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9 **UNITED STATES BANKRUPTCY COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**

11 In re)	No.	01-30923 DM
12 PACIFIC GAS AND ELECTRIC	)	Chapter	11
13 COMPANY,	)	Date:	January 16, 2002
14 Debtor.	)	Time:	9:30 a.m.
15	)	Ctrm:	Hon. Dennis Montali
16	)		235 Pine Street, 22 nd Floor
	)		San Francisco, California

17 **UNITED STATES TRUSTEE'S**
18 **OPPOSITION TO DEBTOR'S MOTION TO EXTEND EXCLUSIVITY**

19 Linda Ekstrom Stanley, United States Trustee, opposes Pacific Gas and Electric
20 Company's Motion for Order Further Extending Exclusivity Period for Plan of
21 Reorganization (the "Exclusivity Motion"). Although debtor's stated reason for an
22 extension of exclusivity is the complexity of the case, the Exclusivity Motion is intended
23 to limit the full participation of all parties to this bankruptcy case by blocking the filing of
24 alternative plans and should be denied. When debtor commenced this case, and the
25 Bankruptcy Court conferred its broad protection on the bankruptcy estate, debtor
26 relinquished any absolute right it may have had to self-determination. Chapter 11
27 cases cry out for the full participation and involvement of all parties in interest. Chapter
28 11 works most efficiently as a collaborative effort by all parties in interest to achieve a

UNITED STATES TRUSTEE'S OBJECTION TO DEBTOR'S MOTION TO EXTEND EXCLUSIVITY

1 workable solution. Congress enshrined this principle when it enacted Bankruptcy Code
2 § 1121, limiting debtor's absolute right to control the plan and giving parties in interest
3 full rights to file plans. Limiting exclusivity will not foster negotiation because debtor has
4 made clear the only plan it will accept is its own plan. The only way to ensure parties in
5 interest have the right to full participation is to give them the right to file a plan. With the
6 right to file a plan, a party can negotiate for different treatment or file a competing plan
7 for the consideration of all creditors.

8 Limiting a party's right to file a plan should be authorized only in exceptional
9 circumstances. Debtor has not shown any compelling reason to extend exclusivity.
10 PG&E has already had eight months to prepare and file its plan. During that same
11 time, parties in interest have been restrained from filing plans. PG&E's plan has been
12 on file for four months and has been substantially amended. The complexity and size
13 of the case argue in favor of more participation by parties in interest, not less. Denial
14 will encourage participation by the parties most affected by the plan and will serve to
15 ensure the best plan is confirmed, not simply the only plan now under consideration.

16 **I. PG&E HAS NOT MET ITS BURDEN OF PROVING THERE IS "CAUSE" TO**
17 **EXTEND EXCLUSIVITY**

18 PG&E has not met its burden of proof to show the extension of exclusivity is
19 warranted. The Bankruptcy Court may only extend exclusivity upon a showing of
20 appropriate "cause." 11 U.S.C. § 1121(d); *In re Texaco*, 79 B.R. 322, 326 (Bankr.
21 S.D.N.Y. 1987). PG&E, as the movant, bears the burden of demonstrating cause exists
22 to extend exclusivity. *Id.* ("The party who seeks the extension . . . has the burden of
23 establishing cause."); *In re General Bearing Corp.*, 136 B.R. 361, 367 (Bankr. S.D.N.Y.
24 1992).

25 PG&E cites just a few factors to support the existence of "cause" to extend
26 exclusivity. Debtor supports its request largely by reference to what has become the
27 standard, stock description of PG&E's bankruptcy case: "large, complex, unique."

28 The flaw in PG&E's argument is the failure to make a compelling showing of

1 particular facts demonstrating “cause” exists. Apart from “size and complexity,”
2 descriptors that are themselves just conclusions, not facts, debtor offers no novel facts
3 to support the extension. “[S]ize and complexity must be accompanied by other factors
4 pertinent to the particular debtor and its reorganization to justify extension of plan
5 exclusivity . . . “ *Texaco*, 88 B.R. at 537.

