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

11
12 In re

Case No. 01-30923 DM

13 PACIFIC GAS AND ELECTRIC
COMPANY, a California corporation,

Chapter 11 Case

14 Debtor.

Date: October 29, 2001

Time: 9:30 a.m.

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

Judge: Hon. Dennis Montali

15 Federal I.D. No. 94-0742640

16
17 DEBTOR'S NOTICE OF MOTION AND THIRD MOTION FOR ORDER
18 EXTENDING TIME TO ASSUME, ASSUME AND ASSIGN, OR
19 REJECT REAL PROPERTY LEASES;
20 SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

[SUPPORTING DECLARATION OF TAMMIE CANDELARJO FILED SEPARATELY]

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HOWARD
RICE
NEMEROVSKI
CANADY
BALK
& RABKIN

A Professional Corporation

1 **NOTICE OF MOTION AND MOTION**

2 **PLEASE TAKE NOTICE** that on October 29, 2001, at 9:30 a.m., or as soon
3 thereafter as the matter may be heard, in the Courtroom of the Honorable Dennis Montali,
4 located at 235 Pine Street, 22nd Floor, San Francisco, California, Pacific Gas and Electric
5 Company, the debtor and debtor in possession in the above-captioned Chapter 11 case (the
6 "Debtor" or "PG&E"), will and hereby does move the Court (the "Motion") for entry of an
7 order further extending the time for PG&E to assume, assume and assign, or reject unexpired
8 real property leases under which PG&E is a lessee, pursuant to 11 U.S.C. Section 365(d)(4).

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

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

21 **PLEASE TAKE FURTHER NOTICE** that pursuant to Rule 9014-1(c)(1) of the
22 Bankruptcy Local Rules of the United States District Court for the Northern District of
23 California, any opposition to the Motion and the relief requested herein must be filed with
24 the Bankruptcy Court and served upon appropriate parties (including counsel for PG&E) at

25 _____
26 ¹ Notwithstanding 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., rights of way) that
may not constitute leases pursuant to Section 365.

1 least 14 days prior to the scheduled hearing date. If there is no timely objection to the
2 requested relief, the Court may enter an order granting such relief without further hearing.

3 MEMORANDUM OF POINTS AND AUTHORITIES

4 I.

5 GENERAL BACKGROUND

6 PG&E is an investor-owned utility providing electric and gas services to millions
7 of California residents and businesses. Beginning in approximately late May 2000, as a
8 result of the partial deregulation of the power industry, PG&E was forced to pay
9 dramatically increased wholesale prices for electricity. PG&E has, however, been prevented
10 from passing these costs on to retail customers, resulting in a staggering financial shortfall.
11 In the face of the deterioration in PG&E's financial condition, and with little progress having
12 been made toward a resolution of the crisis, PG&E by early April 2001 determined that a
13 Chapter 11 reorganization offered the best prospects for protecting the interests of its
14 creditors, customers, employees and shareholders alike. Accordingly, on April 6, 2001 (the
15 "Petition Date"), PG&E filed a voluntary petition under Chapter 11 of the Bankruptcy Code.
16 PG&E continues to manage and operate its business and property as a debtor in possession
17 pursuant to Sections 1107 and 1108 of the Bankruptcy Code 11 U.S.C. §§1107-1108. No
18 trustee has been appointed.

19 II.

20 THE LEASES

21 1. PG&E is the lessee² under 255 Leases, which can be generally categorized as
22 pertaining to one of the following six functions or uses in the ordinary course of PG&E's
23 business: office, utility, telecommunications, rights of way and similar land use rights,
24 parking and storage. Candelario Decl. ¶3. The office Leases include traditional high-rise
25 office space, warehouses with large yards and offices, small customer service offices, and

26
27 ² 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.

