

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

In re:

PACIFIC GAS AND ELECTRIC  
COMPANY, a California  
Corporation

Debtor.

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§

Case No. 01-30923

50-275  
323

Relief From Stay Cover Sheet

Instructions: Complete caption and Section A for all motions. Complete Section B for mobile homes, motor vehicles, and personal property. Complete Section C for real property. Utilize Section C as necessary. If moving party is not a secured creditor, briefly summarize the nature of the motion in Section D.

(A) Date Petition Filed: April 19, 2001 Chapter: 11  
Prior hearings on this obligation: N/A

(B) Description of personal property collateral (e.g. 1983 Ford Taurus):

Secured Creditor ☐ or lessor ☐

Fair Market Value: \$  
Contract Balance: \$  
Monthly Payment: \$  
Insurance Advance: \$

Source of value: \$  
Pre-Petition Default: \$  
No. of Months:   
Post-Petition Default:   
No of Months:

(C) Description of real property collateral (e.g. Single family residence; Oakland, CA).

Fair Market value: \$ Source of value If appraisal, date

Moving Party's position (first trust deed, second, abstract, etc.)

Approx. Bal.: \$ Pre-Petition Default: \$  
As of (date): No. of Months:   
Monthly Payment: \$ Post-Petition Default: \$  
Notice of Default (date) No of months:   
Notice of Trustee's Sale Advances Senior Lines \$

Specify name and status of other liens and encumbrances, if known (e.g. trust deeds, tax liens, etc.)

Position	Amount	Monthly Payment	Defaults
1 <sup>st</sup> Trust Deed	\$	\$	\$
2 <sup>nd</sup> Trust Deed	\$	\$	\$
(Total)	\$	\$	\$

(D) Other pertinent information:  
SMUD is a potential plaintiff in an action against PG&E proposed to be filed before FERC, concerning alleged wrongful termination of certain rights by PG&E.

Dated September 4, 2003

W. Laubach by J. Rudd  
Signature hypermission R

Wendy K. Laubach  
Print or Type Name

Attorney for Sacramento Municipal Utility District

MOTION FOR RELIEF COVER SHEET

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Attorneys for Claimant Sacramento Municipal Utility District

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

In re:

PACIFIC GAS AND ELECTRIC  
COMPANY, a California  
Corporation

Debtor.

§ Case No. 01-30923

§  
§ **MOTION AND NOTICE OF MOTION  
OF SMUD FOR RELIEF FROM  
AUTOMATIC STAY IN LITIGATION**

§ Date: September 26, 2003

§ Time: 10:30 A. M.

§ Place: 235 Pine Street, 22<sup>nd</sup> Floor,  
§ San Francisco, CA

§ Judge: Honorable Dennis Montali

PLEASE TAKE NOTICE that on the date and time set forth above, or as soon thereafter as the matter may be heard, Sacramento Municipal Utility District ("SMUD") will urge this motion for an order for relief from the automatic stay in the above-captioned bankruptcy case in order to proceed with an action to be filed before the Federal Energy Regulatory Commission ("FERC"). SMUD's motion will be made pursuant to 11 U.S.C. §362(d)(1), 28 U.S.C. §§ 157(c)(1) and 1334 (c)(1), Federal Rules of Bankruptcy Procedure, Rule 4001, and Local Bankruptcy Rules, Rules 4001-1 and 9015-2(f), and on the grounds that cause exists for lifting the automatic stay.

This motion is based on the accompanying Memorandum of Points and Authorities, Declaration of Harvey L. Reiter, the pleadings, records and files herein, and such evidence, oral and documentary, as may be produced at the hearing on this motion. The relief from stay sought

1 by SMUD is necessary to permit SMUD to file an action before FERC to require PG&E to extend  
2 the term of a 200 MW transmission contract by and between SMUD, PG&E, Southern California  
3 Edison Company ("SCE"), and San Diego Gas & Electric Company ("SDGE").

