

RAS 4002

STATE OF CALIFORNIA

GRAY DAVIS, Governor

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



February 11, 2002

DOCKETED
USNRC

March 4, 2002 (11:09AM)

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudication Staff

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Re: **In the Matter of Pacific Gas and Electric Company Application for License Transfers and Conforming Administrative License Amendments for Diablo Canyon Power Plant, Units 1 and 2, Docket Nos. 50-275, 50-323**

To Whom It May Concern:

Enclosed for filing in the above-docketed case, please find an electronic version of a document entitled **"RENEWED MOTION TO DISMISS APPLICATIONS, OR IN THE ALTERNATIVE TO HOLD APPLICATIONS IN ABEYANCE, AND NOTICE OF BANKRUPTCY COURT RULING"** ("Renewed Motion").

Thank you for your cooperation in this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Laurence G. Chaset', written over a horizontal line.

Laurence G. Chaset
Staff Counsel

Enclosure

Template = SECY-041

SECY-02

**UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION**

In the Matter of
Pacific Gas and Electric Company
Application for License Transfers and
Conforming Administrative License
Amendments for Diablo Canyon Power
Plant, Units 1 and 2

Docket Nos. 50-275, 50-323

**RENEWED MOTION TO DISMISS APPLICATIONS, OR
IN THE ALTERNATIVE TO HOLD APPLICATIONS IN ABEYANCE,
AND NOTICE OF BANKRUPTCY COURT RULING**

Pursuant to 10 CFR §§2.1306 and 2.1309, the Public Utilities Commission of the State of California ("CPUC"), hereby renews it previously filed motions for summary dismissal of the Application submitted in the captioned dockets, or, in the alternative, to hold the Application in abeyance. In addition, the CPUC provides notice and submits a copy of the Bankruptcy Court's "Memorandum Decision Regarding Preemption and Sovereign Immunity," issued February 7, 2002 ("the Preemption Decision").¹

As the CPUC previously pointed out on page 6 of its Petition that was filed in this matter on February 6, "The Bankruptcy Court's ruling on certain facial preemption issues . . . will determine whether PG&E's plan is lawful and may move forward at all." In the

¹ Copies of the Preemption Decision are attached to this Renewed Motion as Exhibit A. Exhibit A is not attached to the service copies. The Preemption Decision is also available on the Bankruptcy Court's internet site at <http://www.canb.uscourts.gov/>.

Preemption Decision, the Bankruptcy Court has determined that PG&E's Plan is not lawful and may not move forward as it is currently designed. Specifically, the Bankruptcy Court held that:

“... there is no express preemption of nonbankruptcy law that permits a wholesale unconditional preemption of numerous state laws. . . . Thus if [PG&E and its corporate Parent] adhere to their contention that express preemption is available to them, the Disclosure Statement must be disapproved since the Plan could not be confirmed in the face of the vigorous objections made by the State and the Commission.”

Preemption Decision, at 3.

Although the Bankruptcy Court did give PG&E the opportunity to amend its Plan and Disclosure Statement to attempt to “establish with particularity the requisite elements of implied preemption” (*Id.*), the Bankruptcy Court's Preemption Decision is fatal to PG&E's Plan as currently proposed, and as proposed to be implemented in the above-captioned proceedings. For instance, it is fatal to PG&E's request for transfer of those portions of its beneficial interest in the CPUC-jurisdictional Nuclear Decommissioning Trusts that are associated with the Diablo Canyon Power Plant (“DCPP”), which relies wholly on the requirement that the Bankruptcy Court either “compel” the CPUC to approve such transfer or to “deem” such approval to have been granted by the CPUC. See the CPUC's Petition, at 14.

The Preemption Decision “rejects outright Proponents' across-the-board, take-no-prisoners preemption strategy in the Plan and Disclosure Statement.” Preemption Decision, at 46. PG&E's Application in this matter is mooted by the Preemption

Decision, since PG&E's current Plan, from which its Application flows, has been held to be unconfirmable.

In terms of process, the Bankruptcy Court has ordered PG&E, by February 21, 2002, to:

1. File and serve a response to the term sheet for the Commission's alternative plan, which will be filed on February 13, 2002.

2. File and serve a statement as to whether it intends to seek interlocutory review of the Court's order, or whether it seeks to amend its plan to attempt to meet the requirements for implied preemption. In that regard, the Court ordered that should PG&E seek to further amend its Disclosure Statement, it must do so by "showing what ultimate facts will be proven to lead the court to find that the application of [certain specified provisions of the California Public Utilities Code and Commission decisions] to the facts of PG&E's proposed reorganization are economic in nature rather than directed at protecting public health and safety or other noneconomic concerns, and that those particular laws stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress and the Bankruptcy Code." Preemption Decision, at 40-41.

3. Submit a form of order denying approval of the Disclosure Statement "for the reasons stated" in this Memorandum Decision if that is its desire. *Id.*, at 48-49.


4. File and serve any request for interlocutory certification of the order denying approval of the Disclosure Statement that it wishes to have this court enter. *Id.*, at 49.

Because the Bankruptcy Court has "reject[ed] outright" the preemption strategy upon which the Application herein depends, the Nuclear Regulatory Commission

("NRC") should dismiss the Application. At a minimum, the NRC should hold any proceedings in this matter in abeyance until there is a viable Plan pending before the Bankruptcy Court.

February 11, 2002

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Laurence G. Chaset", written over a horizontal line.

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EXHIBIT A

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re) Bankruptcy Case
PACIFIC GAS & ELECTRIC COMPANY,) No. 01-30923DM
Debtor.) Chapter 11

MEMORANDUM DECISION REGARDING
PREEMPTION AND SOVEREIGN IMMUNITY

I. Introduction

On September 20, 2001, Debtor, Pacific Gas and Electric Company ("PG&E"), and its corporate parent, PG&E Corporation ("Corporation", and together with PG&E, "Proponents") filed their first plan of reorganization for PG&E and a disclosure statement.

On December 4, 2001, this court conducted a status conference regarding objections to the September 20th disclosure statement, and by Order Rescheduling Hearings On Approval Of Disclosure Statement ("Rescheduling Order") filed December 5, 2001, the court fixed December 19, 2001, as the date for Proponents to file a revised plan of reorganization and a revised disclosure statement. On December 19, 2001, Proponents filed their First Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code For Pacific Gas and Electric Company (the "Plan") and their First Amended

1 Disclosure Statement For First Amended Plan of Reorganization
2 Under Chapter 11 of the Bankruptcy Code For Pacific Gas and
3 Electric Company Proposed By Pacific Gas and Electric Company and
4 PG&E Corporation (the "Disclosure Statement").

5 The Rescheduling Order directed Proponents to include in the
6 Disclosure Statement a description specifically of

7 ... (1) the laws and regulations [Proponents] seek[] to
8 preempt through confirmation of [Proponents' Plan]; (2) the
9 governmental units affected by any such preemption; and (3)
10 how the various transactions contemplated by the [Plan] will
11 affect certain executory contracts and [PG&E's] obligations
12 under those contracts.

13 That order set forth a schedule for consideration of
14 various objections to the adequacy of the Disclosure Statement,
15 including any objections to be filed by the California Public
16 Utilities Commission ("Commission" or "CPUC"), the Attorney
17 General of the State of California ("State"), and any other
18 governmental unit contending that the Plan is facially invalid
19 based upon sovereign immunity or impermissible federal preemption.

20 Thereafter the State, the Commission, and various other
21 parties filed their objections, memoranda and supporting papers
22 and Proponents and the Official Committee of Unsecured Creditors
23 ("Committee") filed their memoranda and supporting papers in
24 defense of the Plan and Disclosure Statement. The court conducted
25 a hearing on the sovereign immunity and preemption challenges on
26 January 25, 2002.

27 During oral argument counsel for Corporation stated "Your
28 honor makes the law." This court doubts that with the stroke of a
pen upon an order confirming the Plan it could make federal law
and sweep aside a substantial body of nonbankruptcy law. Rather,

1 the court believes its job is to interpret and apply the law,
2 searching where in the Bankruptcy Code nonbankruptcy law is
3 specifically preempted and where, under controlling case law, the
4 purposes of federal bankruptcy law are frustrated such that
5 federal law must prevail over specific conflicting state law.

6 For the reasons explained below, the court concludes that
7 there is no express preemption of nonbankruptcy law that permits a
8 wholesale unconditional preemption of numerous state laws, some of
9 which are identified in the Disclosure Statement and some of which
10 are obscured by the phrase "including but not limited to." Thus,
11 if Proponents adhere to their contention that express preemption
12 is available to them, the Disclosure Statement must be disapproved
13 since the Plan could not be confirmed in the face of the vigorous
14 objections made by the State and the Commission.

15 Nonetheless, the court believes that the Plan could be
16 confirmed if Proponents are able to establish with particularity
17 the requisite elements of implied preemption. If the Disclosure
18 Statement is amended consistent with this Memorandum Decision, the
19 court will approve it and let the Proponents test preemption at
20 confirmation.

21 The court also believes the Plan as drafted offends sovereign
22 immunity because it seeks affirmative relief against the State and
23 the Commission. If the Plan and Disclosure Statement are amended
24 as Corporation's counsel intimated they would be, then the Plan
25 will overcome the sovereign immunity defense. If, however,
26 Proponents leave unchanged the provisions of the Plan that seek
27 injunctive and declaratory relief against the Commission and the
28 State, they will have to prove that there has been a waiver of

1 sovereign immunity. In that case the Disclosure Statement must be
2 amended to describe why Proponents believe sovereign immunity has
3 been waived.

4 II. Preliminary Observations

5 A. In theory, if no one objected to the Plan and Disclosure
6 Statement, Proponents are probably correct that the Plan could be
7 confirmed. The court would not independently block an
8 unchallenged march to confirmation. But Proponents' request that
9 the court not "kill" the Plan now is not persuasive given the
10 serious clash between state and federal law presented by the Plan
11 and the Commission's and the State's strenuous opposition to it.
12 From the commencement of this case the antagonism between PG&E and
13 the Commission has been palpable. The sweep of preemption in the
14 Plan and Disclosure Statement will not go unchallenged. The
15 situation here is not unlike what the court was presented with in
16 the celebrated public utility bankruptcy of Public Service Company
17 of New Hampshire. There the court chose to decide the preemption
18 issue in an adversary proceeding, before confirmation. See Public
19 Service of New Hampshire v. State of New Hampshire (In re Public
20 Service Company of New Hampshire), 99 B.R. 506, 509 (Bankr. N.H.
21 1989) ("Public Service") ("In the present case there is no
22 uncertainty or contingency about the dispute arising in concrete
23 form between the [debtor] and the [state].") The magnitude and
24 complexity of this case weigh heavily in favor of addressing the
25 central issues as early as possible. Once Proponents file a
26 revised plan and set forth in a revised disclosure statement how
27 the various state laws and regulations frustrate Congressional
28 purposes and objectives, the stage will be set for Proponents to

1 attempt to establish that the Plan should preempt conflicting
2 state law at confirmation.

3 B. As the development of the reorganization plan for PG&E
4 has progressed throughout this case, Proponents have submitted
5 mark-ups of the Plan and the Disclosure Statement as recently as
6 February 4, 2002. Thus, for reasons wholly apart from the
7 preemption and sovereign immunity issues, the plan of
8 reorganization and its accompanying disclosure statement are very
9 much works in progress. For simplicity, however, the court will
10 refer to the Plan and the Disclosure Statement (filed December 19,
11 2001) for purposes of the analysis that follows. The February 4th
12 submission has not been reviewed.

