

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

AGDP HOLDING INC., et al.,

Debtors.

)

) Chapter 11

)

) Case No. 25-11446 (MFW)

)

) (Jointly Administered)

)

) Re: Docket Nos. 6, 37

)

) Obj. Deadline: 8/28/25 at 4:00 p.m.

) Hearing Date: 9/4/25 at 2:00 p.m.

)

OBJECTION OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
TO THE DEBTORS' MOTION FOR ENTRY OF INTERIM AND
FINAL ORDERS (I) PROHIBITING UTILITY PROVIDERS FROM
ALTERING, REFUSING, OR DISCONTINUING SERVICE, (II) APPROVING
PROPOSED ADEQUATE ASSURANCE OF PAYMENT, (III) ESTABLISHING
PROCEDURES FOR RESOLVING REQUESTS FOR ADDITIONAL ASSURANCE OF
PAYMENT, AND (IV) GRANTING RELATED RELIEF

Consolidated Edison Company of New York, Inc. ("Con Ed")
hereby objects to the *Debtors' Motion For Entry of Interim and
Final Orders (I) Prohibiting Utility Providers From Altering,
Refusing, of Discontinuing Service, (II) Approving Proposed
Adequate Assurance of Payment, (III) Establishing Procedures For
Resolving Requests For Additional Assurance of Payment, and (IV)
Granting Related Relief* (the "Utility Motion")(Docket No. 6), and
respectfully sets forth the following:

Introduction

The Debtors' Utility Motion improperly seeks to shift the
Debtors' obligations under Section 366(c)(3) of the Bankruptcy
Code from seeking to modify the amount of the adequate assurance



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of payment requested by Con Ed under Section 366(c)(2) to setting the form and amount of the adequate assurance of payment acceptable to the Debtors. This Court should not permit the Debtors to avoid the plain language and requirements of Section 366(c).

Through the Utility Motion, the Debtors seek to have this Court approve their proposed form of adequate assurance of payment, which is a bank account containing \$48,771 that supposedly reflects approximately two-weeks of utility payments using the historical average for such payments over the full twelve-month (12-month) period prior to the August 4, 2025 Petition Date (the "Petition Date"). The Utility Providers List attached at Exhibit "C" to the Utility Motion reflects that the Bank Account would contain \$30,000 on behalf of Con Ed.

This Court should reject the Debtors' proposed Bank Account because: (1) Con Ed bills the Debtors on a monthly basis and provides the Debtors with generous payment terms pursuant to applicable state law, tariffs and/or regulations, such that a supposed two week account, maintained by the Debtors is not sufficient in amount or in form to provide Con Ed with adequate assurance of payment; (2) Section 366(c) of the Bankruptcy Code specifically defines the forms of adequate assurance of payment in Section 366(c)(1), none of which include a segregated bank account; and (3) Even if this Court were to improperly consider

the Bank Account as a form of adequate assurance of payment for Con Ed (which it should not), this Court should reject it as an insufficient form of adequate assurance of payment for the reasons set forth in Section A.1. of this Objection.

Con Ed is seeking a two-month cash deposit in the amount of \$81,798 from the Debtors, which is an amount that Con Ed is authorized to obtain pursuant to applicable state law. Based on the foregoing, this Court should deny the Utility Motion as to Con Ed because the amount of Con Ed's post-petition deposit request is reasonable under the circumstances and should not be modified.

Facts

Procedural Facts

1. On the Petition Date, the Debtors commenced their cases under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") that are now pending with this Court. The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to Bankruptcy Code Sections 1107(a) and 1108.

2. The Debtors' Chapter 11 bankruptcy cases are being jointly administered.

The Utility Motion

3. On the Petition Date, the Debtors filed the Utility Motion.

4. On August 5, 2025, the Court entered the *Interim Order (I) Prohibiting Utility Providers From Altering, Refusing, or Discontinuing Service, (II) Approving Proposed Adequate Assurance of Payment, (III) Establishing Procedures For Resolving Requests For Additional Assurance of Payment, and (IV) Granting Related Relief* (the "Interim Utility Order") (Docket No. 37). The Interim Utility Order set (i) an objection deadline of August 28, 2025, and (ii) the final hearing on the Utility Motion to take place on September 4, 2025 at 2:00 p.m.

