

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN**

In re:	§	Chapter 11
	§	
CAPITOL LAKES, INC., <sup>1</sup>	§	Case No. 16-10158
	§	
Debtor.	§	Hon. Robert D. Martin

**MOTION OF DEBTOR FOR INTERIM AND FINAL ORDERS  
(I) PROHIBITING UTILITY PROVIDERS FROM ALTERING, REFUSING  
OR DISCONTINUING SERVICE, (II) DEEMING THE UTILITY  
PROVIDERS ADEQUATELY ASSURED OF FUTURE PERFORMANCE,  
AND (III) ESTABLISHING PROCEDURES FOR DETERMINING  
REQUESTS FOR ADDITIONAL ADEQUATE ASSURANCE**

Capitol Lakes, Inc., the above-captioned debtor and debtor in possession (the “Debtor”), by and through its undersigned proposed attorneys, files this motion (the “Motion”), pursuant to sections 105(a) and 366 of title 11 of the United States Code (the “Bankruptcy Code”), requesting the entry of interim and final orders (i) prohibiting the Debtor’s utility providers from altering, refusing, or discontinuing service; (ii) deeming the Debtor’s utility providers adequately assured of future performance; (iii) establishing procedures for determining requests for additional adequate assurance by the Debtor’s utility providers; and (iv) scheduling a hearing for contested requests for additional adequate assurance and for a final hearing. In support of this Motion, the Debtor respectfully represents as follows:

**JURISDICTION AND VENUE**

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334, and the General Order of Reference from the United States District Court for the Western District of Wisconsin, dated June 12, 1984. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

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<sup>1</sup> The debtor in this chapter 11 case, along with the last four (4) digits of its taxpayer identification number, is: Capitol Lakes, Inc. (2320). The mailing address of the debtor, solely for purposes of notices and communications,

2. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.
3. The statutory bases for the relief requested herein are Bankruptcy Code sections 105(a) and 366.

### **BACKGROUND**

4. On January 20, 2016 (the “Petition Date”), the Debtor commenced its case by filing a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

5. The Debtor remains in possession of its assets and continues to operate and manage its business as a debtor in possession pursuant to Bankruptcy Code sections 1107 and 1108.

6. No trustee, examiner or committee of creditors has been appointed in this case.

7. The factual background regarding the Debtor, including its current and historical business operations and the events precipitating this chapter 11 filing, is set forth in detail in the *Declaration of Tim Conroy in Support of Chapter 11 Petition and First Day Motions of Capitol Lakes, Inc.* (the “Conroy Declaration”), filed contemporaneously herewith and incorporated herein by reference.

#### **A. The Debtor’s Accounts With Utility Providers**

8. The Debtor receives electricity, gas, telephone, internet, cable television, water, sewer, irrigation, and trash removal services (the “Utility Services”) from approximately nine (9) utility providers (collectively, the “Utility Providers”). A list identifying the Utility Providers with relevant accounts for these companies (the “Utility Services List”) is attached hereto as Exhibit A.<sup>2</sup>

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is: 333 W. Main Street, Madison, WI 53703.

<sup>2</sup> The listing of any entity on Exhibit A is not an admission that any listed entity is a utility within the meaning of Bankruptcy Code section 366. The Debtor reserves all rights to further address the characterization of any particular entities listed on Exhibit A as a utility provider within the meaning of Bankruptcy Code section 366(a). The Debtor

9. At all relevant times, the Debtor has attempted to remain current with regard to payment on its utility bills. Furthermore, to the best of the Debtor's knowledge, the Debtor is current on all amounts owing to the Utility Providers, other than payment interruptions that may be caused by the commencement of this chapter 11 case.

10. Continued and uninterrupted Utility Services are vital to the Debtor's ability to sustain its operations during this chapter 11 case. Cessation of the Debtor's operations would not only jeopardize the Debtor's ability to reorganize, but it would also directly impact the elderly residents living in its facilities. Pursuant to the continuing care contracts with the residents living at the Debtor's facilities, the Debtor pays for Utility Services for the large majority of the residents at its facilities.<sup>3</sup> For these reasons, the Debtor must ensure the continued provision of Utility Services.