4 In order to name PG&E as a defendant in the FERC action, SMUD must first seek relief  
5 from stay in this case. However, SMUD does not seek monetary damages against PG&E's estate.  
6 SMUD seeks only a determination of its rights under applicable FERC guidelines to require  
7 PG&E to extend the term of the transmission contract.  
8

9 SMUD believes that there is "cause" to lift the stay pursuant to 11 U.S.C. section  
10 362(d)(1). "Cause" exists to lift the stay because allowing SMUD to proceed before FERC  
11 promotes the congressional policy of allowing specialized energy proceedings to be conducted  
12 before the administrative agency that has been entrusted by Congress with this function. It would  
13 not serve the interests of judicial economy for the Bankruptcy Court to be required to immerse  
14 itself in such specialized conflicts. Relief from the stay would result in little or no harm to PG&E  
15 in sending this dispute, like many similar disputes that have arisen in this case to date, to FERC  
16 for disposition.  
17

18 PLEASE TAKE FURTHER NOTICE that this motion is made pursuant to Local  
19 Bankruptcy Rule 4001-1. A preliminary hearing on this motion will be held on  
20 September 26, 2003, at 10:30 a.m. at 235 Pine Street, 22<sup>nd</sup> Floor, San Francisco, California.  
21 Pursuant to Local Rule 4001-1(f), respondent is not required to, but may, file objections to this  
22 motion. Any objections filed must also be served on counsel for SMUD at the address listed at  
23 the top left-hand corner of this Notice.  
24  
25  
26  
27  
28

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909 FANNIN, SUITE 1500, HOUSTON, TEXAS 77010  
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1 WHEREFORE, SMUD requests that the Court enter its order granting relief from the stay  
2 to permit SMUD to file an action before FERC to require PG&E to extend its transmission  
3 contract with SMUD.

4 Date: September 4, 2003

DIAMOND MCCARTHY TAYLOR FINLEY  
BRYANT & LEE, L.L.P.

6 By: W. Laubach by J. Ridd  
7 Wendy K. Laubach  
Attorney for SMUD  
7 permission  
JR

**PROOF OF SERVICE**  
c.c.p. § 1011; §1013(a)(c)(e)

I, Wendy K. Laubach, declare that:

I am a citizen of the United States, and employed in the County of Harris, Texas. I am over the age of eighteen years and not a party to the within action. My business address is: 909 Fannin, Suite 1500, Houston, Texas 77010.

On September 4, 2003, I served the following document(s);

**MOTION AND NOTICE OF MOTION OF SMUD FOR RELIEF FROM  
THE AUTOMATIC STAY IN LITIGATION**

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
SMUD'S MOTION FOR RELIEF FROM STAY IN LITIGATION**

**DECLARATION OF HARVEY L. REITER IN SUPPORT OF SMUD'S  
MOTION FOR RELIEF FROM STAY IN LITIGATION**

- (x) by placing a true copy thereof enclosed in a sealed envelope with postage fully prepaid in the United States mail at Houston, Texas, following ordinary business practices, addressed as shown below.
- ( ) causing a true copy thereof enclosed in a sealed envelope to be hand delivered.
- ( ) by causing a true copy thereof enclosed in a sealed envelope to be delivered by UPS or other over-night delivery service.
- ( ) by facsimile to the facsimile numbers below.

Counsel for PG&E  
Howard, Rice, Nemerovski, Canady, Falk & Rabkin  
Attn: James L. Lopes, Esq.  
Three Embarcadero Center, 7<sup>th</sup> Floor  
San Francisco, CA 94111

Cooley Godward LLP  
Attn: Stephen C. Neal, Esq.  
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Office of the United States Trustee  
Attn: Patricia Cutler, Esq.  
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Counsel for the Official Committee of Unsecured Creditors  
Milbank, Tweed, Hadley & McCloy  
Attn: Paul Aronzon, Esq.  
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Counsel for the California Public Utilities Commission  
Paul, Weiss, Rifkind, Wharton & Garrison LLP  
Attn: Alan W. Kornberg  
1285 Avenue of the Americas  
New York, New York 10019-6064

On September 5<sup>th</sup> and/or 6<sup>th</sup>, 2003, I also served the following document(s);

**MOTION AND NOTICE OF MOTION OF SMUD FOR RELIEF FROM  
THE AUTOMATIC STAY IN LITIGATION**

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
SMUD'S MOTION FOR RELIEF FROM STAY IN LITIGATION**

**DECLARATION OF HARVEY L. REITER IN SUPPORT OF SMUD'S  
MOTION FOR RELIEF FROM STAY IN LITIGATION**

(x) by placing a true copy thereof enclosed in a sealed envelope with postage fully prepaid in the United States mail at Houston, Texas, following ordinary business practices, addressed as shown on the Special Notice List Dated July 24, 2003.

