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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: No C-02-1550 VRW  
PACIFIC GAS and ELECTRIC CO, (Bankruptcy Case No 01-30923 DM)  
Appellant, Cross- Chapter 11 Case  
Appellee, Debtor and  
Debtor in Possession  
Federal ID No 94-0742640 ORDER

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The California Public Utilities Commission, the People of the State of California on behalf of a variety of interested state agencies (see Mot for Stay (Doc #100) at 1 n 1), the City and County of San Francisco and the California Hydropower Reform Coalition (collectively, movants) move, pursuant to FRBP 8017(b), for a stay of proceedings pending an appeal to the Ninth Circuit of the court's August 30, 2002, order in this matter. Doc #100. For the reasons detailed below, the motion for stay (Doc #100) is DENIED.

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## I

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2 On August 30, 2002, the court entered an order deciding  
3 an appeal by Pacific Gas & Electricity Company and Pacific Gas &  
4 Electricity Corporation (collectively, PG&E) from the bankruptcy  
5 court's Memorandum Decision Regarding Preemption and Sovereign  
6 Immunity of February 7, 2002, and subsequent order of March 18,  
7 2002. Doc #93. The court's August 30, 2002, order reversed the  
8 decision of the bankruptcy court and remanded the case to that  
9 court for further proceedings. Id. PG&E filed a request for entry  
10 of judgment on September 5, 2002. Doc #94. On September 10, 2002,  
11 movants filed a statement of non-opposition to the entry of  
12 judgment. Doc #95.

13 In a companion order issued today, the court has amended  
14 its August 30, order, pursuant to 28 USC §1292(b), to include a  
15 statement that the issue decided in that order is appropriate for  
16 immediate interlocutory review by the court of appeals. Movants  
17 now request a stay of further proceedings in this matter pending  
18 the resolution of their appeal. See FRBP 8017(b).

## II

19  
20  
21 Federal Rule of Bankruptcy Procedure 8017(a) provides for  
22 an automatic 10 day stay after the entry of any judgment of a  
23 district court on a bankruptcy appeal. FRBP 8017(a). Section  
24 8017(b) allows for a more extended stay upon motion by one of the  
25 parties to the appeal. FRBP 8017(b). The 8017(b) stay, if  
26 granted, may extend no longer than "30 days after the entry of  
27 judgment of the district court \* \* \* unless the period is extended  
28 for cause shown." Id. If, however, the party who obtains the stay

1 files an appeal of the judgment before the expiration of the stay  
2 period, then the stay remains in effect until the court of appeals  
3 reaches a decision on the appeal. Id.

4 The Federal Rules of Bankruptcy Procedure also provide  
5 for a 10 day stay of proceedings upon the entry of an order by a  
6 bankruptcy court confirming a reorganization plan, unless the  
7 bankruptcy court orders otherwise. See FRBP 3020(e). As the  
8 Advisory Committee to the 1999 amendments to the Federal Rules of  
9 Bankruptcy Procedure explained, the goal of section 3020(e) is "to  
10 provide sufficient time for a party to request a stay pending  
11 appeal of an order confirming a plan \* \* \* under chapter 11 of the  
12 Code before the plan is implemented and an appeal becomes moot."  
13 FRBP 3020(e), Adv Comm Notes, 1999 Amend. As this explanatory note  
14 makes plain, the rule expressly provides for a 10 day period during  
15 which parties potentially aggrieved by a bankruptcy court's  
16 confirmation of a reorganization plan may seek a stay pending  
17 appeal.

18 To justify a stay of proceedings under FRBP 8017(b),  
19 movants must meet the terms of a test virtually identical to that  
20 for a preliminary injunction. Movants must show a likelihood of  
21 success on the merits and the possibility of irreparable injury  
22 were the stay denied or, in an alternative formulation of the same  
23 standard, serious legal questions and a balance of hardships were  
24 the stay denied. See In re KAR Dev Assoc, LP, 182 BR 870, 872 (D  
25 Kan 1995); In re Winslow, 123 BR 647 (D Colo 1991) (holding that  
26 the test for a stay under FRBP 8017 is the same as that under FRBP  
27 8005); Lopez v Heckler, 713 F2d 1432, 1435 (9th Cir 1983), rev'd on  
28 other grounds, 463 US 1328 (1983) (noting the common language of

1 the test for stay pending appeal and the test for a preliminary  
2 injunction).

3           As with the test for a preliminary injunction, the test  
4 for a stay pending appeal is susceptible to different formulation.  
5 See, e g, Oakland Tribune, Inc v Chronicle Publishing Co, 762 F2d  
6 1374, 1376 (9th Cir 1985). "Under any formulation of the test,  
7 plaintiff must demonstrate that there exists a significant threat  
8 of irreparable injury." Id (citations omitted). If movants fail  
9 to meet the "minimum showing" of a threat of irreparable injury,  
10 the court "need not decide whether [movants are] likely to succeed  
11 on the merits." Id.

