

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)
)
Implementation of Section 703(e))
of the Telecommunications Act)
of 1996)
)
Amendment of the Commission's Rules)
and Policies Governing Pole)
Attachments)

CS Docket No. 97-151

**COMMENTS OF THE
UNITED STATES TELEPHONE ASSOCIATION**

Its Attorneys

Mary McDermott
Linda Kent
Keith Townsend
Hance Haney

Todd Colquitt, Director
Legal & Regulatory Affairs

U.S. Telephone Association
1401 H Street, NW, Suite 600
Washington, DC 20005
(202) 326-7249

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SUMMARY

To enhance the framework of negotiations, the Commission should require an aggrieved attacher to certify that it did in fact raise with the pole owner beforehand every issue contained in any subsequent complaint. For its part, the pole owner should be required to respond quickly in a good faith effort to resolve the dispute. To reinforce the emphasis on dispute resolution rather than complaints, the Commission should require aggrieved attachers to file a thirty-day Notice of Intent. Such a Notice would allow the parties thirty days to attempt to reach resolution.

For purposes of Section 224, the definition of “cable service” as defined in Section 3 applies. The statutory language of Section 224 makes it clear that the pre-1996 Act formula for resolving pole attachment complaints will continue to apply only to pole attachments used to provide cable service. Because of the amendments made to Section 224, different rates necessarily apply to pure CATV versus any other service. Consequently, the findings in the Heritage complaint are no longer applicable.

Space in a conduit is unusable because it is either reserved for maintenance, set aside for municipal use, or deteriorated. Accordingly, ducts that are reserved for maintenance, government use, or that have deteriorated and can no longer be used should be considered as other than usable space when applying the conduit attachment formula.

Safety concerns dictate that third party overlashing be permitted only with the express consent of the pole owner. Pole owners should be free to require third party overlashers to enter into licensing arrangements. Doing so provides for a direct relationship between the pole owner and the third party overlasher and facilitates communication regarding attachment modifications.

The overlasher must shoulder a reasonable portion of the costs of the pole. Third party overlashers should be counted as attaching entities for purposes of allocating the costs of the non-usable portion of the pole and charged accordingly. With respect to the costs of the usable space, overlashers should not be charged by pole owners for the costs of such space.

With respect to the issue raised by Duquesne Light Company, the statutory language for allocating costs in Section 224 refers to space, not load capacity. Although additional attachments

cause additional maintenance and administrative costs, these costs are reflected in the in the carrying charge components.

The Commission cannot adopt proportional apportionment to allocate the costs of the other than usable space. The statutory language clearly states that regardless of the number of attachments an attaching entity has in the usable space, that attaching entity cannot be allocated a greater or lesser portion of the costs of the non-usable space than other attaching entities.

The Commission inappropriately singles out incumbent LECs by proposing to treat ILECs as attaching entities for purposes of apportioning the costs of the non-usable space, yet does not include electric utilities. The Commission must treat all Section 224-defined utilities identically. Furthermore, if the Commission is going to treat ILECs as attaching entities for cost allocation purposes, then the Commission must extend to ILECs the protections afforded to attaching entities in Section 224 *vis à vis* agreements with other utilities.

The pole owner should not bear the costs of government public pole attachments alone. The costs of the government attachments should be borne equally by pole owner and attachers. Government attachments should not be counted for purposes of allocating the costs of non-usable space.

Pole owners should be allowed to develop presumptive averages of their own, based on the information they possess. Because geography and population density greatly affect pole distribution patterns, pole owners should also be allowed to develop averages for areas that share similar characteristics.

The Commission should resolve rights-of-way complaints on a case-by-case basis. Given the Commission's limited experience, any attempt to impose a methodology at this point in time would be premature.

Annual increment phase-in's of rate hikes should be prospective, not retrospective, i.e. any rate hikes should become effective on the same date as the rules adopted in this proceeding.

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**COMMENTS OF THE
UNITED STATES TELEPHONE ASSOCIATION**

The United States Telephone Association ("USTA") respectfully submits these comments in response to the Notice of Proposed Rulemaking issued in the above-referenced docket.¹ USTA is the principal trade association of the local exchange carrier ("LEC") industry, with over 1,000 members. The Commission seeks comment on many of the same issues in this proceeding as it raised in the previous rulemaking regarding pole attachments.² As the Commission has indicated that it will incorporate relevant comments from that proceeding into the instant rulemaking,³

¹ Notice of Proposed Rulemaking, In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996 and Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket 97-151, FCC 97-234, released August 12, 1997 ("Notice").