I declare under penalty of perjury that the foregoing is true and correct. Executed September 4, 2003 at Houston, Texas.

  
Wendy K. Laubach

by S. Ridd  
7 permission

Wendy K. Laubach  
Diamond McCarthy Taylor Finley Bryant & Lee, L.L.P.  
Two Houston Center  
909 Fannin, Suite 1500  
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Attorneys for Claimant Sacramento Municipal Utility District

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

In re:

Case No. 01-30923

PACIFIC GAS AND ELECTRIC  
COMPANY, a California  
Corporation

Debtor.

MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT  
OF MOTION OF SMUD FOR  
RELIEF FROM AUTOMATIC STAY  
IN LITIGATION

Date: September 26, 2003

Time: 10:30 A.M.

Place: 235 Pine Street, 22<sup>nd</sup> Floor,  
San Francisco, CA

Judge: Honorable Dennis Montali

Sacramento Municipal Utility District ("SMUD") hereby submits this memorandum of points and authorities in support of its motion for relief from the automatic stay re non-bankruptcy litigation. SMUD seeks relief from the stay to file a complaint against PG&E before the Federal Energy Regulatory Commission ("FERC") under Section 206 of the Federal Power Act. The purpose of the complaint is to obtain an order of FERC directing PG&E to comply with certain FERC guidelines assuring transmission customers the right to extend the term of existing transmission contracts, on certain conditions, in order to permit customers to continue taking transmission service from their existing transmission providers.

1 I. BACKGROUND

2 On August 1, 1967, SMUD entered into an agreement for 200 MW of firm physical  
3 transmission capacity with the Debtor, Southern California Edison Company ("SCE"), and San  
4 Diego Gas & Electric Company ("SDGE"), entitled "Contract Between California Companies  
5 and Sacramento Municipal Utility District for Extra High Voltage Transmission and Exchange  
6 Service (as amended, the "Transmission Contract").<sup>1</sup> PG&E's chapter 11 plan calls for the  
7 assumption of the Transmission Contract. The contract currently is set to expire in January 2005.  
8 However, as set forth below, applicable FERC guidelines authorize SMUD to extend the  
9 contract's term.

11 Under FERC Order 888 (*"Promoting Wholesale Competition Through Open Access Non-*  
12 *Discriminatory Transmission Services by Public Utilities"*),

13 all firm transmission customers (requirements and transmission-only),  
14 upon the expiration of their contracts or at the time their contracts become  
15 subject to renewal or rollover, should have the right to continue to take  
16 transmission service from their existing transmission provider.<sup>2</sup>

17 The limitations are that

18 the underlying contract must have been for a term of one-year or more and  
19 the existing customer must agree to match the rate offered by another  
20 potential customer, up to the transmission provider's maximum filed  
21 transmission rate at that time, and to accept a contract term at least as long  
22 as that offered by the potential customer.<sup>3</sup>

23 The purpose of this right-of-first-refusal procedure is "to preserve the certainty and continuity of  
24 transmission service."<sup>4</sup>

25 <sup>1</sup> Though all three companies entered into the Transmission Contract with SMUD, PG&E is the sole owner of the  
26 capacity made available to SMUD under the contract.

27 <sup>2</sup> FERC Stats. & Regs. Reg. Preambles, para. 31,036 at 31,665 (1996), *aff'd in relevant part sub nom. Transmission*  
*Access Policy Study Group v. FERC*, 225 F.3d 667, 735 (D.C. Cir. 2000), *aff'd*, *New York v. FERC*, 122 S. Ct. 1012  
(2002).

28 <sup>3</sup> *Id.*

<sup>4</sup> *Transmission Access Policy Study Group v. FERC*, 225 F.3d at 735.



