



Signed and Filed: April 28, 2005

Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re)	
)	Bankruptcy Case
PACIFIC GAS & ELECTRIC COMPANY,)	No. 01-30923DM
a California corporation,)	
)	Chapter 11
Debtor.)	
)	

MEMORANDUM DECISION ON
SUBSTANTIAL CONTRIBUTION MOTION

I. Introduction

The City of Palo Alto ("Palo Alto") filed a Motion Of The City Of Palo Alto For Order Directing Payment Of Reasonable Attorneys' Fees And Costs Pursuant To Section 503(b)(3)(D), 503(b)(3)(F) And 503(b)(4) (the "Motion"), together with a supporting Memorandum of Points and Authorities and a Declaration of Grant Kolling (the "Kolling Declaration"). The Motion was opposed by Pacific Gas & Electric Company ("PG&E"). The former Official Committee of Unsecured Creditors ("Committee") filed Comments regarding the Motion and other similar motions filed by other parties.

The Motion came on for hearing on March 8, 2005. Palo Alto was represented by G. Larry Engel, Esq., one of its attorneys; PG&E was represented by William J. Lafferty, Esq., one of its attorneys. The Committee did not appear.

1 For the reasons explained below, the Motion will be denied.

2 II. Background¹

3 PG&E filed its Chapter 11 petition on April 6, 2001, and
4 shortly thereafter the United States Trustee appointed the
5 Committee. Palo Alto was member of the Committee; the Committee
6 and Palo Alto each retained its own counsel.

7 PG&E's Chapter 11 Plan of Reorganization (the "Settlement
8 Plan") was confirmed by an order of the court on December 22,
9 2003, following lengthy and contested confirmation trials on
10 earlier plans, a lengthy settlement conference before a bankruptcy
11 judge of this district, and a further contested trial on the
12 Settlement Plan.

13 Palo Alto is proceeding under alternative provisions of the
14 Bankruptcy Code on the Motion. Section 503(b)(3)(D) permits the
15 court to allow "actual, necessary expenses, other than
16 compensation and reimbursement specified in paragraph (4) of this
17 subsection, incurred by ... (D) a creditor ... in making a
18 substantial contribution in a case under Chapter ... 11 of this
19 title." Palo Alto is undisputably a creditor of PG&E and thus
20 believes it is entitled to proceed under this subsection. In the
21 alternative, it seeks the same recovery under Bankruptcy Code
22 section 503(b)(4), which authorizes the court to allow "reasonable
23 compensation for professional services rendered by an attorney or
24 an accountant of an entity whose expense is allowable paragraph

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28 ¹ The following discussion constitutes the court's findings
of fact and conclusions of law. Fed. R. Bankr. P. 7052(a).

1 (3) of this subsection"² During this case Palo Alto employed
2 three law firms as its bankruptcy counsel, but its principal
3 counsel throughout the entire case was Mr. Engel, who was a member
4 of each of those three firms in sequence. These claims asserted
5 in the Motion will be referred to as the "Substantial Contribution
6 Claims."

7 Palo Alto also seeks recovery under Bankruptcy Code section
8 503(b)(3)(F), which authorizes the court to award compensation to
9 a member of a committee appointed under section 1102 of the
10 Bankruptcy Code, "... if such expenses are incurred in the
11 performance of the duties of such committee." This theory of
12 recovery by Palo Alto will be referred to as its "Committee
13 Claim."

14 Palo Alto thus seeks compensation for its services as a
15 member of the Committee and contends that it should be compensated
16 for its opposition to PG&E's original proposed plan of
17 reorganization as well as the subsequent plans considered by the
18 court; it also contends that it provided a dynamic for the
19 ultimate resolution of this complex Chapter 11 case through court
20 supervised settlement conferences, much in the same way that
21 Dynegy Power Marketing, Inc. ("Dynegy") has sought compensation.³

23 ² Even if a creditor does not have any expenses to recover
24 under section 503(b)(3), the creditor's professionals may still
25 recover compensation under section 503(b)(4). Law Offices of Neil
Vincent Wake v. Sedona Institute (In re Sedona Institute), 220
B.R. 74 (9th Cir. BAP 1998).

