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12 PACIFIC GAS AND ELECTRIC COMPANY

13 UNITED STATES BANKRUPTCY COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 In re

17 PACIFIC GAS AND ELECTRIC
18 COMPANY, a California corporation,
19 Debtor.

20 Federal I.D. No. 94-0742640

Case No. 01-30923 DM

Chapter 11 Case

Date: June 20, 2001

Time: 9:30 a.m.

Place: 235 Pine St., 22nd Floor
San Francisco, California

Judge: Hon. Dennis Montali

21 DEBTOR'S NOTICE OF MOTION AND MOTION FOR ORDER EXTENDING
22 TIME TO ASSUME, ASSUME AND ASSIGN, OR REJECT REAL PROPERTY
23 LEASES; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

24 [SUPPORTING DECLARATION OF TAMMIE CANDELARIO FILED SEPARATELY]

25 NOTICE OF MOTION AND MOTION

26 PLEASE TAKE NOTICE that on June 20, 2001, at 9:30 a.m., or as soon
27 thereafter as the matter may be heard, in the Courtroom of the Honorable Dennis Montali,
28 located at 235 Pine Street, 22nd Floor, San Francisco, California, Pacific Gas and Electric
Company, the debtor and debtor in possession in the above-captioned Chapter 11 case (the
"Debtor" or "PG&E"), will and hereby does move the Court (the "Motion") for entry of an

PG&E'S MOT. TO EXT. TIME TO ASSUME OR REJECT REAL PROP'TY LEASES No. 01-30923 DM

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1 order extending the time for PG&E to assume, assume and assign, or reject unexpired real
2 property leases under which PG&E is a lessee, pursuant to 11 U.S.C. Section 365(d)(4).

3 By this Motion, PG&E seeks an order extending, until the time of confirmation of
4 a plan of reorganization in this case, the time to assume or reject the real property leases
5 (collectively, the "Leases") listed on Exhibit 1 to the Declaration of Tammie Candelario
6 ("Candelario Decl.") filed concurrently herewith,¹ without prejudice to the right of any
7 lessor subsequently to move this Court for an order compelling assumption or rejection of its
8 Lease at an earlier date for good cause shown. PG&E submits that there is cause to grant the
9 requested extension, because, *inter alia*, the Leases are essential to its operations, PG&E
10 continues to comply with its post-petition obligations thereunder, and this case is
11 exceptionally complex and involves a large number of leases.

12 This Motion is based on the facts and law set forth herein, the accompanying
13 Candelario Declaration, the record of this case and any evidence presented at or prior to the
14 hearing on this Motion.

15 **PLEASE TAKE FURTHER NOTICE** that pursuant to Rule 9014-1(c)(1) of the
16 Bankruptcy Local Rules of the United States District Court for the Northern District of
17 California, any opposition to the Motion and the relief requested herein must be filed with
18 the Bankruptcy Court and served upon appropriate parties (including counsel for PG&E) at
19 least 14 days prior to the scheduled hearing date. If there is no timely objection to the
20 requested relief, the Court may enter an order granting such relief without further hearing.

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26 ¹Notwithstanding the relief requested by this Motion, PG&E expressly reserves the
27 right to assert that any Lease does not constitute a nonresidential real property lease within
28 the meaning of 11 U.S.C. Section 365. PG&E notes that in an abundance of caution, the list
of Leases includes certain agreements regarding real property rights (e.g., easements and
rights of way) that may not constitute leases pursuant to Section 365.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 GENERAL BACKGROUND

4 PG&E is an investor-owned utility providing electric and gas services to millions
5 of California residents and businesses. Beginning approximately last summer, as a result of
6 the partial deregulation of the power industry, PG&E was forced to pay dramatically
7 increased wholesale prices for electricity. PG&E has, however, been prevented from
8 passing these costs on to retail customers, resulting in a staggering financial shortfall. In the
9 face of the deterioration in PG&E's financial condition, and with little progress having been
10 made toward a resolution of the crisis, PG&E by early April 2001 determined that a
11 Chapter 11 reorganization offered the best prospects for protecting the interests of its
12 creditors, customers, employees and shareholders alike. Accordingly, on April 6, 2001 (the
13 "Petition Date"), PG&E filed a voluntary petition under Chapter 11 of the Bankruptcy Code.
14 PG&E continues to manage and operate its business and property as a debtor in possession
15 pursuant Sections 1107 and 1108 of the Bankruptcy Code 11 U.S.C. §§1107-1108. No
16 trustee has been appointed.