1 yards with a small office building. Id. The utility Leases are used to support the provision
2 of gas and electric service to PG&E's customers and include leases of land for electric
3 substations, mobile generator sites and gas regulator/meter stations. Id. The
4 telecommunications Leases are used to support PG&E's independent telecommunications
5 infrastructure and include leasing of vault and antenna/passive reflector space on
6 mountaintops and other key locations throughout PG&E's service territory. Id. The rights
7 of way and similar land use rights Leases are used to support PG&E's transmission and
8 distribution of gas or electric power and storage of gas. Id. The parking Leases are used to
9 provide ancillary parking adjacent to a PG&E facility. Id. The storage Leases are used for
10 storage of materials and equipment. Id.

11 2. Pursuant to Bankruptcy Code Section 365(d)(4), all of the Leases would have
12 been deemed rejected 60 days after the Petition Date (i.e., by June 5, 2001), unless either
13 (a) the Court approved PG&E's assumption of the Leases, or (b) the Court extended the time
14 to assume or reject the Leases, by (in either case) granting a motion filed by that date.

15 3. By orders filed on or about June 25, 2001 and July 5, 2001, respectively,
16 (collectively, the "Extension Orders")³, the Court extended until October 5, 2001 the time
17 during which PG&E may file a motion to assume, assume and assign, or reject all of the
18 Leases except one.⁴ Pursuant to the Extension Orders, such extension is without prejudice to
19 PG&E seeking a further extension of the time to assume, assume and assign, or reject the
20

21 ³ The June 25 Extension Order related to 238 Leases; the July 5 Extension Order
22 related to 17 Leases.

23 ⁴ With respect to PG&E's lease with Regency Centers, L.P. in the Strawflower Village
24 Shopping Center in Half Moon Bay, California (the "Regency Lease"): (i) the time during
25 which PG&E may file a motion to assume, assume and assign, or reject the Regency Lease
26 is extended until at least August 31, 2001; (ii) If PG&E is not in a position to determine
27 whether to assume, assume and assign, or reject the Regency Lease by August 31, 2001,
28 then PG&E cannot file a motion to reject the Regency Lease until after December 31, 2001
(but PG&E may file a motion to assume or assume and assign the Regency Lease during this
period); and (iii) If PG&E has not assumed, assumed and assigned, or rejected the Regency
Lease by December 31, 2001, the time during which PG&E may file a motion to assume,
assume and assign, or reject the Regency Lease is extended until any date beyond December
31, 2001 that may be set by the Court pursuant to motion filed by PG&E on or prior to
October 5, 2001.

1 Leases by motion filed prior to October 5, 2001, or by filing a reorganization plan by that
2 date which sets forth PG&E's intentions regarding such Leases.

3 4. On September 20, 2001, PG&E (along with co-proponent PG&E Corporation,
4 PG&E's parent company) filed a plan of reorganization (the "Plan") with the Court. The
5 Plan proposes to either assume, assume and assign or reject each of the Leases, as set forth
6 on the respective schedules referenced in the Plan, which will be provided prior to
7 confirmation of the Plan. For the reasons explained below, PG&E is not in a position to file
8 such schedules at this time. Candelario decl. ¶4.

9 5. By this Motion, PG&E seeks to extend until the date of confirmation of a
10 Chapter 11 plan in this case (or such other date as this Court may order on motion made on
11 or before that date⁵) the time to assume, assume and assign, or reject the Leases.⁶

12 6. Among other things, PG&E requires this additional time to intelligently and
13 meaningfully appraise the Leases in the context of its plan of reorganization. The Plan
14 provides for the disaggregation and restructuring of PG&E's business into four lines of
15 business to be conducted by the reorganized Debtor and three new companies, and a transfer
16 of PG&E's assets and liabilities (including certain of the Leases) to these companies.
17 Candelario decl. ¶4 Thus, PG&E must assess the potential need for and value of each of the
18 Leases, as well as evaluate the proposed transfer of certain of the Leases to one of the newly
19 created companies. The sheer size and complexity of this case also necessarily impact such
20 determinations. As set forth in previous papers filed with the Court, PG&E has reported
21

22 ⁵ 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
24 of PG&E's Chapter 11 plan.