13 Also for convenience in this Memorandum Decision, the court's
14 reference to nonbankruptcy "law(s)" will include statutes,
15 regulations, Commission decisions, Commission rules, Commission
16 resolutions and all other state law authorities that Proponents
17 seek to preempt through confirmation of the Plan.

18 C. The following discussion deals with arguments made by the
19 State and the Commission. To the extent other objectors joined
20 the State and the Commission, their positions are addressed below.
21 The court will only make the following brief comments about other
22 objections.

23 The California Hydropower Reform Coalition argues, in part,
24 that the rate making authority of the Commission which is not
25 challenged under the Plan will be implicated because its
26 traditional jurisdiction over some of PG&E's properties will
27 cease. It also contends that the Proponents cannot be selective,
28 preempting some state laws but not other state and federal laws.

1 The court is not persuaded by those arguments. Similarly, the
2 City and County of San Francisco maintains that the deference
3 bankruptcy law pays to state law for the definition of property
4 rights somehow supports its opposition to Proponents' attempted
5 preemption of state laws in the Plan. The court also rejects
6 those arguments. Any other remaining objections by other parties
7 are largely rendered moot in view of the obvious fact that, unless
8 this court's decision is reversed on appeal, the Plan and
9 Disclosure Statement will have to be modified consistent with this
10 Memorandum Decision.

11 III. Provisions of Plan Calling For Preemption

12 Proponents' full-scale attack on any state law that
13 interferes with the Plan is anything but subtle:

14 Section 1123(a) of the Bankruptcy Code preempts any otherwise
15 applicable non-bankruptcy law that may be contrary to its
16 provisions. Accordingly, a plan may contain certain
17 provisions that would not normally be permitted under
18 non-bankruptcy law. For example, section 1123(a)(5) of the
19 Bankruptcy Code authorizes, among other things, the sale or
20 transfer of assets by [PG&E] without the consent of the State
21 or the [Commission].

22 Disclosure Statement, 4:18-23.

23 Then they continue:

24 The preemptive effect of the Confirmation Order extends to
25 all statutes, rules, orders and decisions of the [Commission]
26 otherwise applicable to the Restructuring Transactions and
27 the implementation of the Plan. In the Proponents' view, the
28 Confirmation Order supersedes any statute, rule, order or
29 decision that the [Commission] might interpret to otherwise
30 apply to the Restructuring Transactions and the
31 implementation of the Plan whether specified here or not.
32 The statutes, rules, orders or decisions thus preempted
33 include, but are not limited to, the following....

34 Disclosure Statement, 129:15-20 (emphasis added).

35 Proponents argue that confirmation of the Plan will have the
36 following results:

1 Accordingly, the Proponents contend that the Confirmation
2 Order approving the Plan and authorizing the transactions
3 pursuant to the Plan will preempt 'otherwise applicable
4 nonbankruptcy law' in the following areas: (1) any approval
5 or authorization of the [Commission] or compliance with the
6 California Public Utilities Code or [Commission] rules,
7 regulations or decisions otherwise required to transfer
8 public utility property (including authorizations to
9 construct facilities), issue securities and implement the
10 Plan; and (2) the exercise of discretion by any other state
or local agency or subdivision to deny the transfer or
assignment of any of [PG&E's] property, including existing
permits or licenses, or the issuance of identical permits and
licenses on the same terms and conditions as the [PG&E's]
existing permits and licenses where both the Reorganized
Debtor and one or more of ETrans, GTrans and Gen require such
permit or license for their post Effective Date operations.
Such preemption pursuant to section 1123(a) of the Bankruptcy
Code shall occur at the time the Plan is implemented.¹

11 Disclosure Statement, 10:9-20.

12 Later in the Disclosure Statement Proponents set forth a
13 series of California Public Utility Code Sections, Commission
14 Decisions, Commission Resolutions or Commission Rules that they
15 contend will be superseded by confirmation of the Plan.² While
16 State and Commission challenge any preemptive effect of
17 confirmation of the Plan, the particular sections of the Public
18

19 ¹ Reorganized Debtor is PG&E post-confirmation; ETrans,
20 GTrans, and Gen are limited liability companies to be formed in
connection with confirmation of the Plan.

21 ² Although the Rescheduling Order directed Proponents to
22 describe preempted laws and regulations and the affected
governmental units specifically, Proponents simply stated: "See
23 Exhibit H to this Disclosure Statement for a list of some of the
state agencies and political subdivisions that may be impacted by
the Plan." Disclosure Statement, 127:18-19 (emphasis added).
24 "Exhibit I to this Disclosure Statement lists some of the laws,
25 regulations and rules of state agencies and subdivisions that are
subject to preemption, along with the relevant agencies."
26 Disclosure Statement, 132:15-17 (emphasis added). In view of the
27 court's decision that Proponents' theory of express preemption
must be rejected, and implied preemption applied specifically as
28 to each offending law, the objections by various parties that
Proponents did not comply with the precise terms of the
Rescheduling Order, although meritorious, will be treated as moot.

1 Utilities Code, Commission rule and Commission decision that the
2 Commission seems most concerned about are the following (with the
3 brief explanation Proponents make in the Disclosure Statement
4 concerning each particular code section, decision and rule):

5 Public Utilities Code § 377: This section, enacted in January
6 2001, purports to prohibit the transfer of generating assets
7 to Gen as part of the Plan, and to otherwise require
[Commission] authorization of the transfer of those assets
under Public Utilities Code § 851.

8 Public Utilities Code § 451: The [Commission] could interpret
9 this section to conflict with the Bankruptcy Court's
establishment of the conditions under which the Reorganized
Debtor may resume procurement of the net open position or the
10 transfer of any of [PG&E's] assets or businesses to any of
ETrans, GTrans or Gen. To that extent, § 451 would be
11 preempted.

12 Public Utilities Code § 453: The [Commission] could interpret
13 § 453 to preclude the Reorganized Debtor entering into the
power sales agreement with Gen, the transportation and
storage services agreement with GTrans, and some or all of
14 the transitional service agreements with ETrans, GTrans and
Gen. To that extent, § 453 would be preempted.

15 Public Utilities Code §§ 816-830: These sections govern the
16 issuance by a public utility of debt or equity securities,
among other things requiring the approval of the [Commission]
17 prior to the issuance. These sections are preempted because
the Confirmation Order will authorize the issuance of
18 securities and the financings that are required for the
Restructuring Transactions and the implementation of the
19 Plan.

20 Public Utilities Code § 851: This section would require
21 approval of the [Commission] before [PG&E] could 'sell,
lease, assign, mortgage, or otherwise dispose of or encumber'
22 its property, including certificates of public convenience
and necessity, pursuant to the Plan. The Bankruptcy Court's
23 Confirmation Order would preempt the need for this
authorization.

24 [Commission] Resolution L-244: By this Resolution, the
[Commission] purported to prohibit [PG&E] from moving its gas
25 transmission assets to FERC jurisdiction under the NGA
without express authorization by the [Commission]. The
26 Bankruptcy Court's Confirmation Order would preempt the need
for this authorization, even if it were an otherwise lawful
27 requirement. (Footnote omitted.)

28 [Commission] Gain on Sale 'Rules': Over the years, the

1 [Commission] has issued a number of often-inconsistent
2 decisions assigning or allocating the gain on the sale of
3 public utility property to or between shareholders and
4 ratepayers. To the extent that the [Commission] attempts to
5 apply its gain on sale 'rules' in a manner that results in
6 the application of proceeds from property sold pursuant to
7 the Plan other than as provided for in the Plan or that
8 imputes a 'gain on sale' from the transfer of assets or the
9 other Restructuring Transactions or implementation of the
10 Plan, such action would be preempted. (Footnote omitted.)

11 D.01-12-017 (December 11, 2001), Ordering Paragraph 5: In
12 this Decision, issued December 11, 2001, the [Commission]
13 attempts to exercise control over [PG&E's] property by
14 purporting to 'reserve[] the right to claim a return of the
15 full value of the asset to [PG&E's] ratepayers' should the
16 Bankruptcy Court authorize the transfer of [PG&E's]
17 transmission assets pursuant to the Plan. Inasmuch as this
18 is a direct attempt to interfere with the Plan, this Decision
19 is preempted.

20 Disclosure Statement, 129:21-131:15.

21 A core feature of the Plan is referred to by the parties as
22 "disaggregation," meaning PG&E's creation of three new limited
23 liability companies and the separation of all of PG&E's operations
24 primarily into four lines of business based upon PG&E's historical
25 functions: retail gas and electric distribution, to be carried out
26 by Reorganized Debtor; electric transmission, to be carried out by
27 ETrans, LLC ("ETrans"); interstate gas transmission, to be carried
28 out by GTrans, LLC ("GTrans"); and electric generation, to be
carried out by Electric Generation, LLC ("Gen", and collectively
with ETrans and GTrans, the "LLC's"). Disclosure Statement 6:16-
20.

For the disaggregation of the electrical transmission, the
Plan contemplates that ETrans and the Proponents:

shall seek an affirmative ruling of the bankruptcy court,
which may be the Confirmation Order, that, pursuant to
section 1123 of the Bankruptcy Code, the approval of any
California state and local Governmental Entity, including but
not limited to, the [Commission], shall not be required in
order to, among other things, transfer or operate the ETrans

1 Assets, for the transfer and use of various permits,
2 licenses, leases, and other entitlements in connection with
3 the transfer and operation of the ETrans Assets, to transfer
4 operational control of its transmission facilities . . . to
5 issue securities, to assume the ETrans liabilities or to
6 otherwise effectuate the Restructuring Transactions.

7 Plan, 60:24-61:4.³

8 As shown above, Proponents want the Plan to preempt the
9 Commission's "gain on sale" rules. As a condition precedent to
10 confirmation of the Plan, the Plan requires this court to enter an
11 order prohibiting officials of the Commission and officials of the
12 State ". . . from taking any action related to the allocation or
13 other treatment of 'gain on sale' related to assets transferred or
14 disposed of under the Plan that would adversely impact the
15 Reorganized Debtor."⁴ In their response to the preemption and
16 sovereign immunity objections, Proponents concede that the relief
17 sought in connection with the "gain on sale" rules are in the
18 nature of an injunction. At the same time, Proponents have
19 indicated that even that injunctive provision would be amended,
20 and thus be limited to seeking declaratory relief only. For
21 purposes of the present analysis, however, the court will assume
22 that Proponents desire confirmation to constitute an injunction

23 ³ Comparable language appears for the transactions involving
24 Reorganized Debtor (Plan, 72:10-18), Gen (Plan, 66:13-22) and
25 GTrans (Plan, 63:11-18).

26 ⁴ The Disclosure Statement is conspicuously lacking in any
27 detailed information that describes the operation of those rules
28 and how they would affect the post-confirmation activities of the
Reorganized Debtor, the LLC's, or any other entity. More
information is needed regardless of the ultimate outcome of the
sovereign immunity issue if Proponents wish to attempt to preempt
those rules.

1 against enforcement of those rules.⁵

2 IV. Issues

3 In order to decide whether to approve or disapprove the
4 Disclosure Statement, the court must answer the following
5 questions.

6 A. Does the Bankruptcy Code expressly or impliedly preempt
7 California laws so that Proponents may ignore them and seek to
8 obtain confirmation of the Plan?