17 II.

18 THE LEASES

19 1. PG&E is the lessee under approximately 240 Leases, which can be generally
20 categorized as pertaining to one of the following five functions or uses in the ordinary course
21 of PG&E's business: office, utility, telecommunications, parking and storage. Candelario
22 Decl. ¶3. The office Leases include traditional high-rise office space, warehouses with large
23 yards and offices, small customer service offices, and yards with a small office building. *Id.*
24 The utility Leases are used to support the provision of gas and electric service to PG&E's
25 customers and include leases of land for electric substations, mobile generator sites and gas
26 regulator/meter stations. *Id.* The telecommunications Leases are used to support PG&E's
27 independent telecommunications infrastructure and include leasing of vault and
28 antenna/passive reflector space on mountaintops and other key locations throughout PG&E's

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1 service territory. *Id.* The parking Leases are used to provide ancillary parking adjacent to a
2 PG&E facility. *Id.* The storage Leases are used for storage of materials and equipment. *Id.*

3 2. Pursuant to Bankruptcy Code Section 365(d)(4), all of the Leases will be deemed
4 rejected 60 days after the Petition Date (i.e., by June 4, 2001), unless either (a) the Court
5 approves PG&E's assumption of the Leases by granting a motion filed by that date, or
6 (b) the Court extends the time to assume or reject the Leases by granting a motion filed by
7 that date.

8 3. By this Motion, PG&E seeks to extend until the date of confirmation of the
9 Chapter 11 plan in this case (or such other date as this Court may order on motion made on
10 or before that date²) the time to assume, assume and assign, or reject the unexpired Leases
11 listed on Exhibit 1 to the Candelario Declaration submitted herewith (the "Exhibit").³

12 4. Among other things, PG&E requires this additional time to intelligently and
13 meaningfully appraise the potential need for and value of each of the Leases in the context of
14 the formulation of its plan of reorganization. Candelario Decl. ¶4. The sheer size and
15 complexity of this case necessarily impact such determinations. As set forth in previous
16 papers filed with the Court, PG&E has reported assets in excess of \$20 billion, has
17 approximately 45,000 creditors and employs about 20,000 people. In addition, PG&E is in
18 the midst of grappling with an unprecedented energy crisis, resulting in more pressing and
19 immediate matters requiring most of PG&E's attention in the first phase of this Chapter 11
20 case.

21 _____
22 ²Thus, the Court's granting of this Motion will not prejudice any lessor or other party
23 in interest from seeking to compel PG&E to assume or reject a Lease prior to confirmation
24 of PG&E's Chapter 11 plan.

25 ³To the extent any Leases will expire by their own terms prior to the confirmation date
26 of PG&E's Chapter 11 plan, PG&E seeks to extend the time to assume or reject such Leases
27 until such expiration date (including any applicable extensions under such Leases).
28 However, because it is PG&E's position that PG&E, pre-assumption (or rejection), can
proceed to exercise any extension option under any Lease if such extension is undertaken in
the ordinary course of PG&E's business, then to the extent PG&E exercises an option to
extend the term of any one or more of the Leases prior to its expiration, the Lease (including
the extended term) shall be covered by the order on this Motion, and PG&E's subsequent
assumption, assumption and assignment or rejection shall apply to the Lease as so extended.

1 Ton Restaurant & Pastry Shop, Inc., 52 B.R. 850, 852 (Bankr. N.D. Ill. 1985).

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3 B. Factors For Determining Whether Cause Exists For Extending The Time To
4 Assume Or Reject Unexpired Leases Under Bankruptcy Code Section 365(d)(4).

5 Courts consider the facts of each case to determine whether cause exists to extend
6 the time for a debtor to assume or reject its unexpired real property leases and to set a new
7 date by which it must assume or reject such leases. The Ninth Circuit has concluded that the
8 following factors are significant in determining whether sufficient cause exists to extend the
9 time to assume or reject nonresidential real property leases under Section 365(d)(4):

- 10 • whether the leases are the primary assets of the debtor;
11 • whether the lessor continues to receive rental payments;
12 • whether the case is exceptionally complex and involves a large number of
13 leases.

14 In re Victoria Station, Inc., 88 B.R. 231, 236 n.7 (B.A.P. 9th Cir. 1988), aff'd, 875 F.2d 1380
15 (9th Cir. 1989). In addition, other courts, including a bankruptcy court in California, have
16 also considered the following criteria:

- 17 • whether the decision to assume or reject the lease would be central to any plan
18 of reorganization;
19 • whether there is a reasonable possibility that the debtor will submit a plan
20 capable of being confirmed;
21 • whether the debtor has had the time necessary to intelligently appraise its
22 financial situation and the potential value of its assets in terms of the
23 formulation of a plan;
24 • whether the lessor will be subject to damages beyond compensation available
25 under the Bankruptcy Code due to the debtor's continued occupation;
26 • whether the lessor has a reversionary interest in the building built by the
27 debtor on the lessor's land; and
28 • the existence of any other facts bearing on whether the debtor has had a

1 reasonable amount of time to decide whether to assume or reject.