SMUD plainly qualifies for a term extension under Order No. 888. It is an existing customer under a contract with a term of one year or more, and has offered to match the rate and term offered by other potential customers. Nevertheless, PG&E has refused, asserting (1) that its continued ability to provide service is rendered uncertain by the expiration of contractual arrangements with third parties that PG&E believes are necessary to fulfill its contract with SMUD, and (2) that Order No. 888's right of first refusal mechanism is incompatible with the open-access transmission system managed by the California Independent System Operator ("Cal ISO").

SMUD believes that these defenses have no merit. There is no need, however, for the Bankruptcy Court to take up the merits of PG&E's defenses. Instead, the dispute over whether PG&E's refusal violates FERC Order No. 888 should be submitted to FERC for decision.

SMUD would experience an undue hardship and risk if it were required to wait until PG&E emerged from bankruptcy before initiating the proposed FERC complaint. SMUD has attempted to resolve this issue with PG&E informally since early 2003, without success. Although SMUD intends to request fast-track processing from FERC, which may reasonably be expected to lead to a resolution within two to three months after filing, there can be no guarantee that FERC will grant this request. If FERC declines to fast-track the complaint, resolution may be delayed for a substantial additional period. SMUD needs to file its FERC complaint immediately in order to permit sufficient time, in the event of an unfavorable disposition, for SMUD to make alternative arrangements for the 200 MW of capacity that will be lost when the Transmission Contract expires. Prudent industry practice requires lead time of many months to arrange for alternative sources of transmission capacity on the scale involved in this dispute.

## **II. CAUSE EXISTS TO LIFT THE STAY TO ALLOW SMUD TO FILE ITS ACTION BEFORE FERC**

Section 362(d) of the Bankruptcy Code provides in relevant part that

[o]n request of a party in interest . . . the court shall grant relief from the stay . . . such as by terminating, annulling, modifying, or conditioning such stay – (1) for cause . . . .

11 U.S.C. section 362(d)(1). The burden is on the debtor to show that there is no cause for relief.<sup>5</sup>

Because there is no clear definition of what constitutes “cause,” relief from stay must be determined on a case-by-case basis.<sup>6</sup> Four factors are most applicable in the contest of determining cause to lift the stay to allow litigation to proceed in another forum: “(1) the harm to the party seeking relief from the stay if the stay is not lifted; (2) the harm to the debtor if the stay is lifted; (3) the interests of creditors; and (4) the effect on the fair and efficient administration of justice.”<sup>7</sup> All of these factors support SMUD’s request for relief.

**A. The Balance-of-Harm Analysis Favors SMUD.**

In determining whether cause exists to grant relief from the stay, courts apply a balancing test, “finding ‘cause’ when the stay will harm the creditor and lifting the stay will not *unjustly* harm the debtor or other creditors.”<sup>8</sup> In this case, the balance-of-harm test clearly favors SMUD’s request for relief. Regardless of whether the stay is lifted, PG&E is obligated to comply with all applicable FERC regulations. The only issue is whether the dispute over what those regulations require will be resolved in this Court or before FERC. There will be no harm to PG&E in submitting its dispute with SMUD before FERC. FERC is in a unique position to provide an efficient resolution of the dispute over the Transmission Contract. FERC is a specialized tribunal that handles Federal Power Act disputes of this sort as a matter of routine. In contrast, SMUD

<sup>5</sup> 11 U.S.C. section 362(g); *In re Ellis*, 60 B.R. 432, 435 (B.A.P. 9<sup>th</sup> Cir. 1985); *In re Gavin*, 24 B.R. 578, 580 (B.A.P. 9<sup>th</sup> Cir. 1981).

<sup>6</sup> *In re Tucson Estates, Inc.*, 912 F.2d 1162, 1166 (9<sup>th</sup> Cir. 1990) (citing *In re MacDonald*, 755 F.2d 715-717 (9<sup>th</sup> Cir. 1985)); see also *In re Conejo Enterprises, Inc.*, 96 F.3d 346, 352 (9<sup>th</sup> Cir. 1996); *In re Castlerock Properties*, 781 F.2d 159, 163 99<sup>th</sup> Cir. 1986); *In re Beguelin*, 220 B.R. 94, 98 (9<sup>th</sup> Cir. BAP 1998).

