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UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re	No.	01-30923 DM
PACIFIC GAS AND ELECTRIC COMPANY,	Chapter	11
Debtor.	Date:	October 22, 2001
	Time:	1:30 p.m.
	Ctrm:	Hon. Dennis Montali 235 Pine Street, 22nd Floor San Francisco, California

UNITED STATES TRUSTEE'S REPLY OBJECTION TO PROFESSIONAL FEE APPLICATIONS OF

DEBTOR'S PROFESSIONALS:

HELLER, EHRMAN, WHITE & McAULIFFE, LLP
ERNST & YOUNG CORPORATE FINANCE LLC

AND

OFFICIAL UNSECURED CREDITORS' COMMITTEE'S PROFESSIONALS:

MILBANK, TWEED, HADLEY & McCLOY

The United States Trustee submits this reply to the further papers filed by debtor's professionals, Heller, Ehrman, White & McAuliffe, and Ernst & Young Corporate Finance,

LLC and the OCC's law firm, Milbank, Tweed, Hadley & McCloy.[1/] The purpose of this reply brief is to respond to specific points raised by the professionals (1) during and after the October 22, 2001 hearing and (2) in briefing submitted either at the time of the hearing or shortly thereafter. The United States Trustee stands by her original objections, as supplemented herein.

DEBTOR'S PROFESSIONALS

Heller, Ehrman, White & McAuliffe

I. Administrative and Secretarial Time Is Not Compensable by the Estate

A. The United States Trustee Objects to Paraprofessional Time Which Is Administrative in Nature

HEWM seeks approximately $206,808 in paralegal, law student and staff time. As noted in the United States Trustee's Objection, the United States Trustee analyzed each time entry comprising this request. The United States Trustee did not request the court disallow the full $206,808. Rather, the United States Trustee objected solely to the portion of that request which appeared to be overhead or administrative time, a total of $82,522. The entries comprising this time were described in the United States Trustee's Objection; they consist of indexing files, reviewing and updating files and organization of files.

B. Paraprofessional Time is Not Compensable If It is Administrative or Clerical

Section 330(a) of Title 11 of the United States Code[2/] authorizes the court to allow professional firms to bill for paraprofessional time. The inquiry should not end there, however, because the statute does not explicitly authorize billing bankruptcy estates for administrative time in the guise of paraprofessional services and the courts have so held.

[1/] Capitalized terms have the same meaning they were given in the original *United States Trustee's Objection to Professional Fee Applications* filed October 15, 2001.

[2/] 11 U.S.C. § 330(a) (1) provides:
After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103 -

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and (B) reimbursement for actual, necessary expenses.

Many courts only authorize time billed by paraprofessionals if the applicant proves the time is paralegal in nature, not administrative or clerical. *In re Poseidon Pools of America*, 216 B.R. 98, 101 (Bankr. E.D.N.Y 1997); *In re Bennett Funding Group, Inc.,* 213 B.R. 234, 246-47 (Bankr. N.D.N.Y. 1997); *In re CF&I Fabricators of Utah, Inc.*, 131 B.R 474 , 490-491 (Bankr. D. Utah 1991); *In re Wildman*, 72 B.R. 700, 728 (Bankr. N.D. Ill. 1987); *cf. Missouri v. Jenkins*, 491 U.S. 274, 286, 109 S.Ct. 2463, 2470 (1989)(in Civil Rights Attorney's Fees Award Act cases, purely clerical services must be distinguished from those that are paralegal in nature).

C. Paraprofessional Work is Characterized by Substantive Legal Work Performed by Educated and Knowledgeable Staff

Defining paralegal services is difficult, but case law provides certain rules of thumb to assist the analysis. Most courts evaluate the precise nature of the work being done. To be paralegal work, it must:

> [I]nvolve[] the performance, under the ultimate direction and supervision of an attorney, of specifically-delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal concepts that, absent such assistant, the attorney would perform the task.

