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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

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

ORDER AND JUDGMENT DISAPPROVING
DISCLOSURE STATEMENT; RULE 54(b) CERTIFICATION

I. DISAPPROVAL OF DISCLOSURE STATEMENT

For the reasons stated in the court's Memorandum Decision Regarding Preemption and Sovereign Immunity filed on February 7, 2002 ("Memorandum Decision"), the Plan (as defined in the Memorandum Decision) could not be confirmed as a matter of law. Therefore the Disclosure Statement (also as defined in the Memorandum Decision) is DISAPPROVED.

II. REQUEST FOR FINAL JUDGMENT

This Order and Judgment Disapproving Disclosure Statement ("Order") is issued pursuant to Rules 54(b) and 58 of the Federal Rules of Civil Procedure and Rules 7054, 9014 and 9021 of the Federal Rules of Bankruptcy Procedure (the "Rules"), upon the Request For Final Judgment and/or Order Re Express Preemption ("Request") filed on February 21, 2002, by Debtor, Pacific Gas and

1 Electric Company ("PG&E", and with its corporate parent, PG&E
2 Corporation, "Proponents") for a separate and final order
3 regarding the matter of express preemption addressed by the
4 Memorandum Decision, which sustained the objections of the State
5 of California ("State"), the California Public Utilities
6 Commission ("CPUC"), and various other parties (collectively,
7 "Objectors") to the adequacy of the Disclosure Statement.

8 This Order is based upon rejection of Proponents' express
9 preemption theory, as explained in the Memorandum Decision, and is
10 not intended to and does not address or finally adjudicate any
11 other issues or disputes among Proponents and Objectors, including
12 but not limited to the implied preemption and sovereign immunity
13 disputes discussed in the Memorandum Decision. The latter issues
14 (and numerous other anticipated objections to confirmation based
15 on matters unrelated to preemption) remain subject to further
16 litigation, and the court reserves these issues for final rulings
17 in connection with the plan confirmation process. For purposes
18 of Rule 54(b), these are other claims within the concept of
19 multiplicity of claims, or theories, in the Plan and Disclosure
20 Statement and any future versions of them.

21 After consideration of the Request, the oral arguments
22 presented by counsel for the parties at a hearing on February 27,
23 2002, and the memorandum filed by CPUC and the City and County of
24 San Francisco ("CCSF")(and joined by State) on March 14, 2002, the
25 court concludes that it is appropriate to enter the Order as a
26 final judgment and to make the necessary determinations under Rule
27 54(b). The fact that there are apparently no reported cases
28 dealing with the particular type of contested matter presented on

1 an objection to approval of a disclosure statement, and whether
2 there can be a discrete and separate "claim" in that context, does
3 not justify denying the Request. The civil litigation and
4 bankruptcy adversary proceeding cases cited by CPUC and CCSF
5 generally involve traditional claims for relief based upon
6 historical facts presented under varying legal theories. Here,
7 instead, is an attempt to reorganize PG&E under Chapter 11 of the
8 Bankruptcy Code premised upon a business proposition,
9 disaggregation. An essential, if not indispensable feature of
10 that strategy, is the overriding of numerous state laws and
11 regulations by one powerful device, 11 U.S.C. § 1123(a). This
12 theory - now rejected by the court - is as much a claim for relief
13 in the context of a proposed Chapter 11 reorganization plan as any
14 other "cause of action" in traditional litigation seeking relief.
15 Further, although the denial of approval of a disclosure statement
16 is interlocutory (See Memorandum Decision, pp. 46-47), it is very
17 much an order that could be appealed under 28 U.S.C. § 158(a)(3)
18 or (b)(1). Thus, the court rejects CPUC's and CCSF's argument
19 that the order is not a "judgment" within the meaning of the
20 Rules.¹ The court has no doubt that the Order is a decision on a
21 cognizable "claim" asserted by Proponents that the Plan, dependent
22 upon express preemption, is confirmable. Moreover, that claim
23 will not be revisited: it is the law of this case and the court's
24 decision on that claim is final.

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¹ Rule 9001(7) provides that "'Judgment' means any
27 appealable order," and Rule 9002 provides that "Judgment" in the
28 Federal Rules of Civil Procedure "includes any order appealable to
an appellate court."

1 III. CERTIFICATION DETERMINATIONS²

2 The United States Supreme Court, in Curtis-Wright Corporation
3 v. General Electric Company, 446 U.S. 1 (1980) and the Ninth
4 Circuit, in Morrison-Knudsen Company, Inc. v. Archer, 655 F.2d 962
5 (9th Cir. 1981), have set forth the particulars to be addressed by
6 the trial court in making the Rule 54(b) certification. The court
7 addresses the particulars:

8 A. "A district court must first determine that it is dealing
9 with a 'final judgment.'" Curtis-Wright, 446 U.S. at 7. The court
10 determines that it is doing exactly that. See discussion in II,
11 supra.

12 B. The "judgment" must be a "decision upon a cognizable
13 claim for relief, and it must be 'final' in the sense that it is
14 'an ultimate disposition of an individual claim entered in the
15 course of a multiple claims action.'" Id., quoting Sears, Roebuck
16 & Co. v. Mackey, 351 U.S. 427, 436 (1956). The court determines
17 that the Order is exactly that. See discussion in II, supra.

