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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 18, 2001  
Time: 10:00 a.m.  
Place: 235 Pine St., 22nd Floor  
San Francisco, California

21 DEBTOR'S NOTICE OF MOTION AND MOTION FOR ORDER AUTHORIZING  
22 ASSUMPTION OF COLLECTIVE BARGAINING AGREEMENTS;  
23 SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

24 [SUPPORTING DECLARATION OF RUSSELL M. JACKSON FILED SEPARATELY]

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## Statutes

11 U.S.C.	
§365(a)	1, 7, 8
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3 Lawrence P. King, Collier on Bankruptcy ¶365.03[1] (15th ed. rev. 2000)

7

1 MEMORANDUM OF POINTS AND AUTHORITIES

2  
3 I.

4 INTRODUCTION

5 Pacific Gas and Electric Company, the debtor and debtor in possession in the above-  
6 captioned Chapter 11 case ("PG&E" or the "Debtor"), hereby moves this Court for an order  
7 authorizing assumption of its collective bargaining agreements with the three unions that  
8 represent almost 70% of PG&E's employees, pursuant to Section 365(a) of the Bankruptcy  
9 Code (11 U.S.C. §365(a)).

10 PG&E is a party to four collective bargaining agreements (the "collective bargaining  
11 agreements"): two with the International Brotherhood of Electrical Workers, Local 1245,  
12 AFL-CIO ("IBEW"), and one each with the Engineers and Scientists of California, IFPTE  
13 Local 20, AFL-CIO and CLC ("ESC"), and the International Union of Security Officers  
14 ("IUSO"). Declaration of Russell Jackson, filed herewith ("Jackson Decl.") ¶2. The current  
15 IBEW and ESC collective bargaining agreements went into effect on January 1, 2000 and  
16 will expire on December 31, 2002. Id. The collective bargaining agreement with the IUSO  
17 became effective on January 1, 2000 and will expire on February 28, 2003. Id. The  
18 collective bargaining agreements govern the wages, hours and working conditions of  
19 approximately 13,830 employees. Id. ¶3.

20 Assuming the collective bargaining agreements is vital to preserving PG&E's positive  
21 working relationships with the IBEW, ESC and IUSO and the PG&E employees they  
22 represent during the post-petition period. PG&E's unionized workforce plays a crucial role  
23 in the continued success of PG&E's core business. PG&E's affirmation of the collective  
24 bargaining agreements will reassure its unionized workers that their wages, hours and  
25 working conditions, as codified in the collective bargaining agreements, remain intact and  
26 that PG&E will continue to bargain with their union representatives in good faith.

II.

FACTUAL BACKGROUND

A. The Collective Bargaining Agreements.

PG&E has been a party to a series of collective bargaining agreements with the IBEW and ESC for almost a half a century. Jackson Decl. ¶2. It has been a party to the IUSO collective bargaining agreement for almost 15 years. Id. In the aggregate, the four collective bargaining agreements to which PG&E is a party<sup>1</sup> govern the wages, hours and working conditions of over 69% of PG&E's workforce.<sup>2</sup> Specifically, those collective bargaining agreements include provisions specifying employee wages and benefits, bidding and transfer rights, overtime work allocation protocol, and displacement and severance procedures. Id. ¶3.

The collective bargaining agreements also contain a multi-step grievance process for the resolution of disputes that arise under the agreements. Id. ¶5. The final step of the respective grievance processes is arbitration before a neutral fact finder. The majority of disputes are settled at a grievance step below arbitration. Typically, cases that reach the arbitration level for resolution involve employee termination or disputes over the interpretation of key provisions of the collective bargaining agreements. Id.

Set forth below is a brief overview of the three labor unions that are parties to collective bargaining agreements with PG&E. The IBEW, ESC and IUSO collective bargaining agreements are attached to the Jackson Declaration as Exhibits A, B and C, respectively.

1. The International Brotherhood Of Electrical Workers.

Approximately 12,200 PG&E employees are represented by the IBEW under two separate bargaining agreements. Jackson Decl. ¶6. These employees provide a wide variety

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<sup>1</sup>PG&E is a party to two separate collective bargaining agreements with the IBEW.

<sup>2</sup>PG&E employs approximately 19,950 workers. Jackson Decl. ¶4.

