

50-275/323

1 JAMES L. LOPES (No. 63678)
JEFFREY L. SCHAFFER (No. 91404)
2 GARY M. KAPLAN (No. 155530)
HOWARD, RICE, NEMEROVSKI, CANADY,
3 FALK & RABKIN
A Professional Corporation
4 Three Embarcadero Center, 7th Floor
San Francisco, California 94111-4065
5 Telephone: 415/434-1600
Facsimile: 415/217-5910

6 Attorneys for Debtor and Debtor in Possession
7 PACIFIC GAS AND ELECTRIC COMPANY

8
9 UNITED STATES BANKRUPTCY COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 In re
13 PACIFIC GAS AND ELECTRIC
14 COMPANY, a California corporation,
15 Debtor.
16 Federal I.D. No. 94-0742640

Case No. 01-30923 DM .

Chapter 11 Case

Date: July 5, 2001

Time: 9:30 a.m.

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

Judge: Hon. Dennis Montali

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

[SUPPORTING DECLARATION OF TAMMIE CANDELARIO FILED SEPARATELY]

22
23 NOTICE OF MOTION AND MOTION

24
25 PLEASE TAKE NOTICE that on July 5, 2001, at 9:30 a.m., or as soon
26 thereafter as the matter may be heard, in the Courtroom of the Honorable Dennis Montali,
27 located at 235 Pine Street, 22nd Floor, San Francisco, California, Pacific Gas and Electric
28 Company, the debtor and debtor in possession in the above-captioned Chapter 11 case (the

PG&E'S MOT. TO EXT. TIME TO ASSUME OR REJECT REAL PROPERTY LEASES

Approved: Add. Rtds. Ogc Mail Center

HOWARD
RICE
NEMEROVSKI
CANADY
FALK
& RABKIN
A Professional Corporation

1 “Debtor” or “PG&E”), will and hereby does move the Court (the “Motion”) for entry of an
2 order extending the time for PG&E to assume, assume and assign, or reject unexpired real
3 property leases under which PG&E is a lessee, pursuant to 11 U.S.C. Section 365(d)(4).

4 By this Motion, PG&E seeks an order extending, until the time of confirmation of
5 a plan of reorganization in this case, the time to assume or reject the real property leases
6 (collectively, the “Leases”) listed on Exhibit 1 to the Declaration of Tammie Candelario
7 (“Candelario Decl.”) in support of the Motion filed concurrently herewith,¹ without
8 prejudice to the right of any lessor subsequently to move this Court for an order compelling
9 assumption or rejection of its Lease at an earlier date for good cause shown. PG&E submits
10 that there is cause to grant the requested extension because, *inter alia*, the Leases are
11 essential to its operations, PG&E continues to comply with its post-petition obligations
12 thereunder, and this case is exceptionally complex and involves a large number of leases.²

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

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

22
23
24 ¹ Notwithstanding the relief requested by this Motion, PG&E expressly reserves the
25 right to assert that any Lease does not constitute a nonresidential real property lease within
26 the meaning of 11 U.S.C. Section 365. PG&E notes that in an abundance of caution, the list
27 of Leases includes certain agreements regarding real property rights (e.g., rights of way) that
28 may not constitute leases pursuant to Section 365.

² PG&E notes that on May 23, 2001, it submitted a similar motion to extend the time to
assume, assume and assign or reject approximately 240 real property leases, which motion is
scheduled to be heard on June 20, 2001 (the “First Extension Motion”). The Leases that are
the subject of this Motion were inadvertently omitted from the First Extension Motion.

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 lessee³ under 17 Leases, which can be generally categorized as
20 pertaining to one of the following functions or uses in the ordinary course of PG&E's
21 business: rights of way and similar land use rights for the transmission and distribution of
22 gas or electric power and storage of gas. Candelario Decl. ¶3. Such Leases are used to
23 support the provision of gas and electric service to PG&E's customers. Id.

