

50-275/323

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PACIFIC GAS AND ELECTRIC COMPANY

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re

PACIFIC GAS AND ELECTRIC
COMPANY, a California corporation,

Debtor.

Federal I.D. No. 94-0742640

No. 01-30923 DM

Chapter 11

Date: May 25, 2001
Time: 1:30 p.m.
Place: 235 Pine St., 22nd Floor
San Francisco, California
Judge: Hon. Dennis Montali

REPLY BRIEF IN SUPPORT OF
MOTION FOR ORDER AUTHORIZING ASSUMPTION OF
EXECUTORY HYDROELECTRIC POWER PURCHASE CONTRACTS

[SUPPORTING DECLARATION OF KEVIN H. GOISHI
FILED SEPARATELY]

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9/1 Add: Kids Oge Mail Center

REPLY BRIEF ISO ORDER AUTHORIZING ASSUMPTION OF EXEC. HPP CONTRACTS

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1 Pacific Gas and Electric Company, the debtor and debtor in possession in the above-
2 captioned case ("PG&E"), respectfully submits this Reply Brief In Support Of Motion For
3 Order Authorizing Assumption Of Executory Hydroelectric Power Purchase Contracts (the
4 "Motion"). Pursuant to Section 365(a) of the Bankruptcy Code (11 U.S.C. §365(a)), PG&E
5 seeks to assume eight hydroelectric power purchase contracts and the ancillary agreements
6 and amendments thereto (collectively, the "HPP Contracts"). This Reply Brief responds to
7 the "Qualified Opposition To Debtor's Motion For Order Authorizing Assumption Of
8 Executory Hydroelectric Power Purchase Contracts" filed individually by the Oakdale and
9 South San Joaquin Irrigation Districts, Oroville-Wyandotte Irrigation District, Nevada
10 Irrigation District, Merced Irrigation District, Placer County Water Agency, and Yuba
11 County Water Agency (collectively, the "Irrigation Districts"). The Irrigation Districts raise
12 common concerns which are discussed below.

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I.

ANCILLARY AGREEMENTS AND AMENDMENTS

The Irrigation Districts request that PG&E specify the ancillary agreements and
amendments included in the Motion but not filed with the Court due to their
voluminousness. PG&E has attached as Exhibit A to the Declaration of Kevin H. Goishi
("Goishi Declaration"), filed concurrently herewith, a list of these ancillary agreements and
amendments. These documents do not materially alter PG&E's obligations under the
primary contracts.

II.

ADEQUATE ASSURANCE

Section 365(b)(1) provides that a debtor in possession may not assume an executory
contract unless it provides adequate assurance that it will cure any default, that it will
compensate the other party for any pecuniary loss resulting from the default, and that the
contract will be performed in the future. 11 U.S.C. §365(b)(1)(A)-(C); see also Worthington

v. General Motors Corp. (In re Claremont Acquisition Corp.), 113 F.3d 1029, 1033 (9th Cir. 1997) (“In general, a debtor must cure all defaults, both monetary and nonmonetary, prior to the assumption and assignment of an executory contract.”). The Irrigation Districts err in their contention that section 365 “permits Debtor to assume the Contracts only if it cures all defaults.” Adequate assurance that the action will be taken is a sufficient substitute for the immediate taking of the action. 3 Lawrence P. King, Collier on Bankruptcy ¶365.05[2], at 365-48 (15th ed. rev. 2000). The meaning of the term “adequate assurance” is left to be developed based upon the facts and circumstances of each case but “fall[s] considerably short of an absolute guarantee of performance.” Cinicola v. Scharffenberger, — F.3d —, No. 00-3318, 2001 WL 427639, at *9 n.10 (3rd Cir. Apr. 25, 2001) (citations omitted); see Collier on Bankruptcy, supra, ¶365.05[3][a], at 365-48 to 365-49.

In Part III of the Motion, PG&E provides adequate assurance that it will cure all arrearages and that it will perform the HPP Contracts in the future, upon entry of the Court’s order granting the Motion. As of May 16, 2001, the O&M payments in arrears total an aggregate amount of \$1,376,633.94: (1) Rollins Powerhouse Project — \$6,794.32; (2) Sly Creek Powerhouse Project — \$0; (3) Yuba-Bear Project — \$170,428.93; (4) Yuba River Development Project — \$325,606.77; (5) South Fork Project — \$284,146.04; (6) Merced River Development Project — \$446,623.71; and (7) Middle Fork Project — \$143,034.17. An updated schedule of the payments which fell due after the petition date but which were accrued during the pre-petition period is attached as Exhibit B to the Goishi Declaration. These figures vary to some extent from those the Irrigation Districts have provided because PG&E has not included in its calculations payments due which cover the post-petition period. PG&E is processing for payment such post-petition amounts.

In addition to the O&M payments, the total amount of semiannual payments in arrears as of May 15, 2001 is \$2,462,830.80: (1) Merced Irrigation District — \$427,793.50; (2) Nevada Irrigation District — \$716,226.05; and (3) Placer County Water Agency — \$1,318,811.25. These amounts reflect the payments which fell due after the petition date but were accrued during the pre-petition period. As with the O&M payments, PG&E has

1 processed for payment the amounts due which cover the post-petition period.

2 PG&E has sufficient cash reserves to cure the arrearages and substantial revenue to
3 provide adequate assurance of future performance under the HPP Contracts. As of May 15,
4 2001, PG&E's cash accounts totaled approximately \$32 million and short-term investments
5 totaled approximately \$2.6 billion. In addition, PG&E's gas and electric revenue totaled
6 approximately \$9.2 billion in 1999; \$9.6 billion in 2000; and \$2.5 billion in the first three
7 months of March 2001. This information is included in the Schedules And Statement Of
8 Financial Affairs ("Schedules And Statement") filed with the Court on May 15, 2001. Per
9 the Irrigation Districts' request for evidentiary support, and pursuant to Federal Rule of
10 Evidence 201, PG&E asks the Court to take judicial notice of the Schedules And Statement.¹
11 PG&E has attached as Exhibit C to the Goishi Declaration the relevant sections of the
12 Schedules And Statement for the Court's and the parties' convenient reference.

13 The Irrigation Districts also contend that PG&E failed to address the future
14 performance of PG&E's non-monetary obligations under the HPP Contracts. If the Court
15 authorizes assumption, the contracting parties will be required to comply with the terms of
16 the HPP Contracts, and PG&E fully intends to perform its contractual obligations.

17 Finally, Yuba County Water Agency contends on page three of its Qualified
18 Opposition that PG&E owes payment of \$860,000 in connection with the Lake Francis Dam
19 Facility. The parties negotiated an agreement that this payment would be contingent on their
20 formal execution of an amendment to the HPP Contract between PG&E and Yuba County
21 Water Agency. The parties have not yet executed such an amendment. PG&E will make the
22 payment at issue upon the parties doing so.

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26 ¹The Court may take judicial notice of pleadings and other papers on file in an underlying
27 bankruptcy case. See Mullis v. United States Bankruptcy Court, 828 F.2d 1385, 1388 n.9 (9th Cir.
28 1987) (recognizing that "pleadings, orders and other papers on file in the underlying bankruptcy
case" are subject to judicial notice.).

1 III.

2 CONCLUSION

3 Pursuant to 11 U.S.C. Section 365, PG&E respectfully requests that the Court enter an
4 order authorizing PG&E to assume the HPP Contracts.

5
6 DATED: May 18, 2001

7 Respectfully,

8 HOWARD, RICE, NEMEROVSKI, CANADY,
9 FALK & RABKIN
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11 By: Janet Nexon
12 JANET A. NEXON

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

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