18 C. Once the foregoing factors are established, the court
19 must answer the inquiry in Rule 54(b) whether there is any just
20 reason for delay. Curtis-Wright, 446 U.S. at 8. That requires
21 dealing with the following:

22 First, the issues and facts involved in the court's
23 Memorandum Decision regarding express preemption are separable
24 from those involved for implied preemption and other confirmation
25 and disclosure issues. The risk of overlap is minimal, given the
26 sweeping reach of Proponents' proposed preemption in the Plan.

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

1 Next, the nature of the Proponents' express preemption claims is
2 such that it is unlikely an appellate court would have to decide
3 the same issue more than once, assuming there are subsequent
4 appeals regarding any part of the disclosure and confirmation
5 process. The court has ruled on the issue of express preemption.
6 Unless reversed on appeal, the law of the case has been
7 established: there is no express preemption under 11 U.S.C.
8 § 1123(a) of all state laws that conflict with the Plan or the
9 Debtor's implementation of it if confirmed.

10 Related to the concerns about duplication of appeals is the
11 problem of whether the issues on appeal would be mooted by
12 subsequent developments in the case. Morrison-Knudsen, 655 F.2d
13 at 965, quoting Curtis-Wright, 446 U.S. at 5-6. The court
14 recognizes the possibility that pending an appeal of the express
15 preemption issue, an alternative plan might be confirmed.³ This
16 is a distinct possibility, and is a factor the court weighs
17 against making the certification. But Curtis-Wright makes clear
18 that the presence of such a factor does not make certification
19 improper. Rather, it requires the court to go further and find
20 sufficient reason for certification. Curtis-Wright, 446 U.S. at
21 8, fn. 2.

22 Here there are several compelling reasons to do so. This is
23 a Chapter 11 case of enormous significance to thousands of
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27 ³ The court takes judicial notice of Proponents' Second
28 Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy
Code for Pacific Gas and Electric Company, filed on March 7, 2002.

1 creditors owed billions of dollars.⁴ It is clearly one of the
2 largest bankruptcies in United States history, and definitely the
3 largest involving a public utility. An attempt by a utility to
4 free itself from state regulation to the extent contemplated in
5 the Plan is virtually without precedent. Further, PG&E expects to
6 pay creditors in full with interest, but already this case is
7 nearly a year old and further delay should be avoided. Creditors
8 have a real economic interest in a speedy resolution of the case.
9 If a court on appeal believes that express preemption is available
10 here, the rule of law should be settled forthwith.

11 Next, as proponents point out, the court's ruling on express
12 preemption raises the evidentiary burden they must sustain to
13 obtain plan confirmation premised upon implied preemption. If
14 this court's decision is going to be reversed, then PG&E and its
15 creditors should not suffer the consequences and delay (and
16 potentially staggering administrative expenses) of having to
17 attempt to confirm its alternative plan.

18 In addition, bankruptcy procedure allows for appellate review
19 by the district court or the bankruptcy appellate panel ("BAP"),
20 and that might give this court and the parties the benefit of at
21 least one level of appellate review far more quickly than in non-
22 bankruptcy cases. That speed means mootness is less likely.⁵

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⁴ Not to mention millions of ratepayers/customers of the state's largest utility.

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⁵ Appeals to the BAP are normally disposed of within a few months and already in this case one appeal to the district court has been completed promptly. The court does not address whether and in what circumstances the Ninth Circuit could or would review any decision by the BAP or district court.

1 D. There is one last consideration favoring certification,
2 not found in any other case that has been cited or located. That
3 has to do with the standard a court on appeal is to apply in
4 considering whether to review the Order on the merits. In
5 Morrison-Knudsen the court cautioned that sometimes a particular
6 appeal "will materially advance disposition of the claims before
7 the trial court, but in such cases the appropriate procedure for
8 the district court is to certify its order for interlocutory
9 appeal under 28 U.S.C. § 1292(b)." Morrison-Knudsen, 655 F.2d at
10 966. In that situation, however, the circuit court can make its
11 own determination whether to accept the appeal, considering the
12 likelihood or probability of having to issue multiple opinions on
13 the same or related issues of law. Here, the bankruptcy court
14 does not have the § 1292(b) option available to it. But the Order
15 is interlocutory, and the district court or the BAP will decide to
16 review an interlocutory order on appeal only after considering:
17 the likelihood of avoiding wasteful litigation and expense;
18 whether the court is presented with a meritorious issue of a
19 controlling question of law; and whether considering the appeal
20 materially advances the ultimate termination of the litigation.
21 Belli v. Temkin (In re Belli) 268 B.R. 851, 858 (9th Cir. BAP
22 2001). The Rule 54(b) certification considerations (discussed,
23 supra) are different, and to this court, far more meaningful in
24 the context of the present controversy. Put differently, under
25 the standards for interlocutory review proponents could be caught
26 in a procedural limbo: at present and as long as another plan can
27 be proposed their appeal might not meet the standards for
28 interlocutory review, but after another plan is confirmed their

1 appeal presumably would be moot. For these reasons as well, there
2 is even greater justification for making the Rule 54(b)
3 certification than for denying it.

4 IV. CONCLUSION

5 This Order, although interlocutory as decided by the
6 authorities cited in the Memorandum Decision, is final for
7 purposes of certification under Rule 54(b). The court determines
8 that there is no just reason for delay within the meaning of Rule
9 54(b). The clerk of the court is directed to enter this Order as
10 a final judgment pursuant to Rule 54(b).

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Dated: March 18, 2002

S/ _____
Dennis Montali
United States Bankruptcy Judge