6 The Bankruptcy Court should ask why the proposed relief is necessary at all.
7 Does debtor believe there is a competing plan? What would be the consequence of the
8 filing of a competing plan? Would a competing plan distract the company from its
9 reorganization purposes? Does debtor face resource limitations? Are there unique
10 circumstances inherent in debtor’s business that make consideration of a competing
11 plan harmful to debtor’s business? Would the filing of a competing plan result in mass
12 defections by employees? Would investors and potential lenders be frightened by a
13 competing plan? Would a competing plan jeopardize the rehabilitation of the
14 company? Debtor sets out none of these reasons presumably because none exist.

15 Having failed to prove the necessity of an extension of exclusivity with a
16 particularized factual showing, debtor’s motion should be denied.

17 **II. EXTENDING EXCLUSIVITY SHOULD NOT BE AUTHORIZED BECAUSE IT**
18 **CONFLICTS WITH CONGRESS’S INTENT TO ALLOW PARTIES IN**
19 **INTEREST TO PROPOSE PLANS**

20 **A. The Bankruptcy Code Was Not Intended to Restrict Non-Debtors**
21 **From Filing Plans**

22 Congress made a subtle but important change to the practice of proposing plans
23 of reorganization by enacting the current Bankruptcy Code in 1978. Prior to the new
24 statute’s enactment, the Bankruptcy Act did not permit non-debtors in chapter XI to file
25 plans of arrangement. Section 1121 of the new Bankruptcy Code completely changed
26 that practice. The statute remedied the perceived weakness of the Act by allowing “any
27 party in interest” to file a plan and disclosure statement under the Code. 11 U.S.C.
28 § 1121(c); *In re Texaco*, 75 B.R. 322, 325 (S.D.N.Y. 1987).

The goal reflected in 11 U.S.C. § 1121, in allowing other interested parties
to file a plan of reorganization after the expiration of the debtor’s

1 exclusivity period, was predicated on the theory that there should be a
2 relative balance of negotiating strength between debtors and creditors
during the reorganization process.

3 *Id.*, citing *Teachers Ins. and Ann. Assoc. of Am. v. Lake in the Woods (In re Lake in the*
4 *Woods)*, 10 B.R. 338, 343 (E.D. Mich. 1981). The Bankruptcy Code was intended to
5 open the plan proposal process to creditors and debtors alike. *Texaco*, 79 B.R. at 325.

6 The Bankruptcy Court should be wary of granting extensions to the extraordinary
7 relief afforded debtors in the grant of exclusivity without clear and compelling
8 justification. Exclusivity should be seen as complementary to the automatic stay. Both
9 are tantamount to an injunction granted without any showing of need by the petitioning
10 debtor. These two pillars of the Bankruptcy Code give meaning and depth to the
11 “breathing spell” afforded chapter 11 debtors. See H.R. Rep. No. 595, 95th Cong., 2d
12 Sess. 174, *reprinted* in App. C COLLIER ON BANKRUPTCY App. Pt. 4(d)(i) at 1281 (15th
13 ed. rev. 2001) (the breathing spell gives businesses time to work constructively with
14 creditors to propose a plan of reorganization). The stay protects a debtor’s property
15 from legal process while the case is pending. Exclusivity allows a debtor the
16 opportunity to organize its affairs, consider its options, negotiate with creditors and
17 propose a plan:

18 Proposed chapter 11 recognizes the need for the debtor to remain in
19 control to some degree, or else debtors will avoid the reorganization
20 provisions in the bill until it would be too late for them to be an effective
remedy.

21 H. R. Rep. No. 95-595, 95th Cong., 1st Sess. 231-32, *reprinted in* App. C COLLIER ON
22 BANKRUPTCY App. Pt. 4(d)(i) at 1352 (15th ed. rev. 2001).

23 Congress’s initial grant of relief to debtors in chapter 11 cases was never
24 intended to be absolute, particularly in view of the lack of showing required to obtain the
25 relief. Congress expressed concern for the rights of non-debtors, too:

26 At the same time, the bill recognizes the legitimate interests of creditors,
27 whose money is in the enterprise as much as the debtor’s, to have a say
28 in the future of the company. The bill gives the debtor an exclusive right
to propose a plan for 120 days. In most cases, 120 days will give the
debtor adequate time to negotiate a settlement, without unduly delaying
creditors . . .