5. Through the Utility Motion, the Debtors seek to avoid the applicable legal standards under Bankruptcy Code Sections 366(c)(2) and (3) by seeking Court approval for their own proposed form of adequate assurance of payment, which is the Bank Account containing \$48,771 that supposedly reflects approximately two-weeks of utility payments using the historical average for such payments over the full twelve-month (12-month) period prior to the Petition Date. Utility Motion at ¶ 13.

6. The Debtors propose "depositing" \$48,771 into the Bank Account, and refer to the monies contained in the Bank Account as the "Adequate Assurance Deposit." Utility Motion at ¶ 13. However, monies contained in an escrow account controlled by a customer of a utility, such as the proposed Bank Account here, are not recognized by any state public utility commission as a "cash deposit" provided by a customer to a utility. Section

366(c) of the Bankruptcy Code specifically defines the forms of adequate assurance of payment in Section 366(c)(1), none of which include a segregated utility bank account. Simply put, the Debtors are not proposing to provide any of their utilities with cash deposits as adequate assurance of payment pursuant to Section 366(c) of the Bankruptcy Code.

7. The proposed Bank Account is not acceptable to Con Ed and should not be considered relevant by this Court because Sections 366(c)(2) and (3) do not allow the Debtors to establish the form or amount of adequate assurance of payment. Under Sections 366(c)(2) and (3), this Court and the Debtors are limited to modifying, if at all, the amount of the security sought by Con Ed under Section 366(c)(2).

8. The Debtors claim that they have historically maintained a satisfactory payment history with their utility providers. Utility Motion at ¶ 9. However, even if true, Section 366(c)(3)(B)(ii) expressly provides that in making an adequate assurance of payment determination, a court may not consider a debtor's timely payment of prepetition utility charges.

9. The Debtors propose that monies contained in the Bank Account will be returned to the Debtors upon the earlier of the effective date of a Chapter 11 plan or such other time as the Debtors' Chapter 11 cases may be closed. Utility Motion at ¶

15. Con Ed bills the Debtors in arrears and will likely provide post-petition utility goods/services to the Debtors through the effective date of a plan, meaning that any monies contained in the Bank Account should not be returned to the Debtors until the Debtors confirm that they have paid in full their post-petition utility expenses owed to their utility companies.

10. The Utility Motion does not address why the Bank Account would be underfunded with supposedly two-weeks of utility charges when the Debtors know that Con Ed is required by applicable state laws, regulations or tariffs to bill the Debtors monthly. Moreover, the Debtors presumably want Con Ed to continue to bill them monthly and provide them with the same generous payment terms that they received prepetition. Accordingly, if the Bank Account is relevant, which Con Ed disputes, the Debtors need to explain: (A) Why they are only proposing to deposit supposed two-week amounts into the Bank Account; and (B) How such an insufficient amount could even begin to constitute adequate assurance of payment for Con Ed's monthly bills.

11. Furthermore, the Utility Motion does not address why this Court should consider modifying, if at all, the amount of Con Ed's adequate assurance requests pursuant to Section 366(c)(2).

The Debtors' Financing Motion

12. On the Petition Date, the Debtors filed the *Debtors' Motion For Entry of Interim and Final Orders, Pursuant To Sections 105, 361, 262, 363, 364, 53 and 507 of the Bankruptcy Code (I) Authorizing the Debtors To Obtain Senior Secured Superpriority Postpetition Financing; (II) Granting (A) Liens and Superpriority Administrative Expense Claims and (B) Adequate Protection To Certain Prepetition Lender; (III) Authorizing Use of Cash Collateral; (IV) Scheduling a Final Hearing; and (V) Granting Related Relief* the "Financing Motion") (Docket No. 12).

13. Through the Financing Motion, seek authority to obtain post-petition DIP financing pursuant to a senior secured term loan facility in an aggregate amount of \$45,781,302.19. Financing Motion at ¶ 1.