In re CF&I Fabricators of Utah, Inc., 131 B.R. at 490 (*quoting American Bar Ass'n Standing Cmte. on Legal Assistants: Position Paper on the Question of Legal Assistant Licensure or Certification*, at 4 (December 5, 1985)). According to the Supreme Court, paralegal services consist of duties a lawyer might perform at a higher billing rate, and can include investigation, interviewing, assistance with depositions, data compilation, cite-checking and correspondence-drafting. *Missouri v. Jenkins*, 491 U.S. at 288, 109 S.Ct. at 2472.

D. The Services To Which the United States Trustee Objects Are Administrative

After the initial hearing in this matter on October 22, 2001, HEWM submitted the declaration of one of its paralegals, Mr. David Luster (the "Luster Declaration"). The declaration makes clear the United States Trustee's objection should be sustained because the work performed is not, for the most part, legal in nature. Rather, most of the work is administrative. Mr. Luster describes in greater detail the nature of his work devoted to file

management, file organization, and disseminating recent articles.

The United States Trustee wishes to impress on the court she has not objected to the vast majority of the time billed to the estate by HEWM's paralegals. She has not objected, for example, to the significant time billed to the file by Natalie McLaughlin, who monitored a range of FERC dockets. Rather, the United States Trustee has narrowly focused on the time recorded by several individuals which appears administrative in nature. This time is not separately compensable because it should be an element in the high billing rates of HEWM's other professionals, many of whom charge rates in excess of $300 - $400 /hour.

The time entries do not support a conclusion the work is substantive in nature. Mr. Luster's time entries are repeated over and over with little change: "Review material for attorney review (2.8); review and organize case files (2.20); review and route articles re PG&E (.50)." The entries do not provide any specificity, suggesting the time is administrative in nature. "If the time entry is not for research, drafting, or "substantive procedural legal work," the implication arises that the time must be secretarial or nonlegal in nature. . . ." *In re CF&I Fabricators of Utah, Inc.,* 131 B.R. at 491.

Even with the addition of Mr. Luster's declaration, the services cannot be characterized as legal in nature. A significant amount of Mr. Luster's time is devoted to library-related services (collecting and disseminating articles from a news service and several California papers). Library-related services should be a component of overhead and not paid independently by the estate.

HEWM seems to suggest the high volume of paper in this case alone supports a conclusion the time is not administrative. Mr. Luster describes file maintenance and organization matters performed by Ms. Morris, Mr. Stone, Ms. Constantine, Ms. Nwoso and Ms. Gordon. None of his descriptions demonstrate the use of any special training, education or expertise which might support a conclusion the work was substantively legal: Ms. Nwosu "prepared binders," Mr. Stone "indexed pleadings," Ms. Gordon "updated index of hearing exhibits" and Ms. Morris did extensive docketing.

E. The Third Circuit Decision In *Busy Beaver* Should Not Be Followed

Although HEWM's papers do not refer to the case, firms seeking payment for clerical services in the guise of paraprofessional fees under § 330 frequently cite the Third Circuit's decision in *In re Busy Beaver Building Centers*, 19 F.3d 833 (3d Cir. 1994). The *Busy Beaver* court held that so long as work is performed by a paraprofessional, it is compensable under 11 U.S.C. § 330(a). According to that court, "the classification of services as clerical or non-clerical does not decide the question of compensability under §330: clerical services may be compensated in the proper context" and so long as the practice was consistent with the local "market practices." *Id.* at 852.

The Bankruptcy Court should not follow the Third Circuit's decision in *Busy Beaver* for several important reasons:

Even if the 'market practice' theory adopted by the *Busy Beaver* court applied, HEWM has not proven what the market practice in San Francisco might be, let alone that all law firms in San Francisco bill their clients for clerical and overhead tasks.[3] At least one court has denied compensation for clerical services because the firm failed to prove what market practices were:

> Applicant has not met its burden which exists independent of Busy Beaver Building of showing . . . that the majority of firms in this district regularly (a) charge clients for clerical services at the rates charged by the Applicant, and (b) disclose to their clients that they are being charged for clerical services at professional or paraprofessional rates.

In re Poseidon Pools of America, Inc., 180 B.R. 718, 746 (Bankr. E.D.N.Y. 1995), *aff'd* 216 B.R. 98, 101 (Bankr. E.D.N.Y 1997).