1 of essential services to PG&E and its customers. The majority of IBEW-represented  
2 employees are highly skilled craft personnel, many of whom have completed at least one 36-  
3 month training program to perfect their trade. The IBEW represents employees in key areas  
4 such as electric and gas transmission and distribution, electric operations, steam and nuclear  
5 power generation, general capital construction, meter reading and maintenance, customer  
6 service, materials and fleet. IBEW classifications include lineman, gas service  
7 representative, electric crew foreman, materials handler, heavy equipment operator, water  
8 system repairman, radiation technician, welder, meter reader, computer operator and  
9 customer service representative. Id.

10  
11 2. The Engineers And Scientists Of California.

12 The ESC represents approximately 1,530 engineers and technical employees of PG&E.  
13 Jackson Decl. ¶7. These employees perform various functions such as engineering design  
14 and other estimating, planning, drafting and technology positions. Typical ESC job  
15 classifications include design engineers, engineering estimators, distribution engineers,  
16 engineering technicians and land agents. Id.

17 Many of the ESC engineering positions require an engineering degree, and in some  
18 cases professional registration. Id. Technologists and land positions require college degrees  
19 (AA or BA/BS) in the appropriate area. These positions typically require two to five years  
20 of experience before the employees are able to perform the full duties of the job. Id.

21  
22 3. The International Union Of Security Officers.

23 The IUSO represents approximately 100 employees who provide physical security to  
24 PG&E's Diablo Canyon Nuclear Power Plant. Jackson Decl. ¶8. These employees must  
25 meet all PG&E and Nuclear Regulatory Commission requirements and pass a background  
26 check. Id.



1           B.   Arrearages Under The Collective Bargaining Agreements.

2           In connection with its assumption of the collective bargaining agreements, PG&E will  
3   cure all outstanding arrearages thereunder, which total approximately \$20.9 million. As  
4   described more fully below, the arrearages include amounts owed pursuant to grievance  
5   awards and settlements (approximately \$1.2 million) and amounts owed to employees for  
6   severance and displacement payments related to power plant divestiture (approximately  
7   \$19.7 million). See Jackson Decl. ¶7.

8  
9           1.   Grievance Awards And Settlements.

10          The majority (in number) of the outstanding arrearages under the collective bargaining  
11   agreements consists of payments due pursuant to grievance settlements reached by PG&E  
12   and the unions over compensation issues regarding the allocation and payment of overtime  
13   and the backpay (less interim earnings) of reinstated unionized employees, and other  
14   compensation-related issues, such as temporary classification upgrade pay. Jackson Decl.  
15   ¶9.

16          PG&E estimates that approximately \$158,410 is owed to 202 unionized employees  
17   (\$784 per grievant, on average) for pre-petition settlements based on overtime awards. Id.  
18   ¶9. PG&E further estimates that approximately 12 unionized employees are or will be owed  
19   \$781,800 for backpay awards related to reinstatement of their positions, including estimated  
20   arbitration awards for those discharged prior to PG&E's Chapter 11 filing. Id. Collectively,  
21   all unpaid wage-related grievances awards (and pending awards or settlements) total  
22   approximately \$1,087,442, with an average payment of \$3,305 per grievant. Id.

23          In addition, there are approximately 115 employees owed approximately \$147,200 in  
24   miscellaneous payments for moving expenses, scheduling violations, upgrade pay and  
25   benefit reinstatement. Jackson Decl. ¶9.

26  
27          2.   Severance/Displacement Payments.

28          The other arrearages that PG&E will cure in connection with its assumption of the

1 collective bargaining agreements consist of amounts owed for severance and displacement  
2 payments to 276 IBEW-represented employees, totaling \$19.7 million. These employees are  
3 entitled to such payments because they fulfilled their contractual obligations to complete up  
4 to three years of operations and maintenance work at former PG&E plants that were sold to  
5 third parties. Jackson Decl. ¶10.

6 In August 1996, the California Legislature enacted Assembly Bill 1890 ("AB 1890"),  
7 which restructured the state electric industry by mandating that electric services be  
8 unbundled, and that wholesale markets be opened up to competition by January 1, 1998. AB  
9 1890 generally codified a market structure prescribed by the CPUC in its December 1995  
10 Preferred Policy Decision (the "1995 Policy Decision"). In its 1995 Policy Decision, the  
11 CPUC provided PG&E strong financial disincentives for remaining in the power generation  
12 business. Pursuant to those disincentives, and after CPUC approval, PG&E divested many  
13 of its electric generation power plants over time. Jackson Decl. ¶11.