<sup>7</sup> *Peerless Inc. Co. v. Rivera*, 208 B.R. 313, 315 (D.R.I. 1997) (citing *Tucson Estates*, 912 F.2d at 1166).

<sup>8</sup> *In re Silverling*, 179 B.R. 909, 911 (Bankr. E.D. Cal. 1995) (emphasis in original); see also *In re C&S Grain Co.*, 47 F.3d 233, 238 (7<sup>th</sup> Cir. 1995) (“In determining whether cause exists, the bankruptcy court should base its decision on the hardships imposed on the parties with an eye towards the overall goals of the Bankruptcy Code.”).

1 will lose important rights of first refusal under FERC Order No. 888 if it is not permitted to seek a  
2 timely resolution of this dispute sufficiently in advance of the contract's currently scheduled  
3 expiration date.

4 **B. Lifting the Stay Will Have No Impact on Creditors.**

5 The court in *Peerless Inc. Co. v. Rivera*<sup>9</sup> found that the important issue for creditors was  
6 not where a particular dispute with the debtor was decided, but what the outcome was. The court  
7 also found that the interests of the creditors would be best served by proceeding in the non-  
8 bankruptcy forum, which would maximize the chances of settlement and minimize litigation  
9 costs.<sup>10</sup> Similarly, PG&E's creditors should be indifferent even to the resolution of the merits of  
10 this dispute, let alone the forum. SMUD is not seeking monetary damages against PG&E's  
11 estate. If anything, creditors should support an extension of the Transmission Contract, because  
12 SMUD currently is paying below maximum tariff transmission prices and may have to increase  
13 its rates to posted tariff levels in order to obtain an extension.  
14

15 **C. Relief from the Stay Would Promote the Fair and Efficient Administration of Justice.**

16 The Ninth Circuit recognizes that "[t]he the stay may be lifted as a matter of judicial  
17 economy."<sup>11</sup> In *In re Universal Life Church, Inc.*, a California bankruptcy court acknowledged  
18 that the interests of judicial economy were best served by permitting the IRS to proceed with a tax  
19 claim before the specialized tax court, which was "likely to produce a more uniform and prompt  
20 claim before the specialized tax court, which was "likely to produce a more uniform and prompt  
21

22  
23  
24 <sup>9</sup> 208 B.R. 313, 315 (D.R.I. 1997).

25 <sup>10</sup> *Id.* at 316-17.

26 <sup>11</sup> *In re Beguelin*, 220 B.R. 94, 98 (9<sup>th</sup> Cir. BAP 1998) (citing *In re Westwood Broadcasting, Inc.*, 35 B.R. 47, 48-49  
27 (Bankr. D. Hawaii 1983) (granting the plaintiffs' motion for relief from stay to allow them to proceed with litigation  
28 in state court)); *In re Kemble*, 776 F.2d 802, 806 (9<sup>th</sup> Cir. 1985) (lifting stay for purposes of judicial economy to  
allow litigation to proceed in district court was not abuse of discretion); *see also Conejo Enterprises*, 96 F.3d at 353  
("Judicial economy and efficient administration of the estate [are] properly considered by the bankruptcy court" in  
determining whether or not to grant relief from stay).

1 resolution of the tax issue.”<sup>12</sup> Similarly, in the present case, judicial economy will be best served  
2 by sending this Federal Power Act dispute to FERC, which handles such specialized disputes as a  
3 matter of routine.

4 The Second Circuit has explicitly acknowledged the relationship between the existence of  
5 a specialized non-bankruptcy tribunal and the promotion of judicial economy. The Second  
6 Circuit considers 12 factors when deciding whether or not to lift a stay in order that litigation may  
7 continue to completion in another tribunal.<sup>13</sup> Although “[n]ot every one of these factors will be  
8 relevant in every case,”<sup>14</sup> the fourth factor, “whether a specialized tribunal with the necessary  
9 expertise has been established to hear the cause of action,” is instructive in the present case. Like  
10 the “efficient administration of justice” factor in the Ninth Circuit, this factor militates in favor of  
11 sending specialized FERC disputes to FERC for efficient resolution.

