Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding	PP Docket No. 93-253
Amendment of the Commission's Cellular PCS Cross-Ownership Rule	GN Docket No. 90-314
Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services	GN Docket No. 93-252

To: The Commission

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COMMENTS OF DCR COMMUNICATIONS, INC.

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SUMMARY

DCR Communications, Inc. ("DCR") is a small, woman- and minority-owned business that intends to participate in the C block auction. Despite having relied on the minority- and gender-based PCS preferences in preparing for the auction, DCR believes that the Commission's proposals, which envision eliminating any racial or gender basis for the PCS preferences, are now necessary in order to ensure the timely completion of the C block auction in light of Adarand, and to provide meaningful opportunities for designated entity ("DE") participation in broadband PCS. Under the current set of racial and gender-based preferences, DEs would face uncertainty and delay that could significantly affect their financing efforts and exacerbate the headstart problems that already confront them.

DCR believes that the efforts of Congress and the Commission to ensure realistic opportunities for minorities and women to participate in broadband PCS have met the highest standard of the public interest and should not be abandoned. However, at this late date, DEs cannot afford either a further delay of the auction or the uncertainty of a potential legal challenge under Adarand. Some investors have already lost interest due to both the earlier delay associated with the TEC stay and the growing headstart of other wireless carriers, including cellular carriers and the A and B block licensees. If designated entities are to maintain the financing they have worked hard to secure, the Commission must now demonstrate its

commitment to proceed promptly with the C block auction, and must eliminate uncertainty to the degree possible.

Extending minority and gender preferences to all small businesses in the way the Commission proposes is the most judicious means of achieving this end, while maintaining the integrity of the entrepreneur blocks. Most minority and woman businesses that have relied on the preferences will not be prejudiced in this manner, and all designated entities will be given a realistic opportunity to participate in the auction. Moreover, under its proposed rules, the Commission will be able to provide minority and woman businesses with the opportunity advocated by Congress, because most such businesses will qualify as small businesses. Most importantly, the auction will be able to proceed promptly with the threat of a legal challenge greatly reduced. For these same reasons, the Commission's expedited comment procedures are necessary in order to ensure to DEs the opportunity to participate in broadband PCS. The procedures are clearly lawful as an exercise of the Commission's broad procedural discretion under the Communications Act.

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To: The Commission

COMMENTS OF DCR COMMUNICATIONS, INC.

DCR Communications, Inc. ("DCR") respectfully submits these comments in response to the Commission's Further Notice of Proposed Rulemaking in the above-captioned matter.[1/]

DCR is a small, woman and minority entity that was formed in order to participate in the C block auction (the "auction"). DCR has structured itself in accordance with the Commission's control group rules for small, woman and minority businesses (with rural telephone companies, designated entities or "DEs"), relying upon the Commission's gender and racial preferences in structuring its ownership interests. DCR believes that the efforts of Congress and the Commission to ensure realistic opportunities for minorities and women to participate

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[1/] Implementation of Section 309(j) of the Communications Act ("NPRM") (rel. June 23, 1995).

fully in the new areas of telecommunications have met the highest standard of the public interest and should not be abandoned in the face of legal setbacks. Nonetheless, in light of the serious risk of delay now posed to the conduct of the auction if these minority and gender preferences are maintained, and the effect of uncertainty upon its ability to conclude acceptable financing arrangements, DCR is prepared to extend to all small businesses the preferences for which only small woman- or minority-owned businesses would be eligible under the existing rules.

DCR believes that the Commission's expeditious response to the Supreme Court's decision in Adarand Constructors, Inc. v. Pena,[2] and its prompt conduct of the auction, will present DEs with the most realistic opportunity to succeed in a PCS industry in which the A and B block headstart and the competition of other wireless carriers otherwise threaten to become a greater and greater obstacle.

I. ELIMINATION OF THE MINORITY AND GENDER PREFERENCES IS NECESSARY IN ORDER TO ENSURE PARTICIPATION BY DESIGNATED ENTITIES IN THE AUCTION FOR AND OFFERING OF PCS.

The Commission designed its DE preferences in response to the Congressional directive to provide "economic opportunity for a wide variety of applicants, including small businesses and businesses owned by members of minority groups and women."[3]

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[2] 1115 S. Ct. 2097 (1995).

[3] 47 U.S.C. § 309(j)(4)(C).