26 ³ At a hearing on March 8, 2005, the court heard Dynegy's
27 substantial contribution motion and denied it on the record
28 although as of this date no written order has been issued. To the
extent that Palo Alto supports its Motion by the arguments that
Dynegy advanced, namely that it should be given credit for

1 Palo Alto also claims that it pointed out flaws in PG&E's various
2 plans and that it provided criticisms of the plan sponsored by the
3 California Public Utility Commission ("CPUC") and the Committee
4 (the "CPUC/Committee Plan"). Finally, it contends that its
5 counsel's role at trial during an examination of the Committee's
6 financial advisor prevented the CPUC/Committee Plan confirmation
7 effort from failing, and it should be compensated for that as
8 well.

9 After describing the foregoing efforts generally in the
10 Motion, Palo Alto then turns to more specific categories and
11 divides its Motion into the following:

12 (1) Moderating and ultimately defeating PG&E's first
13 attempted plan of reorganization (the "PG&E Litigation Plan");

14 (2) Moderating the CPUC/Committee Plan so that it could
15 become the foundation for the Settlement Plan;

16 (3) Improving the Settlement Agreement that was the
17 centerpiece of the Settlement Plan; and

18 (4) Preventing or moderating the adverse effects of various
19 of PG&E's excessive actions that were not in the best interest of
20 creditors.

21 The court will address each of those four categories in turn,
22 but first must underscore a point made by Palo Alto in its Motion,

23 _____
24 suggesting and encouraging the court ordered settlement
25 conference, the Motion will be denied for the same reasons stated
26 on the record in the Dynegy hearing. Specifically, the court
27 observed then, and repeats now, that settlement and settlement
28 conferences are part of the fabric of bankruptcy and indeed the
court itself considered ordering the parties to a settlement
conference before being asked to do so by the Committee, Dynegy or
anyone else. Neither Dynegy nor Palo Alto can establish a
Substantial Contribution Claim under section 503(b)(3) or (4) for
suggesting or supporting a court supervised settlement conference.

1 which point is consistent with Palo Alto's theme almost from the
2 start of this case. That theme is one of David vs. Goliath, and
3 Palo Alto would have the court conclude that it has reined in the
4 giant and now must be compensated:

5 Therefore, by its opposition to the PG&E Litigation Plan and
6 by keeping the prospect of a competing alternative plan
7 viable, as well as a 'Plan C' fallback, Palo Alto helped save
8 everyone from even more prolonged litigation over PG&E's
9 audacious disaggregation/deregulation agenda. Furthermore,
10 Palo Alto's objections with respect to actual and threatened
11 PG&E actions also served to moderate PG&E's aggressiveness
12 and thereby reduced PG&E's liability, including with respect
13 to the congestion and related transmission-pricing problems
14 strategically created by PG&E.

15 Motion 6:7-13 (Emphasis added; footnote omitted.)

16 The Committee's Comments spread the credit much more widely,
17 pointing out that each member of the Committee undertook a duty to
18 protect the rights and interests of all unsecured creditors, and
19 each member accepted appointment knowing it would be called upon
20 to make "an extraordinary level of commitment in this large
21 complex case." The Committee alluded to the substantial expense
22 incurred by all members, including their hiring of outside
23 attorneys to represent not only their individual interests, but to
24 provide them with advice concerning their activities on and
25 service as members of the Committee. The Committee added that the
26 significant commitments made by all members were such that it
27 would not be equitable for certain members to be awarded payment
28 or reimbursement on account of those efforts. The Committee
mentioned and the court accepts as true, that the Committee acted
as a whole, and actions for the Committee should not be attributed
to any individual member. The Committee operated through various
members and professionals, and no one Committee member or any of

1 the Committee's professionals can take individual credit for the
2 results.⁴

3 The Committee does acknowledge that Palo Alto assisted the
4 Committee during the confirmation trial by cross-examining the
5 Committee's financial expert to help clarify points that it
6 concedes and Palo Alto contends needed to be established in the
7 trial record.⁵

8 III. Discussion

9 A "substantial contribution" to the bankruptcy case by the
10 creditor is the sine qua non of recovery under section 503(b).
11 See 2 Norton Bankruptcy Law & Practice 2d § 42:28 (1997) ("The
12 preeminent question to be asked before awarding professional
13 compensation under § 503(b)(4) is whether the services resulted in
14 an actual, direct and demonstrable benefit to the estate."). A
15 creditor's request under this section should be allowed only if
16 the creditor demonstrates by a preponderance of the evidence that
17 the expenses were incurred in an endeavor that "provide[d]
18 tangible benefits to the bankruptcy estate and the other unsecured
19 creditors." In re Catalina Spa & R.V. Resort, Ltd., 97 B.R. 13,

21 ⁴ The court is deciding Palo Alto's Motion on its own
22 merits, and does not deny the Motion because other Committee
23 members (other than Dynegy) did not assert Substantial
24 Contribution Claims or Committee Claims.