**B. The Debtor's Ability to Meet Its Post-petition Obligations to Utility Providers**

11. The Debtor estimates that its cost for the Utility Services during the 30 days after the Petition Date will be approximately \$78,300. The Debtor's average monthly utility payments to each Utility Provider based on a twelve (12) month average for the full year of 2015 is set forth on the Utility Services List.

12. Assuming that the relief requested in the other first day motions is granted, the Debtor will have adequate cash on hand to meet all of its necessary post-petition operating expenses on a current basis, including payments to the Utility Providers. The Debtor is, by

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further reserves all rights to terminate the services of any Utility Provider at any time and to seek an immediate refund of any utility deposit without effect to any right of setoff or claim asserted by a Utility Provider against it. The relief requested herein is with respect to all Utility Providers and is not limited to only those identified in Exhibit A.

<sup>3</sup> Of the 169 occupied units at the Debtor's facilities, the Debtor is responsible for payment of the utility bills related to 119 of those units. The residents at 50 of the 51 occupied units at the Debtor's Main Gate facility are responsible for payment of their own utility bills.

separate motion, seeking to maintain access to cash collateral financing (the “Cash Collateral”) to make such payments.

**RELIEF REQUESTED**

13. By this Motion, the Debtor seeks the entry of an interim and final order (the “Interim Order” and “Final Order”), pursuant to Bankruptcy Code sections 105(a) and 366: (a) prohibiting the Utility Providers from altering, refusing, or discontinuing service to the Debtor; (b) deeming the Utility Providers adequately assured of future performance by the Debtor; (c) establishing procedures for adequate assurance of payment; (d) establishing procedures for determining requests by the Utility Providers for additional adequate assurance from the Debtor; and (e) scheduling a hearing for contested requests for additional adequate assurance and for a final hearing

14. As noted above, the Debtor is also concurrently seeking approval of access to Cash Collateral (as that term is defined in the Bankruptcy Code). Thus, it expects to have funds available for payment to the Utility Providers in the ordinary course of business and pursuant to its procedures established before the Petition Date.

15. In accordance with section 366 of the Bankruptcy Code, the Debtor proposes to provide “assurance of payment” to the Utility Providers within twenty (20) days after the Petition Date by placing a cash deposit (the “Deposit”) equal to one-half of one month’s worth of payments to Utility Providers (approximately \$39,150), as such monthly estimate is set forth on the Utility Services List, into a newly created, segregated account (the “Utility Deposit Account”) for the benefit of the Utility Providers. No creditor of the Debtor shall have any interest in or lien on the Deposit or the Utility Deposit Account. The Debtor submits that the Deposit, in conjunction with the Debtor’s ability to pay for future Utility Services in the ordinary

course of business, constitutes adequate assurance under section 366(c)(1)(A) of the Bankruptcy Code of payment to the Utility Providers.

16. The Debtor proposes that the Deposit be maintained until the earlier of (a) entry of an order of the Court authorizing the return of the Deposit to the Debtor, or (b) the effective date of a Chapter 11 plan in the Debtor's case.

17. In addition, the Debtor seeks authority to reduce the Deposit to the extent that it includes an amount on account of a Utility Company that the Debtor subsequently determines, in its sole discretion, should be removed from the Utility Services List.

18. The Debtor also seeks to establish reasonable procedures (the "Procedures") by which the Utility Providers may request additional adequate assurance of future payment, in the event that the Utility Providers believe that the Deposit does not provide them with satisfactory adequate assurance. The proposed procedures are as follows:

a. Absent any further order of this Court and except as otherwise provided herein, the Utility Providers may not alter, refuse or discontinue service to, or discriminate against, the Debtor on account of the commencement of this case or any unpaid prepetition charges, or request payment of a deposit or receipt of other security in connection with any unpaid prepetition charges;