In responding to this Congressional directive, the Commission observed that businesses owned by women and minorities historically have faced a lack of access to capital that would make it difficult for them to participate in the PCS auction.[4]

The Commission determined that special provisions for minorities and women were constitutional under the "intermediate scrutiny" standard of review as set forth in Metro Broadcasting Inc. v. FCC.[5] However, in Adarand, the Supreme Court expressly overruled the Metro Broadcasting test, and imposed a strict scrutiny standard for evaluating minority preferences. Under this test, the Commission may implement race conscious measures only if they "serve a compelling governmental interest and [are] narrowly tailored to further that interest."[6]

The Commission's minority and gender[7] preferences might well survive the Adarand test. However, even under the intermediate scrutiny test, TEC's challenge to the race-based (and other) preferences was deemed significant enough by the

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[4] Fifth Report and Order, 9 FCC Rcd 5532, 5537-38, 5573-580 (1994).

[5] 497 U.S. 547, 564-65 (1990). See Second Report and Order, 9 FCC Rcd 2348, 2398-400 (1994), recon. 9 FCC Rcd 7245 (1994); Fifth R&O, 9 FCC Rcd 5532, 5537.

[6] Adarand, 115 S. Ct. at 2117.

[7] Although Adarand did not analyze gender preferences, it is likely that such preferences would be subject to similar challenges following that decision. See Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992) (Thomas, J.).

Court of Appeals to support a stay.[8] It is thus highly likely that potential bidders would seek to challenge the PCS designated entity rules under Adarand and seek a similar stay, or that disappointed bidders would seek to do so after the auction. Furthermore, given the Commission's reliance on the intermediate scrutiny test, it is unlikely that the record compiled to date contains the evidence appropriate to demonstrate the necessary showing under Adarand.[9] Accordingly, to prepare for a legal challenge, additional evidence would have to be developed before the auction is held.

Both the further delay inherent in fortifying the minority and gender preferences against a legal challenge, and the great likelihood that such a challenge would now be brought in light of Adarand, seriously jeopardize the efforts of DEs to finalize arrangements for appropriate investment.[10] Forcing the auction to continue despite the uncertainty that is now inherent in its existing ground rules will do nothing to encourage investment, and may cause the existing investment to dry up.[11]

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[8] Telephone Electronics Corp. v. FCC, No. 95-1015 (D.C. Cir. Mar. 15, 1995).

[9] See U.S. Dept. of Justice Office of Legal Counsel Adarand Memorandum (June 28, 1995).

[10] See National Paging and Personal Communications Association ("NPPCA") Letter at 1 (June 16, 1995); Columbia Cellular Letter at 1 (June 21, 1995).

[11] Although stressing the need to go forward, NABOB ultimately recognizes that there is substantial uncertainty concerning whether or when a legal challenge might be brought.

(continued...)

On the other hand, the delay that would result from efforts to supplement the record so as to withstand strict scrutiny could create the same problem. Potential investors are aware that already the Commission has postponed this auction twice -- once until August 2, and now until August 29. If the gap were to widen even more between the auction and the start-up of the PCS businesses of A and B block licensees, the viability of the C block licensees would become more and more questionable.[12] Similarly, as the Commission has recognized, PCS licensees face competition from cellular and ESMR carriers, who have expanded their offerings in anticipation of the advent of PCS.[13]

Eliminating the minority and gender bases for preferences and thus ensuring that the auction will proceed in an expeditious manner will facilitate investment opportunities for all DEs, including women and minorities. Moving forward in this way will send a message to investors that the Commission is now firm in its commitment to proceed with the auction promptly and

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[11] (...continued)
NABOB Letter at 5 (June 15, 1995). As Central Alabama and Mobile Tri-States note, such uncertainty "detrimentally affects entrepreneurs' ability to raise the necessary capital . . . as financing will dry up from all but the most risk-taking (and usurious) sources." Letter at 2 (June 16, 1995).

[12] See NPPCA letter, supra, at 2, explaining that the value of licenses will be severely impaired and contracts, products and employees more difficult to obtain, the larger the A/B headstart; see also National Telecom Letter at 2 n.2 (June 14, 1995).

[13] NPRM, ¶ 8.

to assist small businesses in participating in the offering of PCS.[14]

II. THE COMMISSION'S PROPOSED RULE CHANGES PROVIDE A MEANINGFUL OPPORTUNITY FOR MINORITY AND WOMAN BUSINESSES, AS WELL AS ALL SMALL BUSINESSES, TO PARTICIPATE IN THE AUCTION AND THE PROVISION OF PCS.

The rule changes proposed by the Commission would eliminate special preferences based on race or gender, but preserve the preferences for small businesses (as well as rural telephone companies). These changes are fully consistent with the Commission's statutory mandate.