14. The Debtors have the following milestones: (i) no later than 35 days after the Petition Date - entry of Bid Procedures Order; (ii) no later than 35 days after the Petition Date - entry of Final Financing Order; (iii) no later than 65 days after the Petition Date - Debtors shall conclude accepting bid submissions; (iv) no later than 75 days after the Petition Date - the Debtors shall have concluded an auction for the sale of all or substantially all of the Debtors' assets and declared a successful bidder; (v) no later than 80 days after the Petition Date - entry of one or more order authorizing and approving the

sale of all or substantially all of the Debtors' assets; and (vi) no later than 95 days after the Petition Date - the sale of all or substantially all of the Debtors' assets shall have been consummated in full. Financing Motion at page 28.

15. On August 5, 2025, the Court entered the *Interim Order Pursuant To Sections 105, 361, 362, 363, 364, 503 and 507 of the Bankruptcy Code (I) Authorizing the Debtors To Obtain Senior Secured Superpriority Postpetition Financing; (II) Granting (A) Liens and Superpriority Administrative Expense Claims and (B) Adequate Protection To Certain Prepetition Lenders; (III) Authorizing Use of Cash Collateral; (IV) Scheduling a Final Hearing; and (V) Granting Related Relief* (the "Interim Financing Order") (Docket No. 46).

16. The Interim Financing Order approved a carve-out for payments to the Debtors' professionals incurred prior to the delivery of a carve-out trigger notice, plus an additional \$500,000 after the delivery of a carve-out trigger notice (the "Carve-Out"). Financing Motion at pages 31-33.

17. Attached as Exhibit "C" to the Interim Financing Order is a 13-week Approved Budget through the week ending November 2, 2025 (collectively, the "Budget"). Although the Budget includes a line-item for "Utilities," it is not apparent from the Budget whether sufficient funds have in fact been budgeted for the timely (and full) payment of the Debtors' post-petition utility

charges.

The Debtors' Critical Vendor Motion

18. On the Petition Date, the Debtors filed the *Motion of Debtors For Entry of Interim and Final Orders (I) Authorizing the Debtors To Pay Certain Critical Vendor Claims and PACA/PASA Claims; and (II) Granting Related Relief* (the "Critical Vendor Motion")(Docket No. 9). Through the Critical Vendor Motion, the Debtors sought authority to pay Critical Vendor Claims in an estimated amount of \$1 million. Critical Vendor Motion at ¶ 10.

19. On August 5, 2025, the Court entered the *Interim Order (I) Authorizing the Debtors To Pay Certain Critical Vendor Claims and PACA/PASA Claims; (II) Granting Related Relief* (the "Interim Critical Vendor Order")(Docket No. 40). The Interim Critical Vendor Order authorized the Debtors to pay Critical Vendor Claims in an amount not to exceed \$1 million. Interim Critical Vendor Order at ¶ 1.

20. The Debtors' claim in Paragraph 10 of the Utility Motion that "[u]interrupted Utility Services are essential to the Debtors' ongoing operations and, therefore, the success of these chapter 11 cases." However, the Critical Vendor Motion does not reflect that the Debtors sought Court authority to pay prepetition utility charges.

Facts Regarding Con Ed

21. Con Ed provided the Debtors with prepetition utility goods and/or services and has continued to provide the Debtors with utility goods and/or services since the Petition Date.

22. Con Ed's relationship with the Debtors is governed by tariffs (the "Con Ed Tariffs") that are on file with the New York State Public Service Commission and can be obtained at:

Electric - https://lite.coned.com/_external/cerates/elec.asp
Gas - <https://www.coned.com/en/rates-tariffs/rates/natural-gas?facettab=8cec6928-c68d-40f7-838c-56468a08f82c>

23. The Con Ed Tariffs establish: (a) the amount of security that Con Ed is entitled to seek from its approximately 3.6 million customers under applicable state law; (b) that Con Ed must bill the Debtors monthly; and (c) the billing and payment terms for all of Con Ed's customers. Specifically, under the billing cycle established by the Tariffs, a customer receives approximately one month of utility goods and/or services before Con Ed issues a bill for such charges, which is due on presentation. If payment is not made within twenty (20) days of the invoice date, a late payment charge at the rate of one and one-half percent per monthly billing period is applied to the account. Service may be terminated upon a customer's failure to pay a bill for utility service within twenty (20) days from the date payment is due, but not until Con Ed has provided the customer with: (a) written notice that is mailed to the customer

at the premises where service is rendered and eight (8) days to cure the payment default; or (b) personal service of written notice to the customer and five (5) days to cure the payment default. Accordingly, a customer's account will not be terminated for non-payment of bills until at least fifty-five (55) days after the service is provided.