### 12 III. CONCLUSION

13 This Court should grant SMUD’s motion for relief from the automatic stay. The Court  
14 has permitted other claimants to pursue their claims before specialized non-bankruptcy forums in  
15 this bankruptcy proceeding. In so doing, the Court has avoided being caught up in highly  
16 specialized energy-section proceedings that are most efficiently left to other regulatory bodies.  
17 The Court should follow its prior practice and rule in SMUD’s favor.

18  
19  
20  
21  
22 <sup>12</sup>127 B.R. 453, 454-55 (E.D. Cal. 1991) (citing H.R. No. 595, 95<sup>th</sup> Cong, 1<sup>st</sup> Sess. 343, 1977 U.S. Code Cong. &  
Admin. News 5787, 6300, for the proposition that the need to pursue litigation in another tribunal may provide cause  
for relief from stay).

23 <sup>13</sup> *In re Bogdanovich*, 292 F.3d 104 (2d Cir. 2002). The Second Circuit considers “(1) whether relief would result in  
24 a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy  
25 case; (3) whether the other proceeding involves the debtor as a fiduciary; (4) whether a specialized tribunal with the  
26 necessary expertise has been established to hear the cause of action; (5) whether the debtor’s insurer has assumed full  
27 responsibility for a defense; (6) whether the action primarily involves third parties; (7) whether litigation in another  
28 forum would prejudice the interests of other creditors; (8) whether the judgment claim arising from the other action is  
subject to equitable subordination; (9) whether the movant’s success in the other proceeding would result in a judicial  
lien avoidable by the debtor; (10) the interests of judicial economy and the expeditious and economical resolution of  
litigation; (11) whether the parties are ready for trial in the other proceeding; and (12) the impact of the stay on the  
parties and the balance of harms.” *Id.* at 110 n1.

<sup>14</sup> *Id.*

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(713) 333-5100 • fax (713) 333-5199

1 Respectfully submitted,

2 Date: September 4, 2003

DIAMOND MCCARTHY TAYLOR FINLEY  
BRYANT & LEE, L.L.P.

3  
4 By: W. Laubach  
5 Wendy K. Laubach  
6 Attorney for Claimant  
7 Sacramento Municipal Utility District  
8 by J. Rudd w/ permission  
9 92

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§ Case No. 01-30923

**DECLARATION OF HARVEY  
REITER RE MOTION OF SMUD  
FOR RELIEF FROM AUTOMATIC  
STAY IN LITIGATION**

§ Date: September 26, 2003  
§ Time: 10:30 A.M.  
§ Place: 235 Pine Street, 22<sup>nd</sup> Floor,  
§ San Francisco, CA

**Judge: Honorable Dennis Montali**

**I, Harvey L. Reiter, declare as follows:**

1. I am a partner in the Washington, D.C., office of the law firm of Stinson Morrison Hecker LLP. My areas of concentration include practice before the Federal Energy Regulatory Commission ("FERC").

2. I represent Sacramento Municipal Utility District ("SMUD") in matters pertaining to SMUD's rights under an agreement for 200 MW of firm physical transmission capacity with PG&E, Southern California Edison Company ("SCE"), and San Diego Gas & Electric Company ("SDGE"), entitled "Contract Between California Companies and Sacramento Municipal Utility District for Extra High Voltage Transmission and Exchange Service," dated August 1, 1967 (as amended, the "Transmission Contract"). (Though all three companies entered into the Transmission Contract with SMUD, PG&E is the sole owner of the capacity made available to SMUD under the contract.)