Congress intended only to ensure that "businesses owned by members of minority groups and women are not in any way excluded from the competitive bidding process."[15] Rules that continue to preserve the separate entrepreneurs' blocks, that preserve the C block auction from the very real threat of substantial delay vis-a-vis the A and B blocks (and other carriers) that would result from constitutional challenge, and that further ensure that small businesses will have a meaningful opportunity to participate in PCS, are a race-neutral means of satisfying this Congressional objective. Because minorities and

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[14] Economic bases for preferences are not constitutionally suspect under equal protection analysis. See Harris v. McRae, 448 U.S. 297, 323 (1980).

[15] H.R. Rep. No. 111, 103d Congress, 1st Sess. 255 (1994). This very general directive must, of course, be construed in accordance with constitutional requirements. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979); New York v. United States, 112 S. Ct. 2408, 2425 (1992).

women have traditionally faced a lack of access to capital,[16] the vast majority of them will also qualify as small businesses.[17] Thus, while linked to economic status, the proposed preferences would significantly increase opportunities for women and minorities in the auction.

While the record might ultimately support the award of additional preferences to women and minorities consistent with Adarand, the practical reality is that women and minorities will have lost their opportunity to participate in the PCS market if they are forced to accommodate the delay and uncertainty of proceeding under the existing rules. Moreover, the Commission's request that DEs continue to indicate their minority or woman-owned status on their short forms demonstrates an ongoing effort by the Commission to be in a position to determine the extent to which the Congressional objective of ensuring opportunities for minority and female participation is being achieved.[18]

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[16] Fifth R&O, 9 FCC Rcd 5532, 5537-38, 5573-77.

[17] See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas, FCC 95-159, ¶¶ 20, 135 (rel. April 17, 1995) (noting that because 99% of both woman and minority businesses generated net receipts of less than $1 million, such businesses would be captured within the small business category.) See also Central Alabama and Mobile Tri-States Letter at 3.

[18] NPRM, ¶ 17. DCR assumes that the Commission intends that applicants who indicate that they are minority- or woman-owned will have complied with the control requirements as set forth in 47 C.F.R. § 24.720. DCR requests clarification of this point.

The proposed rules also demonstrate the Commission's commitment to protect businesses owned by women and minorities from substantial disruption based on the rule changes, to the extent possible. We analyze each of the proposed rule changes, in turn:[19]

A. The 50.1/49.9 Percent Equity Option. The Commission originally created this option in 47 C.F.R. § 24.709(b)(6) in order to provide businesses owned by women or minorities with additional flexibility to attract financing.[20] As the Commission recognizes, a number of such businesses have relied on this option in structuring their financing, and eradicating it entirely at this late date could be potentially fatal to their ability to secure the financing that they have worked hard to attract. The Commission should continue to caution applicants, however, that it intends to scrutinize all arrangements, and specifically the 49.9/50.1% equity option, for de facto control by the control group.

B. Affiliation Rules. The Commission wisely proposes abolishing the 47 C.F.R. § 24.720 (1)(11)(ii) affiliation exception for minority businesses controlled by

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[19] We note that gender and minority preferences have been preserved for the F block auction, based on the premise that the Commission will analyze whether racial or gender preferences are appropriate, in light of Adarand, for future spectrum auctions, including the F block auction. NPRM, ¶ 1. DCR urges the Commission to move forward promptly in conducting such an analysis.

[20] Fifth R&O, 9 FCC Rcd at 5602.

minorities that are members of a woman- or minority- owned PCS applicant's control group. This rule was designed to permit minorities with financial resources to bring those resources to the table to assist woman or minority PCS applicants in which they have a genuine stake.[21] To sidestep the issues now posed by Adarand, the Commission can either extend or eliminate this exception. Yet, as the Commission notes, extending it to all entrepreneurial or small businesses would effectively abolish the auction's financial cap, by permitting any applicant to bring a controlling shareholder of a large business into its control group without concern about the affiliation rules. Abolishing the exception, on the other hand, does not deprive woman or minority businesses of investment by minorities whose affiliates would exceed the financial caps; it simply limits that investment to 25% before it becomes attributable.

C. Installment Payments. The Commission's decision to link installment payment plans to financial size under 47 C.F.R. § 24.711(b) is the most equitable approach. DCR's business plans, as well as those of many other DEs, have relied heavily on the installment payment mechanism, which has also been viewed as a significant inducement by investors. All small businesses, including any woman or minority small businesses, would now have the advantage of the most favorable installment payment terms, while larger businesses have less favorable but still attractive

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[21] Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 425-26 (1994).

terms. Larger minority or woman businesses will lose the extra advantage of the gender- and race-based preference of the original rule, but this change will affect relatively few applicants, and only those with over $40 million in gross revenues, who would presumably be in a financial position to be capable of making payments earlier. In any event, as noted above, this change is necessary if the auction is to proceed expeditiously and with a degree of certainty.