9 B. Does sovereign immunity protect the Commission and the
10 State from the declaratory and injunctive relief requested by
11 Proponents in the Plan?⁶

12 V. Discussion

13
14 ⁵ The specific provisions of the Plan which would carry out
15 the preemptive effect of confirmation appear to be the following:
16 Article VII, Implementation Of The Plan, including § 7.1(k)(ii),
17 (as to ETrans), referring to Bankruptcy Code section 1123;
18 § 7.2(i)(ii) (as to ETrans), referring to Bankruptcy Code section
19 1123; § 7.3(j)(ii) (as to Gen), referring to Bankruptcy Code
20 sections 1123 and 1142(b); § 7.5(n)(iii) (as to Reorganized
21 Debtor), referring to Bankruptcy Code section 1123; and § 7.5(e),
22 prohibiting assumption of the net open position. In Article VIII,
23 Confirmation and Effectiveness of the Plan, the following
24 subparagraphs of § 8.1, Conditions Precedent to Confirmation are
noted: (b) declaring that Proponents and their respective
affiliates are not liable for Department of Water Resources
contracts; (c) prohibiting assignment of the Department of Water
Resources contracts; (d) prohibiting assumption of the net open
position; (g) prohibiting officials of the Commission and the
State from enforcing the "gain on sale" rules; (h) declaring
Commission's affiliate transaction rules not applicable; and
(i) calling for approval of the Restructuring Transactions as
preempted by Bankruptcy Code section 1123.

25 ⁶ The court conducted an emergency telephone conference with
26 counsel for Proponents, the Commission, the State and others two
27 days prior to the oral argument in this matter. Pursuant to the
28 instructions of the court during that conference, any issue about
whether sovereign immunity had been waived was deferred and the
question will not be addressed in this Memorandum Decision,
notwithstanding the fact that Proponents argued the doctrine of
waiver extensively in their written submissions.

1 A. **Preemption.**

2 1. **Overview**

3 In Baker & Drake, Inc. v. Public Service Commission of Nevada
4 (In re Baker & Drake, Inc.), 35 F.3d 1348 (9th Cir. 1994) ("Baker
5 & Drake"), the Ninth Circuit Court of Appeals quoted Supreme Court
6 authority on preemption:

7 "It is a familiar and well-established principle that the
8 Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates
9 state laws that 'interfere with or are contrary to, federal
10 law.'"

11 Baker & Drake, 35 F.3d at 1352, quoting Hillsborough County v.
12 Automated Medical Labs, Inc., 471 U.S. 707, 712 (1985) (quoting
13 Gibbons v. Ogden, 9 Wheat. 1, 211, 6 L.Ed. 23 (1824)).

14 "In considering a preemption claim, we look first to the
15 intent and sweep of the federal statute." Baker & Drake, 35 F.3d
16 at 1352. More elaborately, the Supreme Court has stated that:

17 "[t]he purpose of Congress is the ultimate touchstone" in
18 every pre-emption case. As a result, any understanding of
19 the scope of a pre-emption statute must rest primarily on "a
20 fair understanding of congressional purpose." Congress'
21 intent, of course, primarily is discerned from the language
22 of the pre-emption statute and the "statutory framework"
23 surrounding it. Also relevant, however, is the "structure
24 and purpose of the statute as a whole," as revealed not only
25 in the text, but through the reviewing court's reasoned
26 understanding of the way in which Congress intended the
27 statute and its surrounding regulatory scheme to affect
28 business, consumers, and the law.

29 Medtronic, Inc. v. Lohr, 518 U.S. 470, 485-86 (1996) (emphasis in
30 original, citations omitted).

31 As Baker & Drake observed, there are several types of
32 preemption:

33 The statute's preemptive intent may be either express or
34 implied:

35 Under the Supremacy Clause, federal law may supersede
36 state law in several different ways. First, when acting

1 within Constitutional limits, Congress is empowered to
2 pre-empt state law by so stating in express terms.
3 Absent express pre-emptive language, Congress' intent to
4 pre-empt all state law in a particular area may be
5 inferred where the scheme of federal regulation is
6 sufficiently comprehensive to make reasonable the
7 inference that Congress "left no room" for supplementary
8 state regulation. Pre-emption of a whole field also
9 will be inferred where the field is one in which "the
10 federal interest is so dominant that it will be assumed
11 to preclude enforcement of state laws on the same
12 subject."

13 Even where Congress has not completely displaced
14 state regulation in a specific area, state law is
15 nullified to the extent it actually conflicts with
16 federal law. Such a conflict arises when "compliance
17 with both federal and state regulations is a physical
18 impossibility," or when state law "stands as an obstacle
19 to the accomplishment and execution of the full purposes
20 and objectives of Congress."

21 Baker & Drake, 35 F.3d at 1352-53 (emphasis added), quoting
22 Hillsborough County, 471 U.S. at 713 (citations omitted).

23 Only the two emphasized types of preemption above are at
24 issue: express preemption and the last category of implied
25 preemption. Proponents have not urged the court to consider the
26 "Congress left no room" and "federal law is so dominant" types of
27 preemption.

28 Express preemption has been defined as "where Congress
explicitly defines the extent to which its enactments preempt
state law." Williamson v. General Dynamics Corp., 208 F.3d 1144,
1149 (9th Cir. 2000), cert. denied, 531 U.S. 929. See also
English v. General Elec. Co., 496 U.S. 72, 78 (1990) ("Congress
can define explicitly the extent to which its enactments pre-empt
state law").

Implied preemption was addressed by Baker & Drake, which
examined whether the state law at issue was an obstacle to the
accomplishment and execution of the full purposes of the

1 bankruptcy laws. Baker & Drake reviewed two Supreme Court cases
2 that are critical to this court's analysis of the present
3 controversy: Perez v. Campbell, 402 U.S. 637 (1971), and Midlantic
4 National Bank v. New Jersey Depart. of Environmental Protection,
5 474 U.S. 494 (1986). Perez concluded that the Bankruptcy Code
6 preempted state law that interfered with a discharge in bankruptcy
7 and Midlantic acknowledged that the Bankruptcy Code does not
8 preempt state environmental laws or regulations reasonably
9 designed to protect the public health or safety from imminent and
10 identifiable harm. Referring to both decisions, the Ninth Circuit
11 set forth a template which this court finds not only helpful, but
12 controlling in resolving this dispute:

13 As we view these cases, they suggest that federal
14 bankruptcy preemption is more likely (1) where a state
15 statute facially or purposefully carves an exception out of
16 the Bankruptcy Code, or (2) where a state statute is
17 concerned with economic regulation rather than with
18 protecting the public health and safety.

19 Baker & Drake, 35 F.3d at 1353. See also Midlantic, 474 U.S. at
20 506 n. 9 and accompanying text.

21 One of the cases Proponents feature prominently in their
22 argument is Public Service Company of New Hampshire v. State of
23 New Hampshire (In re Public Service Company of New Hampshire), 108
24 B.R. 854 (1989) ("PSNH"). There, the court -- years before Baker
25 & Drake -- stated the same principle:

26 However, federal preemption is more likely when the state
27 "police power" involved is economic regulation rather than
28 health or safety."

29 PSNH 108 B.R. at 869. The court then cited one of Proponents'
30 counsel in a discussion about preemption under the Commerce Clause
31 of the Constitution:

1 State regulations seemingly aimed at furthering public health
2 or safety, or at restraining fraudulent or otherwise unfair
3 trade practices, are less likely to be perceived as "undue
4 burdens on interstate commerce" than are state regulations
5 evidently seeking to maximize the profits of local
6 businesses. Indeed, where the Supreme Court has held that
7 the national interest in the free flow of commerce supersedes
8 a state interest in public safety, it has generally seemed
9 that the challenged statute contributed only marginally if at
10 all to the public safety.

11 Id., quoting L. Tribe, American Constitutional Law, p. 437 (2d ed.
12 1988).

13 It is important to point out that this court does not read
14 Baker & Drake as holding that there can be no preemption of state
15 law except where express preemption appears in the statute. If
16 that were the holding, this matter would be over and the
17 Disclosure Statement would be disapproved. Rather, the court
18 believes there are clear signals in the decision that suggest that
19 there can be implied preemption. First, the above-quoted
20 reference to "economic regulation rather than . . . protecting the
21 public health and safety" suggests a balancing test. Next, the
22 court stressed that while there can be a reorganization, it just
23 may be difficult:

24 Congress in enacting the Bankruptcy Code was not to mandate
25 that every company be reorganized at all costs, but rather to
26 establish a preference for reorganizations, where they are
27 legally feasible and economically practical.

28 Baker & Drake, 35 F.3d at 1354 (italics in original; emphasis
added).

Further, noting that a Nevada statute at issue was
promulgated as part of a safety measure, the court pointed out
that if compliance with that statute were to render the debtor
financially unable to reorganize, neither it nor the state would
be violating any provision of the Bankruptcy Code. But in a

1 footnote the court pointed out that the debtor had not shown that
2 complying with the statute would make a successful reorganization
3 impossible in its case. Id., n. 5. The powerful inference,
4 therefore, is that under appropriate circumstances the state
5 statute could be preempted with a proper showing of what is
6 necessary to make the reorganization possible.

7 One more general principle of preemption is particularly
8 apropos: deference to areas of traditional state regulation.

9 In all preemption cases, and particularly in those in which
10 Congress has "legislated . . . in a field which the States
11 have traditionally occupied," . . . we "start with the
12 assumption that the historic police powers of the States were
13 not to be superseded by the [f]ederal [a]ct unless that was
14 the clear and manifest purpose of Congress."

15 Medtronic, 518 U.S. at 484. See also CSX Transp., Inc. v.

16 Easterwood, 507 U.S. 658, 664 (1993) ("[A] court interpreting a
17 federal statute pertaining to a subject traditionally governed by
18 state law will be reluctant to find pre-emption.").

19 Public utility regulation and environmental regulation are
20 both areas where this deference applies. See Pacific Gas and
21 Elec. Co. v. State Energy Resources Conservation & Development
22 Com'n, 461 U.S. 190, 206 (1983) ("Congress legislated here in a
23 field which the States have traditionally occupied . . . so we
24 start with the assumption that the historic police powers of the
25 States were not to be superseded by the [f]ederal [a]ct unless
26 that was the clear and manifest purpose of Congress"); Fireman's
27 Fund Ins. Co. v. City of Lodi, 271 F.3d 911, 932-33 (9th Cir.
28 2002) (as amended) ("we are 'highly deferential' to local
legislation in areas such as environmental regulation, which
'traditionally has been a matter of state authority'" (citation

1 omitted).

2 With this overview in mind, the court turns to Section
3 1123(a)(5).⁷

4 2. **Preemption under Section 1123(a)(5) generally**

5 a. Language of the Statute

6 Section 1123(a)(5) provides, in relevant part:

7 **§ 1123. Contents of Plan**

8 (a) Notwithstanding any otherwise applicable
9 nonbankruptcy law, a plan shall -

10 (5) provide adequate means for the plan's
implementation, such as -

11 (B) transfer of all or any part of the
12 property of the estate to one or more
entities ...

