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9 UNITED STATES BANKRUPTCY COURT

10 NORTHERN DISTRICT OF CALIFORNIA

11 SAN FRANCISCO DIVISION

12 In re

Case No. 01-30923 DM

13 PACIFIC GAS AND ELECTRIC
COMPANY, a California corporation,

Chapter 11 Case

14 Debtor.
15

Date: September 10, 2003
Time: 9:30 a.m.
Place: 235 Pine Street, 22nd Floor
San Francisco, California
Judge: Hon. Dennis Montali

16 Federal I.D. No. 94-0742640
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18 NOTICE OF MOTION AND MOTION FOR AUTHORITY TO PAY
19 FEES OF DESIGNATED UNDERWRITERS' COUNSEL;
MEMORANDUM OF POINTS AND AUTHORITIES
20 IN SUPPORT THEREOF

21 [SUPPORTING DECLARATION OF MICHAEL J. DONNELLY
FILED SEPARATELY]
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MOTION FOR AUTHORITY TO PAY FEES OF DESIGNATED UNDERWRITERS' COUNSEL

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1 PLEASE TAKE NOTICE that on September 10, 2003 at 9:30 a.m., or as soon
2 thereafter as the matter may be heard, in the Courtroom of the Honorable Dennis Montali,
3 located at 235 Pine Street, 22nd Floor, San Francisco, California, Pacific Gas and Electric
4 Company, the debtor and debtor in possession in the above-captioned Chapter 11 case
5 ("PG&E"), will and hereby does move the Court for authority to pay the fees of designated
6 underwriters' counsel (the "Motion").

7 This Motion is based on this Notice of Motion and Motion, the accompanying
8 Memorandum of Points and Authorities, the Declaration of Michael J. Donnelly filed
9 concurrently herewith, the record of this case and any evidence presented at or prior to the
10 hearing on this Motion.

11 PLEASE TAKE FURTHER NOTICE that pursuant to Rule 9014-1(c)(2) of the
12 Bankruptcy Local Rules for the Northern District of California, any written opposition to the
13 Motion and the relief requested herein must be filed with the Bankruptcy Court and served
14 upon appropriate parties (including counsel for PG&E, the Office of the United States
15 Trustee and the Official Committee of Unsecured Creditors) at least five (5) days prior to the
16 scheduled hearing date. If there is no timely objection to the requested relief, the Court may
17 enter an order granting such relief without further hearing.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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

8 **I.**

9 **FACTUAL BACKGROUND¹**

10 PG&E filed a voluntary petition for relief under Chapter 11 of the Bankruptcy
11 Code on April 6, 2001. A trustee has not been appointed, and PG&E continues to function
12 as a debtor-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

13 Currently before the court is PG&E's proposed Plan of Reorganization Under
14 Chapter 11 of the Bankruptcy Code For Pacific Gas and Electric Company Dated July 31,
15 2003 (the "Plan") filed by PG&E, PG&E Corporation, and the Official Committee of
16 Unsecured Creditors (the "Committee"). The Disclosure Statement for the Plan (the
17 "Disclosure Statement") was approved by the Court on July 31, 2003. The confirmation
18 hearing has been scheduled to commence on November 3, 2003.

19 A significant component of the Plan involves the issuance of debt securities by
20 the Reorganized Debtor as a means of financing the implementation of the Plan. The Plan
21 provides for the Reorganized Debtor to issue and sell new debt securities in the original
22 principal amount of approximately \$8.7 billion, subject to adjustments (the "New Money
23 Notes"), the general terms of which are set forth on the Summary of Terms of Debt
24 Securities, Exhibit A to the Plan. PG&E will utilize the services of underwriters in
25 connection with the financing. The underwriters' services will include assisting in
26

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

1 structuring and marketing the New Money Notes to be sold to investors. As is customary in
2 offerings of securities and in order to satisfy certain statutory requirements under the federal
3 securities laws, the underwriters, together with their counsel, will conduct a due diligence
4 investigation of the issuer of the securities. Under the proposed settlement agreement
5 between PG&E, Parent and the California Public Utilities Commission, PG&E would agree
6 to name UBS Warburg LLC and Lehman Brothers as exclusive bookrunners and lead
7 managers ("Underwriters").