D. Bidding Credits. The Commission has taken the most sensible approach in proposing to eliminate the bidding credit tiers and replacing them with a flat 25% bidding credit for all small businesses under 47 C.F.R. § 24.712(a). While woman or minority businesses with more than $40 million in gross revenues lose their preference as compared to small, non-minority or woman businesses, there is no way to avoid this result in a race-neutral manner without extending a bidding credit to all applicants, and thus making it less meaningful to the vast majority of women and minority applicants that qualify as small businesses.

E. Cellular PCS Cross-Ownership and CMRS Spectrum Aggregation Limit. Modifying the spectrum cap and cross-ownership rules (47 C.F.R. §§ 20.6(d)(2), 24.204(d)(2)(ii)) to remove provisions based on race or gender should have no

significant negative effect on woman or minority applicants.[22] The proposed rule change continues to permit women or minority applicants to own up to 40% of any same-area CMRS licensee provided they are small businesses or rural telephone companies. Similarly, such businesses may continue to own or to attract investors who own up to 40% of a same-area cellular licensee. Under this rule, some large minority or woman businesses may have to comply with the lower, 20% attribution rule, but the number of businesses this change affects is limited, and in any event, investors may divest themselves of excess cellular or PCS interests after the auction. This change thus should not be a major impediment to obtaining investment.

In sum, the Commission has acted in the most equitable fashion given the uncertainties and potential delays now associated with Adarand. Any changes in the rules will inevitably affect some potential applicants. However, the Commission's proposed rules provide woman and minority

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[22] We note that the proposed revision of 47 C.F.R. § 20.6(d)(2) omits the existing rule's reference to broadband PCS and SMR ownership interests, which were previously included in the CMRS aggregation limit. This was presumably unintentional. Similarly, the proposed revision omits (rather than amends, as in the cellular eligibility rule) the last part of the existing provision, which permits a higher attribution limit for interests held "by an entity with a non-controlling equity interest in a broadband PCS licensee or applicant that is a business owned by minorities and/or women." See Erratum, GN Docket No. 93-252 (rel. Nov. 30, 1994). Presumably, the Commission intended to amend this provision, as it did the identical cellular eligibility provision, so that it will apply to interests held in small businesses rather than businesses owned by women or minorities. DCR seeks clarification of these two points.

businesses, most of which are small, with a meaningful opportunity to participate in the auction and offering of PCS without causing undue disruption to the financing efforts of potential applicants. Thus, the proposed rules best accord with the Congressional directive to ensure that woman and minority businesses, as well as small businesses and rural telephone companies, are not excluded from the competitive bidding process. The opportunity for DE applicants now depends upon the Commission's proceeding under the proposed rules in an expeditious fashion, and maintaining its firm commitment to the August 29 auction date -- particularly now that the A and B block licenses have been granted.

III. THE COMMISSION'S EXPEDITED COMMENT PROCEDURE IS NECESSARY AND APPROPRIATE IN LIGHT OF THE CLEAR NEED TO KEEP THE C BLOCK AUCTION ON TRACK.

Certain recent filings have suggested that, in order to amend the DE preferences as proposed, the Commission is legally required to engage in an extensive comment cycle that would further delay the auction.[23] As the Commission has recognized, however, prompt completion of this proceeding is required "in order to facilitate swift action on our rule changes."[24] The expedited comment procedures proposed by the Commission are

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[23] National Telecom Letter at 3; Central Alabama and Mobile Tri-States Letter (June 19, 1995); Omnipoint Letter at 3 (June 21, 1995).

[24] NPRM, ¶ 2.

necessary to achieve that important goal, and are well within the Commission's discretion.

The Commission released the NPRM on June 23, giving parties two weeks to file comments regarding the proposed rule changes. It also published its proposals in the Federal Register on June 30, 1995.[25] Nothing in the Administrative Procedure Act ("APA") prohibits this expedited schedule. The APA states only that interested persons must have an "an opportunity to participate in the rule making through submission of written data, views, or arguments."[26] As the courts have confirmed, this provision imposes no statutory minimum comment period,[27] and thus "[t]here is no requirement concerning how many days [an agency] must allow for comment . . . ."[28]

The Communications Act is likewise silent regarding any minimum time period for public comment. Although the Commission's rules indicate that interested persons will be afforded a reasonable opportunity to submit comments,[29] the Commission has noted that its rules similarly impose no minimum

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[25] 60 Fed. Reg. 34200 (1995).