² Notice of Proposed Rulemaking, In the Matter of Amendment of the Rules and Policies Governing Pole Attachments, CS Docket 97-98, FCC 97-94, released March 14, 1997.

³ Notice at ¶8.

USTA's present comments will focus on the new issues raised here, with reference to its previously filed comments where necessary.

I. To Enhance The Statutory Framework Of Negotiations, The Commission Should Ensure That Both Attachers And Pole Owners Negotiate In Good Faith.

USTA is encouraged by the Commission's affirmation of Congressional and statutory intent that "negotiations between a utility and an attacher should continue to be the primary means by which pole attachment issues are resolved."⁴ However, USTA believes that the Commission's proposal to extend the present requirement for complainants to first file a brief summary of the steps taken to resolve the dispute does little to encourage good faith efforts on the part of attachers to negotiate. The summary often functions only as a filing formality, rather than as a catalogue of genuine efforts undertaken to reach a negotiated compromise.

The Commission should require an aggrieved attacher to certify that it did in fact raise with the pole owner beforehand every issue contained in any subsequent complaint. For its part, the pole owner should be required to respond quickly in a good faith effort to resolve the dispute. To reinforce the emphasis on dispute resolution rather than complaints, the Commission should require aggrieved attachers to file a thirty-day Notice of Intent. Such a Notice would alert the pole owner that an attacher has concerns and would allow the parties thirty days to attempt to reach resolution. If at the end of thirty days certain issues remained unresolved, then the attacher would file a complaint with the Commission on those unresolved issues. Requiring such pre-

⁴ Notice at ¶12.

complaint dispute resolution efforts would strengthen the framework of negotiations and save all parties -- attacher, pole owner, and FCC -- from unnecessarily expending time and resources on an otherwise resolvable dispute.

II. The Commission's Policy And Rules Regarding Attachments By Cable TV Operators Must Comport With The Language And Intent Of Section 224.

The Commission's findings in the Heritage complaint⁵ came before Congress amended Section 224. As originally enacted, Section 224 applied only to CATV operators and did not draw a distinction between different types of CATV attachments and what manner of services were provided over those attachments. Given the statutory construction of Section 224, different rates could not be charged for different types of services. The Commission's findings in the Heritage complaint represented one set of conclusions that reasonably conformed with the plain language of the law.

However, Section 703(e) of the Telecommunications Act of 1996⁶ differentiated between different types of services by drawing a bright line distinction between service providers offering pure CATV only and everyone else. For purposes of Section 224, the definition of "cable

⁵ Heritage Cablevision Associates of Dallas, L.P. v. Texas Utilities Electric Co., 6 FCC Rcd. 7099 (1991), recon. dismissed, 7 FCC Rcd. 4192, aff'd sub. nom. Texas Utilities Electric Co. v. FCC, 997 F 2d 925 (DC Circuit 1993) ("Heritage complaint").

⁶ Telecommunications Act of 1996, Public Law No. 104-104, 104 Stat. 56, 149-151, signed February 8, 1996 (to be codified at 47 U.S.C. § 224) ("1996 Act").

service” as defined in Section 3 applies.⁷ The statutory language of Section 224 makes it clear that the pre-1996 Act formula for resolving pole attachment complaints will continue to apply only to pole attachments used to provide cable service.⁸ In resolving a complaint, a cable operator in a situation identical to that of the Heritage complainant would have recourse to the new formula in Section 224(e), not the pre-existing formula. Because of the amendments made to Section 224, different rates necessarily apply to pure CATV versus any other service. Therefore, having been superseded by the statutory amendments, the findings in the Heritage complaint are no longer applicable.

III. Conduit Does Contain Other Than Usable Space And Those Costs Should Be Shared By All Conduit Occupants.

Although unusable conduit space differs from unusable pole space in the way it is created, it is nonetheless unusable. Space on a pole is classified as unusable because it is either set directly into the ground or because safety considerations prevent its use. Space in a conduit is unusable because it is either reserved for maintenance, set aside for municipal use, or deteriorated. The reservation of a maintenance duct is for the benefit of all conduit occupants and essentially renders

⁷ 47 U.S.C. §3(7) “The term ‘cable service’ has the same meaning given such term in section 602.” In turn, 47 U.S.C. §602(6) states that “the term ‘cable service’ means (A) the *one-way* transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service;” (emphasis added)

⁸ 47 U.S.C. §224(d)(3) “This section shall apply to the rate for any pole attachment used by a cable television system *solely* to provide cable service.” (emphasis added)

that duct unusable. The costs of that space should be shared by all who benefit from it.

Accordingly, ducts reserved for maintenance should be considered as other than usable space when applying the conduit attachment formula.

