reorganization Agreement and keep the CPUC/Committee Plan case alive as a counterweight to the PG&E Litigation Plan, hoping for useful modifications before confirmation. By choosing the latter course, Palo Alto advanced the best interests of creditors at some sacrifice to Palo Alto's own interests when PG&E excluded Palo Alto from the final settlement process recommended by Palo Alto, and then expanded the Reorganization Agreement precedent to impose a more extreme Settlement Agreement than Palo Alto considered "safe" for its future defense needs against PG&E. By excluding Pal Alto and other objectors from that settlement process before Judge Newsome, PG&E created the need for opposition to reform the Proposed Settlement Agreement and plan, since PG&E's settlement compromises only addressed the CPUC's concerns.

[6] The Trial Record also shows that there were arguments by other objectors in which Palo Alto could have joined, but declined to do so. There were also arguments that Palo Alto could have made or passed to others that Palo Alto refrained from making. What was common to both types of restraint was that Palo Alto was concerned about limiting the power of PG&E to hurt Palo Alto and its allies, but Palo Alto did not want to spoil PG&E's economics or otherwise hurt PG&E's legitimate interests.

However, Palo Alto's goal was not to harm PG&E, but rather to protect Palo Alto and other pass through and disputed creditors from further harm by PG&E.

PG&E's aggressive approach to that "regulatory jailbreak," and PG&E's related and incidental attack on creditor targets like Palo Alto required a proactive defense by Palo Alto. Palo Alto's "blowing the whistle" on PG&E actions contrary to the best interests of the estate included several features, only some of which are asserted as the basis for the claims in this Motion. For example, Palo Alto has not made a claim either (i) for its attempts to require reforms from PG&E at the Federal Energy Regulatory Commission ("FERC"), the Nuclear Regulatory Commission (the "NRC") or the California Public Utilities Commission (the "CPUC"), or (ii) for the enforcement of Palo Alto's individual claims against PG&E, including in the "antitrust estimation proceeding" that resulted in this Court's Memorandum Decision on May 15, 2003, filed as Docket No. 12815. However, because those excluded efforts benefited the PG&E estate in various important ways,[7] by not seeking that recovery Palo Alto is effectively seeking substantially less than 100% of what Palo Alto spent in order to benefit the estate. Moreover, as a solvent debtor whose actions compelled a proactive response by creditors like Palo Alto, it is only fair for PG&E to compensate Palo Alto, since the Settlement Plan pays creditors in full and since PG&E equity benefits substantially, as reflected in PG&E Corp.'s stock price.[8] PG&E reportedly paid more than $88 million in bonuses to executives, including to each of a long list of individual PG&E employees, each of whom received more than requested by Palo Alto in this Motion. Therefore, PG&E has no meritorious cause to complain about the economics of Palo Alto's Motion.

Many creditors were at risk during the PG&E litigation process, especially those like Palo Alto, which were required by the PG&E monopoly circumstances to continue to deal into the

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[7] By means of its discovery in Palo Alto's individual efforts to enforce and defend its rights, Palo Alto also obtained useful evidence and arguments with which to combat the PG&E Litigation Plan and to make other contributions described herein. By calling attention to PG&E aggression that was counterproductive, Palo Alto moderated that aggression and helped save PG&E from creating additional liability for PG&E without corresponding legitimate cause or benefit to the creditors.

[8] The Dow Jones Daily Bankruptcy Review for July 7, 2004, shows the stock of PG&E at $28.25, close to the 52 week high of $30.32, compared to the 52 week low of $18.50.

future with any reorganized debtors.[9] Palo Alto's special contribution involved timely and continuing objections, alerting the court and key parties to the risks and problems inherent in PG&E's various plan provisions and actions, because that criticism had the greatest chance of reforming and moderating such PG&E plans and actions.

Throughout the Chapter 11 Case and related regulatory proceedings, Palo Alto continuously confronted complex legal issues that had to be litigated before PG&E could emerge from bankruptcy. Therefore, by its opposition to the PG&E Litigation Plan and by keeping the prospect of a competing alternative plan viable, as well as a "Plan C" fallback,[10] Palo Alto helped save everyone from even more prolonged litigation over PG&E's audacious disaggregation/deregulation agenda. Furthermore, Palo Alto's objections with respect to actual and threatened PG&E actions also served to moderate PG&E's aggressiveness and thereby reduced PG&E's liability, including with respect to the congestion and related transmission-pricing problems strategically created by PG&E.

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[9] PG&E contends that the promise of full payment of creditors under the PG&E Litigation Plan should have eliminated objections. However, PG&E ignored the threat that the PG&E Litigation Plan posed to pass-through and disputed creditors like Palo Alto. Moreover, as evidenced by the Committee's refusal to extend its Support Agreement for the PG&E Litigation Plan and the Committee's subsequent support instead for its joint CPUC/Committee Plan, all creditors should have been concerned that confirmation of the PG&E Litigation Plan would merely mean further delay. Many objecting parties, including the CPUC and the California Attorney General, would have required extended time to enforce their appeals, which could not be dismissed as moot and which would not have been overlooked by the rating agencies. Thus, the PG&E Litigation Plan would never have become effective, and everyone would have been worse off in that limbo. Therefore, eliminating the PG&E Litigation Plan at trial was a substantial contribution by itself.

As explained in the Declaration of Grant Kolling, Palo Alto was also effective in preventing many of the negative and harmful results that were foreseeable if PG&E had been simply dealing with financial creditors, whose incentive was to accept any plan that proposed prompt, full payment of their claims. Fortunately for all concerned, the Committee realistically assessed the inability of the PG&E Litigation Plan to become effective in any reasonable time period and balanced (i) the interests of those creditors who would receive the same full repayment in any feasible plan with (ii) the interests of the pass-through and disputed creditors.

[10] While PG&E continuously and incorrectly insisted that the PG&E Litigation Plan was the only possible plan, few others believed that position, although many were willing to support any full payment plan. The primary focus was on the quickest possible effective date exit. Because of concerns about the long, probable delays in the effectiveness of any PG&E Litigation Plan, at best, the Committee and others were ultimately unwilling to join PG&E in a long-term, exclusive litigation effort to attempt to confirm and make effective the PG&E Litigation Plan. The Committee's ultimate joinder in the CPUC/Committee Plan evidenced that conclusion. However, even the CPUC/Committee Plan faced challenges that concerned creditors desperate for a prompt exit through a plan that could become effective within a reasonable time. Clearly, there was always the means for a viable and fair plan that could become effective, but that would have required compromises which neither PG&E nor the CPUC or others were willing to make (until the end after prolonged litigation caused widespread doubts about both competing plans). "Plan C" was a "fallback" means of making a reformed and improved Committee plan alternative viable, by providing more cash and solving more problems, although in a manner not agreeable to PG&E or the CPUC. While Palo Alto did not push "Plan C", the existence of a viable fallback option made it easier for the Committee and others to "call PG&E's bluff" and resist the nonfeasible and objectionable PG&E Litigation Plan.