13 (D) sale of all or any part of the
14 property of the estate,

11 U.S.C. § 1123(a)(5)(B) and (D).

15 Starting with the words of the statute, paragraph (5) of
16 Section 1123(a) says only that the plan shall "provide adequate
17 means for the plan's implementation, such as [various
18 alternatives]." 11 U.S.C. § 1123(a)(5) (emphasis added).
19 Paragraph (5) can be read simply as a directive to the plan
20 proponent about what must go into the plan. It does not have to
21 be read as an "empowering" statute that, under Proponents'
22 construction, would permit them to do whatever they wanted - "such
23 as" but not limited to the statutory examples - subject only to
24

25
26
27 ⁷ Unless otherwise indicated, all Section and Rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

1 the requirements of Section 1129.⁸

2 This construction - interpreting Paragraph (5) as directive
3 rather than empowering - does not read the "notwithstanding"
4 clause out of the statute. As several parties suggest, that
5 clause still serves a useful purpose by preempting any state law
6 that, for example, would prohibit a party from even submitting a
7 plan to the bankruptcy court without first obtaining approval from
8 a debtor's shareholders. The court can imagine other examples,
9 such as labor laws that might obligate a plan proponent to
10 negotiate in good faith with unions before submitting a plan or
11 corporate laws that would require "a resolution of the board of
12 directors" before a plan could be proposed. 124 Cong. Rec. H11103
13 (Sept. 28, 1978); S17419 (Oct. 6, 1978) (statement of Senator
14 DeConcini).⁹

15
16 ⁸ Moreover, there is some ambiguity in Congress' use of
17 the words "adequate means" for the plan's implementation. If
18 Congress had meant "any means, provided they are adequate," it
19 could have said so. See Cipollone v. Liggett Group, Inc., 505
20 U.S. 504, 529 and n. 27 (1992) (rejecting "theoretical elegance"
of interpreting statute at highest or lowest level of generality
in favor of middle ground "fair understanding of congressional
purpose").

21 ⁹ The court is not at all troubled that the above
22 construction involves a relatively minor role for the
23 "notwithstanding" clause as applied to Paragraph (5). See
24 Medtronic, 518 U.S. at 484 (even where express preemption is
25 clear, "we must nonetheless 'identify the domain expressly pre-
26 empted'"). That clause does not appear to apply at all to some
27 Paragraphs of Section 1123(a). For example, it is doubtful
28 Congress saw any need to preempt nonbankruptcy laws that might
contradict Paragraph (2). That paragraph only requires a plan to
"specify any class of claims or interests that is not impaired
under the plan." What nonbankruptcy law would contradict that
provision? See also 11 U.S.C. § 1123(a)(1) (plan shall designate
classes) and (a)(3) (plan shall specify treatment of impaired
classes). Compare 1123(a)(6) (corporate debtors must include in
their charter a ban on issuance of nonvoting securities,
notwithstanding any contrary nonbankruptcy law) and 1123(a)(7)

1 Not only is Proponents' reading unnecessary, it leads to
2 absurd results. At the hearing on January 25, 2002, the court
3 questioned whether under Proponents' reading of Section 1123(a)(5)
4 there would be any limit to what a debtor could do. The court
5 asked counsel about several hypothetical situations, following the
6 Supreme Court's directive to discern "the way in which Congress
7 intended the statute and its surrounding regulatory scheme to
8 affect business, consumers, and the law." Medtronic, 518 U.S. at
9 486. The court questioned whether a plan could provide for a
10 debtor to sell liquor to minors (notwithstanding state laws to the
11 contrary), or trade with foreign enemies (notwithstanding federal
12 statutes to the contrary), or dump toxic wastes (notwithstanding
13 environmental laws and Supreme Court precedent), or merge with
14 competitors to create a monopoly or gain some other competitive
15 advantage (in violation of state or federal antitrust laws).
16 There were no satisfactory answers.¹⁰

17 Taken in context, Section 1123 looks more like a component of
18 Congress' roadmap that heads towards confirmation. First,

19 _____
20 (governing selection of officer, director, or trustee under the
21 plan, notwithstanding any contrary nonbankruptcy law).

22 ¹⁰ The most offensive plans might be reined in by something
23 like Midlantic's limitation on abandonment of toxic wastes. See
24 Midlantic, 474 U.S. at 494. That decision, however, arose under
25 Section 554, which does not have the "notwithstanding" clause.
26 See 11 U.S.C. § 554. Moreover, Midlantic was strictly limited to
27 state laws or regulations reasonably designed to protect the
28 public health or safety from "imminent" and "identifiable" harm.
See Midlantic, 474 U.S. at 506 n. 9 and accompanying text. The
potential harm from antitrust violations, for example, might not
be imminent and clearly identifiable, but the court does not
believe Congress intended to eviscerate all antitrust laws for
debtors in bankruptcy (especially solvent debtors). In other
words, Midlantic does not cure the problems with Proponents'
reading of the statute.

1 Subchapter II of Chapter 11, entitled "The Plan," begins by
2 stating by whom and when plans may be filed (Section 1121. Who may
3 file a plan); then directs how a plan is to position creditors and
4 owners (Section 1122. Classification of claims or interests); next
5 prescribes what goes into a plan (Section 1123. Contents of plan).
6 That section, and in particular its internal structure, is a
7 "blueprint" the plan proponent is to follow when constructing what
8 has been characterized as resembling a contract. Hillis Motors,
9 Inc. v. Hawaii Automobile Dealers' Association, 997 F.2d 581, 588
10 (9th Cir. 1993) ("A reorganization plan resembles a consent decree
11 and therefore, should be construed basically as a contract.")

12 The mandatory rules Congress has established for that
13 contract include the designation of classes of claims or interests
14 (Section 1123(a)(1)); the designation of not impaired classes of
15 claims or interests (Section 1123(a)(2)); the treatment of
16 impaired classes of claims or interests (Section 1123(a)(3));
17 equal treatment of classes, unless members agree otherwise
18 (Section 1123(a)(4)); adequate means for implementation (Section
19 1123(a)(5)); corporate charter provisions (Section 1123(a)(6));
20 and provisions consistent with public policy for selection of
21 officers, directors and trustees (Section 1129(a)(7)).

22 A plan that lacks any of these seven components (except where
23 one or more may be inapplicable) is structurally defective because
24 the "shall" directive of Section 1123(a) has not been satisfied.¹¹

25 In view of the scant legislative history about Section 1123
26

27 ¹¹ In Section 1123(b) Congress has given plan proponents
28 various options that a plan may contain. Those options are not
relevant to this discussion.

1 discussed, infra, it is apparent that that section is largely a
2 carryover from its counterparts under the former Bankruptcy Act.
3 Section 91 of that Act (former 11 U.S.C. § 91) described
4 provisions a Chapter IX petitioner "may include" in a plan
5 (provisions modifying or altering rights of creditors generally;
6 other provisions not inconsistent with Chapter IX; provisions for
7 rejection of executory contracts or unexpired leases). Section
8 216 of the Bankruptcy Act (former 11 U.S.C. § 616) contained nine
9 subparagraphs beginning with "shall include in," "shall provide
10 for," or "shall specify." Five subparagraphs provided that the
11 plan "may" deal with, provide for, or include other provisions.¹²

12 In Chapter XI, Bankruptcy Act Section 356 (former 11 U.S.C. §
13 756) required inclusion of provisions dealing with unsecured
14 creditors ("An arrangement [Bankruptcy Act practitioners will
15 recall the phrase "plan of arrangement" in Chapter XI practice]
16 within the meaning of this chapter shall include provisions
17 modifying or altering the rights of unsecured creditors generally
18 or some class of them, upon any terms or for any consideration.")
19 Then Bankruptcy Act Section 357 (former 11 U.S.C. § 757) set forth
20 eight subparagraphs specifying provisions an arrangement "may
21 include."

22 Finally in Chapter XII, Bankruptcy Act Section 461 (former 11
23 U.S.C. § 861) resembled Section 216 (in Chapter X) and set forth
24 seven "shall" include, provide or specify subparagraphs and six
25 "may" subparagraphs.

26 Under the Bankruptcy Act there was no counterpart to today's
27

28 ¹² See footnote 15, infra, and accompanying text.

1 disclosure statement. Now in Section 1125 Congress has directed
2 that adequate information be provided that would enable a
3 hypothetical investor typical of holders of claims or interests of
4 a relevant class to make an informed judgment about the plan. In
5 practice it is in the disclosure statement that plan proponents
6 set forth a description of their business, the reasons for their
7 financial difficulties, historical and current financial
8 information, material post-petition events, a summary of assets
9 and liabilities, a description of the plan, and perhaps most
10 importantly, a means for effectuating the plan.¹³

11 This court is convinced that the contents of the plan's
12 provisions, and in particular those found in Section 1123(a)(5),
13 are derived from the Bankruptcy Act that required the plan to tell
14 creditors what they were going to get and how they were going to
15 get it. That is still the purpose of the section.

16 From the foregoing the court rejects the notion that
17 Congress, without a hint in the legislative history, in a section
18 of the Bankruptcy Code entitled "Contents Of Plan," and using
19 words calling for "adequate means for the Plan's implementation,"
20 intended to permit a debtor's plan -- confirmed by a bankruptcy
21 judge (not by a legislative act, as in most preemption
22

23 ¹³ For example, the United States Trustee's Guidelines For
24 Region 17 (covering this district) include a requirement that the
25 disclosure statement include:

26 (j) MEANS OF EFFECTUATING THE PLAN: The statement should
27 include how the goals of the plan are to be accomplished,
28 e.g., infusion of cash by an investor, sale of real or
personal property, continued business operations, or issuance
of stock. If an investor is to provide funds, financial
information about the investor should be included.

1 situations)¹⁴ -- to obliterate a whole area of jurisdiction and
2 authority traditionally left to state law. If the PSNH court
3 thought this was a simple matter of "plain meaning" (PSNH, 108
4 B.R. at 874-879), that interpretation was a far cry from its
5 observation only a few months earlier, that there was an

6 . . . ambiguity left in the statute by Congress in the
7 enactment of the 1978 Code. Bankruptcy Code §§ 1123(a)(5);
1129(a)(3) and 1129(a)(6).

8 Public Service, 99 B.R. at 509.

9 b. Legislative History of Section 1123

10 Proponents contend that by inserting the clause
11 "notwithstanding any otherwise applicable law" into Section 1123,
12 Congress expressly exempted all state laws inconsistent with what
13 a plan proposes and a court chooses to confirm. Nothing in the
14 legislative history of Section 1123, however, indicates that its
15 drafters intended for state law to be so expansively preempted.
16 To the contrary, the absence of any meaningful discussion
17 regarding the purpose and consequences of the clause demonstrates
18 that Congress did not draft Section 1123 as a blanket preemption
19 of state law.

20 Section 1123(a), as initially enacted, did not state that its
21 provisions were applicable "notwithstanding any otherwise
22 applicable nonbankruptcy law." The legislative history of
23 Section 1123 does not indicate that its provisions preempt state
24 law; rather, the legislative history suggests that Section 1123 is
25
26

27 ¹⁴ See, i.e., Schneiderwind v. ANR Pipeline Co., 485 U.S.
28 293, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988).

1 derived from Section 216¹⁵ of the Bankruptcy Act (also known as the
2 Bankruptcy Statute of 1898). The House Report pertaining to the
3 Bankruptcy Reform Act of 1978 states that, with respect to
4 sections 1123(a)(5):

5 Subsection (a) specifies the matter that a plan of
6 reorganization must contain. . . . Paragraph (4) [now
7 paragraph (5)] of subsection (a) is derived from section
8 216 of current law, with some modifications. It
9 requires the plan to provide adequate means for the
10 plan's execution. These means may include retention by
11 the debtor of all or any part of the property of the
12 estate, transfer of all or any part of the property of
13 the estate to one or more entities, whether organized
14 pre- or postconfirmation, merger or consolidation of the
15 debtor with one or more persons, sale and distribution
16 of all or any part of the property of the estate,
17 satisfaction or modification of any lien, cancellation
18 or modification of any indenture or similar instrument,
19 curing or waiving of any default, extension of maturity
20 dates or change in interest rates of securities,
21 amendment of the debtor's charter, and issuance of

14 ¹⁵ Section 216 of the Bankruptcy Act did not contain any
15 provision preempting state law. Subsection 216(10) (the
16 subsection from which section 1123(a)(5) is derived) provided:

17 A plan of reorganization under this chapter --

18 * * *

19 . . . shall provide adequate means for the execution of the
20 plan, which may include: the retention by the debtor of all
21 or any part of its property; the sale or transfer of all of
22 or any part of its property to one or more other corporations
23 theretofore organized or thereafter to be organized; the
24 merger or consolidation of the debtor with one or more other
25 corporations; the sale of all or any part of its property,
26 either subject to or free from any lien, at not less than a
27 fair upset price and the distribution of all or any assets,
28 or the proceeds derived from the sale thereof, among those
having an interest therein; the satisfaction or modification
of liens; the cancellation or modification of indentures or
of other similar instruments; the curing or waiver of
defaults; the extension of maturity dates and changes in
interest rates and other terms of outstanding securities; the
amendment of the charter of the debtor; the issuance of
securities of the debtor or such other corporations for cash,
for property, in exchange for existing securities, in
satisfaction of claims or stock or for other appropriate
purposes. . . .