25 ⁶ To 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 pre-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 assets in excess of \$30 billion, has approximately 45,000 creditors and employs about
2 20,000 people. In addition, PG&E is in the midst of grappling with an unprecedented energy
3 crisis, resulting in more pressing and immediate matters requiring most of PG&E's attention
4 in the first phase of this Chapter 11 case.

5 7. The requested extension is a proper exercise of PG&E's business judgment, and
6 there is cause to grant the requested extension, because, *inter alia*, (a) the Leases are essential
7 to PG&E's operations, (b) PG&E continues to comply with its post-petition obligations
8 under the Leases, and (c) this case is exceptionally complex and involves a relatively large
9 number of leases.

10 III.

11 CAUSE EXISTS UNDER BANKRUPTCY CODE SECTION
12 365(d)(4) TO GRANT PG&E AN EXTENSION OF TIME TO
ASSUME, ASSUME AND ASSIGN, OR REJECT THE LEASES

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

15 Section 365(a) of the Bankruptcy Code gives a debtor in possession the power to
16 assume or reject any executory contract or unexpired lease. Section 365(d)(4) provides that,
17 unless the debtor assumes or rejects an unexpired lease of nonresidential real property within
18 60 days after the petition date, the lease is deemed rejected, and provides further that if the
19 debtor shows "cause" for an extension, the court is empowered to extend the time period to
20 assume or reject such a lease.

21 Accordingly, in an effort to provide debtors with the best opportunity to
22 reorganize successfully, courts regularly permit extensions of time for debtors to decide
23 whether to assume or reject unexpired real property leases. "Particularly in large chapter 11
24 cases, a sixty day period, or even an extended but set period, is unrealistic if it will force a
25 debtor in possession to assume or reject leases before it can finalize a business plan." 2
26 Lawrence P. King, Collier on Bankruptcy ¶365.04[3][d][i] at 365-37 (15th ed. rev. 2000).
27 "The amount of additional time to be given, if any, has been left to the discretion of the court
28 and the Code does not limit the court in granting a substantial extension of time." In re Bon

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

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

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

- 9
- 10 • whether the leases are the primary assets of the debtor;
 - 11 • whether the lessor continues to receive rental payments; and
 - 12 • whether the case is exceptionally complex and involves a large number of leases.

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

- 17
- 18 • whether the decision to assume or reject the leases would be central to any plan of reorganization;
 - 19 • whether there is a reasonable possibility that the debtor will submit a plan capable of being confirmed;
 - 20 • whether the debtor has had the time necessary to intelligently appraise its financial situation and the potential value of its assets in terms of the formulation of a plan;
 - 21 • whether the lessor will be subject to damages beyond compensation available under the Bankruptcy Code due to the debtor's continued occupation;
 - 22 • whether the lessor has a reversionary interest in the building built by the debtor on the lessor's land; and
 - 23 • 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
9 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.

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 subject to the Leases to support the provision of gas and electric service to
14 its customers. Candelario Decl. ¶5.

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

22
23 ⁷ Indeed, PG&E has even made pro-rata payments for its obligations under the Leases
24 for the "stub period" from the Petition Date until the next regularly scheduled payment date,
25 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).

26 ⁸ Moreover, several courts, including the Ninth Circuit, have held that a debtor may be
27 granted an extension under Section 365(d)(4) despite its failure to perform its post-petition
28 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
(continued . . .)

1 Third, PG&E's Chapter 11 case is particularly complex and involves a relatively
2 large number of leases. As discussed above, there are 255 Leases with respect to property
3 located throughout California. In addition, in view of its assets in excess of \$30 billion, total
4 creditors of approximately 45,000, and the effort to continue to provide utility services as
5 constant as possible to millions of customers in the midst of an unprecedented energy crisis,
6 PG&E's bankruptcy case is undeniably large and complex. The complexity is heightened by
7 the Plan's proposed restructuring of PG&E's business and transfer of certain of the Leases to
8 newly created companies.