b. The Debtor will serve this Motion and any order granting this Motion (the "Order"), if granted by the Court, via first-class mail, within three (3) business days after the date that the Order is entered by the Court on all Utility Providers identified on the Utility Services List attached hereto as Exhibit A; provided that for any Utility Provider that may have been omitted the Utility Services List, the Debtor shall have the right to supplement such list and shall promptly provide notice of this Motion and the Order upon learning of such Utility Provider;

c. A Utility Provider may submit a written request for additional assurance of payment (the "Additional Assurance Request") by submitting such request to (i) DLA Piper LLP (US), 1251 Avenue of the Americas, New York, NY 10020 (Attn: Thomas R. Califano, Esq.), and (ii) Sweet DeMarb, LLC, One North Pinckney Street, Suite 300, Madison, WI 53703 (Attn:

Rebecca R. DeMarb) (together, the “Notice Parties”) on or before thirty (30) days after the Petition Date;

d. Any Additional Assurance Request must: (a) be in writing; (b) set forth the location for which utility services are provided; (c) include a summary of the Debtor’s payment history relevant to the affected account(s), include any security deposits or other prepayments or assurances previously provided by the Debtor; (d) describe in sufficient detail the reason(s) why the treatment afforded pursuant to the procedures set forth herein does not constitute satisfactory adequate assurance of payment; and (e) include a proposal for what treatment would constitute adequate assurance of payment from the Debtor, along with an explanation of why such proposal is reasonable;

e. If a Utility Provider makes a timely Additional Assurance Request that the Debtor believes is reasonable, then the Debtor shall be authorized in its sole discretion (but subject to the terms of the approved use of Cash Collateral) to comply with such request without further order of the Court;

f. The Debtor may reduce the amount of the Deposit by any amount allocated to a particular Utility Provider to the extent consistent with any alternative adequate assurance arrangements mutually agreed to by the Debtor and the affected Utility Provider;

g. If the Debtor believes that the Additional Assurance Request is unreasonable, then the Debtor will schedule a hearing to determine the adequate assurance to such Utility Provider as necessary at the next omnibus hearing scheduled in this case (the “Determination Hearing”);

h. Pending resolution of that issue at any such Determination Hearing, any Utility Provider making an Additional Assurance Request shall be prohibited from altering, refusing, or discontinuing service to the Debtor;

i. Any Utility Provider that does not timely file an objection either to the procedures set forth herein, or to the Deposit, is deemed to consent to and be bound by the procedures and amount of the Deposit provided by the Debtor; and

j. A Utility Provider shall be deemed to have adequate assurance of payment unless and until a future order of this Court is entered requiring further adequate assurance of payment.

19. Although the Debtor believes that the Utility Services List is complete, the Debtor requests authority, without further order of the Court, to supplement the Utility Services List if any Utility Provider has been inadvertently omitted. If the Debtor supplements the Utility Services List subsequent to the filing of this Motion, the Debtor promptly will serve a copy of this Motion, and the signed order granting this Motion, on any Utility Provider that is added to the Utility Services List by such a supplement (the "Supplemental Service"). Concurrently with the Supplemental Service, (i) the Debtor will file with the Court a supplement to the Utility Services List adding the name of the Utility Provider so served, and (ii) the Debtor will increase the Deposit by an amount equal to approximately one half of one month of the estimated utility expense for the Utility Services provided by the added Utility Provider. The added Utility Provider shall have thirty (30) days from the date of service of this Motion and the Order to make an Additional Assurance Request. If such an Additional Assurance Request is made, the Debtor shall abide by the Procedures set forth above, as applicable. Pending resolution of any Determination Hearing relating to an Additional Assurance Request, the Debtor seeks an order prohibiting any such Utility Provider from altering, refusing, or discontinuing Utility Services to the Debtor.

20. Further, it is possible that during the course of this chapter 11 case, certain Utility Services accounts with respect to which funds have been contributed to the Deposit will be closed in the ordinary course of the Debtor's business (each, a "Closed Account" and collectively, the "Closed Accounts"). The Debtor requests that if any Utility Services account becomes a Closed Account during the course of these cases, the Debtor shall be authorized to decrease the amount of the Deposit by withdrawing from Utility Deposit Account the amount deposited with respect to such Closed Account.