As is the case with poles, governments -- typically cities -- often require reservation of conduit space for sole city use as a public interest requirement. Fulfillment of this government demand renders the amount of ducting reserved by the government as unusable. As is the case with government attachments on poles, USTA does not believe that the conduit owner alone should bear the costs of government occupancy in the conduit.⁹ But for the existence of the conduit owner, every other conduit occupant would otherwise have to install its own conduit and thereby be subject to the same public interest requirement. The costs of the government conduit occupancy should be borne equally by conduit owner and occupants. Accordingly, ducts reserved for government use should be considered as other than usable space when applying the conduit attachment formula.

Finally, individual ducts within conduit can and do deteriorate to the point where they are no longer usable. Unlike poles, though, individual ducts cannot be changed out or replaced unless the entire conduit is replaced. This is an expensive undertaking that imposes unnecessary costs on the conduit owner and occupants. Nevertheless, the deteriorated duct is no longer usable by any party. Accordingly, deteriorated ducts that can no longer be used should be considered as other than usable space when applying the conduit attachment formula.

⁹ See *infra*, at VII.

IV. Third Party Overlashers Have An Obligation To Shoulder Their Fair Share Of The Costs Of The Other Than Usable Space.

To expand upon USTA's previous comments on overlashing,¹⁰ safety concerns dictate that third party overlashing can only be permitted with the express consent of the pole owner. USTA believes that the pole owner alone has the authority to permit overlashing by third parties onto existing attachments. Existing attachers cannot allow third parties to overlash without consent from the pole owner.

As pole owners, ILECs assume obligations of liability and public safety and therefore must retain reasonable control to ensure that access demands and pole load capacities are in concert with one another. In its Interconnection Order, the Commission acknowledged that there are too many different and unique variables surrounding pole attachments to delineate specific rules governing the type and manner of access granted.¹¹ Therefore, pole owners are responsible for determining whether a specific access request should be granted as requested, within reasonable bounds set forth by the Commission.¹² Allowing third party overlashing without first obtaining consent from the pole owner deprives the pole owner of an accurate picture of the demands placed on its pole system. This inaccurate picture distorts the pole owner's ability to

¹⁰ Reply Comments of USTA at p. 14, Notice of Proposed Rulemaking, CS Docket 97-98 (filed August 11, 1997).

¹¹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, FCC 96-325 ("Interconnection Order") at ¶ 1149.

¹² Interconnection Order at ¶¶ 1151-1158.

properly evaluate and grant attachment and modification requests from other attachers.

Accordingly, pole owners should be free to require third party overlashers to enter into licensing arrangements as prerequisite for overlashing. Doing so provides for a direct relationship between the pole owner and the third party overlasher and facilitates communication regarding attachment modifications.¹³

In cases where the pole owner agrees to permit third party overlashing, the overlasher must shoulder a reasonable portion of the costs of the pole. Specifically, USTA believes that third party overlashers should be counted as attaching entities for purposes of allocating the costs of the other than usable space on the pole and charged accordingly. As overlashers, these third parties enjoy the benefits of the other than usable space and the costs associated with owning and maintaining it. Therefore, they should assume their fair share of the costs of such space. Entering into a licensing arrangement with the pole owner prior to overlashing will facilitate billing and collection of their share of the costs of the other than usable space. It will also alleviate the pre-existing attacher of any billing and collection costs it might otherwise incur absent the direct licensing arrangement between pole owner and overlasher.

With respect to the costs of the usable space, USTA does not believe that overlashers should be charged by pole owners for the costs of such space. USTA has already stated that it does not believe that parties overlashing onto their own pre-existing attachments should be

¹³ In addition to liability and safety issues, licensing arrangements facilitate the coordination of pole repairs. Knowing exactly who is attached to a pole is extremely important in quickly replacing poles that have been damaged and re-setting attachments, particularly when a large number of poles have been damaged by a storm.

charged additionally.¹⁴ Likewise, USTA does not believe that third party overlashers should be charged a portion of the usable space by the pole owner either.

With respect to dark fiber, USTA believes that leasing and overlashing are two separate issues. Third party overlashers should shoulder a portion of the costs of unusable space because they benefit from such space and their physical presence causes additional administrative and maintenance costs. Unlike overlashing, however, leasing dark fiber does not necessarily cause the pole owner to incur significant additional costs.¹⁵ Any rules the Commission adopts with respect to dark fiber must ensure that CATV operators do not circumvent application of the new formula by bundling together non-cable service provided by dark fiber lessees with their own cable service to their customers. Such an arrangement would eviscerate the intent of Section 224(d)(3).