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

11 The factors employed by other courts to evaluate cause are also met in this case.
12 Because the Leases are essential to PG&E's ongoing business operations, and such
13 operations are anticipated to be an important source for funding PG&E's Plan, the decision
14 to assume or reject these Leases is integral to the Plan. Candelario Decl. ¶5. In addition,
15 based on, among other things, PG&E's overall financial position and prospects, there is
16 clearly more than a "reasonable possibility" that the Plan (as it may be amended) is capable
17 of being confirmed. *Id.* ¶7. Furthermore, based on the tremendous size and complexity of
18 this case and the need to operate in the midst of an unprecedented energy crisis, PG&E in
19 this early phase of its Chapter 11 case, has focused on the most urgent matters, leaving it
20 insufficient time to fully consider and analyze its portfolio of leases, including assessing the
21 potential need for and value of each of the Leases, and evaluating the proposed transfer of
22 certain of the Leases to one of the new companies to be formed pursuant to the Plan.
23 Moreover, there is no evidence indicating that the lessors under the Leases will be subject to
24 damages beyond compensation available under the Bankruptcy Code due to PG&E's
25 continued occupation of the premises during the requested extension.

26 _____
27 (. . . continued)

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 Courts routinely find "cause" for granting an extension of the time to assume or
2 reject leases where, as here, the debtor is unable to make a clear and informed assessment of
3 the leases' benefits and burdens to the estate within the statutory period. See, e.g., Legacy
4 Ltd. v. Channel Home Ctrs., Inc. (In re Channel Home Ctrs., Inc.), 989 F.2d 682, 688 (3d
5 Cir. 1993) (extension granted where debtor could not make informed decision within
6 existing time to determine whether leases were necessary for plan of reorganization);
7 Chapman Inv. Assocs. v. American Healthcare Mgmt., 94 B.R. 420 (N.D. Tex. 1989), aff'd,
8 900 F.2d 827 (5th Cir. 1990) (cause for extension where debtor had numerous leases
9 throughout United States it had to examine prior to making decision to assume or reject); In
10 re S & M Food Servs., Inc., 117 B.R. 497 (Bankr. E.D. Mo. 1990) (cause for granting
11 extension where debtor had not had reasonable period to determine value of leases in context
12 of various alternatives in plan of reorganization); In re Coastal Dry Dock & Repair Co., 62
13 B.R. 879 (Bankr. E.D.N.Y. 1986) (cause for granting extension based on importance of lease
14 to reorganization proceeding, and size and complexity of case).

15 Furthermore, the extension requested by this Motion—until the time of
16 confirmation of PG&E's Chapter 11 plan—is consistent with extensions granted by other
17 courts. See, e.g., In re Monica Scott, 123 B.R., 990, 993 n.8 (Bankr. D. Minn. 1991) (court
18 can delay time to assume or reject leases until the moment of confirmation, when the
19 debtor's chances of rehabilitation would finally be clear; "[u]nless the Congress addresses
20 this situation, cause will undoubtedly be found to exist, as a matter of course, for extending
21 to confirmation the time to assume or reject significant leases in Chapter 11 cases"); Omni
22 Partners, L.P. v. Pudgie's Dev. of N.Y., Inc. (In re Pudgie's Dev., Inc.), 239 B.R. 688
23 (S.D.N.Y. 1999) (acknowledging bankruptcy court's prior extension of debtors' time to
24 assume or reject leases through and including confirmation of a plan of reorganization);
25 accord; In re Jamesway Corp., 179 B.R. 33 (S.D.N.Y. 1995); In re Farley Inc., 152 B.R. 516
26 (Bankr. N.D. Ill. 1993); In re Ames Dep't Stores, Inc., 136 B.R. 353 (Bankr. S.D.N.Y.
27 1992); In re Allegheny Int'l, Inc., 118 B.R. 282 (Bankr. W.D. Pa. 1990); In re Revco D.S.
28 Inc., 109 B.R. 264 (Bankr. N.D. Ohio 1989).

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

5 IV.

6 CONCLUSION

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

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

14 DATED: October 1, 2001

15 Respectfully,

16 HOWARD, RICE, NEMEROVSKI, CANADY,
17 FALK & RABKIN
18 A Professional Corporation

19 By: 
20 GARY M. KAPLAN

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