**BASIS FOR RELIEF**

21. Bankruptcy Code Section 366 supports the relief requested in this Motion. It provides, in pertinent part, as follows:

(a) Except as provided in subsections (b) and (c) of this section, a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.

(b) Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date. On request of a party in interest and after notice and a hearing, the court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment.

\* \* \*

(c)(2) Subject to paragraphs (3) and (4), with respect to a case filed under chapter 11, a utility referred to in subsection (a) may alter, refuse, or discontinue utility service, if during the 30-day period beginning on the date of the filing of the petition, the utility does not receive from the debtor or the trustee adequate assurance of payment for utility service that is satisfactory to the utility.

11 U.S.C. § 366.

22. Bankruptcy Code section 366 applies to entities providing electricity, gas, oil, water, trash removal, and/or telephone services, as well as any other entity that supplies services that cannot be readily obtained or replaced elsewhere, or which constitutes a monopoly with respect to the services it provides to a debtor. See In re Lucre, Inc., 333 B.R. 151, 154 (Bankr. W.D. Mich. 2005) (finding that entities providing energy and telephone services were utilities under Bankruptcy Code section 366); In re Woodland Corp., 48 B.R. 623, 624–25 (Bankr. D.N.M. 1985) (finding that section 366 applied to electricity company that provided electrical



services to debtor); In re Nw. Recreational Activities, Inc., 8 B.R. 7, 9 (Bankr. N.D. Ga. 1980) (discussing section 366's application to "utilities").

23. Bankruptcy Code section 366 protects a debtor against the immediate termination of utility services after it files for bankruptcy. Pursuant to this section, a utility may not, during the first 20 days of the case, alter, refuse, or discontinue services to a debtor in a chapter 11 case solely because of unpaid prepetition amounts. However, the utility may do so thereafter unless the debtor furnishes "adequate assurance" of payment. See In re Beach House Prop., LLC, No. 08-11761-BKC-RAM, 2008 WL 961498, at \*1 (Bank. S.D. Fla. Apr. 8, 2008) (section 366(c) requires that debtor provide adequate assurance of payment); In re Viking Offshore (USA) Inc., No. 08-31219-H3-11, 2008 WL 782449, at \*2-3 (Bankr. S.D. Tex. March 20, 2008) (same).

24. Under Bankruptcy Code section 366(c)(1)(A), "adequate assurance" means "(i) a cash deposit; (ii) a letter of credit; (iii) a certificate of deposit; (iv) a surety bond; (v) a prepayment of utility consumption; or (vi) another form of security that is mutually agreed on between the utility and the debtor or the trustee." 11 U.S.C. § 366(c)(1)(A); see also, In re Syroco Inc., 374 B.R. 60 (Bankr. D.P.R. 2007), (deposit consisting of cost of two weeks' service was "adequate assurance" under section 366 of Bankruptcy Code); In re Bake-Line Grp., LLC, 312 B.R. 48, 50 (Bankr. D. Del. 2004) (finding that Bankruptcy Code section 366 suggests that utilities be given adequate assurance of payment, such as a deposit).

25. While the form of adequate assurance of payment may be limited under Bankruptcy Code subsection 366(c) to the types of security enumerated in Bankruptcy Code section 366(c)(1)(A), the amount of the deposit or other form of security remains fully within the reasonable discretion of the court. See In re Circuit City Stores, No. 08-35683, 2009 WL 484553, at \*4 (Bankr. E.D. Va. Jan. 14, 2009) (stating that courts have discretion under section

366(c) to determine the amount of adequate payments or collateral required to a utility company); Beach House Prop., 2008 WL 961498, at \*1(quoting 3 COLLIER ON BANKRUPTCY ¶ 366.03[2] (rev. 15th ed. 2006)) (“[u]nder § 366(c)(2), the debtor must pay what the utility demands, *unless the court orders otherwise*”) (emphasis in original).