12           For the purpose of its analysis and given the relative  
13 novelty and complexity of the issues addressed by the court's  
14 August 30, 2002, order, the court assumes arguendo that movants  
15 have adequately met their burden of demonstrating a likelihood of  
16 success on the merits under either formulation of the test. Even  
17 so, movants must show that they would suffer irreparable harm if  
18 denied a stay; that they cannot do.

19           The essence of movants' argument is that if the court  
20 does not grant an immediate stay pending appeal, the course of  
21 further bankruptcy proceedings may proceed at such a pace that any  
22 appealable issues will have become moot by the time movants are in  
23 a position to raise them. If it "is apparent that absent a stay  
24 pending appeal \* \* \* the appeal will be rendered moot," that  
25 circumstance is, as movants note, "the quintessential form of  
26 prejudice" justifying a stay. *In re Country Squire Associates of*  
27 *Carle Place, LP*, 203 BR 182, 183 (2nd Cir BAP 1996) (internal  
28 quotation marks and citations omitted). To demonstrate such

1 prejudice, however, movants must make apparent to the court the  
2 imminent danger that the issues movants seek to raise on appeal  
3 will become moot.

4           The Ninth Circuit has identified two circumstances in  
5 which dismissal for mootness of an appeal from bankruptcy  
6 proceedings involving a reorganization plan is warranted: (1) "if a  
7 party opposing a reorganization plan has failed to obtain a stay  
8 pending appeal, and the plan has been carried out to substantial  
9 [consummation];" and (2) if "an appellant neglected to obtain a  
10 stay pending appeal and the rights of third parties have  
11 intervened." *In re Arnold & Baker Farms*, 85 F3d 1415, 1419-1420  
12 (9th Cir 1996) (internal quotation marks and citations omitted);  
13 see also *In re Baker & Drake, Inc*, 35 F3d 1348, 1351 (9th Cir  
14 1994).

15           Movants attempt to demonstrate the imminence of mootness  
16 by arguing that "if the bankruptcy court confirms PG&E's proposed  
17 plan and PG&E begins its disaggregation, a court may find that  
18 PG&E's plan will have been substantially consummated, rendering the  
19 appeal moot." Mot for Stay (Doc #100) at 10. As movants' phrasing  
20 concedes, however, this eventuality is, at the moment, entirely  
21 hypothetical. The bankruptcy court has not, in fact, confirmed  
22 PG&E's reorganization plan. Indeed the bankruptcy court has  
23 expressed its intention to consider the California Public Utility  
24 Commission's reorganization plan before taking up PG&E's proposal.  
25 See Lopes Decl (Doc #107), ¶3. And the fact that PG&E has begun  
26 preparations for a possible disaggregation, as PG&E points out,  
27 "should surprise nobody given the size and complexity of the case"  
28 and the difficulties that will attend PG&E's restructuring whatever

1 form it may take. Opp (Doc #106) at 7. The fact that PG&E is  
2 taking preparatory steps toward reorganization in anticipation of a  
3 favorable decision by the bankruptcy court coupled with no more  
4 than the possibility that the bankruptcy court may confirm PG&E's  
5 reorganization plan do not together amount to a demonstration that  
6 the issues movants wish to raise on appeal are in imminent danger  
7 of becoming moot before they can be heard.

8           Additionally, the Federal Rules of Bankruptcy Procedure  
9 provide a party to a bankruptcy proceeding in which the bankruptcy  
10 court approves a reorganization plan a built-in opportunity to move  
11 for a stay pending appeal, an opportunity guaranteed to become  
12 available to movants. See FRBP 3020(e). The automatic 10 day stay  
13 that follows an order confirming a bankruptcy reorganization plan  
14 as provided by rule 3020(e) exists precisely to serve as a backstop  
15 against the potential problem about which movants complain. That  
16 backstop becomes available to the parties, however, at the time a  
17 potential mootness problem is in real danger of becoming an actual  
18 mootness problem, namely at the moment the bankruptcy court decides  
19 to confirm the reorganization plan proposed and to begin to oversee  
20 implementation of that plan. While that backstop remains in place,  
21 the potential mootness problem of which movants complain remains  
22 remote and speculative.