Because of the legal nature of the disputes and the necessity to participate in the competing plan litigation and trial work in order to make any positive difference,[11] Palo Alto was required to act through both its City Attorney staff and its outside counsel, resulting in substantial costs, only part of which are herein requested to be reimbursed. Palo Alto, through its bankruptcy counsel, identified for reform various problems associated with the competing plans of reorganization. That counsel also made numerous suggestions as to how the plans could be made more useful, feasible, and ultimately confirmable and effective and less harmful or threatening to governmental units and pass-through and disputed creditors with allowable claims. Palo Alto's specific recommendations and suggestions ultimately helped to achieve better balance between the competing plans, and helped to clear the way for the final plan of reorganization (that ultimately emerged as a compromise) to be confirmed and to become effective. References herein to "Palo Alto" therefore include its team, which includes in house and outside counsel and the City's municipal utility staff.

III. SUMMARY OF CONTRIBUTIONS TO BE REWARDED

A. What Are the Contributions Generally?

What are the benefits that justify the substantial contribution award for Palo Alto? At the macro level they include:

(1) Moderating and ultimately defeating[12] the PG&E Litigation Plan, so that a better alternative was possible;

(2) Moderating the CPUC Committee Plan, so that it could become the foundation for the Settlement Plan;

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[11] Palo Alto tried through the Committee to improve and moderate the PG&E Litigation Plan, but those efforts were of limited success. Confidentiality agreements with PG&E prevent Palo Alto from detailing that experience, but Palo Alto commenced litigation as a last resort.

[12] Because, technically, the PG&E Litigation Plan trial did not reach a conclusion, the references herein to the "defeat" of that plan are a short hand reference to what most perceived to be a fatal loss of credibility with key parties when the Court ordered the final settlement process. While PG&E could have continued with that litigation effort, none of the objectors doubted their ability to defeat that plan. What inspired the settlement compromise was not the continuing feat of the PG&E Litigation Plan, but rather the need to resolve the PG&E case so that creditors could be paid

(3) Improving the "can't change a word" Proposed Settlement Agreement, especially to reduce the threats to pass-through and disputed creditors whose claims are ultimately allowable; and

(4) Preventing or moderating the adverse effects of various of PG&E's excessive actions that were not in the best interest of creditors.

B. **Moderating and Then Defeating the PG&E Litigation Plan**

Because PG&E insisted that there was no possible plan of reorganization besides the successive versions of the PG&E Litigation Plan, nothing good was possible in this Chapter 11 case unless and until the PG&E Litigation Plan was defeated. This meant defeating both the core of the PG&E Litigation Plan, as well as the portions that were harmful to Palo Alto and others similarly situated. Palo Alto made both substantial contributions in battling the PG&E Litigation Plan and by exposing the serious flaws and threats in that plan, as amended and supplemented by PG&E from time to time, as PG&E grudgingly adjusted to the opposition with successive amendments. Only when the defeat of the PG&E Litigation Plan was imminent was PG&E open to the Settlement Plan that was ultimately confirmed. No creditor can dispute that the Settlement Plan was a substantial improvement over the PG&E Litigation Plan, or that the Settlement Plan could become effective far sooner than the PG&E Litigation Plan. PG&E's equity also has little to complain about in the end.

Would the PG&E Litigation Plan have been superseded with a better plan if Palo Alto had not engaged in its opposition as it did? The Court can decide that question, but the reactions of PG&E to Palo Alto's comprehensive approach suggests that Palo Alto's impact was substantial. As the Court will recall from the trial, for many reasons, including to minimize duplication, Palo Alto generally was the last objector to cross-examine the witnesses, and Palo Alto still had useful

cross-examination and evidence in that final position that none of the other objectors had previously raised.[13] A review of the transcripts will confirm the importance of what would have been lost had Palo Alto not "batted in the cleanup position" to expose the flaws not yet otherwise addressed.[14]

In addition, the Court should also note that Palo Alto and others still had the best parts of their opposition cases still to present against the PG&E Litigation Plan,[15] which plan PG&E had repeatedly amended (along with its Disclosure Statement and evidence) on a rolling basis as needed to address successful objections that PG&E correctly worried were too powerful to ignore.[16] The nature of those amendments and their timing were clearly attributable to important

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[13] As the trial transcripts reveal, there were important objections and evidence that were only made by Palo Alto as the last objector to almost every PG&E witness and argument. While Palo Alto could and did on occasion fill in unasked questions on the narrower topics on which the other objectors specialized, Palo Alto was repeatedly the objector who focused the Court, for example, on the gas and electric transmission problems and overreaching, as well as on specific statutory and other flaws, such as the nonassignable franchises with governmental units. Palo Alto does not criticize any other objector for their concentration on their chosen and appropriate objections. The CPUC had many objections, but, apparently for policy or other reasons, the CPUC generally avoided the topics that concerned Palo Alto. On some occasions where Palo Alto's cross-examination evidence exposed a flaw, the CPUC or others sometimes also picked up on that same theme thereafter, which was gratifying to Palo Alto and advanced the common cause. Palo Alto was also grateful for the environmental objection work done by the Counties, the Hydro Coalition and San Francisco, among others, because that freed Palo Alto to concentrate on other issues where it had specialized knowledge and had done the hard analysis and discovery to expose the problems.

[14] It is not practical to recite here all of the important results of Palo Alto's trial work evident in the Trial Record. Obviously, everyone was focused on the problem of the "regulatory jail-break," but time and time again it was Palo Alto at the end of the cross-examination or argument sequence using the PG&E evidence to expose certain flaws and unfairness, especially with respect to the GTrans and the ETrans, which were given little attention by the other objectors, who instead concentrated on the generation entity and its environmental, nuclear decommissioning trust and certain other problems. For example, Palo Alto added some of the less obvious, and yet still important, rating problems, especially for the gas and transmission entities. Similarly, PG&E had a hole in its case that Palo Alto exposed as the final objector in the cross-examination of PG&E witness William Kosturos, when Palo Alto demonstrated that PG&E's analysis did not include the impact of California Public Utility Code § 854(b)(2).

[15] Had the PG&E Litigation Plan battle continued further, Palo Alto's focus on the "franchises agreements," which the utility needs with every governmental unit in Northern California, would also have stopped PG&E, since those "force of law" statutory obligations could not have been forced on the governmental units by the new, disaggregated gas and transmission entities. PG&E's "negotiate-and-if-that-fails-use-condemnation" strategy was exposed by Palo Alto as infeasible because every governmental unit's own condemnation powers have priority over even a regulated utility, and these new, unregulated entities had no such condemnation option. As the Court may recall from the cross-examination of PG&E's franchise agreement witness, that witness admitted that he had no authority for his condemnation against governmental units theory, that PG&E had never even attempted such a condemnation to his knowledge, and that the witness had never even heard of such a condemnation anywhere.

[16] In order to prepare for the affirmative case against PG&E, as well as for the cross-examination and other challenges to PG&E's case, Palo Alto participated in some of the discovery and assembled substantial evidence for its own part of the case against the PG&E Litigation Plan. If Palo Alto had presented its full case, the PG&E Litigation Plan was doomed even further. Although Palo Alto has not included here the cost of its discovery in enforcing its individual claims, including in the antitrust estimation proceeding, that discovery and analysis was also helpful in advancing the opposition to the PG&E Litigation Plan.

evidence from objectors and successful objections, as well as to factual developments that Palo Alto and others correctly predicted, such as the concerns of the rating agencies.