Allowing professional firms to shift expenses from unreimburseable overhead to paraprofessional time may result in double billing because a professional's hourly rate necessarily includes overhead. *In re Poseidon Pools of America, Inc.*, 216 B.R. 98, 101

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[3] HEWM submitted the declaration of Mr. Bordon from PG&E, but Mr. Bordon's comments are restricted to his personal experience in such matters and "practices of large firms regarding staffing and managing cases *being handled for PG&E".* His comments do not purport to represent the status of the "market." *Declaration of Robert Borden in Support of HEWM's First Interim Fee App'l.*, 2:14-16.

(E.D.N.Y 1998). High hourly rates ought to cover something, including non-legal work and power bills.

The Third Circuit itself acknowledged in *Busy Beaver* that *purely* clerical and secretarial tasks may not be compensable, or if they are, only at an appropriate rate of compensation. *Busy Beaver,* 19 F.3d at 852 (*quoting Missouri v. Jenkins*, 491 U.S. at 288 n. 10).

Finally, the practice of allowing firms to give titles and billing numbers to personnel performing administrative or clerical services in bankruptcy cases does not by itself justify payment of those fees. Just because a firm designates an individual as a timekeeper should not compel the conclusion her time can be billed to the estate. Operating a fax or copy machine, collating binders and indexing documents are administrative and secretarial tasks. They do not require special training or skill, judgment or knowledge. The simple fact that they have been separately billed does not make them independently compensable. Chief Justice Rehnquist made a similar point in his dissent in *Missouri v. Jenkins,* a case in which the majority concluded local market practices controlled what might be considered "attorney's fees":

> But I do not think Congress intended the meaning of the statutory term "attorney's fee" to expand and contract with each and every vagary of local billing practice. Under the [majority's] logic, prevailing parties could recover at market rates for the cost of secretaries, private investigators, and other types of lay personnel who assist the attorney in preparing his case, so long as they could show that the prevailing practice in the local market was to bill separately for these services. Such a result would be a sufficiently drastic departure from the traditional concept of "attorney's fees" that I believe new statutory authorization [would be required].

Missouri v. Jenkins, 491 U.S. at 274, 109 S.Ct. at 2476 (Rehnquist, C.J., *dissenting*).

Chief Justice Rehnquist's comments merit serious consideration. The United States Trustee does not believe the paraprofessional reference in § 330(a) was intended to allow firms to give every employee a billing number. The focus must be on whether the services are legal or clerical in nature. To conclude otherwise in this time of new technology is to invite a gradual but complete migration of costs from overhead to billable time.

F. The *Guidelines for Compensation and Expense Reimbursement of Professionals and Trustees* Do Not Authorize Payment of Administrative Time

The *Guidelines for Compensation and Expense Reimbursement of Professionals and Trustees* require professionals demonstrate paraprofessionals have provided services of a legal nature to the estate. *Guideline* #5 permits firms to seek compensation for paraprofessionals

> [O]nly if [they are identified as paraprofessionals] and if the following requirements are met:
>
> A. The services for which compensation is sought would have had to be done by the professional if not done by the paraprofessional, and would have been compensable under these guidelines;
> B. The person who performed the services is specially trained or is a law school student, and is not primarily a secretary or clerical worker; and
> C. The application includes a resume or summary of the paraprofessional's qualifications.

The *Guidelines* prohibit shifting administrative costs to paraprofessional services. *Guideline* #25 says: "Paraprofessional Services--May be compensated as a paraprofessional under § 330 but not charged or reimbursed as an expense." *Guideline* #22 ("Office Overhead--Not reimbursable. Overhead includes: secretarial time, secretarial overtime, word processing time, charges for after-hour and weekend air conditioning and other utilities, and cost of meals or transportation provided to professionals and staff who work late or on weekends.") Read together, these rules prohibit a professional firm from shifting administrative, non-compensable tasks into reimbursable costs.

