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8 **UNITED STATES BANKRUPTCY COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

10
11 In re) No. 01-30923 DM
12 PACIFIC GAS & ELECTRIC COMPANY,) Chapter 11
13 Debtor.) [Not set for hearing]
14)
15)
16)

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18 **UNITED STATES TRUSTEE'S**
OBJECTION TO DEBTOR PACIFIC GAS AND ELECTRIC COMPANY'S
19 **APPLICATION TO EMPLOY AND RETAIN CONSULTING FIRMS**

20 The United States Trustee submits this objection to *Pacific Gas and Electric*
21 *Company's Application to Employ and Retain Consulting Firms* (the "Application") seeking
22 to employ LECG LLC, The Brattle Group, Inc. ("Brattle"), Charles River Associates,
23 Lexecon, Inc. and Brown, Williams, Moorhead & Quinn, Inc. (collectively, the "Applicants").

24 The Application should not be granted because (1) at least one of the Applicants,
25 LECG LLC, appears to have a conflict of interest because it continues to represent creditors
26 of the estate in connection with the California energy crisis, (2) all of the Applicants work for
27 debtor's "affiliates" but do not describe who that is or what the work consists of, (3) it is
28 impossible to determine the extent of the conflict checks the Applicants may have done, (4)

1 the Applicants failed to provide copies of their retainer agreements, (5) debtor's parent,
2 PG&E Corp. has agreed to purchase nearly \$750,000 in claims to eliminate *Siliconix*-type
3 problems the Applicants would otherwise face, and (6) the Application proposes a "rolling
4 employment order" procedure which is not consistent with § 327(a).

5 **Argument**

6 The United States Trustee is responsible for, *inter alia*, supervising "the
7 administration of cases . . . under chapter . . . 11" of the Code and is given discretion to file
8 comments with the court with respect to applications for employment of professional
9 persons. 28 U.S.C. § 586(a)(3). Professionals seeking employment by a bankruptcy
10 estate pursuant to 11 U.S.C. § 327(a) must be approved in advance by demonstrating they
11 have no conflict of interest and are disinterested. *Neben & Starrett, Inc. v. Chartwell*
12 *Financial Corporation (In re Park-Helena Corp.)*, 63 F.3d 877, 881 (9th Cir. 1995); *Rome v.*
13 *Braunstein*, 19 F.3d 54, 57 (1st Cir. 1994). Section 327 "serve[s] the important policy of
14 ensuring that all professionals tender undivided loyalty and provide untainted advice and
15 assistance in furtherance of their fiduciary responsibilities." *Rome v. Braunstein*, 19 F.3d at
16 58; *In re Arochem Corp.*, 176 F.3d 610, 621 (2d Cir. 1999).

17 The United States Trustee has the following objections to the Application:

18 1. LECG Has a Conflict of Interest

19 LECG LLC appears to have a direct conflict of interest. The firm discloses that it
20 represents many of the major players in the California energy market, including, but not
21 limited to Enron, Dynegy, Calpine, Duke Energy, GWF Power Systems and Oildale Energy.
22 The firm says it will continue to represent those creditors "concerning the California energy
23 market." Bankruptcy Code § 327(a) does not permit a professional with a conflict of interest
24 to be employed. LECG LLC is seeking to be retained by the debtor. The firm cannot
25 simultaneously work for creditors.

26 LECG LLC seems to recognize the conflict of interest, urging an irrelevant cure to the
27 problem. LECG LLC offers to establish "appropriate confidentiality walls" to protect PG&E's
28 confidential information. The court ought to reject this proposal. A conflict of interest calls

1 into question the integrity of the professional. It asks whether the professional is prohibited
2 by ethical obligations arising in existing relationships from acting in its client's best interest.
3 An "ethical wall" does nothing to solve this problem. It only seeks to ensure information is
4 safeguarded. It does nothing to ensure that members of the firm have the ethical latitude to
5 discharge their obligations to the estate. Representation of debtor in this setting is
6 inappropriate.