24. In order to avoid the need to bring witnesses and have lengthy testimony regarding Con Ed's regulated billing cycle, Con Ed requests that this Court, pursuant to Rule 201 of the Federal Rules of Evidence, take judicial notice of Con Ed's billing cycle. Pursuant to the foregoing request and based on the voluminous size of the applicable documents, Con Ed's web site links to the tariffs and/or state laws, regulations and/or ordinances can be found at the following:

Electric - https://lite.coned.com/_external/cerates/elec.asp

Gas - <https://www.coned.com/en/rates-tariffs/rates/natural-gas?facettab=8cec6928-c68d-40f7-838c-56468a08f82c>

25. Subject to a reservation of Con Ed's right to supplement its post-petition deposit request if additional accounts belonging to the Debtors are subsequently identified, Con Ed's estimated prepetition debt and post-petition deposit request is as follows:

<u>Number of Accounts</u>	<u>Est. Prepet. Debt</u>	<u>Deposit Request</u>
4	\$101,222.93	\$81,798 (2-month)

26. Con Ed held prepetition cash deposits totaling \$85,935

that it recouped against prepetition debt pursuant to Section 366(c)(4) of the Bankruptcy Code. No prepetition deposit amount remains after recoupment.

Discussion

A. THE UTILITY MOTION SHOULD BE DENIED AS TO CON ED.

Sections 366(c)(2) and (3) of the Bankruptcy Code provide:

(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;

(3)(A) On request of a party in interest and after notice and a hearing, the court may order modification of the amount of an assurance of payment under paragraph (2).

As set forth by the Supreme Court of the United States, "[i]t is well-established that 'when the statute's language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to enforce it according to its terms.'" *Lamie v. United States Trustee*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000)). *Rogers v. Laurain (In re Laurain)*, 113 F.3d 595, 597 (6th Cir. 1997) ("Statutes . . . must be read in a 'straightforward' and 'commonsense' manner."). A plain reading of Section 366(c)(2)

makes clear that a debtor is required to provide adequate assurance of payment satisfactory to its utilities on or within thirty (30) days of the filing of the petition. *In re Lucre*, 333 B.R. 151, 154 (Bankr. W.D. Mich. 2005). If a debtor believes the amount of the utility's request needs to be modified, then the debtor can file a motion under Section 366(c)(3) requesting the court to modify the amount of the utility's request under Section 366(c)(2).

In this case, the Debtors filed the Utility Motion to improperly shift the focus of their obligations under Section 366(c)(3) from modifying the amount of the adequate assurance of payment requested under Section 366(c)(2) to setting the form and amount of the adequate assurance of payment acceptable to the Debtors. Accordingly, this Court should not reward the Debtors for their failure to comply with the requirements of Section 366(c), and it should deny the Utility Motion as to Con Ed.

1. The Debtors' Proposed Bank Account Is Not Relevant And Even If It Is Considered, It Is Unsatisfactory Because It Does Not Provide Con Ed With Adequate Assurance of Payment.