23           The case on which movants chiefly rely requires a far  
24 more significant danger of mootness to demonstrate a potential  
25 irreparable injury absent a stay. In In re Roberts Farms, Inc, 652  
26 F2d 793 (9th Cir 1981), the Ninth Circuit found the dismissal for  
27 mootness of three appeals from bankruptcy proceedings appropriate  
28 on two grounds. First, the court found that the bankruptcy court's

1 "plan of arrangement has been so far implemented that it [was]  
2 impossible to fashion effective relief for all concerned" at the  
3 time an appeal was filed. Id at 797. Second, the court found that  
4 "[a]ppellants ha[d] failed and neglected diligently to pursue their  
5 available remedies to obtain a stay of objectionable orders of the  
6 Bankruptcy Court and ha[d] permitted such a comprehensive change of  
7 circumstances to occur as to render it inequitable for this court  
8 to consider the merits of their appeal." 652 F2d at 798. Plans of  
9 reorganization of PG&E have been presented to the bankruptcy court  
10 for consideration, but not adopted, let alone implemented.

11 Similarly, the court in In re Advanced Mining Systems,  
12 Inc, 173 BR 467 (SDNY 1994) entered a seven day stay pending appeal  
13 because, in that case, the court determined found that "[i]f a stay  
14 pending appeal is denied, the debtors' assets will be distributed  
15 without reserve for the [appellants'] claim." 173 BR at 468. The  
16 court found that denial of the stay would moot the appeal as a  
17 matter of course, because it would immediately drain the estate of  
18 any resources out of which to compensate the appellants. Again,  
19 such an immediate response to a bankruptcy court decision does not  
20 yet threaten movants' claims, because the bankruptcy court has yet  
21 to make such a decision, and once it does so movants will have an  
22 automatic 10 day period in which to file an appeal of that  
23 determination.

24 The absence of a showing of irreparable injury is itself  
25 sufficient to warrant denial of a motion to stay. See Oakland  
26 Tribune, 762 F2d at 1376; Lopez, 713 F2d at 1435. Were it  
27 necessary for the court to consider the other factors in the test,  
28 however, consideration of the public interest would yield the same

1 result. As the Ninth Circuit has noted, in applying the test for a  
2 motion for stay pending appeal, "the public interest is a factor to  
3 be strongly considered." Lopez, 713 F2d at 1435-1436 (citation  
4 omitted).

5 Two interests of the public weigh strongly against  
6 granting a stay of proceedings at this time. First, if the court  
7 were to issue a stay at this juncture, it would interfere with the  
8 bankruptcy court's management of the proceedings before it. The  
9 public interest in economizing judicial resource suggests that  
10 issuing a stay pending appeal of the express preemption issues,  
11 thereby requiring PG&E to move forward with and the bankruptcy  
12 court to consider PG&E's arguments for implied preemption, would  
13 serve little purpose. Resolution of this appeal by the Ninth  
14 Circuit may render those arguments wholly unnecessary. Moreover,  
15 the bankruptcy court has expressed its intention to begin  
16 consideration of proposed reorganization plans by taking up the  
17 proposal of the California Public Utility Commission first. See  
18 Lopes Decl (Doc #107), ¶3.

19 Second, the public has a significant interest in the  
20 expeditious resolution of PG&E's bankruptcy, given the size of the  
21 bankruptcy, the size of the interest costs that continue to mount  
22 as proceedings drag on and the direct connection between these  
23 proceedings and the provision of a vital public utility service.  
24 Consideration of both of these strong interests of the public  
25 dictate the same conclusion: a stay of proceedings pending appeal  
26 at this time is both premature and legally unjustified.

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III

In their reply brief, movants argue for the first time that PG&E should be judicially estopped from opposing the motion to stay, because permitting PG&E's opposition would allow PG&E to derive unfair advantage from a position clearly inconsistent with one it adopted in earlier proceedings. See Reply (Doc #109) at 6-8. The court in its discretion can decide whether to consider arguments raised for the first time in a reply brief. See Glenn K Jackson, Inc v Roe, 273 F3d 1192 (9th Cir 2001). If a court chooses to rely on materials raised for the first time in a reply brief, the opposing party must be afforded a reasonable opportunity to respond. See Beaird v Seagate Tech, Inc, 145 F3d 1159, 1164-1165 (10th Cir 1998). Because the court has concluded that movants have failed to demonstrate that they would suffer an irreparable injury if not granted a stay, the court declines to consider movants' estoppel argument.

## IV

Two other motions filed by PG&E continue to appear as pending on the court's docket: a motion to expedite hearing and determination of appeal (Doc #26) and a motion for leave to file excess pages in an opposition brief to a motion to dismiss PG&E's appeal (Doc #47). Because the court has already heard argument and ruled on the appeal at issue in the former motion, that motion (Doc #26) is TERMINATED as moot. The parties and court disposed of the latter motion by a stipulation and order dated June 6, 2002. Doc #60. Insofar as it continues to appear as pending, that motion (Doc #47) is TERMINATED as an administrative matter.

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V

For the reasons discussed above, the court DENIES  
movants' motion to stay further proceedings pending appeal of the  
court's express preemption order. Doc #100. In addition, two  
other pending motions (Docs ##26, 47) are TERMINATED.

IT IS SO ORDERED.

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VAUGHN R WALKER  
United States District Judge