[26] 5 U.S.C. § 553(c).

[27] Connecticut Light and Power Co. v. NRC, 673 F.2d 525, 534 (D.C. Cir. 1982), cert. denied, 459 U.S. 835 (1982).

[28] Phillips Petroleum Co. v. EPA, 803 F.2d 545, 559 (10th Cir. 1986); but see Athens Community Hospital v. Heckler, 565 F. Supp. 695, 698 (E.D. Tenn. 1983) (apparently confusing § 553(c) with § 553(d)).

[29] 47 C.F.R. § 1.415(b).

comment period. "[T]he flexibility in the present rules enables the Commission, based upon its judgment and experience in these matters, to determine the time frame most appropriate to the nature of the rulemaking proceeding and the complexity of the issues involved."[30]

Absent a statutorily imposed minimum comment period, the Commission has substantial discretion to order its docket by fashioning its own "methods of inquiry permitting [it] to discharge [its] multitudinous duties."[31] The Supreme Court affirmed this principle in the leading case of Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council.[32] Indeed, Section 4(j) of the Communications Act expressly provides the Commission with extensive discretion to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."[33] Section 4(i) of the Act provides additional authority for the Commission to perform "any act not inconsistent with [the Communications Act], as may be necessary in the execution of its functions."[34] Failure to proceed promptly with the C block auction would hamper

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[30] Amendment of Section 1.415 of the Commission's Rules, 61 F.C.C. 2d 491 (1976).

[31] FCC v. Schreiber, 381 U.S. 279, 290 (1965).

[32] 435 U.S. 519, 543 (1978).

[33] 47 U.S.C. § 154(j). See generally FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).

[34] 47 U.S.C. § 154(i).

the Commission's ability to meet its substantive responsibility to bring DE participation in PCS service to the public expeditiously. Accordingly, the Commission's swift response to the Supreme Court's Adarand decision represents an appropriate means to carry out its responsibilities.[35]

The expedited comment period chosen to accommodate the present circumstances satisfies the Commission's "reasonable time"[36] requirement by providing for enough time to adopt new rules in advance of the proposed July 28 deadline for filing short forms. The Commission already has rescheduled the auction from August 2 to August 29. Delaying the auction further would give established carriers even more of a headstart and would fail to signal to investors -- as is now imperative -- the Commission's unwavering intent to proceed with the auction as soon as possible.[37] Moreover, in light of previous opportunities for commentary on the need for race and gender

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[35] See North American Telecommunications Ass'n v. FCC, 772 F.2d 1282, 1292 (7th Cir. 1985) (section 4(i) is a "necessary and proper clause" empowering the Commission to "deal with the unforeseen"); New England Telephone and Telegraph Co. v. FCC, 836 F.2d 1101, 1108 (D.C. Cir. 1987) (same).

[36] 47 C.F.R. § 1.415(b).

[37] Nor is pushing back the proposed July 28 deadline for filing short forms a realistic option if the Commission hopes to meet the revised August 29 auction timetable. If the auction is to be held on August 29, the FCC would have only one month to review the short forms if they are submitted, as planned, on July 28. This schedule is already much shorter than the approximately two months provided for in the A and B block auction.

preferences,[38] only a brief comment period is needed for thorough consideration of the relevant issues.[39]

CONCLUSION

For the reasons set forth above, DCR supports the rules proposed by the Commission, and believes the Commission should move ahead with the auction as scheduled for August 29, 1995, without further delays.

Respectfully submitted,

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[38] Cf. Connecticut Light and Power Co. v. NRC, 673 F.2d 525, 534 (D.C. Cir. 1982) (upholding NRC's refusal to extend comment period where extensive public comment had preceded rule making).

[39] Similarly, no statute requires the Commission to permit reply comments. Although the Commission does ordinarily solicit replies, 47 C.F.R. § 1.415(c), it is entitled pursuant to its own regulations to waive that rule on its own motion where good cause exists. 47 C.F.R. § 1.3. See Northeast Cellular Telephone v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("The FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest"). In this case, as noted above, time constraints demand a flexible response.

CERTIFICATE OF SERVICE

I, Lynn R. Charytan, hereby certify that I have this 6th day of July, 1995, caused to be delivered by hand the foregoing Comments of DCR Communications, Inc. to the persons named on the attached service list.

Lynn R. Charytan

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