This Court should not even consider the Bank Account as a form of adequate assurance of payment because: (1) It is not relevant because Section 366(c)(3) provides that a debtor can only modify "the amount of an assurance of payment under

paragraph (2)"; and (2) The Bank Account is not a form of adequate assurance of payment recognized by Section 366(c)(1)(A). Moreover, even if this Court were to consider the Bank Account, the Bank Account is an improper and otherwise unreliable form of adequate assurance of future payment for the following reasons:

1. Unlike the statutorily approved forms of adequate assurance of payment, the Bank Account is not something held by Con Ed. Accordingly, Con Ed would have no control over how long the Bank Account will remain in place.
2. It is underfunded from the outset because even if the Debtors were to place a two-week amount in the Bank Account for Con Ed, Con Ed issues monthly bills and by the time a default notice is issued, the Debtors will have received approximately 60 days of commodity or service.
3. The Debtors should not reduce the amount of the Bank Account on account of the termination of utility services to a Debtor account until the Debtors confirm that all post-petition charges on a closed account are paid in full.

Accordingly, this Court should not approve the Bank Account as adequate assurance as to Con Ed because the Bank Account: (a) Is not the form of adequate assurance requested by Con Ed; (b) Is not a form recognized by Section 366(c)(1)(A); and (c) Is an otherwise unreliable form of adequate assurance.

2. The Utility Motion Should Be Denied As To Con Ed Because The Debtors Have Not Set Forth Any Basis For Modifying Con Ed's Requested Deposit.

In the Utility Motion, the Debtors fail to address why

this Court should modify the amount of Con Ed's request for adequate assurance of payment. Under Section 366(c)(3), the Debtors have the burden of proof as to whether the amount of Con Ed's adequate assurance of payment request should be modified. *See In re Stagecoach Enterprises, Inc.*, 1 B.R. 732, 734 (Bankr. M.D. Fla. 1979) (holding that the debtor, as the petitioning party at a Section 366 hearing, bears the burden of proof). However, the Debtors here do not provide this Court with any evidence or factually supported documentation to explain why the amount of Con Ed's adequate assurance request should be modified. Accordingly, this Court should deny the relief requested by Debtors in the Utility Motion and require the Debtors to comply with the plain requirements of Section 366(c) with respect to Con Ed.

B. THIS COURT SHOULD ORDER THE DEBTORS TO PROVIDE THE ADEQUATE ASSURANCE OF PAYMENT REQUESTED BY CON ED PURSUANT TO SECTION 366 OF THE BANKRUPTCY CODE.

Section 366(c) was amended to overturn decisions such as *Virginia Electric and Power Company v. Caldor, Inc.*, 117 F.3d 646 (2d Cir. 1997), holding that an administrative expense, without more, could constitute adequate assurance of payment in certain cases. Section 366(c)(1)(A) specifically defines the forms that assurance of payment may take as follows:

- (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 upon between the utility and the debtor or the trustee.

Section 366 of the Bankruptcy Code was enacted to balance a debtor's need for utility services from a provider that holds a monopoly on such services, with the need of the utility to ensure for itself and its rate payers that it receives payment for providing these essential services. See *In re Hanratty*, 907 F.2d 1418, 1424 (3d Cir. 1990). The deposit or other security "should bear a reasonable relationship to expected or anticipated utility consumption by a debtor." *In re Coastal Dry Dock & Repair Corp.*, 62 B.R. 879, 883 (Bankr. E.D.N.Y. 1986). In making such a determination, it is appropriate for the Court to consider "the length of time necessary for the utility to effect termination once one billing cycle is missed." *In re Begley*, 760 F.2d 46, 49 (3d Cir. 1985).

Con Ed bills the Debtors on a monthly basis for the charges already incurred by the Debtors in the prior month. Con Ed then provides the Debtors with 20 days to pay the bill, the timing of which is set forth in applicable state laws, tariffs and/or regulations. Based on the foregoing state-mandated billing cycles, the minimum period of time the Debtors could receive service from Con Ed before termination of service for non-payment of post-petition bills is approximately two (2) months.

Moreover, even if the Debtors timely pay their post-petition utility bills, Con Ed still has potential exposure of approximately 60 days or more based on its billing cycle.

Furthermore, the form and amount of Con Ed's adequate assurance request is the form and amount that the applicable public service commission, which is a neutral third-party entity, permits Con Ed to request from its customers. Con Ed is not taking the position that the cash deposit that it is entitled to obtain under applicable state law is binding on this Court, but instead is introducing that form and amount as evidence of the form and amount that the applicable regulatory entity permits Con Ed to request from its customers.