C. Moderating the CPUC Committee Plan to Lay the Foundation for the Settlement Plan, Including by Saving the Reorganization Agreement From PG&E and by Filling in the Equity Cram Down Hole in the CPUC Committee Plan Case With Additional Lumsden Testimony

While Palo Alto objected to both the initial CPUC Plan and the CPUC/Committee Plan, Palo Alto wished to reform those plans, rather than to kill them. However, PG&E tried to obliterate the CPUC Reorganization Agreement (that later served as the basis for the more extreme Proposed Settlement Agreement). PG&E seriously threatened the CPUC/Committee Plan by exploiting the equity cram down hole in the CPUC case, despite CPUC's last-minute salvage effort by Tom Lumsden's testimony. Palo Alto helped rescue the CPUC Reorganization Agreement and the CPUC/Committee Plan, as described herein. It was the continued existence of the alternative Reorganization Agreement and CPUC/Committee Plan, ideally to be reformed to address Palo Alto's concerns, that made an important difference in the ultimate PG&E settlement compromise. But for such Palo Alto's actions, PG&E might have considered its leverage to be sufficient to persist in its nonfeasible PG&E Litigation Plan, to the prejudice of all concerned.

D. Improvements in the Settlement Plan Despite PG&E's Refusal to Accept Reforms Until the CPUC ALJ and Commissioners Agreed With At Least Some of Palo Alto's Prior Arguments

But for Palo Alto's detailed focus on the dangerous ambiguities in the Proposed Settlement Agreement, the reforms inherent in the Actual Settlement Agreement and in the Court's related Memorandum Decisions would not have been possible. The positions of PG&E with respect to such dangerous provisions would have otherwise remained a mystery, hidden behind the Confidentiality Order and PG&E's attorney-client privilege (since the PG&E executives witnesses consistently deferred the hard interpretation questions on cross examination to their lawyers). Fortunately, Palo Alto's objections not only improved the Proposed Settlement Agreement with the various reforms included in the Actual Settlement Agreement, but creditor protections and useful clarifying interpretations were also added by this Court's Memorandum Decisions and by some PG&E or CPUC concessions in the Trial Record. Without such reforms,

protections and clarifications, "after-the-fact" enforcement of PG&E's interpretations of the Settlement Agreement and Plan would have been much more dangerous for pass-through and disputed creditors with allowable claims like Palo Alto.

E. Palo Alto's Actions Moderated Other PG&E Ambitions or Actions That Would Have Been Counterproductive

Although applicable confidentiality orders prevent discussion of the details, as a member of the Committee, Palo Alto was asked or invited to attempt to discourage PG&E from advancing some of its nonproductive ideas or to consider better and more feasible alternatives. Discouraging PG&E from a premature, omnibus assumption of all franchises with zero cure for objectionable assignment to ETrans and GTrans was merely one example.

IV. ADDITIONAL GENERAL BACKGROUND

A. Additional Procedural Background

The Court is well aware of the long history of the case, including the key problems evident in the Trial Record, commencing with PG&E filing the PG&E Litigation Plan and triggering test case litigation and substantial opposition from many parties, including Palo Alto. Many correctly believed that PG&E was wrong in its improbable assertion that the PG&E Litigation Plan was the only possible plan, but only some motivated objectors corrected the problem. Because many informed creditors knew that the PG&E Litigation Plan, at best, could become effective only after years of appeals, if ever, the common goal was to eliminate the nonfeasible PG&E Litigation Plan, so that it could be replaced by a better plan with a more prompt effective date. The CPUC proposed a plan and, realizing its flaws when it was criticized, advanced the CPUC/Committee Plan as an alternative. Because PG&E was exclusively devoted to the PG&E Litigation Plan, which was attractive and credible to few others as the exclusive choice, PG&E vigorously attacked the CPUC/Committee Plan. Palo Alto sought reforms in the CPUC/Committee Plan through its objections, while seeking to clear the PG&E Litigation Plan from the path as an obstacle to a better plan.

The opponents of the PG&E Litigation Plan all believed that the PG&E Litigation Plan was doomed from day one, although each objector approached the defeat of that plan from a

unique perspective with separate arguments, including, among some of the more powerful arguments, those of Palo Alto in the Trial Record.

In response to the PG&E Litigation Plan, the CPUC filed its proposed plan of reorganization and the Committee, after certain modifications, became a co-proponent of the CPUC/Committee Plan. Both Palo Alto and PG&E opposed the CPUC/Committee Plan. Palo Alto's constructive opposition to the CPUC/Committee Plan (and later the Settlement Plan) was primarily focused on making modifications to the plan that would make it more feasible, defensible, and ultimately, more confirmable. Indeed, at trial of the competing plans, it was Palo Alto's challenges to the PG&E Litigation Plan, Palo Alto's qualified support for the CPUC Reorganization Agreement, and Palo Alto's addition to Tom Lumsden's testimony that ultimately facilitated to the mandatory settlement process recommended jointly by Palo Alto and the Committee and ordered before the Honorable Judge Randall J. Newsome. Although Palo Alto and some other objectors were invited by this Court into the settlement process, only PG&E, the staff of the CPUC, and certain Committee representatives participated after the introductory meeting in that confidential settlement process. On June 19, 2003, PG&E and the CPUC's staff announced a proposed settlement (the "Proposed Settlement Agreement"), and on July 31, 2003, PG&E and the Committee filed a joint plan of reorganization reflecting the Proposed Settlement Agreement, which contained various provocative ambiguities and which was accompanied by a comprehensive confidentiality order (the "Confidentiality Order") that prohibited any ability of affected objectors to deduce the meaning and effect of the Proposed Settlement Agreement from its "legislative history" or the unrevealed intent of the parties.[17] By refusing to explain the meaning and effect of the critical parts of the document, and instead insisting that the ambiguous documents "spoke for themselves," PG&E forced objections by Palo Alto, the State of California and others in order to narrow the dangers.

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[17] Objectors like Palo Alto were understandably concerned that history would repeat itself with PG&E using the ambiguities aggressively to the prejudice of Palo Alto and others. Whether or not Palo Alto's related objections to the Proposed Settlement Agreement and Settlement Plan were sufficient to defeat the objectionable provisions, the only means of narrowing the dangerous portion of the possible adverse interpretations was by means of objection.

Subsequent to Palo Alto's opposition, the CPUC reviewed the Proposed Settlement Agreement through an administrative law judge hearing and, ultimately, by Commissioners approving a modified version of the Proposed Settlement Agreement, making some of the clarifications/modifications/suggestions proposed by Palo Alto.[18] Accordingly, the Plan that was ultimately confirmed by this Court reflected several of the necessary modifications proposed and suggested by Palo Alto, without which the Plan would not have become effective.[19]

B. Palo Alto Played a Unique and Important Role in this Case.

Throughout this case, Palo Alto has played an important role in adding value to the estate. First, Palo Alto, because of its unique and specialized knowledge, played an important role on and supporting the Committee. Second, the Committee found Palo Alto to be a useful "tough cop" supporter in dealing with PG&E, because (i) PG&E's audacious approach to the plan and many other issues engendered serious concern for many, especially pass-through and disputed creditors with allowable claims and governmental units, and (ii) Palo Alto was correctly perceived as an unwilling target of PG&E's aggression, which had no real choice but to resist such conduct.[20] Third, Palo Alto, by opposing aspects of the various plans of reorganization that were objectionable, compelled plan proponents to reform and improve their positions and amend their proposed plans of reorganization (although the final Settlement Plan still contains some dangers for pass-through and disputed creditors like Palo Alto).