14 AB 1890 requires that utilities that sell any electricity generating facility continue to  
15 operate and maintain such facility for a period of two years following the sale, and that  
16 reasonable costs associated with "voluntary severance, retraining, early retirement,  
17 outplacement, and related benefits due to plants sales are to be recovered through  
18 Competitive Transition Charges." Id. ¶12.

19 Recognizing that the sale of its fossil-fueled generation plants could take several years,  
20 and that it needed to retain highly skilled personnel who were knowledgeable about the  
21 operation of these plants, PG&E negotiated an employee severance and displacement  
22 program with the IBEW. Id. ¶13. The purpose of the program was to ensure that highly  
23 skilled union employees who worked at the plants would not leave their jobs, thus preventing  
24 PG&E from fulfilling its statutory obligation under AB 1890 to provide operating and  
25 maintenance services to the plants' buyers. The program provided for lump sum payments  
26 during the three-year sale period and a \$50,000 payment when the two-year operations and  
27 maintenance obligation was completed, or if the employee was displaced from his/her  
28 position at the sold facility. Id. The PG&E/IBEW letter agreement (known as LA R3-97-

1 53-PGE), outlining the severance and displacement program was signed by PG&E and the  
2 IBEW on April 14, 1997.<sup>3</sup> The PG&E/IBEW letter agreement is attached as Exhibit D to the  
3 Jackson Declaration. Id. ¶14.

4 Significantly, the severance and displacement program which PG&E is contractually  
5 obligated to implement under its letter agreement with the IBEW, and all reasonable costs  
6 resulting from implementation of that program, have already passed regulatory muster before  
7 the California Public Utilities Commission (the "CPUC"). In its Decision #00-02-048,  
8 issued on February 17, 2000, the CPUC reviewed the basic parameters of the severance and  
9 displacement program in a contested proceeding, and concluded that such program  
10 implementation costs reasonably incurred by PG&E are recoverable as customer rates in  
11 accordance with AB 1890.

12 Shortly after PG&E filed its Chapter 11 petition commencing this case, the final  
13 payment under the negotiated severance/displacement program became due to 276 union  
14 operations and maintenance employees. Jackson Decl. ¶10. It is undisputed that the union  
15 employees eligible for the payment fulfilled all of their obligations under the collective  
16 bargaining agreement. Id. ¶15. PG&E did not pay those employees their negotiated  
17 severance/displacement pay due to the Bankruptcy Code's prohibition against the payment  
18 of pre-petition debts by Chapter 11 debtors. The IBEW has filed a grievance challenging the  
19 Company's failure to honor its obligation under the collective bargaining agreement to pay  
20 the severance/displacement payments to the affected employees. Id.

21 PG&E will promptly cure all defaults by paying all arrearages under the collective  
22 bargaining agreements described above upon its assumption of the collective bargaining  
23 agreements, as required by Bankruptcy Code Section 365(b).

24  
25 <sup>3</sup>The collective bargaining agreements recognize that collective bargaining is a constant  
26 process in labor-management relations. The PG&E/IBEW collective bargaining agreements  
27 provide that the parties may enter into binding letter agreements during the term of the  
28 agreement. During general negotiations over the January 1, 2000 to December 31, 2002  
collective bargaining agreement, the parties formally affirmed the letter agreement regarding  
the severance and displacement program as part of that agreement. Jackson Decl. ¶14.

1 III.

2 ARGUMENT

3 Bankruptcy Code Section 365 governs the treatment of executory contracts following  
4 the filing of a bankruptcy petition: a “trustee [or debtor in possession], subject to the court’s  
5 approval, may assume or reject any executory contract or unexpired lease of the debtor.”  
6 11 U.S.C. §365(a). By this Motion, PG&E asks the Court to enter an order pursuant to  
7 Section 365(a) authorizing it to assume the collective bargaining agreements.

8  
9 A. Collective Bargaining Agreements Are Executory Contracts.

10 There is no doubt that collective bargaining agreements are executory contracts subject  
11 to assumption by a debtor. See, e.g., NLRB v. Bildisco & Bildisco, 465 U.S. 513, 521-22  
12 (1984). Although Section 1113 of the Bankruptcy Code addresses only the rejection of  
13 collective bargaining agreements, it is well established that the assumption of collective  
14 bargaining agreements is governed by the executory contract provisions of Bankruptcy Code  
15 Section 365. Wien Air Alaska, Inc. v. Bachner, 865 F.2d 1106, 1111 (9th Cir. 1989)  
16 (assumption of contract is governed by Section 365); Massachusetts Air Conditioning &  
17 Heating Corp. v. McCoy, 196 B.R. 659, 663 (D. Mass. 1996) (“[A]ssumption of collective  
18 bargaining agreement continues to be governed by the provisions for executory contracts  
19 under §365”).