Ernst & Young Corporate Finance LLC

There is no Reasoned Support for Ernst & Young's Claim that Conflicts Checks Should be Paid by a Bankruptcy Estate

Ernst & Young correctly refers the Bankruptcy Court to the only reported case allowing a firm to bill a bankruptcy estate for "conflicts checks." *In re Bennett Funding Group, Inc.*, 213 B.R. 234, 249-50 (Bankr. N.D.N.Y 1997). The Bankruptcy Court should reject the firm's invitation to pay $29,705 in conflict-checking on the authority of *Bennett Funding*. The standard for professional compensation is found at 11 U.S.C. § 330(a), and it

authorizes "reasonable compensation" for services rendered that are "actual and necessary." Compensation may be reasonable if it confers a benefit on the estate. 11 U.S.C. § 330(a)(4)(A)(ii).

There is no benefit to the estate in a conflicts check done prior to employment. First, the services rendered pre-date the employment order and might be considered uncompensable on that ground alone. More importantly, though, the conflicts check benefits only the professional seeking employment – it is a professional necessity prerequisite to employment. The *Bennett Funding* case does not contain any authority let alone reasoning for the Bankruptcy Court to conclude otherwise. The request is also inconsistent with local practice, which generally does not allow compensation for conflict-checking.

OCC PROFESSIONALS

Milbank, Tweed, Hadley & McCloy

I. Milbank's Explanation for the Approximately $660,000 in Regulatory Work Is Not Adequate

In her original objection to Milbank's fees, the United States Trustee observed that Milbank had used three categories (business analysis, business operations and other litigation) to bill a wide variety of regulatory matters. Apparently conceding the original application was insufficient, Milbank has re-categorized its time into approximately *thirty five* categories. While the re-categorization is generally helpful, it does not satisfy Milbank's burden of proving the fees it incurred are necessary and therefore compensable.

It is important to note Milbank has now submitted descriptions of 35 categories of work, but it has not attributed a dollar value to these categories, as required by the *Guidelines.*[4/] This is not a meaningless or unimportant oversight. The firm is requesting a

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[4/] *Guideline # 3* is entitled "**Project Billing" and provides:**

> In any application exceeding $10,000, or when the professional's anticipated services for the case will exceed $20,000, the narrative should categorize by subject matter and separately discuss each professional project or task. All work for which compensation is requested should be in a category. Miscellaneous items may be included in a category such as "Case Administration." (Such a miscellaneous category should not generally represent more than 15% of the fee request.) The professional may use reasonable discretion in defining projects for this

total of more than $1,000,000 in fees for the three general categories. This is its second attempt at creating a meaningful record. And, it had the benefit of the United States Trustee's objection to the original application when it decided to re-characterize its fees.

Milbank has not asked for any relief for its failure to meet its obligations under the *Guidelines*, a court-imposed system of uniform fee applications.[5/] The United States Trustee urges the Bankruptcy Court disallow 10% of this category of fees (or $66,000, which is 10% of the regulatory matters ($660,000)) to take account of Milbank's failure to follow the *Guidelines*.

The Office of the United States Trustee reviewed and summarized the time entries attributable to Milbank's regulatory work again, this time based on the new category numbers supplied with the *Supplemental Declaration of Edwin F. Feo in Response to the United States Trustee's Objection, etc.* (The "Feo Decl."). The analysis is attached to the *Supplemental Declaration of Patricia Martin* as Exhibit "B". The analysis shows the precise amount of time Milbank spent on each of the 35 revised categories it has created for regulatory matters. The United States Trustee has the following concerns about Milbank's regulatory work:

> purpose, provided that the application provides meaningful guidance to the Court as to the complexity and difficulty of the task, the professional's efficiency and the results achieved. (A separate category should generally be created for a project when the fees attributable to that project exceed $5,000.) With respect to each project or task, the number of hours spent and the amount of compensation and expenses requested should be set forth at the conclusion of the discussion of that project or task. Please also note the requirements in Guideline 11 relating to time records by project. (Emphasis added).

[5/] Milbank makes pointed reference in its application to the supposed non-opposition of parties with a financial stake in the case to Milbank's fees *(Declaration of Paul Aronzon in Support of First Interim Application of Milbank, etc.* (the "Aronzon Decl."), 8:27-28 " Moreover, no party in economic interest has objected to the fees,") suggesting but not saying the United States Trustee's objections are unwarranted.