8
9 A. Services to be Provided by Skadden as Underwriters' Counsel.

10 PG&E has designated Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden")
11 to act as Underwriters' counsel ("Underwriters' Counsel"). In this capacity, Skadden's
12 services may include: (i) reviewing, drafting and/or negotiating the legal documentation,
13 including the registration statement and related prospectus to be filed with the Securities and
14 Exchange Commission ("SEC") by PG&E for the offerings of New Money Notes to the
15 public; and (ii) conducting the due diligence investigation of PG&E as the issuer of the debt
16 securities being sold to the public. Specifically, Skadden will be responsible for reviewing
17 and assisting in creating the registration statement and prospectus for the offering of New
18 Money Notes for, among other things, compliance with federal and state laws, rules and
19 regulations relating to registered securities offerings as well as the descriptions of the debt
20 securities and the underwriting arrangements. In connection with the preparation of the
21 registration statement, Skadden will assist with the due diligence investigation of PG&E,
22 which will consist of a review of PG&E's material contracts, financing arrangements,
23 materials relating to pending or threatened litigation, environmental reports and assessments
24 and other materials, and will meet with members of PG&E's management and external
25 auditors to discuss business, legal and financial affairs. Skadden will also be responsible for
26 drafting, reviewing and/or negotiating the underwriting agreement, indenture and other legal
27 documents relating to issuance and sale of the New Money Notes. In connection with the
28 offering, Skadden will also provide the Underwriters with customary legal opinions with

1 respect to matters relating to the offerings as well as a "negative assurance" letter providing
2 the Underwriters with assurance that Skadden has no reason to believe that the registration
3 statement or the prospectus contain any untrue statement or omission of a material fact.
4 Skadden will also be responsible for reviewing the "comfort letter" provided by PG&E's
5 external auditors, covering the audited and unaudited financial information to be included in
6 the registration statement.

7 Skadden will not represent PG&E in an attorney/client relationship with respect
8 to its services as Underwriters' Counsel, although Skadden may continue to act as special
9 regulatory counsel to PG&E.²

10
11 B. Necessity for Services of Underwriters' Counsel.

12 Conditions precedent to the effectiveness of the Plan include the consummation
13 of the sale of the New Money Notes by the Reorganized Debtor as contemplated by the
14 Plan.³ Preparing the registration statement for securities offerings involves substantial legal
15 work to ensure that the disclosure contained therein is accurate and complies with securities
16 laws, rules and regulations. Once the registration statement is filed, there may be a lengthy
17 SEC review process for the securities offerings before the registration statements are
18 declared effective. Skadden, pursuant to its previous employment in this case, has devoted
19 material time and attention to this process, albeit in connection with a prior plan. In order to
20 meet the foregoing conditions precedent to the effectiveness of the Plan, the legal work by
21 Underwriters' Counsel must be recommenced now in connection with the Plan. This legal
22 work will include participating in the preparation of the registration statements and
23 conducting the due diligence investigation, which will also require substantial coordination
24 with the issuer and its counsel.

25
26 ² Skadden was approved as special regulatory counsel to PG&E by Order entered on
27 July 24, 2001 (docket no. 1589). On March 8, 2002, Skadden filed the Supplemental
28 Declaration of John S. Moot, disclosing its role as underwriters' counsel (docket no. 5078).

³ See Section 8.2 of the Plan describing the conditions precedent to the effectiveness
of the Plan.

1 It is customary for the issuer to pay for the underwriters' legal fees in connection
2 with complex debt offerings such as those involved under the Plan.

3 II.

4 **PAYMENT OF FEES INCURRED BY UNDERWRITERS' COUNSEL IS**
5 **APPROPRIATE PURSUANT TO BANKRUPTCY CODE SECTION 363(b)(1)**

6 A. Sound Business Purposes Support PG&E's
7 Payment of Fees Incurred by Underwriters' Counsel.

8 The Court has considerable discretion in approving a request pursuant to Section
9 363(b)(1) of the Bankruptcy Code ("[t]he trustee, after notice and a hearing, may use, sell or
10 lease, other than in the ordinary course of business, property of the estate"). See Dai-Ichi
11 Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding
12 Corp.), 242 B.R. 147, 153 (D. Del. 1999) (affirming the bankruptcy court's decision to
13 approve expenditure for employee incentive programs, noting that bankruptcy court has
14 considerable discretion in approving a Section 363(b) motion).