26. It has been well established that the requirement that a utility receive adequate assurance of payment does not require a guarantee of payment. See, e.g., In re Circuit City Stores, 2009 WL 484553 at \*4 (“A debtor need not provide utility companies an absolute guarantee of payment.”); In re Astle, 338 B.R. 855, 860–61 (Bankr. D. Idaho 2006) (same); In re Anchor Glass Container Corp., 342 B.R. 872, 875 (Bankr. M.D. Fla. 2005) (same); Adelphia Bus. Solutions, Inc., 280 B.R. 63, 80 (Bankr. S.D.N.Y. 2002) (same). Instead, the protection granted to a utility is intended to avoid exposing the utility to an unreasonable risk of nonpayment. Astle, 338 B.R. at 860-61. Whether a utility is subject to an unreasonable risk of nonpayment must be determined from the facts and circumstances of each case. See Anchor Glass Container Corp., 342 B.R. at 875; see generally, In re Keydata Corp., 12 B.R. 156, 158 (BAP 1st Cir. 1981).

27. The essence of the Court’s inquiry is an examination of the totality of the circumstances in making an informed judgment as to whether utilities will be subject to an unreasonable risk of nonpayment for post-petition services. Adelphia, 280 B.R. at 82–83; see also Anchor Glass Container Corp., 342 B.R. at 875 (“The type of arrangement that constitutes adequate assurance of future payment is a fact-intensive inquiry, determined under the individual circumstances of the case. . . . Section 366 requires a determination that a utility is not subject to unreasonable risk of nonpayment . . . .”); In re Magnesium Corp. of Am., 278 B.R. 698, 714 (S.D.N.Y. 2002) (internal quotation omitted) (“In deciding what constitutes adequate assurance

in a given case, a bankruptcy court must focus upon the need of the utility for assurance, and to require that the debtor supply no more than that, since the debtor almost perforce has a conflicting need to conserve scarce financial resources.”).

28. Here, the Debtor proposes to make the Deposit to provide adequate assurance to its Utility Providers. Under the circumstances of this case, the Debtor believes that the deposit of one half of one month’s worth of utility expenses, based on the Debtor’s estimated monthly consumption, constitutes adequate assurance of payment under Bankruptcy Code section 366(c).

29. In addition, the Debtor proposes to protect the Utility Providers by establishing the Procedures provided herein, whereby any Utility Provider can request additional adequate assurance in the event that it believes there are facts and circumstances with respect to its providing post-petition services to the Debtor that would merit greater protection.

30. Finally, the Debtor has budgeted for all of the post-petition obligations of the Utility Providers. In light of these commitments, the Debtor submits that the Utility Providers are adequately assured of future payments.

31. If the Utility Providers are permitted to terminate service after the Petition Date, the Debtor would be unable to operate its business to the severe detriment of its estate, residents, creditors, and employees. The Debtor would then be forced to pay whatever amounts are demanded by the Utility Providers or face the cessation of essential utility services, and ultimately, its business. The rights of the Utility Providers, however, will not be prejudiced should the relief requested in this Motion be granted.

32. The relief sought herein is similar to the relief granted in other recent chapter 11 cases filed in this and other jurisdictions. See, e.g., In re Cardiac Science Corp., Case No. 15-13766 (Bankr. W.D. Wis. Dec. 22, 2015) (approving adequate assurance in the form of cash

deposits equal to half of one month's average utility bill for each utility); In re Reddy Ice Holdings, Inc., Case No. 12-32349 (SGJ) (Bankr. N.D. Tex. May 4, 2012) (approving adequate assurance in the form of deposit in a segregated account of roughly two weeks' utility costs); In re Erickson Retirement Cmtys., LLC, Case No. 09-37010 (SGJ) (Bankr. N.D. Tex. Nov. 24, 2009) (approving adequate assurance in the form of roughly one month deposit of monthly utility costs); In re Renaissance Hosp. Grand Prairie, Inc., Case No. 08-43775 (DML) (Bankr. N.D. Tex. Sept. 5, 2008) (approving adequate assurance in the form of a one month deposit to requesting utilities); In re SemCrude, L.P., Case No. 08-11525 (BLS) (Bankr. D. Del. August 19, 2008) (approving adequate assurance in the form of a letter of credit or escrow account containing an amount equal to two weeks' deposit); In re Steve & Barry's Manhattan, LLC, Case No. 08-12579 (ALG) (Bankr. S.D.N.Y. July 31, 2008) (approving adequate assurance to requesting utilities in an amount equal to two weeks' deposit).