25 ⁵ Because the court has decided to deny the Motion for the
26 reasons discussed in this Memorandum Decision, it will not discuss
27 PG&E's objection that the Motion provides no adequate breakdown of
28 the specific time records accompanying the Motion to assess
section 503(b)(4)'s requirement that the compensation be
reasonable "... based on the time, the nature, the extent, and the
value of such services." The court notes, in passing, that PG&E's
point is well taken, and were the court inclined to grant the
Motion generally, this problem with the supporting documentation
might have presented further difficulties for Palo Alto.

1 17 (Bankr. S.D. Cal. 1989).

2 The measure of any "substantial contribution" is the extent
3 of the benefit to the estate. Cellular 101, Inc. v. Channel
4 Communications, Inc. (In re Cellular 101, Inc.), 377 F.3d 1092,
5 1096 (9th Cir. 2004) (quoting In re Christian Life Ctr., 821 F.2d
6 1370, 1373 (9th Cir. 1987)). That benefit does not necessary have
7 to lead to confirmation of a plan; it could also be a substantial
8 contribution if a party uncovered facts that would lead to denial
9 of confirmation. Id. at 1097 (citation omitted).⁶ As the
10 following will demonstrate, the problem for Palo Alto on the
11 present record is that the court cannot call Palo Alto's
12 contribution "substantial."

13 (1) Moderating/Defeating the PG&E Litigation Plan

14 Palo Alto argues that it raised certain discrete challenges
15 (gas and electric transmission matters, nonassignable franchises
16 issues, etc.), and that had the PG&E Litigation Plan gone forward,
17 PG&E would have been stopped it in its tracks by Palo Alto's
18 formidable defenses. But the PG&E Litigation Plan did not go
19 forward, and the court never was called upon to grant or deny
20 confirmation of that plan. Thus, the court finds it very
21 speculative to conclude that a substantial contribution was made

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23 ⁶ It remains unclear whether a creditor's motivation is
24 dispositive or even relevant in deciding whether to allow a
25 substantial contribution claim. The concurrence in Cellular 101
26 discussed the issue but the majority held that it did not need to
27 resolve the issue because the extent to which the estate was
28 benefitted clearly outweighed the benefit to the party making the
contribution. Cellular 101, 377 F.3d 1097-98 (majority) and 1098-
99 (concurrence). This court has never questioned Palo Alto's
motives and assumes, for purposes of this discussion, that the
actions described in its Motion reflect a motivation that would
not be insufficient for purposes of Section 503(b).

1 in defeating a plan that was never defeated and upon which the
2 court made no ultimate definitive ruling. For these reasons Palo
3 Alto's attempts to recover a Substantial Contribution Claim for
4 the first category described above must fail.

5 (2) Moderating CPUC/Committee Plan

6 Palo Alto claims to have moderated the CPUC/Committee Plan.
7 That statement is easy to make in the abstract; the Motion itself
8 is extremely vague and affords the court no basis on which to
9 grant the requested relief. Palo Alto says that this court can
10 call upon its own recollections and observations and reach the
11 conclusion Palo Alto desires. Without commenting on the court's
12 own memory and powers of recall, the record must establish those
13 facts, for without a record a decision would be virtually immune
14 from appellate review. Palo Alto has not carried its burden on
15 this theory of recovery.

16 (3) Improving the Settlement Agreement/Settlement Plan

17 Palo Alto argues that it improved the Settlement Plan by
18 focusing on ambiguities in the proposed Settlement Agreement. It
19 further contends that improvements in the final Settlement
20 Agreement would not have been possible without its efforts.

21 As with the prior category, the assertions are vague. In
22 footnote 18 of the Motion Palo Alto says that some changes it
23 urged were adopted. No details are provided.

24 More importantly, the court does not have the perception (nor
25 does the record establish) that Palo Alto's efforts in this regard
26 decisively contributed to the result. The court is aware that
27 Palo Alto and the other Municipal Objectors took the lead on the
28 issues addressed in part VI.A.4. of the court's original and

1 amended Memorandum Decision Approving Settlement Agreement and
2 Overruling Objections to Confirmation of Reorganization Plan. In
3 re Pacific Gas & Elec. Co., 304 B.R. 395, 413-16 (Bankr. N.D. Cal.
4 2004) (portion entitled "Specific Provisions of the Settlement
5 Agreement"). The court overruled those objections. Id.