15 In determining whether to authorize a transaction under Section 363(b)(1), courts
16 require a debtor to show that a sound business purpose justifies such actions, applying the
17 business judgment test. See, e.g., Stephens Indus., Inc. v. McClung, 789 F.2d 386, 389-90
18 (6th Cir. 1986); Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722
19 F.2d 1063, 1071 (2d Cir. 1983); see also 3 Lawrence P. King, Collier on Bankruptcy
20 ¶363.02[1][g] (15th ed. rev. 1998).

21 Once the debtor has articulated a rational business justification, a presumption
22 attaches that the decision was made "on an informed basis, in good faith and in the honest
23 belief that the action taken was in the best interests of the [debtor]." See, e.g., Official
24 Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.),
25 147 B.R. 650, 656 (S.D.N.Y. 1992) (citing Smith v. Van Gorkom, 488 A.2d 858 (Del.
26 1985)).

27 Sound business justifications support PG&E's request to pay the legal fees of
28

1 Underwriters' Counsel. It is necessary that the time-consuming and complex legal work to
2 be performed by Underwriters' Counsel be done promptly in order for PG&E to ensure that
3 it can timely meet the conditions precedent to the effectiveness of the Plan. Because the
4 issuer's payment of such fees is a common business practice for complex debt offerings,
5 PG&E believes that it is necessary to pay these costs in furtherance of implementation of the
6 Plan. PG&E is solvent and has sufficient cash to pay these expenses without causing any
7 detriment to its creditors.⁴

8
9 B. Proposed Procedures for Review and Approval of
10 Fees Incurred by Skadden as Underwriters' Counsel.

11 PG&E requests authority to pay, on a monthly basis hereafter, the fees and
12 expenses of Skadden as Underwriters' Counsel, in accordance with the following
13 procedures:

14 1. Following entry of an order approving this Motion, Skadden shall promptly
15 transmit, by facsimile and first class mail, copies of any invoices for services provided
16 during September, 2003, to PG&E and its counsel, to counsel for the Committee and to the
17 United States Trustee.

18 2. Beginning with the monthly billing cycle for October 2003, Skadden shall
19 transmit, by facsimile and first class mail, copies of its monthly invoices to PG&E and its
20 counsel, to counsel for the Committee and to the United States Trustee, no later than the 20th
21 day of the following month.

22 3. If any of the parties receiving copies of Skadden invoices pursuant to
23 paragraphs 1 and 2 above (an "Objecting Party") believe that all or any portion of the
24 amounts reflected in any invoice are unreasonable, such Objecting Party shall provide
25 written notice, by facsimile and first class mail, of such objection to Skadden, within 10 days
26 of the receipt of the invoice in question (with a copy to PG&E and its counsel).

27 ⁴As reflected in PG&E's June 2003 Monthly Operating Report, PG&E held more
28 than \$3.7 billion in cash reserves as of June 30, 2003.

4. Promptly following the expiration of the 10-day period set forth in paragraph 3 above, PG&E may, without further order or authorization, pay any undisputed portion of such invoice(s). As to any disputed portion, PG&E may pay such disputed portion promptly following resolution of any objection with an Objecting Party, or, if any such objection cannot be consensually resolved, promptly following an order of the Court approving such disputed portion.

5. The payment of any fees and expenses of Skadden as Underwriters' Counsel will be expressly subject to disallowance by the Court.

CONCLUSION

For all of the foregoing reasons, PG&E respectfully requests that the Court approve the request set forth above to pay the fees of Underwriters' Counsel, and grant such other and further relief as may be just and appropriate.

DATED: August 21, 2003

Respectfully,

**HOWARD, RICE, NEMEROVSKI, CANADY,
FALK & RABKIN**
A Professional Corporation

By:

Barbara Gordon
BARBARA GORDON

**Attorneys for Debtor and Debtor in Possession
PACIFIC GAS AND ELECTRIC COMPANY**