

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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
OBJECTION TO LATE FILED CLAIMS

I. Introduction

Enron Energy Marketing Corp. ("EEM") and Enron Energy Services, Inc. ("EES," and with EEM, "Enron") timely filed two proofs of claim (the "Original Claims") on September 5, 2001, the claims bar date. Enron later filed two amended proofs of claim (the "Amended Claims") on February 17, 2003. Pacific Gas and Electric Company ("Debtor") objected to the allowance of the Amended Claims because they were filed out of time.¹

The matter came before the court on April 23, 2004, with the appearances of counsel noted in the record.

For the reasons summarized below, the court sustains Debtor's objections and disallows the Amended Claims as untimely.

¹ Debtor has reserved its substantive objections to the Amended Claims in the event they are deemed to be timely. Disputes regarding the Original Claims have been settled.

1 II. Facts²

2 The facts are not in dispute and will only be summarized
3 here.

4 The Original Claims are based upon Debtor's

5 "... non-payment of significant cumulative unpaid credit
6 balances that were accrued and owing prior to April 6, 2001,
the date [Debtor] filed its bankruptcy case...."

7 (Riders to Original Claims, p. 1.)

8 The riders to the Original Claims summarize the "Direct
9 Access" program and the rights, duties and obligations of the
10 parties under Energy Service Provider (ESP) Service Agreements
11 ("ESP Agreements") executed by Debtor and both EES and EEM. As
12 described in the riders, beginning in mid-2000, Debtor owed Enron
13 substantial amounts as a result of the "PX Credit," which Enron
14 estimated as of the date of Debtor's Chapter 11 filing to be in
15 excess of \$400 million.

16 The credits are based on Debtor's obligation to pay Enron for
17 electricity it did not have to provide to Enron's Direct Access
18 customers. The higher the price of electricity Debtor did not
19 have to produce or purchase, the more it was obligated to pay
20 Enron.

21 At oral argument counsel for Enron suggested that the credits
22 were based on Debtor's tariffs, while counsel for Debtor quoted
23 the riders and insisted that Enron's alleged right of recovery
24 "...arise[s] under the Energy Services Provider
25 Agreement[s](sic)...." The precise origin of the right to recover
26 the credits is not material to whether the Amended Claims should

27
28 ² The following discussion constitutes the court's findings
of fact and conclusions of law. Fed. R. Bankr. P. 7052(a).

1 be allowed as timely.

2 While each of the Original Claims reserved to Enron the right
3 to amend them "to describe the claim, including without
4 limitation, the amount thereof or the theory of recovery...."
5 (Riders to Original Claims, p. 2), there was no reference to any
6 facts pertaining to the California Public Utilities Commission's
7 ("CPUC") Direct Access Cost Responsibility Surcharge ("DA CRS")
8 described below. There was also no notice to Debtor that the
9 Original Claims might later include a demand for reimbursement
10 based upon Enron's customers' DA CRS liability. Indeed, such
11 liability was not reasonably foreseeable, either in fact, or from
12 the face of the Original Claims.

13 Nor were there any allegations that prior to Debtor's
14 bankruptcy Enron had switched its Direct Access customers to
15 Debtor's "bundled" service and thus those customers might assert
16 claims against Enron.

17 On March 9, 2001, the Regents of the University of California
18 and the Board of Trustees of the California State University (the
19 "DA plaintiffs") sued EES in the United States District Court for
20 the Northern District of California for a preliminary injunction,
21 specific performance, breach of contract, and other relief. (The
22 Regents of the University of California, et al. v. Enron Energy
23 Services, Inc. (U.S.D.C. No. C-01-1006)). The essential factual
24 allegations of that lawsuit were that EES terminated the DA
25 plaintiffs' Direct Access service and required them to obtain
26 electric service from Debtor under Debtor's bundled service
27 arrangement. The DA plaintiffs principally sought a return to
28

1 Direct Access service.³ That litigation was settled approximately
2 three months after it was filed, with the DA plaintiffs reserving
3 any claim they may have then had or in the future might have
4 against EES for losses or assessments incurred as a result of
5 their being returned to bundled service, and which damages would
6 be based upon energy purchased by the California Department of
7 Water Resources ("CDWR") between February and June, 2001, a
8 critical component of CPUC's assessment of the DA CRS.

9 Beginning in January, 2002, the CPUC commenced proceedings to
10 deal with various Direct Access issues. After several months of
11 administrative proceedings, the CPUC issued a decision on November
12 7, 2002 (D. 02-11-022) which imposed the DA CRS on various parties
13 that had received bundled service during certain periods of early
14 2001. By that same time, some of Enron's former customers had
15 filed claims (the "Surcharges Claims") in Enron's Chapter 11 case⁴
16 seeking reimbursement DA CRS obligations for which they ultimately
17 may be found liable as a result of their return to bundled
18 service.