1 securities.

2 H.R. Rep. 95-595, 1978 U.S.C.C.A.N. 5963, 6363, 95th Cong., 1st
3 Sess. 1977 (Sept. 8, 1977). The foregoing legislative history of
4 section 1123, as initially enacted, does not indicate that it
5 preempts state law.

6 In 1980, Congress amended Section 1123(a) to add the phrase
7 "[n]otwithstanding any otherwise applicable nonbankruptcy law."
8 Despite this change, the legislative history accompanying the
9 amendment states that "This amendment makes it clear that the
10 rules governing what is contained in the reorganization plan are
11 those specified in this section; deletes a redundant word; and
12 makes several stylistic changes." H.R. Rep. 96-1195, at 22, 122-
13 23, 96th Cong., 2d Sess. 1980 (July 25, 1980). If the words
14 "notwithstanding otherwise applicable nonbankruptcy law" meant
15 that a debtor could propose a plan contrary to any law, Congress
16 would not have treated the amendment as merely "styl~~stic~~." More
17 importantly, the observation that the amendment "makes it clear
18 that the rules governing what is contained in the reorganization
19 plan are those specified in this section" indicates that this
20 section (and no other law) governs what is to be placed into a
21 plan of reorganization.¹⁶ It does not indicate that whatever is
22 placed into a plan of reorganization preempts state law. The
23 legislative history of Section 1123(a) simply does not support the
24 revolutionary significance that PG&E attributes to the amendment.

25 c. Case Law

26
27 ¹⁶ This phrase further supports this court's conclusion that
28 Section 1123(a)(5) is a directive as opposed to an empowering
statute.

1 Proponents cite several cases in support of their reading of
2 Section 1123(a), and they point out that parties opposing the Plan
3 have cited no case to the contrary. Proponents' cases, however,
4 are all distinguishable.

5 Proponents' two leading cases are PSNH and Universal
6 Cooperatives, Inc. v. FCX, Inc. (In re FCX, Inc.), 853 F.2d 1149
7 (4th Cir. 1988), cert. denied, 489 U.S. 1011 (1989) ("FCX").

8 In PSNH the proposed plan of reorganization was very similar to
9 Proponents' Plan. It involved:

10 the proposed use of § 1123(a)(5) of the [Bankruptcy] Code to
11 authorize transfer of assets and restructuring of entities
12 [of the public utility therein, PSNH,] in such a fashion as
13 would result in transfer of regulatory jurisdiction over the
debtor and its rates from the New Hampshire Public Utilities
Commission ["NHPUC"] to the Federal Energy Regulatory
Commission ["FERC"].

14 PSNH, 108 B.R. at 857 (quoting court's earlier order).

15 The State of New Hampshire apparently opposed PSNH's plan
16 because moving into federal jurisdiction

17 would enable PSNH to recover much of its investment in the
18 Seabrook nuclear power plant even before Seabrook operates[,]
19 in contrast to what state law would allow before operation
under the "Anti-CWIP" law in New Hampshire.

20 PSNH, 108 B.R. at 860 (footnotes omitted).

21 In this context the PSNH court conducted a scholarly,
22 thorough and helpful analysis of the legislative history and
23 statutory framework. Focusing on the history of Section
24 1129(a)(6), the PSNH court noted that "prior to 1978 public
25 utilities had to have public utility commission approval for plans
26 of reorganization." Id. at 863. Then, with the adoption of the
27 Bankruptcy Reform Act of 1978, regulatory approval was explicitly
28 required for reorganizations involving railroads and

1 municipalities, but no such explicit requirement applied to non-
2 railroad reorganizations under chapter 11 except that Section
3 1129(a)(6) requires regulators' approval for any change in rates.
4 See 11 U.S.C. § 943(b)(6) (municipalities), § 1129(a)(6) (rates),
5 § 1172(b) (railroads), and PSNH, 108 B.R. at 864-66. Considering
6 this history and its reading of Section 1123(a)(5) as an
7 "empowering" statute, the PSNH court held that NHPUC did not have
8 an absolute "veto" power over PSNH's plan of reorganization. Id.
9 at 883 and 891.¹⁷

10 The PSNH decision relies on express preemption, which has

11
12 ¹⁷ The PSNH court stated:

13 In my opinion, the reorganization process of chapter 11
14 cannot work B in the way that Congress envisioned under the
15 drastic overhaul of the reorganization chapters in the 1978
16 Act [i.e., when it removed the veto power of public utility
17 commissions from Chapter 11 cases generally] B if one party
18 in interest has an effective veto over the necessary
19 restructuring to implement a plan and the reorganization
20 court no longer has an early and direct role in plan
21 formulation and approval.

22 PSNH, 108 B.R. at 891 (emphasis in original).

23 After the PSNH decision, Congress considered amending Section
24 1129(a)(6). As summarized by the legislative history, the
25 amendment would have provided that electric utilities would need
26 state regulators' approval not only for confirmation of any plan
27 but also to "take any other action pertaining to the debtor that
28 would terminate or restrict the existing jurisdiction of the state
regulatory authority." H.R. Rep. 101-1015, at 43, 1991 W.L. 4376
(Leg. Hist.), 101st Cong., 2d Sess. 1990 (Jan. 3, 1991).

23 Congress did not enact this absolute veto power. If
24 Congress' failure to act has any weight at all, it is entirely
25 consistent with the disposition herein. The Bankruptcy Code
26 neither gives an absolute preemption power to Proponents nor an
27 absolute veto power to the State and the Commission. Rather, each
28 alleged instance of implied preemption must be tested to determine
whether the particular state law at issue "stands as an obstacle
to the accomplishment and execution of the full purposes and
objectives of Congress." Baker & Drake, 35 F.3d at 1353 (citation
omitted).

1 been rejected above. Nevertheless, as an alternative basis for
2 its conclusion PSNH relies on implied preemption, and its analysis
3 appears generally consistent with Baker & Drake's observation that
4 federal bankruptcy preemption is more likely "where a state
5 statute is concerned with economic regulation rather than with
6 protecting the public health and safety." Baker & Drake, 35 F.3d
7 at 1353.¹⁸

8 According to PSNH: (1) the State of New Hampshire's concerns
9 were purely economic not health or safety (PSNH, 108 B.R. at 890),
10 (2) "the inescapable result of the State's position is that no
11 plan can be confirmed in this case unless it is approved by the
12 [NHPUC]" (id. at 861, emphasis in original),¹⁹ (3) the consequent
13 jurisdictional "stalemate" would be inimical to the "prompt and
14 orderly processes necessary to an effective reorganization 'before
15 the patient dies'" (id. at 856 n. 1, 890 and 891), and (4) the
16 Bankruptcy Code "would seem to indicate" a preemptive intent as to
17

18 ¹⁸ It is noteworthy that, having decided that express
19 preemption pertains, the court in PSNH immediately qualified the
so-called unconditional preemption:

20 In terms of the literal language of § 1123(a)(5) it seems
21 obvious that the section on its face contemplates that
22 restructuring transactions necessary to a plan of
reorganization may be provided....

23 PSNH, 108 B.R. at 881 (emphasis added).

24 Since there is nothing in the statute about "necessary" it seems
25 the court was really considering implied -- or better yet
"applied" -- preemption.

26 ¹⁹ "[If] the PUC has the last say about everything, we may
27 as well close up our tents and send it over to the PUC, let them
reorganize this company and when they have approved it, send it
28 over and I'll sign it." PSNH, 108 B.R. at 887 (quoting hearing
transcript).

1 "restructuring provisions of a chapter 11 plan of reorganization"
2 (an express intent, according to PSNH) (id. at 882).²⁰ The PSNH
3 court specifically reserved some issues for the hearing on plan
4 confirmation:

5 1. Those aspects of the debtor's plan of reorganization
6 . . . or any amended plan containing similar provisions . . .
7 that are necessary and required to effectuate the
8 "restructuring" of the debtor into a reorganized entity or
9 entities capable of achieving a feasible reorganization,
10 subject to the confirmation requirements of § 1129 of the
11 Bankruptcy Code, and are actions specifically covered by
12 § 1123(a)(5) of the Bankruptcy Code, may be approved as part
13 of confirmation . . . notwithstanding any otherwise
14 applicable law that would require approval of such actions by
15 the New Hampshire Public Utilities Commission.

11 * * *

12 3. Whether such restructuring is necessary and required
13 for a feasible reorganization will be a § 1129 issue

14 4. . . . the effect on the public interest of such a
15 plan arguably will be one of the factors to be considered at
16 confirmation

17 PSNH, 108 B.R. at 892 - 893 (Appendix ¶¶ 1, 3 and 4) (emphasis
18 added).

19 The PSNH decision emphasized that "the issue is a narrower
20 one than may first appear." Id. at 861. The essential holding of
21 PSNH is only that the Bankruptcy Code preempts the public utility
22 commission's absolute "veto" power over a bankruptcy
23 restructuring. The PSNH decision noted that, ironically, the
24 bankruptcy restructuring might have been "essential to restoring
25 the enterprise to financial health so it can then comply with
26 ongoing regulatory requirements." Id. at 890 n. 38 and 891
(emphasis in original). Moreover, the PSNH court emphasized that

27 ²⁰ According to the PSNH court, the State of New Hampshire
28 "does not really argue to the contrary." PSNH, 108 B.R. at 882.
 Here the State and the Commission do!

1 there was no preemption of such ongoing regulatory requirements:

2 Nothing in § 1123 or § 1129 of the Bankruptcy Code has
3 the effect of exempting the reorganized entity or entities
4 under a confirmed plan of reorganization from any ongoing
5 applicable regulatory requirements by NHPUC as to the future
6 operations of said entity or entities (save for any
7 questioning of the restructuring itself) once the
8 restructuring necessary and required for a feasible
9 reorganization has been effectuated as part of a confirmed
10 plan of reorganization.

11 PSNH, 108 B.R. 893 (Appendix ¶ 5).

12 The PSNH court acknowledged that NHPUC might lose its rate-
13 setting jurisdiction over some reorganized entities because they
14 would come under FERC jurisdiction,

15 [but] the argument that "Congress didn't intend to take rate-
16 setting authority from the states" by § 1123 of the
17 Bankruptcy Code is simply misplaced. Congress already
18 considered the public interest when it withdrew considerable
19 regulatory authority from the states in its FERC legislation,
20 as affirmed in the preemption decision by the Supreme Court
21 in Mississippi Power & Light v. State of Mississippi, 487
22 U.S. 354 [1988]

23 Like it or not, Congress has decreed that local rates
24 can be determined by FERC Congress apparently
25 believes that regional requirements and regulation sometimes
26 have to override local state requirements to have a rational
27 power supply system in the country.