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[18] The CPUC reviewed the Proposed Settlement Agreement through an administrative law judge proceeding and, later, on December 18, 2003, the CPUC issued a written decision modifying the Proposed Settlement Agreement and approving it, as so modified, including various changes urged by Palo Alto in both this Court and at the CPUC. Two of the five Commissioners dissented from the CPUC's decision and have filed an appeal, reflecting both unique and common concerns. On December 19, 2003, the CPUC and PG&E executed a settlement agreement that included the modifications required by the CPUC's decision (the "Actual Settlement Agreement").

[19] The Court entered an order confirming the Settlement Plan, and approving the Actual Settlement Agreement (as amended by the CPUC), on December 22, 2003, with certain follow up arguments and hearings occurring thereafter. Palo Alto filed a notice of appeal directed at protecting Palo Alto from certain threats still inherent in the Actual Settlement Agreement and Plan, and Palo Alto is still trying to settle those issues with PG&E or the Committee. As expected, the Palo Alto appeal has not adversely affected the implementation and consummation of the Settlement Plan.

[20] Whether or not the PG&E harms against Palo Alto were lawful, the intent and effect of PG&E's actions obviously were to harm Palo Alto. While third parties rescued some of PG&E's other targets (*e.g.*, the QF's), Palo Alto and its small group of allies could only count on themselves. Palo Alto's resistance seemed to reduce the problem, if only because PG&E did not want to give more ammunition to Palo Alto's protests. *See* Exhibit A.

Because of the Debtor's unprecedented approach to achieve its ambitious, yet provocative goals, such as substantial freedom from State regulation of at least three of its major business lines through a plan of disaggregation and other means, the Committee was compelled to be extraordinarily active and to undertake numerous responsibilities and tasks not usually performed by creditors' committees. In the nearly three years after the Debtor filed its petition, the Committee, as a whole or by its various subcommittees, held at least an estimated 100 in-person and telephonic meetings or conferences, which Palo Alto attended, typically represented by Senior Assistant City Attorney Grant Kolling, an expert on the laws relating to municipal utilities as well as the regulatory laws that are supposed to protect them from investor owned utilities and transmission owners like PG&E, and by bankruptcy counsel, typically Larry Engel. In addition to meetings of the Committee as a whole, the Committee created at least four subcommittees (Finance, Legislative/Regulatory, Litigation, and Plan Negotiation), as well as various ad hoc task forces of members. Less formal working groups also met and then reported to the full Committee or its professionals. Moreover, there were literally thousands of telephone calls and e-mail messages exchanged between and among the Committee members and professionals throughout the proceedings.

Because of its specialized knowledge and its long experience with PG&E, Palo Alto was selected to chair the Legislative/Regulatory Subcommittee and served on both the Plan Negotiation and Finance Subcommittees. The Legislative/Regulatory, Plan Negotiation and Finance Subcommittees' members periodically met in-person or by telephone, especially during the first eighteen to twenty-four months. Additionally, Palo Alto served on an informal subcommittee to evaluate the option of a fallback sale of assets, such as "Plan C." In addition to its subcommittee services, Palo Alto performed other important activities that supported the Committee's mission. For example, Palo Alto served as a liaison to various California cities located in PG&E's service territory during their negotiations with PG&E in regard to new franchises for PG&E's ETrans and GTrans entities.[21] Further, Palo Alto, at the Committee's

[21] Indeed, PG&E tried to assume the franchises in an unheralded omnibus motion, claiming they were executory contracts with no cure obligations, potentially triggering litigation with hundreds of governmental units all of whom would have reacted badly to the surprise when they heard of it. Palo Alto opposed the treatment of the

request, served as a Committee representative or consultant with respect to certain other matters that arose during the case, including various legislative and governmental issues.

The benefits afforded to the Committee and the estate as a result of Palo Alto's services were substantial, as even PG&E itself recognized in the early phase of the case before PG&E's escalation with respect to electric and gas transmission problems forced Palo Alto to respond accordingly. At all times, as the Committee and its professionals can confirm, Palo Alto was careful to separate its representative actions from its individual actions.[22] However, on many occasions the individual actions of Palo Alto also facilitated the Committee's goals, as was illustrated when Palo Alto helped save from PG&E's challenges the Reorganization Agreement in the CPUC/Committee Plan and helped cover the equity cram down hole in the CPUC case with supplemental evidence from Tom Lumsden.[23]

Because of its unique and specialized knowledge and comprehensive involvement, Palo Alto was able to represent or assist the Committee on numerous issues and permitted the Committee to avoid the multiplicity of professionals, and the attendant cost, that otherwise would have been required to ensure that the Committee received proper representation with respect to these matters. For example, because PG&E's perspective on the law and the facts was aggressively partisan for its PG&E Litigation Plan and related agenda, the Committee needed to understand and balance other side of the arguments, a need which PG&E could not and did not fill. Thus, Palo Alto served as a "sounding board" for the Committee to understand and anticipate the real disputes to come when PG&E's approach was tested against the actual objector

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franchises typically granted by adoption of ordinances as executory contracts, and, ultimately, convinced PG&E to change its position and defer assuming the franchises. While these issues were ultimately resolved consensually in the context of the final Settlement Plan, one of the fatal flaws in the PG&E Litigation Plan was the inability of ETrans and GTrans to force assumption and assignment of these statutory, force of law arrangements with almost every governmental unit in PG&E's service territory.

[22] Because of Palo Alto's close working relationship with the Committee members and professionals, it was easy for everyone to understand that distinction. Moreover, the Committee operated effectively on a consensus basis, and Palo Alto was able consistently to be part of the Committee consensus.

[23] While PG&E was unhappy that Palo Alto was less aggressive in its efforts to reform the CPUC/Committee Plan than in Palo Alto's challenges to the PG&E Litigation Plan, the difference was attributable to the proponents. Palo Alto did not expect to have to block the CPUC/Committee Plan ultimately to negotiate reforms. On the other hand, PG&E's response to a successful Palo Alto challenge to part of the PG&E Litigation Plan was to amend the provision unilaterally and continue to battle for their amended plan that ignored Palo Alto's concerns.

arguments, rather than only against PG&E's "mock trial" version of those objections and arguments. Once the Committee and its professionals understood all sides of the issue, they could make their decisions on a more informed basis than if they had only listened to PG&E. Of course, Palo Alto's role was very different from the role performed by the Committee's counsel. Palo Alto's services did not duplicate, but complemented and supplemented, the services rendered by the Committee's counsel and other professionals. For example, since creditors correctly feared the long foreseeable gap between any confirmation of any PG&E Litigation Plan and any realistic effective date, at best,[24] the Committee was focused on the scores of feasibility problems, many of which were also concerns that Palo Alto had special knowledge of, such as, for instance, the statutorily-based franchises with governmental units without which PG&E's proposed ETrans and GTrans could not function.

