

1
2
3 UNITED STATES BANKRUPTCY COURT
4 EASTERN DISTRICT OF CALIFORNIA
5
6 SACRAMENTO DIVISION
7
8

9 In re) Case No. 06-20046-A-11
10 LARGE SCALE BIOLOGY) Docket Control No. FWP-6
11 CORPORATION,)
12 Debtor.) Date: February 3, 2006
13) Time: 10:00 a.m.
_____)

14 On February 3, 2006 at 10:00 a.m., the court considered the
15 motion of the debtor in possession to determine that its
16 agreement with P.G.&E. provided P.G.&E. with adequate assurance
17 of payment for future utility service. The text of the final
18 ruling appended to the minutes of the hearing follows below.
19 This final ruling constitutes a "reasoned explanation" for the
court's decision and accordingly is posted to the court's
Internet site, www.caeb.uscourts.gov, in a text-searchable format
as required by the E-Government Act of 2002. The official record
of this ruling remains the ruling appended to the minutes of the
hearing.

20 **FINAL RULING**

21 The motion will be granted in part and denied in part.

22 The debtor-in-possession seeks an order approving agreement
23 with PG&E concerning the debtor's assurance of payment for future
24 utility service. The debtor also seeks to prohibit PG&E from
25 altering, refusing, or discontinuing utility service, as long as
26 this assurance of payment is performed.

27 Under the agreement, the debtor has agreed to pay \$35,945
28 deposit to PG&E as an assurance of payment for future utility

1 services. This deposit is approximately twice the debtor's
2 monthly utility bill. The deposit will be paid in three
3 installments of \$11,981.67. The installments are due on February
4 10, 2006, March 10, 2006, and April 10, 2006.

5 Except as permitted by 11 U.S.C. §§ 366(b) & 366(c), 11
6 U.S.C. § 366(a) bars a utility for refusing, altering, or
7 discontinuing utility service to a debtor on the basis that a
8 bankruptcy petition has been filed or the existence of a debt to
9 the utility for prepetition utility services.

10 A utility may alter, refuse, or discontinue service if a
11 debtor or trustee fails to furnish the utility with assurance of
12 payment. See 11 U.S.C. §§ 366(b) & 366(c)(2). 11 U.S.C. §
13 366(c)(1)(A) defines what is an acceptable assurance of payment
14 for future utility service. It may take the form of a cash
15 deposit, letter or credit, certificate of deposit, surety bond,
16 prepayment, or any other form of security that the trustee/debtor
17 and the utility may agree upon.

18 In cases under any chapter except chapter 11, the debtor or
19 trustee must offer the utility assurance of payment within 20
20 days of the order for relief. See 11 U.S.C. § 366(b). If no
21 assurance of payment is given, the utility may refuse, alter, or
22 discontinue utility service. When a timely offer of assurance of
23 payment is made, section 366(b) does not permit the utility to
24 reject the assurance of payment as unsatisfactory and then
25 refuse, alter, or discontinue utility service. Instead, if the
26 utility does not believe the offered assurance of payment is
27 adequate, the utility must request that the court make reasonable
28 modifications to the assurance of payment offered by the debtor.

1 See 11 U.S.C. § 366(b) .

2 Section 366(b), however, does not apply in chapter 11 cases.
3 Section 366(c)(2) is applicable. Section 366(c)(2) requires that
4 a chapter 11 debtor offer a utility assurance of payment within
5 30 days of the filing of the petition. As under section 366(b),
6 if adequate assurance is not timely offered, the utility may
7 alter, refuse, or discontinue utility service. Unlike section
8 366(b), however, section 366(c)(3) permits a utility to reject
9 the assurance of payment offered by a chapter 11 debtor and then
10 unilaterally refuse, alter, or discontinue utility service. When
11 a chapter 11 debtor is unable to satisfy the utility, the debtor
12 must seek a court order determining that the offered assurance of
13 payment, or some modified version of it, is adequate. See 11
14 U.S.C. § 366(c)(3) .

15 In this case, the debtor and the utility have agreed on the
16 appropriate assurance of payment. While section 366(c)(3)(A)
17 provides that the court may order "modification of the amount of
18 an assurance [payment]," it makes no provision for the court to
19 approve such agreements regarding assurance of payments.
20 Nevertheless, under section 366(c)(3)(B), the court has the
21 authority to make a finding regarding the adequacy of the
22 debtor's assurance of payment. That section outlines the factors
23 the court may not consider when determining "whether an assurance
24 of payment is adequate." Because the court may approve the
25 adequacy of the assurance of payment, it may also approve, i.e.,
26 determine as adequate, the agreement of the parties on this
27 issue.

28 ///

1 In fact, the assurance of payment agreed to by the parties
2 is adequate. It is taking the form of a cash deposit that
3 appears sufficient to guarantee that the debtor will pay for
4 future utility services.

5 However, approval of their agreement does not mean that the
6 court may issue a blanket prohibition barring the utility from
7 altering, refusing, or discontinuing service to the debtor in the
8 future. In a chapter 11 case, section 366(a) prohibits a utility
9 from discontinuing service unless the discontinuance is pursuant
10 to sections 366(c). As discussed above, both the debtor and the
11 utility may seek modification of the assurance payment at any
12 time. See 11 U.S.C. § 366(c)(3). In the face of this right to
13 seek the modification of the assurance of payment, the court
14 cannot perpetually bar the utility from altering, refusing, or
15 discontinuing service. Instead, the court will order, in light
16 of the agreement of the parties, that in the event the utility
17 later determines the assurance of payment approved today is no
18 longer adequate, the utility shall not refuse, alter, or
19 discontinue utility service until it has first requested that the
20 court modify the debtor's assurance of payment and the debtor has
21 failed to provide such modified assurance of payment.

22 Therefore, the court finds that the assurance of payment is
23 adequate for purposes of section 366(c) and the agreement will be
24 approved. This does not prevent, however, any party in interest
25 from seeking a modification of the assurance payment at some time
26 in the future. The motion will be denied to the extent it seeks
27 a blanket prohibition barring PG&E from altering, refusing, or
28 discontinuing service, but the court will curtail PG&E's right to

1 unilaterally refuse, alter, or discontinue utility service as
2 outlined immediately above.