24 2. Pursuant to Bankruptcy Code Section 365(d)(4), all of the Leases will be deemed
25 rejected 60 days after the Petition Date (i.e., by June 5, 2001), unless either (a) the Court

26 _____
27 ³ References herein to PG&E's status as a "lessee" and to the "lessors" under the
28 Leases are for ease of reference only and should not be construed as a concession by PG&E
that the Leases constitute real property leases within the meaning of 11 U.S.C. Section 365.

HOWARD
RICE
NEMEROWSKI
CANADY
BALK
& RABKIN
A Professional Corporation

1 approves PG&E's assumption of the Leases, or (b) the Court extends the time to assume or
2 reject the Leases, by (in either case) granting a motion filed by that date.

3 3. By this Motion, PG&E seeks to extend until the date of confirmation of the
4 Chapter 11 plan in this case (or such other date as this Court may order on motion made on
5 or before that date⁴) the time to assume, assume and assign, or reject the unexpired Leases
6 listed on Exhibit 1 to the Candelario Declaration submitted herewith (the "Exhibit").⁵

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

16 5. The requested extension is a proper exercise of PG&E's business judgment, and
17 there is cause to grant the requested extension, because, *inter alia*, (a) the Leases are essential
18 to PG&E's operations, (b) PG&E continues to comply with its post-petition obligations
19 under the Leases, and (c) this case is exceptionally complex and involves (including the
20 leases that are the subject of the First Extension Motion) a relatively large number of leases.

21 _____
22 ⁴ Thus, 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
of PG&E's Chapter 11 plan.

24 ⁵ To the extent any Leases will expire by their own terms prior to the confirmation date
25 of PG&E's Chapter 11 plan, PG&E seeks to extend the time to assume or reject such Leases
26 until such expiration date (including any applicable extensions under such Leases).
27 However, because it is PG&E's position that PG&E, pre-assumption (or rejection), can
28 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 III.

2 CAUSE EXISTS UNDER BANKRUPTCY CODE SECTION
3 365(d)(4) TO GRANT PG&E AN EXTENSION OF TIME TO
4 ASSUME, ASSUME AND ASSIGN, OR REJECT THE LEASES

5 A. Bankruptcy Code Section 365(d)(4) Permits A Court To Extend, For Cause, The
6 Time To Assume Or Reject Leases Beyond 60 Days After The Petition Date.

7 Section 365(a) of the Bankruptcy Code gives a debtor in possession the power to
8 assume or reject any executory contract or unexpired lease. Section 365(d)(4) provides that,
9 unless the debtor assumes or rejects an unexpired lease of nonresidential real property within
10 60 days after the petition date, the lease is deemed rejected, and provides further that if the
11 debtor shows "cause" for an extension, the court is empowered to extend the time period to
12 assume or reject such a lease.⁶

13 Accordingly, in an effort to provide debtors with the best opportunity to
14 reorganize successfully, courts regularly permit extensions of time for debtors to decide
15 whether to assume or reject unexpired real property leases. "Particularly in large chapter 11
16 cases, a sixty day period, or even an extended but set period, is unrealistic if it will force a
17 debtor in possession to assume or reject leases before it can finalize a business plan." 2
18 Lawrence P. King, Collier on Bankruptcy ¶365.04[3][d][i] at 365-37 (15th ed. rev. 2000).
19 "The amount of additional time to be given, if any, has been left to the discretion of the court
20 and the Code does not limit the court in granting a substantial extension of time." In re Bon
21 Ton Restaurant & Pastry Shop, Inc., 52 B.R. 850, 852 (Bankr. N.D. Ill. 1985).

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

24 Courts consider the facts of each case to determine whether cause exists to extend

25
26 ⁶ Controlling Ninth Circuit authority requires that a motion to extend the time to
27 assume or reject leases be brought within 60 days after the petition date, rather than
28 requiring that the motion be heard or decided within that time. In re Southwest Aircraft
Servs., Inc., 831 F.2d 848 (9th Cir. 1987).