28 PSNH, 108 B.R. at 872 (footnotes omitted).

 The court does not disagree with most of the PSNH analysis.
Although the court cannot agree that Section 1123(a)(5) is an
"empowering" statute that explicitly preempts or overrides all
contrary nonbankruptcy law, the court agrees that restructuring
generally is a proper purpose of chapter 11 and that the
Bankruptcy Code would seem to indicate at least some preemptive
intent in favor of restructuring, which would preempt a state
regulator's absolute veto power over bankruptcy restructuring.
See PSNH, 108 B.R. at 882. To the extent that PSNH implies a

1 broader preemption, it may be factually distinguishable because
2 (a) any economic need for PG&E to disaggregate is not immediately
3 obvious, unlike in PSNH, and (b) the objecting parties in this
4 case advance some non-economic concerns, unlike the State of New
5 Hampshire in PSNH. See Baker & Drake, 35 F.3d at 1353 (bankruptcy
6 preemption more likely for economic regulation rather than public
7 health and safety).

8 No evidence exists at this stage in the reorganization
9 process whether PG&E has an economic need to disaggregate. In
10 PSNH, unlike this case, the court questioned the debtor's solvency
11 and emphasized the need to reorganize "before the patient dies."
12 PSNH, 108 B.R. at 856 n. 1, 890 n. 38, and 891. The Proponents
13 and the Committee have suggested that there is some economic need
14 to disaggregate because the financial markets effectively may
15 require it.²¹ The court agrees with PSNH, however, that "[w]hether
16 such restructuring is necessary and required for a feasible
17 reorganization will be a § 1129 issue." PSNH, 108 B.R. at 892,
18 Appendix ¶ 3. Preemption and feasibility can be addressed in that
19 context, but only after further elaboration in a revised
20 Disclosure Statement.

21 As to non-economic considerations, the State, the Commission
22 and other objectors have argued that Proponents are abusing the
23 bankruptcy process to escape the Commission's jurisdiction. To
24

25 ²¹ Apparently the Proponents and the Committee believe that
26 PG&E's creditors will need to be paid over time, that this
27 requires debt securities, and that the debt securities will not be
28 acceptable to the financial markets, or perhaps will not trade at
par, unless PG&E's business is removed to some extent from the
Commission's jurisdiction by disaggregation. The court makes no
determination on these issues.

1 the extent that this is a "facial invalidity" objection the court
2 rejects it. Using bankruptcy reorganization to move from state
3 regulation to federal regulation is not necessarily improper.
4 Proponents have argued without dispute that there is nothing
5 illegal about a disaggregated utility structure, and that if PG&E
6 had founded its business as several separate entities, or if
7 another entity did so now, those entities would be outside the
8 Commission's jurisdiction to the same extent as proposed under the
9 Plan. Moreover, among the purposes of the Bankruptcy Code is
10 giving debtors a fresh start. Perez, 402 U.S. at 649. Applied to
11 corporate debtors the fresh start might entail restructuring their
12 business. The court believes, however, that for Proponents to
13 preempt state law barring disaggregation, they will need to rely
14 on more than just the general policy of Chapter 11 favoring
15 reorganizations. They must show that enforcing such state law
16 would be an "obstacle to the accomplishment and execution of the
17 full purposes of the bankruptcy laws." Baker & Drake, 35 F.3d at
18 1353. The court does not presently decide whether Proponents must
19 show that disaggregation is necessary to pay past debts, or to
20 avoid incurring future significant debts, or any other standard.
21 These are matters to be shown in general in a revised Disclosure
22 Statement, and to be proven at trial.

23 Another non-economic consideration raised by several
24 objectors is that there are potential environmental impacts from
25 disaggregation.²² How disaggregation itself would have any adverse
26

27 ²² It is not clear that environmental impacts are matters of
28 public "safety" or even public "health," although at some point
environmental degradation no doubt would have serious health

1 environmental impact is not immediately obvious. As Proponents
2 point out, the disaggregated entities will still be subject to all
3 the usual zoning and environmental regulations. The objectors
4 argue, however, that disaggregation will remove some lands from
5 the Commission's jurisdiction, that FERC has previously defined
6 its mandate to exclude environmental concerns, that even if FERC
7 were to consider environmental issues most of PG&E's current land
8 holdings will not be subject to either the Commission's or FERC's
9 jurisdiction, and that under California law this would be
10 sufficient to block PG&E's proposed disaggregation or perhaps
11 condition it on some level of environmental commitments.²³ The
12 court finds merit in both arguments. The court agrees with PSNH
13 that Proponents would have a more difficult preemption argument if
14

15 consequences for some or all of us. As noted above, however,
16 preemption is particularly unlikely for environmental matters.
17 Midlantic, 474 U.S. 494; Fireman's Fund, 271 F.3d at 932 - 933
18 ("highly deferential" to local environmental regulation). See
19 also Baker & Drake, 35 F.3d at 1354 (noting non-economic purposes
20 of state regulation other than health and safety).

21 ²³ The Plan and Disclosure Statement include assurances that
22 PG&E, the LLCs and Land Holdings (another entity to be formed by
23 Proponents after confirmation) will remain subject to any
24 applicable environmental laws and regulations and that Proponents
25 have no intention of changing their environmental policies and
26 standards. See Plan § 7.8 (Regulatory Issues") at 74:5-9 and
27 Disclosure Statement §§ VI.D.4 ("Land Ownership") and L.
28 ("Regulatory Impact of the Plan") at 99:1-3 and 126:16-127.19.
The court notes that these commitments do not necessarily bar all
development of all land forever, nor is it clear that they must do
so to comply with state law. Unlike most other land-holders PG&E
has been subject to additional restrictions because of the
Commission's jurisdiction over it. The Commission has argued that
this is appropriate because, as part of the "regulatory compact,"
California ratepayers subsidized PG&E's acquisition and non-
development of its land. The merits of this argument are not
before the court, and the issue is described here only to clarify
that the alleged environmental consequences of disaggregation do
not render the Plan facially unconfirmable.

1 they intended to block "ongoing regulatory requirements." PSNH
2 108 B.R. at 890 n. 38, 891 and 893 (Appendix ¶ 5). On the other
3 hand, the court rejects any argument that preemption is less
4 serious because conceptually it occurs only at the instant of
5 disaggregation. Proponents attempt to distinguish Baker & Drake
6 by arguing that there the Nevada law on point did not impede the
7 event of reorganization, but only the post-confirmation operations
8 of the reorganized debtor. Here they emphasize that once the Plan
9 is confirmed and becomes effective, Reorganized Debtor, the LLC's
10 and all other affiliated entities will comply fully with
11 applicable law just as PG&E is doing now as required by 28 U.S.C.
12 § 959(b). Their theory is that only a single event -- what their
13 counsel calls the "big-bang" of confirmation -- will be exempt
14 from state law that would otherwise prohibit the Restructuring
15 Transactions. The court rejects this theory. State law applies,
16 or it is preempted. It is not a temporal thing, suspended only
17 for a moment. Therefore, the environmental objections do not
18 render the Plan facially unconfirmable but they may be relevant to
19 preemption issues at the confirmation hearing.

20 In sum, the court cannot agree with PSNH to the extent it
21 suggests a sweeping mandate to preempt whatever plan proponents
22 (and perhaps a single bankruptcy judge) decide should be
23 preempted. The court has found no other cases that suggest such
24 an open-ended preemption. Rather, in all those cases the scope of
25 preemption is limited either by the description of the law being
26 displaced or by the nature of the preemptive statute.

27 Proponents' other leading case is FCX. FCX held that state
28 law restrictions on the surrender of collateral known as

1 "patronage certificates" were preempted by the Bankruptcy Code.
2 FCX, 853 F.2d 1149. In distinguishing a decision that reached the
3 opposite conclusion (Calvert v. Bongards Creameries (In re
4 Schauer), 62 B.R. 526 (Bankr. D. Minn. 1986), aff'd, 835 F.2d 1222
5 (8th Cir. 1987)), FCX stated:

6 In re Schauer, however, is distinguishable on two grounds.
7 First, the trustee there did not rely on § 1123(a)(5)(D), but
8 [instead on] § 363(b)(1) and § 704 Second, and more
9 importantly, § 363(b)(1) and § 704 are substantively
10 different from § 1123(a)(5)(D). . . . § 363(b)(1) and § 704
11 are no more than "enabling statutes that give the trustee the
12 authority to sell or dispose of property if the debtor[]
13 would have had the same right under state law." . . .

14 In contrast, § 1123(a)(5) is an empowering statute. As
15 stated by Collier: "The alternatives set forth in §
16 1123(a)(5) are self executing. That is, the plan may propose
17 such actions notwithstanding nonbankruptcy law or
18 agreements." 5 Collier on Bankruptcy ¶ 1123.01, at 1123-10.
19 Section 1123(a)(5)(D) then does not simply provide a means to
20 exercise the debtor's pre-bankruptcy rights; it enlarges the
21 scope of those rights, thus enhancing the ability of a
22 trustee or debtor in possession to deal with property of the
23 estate.

24 FCX, 853 F.2d at 1154-55.²⁴

25 The court disagrees with FCX to the extent, if any, that it
26 supports an unfettered right to dispose of assets without regard
27 to state law as part of a plan pursuant to Section 1123(a)(5)(D).
28 The court in FCX was not faced with anything similar to relief
sought by Proponents in this case, and did not discuss the
ramifications of such a reading. In fact, the debtor did not even
seek to sell or transfer the patronage certificates to a third

24 The Collier treatise provides no analysis or discussion
of the issues and simply cites a few cases that also have no
meaningful discussion for present purposes. See also PSNH, 108
B.R. at 883 n. 25 (no meaningful discussion in cases other than
FCX).

1 party. It proposed - and was allowed - to force a creditor to
2 accept collateral in violation of that creditor's own articles of
3 incorporation. FCX, 853 F.2d at 1149.

4 In addition, the court notes that debtors are already
5 empowered to sell property, notwithstanding some nonbankruptcy
6 laws, pursuant to Sections 363(f) and 1129(b)(2)(A)(ii). Those
7 sections have carefully worked-out limitations on sales (such as
8 requiring that any liens attach to the proceeds of sale and that
9 sales be subject to credit bids). See 11 U.S.C. §§ 363(f) and
10 1129(b)(2)(A)(ii). Therefore, it is not necessary to rely on
11 Section 1123(a)(5)(D) as an empowering statute for any sales of
12 the type that Congress explicitly authorized. Moreover, even if
13 Section 1123(a)(5)(D) were an empowering statute, it would be
14 inappropriate to interpret it in such a way as to ignore the
15 carefully limited powers in Sections 363(f) and
16 1129(b)(2)(A)(ii).²⁵

17
18 ²⁵ The court notes that other sections of the Bankruptcy
19 Code, or nonbankruptcy law, appear to be more appropriately
20 tailored sources of empowerment for the other paragraphs of
21 Section 1123(a)(5). For example, Paragraph (G) of Section
22 1123(a)(5) suggests that one means of implementing a plan is to
23 provide for "curing or waiving a default." 11 U.S.C.
24 § 1123(a)(5)(G). The curing and waiving powers are covered either
25 by Section 1129(a)(8)(A) (class accepts a plan, thereby waiving
defaults) or Section 1129(a)(8)(B) (class is unimpaired because
defaults are cured). Moreover, those powers are more precisely
tailored to this purpose: Sections 1124(2)(A) and 365(b)(2)(D)
specify that the "cure" need not include, for example, any
"penalty rate." See 11 U.S.C. §§ 365(b)(2)(D), 1124(2)(A), and
1129(a)(8)(B).