**3. PG&E's chapter 11 plan calls for the assumption of the Transmission Contract.**

**AFFIDAVIT RE SMUD MOTION FOR RELIEF**

1           4. The Transmission Contract currently is set to expire in January 2005. I have prepared  
2 a draft complaint to be filed by SMUD against PG&E before FERC under Section 206 of the  
3 Federal Power Act, in which SMUD seeks an order of FERC directing PG&E to extend the term  
4 of the contract. As set forth in SMUD's Memorandum of Points and Authorities in support of its  
5 Motion for Relief from Stay, applicable FERC guidelines authorize SMUD to extend the  
6 contract's term. These FERC guidelines assure transmission customers the right to extend the  
7 term of existing transmission contracts, on certain conditions, in order to permit customers to  
8 continue taking transmission service from their existing transmission providers. The purpose of  
9 the FERC guidelines, including a right-of-first-refusal procedure, is to preserve the certainty and  
10 continuity of transmission service.  
11

12           5. SMUD plainly qualifies for a term extension under FERC guidelines. It is an existing  
13 customer under a contract with a term of one year or more, and has offered to match the rate and  
14 term offered by other potential customers. Nevertheless, PG&E has refused, asserting (1) that its  
15 continued ability to provide service is rendered uncertain by the expiration of contractual  
16 arrangements with third parties that PG&E believes are necessary to fulfill its contract with  
17 SMUD, and (2) that FERC's right-of-first-refusal mechanism is incompatible with the open-  
18 access transmission system managed by the California Independent System Operator ("Cal ISO").  
19 SMUD disagrees. SMUD has been attempting to resolve this issue with PG&E since at least  
20 early 2003, without success, and now has no alternative to seeking an immediate resolution of this  
21 dispute before FERC.  
22

23           6. SMUD would experience an undue hardship and risk if it were required to wait until  
24 PG&E emerged from bankruptcy before initiating the proposed FERC complaint. Although  
25 SMUD intends to request fast-track processing from FERC, which may reasonably be expected to  
26 lead to a resolution within two to three months after filing, there can be no guarantee that FERC  
27  
28

1 will grant this request. If FERC declines to fast-track the complaint, resolution may be delayed  
2 for a substantial additional period. SMUD needs to file its FERC complaint immediately in order  
3 to permit sufficient time, in the event of an unfavorable disposition, for SMUD to make  
4 alternative arrangements for the 200 MW of capacity that will be lost when the Transmission  
5 Contract expires. Prudent industry practice requires lead time of many months to arrange for  
6 alternative sources of transmission capacity on the scale involved in this dispute.  
7

8 7. Regardless of whether the stay is lifted, PG&E is obligated to comply with all  
9 applicable FERC regulations. The only issue is whether the dispute over what those regulations  
10 require will be resolved in this Court or before FERC. There will be no harm to PG&E in  
11 submitting its dispute with SMUD before FERC. FERC is in a unique position to provide an  
12 efficient resolution of the dispute over the Transmission Contract. FERC is a specialized tribunal  
13 that handles Federal Power Act disputes of this sort as a matter of routine.  
14

15 8. In contrast, SMUD will lose important rights of first refusal under FERC guidelines if  
16 it is not permitted to seek a timely resolution of this dispute sufficiently in advance of the  
17 contract's currently scheduled expiration date.

18 9. PG&E's creditors should be indifferent to the resolution of this dispute is resolved.  
19 SMUD is not seeking monetary damages from PG&E's estate. If anything, creditors should  
20 support an extension of the Transmission Contract, because SMUD currently is paying below  
21 maximum tariff transmission prices and may have to increase its rates to posted tariff levels in  
22 order to obtain an extension.  
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28



DIAMOND MCCARTHY TAYLOR FINLEY BRYANT & LEE, L.L.P.  
909 FANNIN, SUITE 1500, HOUSTON, TEXAS 77010  
(713) 333-5100 • fax (713) 333-5199

1 I declare under penalty of perjury under the laws of the United States of America and the  
2 State of California that the foregoing is true and correct. Executed this 28<sup>th</sup> day of August, 2003,  
3 at WASHINGTON D.C.

4 Harvey L. Reiter  
5 Harvey L. Reiter

6  
7 STATE OF DISTRICT OF COLUMBIA  
8  
9 COUNTY OF \_\_\_\_\_

10 Sworn to before me, a notary public, on this 28<sup>th</sup> day of August, 2003.

11 Catherine L. Scott

12 CATHERINE L. SCOTT  
13 NOTARY PUBLIC DISTRICT OF COLUMBIA

14 My Commission expires  
15 6/30/08

