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12 PACIFIC GAS AND ELECTRIC COMPANY

13 UNITED STATES BANKRUPTCY COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

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

Case No. 01-30923 DM

Chapter 11 Case

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

HOWARD
RICE
NEMEROVSKI
CANADY
FALK
& RABKIN
A Professional Corporation

22 DEBTOR'S NOTICE OF MOTION AND MOTION FOR ORDER
23 AUTHORIZING PAYMENT OF CERTAIN NON-ENERGY BILLING ADJUSTMENTS;
24 SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

25 [DECLARATION OF DAVID W. PHILLIPS IN SUPPORT
26 HEREOF FILED SEPARATELY]

27 PLEASE TAKE NOTICE that on September 10, 2003 at 9:30 a.m., or as soon
28 thereafter as the matter may be heard, in the Courtroom of the Honorable Dennis Montali,
located at 235 Pine Street, 22nd Floor, San Francisco, California, Pacific Gas and Electric
Company, the debtor and debtor in possession in the above-captioned Chapter 11 case
("PG&E" or the "Debtor"), will and hereby does move the Court (the "Motion") for entry of
an order authorizing PG&E to pay certain pre-petition non-energy billing adjustments to

MOT. TO PAY NON-ENERGY BILLING ADJUSTMENTS

DR RPO

1 approximately 150 customers in accordance with PG&E's non-energy billing adjustment
2 policies.

3 This Motion is made pursuant to Section 105(a) of the United States Bankruptcy
4 Code (11 U.S.C. §105(a)), and is based on this Notice of Motion and Motion, accompanying
5 Memorandum of Points and Authorities, the Declaration of David W. Phillips filed
6 concurrently herewith (the "Phillips Declaration"), the record of this case and any evidence
7 presented at or prior to the hearing on this Motion.

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

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 PG&E hereby moves this Court for an order authorizing PG&E to pay certain
4 amounts currently owed and amounts that become due to customers as a result of pre-
5 petition non-energy billing ("NEB") adjustments, in an aggregate amount of approximately
6 \$2,250,000.

7 **I.**

8 **FACTUAL BACKGROUND¹**

9 PG&E performs construction and engineering work for its customers that is
10 generally related to the overall provision of gas and electric service.² For example, PG&E
11 may relocate a PG&E-owned gas meter for the convenience of the customer, convert
12 facilities for temporary services, or perform construction or engineering services related to
13 distribution and transmission projects. Because of its expertise and specialized equipment,
14 PG&E is often the first, if not the only, choice for this work.

15 Typically the customer requests that PG&E perform certain work. PG&E designs
16 the job and provides a contract with a stated amount to be charged for the work. The
17 contract is signed and the money is collected in advance of performance of the construction
18 or engineering work. The funds are deposited into the non-energy billing system ("NEBS").
19 Certain such contracts were entered into prior to the filing of the Chapter 11 case and, as a
20 result thereof, funds were deposited into NEBS. After the filing and during the Chapter 11
21 case, certain customers cancelled or modified the construction projects or the engineering
22 work resulting in a partial or total reduction of the contract cost. Since the work had been
23 paid for in full pre-petition, the funds remain in NEBS. Prior to the Chapter 11 case, PG&E
24 would in such situations make the appropriate adjustment to NEBS and pay the full or
25 unused portion of the contract amount from NEB to the customer. The typical cancellation

26 ¹The evidentiary basis and support for the facts set forth in this Motion are contained in
27 the Declaration of David W. Phillips filed concurrently herewith.

28 ²Work related to main line extension contracts ("MLX") is not included in this Motion
because it was the subject of this Court's orders dated April 2001 and March 25, 2002.

1 or modification adjustment amount is estimated to be \$10,000 or less.

2 A similar situation exists under "Actual Cost Contracts" entered into prior to the
3 Chapter 11 case for services generally related to transmission projects. Again, the customer
4 contacted PG&E to perform construction or engineering or design work relating to the
5 building of higher voltage projects. PG&E and the customer entered into an Actual Cost
6 Contract. PG&E then designed the job, billed the customer and funds were collected and
7 deposited into NEBS. The terms of the Actual Cost Contracts provide for a reconciliation at
8 the time of completion of the project between the actual cost of the project and the billed and
9 collected amount. Prior to the Chapter 11 case, in such situations, PG&E reconciled the
10 Actual Cost Contract amount with the actual project cost. When the adjustment was a credit
11 balance, the amount was paid to the customer. Since the filing of the Chapter 11 case, these
12 funds have been held in NEBS.