20  
21 B. PG&E’s Assumption Of The Collective Bargaining Agreements Is Based On  
22 Sound Business Judgment.

23 The Bankruptcy Code does not provide courts with a standard to use in determining the  
24 propriety of a debtor in possession’s decision to assume executory contracts. 3 Lawrence P.  
25 King, Collier on Bankruptcy ¶365.03[1], at 365-22 (15th ed. rev. 2000). Absent statutory  
26 guidance, the widely accepted test adopted by the courts is the business judgment standard.  
27 See Bildisco, 465 U.S. at 523; Group of Institutional Investors v. Chicago, Milwaukee,  
28 St. Paul & Pac. R.R. Co., 318 U.S. 523, 550 (1943) (“[T]he question whether a lease should

1 be rejected, and if not, on what terms it should be assumed is one of business judgment”).  
2 Under this rule, courts accord great deference to a debtor in possession’s decision to assume  
3 an executory contract. See, e.g., Orion Pictures Corp. v. Showtime Networks, Inc. (In re  
4 Orion Pictures Corp.), 4 F.3d 1095, 1098 (2d Cir. 1993) (“At heart, a motion to assume  
5 should be considered a summary proceeding”); Lubrizol Enters., Inc. v. Richmond Metal  
6 Finishers, Inc. (In re Richmond Metal Finishers, Inc.), 756 F.2d 1043, 1046 (4th Cir. 1985)  
7 (“Lubrizol”) (“[T]he bankrupt’s decision . . . is to be accorded the deference mandated by the  
8 sound business judgment rule as generally applied by courts to discretionary actions or  
9 decisions of corporate directors”); In re III Enters., Inc., 163 B.R. 453, 469 (Bankr. E.D. Pa.  
10 1994) (“We will not substitute our own business judgment for that of the Debtor . . . unless  
11 ‘the decision is so unreasonable that it could not be based on sound business judgment, but  
12 only on bad faith or whim’”) (citations omitted); Summit Land Co. v. Allen (In re Summit  
13 Land Co.), 13 B.R. 310, 315 (Bankr. D. Utah 1981) (“[C]ourt approval under Section 365(a),  
14 if required, except in extraordinary situations, should be granted as a matter of course. To  
15 begin, this rule places responsibility for administering the estate with the trustee, not the  
16 court”).

17 The Ninth Circuit, in accordance with the widely accepted standard prevailing in other  
18 jurisdictions, also has adopted the business judgment rule for reviewing Section 365(a)  
19 motions. Robertson v. Pierce (In re Chi-Feng Huang), 23 B.R. 798, 800 (B.A.P. 9th Cir.  
20 1982) (“We believe the ‘business judgment’ rule is the standard which controls the court’s  
21 right to disapprove the [debtor in possession’s] decision to reject an executory contract. . . .  
22 Virtually all recent Bankruptcy Court decisions follow this rule”) (citations omitted);  
23 Turbowind, Inc. v. Post Street Mgmt., Inc. (In re Turbowind, Inc.), 42 B.R. 579, 585 (Bankr.  
24 S.D. Cal. 1984) (“The debtor has met its burden under the liberal ‘business judgment’  
25 standard”). Under the rule as generally formulated and applied in corporate litigation, courts  
26 defer to decisions of corporate directors regarding matters entrusted to their business  
27 judgment except upon a finding of bad faith or gross abuse of business discretion. See  
28 Lubrizol, 756 F.2d at 1047; Lewis v. Anderson, 615 F.2d 778, 782 (9th Cir. 1979).

1 Applying the foregoing precedents to this case, it is abundantly clear that PG&E's  
2 decision to assume the collective bargaining agreements was neither made in bad faith nor a  
3 gross abuse of its business discretion. To the contrary, PG&E's decision is anchored on  
4 fundamentally sound business reasons. First, PG&E's skilled union work force performs the  
5 functions that are critical to PG&E's ability to fulfill its legal duty to deliver safe and reliable  
6 service to its customers. The post-petition revenues PG&E collects from its customers are  
7 directly tied to the work performance of its unionized workforce. Jackson Decl. ¶16. As  
8 recognized by the Bankruptcy Court in In re Typocraft Co., 229 B.R. 685, 689 (Bankr. E.D.  
9 Mich. 1999):

10 "Labor is often an important, and in some cases the most important, factor and  
11 thus the status of any CBA [collective bargaining agreement] is critical to the  
success or failure of the operation (and likely the reorganization case itself)."