2 See In re Ernst Home Ctr., Inc., 209 B.R. 967, 970 (Bankr. W.D. Wash. 1997); In re Muir
3 Training Techs., Inc., 120 B.R. 154, 158-59 (Bankr. S.D. Cal. 1990); Theatre Holding Corp.
4 v. Mauro, 681 F.2d 102, 105 (2d Cir. 1982); In re 611 Sixth Ave. Corp., 191 B.R. 295, 298
5 (Bankr. S.D.N.Y. 1996); Escondido Mission Village L.P. v. Best Prods. Co. (In re Best Prod.
6 Co.), 137 B.R. 114, 116-17 (Bankr. S.D.N.Y. 1992); In re S & M Food Servs., Inc., 117 B.R.
7 497, 497 (Bankr. E.D. Mo. 1990).

8 C. PG&E Has Established Cause For An Extension Of Time To Assume Or Reject
9 The Leases Based On The Relevant Factors Applied By The Courts.

10 Application of the factors from the foregoing cases strongly supports approval of
11 PG&E's request for an extension of time.

12 First, the Leases are critical assets of PG&E's bankruptcy estate, since PG&E
13 uses the property under the approximately 240 Leases for office space, the provision of
14 utility and telecommunications services, parking and storage facilities, all of which are
15 essential to its ongoing business operations. Candelario Decl. ¶5.

16 Second, since the Petition Date, PG&E has generally continued to make rental
17 payments to the lessors under the Leases, and timely perform its other post-petition payment
18 obligations as required by Section 365(d)(3),⁵ and intends to continue to comply with its
19 future post-petition payment obligations.⁶ Candelario Decl. ¶6. Indeed, with a few

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21 ⁵In preparing this Motion, it was discovered that PG&E had failed to make certain
22 post-petition payments with respect to a small number of Leases (generally where the
23 amount owed was attributable to both pre-petition and post-petition periods, or because
24 some lessors had directed PG&E to suspend payments under such Leases while the lessors
25 adjusted the payments required thereunder). PG&E is in the process of making such
26 payments with respect to the post-petition portion of such Lease obligations, and expects that
27 it will be current with respect to such Leases prior to the hearing on the Motion. Candelario
28 Decl. ¶6.

25 ⁶Indeed, PG&E has even made pro-rata payments for all of its obligations under the
26 Leases for the "stub period" from the Petition Date until the next regularly scheduled
27 payment date, which is more generous treatments than some courts require. See, e.g., In re
28 Appletree Markets, Inc., 139 B.R. 417 (Bankr. S.D. Tex. 1992) (holding that Section
365(d)(3) does not require a debtor to pay prorated rents for post-petition occupancy prior to
lease assumption or rejection, where the relevant rent payments fall due pre-petition).

1 exceptions, PG&E was generally current with its pre-petition payment obligations under the
2 Leases as of the Petition Date. Candelario Decl. ¶6. As a result of PG&E's performance of
3 its post-petition obligations under the Leases, and its intent to remain current on all post-
4 petition payment obligations, the lessors thereunder will not be prejudiced by the extension
5 requested by this Motion.⁷

6 Third, PG&E's Chapter 11 case is particularly complex and involves a relatively
7 large number of leases. As discussed above, there are approximately 240 Leases, with
8 respect to property located throughout California. In addition, in view of its assets in excess
9 of \$20 billion, total creditors of approximately 45,000, and the effort to continue to provide
10 utility services as constant as possible to millions of customers in the midst of an
11 unprecedented energy crisis, PG&E's bankruptcy case is undeniably large and complex.

12 Based on the foregoing, all of the factors for determining "cause" for an
13 extension in the Ninth Circuit are satisfied.

14 The factors employed by other courts to evaluate cause are also met in this case.
15 Because the Leases are essential to PG&E's ongoing business operations, and such
16 operations are anticipated to be an important source for funding PG&E's Chapter 11 plan,
17 the decision to assume or reject these Leases would be integral to any plan of reorganization.
18 Candelario Decl. ¶5. In addition, based on, among other things, PG&E's overall financial
19 position and prospects, there is clearly more than a "reasonable possibility" that PG&E will
20 submit a plan capable of being confirmed. *Id.* Furthermore, based on the tremendous size
21 and complexity of this case and the need to operate in the midst of an unprecedented energy
22 crisis, PG&E in this early phase of its Chapter 11 case has focused and for the next several
23 months will continue to focus on the most urgent matters, leaving it insufficient time to fully

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25 ⁷Moreover, several courts, including the Ninth Circuit, have held that a debtor may be
26 granted an extension under Section 365(d)(4) despite its failure to perform its postpetition
27 lease obligations under Section 365(d)(3). See, e.g., *In re Southwest Aircraft Servs., Inc.*,
28 831 F.2d 848, 854 (9th Cir. 1987); *In re Wedtech Corp.*, 72 B.R. 464, 475 (Bankr. S.D.N.Y.
1987); *In re Babylon Ltd. P'ship*, 76 B.R. 270, 275 (Bankr. S.D.N.Y. 1987) (debtor not
required to show adequate assurance of performing future lease obligations in order to obtain
time extension). Accord *In re THW Enters., Inc.*, 89 B.R. 351 (Bankr. S.D.N.Y. 1988).