33. Additionally, for the reasons set forth above, there is ample cause for waiver of the 14-day stay imposed by Bankruptcy Rule 6004(h) of the Federal Rules of Bankruptcy Procedure. Accordingly, to the extent the stay imposed by such rule applies, the Debtor submits that it should be waived.

#### **NOTICE**

34. Notice of this Motion has been provided to (a) the Office of the United States Trustee for the Western District of Wisconsin; (b) the Office of the Attorney General of the State of Wisconsin; (c) the Wisconsin Office of the Commissioner of Insurance; (d) each of the Debtor's twenty (20) largest unsecured creditors; (e) U.S. Bank, N.A. as trustee; (f) counsel to Santander Bank, N.A.; (g) counsel to KBC Bank N.V.; (h) the Utility Providers; and (i) the

Internal Revenue Service and state taxing authorities. The Debtor submits that, in light of the nature of the relief requested, no other or further notice is necessary or required.

**CONCLUSION**

WHEREFORE, based upon the foregoing, the Debtor respectfully requests that the Court enter Interim Order and Final Order (a) granting the relief requested herein and (b) granting such other relief as may be deemed just and proper.

Dated: January 21, 2016

**DLA PIPER LLP (US)**

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*Proposed Counsel for the Debtor and Debtor in Possession*

**Exhibit A**

List of Utilities Companies and Accounts

Acct #	Vendor Name	Vendor Address	Services Vendor Provides	Monthly Average	Year to date (2015) Total
287236815401	AT & T Mobility	P.O. Box 6463, Carol Stream, IL, 60197-6463	Corporate cell phone.	\$ 1,134.34	\$ 13,612.02
8310004919871	AT&T	P.O. Box 5019, Carol Stream, IL, 60197-5019	Internet and Toll Free Number.	\$ 962.97	\$ 11,555.64
83612334	Century Link	P.O. Box 52187, Phoenix, AZ, 85072-2187	Landline phone.	\$ 1,271.42	\$ 15,257.09
409964170	CenturyLink	P.O. Box 4300 , Carol Stream, IL, 60197-4300	Landline phone.	\$ 1,310.84	\$ 15,730.05
8245 11 681 0090060 , 8245 11 681 1477977, 8245 11 681 0631384, 8245 11 681 0065062	Charter Communications	P.O. Box 3019, Milwaukee, WI, 53201-3019	Cable Provider.	\$ 8,964.55	\$ 107,574.54
2082901, 2083300, 2083500, 6331000, 7015600, 7124437,2083400, 2083200	City Treasurer	P.O. Box 2997 , Madison, WI, 53701	Water Utility Company through the city of Madison.	\$ 6,646.82	\$ 79,761.80
27507375, 27523224,27084367,269655 33,26764423,26853096,2647 9394, 26279273,25807660,274496 51,26279273,23081821,2308 1714, 23081805,23081748, 23081771,23081672, 27211614,	Madison Gas And Electric	P.O. Box 1231, Madison, WI, 53701-1231	Gas and Electricity company.	\$ 55,218.21	\$ 662,618.51
131,181,111,487	Pellitteri Waste Systems, Inc	7035 Raywood Road, P.O. Box 259426, Madison, WI, 53725-9426	Garbage Service.	\$ 2,659.04	\$ 31,908.44
218261357	US Cellular	P.O. Box 0205 , Palatine, IL, 60055-0205	Corporate cell phone.	\$ 139.00	\$ 1,667.95