The "Plan C" fallback alternative was another example. While the Committee members and professionals made their own assessment, it was far more cost effective for them to evaluate with Palo Alto's input, rather than to imagine and investigate from scratch, all of the many problems with PG&E's Litigation Plan, and later the problems with the CPUC Committee Plan and the Settlement Plan. The goal of the best, quickest to effectiveness and most feasible plan, was shared between the Committee and Palo Alto, and the only means of achieving a better plan was to defeat the lesser plans (or reform their objectionable provisions) on which PG&E or other proponents insisted.

C. The Unprecedented and Litigious Nature of This Case Required Extraordinary Use of Attorneys

Among the reasons why Palo Alto had to use the services of attorneys extensively and at significant cost is that the PG&E Litigation Plan was designed to accomplish a radical legal entity and other changes not contemplated by existing law through "test case" litigation of numerous issues not well settled or clarified by the courts. The competing plans also involved many other novel questions, as did the ultimate Settlement Plan. Repeatedly, when PG&E and CPUC

[24] Many creditors doubted that PG&E's Litigation Plan would ever become effective, although, since PG&E would not accept any alternatives, the sooner that the PG&E Litigation Plan was defeated, the sooner a better alternative was possible.

witnesses were asked about the meaning and effect of the many ambiguous provisions of the Settlement Plan or Settlement Agreement, first, the witnesses asserted that the Settlement Agreement provisions "spoke for themselves," but when pressed, these witnesses then said that they were not lawyers and that they would have to ask their own lawyers what was the meaning and effect of those provisions.[25] Therefore, PG&E forced everyone to engage their lawyers in the evaluation, since if the business negotiators from PG&E could not explain their agreement without their lawyers, there would be no way for anyone else to evaluate the agreement or plan without a lawyer (or several with different specialties).

In any event, on scores of critical issues the business people for objectors had to rely upon their attorneys because the documents otherwise were not only ambiguous and incomprehensible, but also opaque and impenetrable. Throughout the case, PG&E made it the lawyers on whom each creditor had to depend in order to understand for themselves both PG&E's rights and obligations, as well as the consequences of PG&E's approach. (To some extent this was also true of the CPUC.) The scores of unprecedented legal issues were repeatedly paramount and essential to resolve. The business issues repeatedly either were overwhelmed by PG&E's legal issues, or were dependent on underlying legal issues in dispute. Since so many of the interdependent legal issues were unsettled, there were numerous contrary analyses that needed to be balanced in second, third or fourth opinions by attorneys for Committee members or objectors.

D. Palo Alto's Reimbursement Request Is a Modest Percentage of Its Costs, And Efforts for Which Palo Alto Does Not Seek Reimbursement Still Added Value to the Case

Palo Alto was required directly or indirectly to respond to or monitor PG&E challenges to Palo Alto's rights and interests in numerous different forums, including the CPUC, FERC and the NRC, as well as with third parties being lobbied by PG&E against Palo Alto's interests (e.g., CAISO). While Palo Alto has not here requested compensation for that effort, that involvement added value to Palo Alto's contributions to both the Committee and to creditors generally. Again,

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[25] This effectively blocked any reliable predictability as to the meaning and effect of the ambiguous provisions, since PG&E's counsel could rely upon attorney client and work product privileges to block disclosure as effectively as the Confidentiality Order. Thus, but for objections that required some responsive disclosure, the objectors' lawyers had to guess about the ambiguities.

because PG&E evaluated such things from its own unique perspective, the Committee and other creditors needed a balancing perspective, which Palo Alto offered.

Similarly, Palo Alto did not seek reimbursement for the more direct defense of Palo Alto's individual rights and defenses with respect to this Case, including with respect to its antitrust estimation proceeding and the enforcement and defense of Palo Alto's own claims. However, those unreimbursed efforts also helped Palo Alto add value, both from the use of discovery results and by increasing the data/evidence that Palo Alto could then use to address corresponding issues in the various plans of reorganization, including with respect to the gas and electric transmission issues as to which the other objectors and often the Committee looked to Palo Alto.

Palo Alto notes that its allies and supporters, such as the Northern California Power Agency (NCPA), did not themselves apply for relief under Section 503(b), although they also made substantial contributions to the case and Palo Alto's efforts. This allied effort makes Palo Alto's claim even stronger, and Palo Alto will itself address the NCPA's contributions to the effort. *See* Declaration of Grant Kolling.

V. ARGUMENT

A. Applicable Standard for Reimbursement of Palo Alto's Attorneys' Fees and Costs

Section 503(b) describes the categories of expenses that are entitled to receive administrative expense priority. Among the expenses that receive administrative expense priority are the actual and necessary expenses of (i) a creditor that makes a substantial contribution in a Chapter 11 case; and (ii) a member of a creditors' committee incurred in connection with the member's support of the committee's activities.[26] *See* generally the authorities and arguments cited in the Counties 503(b) Application and the Dynegy Application.

1. Attorneys' Fees Incurred by a Committee Member are Reimbursable as an Administrative Expense

In 1994, Congress added subparagraph (F) to Section 503(b)(3) to provide that a committee member may recover as an administrative expense its expenses incurred in connection

[26] See 11 U.S.C. Section 503(b)(3)(D), (F) and (b)(4).

with its support of committee duties. Because Section 503(b)(4) authorizes the recovery of attorneys' fees for the entities identified in Section 503(b)(3), the plain language of Section 503(b)(3) and 503(b)(4) permits a committee member to recover as an administrative expense its actual and necessary attorneys' fees and expenses incurred in the committee member's performance of its duties as a committee member and related support. In *In re First Merchants Acceptance Corp.*, 198 F.3d 394 (3d Cir. 1999), the Third Circuit Court of Appeals held that the plain meaning of the statute must be given effect:

> We fail to find an ambiguity in § 503(b)(3)(F) or § 503(b)(4) that would overcome the straightforward reading of the provision as permitting committee members to recover attorneys' fees for work performed in connection with that entity's service on the committee. There is no principled way to read the language of § 503(b)(4) that allows a recovery of attorneys' and accountants' fees "of an entity whose expense is allowable under paragraph (3)" to include as "entities" those in subsections (A)-(E) of paragraph (3) but not those in subsection (F).