In contrast, the Debtors failed to address in the Utility Motion why this Court should modify, if at all, the amount of Con Ed's adequate assurance of payment request, which is the Debtors' statutory burden. Instead, the Debtors merely asked this Court to approve the Bank Account supposedly containing approximately two-weeks of the Debtors' utility charges. The Debtors did not provide an objective, much less an evidentiary, basis for their proposed adequate assurance in the form of the Bank Account. Moreover, in contrast to the improper treatment proposed to Con Ed, the Debtors have made certain that supposed "critical vendors" and post-petition professionals are favored creditors over Con Ed by ensuring (i) to pay Critical Vendors claims in an

amount up to \$1 million, and (ii) the post-petition bills/expenses of Debtors' counsel are paid, even in the event of a post-petition default on the use of DIP financing and cash collateral, by obtaining a \$500,000 professionals' carve-out for the payment of their fees/expenses after a default and a guarantee of payment for fees incurred up to a default.

Despite the fact that Con Ed continues to provide the Debtors with admittedly crucial post-petition utility goods/services on the same generous terms that were provided prepetition, with the risk of non-payment, the Debtors are seeking to deprive Con Ed of any adequate assurance of payment for which it is entitled to receive for continuing to provide the Debtors with post-petition utility goods/services. Against this factual background, it is reasonable for Con Ed to seek and be awarded the full security that it has requested herein.

WHEREFORE, Con Ed respectfully requests that this Court enter an order:

1. Denying the Utility Motion as to Con Ed;
2. Awarding Con Ed the post-petition adequate assurance of payment pursuant to Section 366 in the amount and form satisfactory to Con Ed, which is the form and amount requested herein;
3. Require the Debtors to close accounts with Con Ed when they no longer require post-petition service from the

Utility for that account or remain administratively responsible for such charges until they do close the account(s); and

4. Providing such other and further relief as the Court deems just and appropriate.

Dated: August 11, 2025 WHITEFORD, TAYLOR & PRESTON LLC

/s/ William F. Taylor, Jr.

William F. Taylor, Jr. (#2936)
600 North King Street, Suite 300
Wilmington, Delaware 19801
Telephone: (302) 353-4145
Facsimile: (302) 357-3270
E-mail: wtaylor@whitefordlaw.com

and

LAW FIRM OF RUSSELL R. JOHNSON III, PLC
Russell R. Johnson III (VSB No. 31468)
John M. Craig (VSB No. 32977)
2258 Wheatlands Drive
Manakin-Sabot, Virginia 23103
Telephone: (804) 749-8861
E-mail: russell@russelljohnsonlawfirm.com
john@russelljohnsonlawfirm.com

*Counsel for Consolidated Edison Company of
New York, Inc.*

CERTIFICATE OF SERVICE

I, William F. Taylor, Jr., do hereby certify that in addition to the notice and service provided through the Court's ECF system, on August 11, 2025, I caused a true and correct copy of the *Objection of Consolidated Edison Company of New York, Inc. to the Debtors' Motion for Entry of Interim and Final Orders (I) Prohibiting Utility Providers from Altering, Refusing, of Discontinuing Service, (II) Approving Proposed Adequate Assurance of Payment, (III) Establishing Procedures for Resolving Requests for Additional Assurance of Payment, and (IV) Granting Related Relief* to be served by email on:

Sean M. Beach
Edmon L. Morton
Kenneth J. Enos
S. Alexander Faris
Sarah Gawrysiak
Evan S. Saruk
YOUNG CONAWAY STARGATT & TAYLOR, LLP
100 North King Street, Rodney Square
Wilmington, Delaware 19801
Email: sbeach@ycst.com, emorton@ycst.com, kenos@ycst.com,
afaris@ycst.com, sgawrysiak@ycst.com, ewaruk@ycst.com
Debtors' Counsel

Jonathan Lipshie
DOJ-UST
844 King Street, Suite 2207
Wilmington, Delaware 19801
Email: jon.lipshie@usdoj.gov

/s/ William F. Taylor, Jr.
William F. Taylor, Jr. #2936)