1 If, on the other hand, a debtor delayed in arriving at an agreement, the
2 court could shorten the period [of exclusivity] and permit creditors to
3 formulate and propose a reorganization plan

3 *Id.*

4 Congress enacted § 1121 to encourage voluntary reorganization but gave
5 debtors only a limited right to self-determination. Congress's limitation on exclusivity
6 must be seen to proscribe a debtor's exclusive right to file a plan. Congress created a
7 creditor democracy in § 1121 and various other provisions of the Code calling for
8 creditor participation. Motions to extend exclusivity should be seen as treading on this
9 democracy. To give effect to Congress's intention, the Bankruptcy Court should grant
10 motions to extend exclusivity reluctantly.

11 **B. Extensions of Exclusivity Should Not Be Used to Block**
12 **Consideration of Other Plans**

13 PG&E's request to extend exclusivity is intended to prevent other parties from
14 proposing their own plans of reorganization. Blocking other plans is not a proper
15 purpose for extending exclusivity. "An extension should not be employed as a tactical
16 device to put pressure on parties in interest to yield to a plan they consider
17 unsatisfactory." S.Rep. No. 95-989 95th Cong. 2d Sess. 118 *reprinted in* App. C
18 *COLLIER ON BANKRUPTCY* App. Pt. 4(e)(i) at 2071 (15th ed. rev. 2001); *In re Public Serv.*
19 *Co. of New Hampshire*, 88 B.R. 521, 537.

20 In *Public Service Co. of New Hampshire*, the court agreed to a first extension of
21 exclusivity for debtor, a request supported by many parties in interest. The *Public*
22 *Service Co. of New Hampshire* court cautioned that a determination whether to extend
23 exclusivity must consider the possibility of an "alternate substantial plan." The court
24 suggested future extensions of exclusivity would be carefully scrutinized to avoid the
25 debtor "hold[ing] the creditors and other parties 'hostage' so [it] can force its view of an
26 appropriate plan upon other parties." *In re Public Service Co. of New Hampshire*, 88
27 B.R. at 537.

28 Extensions of exclusivity should only be granted on compelling showings.

1 According to the Fifth Circuit, the bankruptcy court should carefully weigh requests for
2 extension of exclusivity because it “must avoid reinstating the imbalance between the
3 debtor and its creditors that characterized proceedings under the old Chapter XI.
4 Section 1121 was designed, and should be faithfully interpreted, to limit the delay that
5 makes creditors the hostages of Chapter 11 debtors.” *In re Timbers of Inwood Forest*
6 *Assoc., Ltd.*, 808 F.2d 363, 372 (5th Cir. 1987), *aff’d*, 484 U.S. 365, 108 S.Ct. 626
7 (1988).

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9 **III. DEBTOR FILED A COMPREHENSIVE PLAN FOUR MONTHS AGO AND NO
10 EXTENSION OF EXCLUSIVITY IS NECESSARY**

11 Debtor no longer requires the protection of the formidable cocoon of exclusivity.
12 Debtor’s business did not suffer the kind of neglectful record-keeping or failed business
13 practice one typically finds in chapter 11. This is not a case of simple business
14 incompetence or a failure to pay trust fund taxes. Rather, debtor’s problem was its
15 ability to recover the actual cost of power it purchased in customer rates and other
16 aspects of California’s flawed scheme for electrical deregulation. Debtor’s business, its
17 record-keeping and its staffing have remained constant since the outset of the
18 company’s problems. Since the filing, and to its credit, debtor has taken the time to
19 draft and propose a plan it considers confirmable. The Bankruptcy Court previously
20 approved a 120-day extension of exclusivity, meaning debtor has had fully 240 days of
21 exclusivity.