Another example is that Paragraph (H) of Section 1123(a)(5)
provides for "extension of a maturity date or a change in an
interest rate or other term of outstanding securities." 11 U.S.C.
§ 1123(a)(5)(H). These powers are covered by Sections 506(b),
1129(a)(7), 1129(a)(8)(A) and 1129(b)(2)(B), which collectively
tailor such powers to assure that the interest rate provides

1 The PSNH decision states that "FCX apparently is the only
2 case that has any meaningful discussion of the provisions of
3 1123(a)(5) for present purposes." PSNH, 108 B.R. at 883 n. 25.
4 Proponents have not cited any other case.²⁶ Therefore, the
5 applicable cases reinforce the court's view, based on the
6 statutory language, that Section 1123(a)(5) does not empower
7 Proponents to engage in wholesale preemption of nonbankruptcy law
8 through their Plan. For all of these reasons, Proponents'
9 reliance on PSNH and FCX is insufficient to justify the full scope
10 of relief they seek. At this stage, however, the court cannot say
11 as a matter of law that Proponents will be unable to establish
12 implied preemption of otherwise applicable state laws at the
13 confirmation hearings.

14 d. Other Bankruptcy Preemption Statutes

15 Here, Proponents urge this court to adopt an interpretation
16 of Section 1123(a)(5) that would allow plans and orders confirming

17
18
19 adequate present value, or else that the affected class consents
20 or no junior class receives or retains anything under the plan on
account of their claims or interests.

21 Similarly, nonbankruptcy law such as state and federal
22 antitrust laws may place carefully tailored limits on mergers
under Paragraph (C) of Section 1123(a)(5).

23 ²⁶ Cf. Great Western Bank & Trust v. Entz-White Lumber and
24 Supply, Inc. (In re Entz-White Lumber and Supply, Inc.), 850 F.2d
25 1338, 1340 n. 3 (9th Cir. 1988) (holding that debtor is entitled
26 to cure default using pre-maturity interest rate pursuant to
27 Section 1124(2), but commenting in dicta that Section 1123 "would
28 appear to allow debtors to cure this type of default even if a
party with a claim cured in this way would be impaired under
§ 1124") and Citibank v. Udhuss (In re Udhuss), 218 B.R. 513 (9th
Cir. BAP 1998) (concept of "cure" used throughout bankruptcy code
nullifies default, so cure referred to in Section 1123(a)(5)(G)
does not require payment of default interest even where creditor
is impaired).

1 plans -- the terms of which are not codified or even known until a
2 plan and disclosure statement are filed -- to preempt all state
3 law. Generally, unlike Proponents' interpretation of Section
4 1123(a)(5), other portions of the Bankruptcy Code which preempt
5 state law are self-limiting in scope. In other words, the
6 provisions explicitly describe and set the parameters of state law
7 being exempted, or specifically set forth the nature and scope of
8 the statutory bankruptcy law which preempts the state law. They
9 do not contemplate having parties and the court "make" the
10 preemptive law.

11 For example, Section 1125(d) provides that a bankruptcy
12 court's determination regarding the adequacy of a disclosure
13 statement is not governed by otherwise applicable non-bankruptcy
14 law. The preemption is not open-ended. Similarly, Section
15 1124(2) provides that, notwithstanding any law that entitles a
16 claim or interest to receive accelerated payment upon default, a
17 plan may cure the default and reinstate the maturity of the claim
18 or interest. See Entz-White, 850 F.2d 1338. The statute
19 specifically defines the nature of those state laws being
20 preempted.

21 Likewise, Section 1142(a) defines the type of state law being
22 pre-empted: those laws relating to financial condition. Section
23 1142(a) provides that "notwithstanding any otherwise applicable
24 nonbankruptcy law, rule, or regulation relating to financial
25 condition," the debtor or reorganized entity shall carry out the
26 plan and shall comply with orders of the court. Section 1145,
27 which pertains to specified offers or sales of securities under a
28 plan, exempts (with certain exceptions) debtors and plan

1 proponents from complying with state and local laws requiring
2 registration for offer or sale of a security or registration or
3 licensing of an issuer of, underwriter of, or broker or dealer in
4 a security.

5 Section 541(c)(1) provides that an "interest of the debtor in
6 property becomes property of the estate . . . notwithstanding any
7 provision in . . . applicable nonbankruptcy law" that restricts
8 the transfer of such interest or that is conditioned on the
9 insolvency or financial condition of the debtor. Section 363(1)
10 provides that a trustee may sell, use or lease property
11 "notwithstanding any provision . . . in applicable law that is
12 conditioned on the insolvency or financial condition of the debtor
13 . . ."). Section 365(e)(1) and (f)(3) allow a trustee to assume
14 or assign leases and executory contracts notwithstanding otherwise
15 applicable law that purports to terminate the contract upon such
16 an assumption or which purports to terminate the contract due to
17 the financial condition of the debtor. Section 545 allows a
18 trustee to avoid the fixing of certain statutory liens. Section
19 546(c) places limitations on a seller's statutory right to reclaim
20 goods.

21 In each of these cases, the scope of the preemption is
22 limited either by the description of the law being displaced or by
23 the nature of the preemptive bankruptcy statute. None of these
24 provisions allows a plan or order or law of undefined scope to
25 preempt any and all laws inconsistent with its provisions.

26 e. Conclusion as to Section 1123(a)(5)

27 For the foregoing reasons, the court rejects Proponents'
28 interpretation of Section 1123(a)(5) as allowing it to

1 disaggregate with unfettered preemption of any contrary
2 nonbankruptcy law. The scope of preemption, if any, must be
3 considered in light of the nonbankruptcy laws at issue.

4 **3. Necessary Modifications To Disclosure Statement**

5 At the beginning of this Memorandum Decision the court
6 reminded Proponents that the Rescheduling Order directed them to
7 describe specifically laws they sought to preempt and the
8 governmental units affected by such preemption. Now that the
9 matter has been fully briefed, argued and analyzed, and
10 Proponents' express preemption theory rejected, the court believes
11 it appropriate to expand upon the Rescheduling Order and give
12 Proponents some direction as to minimum disclosures necessary to
13 set the stage for their implied preemption confirmation contest.

14 It would be burdensome, of course, to require Proponents to
15 fill a revised Disclosure Statement with a detailed explanation of
16 each and every law, regulation, decision, ruling, ordinance or
17 other authority Proponents believe stand in the way of
18 confirmation, and further to require Proponents to set forth their
19 entire evidentiary support for their position. That being said,
20 the court will require Proponents to state in summary fashion the
21 reasons why they believe it necessary for each of the Public
22 Utilities Code sections referenced in section III, the gain on
23 sale rules, and Ordering Paragraph 5 of Commission Decision D.01-
24 12-017, to be preempted. Proponents do not need to include
25 specific details at this time. It is sufficient if they prepare
26 the revised disclosures as they would prepare a trial brief,
27 showing what ultimate facts will be proven to lead the court to
28 find that the application of those laws to the facts of PG&E's

1 proposed reorganization are economic in nature rather than
2 directed at protecting public safety or other noneconomic
3 concerns, and that those particular laws stand as an obstacle to
4 the accomplishment and execution of the purposes and objectives of
5 Congress and the Bankruptcy Code.

6 **B. Sovereign Immunity Implications**

7 1. As noted in Section III, several provisions of the
8 Plan seek an affirmative ruling of this court under Section 1123
9 that approval of various state and local governmental units is not
10 required to carry out many of the contemplated transactions. The
11 Plan also seeks an injunction prohibiting members of the
12 Commission and officials of the State from taking certain
13 actions.²⁷

14 In addition, the Plan seeks to exempt PG&E from its statutory
15 obligation to fund the net open position to provide sufficient
16 electric power to serve the public. The Commission argues that
17 this constitutes an attempt to recover money from the State. That
18 duty includes purchasing and paying for power from wholesale
19 suppliers when the demand for power by ratepayers exceeds the
20 utility's own generation capacity. Whether or not the State is

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22 ²⁷ Apart from the sovereign immunity issues discussed in
23 this Memorandum Decision, at a prior hearing the court considered
24 whether injunctive or declaratory relief could be sought as part
25 of the confirmation process or, as the Commission, the State and
26 others contended, required commencement of an adversary proceeding
27 under Part VII of the Federal Rules of Bankruptcy Procedure. The
28 court accepted Proponents' arguments that Rule 7001(7) authorizes
obtaining an injunction or other equitable relief as part of a
Chapter 11 plan, without the need for an adversary proceeding.
The court's decision on that procedural point has not been reduced
to an order to date but it can and will be dealt in any order
approving a disclosure statement or any order confirming a plan of
reorganization.

1 obligated to pay for power purchased by the California Department
2 of Water Resources to cover PG&E's net open position, the Plan --
3 while it may attempt to prevent PG&E from having to pay certain
4 amounts of money -- does not constitute an impermissible attempt
5 to recover money from the State. This is much different from
6 Proponents' attempt to have the Plan prohibit the Reorganized
7 Debtor from assuming the net open position or prohibiting the
8 Reorganized Debtor from accepting, directly or indirectly, an
9 assignment of Department of Water Resources contracts. For the
10 Plan to restrain the Reorganized Debtor from doing such things is
11 the functional equivalent of having the Plan declare that the
12 Reorganized Debtor does not have to comply with certain applicable
13 provisions of nonbankruptcy law. These matters are dealt with in
14 the court's decision concerning implied preemption, *supra*.

15 The Plan seeks equitable and injunctive relief. As such it
16 constitutes ". . . the prosecution, or pursuit, of some claim,
17 demand, or request." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264,
18 407 (1821). More recently than the early 1800s, the Ninth Circuit
19 held that suits requesting nonmonetary relief do not divest the
20 state of its immunity. Mitchell v. Franchise Tax Board (In re
21 Mitchell), 209 F.3d 1111, 1116 (9th Cir. 2000), quoting Seminole
22 Tribe of Florida v. Florida, 517 U.S. 44, 58 (1996) ("The Eleventh
23 Amendment does not exist solely in order to prevent federal court
24 judgments that must be paid out of a State's treasury"). In
25 Mitchell, the bankruptcy court, the Bankruptcy Appellate Panel²⁸

26
27 ²⁸ See Mitchell v. Franchise Tax Board (In re Mitchell), 222
28 B.R. 877 (9th Cir. BAP 1998), aff'd, 209 F.3d 1111 (9th Cir.
2000).

1 and the Ninth Circuit determined an adversary proceeding commenced
2 by a debtor to be a "suit" for Eleventh Amendment purposes. And
3 in NVR Homes, Inc. v. Clerks of the Circuit Courts (In re NVR,
4 LP), 189 F.3d 442 (4th Cir. 1999), cert. denied, 528 U.S. 1117
5 (2000), the court extended the application of this principle to a
6 contested matter commenced against state agencies by motion under
7 Fed. R. Bankr. P. 9014. Rule 7001(7) takes out of the definition
8 of "adversary proceeding" a proceeding to obtain an injunction or
9 other equitable relief when a Chapter 11 plan provides for such
10 relief. But permitting such relief without an adversary
11 proceeding does not change the result for sovereign immunity
12 purposes. Fed. R. Bankr. P. 9014 deals with contested matters
13 "not otherwise governed by [Federal Rules of Bankruptcy Procedure]
14 wherein relief shall be requested by motion." There can be no
15 question but that the attempt to obtain declaratory or injunctive
16 relief through the Plan confirmation process is subject to a
17 properly invoked sovereign immunity defense.