Setting aside the not unreasonable idea that the peace which has broken out between the OCC and the debtor and is memorialized in the Support Agreement makes any objection by one party to the other party's professional fees almost unthinkable, it seems certain the Committee understands the Bankruptcy Court and the United States Trustee each have an independent statutory duty to review fee applications in bankruptcy cases. 11 U.S.C. § 330(a)(2) (court may reduce allowed compensation *sua sponte*); 28 U.S.C. § 586(a)(1)(3)(A)(ii) (U.S. Trustee has statutory obligation to review fee applications). In any event, the considerable effort the Office of the United States Trustee expended in connection with the Milbank Application was occasioned by the poor form of the original and supplementary material the firm supplied.

A. Milbank Insists the OCC Needed Comprehensive Review of Regulatory Matters But the Record Shows Milbank's Efforts Were Not Organized

Milbank argues the full range of regulatory services the firm provided the OCC was compulsory given the importance and complexity of the issues, a difficult point to dispute. After completing the analysis attached to Ms. Martin's declaration, however, the United States Trustee believes Milbank's approach to these issues was uneven and the same result might have been accomplished more simply.

Milbank's approach to regulatory matters was inconsistent. Milbank apparently attended every day of the hearings at the FERC refund settlement proceedings (category #4) for total fees of $47,119 (119.5 hours). Milbank asserts it was important to attend these meetings because they are relevant to a determination of the claims against the estate. Feo Decl. at 6:26-28. Milbank incurred $62,046 in fees on the "creditworthiness" issues which arose in connection with the ISO (category #8), nearly as much as HEWM, which spent $72,896 on creditworthiness issues.

By contrast, Milbank did not expend much effort at all on three other presumably important matters, the FERC El Paso proceeding (category #6) ($1,645 in fees) or the "filed rate case" (category #27)($1,212 in fees) or "parent company ring-fencing/ fraudulent conveyance and other analysis" (category #30) ($1,867 in fees).

Milbank cannot argue the El Paso proceeding is unimportant to the case; HEWM spent $452,738 on this matter for debtor by July 31, 2001. Nor can it argue the filed rate case is not important. HEWM spent $351,304 on the Federal filed rate case during the same period. If Milbank's position is that it was required to cover the regulatory field, it is inconsistent to have allowed important matters to be unattended. The firm's failure to spend time on matters like the El Paso overcharging issue when it spent considerable time on other matters being handled ably by debtor's general and special counsel suggest its approach to the case lacked helmsmanship. If Milbank is relying on the debtor's counsel for these matters, why did it duplicate the work on other matters?

Milbank's failure to break out the amount spent on the 35 separate categories of

strengthens this point. Apparently, Milbank has not evaluated the amount of time and the cost incurred in providing regulatory oversight services to the OCC because it did not break out its time for analysis. It is difficult to understand how the firm could bill the estate for more than $1,000,000 in fees for these three categories *without having evaluated the costs of the services they rendered.* This demonstrates a lack of billing judgment and an absence of effective oversight of case strategy.

B. Milbank Cites Its Involvement in the Plan Drafting Process As a Reason for Doing Regulatory Work But Does Not Explain What Benefit Was Conferred on the Estate

Milbank's supplementary responses contain only conclusory statements about its involvement in the plan process. Ms. Strand, the OCC's co-chair declares the OCC substantially and materially modified the terms of the proposed plan. *Declaration of Clara Yang Strand In Support of First Interim Application of Milbank, etc.* (the "Strand Decl.") 2:19-21. Mr. Aronzon declares Milbank's work furthered negotiation of "issues related to the Plan" and enabled the OCC to take a leadership role in the case. Aronzon Decl. 3:18-23.

None of these statements makes any meaningful progress toward proving what role the OCC and its counsel took in the formulation of the plan. The declarations are unspecific about the nature of the changes, the import of the changes and the necessity of the changes the OCC alleges to have made. Without clear proof of the changes made, Milbank has not met its burden of proof.