Id. at 399.[27]

In *In re Worldwide Direct, Inc.*, 259 B.R. 56 (Bankr. D. Del. 2001), involving an insolvent debtor, the court concluded that reimbursement of a committee member's attorneys' fees should be reserved for unusual circumstances, and that normal and ordinary services, such as the attendance at committee meetings and review of the pleadings, or services that are performed with respect to a member's specific claims or circumstances, are not reimbursable from an insolvent debtor's estate. *Id.* at 62-64. However, the court held that reimbursement of an

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[27] In concluding that the plain meaning of Sections 503(b)(3) and 503(b)(4) should be given effect, the Third Circuit recognized that there was a tension between these Sections and Section 1103 of the Bankruptcy Code, which provides that official committees are authorized to employ counsel, and that such employment is subject to court approval. The Third Circuit, therefore, made clear that bankruptcy courts have the power to ensure that the right to request reimbursement is not abused:

> The bankruptcy court retains the power to ensure that only those fees that are demonstrably incurred in the performance of the duties of the committee, the statutory standard, are reimbursed. Moreover, in its review of each application to determine whether the fee requested is reasonable, as required by the statute, the bankruptcy court must necessarily determine whether the services were necessary. This review is committed to the sound discretion of the bankruptcy courts.

First Merchants, 198 F.3d at 403. *Contra, In re Firstplus Fin., Inc.*, 254 B.R. 888 (Bankr. N.D. Tex. 2000) (relying upon legislative history, court disregarded plain meaning and refused to follow the holding of Third Circuit Court of Appeals in *First Merchants* where the attorney was merely acting as the agent of his creditor client by merely attending meetings). In this case, the active members all collaborated to advance or support the work of the Committee without duplication of the Committee professionals. As explained, this was especially important in this case, given the unprecedented nature of the litigation inspired by PG&E and the predominance of legal issues over business issues.

individual member's attorneys' fees and expenses would be appropriate where the member has specialized knowledge or has performed specific tasks that benefit the committee as a whole and such services are not duplicative of work performed by committee counsel:

> [W]e are aware of circumstances that might justify the performance of committee tasks by a professional retained by an individual member. Such unusual circumstances might include a case where, because of time constraints or the sheer volume of work, the committee asked an individual member's counsel to perform a specific task. Where there is such a conscious and restricted division of labor, it would not result in an inappropriate duplication of effort and the fees incurred by counsel for the member would be a necessary expense of the committee.
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> Similarly, where counsel for a member has a special expertise or has been involved in a matter pre-petition and, therefore, has specialized knowledge that would assist the committee in handling a particular discrete matter, it would be appropriate for the committee in the performance of its duties to ask the member's counsel to perform work on the particular matter. Such a practice would avoid the administrative expense and delay of bringing a new attorney into a matter mid-stream. *See, e.g., In re Jefsaba*, 172 B.R. 786, 801 (Bankr. E.D. Pa. 1994) (finding that the estate should not bear the cost of the learning curve of each new addition to the firm). The committee, in the first instance, should be diligent in assuring that there is no duplication of effort.

Id. at 61. That should be even more appropriate in the case of a solvent debtor like PG&E. As discussed above, Palo Alto fulfilled an unusual and important role in providing the Committee and its counsel with input and direction relating to certain areas that were within Palo Alto's specialized knowledge and experience and in which the Committee appreciated, and often requested, support and consultation.[28] Palo Alto was a useful source of balanced information and alternatives.[29] Such significant involvement in a Chapter 11 case qualifies as a "substantial contribution." *See Columbia Gas Systems, Inc.*, 224 B.R. 540, 554-55 (Bankr. D. Del. 1998)

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[28] Committee members and professionals would often ask for Palo Alto's suggestions/recommendations/analysis as part of its overall strategy in fulfilling its statutory role in this Chapter 11 Case, as well as with respect to the facts and law as to which PG&E or other parties were in error on a wide range of issues in dispute. For example, Palo Alto served in a leadership role in guiding the Legislative/Regulatory subcommittee, in formulating and suggesting positions and strategies on various formal and informal subcommittees, and in negotiating with other parties and providing detailed feedback and suggestions to the Committee members and professionals. Because of the aggressive approach by PG&E throughout the case and concerns about the feasibility and prudence of certain of PG&E's plan provisions, agendas and positions, it was important for the Committee to consider some of the alternatives that PG&E implicitly or explicitly rejected and the other side of the arguments from which PG&E refused to compromise.

[29] For example, when PG&E pronounced its disaggregation plan (and some even more controversial predecessor ideas) as the "only" possible plan, many perceived a need at least to question PG&E's approach, because there were, obviously, other alternatives, as history demonstrates. In a continuous effort to moderate more radical and controversial approaches into more feasible ones, the Committee members needed to do a great deal of work. While many creditors understandably would have supported any feasible plan that included prompt full payment of their claims, such creditors were often interested in testing the credibility of PG&E's analyses, predictions and

(approving substantial contribution application of equity security holder based upon its "overall constructive approach").[30] It is noteworthy that *Columbia Gas*, like the present case, involved a solvent debtor.[31]

Palo Alto seeks reimbursement of a portion of the fees and expenses Palo Alto incurred in rendering services in support of the Committee. Specifically, Palo Alto seeks reimbursement of $1,924,232.67 in attorneys' fees and costs it paid to Brobeck, Phleger & Harrison LLP ("Brobeck") and, thereafter, to Morgan Lewis[32] as part of its services on or for the Committee. *See* Declaration of Grant Kolling attached hereto. These services, which were encouraged by the Committee, avoided the need to utilize additional Committee counsel and saved the estate the expense of additional counsel fees. In fact, the services performed by Palo Alto and through its counsel beneficially directed or supplemented the services performed by the Committee and its counsel, especially because of the usefulness for a tough, feasible and prompt response to match PG&E's approaches to this case, as well as to reform the flawed provisions of the other plans. *See* Declaration of Grant Kolling.

2. Palo Alto is Entitled to Reimbursement of Its Attorneys' Fees and Costs Based on Its Substantial Contribution

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feasibility claims. Palo Alto was one source for data and other perspectives to balance the PG&E approach. Whether PG&E considered its positions negotiable or not, the Committee had the right and responsibility to test and question PG&E's approach, especially since many of PG&E's ideas and recommendations were unprecedented, novel and highly controversial. Whatever one thinks about the results of the PG&E case, those results are clearly far better for creditors and other interested parties as a result of the activities of the Committee, which included active participation and support by many members and their counsel, including Palo Alto and its counsel.

[30] What is "constructive" in each case depends on what is required for the right result. Where a debtor like PG&E insists on a nonfeasible and divisive plan of reorganization that cannot become effective for many years, if ever, the constructive action is to clear away the bad plan in order to create an opportunity for a better plan. When the other plans have flaws, it is constructive to reform them.

[31] While PG&E may argue that there is less need for active Committee services in the case of solvent debtors, the reverse is actually true, where the debtor is resolute on advancing an agenda for deregulating itself and using Chapter 11 as a tool for implementing highly controversial maneuvers that threatened harm to many targets. Moreover, it was really the Committee (along with Judge Montali and Judge Newsome), who deserve the credit for this successful reorganization, due in large part to their indispensable efforts to reconcile the "irresistible force" (PG&E) committed to overcoming the "unmovable object" (CPUC), as well as to intermediate and solve other challenges created by PG&E's aggressive approach. In that effort, many Committee member's counsel and representatives played important roles, including Palo Alto and its counsel.

[32] In February 2003, Brobeck dissolved, and Morgan Lewis hired a number of former partners and employees of Brobeck, including Palo Alto's counsel, Larry Engel. Accordingly, some of the attorneys' fees will be from Morgan Lewis and some will be from Brobeck. For purposes of this motion, the term "Morgan Lewis" will include all former Brobeck partners and employees who worked on this matter.