7 The case *County of Los Angeles v. Forsyth*, 223 F.3d 990 (9th Cir. 2000) does not
8 apply. In *Forsyth*, the Ninth Circuit considered whether a firm which hired a former
9 magistrate judge who had heard confidential matters regarding an open file at the firm might
10 cause the disqualification of his firm solely because of the information he obtained while
11 sitting on the bench. The question here is different – can a professional simultaneously
12 represent two parties with divergent interests?

13 LECG LLC may argue there is no conflict from the description offered. The United
14 States Trustee does not concede this point, but notes if there is a failure of explanation, it
15 lies with the applicant. Rule 2014(a) requires complete disclosure, including a declaration
16 "stat[ing] . . . to the best of the applicant's knowledge, all of the person's connections with
17 the debtor, creditors, any other party in interest, their respective attorneys and accountants,
18 the United States trustee, or any person employed in the office of the United States
19 Trustee." Professionals have a duty to disclose scrupulously all connections to the estate.
20 *Neben & Starrett, Inc. v. Chartwell Financial Corp. (In re Park-Helena Corp.)*, 63 F.3d 877,
21 881-82 (9th Cir. 1995). Professionals are not entitled to withhold information, if there is any,
22 simply because they may believe it does not give rise to a conflict. *Id.* at 882 (quoting *In re*
23 *Haldeman Pipe & Supply Co.*, 417 F.2d 1302, 1304 (9th Cir. 1969)).

24 It is anyone's guess what LECG LLC is working on for other clients pertaining to the
25 California energy market. Is the firm working for Enron on the FERC overcharging
26 proceedings? Is it working for Calpine on QF issues adverse to the estate? Or, is it working
27 on matters for debtor's sister companies pertaining to the plan? Any one of these matters
28 could be inimical to the best interests of the estate. The Application is silent, utterly silent,

1 on these important points. Given the names of the companies LECG LLC works for and the
2 nature of the work, it is not unreasonable to assume substantial conflicts lurk in the
3 representations.

4 2. The Applicants Have Not Disclosed The Identify of "Affiliates" or the Nature of
5 the Work They Have Done for the Affiliates

6 _____The Applicants all disclose they have worked for debtor's "Affiliates" and that most
7 will continue to do so. None of the Applicants define what they mean by "Affiliates" nor what
8 kind of work they are doing for these companies. This disclosure is incomplete and does
9 not meet the spirit of Bankruptcy Rule 2014(a). The United States Trustee cannot
10 determine from the words employed whether the Applicants are working on matters adverse
11 to the estate or not.

12 _____ Oftentimes, Applicants argue that the appearance of a conflict can be cured by
13 notice. Unfortunately, that is impossible here. The Application appears to have been filed
14 on November 2, 2001. As of today, November 8, 2001, the United States Trustee was not
15 able to find any record of the Application having been posted on the Bankruptcy Court's
16 PG&E web-site. So it appears only the OCC and the United States Trustee, the only parties
17 served with the Application, are privy to its contents.

18 3. The Applicants' Conflicts Checks are Inadequate

19 Each of the five Applicants says it checked for conflicts or connections on "debtor's
20 largest secured and unsecured creditors." Taken at face value, this could very well mean
21 the Applicants have only looked at two creditors, the largest unsecured and the largest
22 secured. The disclosure is inadequate. Rule 2014(a) requires disclosure of all connections;
23 it does not contain any limitation at all. The Applicants should describe with precision just
24 which conflicts they checked so parties in interest can determine if the scope is adequate.