19 Enron filed the Amended Claims which are in the nature of
20 indemnity claims against Debtor to the extent Enron may be liable
21 to its own former customers who have asserted the Surcharges
22 Claims based upon their liability for the DA CRS. While Enron
23 disputes liability to its former customers and continues to
24

25 ³ While the parties have not provided the court with any
26 evidence that the DA plaintiffs sued EEM, there is no contention
27 that Enron (as defined herein) was unaware of the litigation.

28 ⁴ Enron and other affiliates filed Chapter 11 cases in the
Southern District of New York on December 2, 2001.

1 contest the Surcharges Claims vigorously, it contends that Debtor
2 is liable to it for any of its liability on the Surcharges Claims
3 as additional damages resulting from Debtor's failure to pay the
4 unpaid credit balances reflected in the Original Claims. The
5 total of the Amended Claims based upon Enron's own potential
6 exposure on the Surcharges Claims was originally estimated to be
7 at least \$510 million.⁵

8 III. Discussion

9 Enron contends that under Fed. R. Bankr. P. 7015, which
10 incorporates F.R.C.P. 15(c) and which in turn may be made
11 applicable to claims objections as contested matters by Fed. R.
12 Bankr. P. 9014(c), the Amended Claims relate back to the Original
13 Claims, and thus may be deemed timely. Debtor does not contest
14 the availability of F.R.C.P. 15(c) but simply contends that there
15 is no relation back here.

16 In the alternative, Enron contends that because the
17 Surcharges Claims were not foreseeable until well after the claims
18 bar date, the Amended Claims may be allowed as late filed claims
19 under the doctrine of "excusable neglect" as articulated by the
20 United States Supreme Court in Pioneer Inv. Servs. Co. v.
21 Brunswick Assoc. Ltd. Co., 507 U.S. 380 (1993) and the many cases
22 that have followed that decision.

23 A. The Amended Claims Do Not Relate Back To The Original
24 Claims.

25 The Original Claims are essentially breach of contract claims

26
27 ⁵ As a result of the settlement among Debtor and Enron and
28 other of its affiliates which has been approved by this court and
by the Enron Chapter 11 court, the potential liability of Debtor
to Enron based upon the Amended Claims is capped at \$30 million.

1 based upon Debtor's undisputed failure to pay cumulative unpaid
2 credit balances owed to Enron. If those claims are based on
3 tariffs and CPUC decisions, rather than the terms of the ESP
4 Agreements, the essence is the same, namely, non-payment of money
5 due. The operative facts supporting either theory are not
6 contested: Debtor owed the credits; Debtor did not pay the
7 credits; Enron filed the Original Claims based upon nonpayment of
8 the credits.

9 The theory underlying the Amended Claims is much more
10 complex, and involves a sequence of subsequent events, no facts of
11 which have been pleaded in the Original Claims: Enron's switching
12 of its customers from Direct Access service to bundled service in
13 early 2001; whether such switching was necessary; the subsequent
14 commencement of administrative proceedings by the CPUC in early
15 2002; the imposition of the DA CRS obligations by the CPUC late in
16 2002; the assertion of the Surcharges Claims by Direct Access
17 customers against Enron beginning in the Fall of 2002; finally,
18 Enron's claims for reimbursement against Debtor in the Amended
19 Claims in February, 2003.

20 The parties rely on the same cases to reach opposite results.
21 For example, Martell v. Trilogy Ltd., 872 F.2d 322, 324-25 (9th
22 Cir. 1989) stands for the proposition that the first sentence of
23 F.R.C.P. 15(c) controls the relation back of an amendment seeking
24 to state a new claim against an original defendant. A new claim
25 must be based upon a common core of operative facts. It is the
26 operative facts that control the question of relation back, not
27 the theory of liability applied to those facts. Santana v.
28 Holiday Inn, Inc., 686 F.2d 736, 739 (9th Cir. 1982) ("Once the

1 defendant is in court on a claim arising out of a particular
2 transaction or set of facts, he is not prejudiced if another
3 claim, arising out of the same facts, is added.") Stated
4 otherwise, the court is to determine whether the amendment is
5 transactionally related to the original pleading. Similarly,
6 Percy v. San Francisco General Hospital, 841 F.2d 975, 978 (9th
7 Cir. 1988), directs the court to compare the original complaint
8 (Original Claims here) with the amended complaint (Amended Claims
9 here) to decide whether the claim to be added will likely be
10 proved by the same kind of evidence offered in support of the
11 original pleading. And in Dominquez v. Miller (In re Dominquez),
12 51 F.3d 1502, 1510 (9th Cir. 1995), the court makes reference to
13 the "same kind of evidence" as necessary to relate back the later
14 claim to the earlier one. Under these well-settled principles
15 there must be facts alleged in the Original Claims that would
16 reasonably alert Debtor to the possibility of assertion of new
17 theories based upon those facts to support the Amended Claims,
18 whether or not those facts or events were foreseeable. There were
19 none.