Pursuant to Section 503(b)(3)(D) of the Bankruptcy Code, a court may allow, as an administrative expense of the case, the actual and necessary expenses of a creditor or committee representing creditors which make a substantial contribution to a Chapter 11 case. Pursuant to section 503(b)(4), a court may further allow, as an administrative expense, reasonable compensation for professional services rendered by an attorney for such creditor or committee. *See Christian Life Center Lit. Defense Com. v. Silva* (*In re Christian Life Center*), 821 F.2d 1370, 1373 (9th Cir. 1987); *LeBron v. Mechem Fin. Inc.*, 27 F.3d 937, 943 (3d Cir. 1994); *In re Downtown Investment Club III*, 89 B.R. 59 (9th Cir. BAP 1988); *In re D.W.G.K. Restaurants, Inc.*, 84 B.R. 684, 688-90 (Bankr. S.D. Cal. 1988). The Eleventh Circuit examined the issue of substantial contribution in the case of *In re Celotex Corp.*, 227 F.3d 1336 (11th Cir. 2000). In its opinion, the court addressed a case of first impression in the Eleventh Circuit regarding whether a creditor's attorney could recover fees and expenses for substantial contribution in a case where the creditor has an adverse interest to the debtor. In its holding, the court noted that "nothing in the bankruptcy code requires a self-deprecating, altruistic intent as a prerequisite to recovery of fees and expenses under Section 503." *Id.* at 1338 (citing *In re DP Partners Ltd.*, 106 F.3d 667, 673 (5th Cir. 1997)). The *Celotex* court further held that, "it is difficult to imagine a circumstance in which a creditor will not be motivated by self-interest in a bankruptcy proceeding. To impose an altruism requirement on the ability to obtain administrative expenses under § 503(b)(3)-(4) would effectively render the section meaningless as to creditors." *In re Celotex Corp.*, 227 F.3d at 1339. Indeed, the Fifth Circuit courts have reviewed the issue of substantial contribution and have found that "the policy aim of authorizing fee awards to creditors is to promote meaningful participation in the reorganization process." *In re DP Partners Ltd.*, 106 F.3d at 672 (citing *In re Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1253 (5th Cir. 1986)).

In determining whether a creditor has made a "substantial contribution," courts have generally held that a creditor's or committee's services must "foster and enhance, rather than retard or interrupt, the process of reorganization." *In re DP Partners Ltd.*, 106 F.3d at 672; *In re Richton Int'l Corp.*, 15 B.R. 854, 856 (Bankr. S.D.N.Y. 1981); *In re Granite Partners, L.P.*, 213 B.R. 440, 446 (Bankr. S.D.N.Y. 1997). Other factors considered in determining whether an

entity's participation constitutes a substantial contribution include: (a) whether the services were undertaken solely for the benefit of the party itself or for the benefit of all parties in the case; (b) whether the services were actions that would have been taken by the party on its own behalf, absent an expectation of reimbursement from the estate; (c) whether the party can demonstrate that its actions provided a direct, significant and demonstrable benefit to the estate; (d) whether the benefit conferred upon the estate exceeds the costs sought to obtain the benefit; and (e) whether the actions were duplicative of those being taken by other parties in the case such as the debtor, the trustee or an official committee. *See In re Jack Winter Apparel, Inc.*, 119 B.R. 629, 633 (E.D. Wis. 1990); 4 L. King, Collier on Bankruptcy, ¶503.10[5], at 503-64 (citations omitted); *In re United States Lines, Inc.*, 103 B.R. 427, 430 (Bankr. S.D.N.Y. 1989) (providing that services that confer a significant and demonstrable benefit upon the reorganization process which have not been rendered solely on behalf of a creditor's own interest should be compensated).

In addressing the self-interest factor, Palo Alto notes that it excluded from its request here the cost of the actions that Palo Alto undertook to defend its individual interests from PG&E in this case and other forums, including with respect to its antitrust estimation proceeding, even though Palo Alto could make the case for broader benefits to creditors and others from such efforts against the solvent debtor. For example, excluded cost of discovery and participation in other forums nevertheless helped improve Palo Alto's contributions in this case, since the FERC, NRC and CPUC proceedings all included data relevant to this case.

While PG&E may contend that Palo Alto was advancing its own interests, Palo Alto is like indenture trustees or others entitled to substantial contributions, where the amount and nature of their efforts exceeded what they would have done for themselves alone, which is especially true of Palo Alto's service for, and ancillary support of, the Committee.[33] Palo Alto also notes

[33] As discussed above, the active participation and facilitative roles performed by Palo Alto (many of which were performed on behalf of the Committee), significantly benefited the estate. *See* Declaration of Grant Kolling. For example, Palo Alto added significant value in this case by assuming an important role in negotiating with other parties where it had specialized knowledge (franchise agreements, regulatory, governmental and legislative issues, etc.) and in providing direction and focus to the Legislative/Regulatory subcommittee. Palo Alto's efforts transcended self-protection and easily satisfy the requirements described in *Richton*, *DP Partners Ltd.*, and *Jack Winter Apparel*.

that its allied objectors (e.g., NCPA) and others similarly situated[34] have not themselves filed substantial contribution claims, confirming that Palo Alto's role as spokesperson for many similarly situated creditors and objectors—exactly the sort of role traditionally rewarded under Section 503(b) with respect to allied parties or informal committees. Moreover, as a nonprofit, governmental unit and municipal utility protecting many interests affected by PG&E's plans and conduct, Palo Alto deserves special consideration beyond the usual precedents applicable to for-profit creditors. In any event, Palo Alto served a unique role that was, in many ways, beneficial to creditors and the estate. For example, when legislators and other parties conferred with Palo Alto about activities that could have been counterproductive and more aggressive than Palo Alto thought prudent, Palo Alto had the credibility as an aggressive objector to convince such parties about the prudence of the more balanced approach used by Palo Alto.[35]

In terms of the expectation of reimbursement factor, Palo Alto believes that many of the active parties on the Committee and other objectors had such expectations that their efforts for the common good might be reimbursed to the extent that the Court perceived them to be useful. *See, e.g.*, the Dynegy Application.

With respect to the benefit to the estate and cost-benefit analysis, Palo Alto notes that the litigation costs and delays inherent in the plan and other litigation provoked by PG&E and its disaggregation/deregulation and other strategic maneuvers were the biggest factor in the economic cost-benefit test. Palo Alto's opposition to the superseded plans clearly facilitated the ultimately successful settlement process, which Palo Alto initially recommended. Moreover, Palo Alto's objections improved each of the plans from the perspective of creditors, especially those

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Palo Alto played a unique and non-duplicative role that conveyed a direct benefit to the estate. Palo Alto's role in this case, while, concededly, generally advanced its own interests, it also furthered the interests of other creditors, and therefore, falls squarely within the contemplated substantial contribution espoused in *Celotex*, *DP Partners Ltd.*, and *United States Lines*. Indeed, Palo Alto's involvement benefited almost every party in interest in the case, often at some expense and prejudice to itself.