22 Why does PG&E need an extension of exclusivity? PG&E already requested a
23 first extension of exclusivity. The request was unopposed, presumably because parties
24 thought PG&E needed time to stabilize its operations and formulate a plan. The
25 request was granted by the Bankruptcy Court. PG&E used the extension of exclusivity
26 to file a comprehensive and far-reaching plan of reorganization. The plan has been on
27 file for nearly four months now, and PG&E’s operations never needed much
28 stabilization. No further extensions of exclusivity are necessary. An extension now

1 would only serve to limit dissent and prevent parties from contributing their ideas and
2 competing plans for reorganization.

3 **IV. NO FURTHER EXTENSIONS OF EXCLUSIVITY SHOULD BE GRANTED**
4 **BECAUSE OF THE COMPLEXITY AND IMPORTANCE OF PG&E'S**
5 **BANKRUPTCY CASE**

6 Since the inception of this case, innumerable parties including debtor and the
7 Official Committee of Unsecured Creditors, have repeated a favorite incantation: "this
8 case is different." Indeed, it is. As the Bankruptcy Court in the *Public Service Co. of*
9 *New Hampshire* case foreshadowed:

10 This chapter 11 proceeding is unique in that it involves the reorganization
11 of regulated monopoly utility company by private investors. The case is
12 also unique in the sense that it involves an otherwise financially sound
13 utility company

14 There in fact have been *no* reorganization cases in the federal courts
15 dealing with privately-owned utility companies since the 1930's.
16 Moreover, the reorganization cases from that prior period usually involve
17 layers of public utility holding companies with convoluted financial
18 dealings that are in no sense analogous to the present proceeding. In a
19 real sense it may well be said that this case is unprecedented.

20 *In re Public Service Co. of New Hampshire*, 88 B.R. 521, 525 (Bankr. D.N.H. 1988).

21 Debtor argues the size and complexity of this case entitle it to an extension of
22 exclusivity.

23 In a conventional bankruptcy case these factors standing alone might merit a
24 second extension of exclusivity but they are not persuasive in this setting. Debtor has
25 already filed a plan of reorganization and has had substantial opportunity to review and
26 amend that plan and the accompanying disclosure statement. Debtor doesn't need
27 more time to formulate a plan.

28 In the *Public Service Co. of New Hampshire* case, perhaps the only analogous
bankruptcy case in this context, both the bankruptcy court and commentators credit the
court's eventual refusal to permit extensions of exclusivity with a limitation on
professional fees and the eventual success of the case. "From the beginning, the court
thought competing reorganization plans could be the most efficient route to pursue.
The court never gave much credence to the debtor's complaint that terminating the

1 exclusivity period would lead to a chaotic process which would endanger the chances of
2 a quick recovery.” John F. Lomax, *Future Electric Utility Bankruptcies: Are They on the*
3 *Horizon and What Can We Learn from Public Service Co, of New Hampshire’s*
4 *Experience*, 12 BANKR. DEVEL. J. 535, 566 (1996); *In re Public Service Co. of New*
5 *Hampshire*, 88 B.R. at 539 and particularly n. 16.

6 The size and complexity of this case do not call out for less information, for more
7 limited terms of reorganization or for a continued and necessarily circumscribed debate
8 over the terms of a single, debtor-sponsored plan. But this would be the natural result
9 of any extension of exclusivity. The large size and inherent complexity of the case, in
10 addition to a factor the debtor did not recite, the importance of the issues the
11 Bankruptcy Court has been asked to decide, compel a completely different conclusion.
12 More voices should be heard, alternative views should be expressed and potentially
13 competing proposals and plans should be considered.

14 Even without attacking any particular component of PG&E’s proposed plan, it is
15 safe to say it is only one version, one concept, of how the company might emerge from
16 bankruptcy protection. In a case with the complexity of this one, it would be wiser to
17 open the floor to alternative proposals which might enhance or shorten creditor
18 recovery and might find the support of a broader range of constituencies than debtor
19 has mustered to date.

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V. CONCLUSION

The United States Trustee urges the court deny the request for an extension of exclusivity. The request is not supported by any facts to show it is necessary let alone compulsory, it is inconsistent with the intention of the drafters of § 1121 which permit any party to file a plan, and it is not appropriate given the nature of the issues and importance of the case.

Date:

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By: _____
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