20 The court agrees with Debtor that a substantial quantum of
21 additional proof is necessary. The court disagrees with Enron,
22 which contends that the termination of customers from Direct
23 Access service to bundled service was part of its obligation to
24 mitigate its damages. The fallacy with this argument is that
25 Debtor's nonpayment of the credits has little to do with what
26 ultimately caused the CPUC to direct that the Direct Access
27 customers pay the DA CRS as a share of the increased energy costs
28 occasioned by the energy crisis and the subsequent purchase of

1 electricity by the CDRW. In other words, even if Debtor had never
2 defaulted on the Direct Access credit obligations to Enron, it may
3 well have followed that Direct Access customers would have been
4 switched back to bundled service and the CPUC may well have
5 reached the same conclusion regarding the imposition of the DA CRS
6 on former Direct Access customers. Enron begs the question by
7 arguing that the Amended Claims merely seek to recover additional
8 damages resulting from Debtor's breach of its obligation to pay
9 the credits. To show that those additional damages result from
10 Debtor's breach requires different evidence. That evidence will
11 not be found within the core of operative facts supporting the
12 Original Claims.

13 In summary the court concludes that the Amended Claims do not
14 sufficiently relate to the Original Claims for purposes of
15 F.R.C.P. 15(c).

16 B. The Amended Claims May Not Be Treated As Timely Under
17 The Excusable Neglect Theory.⁶

18 As well known to the parties, and as has been raised in
19 numerous objections to late filed claims in this Chapter 11 case,

20 _____
21 ⁶ Apart from its excusable neglect theory, Enron also argues
22 that somehow the Amended Claims should be allowed as timely under
23 the long-standing liberal Ninth Circuit policy of allowing
24 amendments of timely informal proofs of claim. See County of Napa
25 v. Franciscan Vineyards, Inc. (In re Franciscan Vineyards), 597
26 F.2d 181 (9th Cir. 1979) and other cases following Franciscan
27 Vineyards. Since there is no evidence of any informal proof of
28 claim to amend to add the Amended Claims, this argument is
unavailing. If Enron is arguing that the Original Claims are
informal proofs of claim that are capable of out-of-time
amendment, then its whole argument under F.R.C.P. 15(c) would be
unnecessary. See also Hi-Tech Communications Corp. v.
Poughkeepsie Business Park, LLC (In re Wheatfield Business Park,
LLC), ____ B.R. ____, 2004 W.L. 825970, 4 C.D.O.S. 3313
(misdirected formal proof of claim treated as informal proof of
claim for purposes of liberal rule of amendment).

1 the Pioneer decision directs the court to consider excusable
2 neglect after consideration of various factors, including the
3 reason for the delay; the danger of prejudice to the debtor; the
4 length of delay and its impact on judicial proceedings; and
5 whether the claimant acted in good faith. Pioneer, 507 U.S. at
6 395. Enron bears the burden of presenting facts demonstrating
7 excusable neglect. Key Bar Invs., Inc. v. Cahn (In re Cahn), 188
8 B.R. 627 (9th Cir. BAP 1995).

9 The reason for the delay in filing the Amended Claims goes
10 directly to the heart of the nature of those claims themselves⁷,
11 namely the post-bar date developments at the CPUC and its
12 subsequent imposition of the DA CRS on various Direct Access
13 customers. Yet when EES was sued in March, 2001, Enron was put on
14 notice that the DA plaintiffs wished to return to Direct Access
15 service and that it was being accused of transferring the DA
16 plaintiffs' accounts from Direct Access to the bundled service, in
17 apparent violation of their rights under their agreements with
18 EES. In addition to seeking injunctive relief, the DA plaintiffs
19 charged EES with breach of contract and breach of the implied
20 covenant of good faith and fair dealing, and prayed for actual
21 damages "as a result of [EES'] breach to perform [sic] its duties
22 and provide Direct Access services ... not for less than \$75,000."
23 The DA plaintiffs also sought attorneys' fees, costs and

24
25
26

27 ⁷ Enron's claims in the Amended Claims arose pre-petition
28 (In re Jensen, 995 F.2d 925 (9th Cir. 1993); Hassanally v.
Republic Bank, 208 B.R. 46 (9th Cir. BAP 1997)).

1 litigation expenses.⁸ That litigation was settled in mid-2001
2 (before the claims bar date in Debtor's Chapter 11 case) and the
3 DA plaintiffs reserved their right to seek damages against EES for
4 any losses or assessments that might follow. While the CPUC
5 proceedings had not formally begun by then, this was Enron's first
6 warning of a potential liability based on the events of early 2001
7 and arising out of Debtor's non-payment of the credits and Enron's
8 transfer of its customers to bundled service.