1 the time for a debtor to assume or reject its unexpired real property leases and to set a new
2 date by which it must assume or reject such leases. The Ninth Circuit has concluded that the
3 following factors are significant in determining whether sufficient cause exists to extend the
4 time to assume or reject nonresidential real property leases under Section 365(d)(4):

- 5 • whether the leases are the primary assets of the debtor;
- 6 • whether the lessor continues to receive rental payments;
- 7 • whether the case is exceptionally complex and involves a large number of
8 leases.

9 In re Victoria Station, Inc., 88 B.R. 231, 236 n.7 (B.A.P. 9th Cir. 1988), aff'd, 875 F.2d 1380
10 (9th Cir. 1989). In addition, other courts, including a bankruptcy court in California, have
11 also considered the following criteria:

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

25 See In re Ernst Home Ctr., Inc., 209 B.R. 967, 970 (Bankr. W.D. Wash. 1997); In re Muir
26 Training Techs., Inc., 120 B.R. 154, 158-59 (Bankr. S.D. Cal. 1990); Theatre Holding Corp.
27 v. Mauro, 681 F.2d 102, 105 (2d Cir. 1982); In re 611 Sixth Ave. Corp., 191 B.R. 295, 298
28 (Bankr. S.D.N.Y. 1996); Escondido Mission Village L.P. v. Best Prods. Co. (In re Best Prod.

1 Co.), 137 B.R. 114, 116-17 (Bankr. S.D.N.Y. 1992); In re S & M Food Servs., Inc., 117 B.R.
2 497, 497 (Bankr. E.D. Mo. 1990).

3
4 C. PG&E Has Established Cause For An Extension Of Time To Assume Or Reject
The Leases Based On The Relevant Factors Applied By The Courts.

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

7 First, the Leases are critical assets of PG&E's bankruptcy estate, since PG&E
8 uses the property subject to the Leases to support the provision of gas and electric service to
9 its customers. Candelario Decl. ¶5.

10 Second, since the Petition Date, PG&E has continued to make the rental or
11 similar payments to the lessors under the Leases, and timely perform its other post-petition
12 payment obligations as required by Section 365(d)(3), and intends to continue to comply
13 with its future post-petition payment obligations.⁷ Candelario Decl. ¶6. As a result of
14 PG&E's performance of its post-petition obligations under the Leases, and its intent to
15 remain current on all post-petition payment obligations, the lessors thereunder will not be
16 prejudiced by the extension requested by this Motion.⁸

17 Third, PG&E's Chapter 11 case is particularly complex and involves a relatively
18 large number of leases. As discussed above, there are 17 Leases (as well as an additional
19 approximately 240 leases that are the subject of the First Extension Motion) with respect to
20 property located throughout California. In addition, in view of its assets in excess of \$20

21
22 ⁷ Indeed, PG&E has even made pro-rata payments for any of its obligations under the
23 Leases for the "stub period" from the Petition Date until the next regularly scheduled
24 payment date, which is more generous treatments than some courts require. See, e.g., In re
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).

25 ⁸ Moreover, 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 post-petition
27 lease obligations under Section 365(d)(3). See, e.g., In re Southwest Aircraft Servs., Inc.,
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
28 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 billion, total creditors of approximately 45,000, and the effort to continue to provide utility
2 services as constant as possible to millions of customers in the midst of an unprecedented
3 energy crisis, PG&E's bankruptcy case is undeniably large and complex.

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

6 The factors employed by other courts to evaluate cause are also met in this case.
7 Because the Leases are essential to PG&E's ongoing business operations, and such
8 operations are anticipated to be an important source for funding PG&E's Chapter 11 plan,
9 the decision to assume or reject these Leases would be integral to any plan of reorganization.
10 Candelario Decl. ¶5. In addition, based on, among other things, PG&E's overall financial
11 position and prospects, there is clearly more than a "reasonable possibility" that PG&E will
12 submit a plan capable of being confirmed. *Id.* ¶7. Furthermore, based on the tremendous
13 size and complexity of this case and the need to operate in the midst of an unprecedented
14 energy crisis, PG&E in this early phase of its Chapter 11 case has focused and for the next
15 several months will continue to focus on the most urgent matters, leaving it insufficient time
16 to fully consider and analyze its portfolio of leases, including determining the need for and
17 the potential value of each of its leases in the context of the formulation of a Chapter 11
18 plan. Moreover, there is no evidence indicating that the lessors under the Leases will be
19 subject to damages beyond compensation available under the Bankruptcy Code due to
20 PG&E's continued occupation of the premises during the requested extension.