13 PG&E currently holds approximately 164 outstanding pre-petition credit
14 adjustments relating to such cancellations or modifications, totaling approximately \$2.25
15 million. Of the 164 credit adjustments, 131 credits are under \$10,000. Since substantially
16 higher amounts are involved in transmission projects, the cancellation or modification of
17 transmission projects result in significantly higher credit adjustments averaging
18 approximately \$28,000. PG&E also estimates that a small percentage of additional NEB
19 credit adjustments for Actual Cost Contracts or cancellations or modifications as described
20 above are likely to accrue in NEBS during the remaining pendency of the Chapter 11 case.

21 II.

22 DISCUSSION

23 This Court Should Authorize Payment Of The Adjustments 24 Pursuant To Section 105(a) And The Court's Inherent Powers.

25 PG&E requests that this Court authorize the payment of certain adjustments
26 described above pursuant to Section 105(a) of the Bankruptcy Code and the Court's inherent
27 powers. Sections 105 authorizes this Court to "issue any order, process, or judgment that is
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1 necessary or appropriate to carry out the provisions of this title.” The purpose of
2 Section 105 is “to assure the bankruptcy court’s power to take whatever action is appropriate
3 or necessary in aid of the exercise of their jurisdiction.” 2 Collier on Bankruptcy, ¶105.01 at
4 105-06 (15th ed. Rev. 2000).

5 Although payment of pre-petition obligations prior to confirmation of a plan in a
6 Chapter 11 case is generally not allowed, Section 105(a) confers the power to authorize
7 payments irrespective of priorities where circumstances so warrant. See, e.g., Crafts
8 Precision Indus. Inc. v. U. S. Healthcare, Inc. (In re Crafts Precision Indus., Inc.), 244 B.R.
9 178, 183 (B.A.P. 1st Cir. 2000) (affirming authorization of vacation payments “pursuant to
10 § 105, irrespective of them being non-priority obligations”); In re Equalnet Communications
11 Corp., 258 B.R. 368, 369 n.2 (Bankr. S.D. Tex. 2000) (exceptions to general rule against
12 pre-confirmation payment of pre-petition claims “arise primarily out of common sense and
13 the presence of a legal or factual inevitability of payment”). For instance, pursuant to
14 Section 105(a), courts have authorized immediate redemption of pre-petition retail coupons,
15 the honoring of credit card debits, credits or chargebacks by retail stores, and the issuance of
16 billing credits to retail customers in connection with pre-petition telephone services. See id.
17 at 369. Such claims are allowed to aid reorganization, prevent the loss of the Debtor’s
18 customer base, and to prevent “potential harm to . . . ‘silent’ or unrepresented
19 constituencies” such as the individual customers affected by PG&E’s non-energy billing
20 adjustment policies. Id. at 370 n.4.

21 The logic of these cases applies in the current context. The Debtor’s continued
22 inability to pay may impose hardships on the Debtor’s customers. The amount of money
23 that the Debtor requests to pay represents a very small percentage of the Debtor’s total assets
24 and the average outstanding payment for the majority of the customers amounts to under
25 \$10,000.

26 In addition, the affected customers were required to submit these payments in
27 connection with what has come to be recognized as a basic necessity in today’s economy.
28 See Nunemaker v. P.T.&T. Co., Nos. 8735 & 8770, 1969 WL 18575 at *7, 70 C.P.U.C. 38

1 (Cal. C.P.U.C. Aug. 26, 1969) ("Water, gas, electric and telephone service have come to be
2 regarded largely as public necessities, and they may not be denied even to the impecunious
3 or to the financially irresponsible members of the public."). Customers needing PG&E's
4 engineering and construction services generally have little choice but to submit payment and
5 do so with the understanding that their services will be performed or, when cancelled or
6 modified, they will be treated fairly and with promptness. Customers with Actual Cost
7 Contracts are entitled to prompt payment of adjustments.

8 In sum, equitable considerations mitigate in favor of authorizing the Debtor to
9 pay adjustments consistent with PG&E's non-energy billing policies. The Debtor therefore
10 requests authority to pay all pre-petition customer non-energy billing adjustments held in
11 NEBS and as such further adjustments occur consistent with such policies.

12
13 III.

14 CONCLUSION

15 For all of the foregoing reasons, PG&E respectfully requests that this Court make
16 and enter an order authorizing PG&E to pay pre-petition non-energy billing adjustments to
17 customers consistent with PG&E's non-energy adjustment policies.

18 DATED: August 21, 2003.

19 HOWARD, RICE, NEMEROVSKI, CANADY,
20 FALK & RABKIN
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21
22 By: Barbara Gordon

BARBARA GORDON

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