9 Then, in January, 2002, the CPUC began proceedings that
10 eventually resulted in the imposition of the DA CRS later the same
11 year. That was another clear early warning to Enron that it may
12 have claims over against Debtor based on what might unfold at the
13 CPUC. Finally, by October, 2002, when former customers of Enron
14 began filing their Surcharges Claims, there could be no doubt
15 about Enron's potential liability and the possibility of seeking
16 indemnity from Debtor.⁹

17 The only somewhat persuasive reasons Enron puts forth to
18 justify the delay in asserting the Amended Claims is the sheer
19 size of the Chapter 11 cases of Enron and its affiliates, the vast
20

21 ⁸ Counsel for Enron has argued that the primary purpose of
22 the litigation was injunctive relief and the restoration of Direct
23 Access service. He also contends that the ultimate settlement of
24 that litigation was designed to insure that the DA plaintiffs
25 would have Direct Access service and that Enron would be able to
26 continue to provide it. That may be so, but there plainly was an
27 allegation of money damages occasioned by the alleged breach of
28 contract by EES.

⁹ The court rejects Debtor's theory that such claims were
asserted as early as July, 2002, since the evidence supporting
that contention is a proof of claim filed by The Lurie Company
based upon rejection of retail energy/sales contracts, and not
based upon Surcharges Claims.

1 number of claims filed in those cases and the limited resources
2 available to them. While those contentions are not supported by
3 competent evidence, they have not been challenged by Debtor and
4 are accepted as true. But Debtor counters that the Surcharge
5 Claims represented a huge portion of at least EES's total
6 liability, and notes that Enron and its affiliates did file
7 numerous timely claims in this case. It also contends that other
8 energy service providers timely filed claims based on theories
9 similar to those of the Amended Claims, illustrating that it was
10 not unreasonable for such claims to have been anticipated in a
11 timely manner.

12 On balance, Enron has not justified the delay from mid-2001
13 at the earliest, or even from early 2002, until February, 2003,
14 when it filed the Amended Claims. The court weighs these two
15 interrelated Pioneer factors (reasons for and length of delay) in
16 Debtor's favor.

17 As to prejudice to the Debtor, Enron argues that Debtor has
18 settled its differences with the CPUC and obtained confirmation of
19 its Plan of Reorganization. It then stresses that creditors will
20 not be affected since Debtor intends to pay them in full plus
21 interest. Debtor concedes that even if it is obligated to pay up
22 to \$30 million on the Amended Claims, the success of its
23 reorganization will not be threatened. It argues without
24 substantiation that significant costs will be incurred by the
25 estate if numerous party claimants are allowed to assert late
26 claims of the type asserted by Enron. Nevertheless Debtor offers
27 no evidence of any similar claims and in fact cites only to
28 pending objections on the merits (rather than on timeliness) of a

1 claim filed by Boston Properties Limited Partnership, a former
2 Direct Access customer of Debtor. The court weighs this Pioneer
3 factor narrowly in favor of Enron.

4 On the Pioneer factor of good faith, Debtor contends that
5 Enron has failed to demonstrate good faith and thus has not
6 carried its burden. The court will not weigh this factor against
7 Enron absence evidence to the contrary. It is inconceivable that
8 a Chapter 11 debtor in possession would knowingly or intentionally
9 ignore the opportunity to assert a multi-million dollar claim in a
10 solvent Chapter 11 case such as Debtor's.

11 On balance, while the last two factors tip slightly in
12 Enron's favor, the authorities construing Pioneer weigh the
13 reasons for the delay factor most heavily. See Graphic
14 Communications Int'l Union, Local 12-N v. Quebecor Printing
15 Providence, Inc., 270 F.3d 1 (1st Cir. 2001), and cases cited
16 therein. Given that Enron had early warning about the potential
17 for liability on its Surcharges Claims, and thus the basis on
18 which to assert indemnity claims against Debtor, and rather weak
19 justification for waiting until February, 2003, the court balances
20 the totality of the Pioneer factors in favor of Debtor and
21 determines that the doctrine of excusable neglect will not save
22 Enron and justify allowance of the Amended Claims.

23 IV. Conclusion

24 For the reasons stated above, Enron's Amended Claims must be
25 excluded from participation in this Chapter 11 case because they
26 neither relate back to the timely filed Original Claims nor is the
27 late filing of the Amended Claims excusable. The court is
28 concurrently issuing an order disallowing the Amended Claims

1 consistent with this memorandum.

2 Dated: May 14, 2004

3 S/ _____
4 Dennis Montali
5 United States Bankruptcy Judge
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28