21 Courts routinely find "cause" for granting an extension of the time to assume or
22 reject leases where, as here, the debtor is unable to make a clear and informed assessment of
23 the leases' benefits and burdens to the estate within the statutory period. *See, e.g., Legacy*
24 *Ltd. v. Channel Home Ctrs., Inc. (In re Channel Home Ctrs., Inc.)*, 989 F.2d 682, 688 (3d
25 Cir. 1993) (extension granted where debtor could not make informed decision within
26 existing time to determine whether leases were necessary for plan of reorganization);
27 *Chapman Inv. Assocs. v. American Healthcare Mgmt.*, 94 B.R. 420, *aff'd*, 900 F.2d 827 (5th
28 Cir. 1990) (cause for extension where debtor had numerous leases throughout United States

1 it had to examine prior to making decision to assume or reject); In re S & M Food Servs.,
2 Inc., 117 B.R. 497 (Bankr. E.D. Mo. 1990) (cause for granting extension where debtor had
3 not had reasonable period to determine value of leases in context of various alternatives in
4 plan of reorganization); In re Coastal Dry Dock & Repair Co., 62 B.R. 879 (Bankr. E.D.N.Y.
5 1986) (cause for granting extension based on importance of lease to reorganization
6 proceeding, and size and complexity of case).

7 Furthermore, the extension requested by this Motion—until the time of
8 confirmation of PG&E’s Chapter 11 plan—is consistent with extensions granted by other
9 courts. See, e.g., In re Monica Scott, 123 B.R., 990, 993 n.8 (Bankr. D. Minn. 1991) (court
10 can delay time to assume or reject leases until the moment of confirmation, when the
11 debtor’s chances of rehabilitation would finally be clear; “[u]nless the Congress addresses
12 this situation, cause will undoubtedly be found to exist, as a matter of course, for extending
13 to confirmation the time to assume or reject significant leases in Chapter 11 cases”); Omni
14 Partners, L.P. v. Pudgie’s Dev. of N.Y., Inc. (In re Pudgie’s Dev., Inc.), 239 B.R. 688
15 (S.D.N.Y. 1999) (acknowledging bankruptcy court’s prior extension of debtors’ time to
16 assume or reject leases through and including confirmation of a plan of reorganization);
17 accord; In re Jamesway Corp., 179 B.R. 33 (S.D.N.Y. 1995); In re Farley Inc., 152 B.R. 516
18 (Bankr. N.D. Ill. 1993); In re Ames Dep’t Stores, Inc., 136 B.R. 353 (Bankr. S.D.N.Y.
19 1992); In re Allegheny Int’l, Inc., 118 B.R. 282 (Bankr. W.D. Pa. 1990); In re Revco D.S.,
20 Inc., 109 B.R. 264 (Bankr. N.D. Ohio 1989).

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

25
26 IV.

27 CONCLUSION

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

PG&E’S MOT. TO EXT. TIME TO ASSUME OR REJECT REAL PROPERTY LEASES

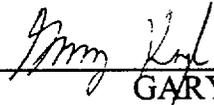
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1. Determining that notice of the Motion was appropriate under the circumstances;
2. Granting the Motion;
3. Extending the time during which PG&E may assume, assume and assign, or reject the Leases until the date of confirmation of PG&E's Chapter 11 plan, or such other date as this Court may order on motion made on or before that date; and
4. For such other relief as this Court determines to be equitable and just.

DATED: June 5, 2001

Respectfully,

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

By:  _____
GARY M. KAPLAN

Attorneys for Debtor and Debtor in Possession
PACIFIC GAS AND ELECTRIC COMPANY

HOWARD
RICE
NEMEROVSKI
CANADY
FALK
& RABKIN
A Professional Corporation