6 Palo Alto's objections to the Settlement Agreement may have
7 implicitly suggested a narrow interpretation of the Settlement
8 Agreement. That arguably may have helped to assure that the
9 Settlement Plan would be confirmable, by reinforcing the court's
10 own conclusion that the Settlement Agreement did not violate
11 California law or the Bankruptcy Code. The trouble for Palo Alto
12 is that the court had already reached those conclusions. See id.
13 at 404-412. Palo Alto has not shown that the outcome for
14 creditors and the estate would have been any different if it had
15 never objected.

16 The court assumes without deciding that Palo Alto's suggested
17 changes to or interpretations of the Settlement Agreement might
18 contribute to its and the Municipal Objectors' future
19 relationships as customers, competitors, and local regulators of
20 PG&E. That is different from benefitting creditors or the estate.

21 Palo Alto has not established that its alleged improvements
22 to the Settlement Agreement and Settlement Plan resulted in a
23 cognizable and substantial benefit to creditors or the estate.
24 Therefore, the court is unable to make a finding favorable to Palo
25 Alto in this category.

26 (4) Other Substantial Contribution Claims and Committee Claim

27 As noted above, the fourth category for which Palo Alto
28 asserts a Substantial Contribution claim is described generally as

1 "preventing or moderating adverse effects" of PG&E's activities.
2 The only real specifics here pertain to what Palo Alto's counsel
3 calls the salvaging of a witness's testimony who, on direct
4 examination by the CPUC and the Committee, failed to demonstrate
5 how the CPUC/Committee Plan could be confirmed. That argument
6 overlooks the facts that the court invited the CPUC and the
7 Committee to move to reopen their case, and thus present the same
8 testimony, and that the court never was called upon to rule on the
9 confirmability of the CPUC/Committee Plan at all. This prevents
10 the court from finding that Palo Alto established a Substantial
11 Contribution Claim by the examination of a witness.⁷

12 From the foregoing the court concludes that Palo Alto is
13 unable to recover Substantial Contribution Claims under section
14 503(b)(3) or (4). Thus it turns to Palo Alto's alternative under
15 section 503(b)(3)(F).

16 The Kolling Declaration describes beyond dispute the
17 uniqueness of this case and the particular skills and special
18 knowledge Palo Alto and its professionals brought to the case in a
19 variety of disciplines and legal specialties. The Kolling
20 Declaration also explains how the Committee welcomed Palo Alto's
21 efforts to educate it, and that it collaborated with the
22 Committee, which might otherwise have needed more help from its

23
24 ⁷ The court is not unmindful of the Committee's
25 acknowledgment of Palo Alto's efforts in this regard. However,
26 the court will not insult Palo Alto by attempting to quantify in
27 minutes or fractions of an hour (and thus in no more than hundreds
28 of dollars, on account of a request of nearly two million dollars)
the time its counsel spent in the courtroom examining that
witness, and then limiting the award to that amount. Even if the
time records were crystal clear on an allocation, the result would
be of no meaningful economic consequence to Palo Alto.

1 professionals. Despite the Kolling Declaration's statements, the
2 Committee's Comments are more persuasive. The record does not
3 reflect any particulars for which the Committee or its
4 professionals called upon Palo Alto to perform services on behalf
5 of the Committee as required by the statute ("... incurred in the
6 performance of the duties of such committee"). Absent a clear
7 indication that Palo Alto stepped up and shouldered a
8 responsibility otherwise belonging to the Committee, the court is
9 unable to grant the Motion and allow the Committee Claim.

10 IV. Conclusion

11 Despite the tenacious advocacy of Palo Alto's counsel
12 throughout this case, and the commendable efforts on his part to
13 protect his client's interest, the complexity of this case makes
14 it all the more difficult to single out any particular party whose
15 contribution can be said to be "substantial" within the meaning of
16 section 503(b) and the case law that has interpreted it. The
17 court has little doubt that counsel's contribution to his client's
18 interest was substantial; it cannot say that Palo Alto stands out
19 as having made a substantial contribution to the case or produced
20 substantial benefits to the estate.

21 Because the record does not support evidence that Palo Alto
22 acted in lieu of the Committee, Palo Alto's alternative theory for
23 the Motion must also be rejected.

24 For the foregoing reasons that Motion will be denied. PG&E's
25 counsel should submit a form of order denying the Motion for the
26 reasons stated in this Memorandum Decision, and should comply with
27 B.L.R. 9021-1.

28 **END OF MEMORANDUM DECISION**

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