1 consider and analyze its portfolio of Leases, including determining the need for and the
2 potential value of each of its Leases in the context of the formulation of a Chapter 11 plan.
3 Moreover, there is no evidence indicating that the lessors under the Leases will be subject to
4 damages beyond compensation available under the Bankruptcy Code due to PG&E's
5 continued occupation of the premises during the requested extension.

6 Courts routinely find "cause" for granting an extension of the time to assume or
7 reject leases where, as here, the debtor is unable to make a clear and informed assessment of
8 the leases' benefits and burdens to the estate within the statutory period. See, e.g., Legacy
9 Ltd. v. Channel Home Ctrs., Inc. (In re Channel Home Ctrs., Inc.), 989 F.2d 682, 688 (3d
10 Cir. 1993) (extension granted where debtor could not make informed decision within
11 existing time to determine whether leases were necessary for plan of reorganization);
12 Chapman Inv. Assocs. v. American Healthcare Mgmt., 94 B.R. 420, aff'd, 900 F.2d 827 (5th
13 Cir. 1990) (cause for extension where debtor had numerous leases throughout United States
14 it had to examine prior to making decision to assume or reject); In re S & M Food Servs.,
15 Inc., 117 B.R. 497 (cause for granting extension where debtor had not had reasonable period
16 to determine value of leases in context of various alternatives in plan of reorganization); In
17 re Coastal Dry Dock & Repair Co., 62 B.R. 879 (Bankr. E.D.N.Y. 1986) (cause for granting
18 extension based on importance of lease to reorganization proceeding, and size and
19 complexity of case).

20 Furthermore, the extension requested by this Motion—until the time of
21 confirmation of PG&E's Chapter 11 plan—is consistent with extensions granted by other
22 courts. See, e.g., In re Monica Scott, 123 B.R., 990, 993 n.8 (Bankr. D. Minn. 1991) (court
23 can delay time to assume or reject leases until the moment of confirmation, when the
24 debtor's chances of rehabilitation would finally be clear; "[u]nless the Congress addresses
25 this situation, cause will undoubtedly be found to exist, as a matter of course, for extending
26 to confirmation the time to assume or reject significant leases in Chapter 11 cases"); Omni
27 Partners, L.P. v. Pudgie's Dev. of N.Y., Inc. (In re Pudgie's Dev., Inc.), 239 B.R. 688
28 (S.D.N.Y. 1999) (acknowledging bankruptcy court's prior extension of debtors' time to

1 assume or reject leases through and including confirmation of a plan of reorganization);
2 accord; In re Jamesway Corp., 179 B.R. 33 (S.D.N.Y. 1995); In re Farley Inc., 152 B.R. 516
3 (Bankr. N.D. Ill. 1993); In re Ames Dep't Stores, Inc., 136 B.R. 353 (Bankr. S.D.N.Y.
4 1992); In re Allegheny Int'l, Inc., 118 B.R. 282 (Bankr. W.D. Pa. 1990); In re Revco D.S.,
5 Inc., 109 B.R. 264 (Bankr. N.D. Ohio 1989).

6 Based on the foregoing, there is sufficient cause for granting PG&E an extension
7 of time to assume and reject the Leases until the date of confirmation of its Chapter 11 plan,
8 without prejudice to the right of any Lessor to seek to compel assumption or rejection at an
9 earlier date based on good cause shown.

10
11 IV.

12 CONCLUSION

13 Wherefore, the Debtor respectfully requests that this Court enter its Order:

- 14 1. Determining that notice of the Motion was appropriate under the circumstances;
15 2. Granting the Motion;
16 3. Extending the time during which PG&E may assume, assume and assign, or
17 reject the Leases and any other nonresidential real property leases under which PG&E is a
18 lessee, until the date of confirmation of PG&E's Chapter 11 plan, or such other date as this
19 Court may order on motion made on or before that date; and
20 4. For such other relief as this Court determines to be equitable and just.

21 DATED: May 23, 2001

Respectfully,

22 HOWARD, RICE, NEMEROVSKI, CANADY,
23 FALK & RABKIN
A Professional Corporation

24 By: 
25 GARY M. KAPLAN

26 Attorneys for Debtor and Debtor in Possession
27 PACIFIC GAS & ELECTRIC COMPANY

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