18 2. Most of Proponents' arguments regarding sovereign
19 immunity are premised upon the notion that the requested relief is
20 proper under Ex Parte Young, 209 U.S. 123 (1908). This court has
21 joined countless others in relying on Ex Parte Young in holding
22 that federal courts can take actions against state officials
23 acting in their representative capacity if they are violating
24 federal law. See Pacific Gas and Electric Co. v. California
25 Public Utils. Comm'n (In re Pacific Gas and Elec. Co.), 263 B.R.
26 306, 314 (Bankr. N.D. Cal. 2001). With that principle as a
27 starting point, Proponents would have the court believe that an
28 injunction is proper because officials of the Commission or the

1 State might violate federal law -- an order confirming a plan of
2 reorganization -- sometime in the future.

3 The Ninth Circuit has held in Goldberg v. Ellett (In re
4 Ellett), 254 F.3d 1135 (9th Cir. 2001), petition for cert. filed,
5 70 U.S.L.W. 3374 (U.S. Nov. 20, 2001), that discharge orders are
6 binding on states notwithstanding their avoidance of bankruptcy
7 court jurisdiction, whether or not the result would prevent a
8 state from collecting monies otherwise owed to it. Ellett, 254
9 F.3d at 1141, citing Mitchell, 209 F.3d at 1117. Authorities from
10 other circuits agree that there are no sovereign immunity
11 implications when the bankruptcy court exercises jurisdiction over
12 the res of the bankruptcy estate. Texas v. Walker, 142 F.3d 813
13 (5th Cir. 1998), cert. denied, 525 U.S. 1102 (1999); State of
14 Maryland v. Antonelli Creditors' Liquidating Trust, 123 F.3d 777
15 (4th Cir. 1997) (confirmation order not a suit against state;
16 state not named as defendant or served with process mandating
17 appearance; order confirming plan, including a provision
18 interpreting Bankruptcy Code § 1146(c), derived not from
19 jurisdiction over the estate or other creditors, but rather from
20 the jurisdiction over debtors and their estates).²⁹ See Section

21
22 ²⁹ Lurking beneath the surface of the instant dispute is the
23 intimation by Corporation's counsel that officials of the
24 Commission or the State will simply take the position that they
25 may ignore an order confirming a plan of reorganization, and thus
26 they will be free to enforce state law based upon the inability of
27 this court to grant in rem relief that preempts such state law.
28 For example, he stated (without offering any evidence) that they
will "impute" things when it comes to rate making. The cases
cited in the text contrast an attempt to obtain affirmative relief
from a sovereign with a bankruptcy court exercising traditional in
rem jurisdiction over the debtor and its assets. That in rem
jurisdiction is binding. Stated otherwise, if an order confirming
the Plan, or any similar plan found to preempt specific state laws

1 1141(a) (confirmed plan binds "any creditor", and Section 1142(a)
2 (debtor and ". . . any entity organized . . . for the purpose of
3 carrying out the plan shall carry out the plan . . .").

4 The Ninth Circuit visited the Ex Parte Young exception
5 recently in Duke Energy Trading and Marketing, LLC v. Davis, 267
6 F.3d 1042 (9th Cir. 2001). There again, as only a few weeks
7 earlier in Ellett, the court upheld the ability of the trial court
8 to enjoin a violation of federal law. Similarly, a threatened
9 violation of federal law can be restrained as well. Aqua Caliente
10 Bank of Cahuilla Indians v. Hardin, 223 F.3d 1041 (9th Cir. 2000),
11 cert. denied, 121 S.Ct. 1485 (2001).

12 The problem with their reliance on Aqua Caliente, Duke
13 Energy, Ellett and similar cases at the present time is that
14 Proponents can point to no ongoing or threatened violation of
15 federal law. They treat the opposition of the Commission and the
16 State to approval of the Disclosure Statement (based upon
17 sovereign immunity, preemption and numerous other grounds) as a
18 presumed threat just as PG&E did when it sought to enjoin the
19 Commission early in this case and was turned away, in part because
20 it could not point to any actual or threatened violation of
21 federal law. See Pacific Gas and Elec., 263 B.R. at 323. Absent
22 such a real threat or an ongoing violation, Ex Parte Young is not
23 available to support injunctive relief through confirmation. Thus

24 _____
25 and regulations, is entered, the bankruptcy court must take the
26 position that any attempt to circumvent the effectiveness of such
27 an order will be met with an injunction as authorized under Ex
28 Parte Young, just as occurred in Ellett. This bankruptcy court
will do exactly that. Otherwise the integrity of the federal
court and its order will be undermined. Thus counsel's warning
that the state officials are "bound to take the plan seriously" is
unquestioned.

1 the Plan as drafted cannot overcome the sovereign immunity
2 objection.

3 Finally, State and Commission argue that the Plan is so
4 pervasive a threat to sovereign immunity that Ex Parte Young is
5 not available based upon the exception found in Idaho v. Couer
6 D'Alene Tribe of Idaho, 521 U.S. 261 (1997). In view of the
7 court's rejection of Proponents' wholesale express preemption
8 theory and its refusal to apply an Ex Parte Young exception to the
9 sovereign immunity defense at this time, it is unnecessary to
10 reach this issue.

11 3. Proponents point to several instances of conduct
12 during this Chapter 11 case that amount to a waiver of sovereign
13 immunity by the Commission and the State. As noted in footnote 6,
14 waiver of sovereign immunity was not an issue the court was
15 willing to consider at the January 25, 2002 hearing. If
16 Proponents believe that the provisions of the Plan seeking
17 injunctive or declaratory relief can be justified because of a
18 waiver of sovereign immunity, then the revised disclosure
19 statement should state with specificity the facts suggesting such
20 a waiver. The issue will be tried as part of confirmation.

21 VI. Disposition

22 This Memorandum Decision rejects outright Proponents' across-
23 the-board, take-no-prisoners preemption strategy in the Plan and
24 Disclosure Statement. If Proponents believe the court is in
25 error, they are entitled to attempt to seek review on appeal. To
26 that end, the court will, if requested, enter an order
27 disapproving the Disclosure Statement (or the latest version of
28 it) for the reasons stated herein. Approval of a disclosure

1 statement is not a final order for purposes of appeal. Everett v.
2 Perez (In re Perez), 30 F.3d 1209, 1217 (9th Cir. 1994), citing
3 Texas Extrusion Corp. v. Lockheed Corp. (Matter of Texas Extrusion
4 Corp.), 844 F.2d 1142, 1154 (5th Cir. 1988), cert. denied, 488
5 U.S. 926 (1988). Denial of approval of a disclosure statement is
6 likewise interlocutory. Asbestos Claimants v. Aetna Casualty &
7 Surety Co. (In re The Wallace & Gale Co.), 72 F.3d 21, 25 (4th
8 Cir. 1995) ("the bankruptcy court's order denying approval of the
9 disclosure statement was interlocutory"), citing Adams v. First
10 Fin. Dev. Corp. (In re First Fin. Dev. Corp.), 960 F.2d 23, 26
11 (5th Cir. 1992). Any appeal will be discretionary with the
12 District Court or the Bankruptcy Appellate Panel (28 U.S.C. §
13 158(a)(3) & (b)) and the court will not impede Proponents if they
14 wish to attempt an appeal of an interlocutory order. In the
15 alternative, the court will consider a proper request to certify
16 the order disapproving the Disclosure Statement under Fed. R. Civ.
17 P. 54(b), made applicable by Fed. R. Bankr. P. 7054(a) and Fed. R.
18 Bankr. P. 9014.

19 Regardless of any decision about an appeal from this
20 decision, the court and parties in interest need to know
21 Proponents' intentions. Will they eliminate the provisions of the
22 Plan and Disclosure Statement that implicate sovereign immunity?
23 Will they amend the Plan to eliminate the express preemption
24 provisions and amend the Disclosure Statement to meet their prima
25 facie burden of disclosure and proceed to a confirmation hearing
26 in an attempt to carry their burden to show implied preemption as
27 the court recognizes as possible? Will they submit an alternative
28 plan to replace the Plan and Disclosure Statement?

1 Apart from the foregoing -- and unrelated to the merits of
2 the court's decision here -- the Commission has stated its
3 intention to file its own plan of reorganization.³⁰ PG&E is
4 entitled to respond to Commission's term sheet.

5 Accordingly, the following schedule will apply:

6 A. No later than February 21, 2002, PG&E is to:

7 1. File and serve its response to Commission's term
8 sheet. The response is to be limited to twenty (20) pages.³¹ If
9 Commission does not file the term sheet by the February 13, 2002,
10 deadline, PG&E's counsel may submit a declaration of noncompliance
11 together with an order that will supplement the Exclusivity Order,
12 terminating Commission's right to file a term sheet and extending
13 all plan exclusivity until June 30, 2002.

14 2. File and serve a statement of its (and
15 Corporation's) intentions as to the future of the plan and
16 disclosure statement process in this Chapter 11 case, addressing
17 the questions raised above.

18 3. Submit a form of order denying approval of the
19 _____

20 ³⁰ On February 1, 2002, this court entered its Order Further
21 Extending Exclusivity Period For Plan of Reorganization, and on
22 February 3, 2002, its Amended Order Further Extending Exclusivity
23 Period For Plan of Reorganization ("Exclusivity Order"). By that
24 Exclusivity Order the court extended PG&E's exclusivity under
25 Section 1121(c)(3) to June 30, 2002, except for the Commission.
26 The Commission has until February 13, 2002, to file and serve a
27 term sheet regarding its contemplated plan of reorganization,
28 specifying (i) the proposed classification of all claims in
interest; (ii) the proposed treatment of all claims in interest;
(iii) the proposed means for implementation of any such plan
(including, without limitation, specifics how particular claims
will be satisfied, reinstated or refinanced); and (iv) a time-line
for proposing and seeking approval of the plan it contemplates.

³¹ The Committee may also file its response to the
Commission's term sheet, subject to the same page limitations.

1 Disclosure Statement "for the reasons stated" in this Memorandum
2 Decision if that is its desire.

3 4. File and serve any request for interlocutory
4 certification of the order denying approval of the Disclosure
5 Statement that it wishes to have this court enter.

6 B. The papers described in the foregoing paragraph A are to
7 be served upon the United States Trustee, counsel for the
8 Committee, and counsel for all parties who filed oppositions to
9 PG&E's Motion For Order Further Extending Exclusivity Period For
10 Plan Of Reorganization and/or any objections to the adequacy of
11 the Disclosure Statement based upon preemption and sovereign
12 immunity grounds.

13 C. Any party who objected to the adequacy of the Disclosure
14 Statement on the basis of preemption and sovereign immunity may
15 present any opposition it has to any request PG&E may file in
16 accordance with paragraph A.4 for certification of any order
17 denying approval of the Disclosure Statement at the hearing
18 mentioned below.

19 D. The court will conduct a hearing on February 27, 2002, at
20 1:30 P.M., to consider all matters addressed in the foregoing. No
21 papers other than those requested are to be filed in connection
22 with that hearing.

23 Dated: February 7, 2002

24 S/ _____
25 Dennis Montali
26 United States Bankruptcy Judge
27
28


CERTIFICATE OF SERVICE

I hereby certify that in accordance with the Commission's regulation at 10 CFR 2.1313, I have this day caused the foregoing document be served upon the following parties by mailing by first-class mail a copy thereof properly addressed to each such party:

Richard F. Locke, Esq.
Pacific Gas and Electric Company
77 Beale Street, B30A
San Francisco, CA 94105

David A. Repka, Esq.
Winston & Strawn
1400 L Street, NW
Washington, DC 20005

Dated at San Francisco, California, this 11th day of February, 2002.


Laurence G. Chaset