25 4. The Applicants Failed to Provide Copies of Their Retainer Agreements

26 Citing unspecified concerns for confidentiality,^{1/} the Applicants failed to attach copies

27 _____
28 ^{1/} The United States Trustee has difficulty understanding what could be so sensitive about the Applicants' work that it cannot be disclosed. The plan has been filed, and any work in support of the plan will be examined in connection with confirmation of the plan. The debtor benefits substantially from the protections of the

1 of their retainer agreements. The agreements must be filed. It is the United States
2 Trustee's recent experience that retainer agreements can be chock full of provisions which
3 are inimical to chapter 11. Recent provisions include indemnities, hold harmless
4 agreements, alternative dispute resolution, jury trial waivers, releases, fee-shifting, and
5 limitations on liability (running the gamut of mere negligence to gross negligence and fraud).
6 Approving a proposed employment without reviewing the retainer is a classic case of buying
7 a pig in a poke. No one can know what the debtor is really getting.

8 The failure to disclose the retainer agreement also makes any meaningful analysis of
9 the fee applications nearly impossible.² The Application says the work the Applicants will
10 perform is too sensitive to disclose. How are parties to evaluate this work when it is
11 complete? What standard will the United States Trustee and others use to see that work
12 was done efficiently, effectively and without unnecessary duplication of effort? The retainer
13 agreements must be filed if we are to understand what the Applicants' responsibilities will
14 be.

15 5. PG&E Corp.'s Purchase of Claims Does Not Eliminate the Grounds for
16 Disqualification

17 Controlling authority in this district would bar employment of the both LECG LLC and
18 Brattle because both Applicants have pre-petition claims against the estate. *In re Siliconix,*
19 *Inc.*, 135 B.R. 378, 380 (N.D. Cal. 1991). LECG LLC's claim is for \$567,463 and Brattle's
20 claim is for \$190,778. The debtor proposes to eliminate this otherwise disqualifying fact by
21 having its shareholder, PG&E Corp., pay \$758,241 to purchase those claims at the moment
22 the Applicants are employed. Under the proposed scenario, ordinary creditors of the estate
23 wait for payment; a favored few are satisfied by the holding company, PG&E Corp.

24 PG&E's generous gesture raises important questions about the independence of

25 _____
26 Bankruptcy Code. It should comply with the modicum of disclosure requirements the statutes require.

27 ² To the extent it was directed at her, the United States Trustee declines debtor's offer to file the retainer
28 agreements under seal. The employment of professionals is a public matter. It is not appropriate to limit access
to such fundamental information when the parties have expended so much time and energy to be sure the public
and parties in interest have access to documents through the Bankruptcy Court's web site. If the documents are
worthy of consideration, a point the United States Trustee urges to be so, they ought to be in the public record.

1 these professional firms. It goes without saying that PG&E Corp. is a substantial
2 beneficiary of the terms of the debtor's proposed plan; indeed, PG&E Corp. would become
3 title holder to debtor's electrical transmission assets, gas transmission assets and debtor's
4 vaunted, low cost electrical generation assets, if the plan is confirmed. By accepting
5 payment of more than three quarters of a million dollars in claims from a principal
6 beneficiary of the proposed plan, the two firms have relinquished any shred of
7 independence. The firms are beholden to debtor's parent for these substantial payments.
8 It is difficult to conceive how the firms would allow themselves to act in a manner
9 inconsistent with the interests of PG&E Corp. under the circumstances.

10 6. The Application Proposes a "Rolling Employment Order" Procedure Which Is
11 Not Consistent with § 327(a)

12 Finally, the Application suggests the Bankruptcy Court approve an employment order
13 that can be expanded to include further applications of similar kind filed in the future absent
14 objection. The United States Trustee does believe this procedure is appropriate. These
15 Applicants, unlike their counterparts in the omnibus order for employment, are being
16 employed under § 327(a). They are involved in the principal bankruptcy work of the estate.
17 Applicants employed under § 327(a) should be employed by separate order.

18 For the foregoing reasons, the United States Trustee objects to the Application.

19 Date: November 8, 2001

Patricia A. Cutler
Assistant United States Trustee

21 By:

22 _____
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