12 PG&E's unionized employees are knowledgeable about PG&E's operations and,  
13 collectively, have decades of experience in the generation, transmission and distribution of  
14 gas and electricity to millions of Californians. The employee demographics of its unionized  
15 workforce and the recruitment challenges PG&E has faced amidst a national shortage of  
16 skilled workers in energy-related industries mandate that PG&E retain this invaluable pool of  
17 employee talent. There is no doubt that the assumption of the collective bargaining  
18 agreement is crucial to PG&E's success during the post-petition period.

19 Further, during the Chapter 11 reorganization, which can be an anxious period for  
20 employees, it is especially important that PG&E's unionized employees remain focused on  
21 successfully and safely completing their job duties. If those employees have any doubt as to  
22 whether PG&E will honor the provisions of the collective bargaining agreements that govern  
23 their wages, hours and working conditions, they are likely to become distracted from their  
24 job duties and become disgruntled. PG&E and its customers cannot tolerate any labor unrest  
25 and strife that could result if there is any equivocation over PG&E's commitment to abide by  
26 its obligations under the collective bargaining agreements. This is especially true given the  
27 expectation of energy black-outs this summer. PG&E must ensure that its skilled union  
28 force is ready and willing to address emergency outage issues. Additionally, many PG&E

workers covered under the collective bargaining agreements are at the front lines dealing with customers' questions and, in many instances, anger over recent rate increases. Employee stress is inevitable, and it is important that PG&E foster a work environment that allows its workers to remain focused on performing their most critical duties. By affirming its collective bargaining agreements, PG&E is unquestionably exercising sound judgment in seeking to reduce, if not eliminate, any conceivable stress or distraction that may stem from negative labor management relations.

Assuming the collective bargaining agreements also will help PG&E retain its highly skilled union workforce. If employees believe their wages and benefits are at risk, or that the company may not honor the grievance process for the resolution of disputes, they will take their marketable skills elsewhere. In order to continue operating, PG&E needs to retain its skilled union workforce.

In sum, assuming the collective bargaining agreements, including curing all arrearages thereunder, is a sound business decision. The continued administration of the collective bargaining agreements in the ordinary course of its business, including the processing of grievances, is crucial to the continued smooth operation of PG&E's business both during and after the Chapter 11 period. Jackson Decl. ¶16. PG&E's unionized workforce plays an essential role in providing safe, responsive and reliable gas and electric services to millions of Californians. Accordingly, the Court should grant PG&E's motion to assume the collective bargaining agreements.

C. PG&E Will Cure All Arrearages And Provide Adequate Assurance Of Future Performance In Compliance With 11 U.S.C. Section 365(b).

Section 365(b)(1) provides that the debtor in possession may not assume an executory contract unless it provides adequate assurance that it will cure any defaults, 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., Inc.), 113 F.3d 1029, 1033 (9th

1 Cir. 1997) ("In general, a debtor must cure all defaults, both monetary and nonmonetary,  
2 prior to the assumption and assignment of an executory contract").

3 In compliance with Section 365(b)(1), and promptly following entry of the Court's  
4 order authorizing assumption of the collective bargaining agreements, PG&E will cure all  
5 arrearages, which, as set forth above, total approximately \$20.9 million. PG&E has adequate  
6 cash reserves to cure these arrearages. Jackson Decl. ¶17.

7 In addition, and as required under Section 365(b), PG&E has sufficient operating  
8 revenue to provide adequate assurance of future performance under the collective bargaining  
9 agreements. The payments due under those agreements represent only a small amount of  
10 PG&E's historical and projected revenues. See id. Further, as discussed above, under AB  
11 1890, these costs should be recoverable in rates as "reasonable costs" associated with  
12 severance and related benefits due to plant sales.

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IV.

CONCLUSION

16 For the foregoing reasons and pursuant to 11 U.S.C. Section 365, PG&E respectfully  
17 requests that the Court enter an order authorizing PG&E to assume the collective bargaining  
18 agreements.

20 DATED: May 18, 2001

Respectfully,

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

24 By: Janet A. Nexon  
JANET A. NEXON

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