II. Milbank Appears To Have Duplicated Saybrook's Legislative Work

The United States Trustee reiterates her concern there appears to have been considerable duplication of effort between the Milbank firm and Saybrook in the areas specified by Mr. Feo and identified by Ms. Martin as Category 24 - Legislative analysis-federal ($26,830) , Category 25-Legislative Analysis-State ($97,137) and Category 29 - SCE/SDG&E MOU ($13,779) for a total of $137,746. The description of services set forth in Saybrook's first interim fee application under "Legislative Matters" (Category 4), pages 8

through 10, suggests considerable duplication of efforts. For example, Saybrook's fee application states:

- Analyzed all legislative matters as they pertain to OCC issues in the bankruptcy, including the twenty plus energy related bills that have been introduced since December 2000
- Meetings with representatives of the Governor's office and discuss their analysis of the SCE MOU
- Discussed with members of the legislature and/or their staffs the status of prospective legislative deliberations on the SCE MOU
- Meetings with the Governor's financial advisers to further understand the SCE MOU and the supplemental financial information provided to the marketplace supporting the transaction.

These are only four of the very specific fifteen categories of services performed by Saybrook in connection with legislative matters. Clearly, there has been some duplication of effort by these two firms.

III. Milbank Initiated the Commodities Trading and Rogers and Associates Matters and Should Not Be Compensated for the Effort

In her original objection, the United States Trustee alleged Milbank's work on the commodities trading motion and the application to employ Rogers and Associates was unnecessary and of no benefit to the estate or the OCC. Milbank seems concedes its client did not initiate these matters. Although Mr. Aronzon alleges the "Committee professionals undertook to only engage in tasks specifically authorized by the Committee" (Aronzon Decl. 2:16-20). Ms. Strand takes responsibility for authorizing work in a narrowly tailored area "services performed by Milbank in the regulatory arena." Strand Decl. 3:1-4. Notable by its absence is any statement by either Mr. Aronzon or Ms. Strand that the OCC members

initiated the trading and Rogers and Associates issues.[6] These matters were pursued on Milbank's recommendation. If there is fault in prosecuting them, it is Milbank's and the firm should not be compensated for the effort.

IV. Milbank Intends to Continue Work on Plan and Regulatory Matters – The United States Trustee Urges Significant Restraint

While not a proper subject of the applications for compensation now pending before the Bankruptcy Court, Mr. Aronzon describes in significant detail the work the OCC professionals, and in particular Milbank, intend to do in the future pending confirmation of the plan they have already bound themselves to support. The United States Trustee is concerned that Milbank's statements are intended by the firm to restrict her ability to object to future fee applications. Mr. Aronzon's comments are flatly inconsistent with the representations by Messrs. Moore and Feo at the October 22, 2001 hearing. She is particularly concerned the firm will rely on Mr. Aronzon's following statement to immunize its work from future objections on the grounds of lack of necessity, duplication or reasonableness:

> Thus, contrary to certain beliefs [principally, those expressed by Messrs. Moore and Feo in response to the Bankruptcy Court's inquiry], the role of the Committee has actually increased and expanded due to the pressures of the Plan confirmation process. We believe that PG&E expects, and the Committee anticipates, that it will participate in all litigation concerning the Plan and be very active in connection with confirmation of the Plan and Plan implementation such that the transactions envisioned in the Plan actually are consummated. To that end, we anticipate, among other things, continued regulatory and legislative monitoring, reporting and appearances as a necessary part of the Plan process and the closing of the transactions contemplated by the Plan.

Aronzon Decl., 8:13-20 (emphasis added). If the Bankruptcy Court accepts the United States Trustee's contention the firm should have shown restraint *in the extent* of its involvement in regulatory matters, Mr. Aronzon's remarks about the future should cause

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[6] Even if the OCC members had initiated these matters, the United States Trustee still believes the work on trading matters was not beneficial to the estate because its intended beneficiaries were only certain specific members of the OCC, not creditors at large.

additional concern about the necessity of Milbank's work and the completeness of its applications for compensation today.

CONCLUSION

The United States Trustee requests the Bankruptcy Court sustain the objections originally filed by the United States Trustee as amplified by the comments set forth above.

Date: November 2, 2001

LINDA EKSTROM STANLEY
UNITED STATES TRUSTEE

Patricia Cutler
Assistant United States Trustee

By: _____
Stephen L. Johnson,
Attorneys for United States Trustee