[34] Besides other governmental units with chronic exposure to PG&E, creditors with allowable pass-through and disputed claims had much in common with Palo Alto. Palo Alto's efforts improved results for all such parties.

[35] While some of Palo Alto's positions and arguments were strong enough to match the PG&E provocation, Palo Alto did not challenge PG&E's legitimate business economics, as distinct from PG&E efforts to increase its powers that unnecessarily threatened Palo Alto and others.

with pass-through and disputed claims and those interacting with the PG&E monopoly on a continuing basis.

Because the small Palo Alto team remained the same during the case and enjoyed an effective working relationship with the Committee, the objectors, and most of the active and inactive parties in the case, Palo Alto was able to be both efficient and non-duplicative. Moreover, because of the unprecedented nature of the legal, regulatory and business disputes at issue in the case and the range of views on such disputed issues among even the most sophisticated parties, it was often necessary and beneficial for the Committee and the Court to hear from various perspectives, including those of Palo Alto and its counsel. Such activities of Palo Alto and its counsel were efficient and non-duplicative, as confirmed by the Trial Record, including where Palo Alto was typically the last in the succession of objectors to cross-examine and argue and added value without duplication.

In addition, certain other factors which may support a substantial contribution award include whether the debtor and other creditors or committees support the movant's application for substantial contribution, and whether the "court's own first-hand observance of the services" reveal a substantial contribution to the case. *In re United States Lines, Inc.*, 103 B.R. at 430; *see also In re Richton*, 15 B.R. at 856; *In the Matter of Baldwin United Corp.*, 79 B.R. 321 (Bankr. S.D. Ohio 1987). A common example of a compensable "substantial contribution" is where the creditor materially contributed to the confirmation of a plan of reorganization. *See, e.g., In re 9085 E. Mineral Office Bldg., Ltd.*, 119 B.R. 246 (Bankr. D. Colo. 1990) (where creditor proposed plan that was ultimately confirmed, its fees were reimbursable as substantial contribution); *In the Matter of Baldwin*, 79 B.R. at 341 ("[T]he timesheets and other evidence make it apparent that Rosenman's ongoing efforts to mediate disputes among the Debtor's potential adversaries and to develop a consensual plan provided a substantial benefit to all involved."). *See generally, In re United States Lines, Inc.*, 103 B.R. at 430 ("Correspondingly, services that confer a significant and demonstrable benefit upon the reorganization process which have not been rendered solely on behalf of a creditor's own interest should be compensated."). We invite the Court to consider for itself how this case would have played out had Palo Alto not

elected to participate actively since we do not expect support from PG&E and the Committee may be inactive by the time of this hearing.[36]

Once it is determined that a creditor has contributed substantially to a Chapter 11 case, courts generally consider the following factors in assessing the reasonableness of fees: (a) the time and labor required; (b) the novelty and difficulty of the questions; (c) the skill requisite to perform the legal services properly; (d) the preclusion of other employment by the attorney due to acceptance of the case; (e) the customary fee; (f) whether the fee is fixed or contingent; (g) time limitations imposed by the client or the circumstances; (h) the amount involved and the results obtained;[37] (i) the experience, reputation and ability of the attorneys; (j) the undesirability of the case; (k) the nature and length of the professional relationship with the client; and (l) awards in similar cases. *See In re Catalina Spa & R.V. Resort, Ltd.*, 97 B.R. 13, 19 (Bankr. S.D. Cal. 1989) (citing *In re Texaco, Inc.*, 90 B.R. 622, 631 (Bankr. S.D.N.Y. 1988)); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). Those factors justify the request here. As the court will recall, most of the work at issue here was done by the undersigned and Grant Kolling of the Palo Alto City Attorneys' Office, and the reasonableness of such requested reimbursement, in comparison to the much higher amounts in the other fee applications considered by the Court for other parties in this matter both on an interim basis and at the end, is clearly appropriate. As previously noted, Palo Alto has not requested all of its fees and expenses, excluding those unique to Palo Alto's individual claim disputes with PG&E and in other forums.

3. By Comparison to the Other Costs in This Case, Including PG&E Management Bonuses and PG&E Attorneys' Fees, the Palo Alto Request is Modest, Especially for a Solvent Debtor

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[36] Whether or not the now largely inactive Committee decides to recommend payment to Palo Alto for these contributions, Palo Alto believes that Committee representatives have previously acknowledged the fact of the various contributions, notwithstanding the complications that may now exist as members resign, their work completed.

[37] While the outcome of Palo Alto's efforts were not always realized, the time spent and work performed in defeating the PG&E Litigation Plan and in moderating the CPUC/Committee Plan helped pave the path for the creation of a plan that could become confirmed. Palo Alto's efforts helped to decrease the amount of time, money and effort spent on unconfirmable plans and directly led to the settlement process, which ultimately produced a confirmable plan. Indeed, Palo Alto also played an important role in helping to achieve the balance between Bankruptcy Court and CPUC jurisdiction and improving the Proposed Settlement Agreement in the Actual Settlement Agreement.

The amount requested by Palo Alto is small and nonmaterial to PG&E, although, as a governmental unit responding to the impacts of the California State budget crisis, the reimbursement is material to Palo Alto. By comparison, numerous PG&E employees each received an individual reorganization bonus far larger than Palo Alto's request. Moreover, this Court can take judicial notice of the numerous and many times larger attorneys' fees paid by PG&E, as well as the additional large amounts initially requested in the Proposed Settlement Agreement for PG&E Corporation's various law firms. When one side of the dispute (*i.e.*, PG&E) engages scores of lawyers in test case litigation, that effort necessarily increases the effort required of the other sides. Given the length, intensity and scope of the disputes in this case, it is remarkable how comparatively small the Palo Alto request is in comparison to the PG&E expenditures and other fees approved by this Court.

The attorneys' fees of Brobeck/Morgan Lewis are also reasonable under the *Catalina Spa* and *Johnson* factors.[38] Accordingly, Palo Alto seeks reimbursement of $1,924,232.67 in fees and costs it paid to Brobeck and Morgan Lewis in making Palo Alto's substantial contribution to this Chapter 11 case. *See* Declaration of Grant Kolling attached hereto.

The foregoing reasons support a determination that Palo Alto has made a substantial contribution to this Chapter 11 case and is entitled to a substantial contribution award in the amount of $1,924,232.67. *Id.*

[38] The fees requested by Palo Alto generally reflect the lowest possible rate per hour while utilizing the required expertise to accomplish each specific task. The hourly rates charged by each professional and legal assistant in this case represent the rates customarily charged by professionals and legal assistants with similar levels of experience. Brobeck's and Morgan Lewis' lawyers' expertise in handling large and complex Chapter 11 cases provided a substantial benefit to the case.

VI. CONCLUSION

WHEREFORE, for the reasons discussed above, Palo Alto respectfully requests that this Court enter an Order granting its request for allowance and payment of $1,924,232.67 and providing for such other relief as the Court deems just and proper.

DATED: July 9, 2004

RESPECTFULLY SUBMITTED,

WHITE & CASE LLP

By: _____
G. Larry Engel
Special Counsel to THE CITY OF PALO ALTO