V. Pole Load Capacity Is Neither An Appropriate Nor Lawful Determinant For Allocating Costs.

USTA would reiterate what it has previously said regarding the spatial presumptions with respect to pole heights and usable space.¹⁶ With respect to the issue raised by the Duquesne Light Company in the present Notice,¹⁷ USTA has already stated that the statutory language for

¹⁴ Id., footnote 34.

¹⁵ For purposes of this discussion, USTA defines dark fiber as excess capacity in pre-existing fiber only.

¹⁶ See, generally, Comments of USTA at pp. 22-27, Notice of Proposed Rulemaking, CS Docket 97-98 (filed June 27, 1997).

¹⁷ Notice at ¶18.

allocating costs in Section 224 refers to space, not load capacity.¹⁸ Although additional attachments cause additional maintenance and administrative costs, these costs are reflected in the in the carrying charge components.

The Commission also seeks further comment on the spatial changes concerning usable space and average pole heights suggested previously by the electric utilities¹⁹ and already extensively commented on in the preceding pole attachment rulemaking.²⁰ Having already commented specifically on this matter,²¹ USTA will limit its comments here to note simply the near universal opposition to such suggestions by other parties commenting in that proceeding.²² Indeed there is disagreement within the electric utility industry about the need to change presumptive pole heights.²³ USTA again urges the Commission to reject the spatial changes suggested by the electric utilities.

¹⁸ Reply Comments of USTA at pp. 13-14, Notice of Proposed Rulemaking, CS Docket 97-98 (filed August 4, 1997).

¹⁹ Whitepaper filed by law firm of McDermott, Will and Emery on August 28, 1996. ("Whitepaper")

²⁰ Notice of Proposed Rulemaking, In the Matter of Amendment of the Rules and Policies Governing Pole Attachments, CS Docket 97-98, FCC 97-94, released March 14, 1997.

²¹ See, generally, Comments of USTA at pp. 22-27 (filed June 27, 1997).

²² See, e.g., Comments of NCTA at pp. 9-15, and Comments of AT&T at pp. 16-19 (both filed June 27, 1997).

²³ See, Comments of The Edison Electric Institute ("EEI") and UTC, The Telecommunications Association ("UTC") at pp. 26-28 (filed June 27, 1997).

VI. The Language And Intent Of Section 224 Clearly Indicates That The Commission Cannot Adopt A Formula Which Allocates The Costs Of The Other Than Usable Space In A Manner Proportionate To The Number Of Attachments An Attaching Entity Has On A Pole.

For reasons already stated in the earlier pole attachment proceeding, USTA believes that the two separate formulas for allocating the costs of the usable and non-usable space should utilize the gross book cost methodology.²⁴ USTA believes that the Commission's treatment of the usable space cost component is straightforward and should be adopted, albeit with the gross book cost methodology. However, USTA has concerns with the Commission's proposed treatment of the other than usable space component. Specifically, USTA is unsure as to what the Commission contends constitutes an attaching entity. The Commission appears to adopt the statutory language when it states that "any telecommunications carrier, or cable operator or LEC attaching to a pole [should] be counted as a separate entity for the purposes of apportionment of the two-thirds of the costs of the unusable space. We also propose that such costs will be apportioned equally to all such attaching entities."²⁵ However, in the next paragraph, the Commission appears to reject the statutory language when it requests comment on "the general premise that counts any telecommunications carrier as a separate attaching entity for each foot, or partial increment of a foot, it occupies on the pole and on such a methodology's consistency with the statutory requirement in section 224(e)(2) for equal apportionment among all attaching

²⁴ See, generally, Comments of USTA at pp. 4-11 and 19-20, Notice of Proposed Rulemaking, CS Docket 97-98 (filed June 27, 1997).

²⁵ Notice at ¶22.

entities.”²⁶

This methodology is not consonant with the statutory language at all.²⁷ The statutory language uses the phrase “equal apportionment,” whereas the Commission’s proposal in paragraph 23 is proportional apportionment. The Commission cannot adopt proportional apportionment. Congress was quite specific in directing the Commission to use proportional apportionment for allocating the costs of the usable space. That Congress expressly did not use identical or similar language in allocating the costs of the other than usable space, but instead explicitly stated that such costs would be allocated using “equal apportionment” could not be a clearer signal of Congressional intent. Regardless of the number of attachments an attaching entity has in the usable space, that attaching entity cannot be allocated a greater or lesser portion of the costs of the non-usable space than other attaching entities.

Moreover, the Commission inappropriately singles out incumbent LECs. The Commission proposes to treat ILECs as attaching entities for purposes of apportioning the costs of the other than usable space, yet does not include electric utilities, or any other type of Section 224-defined “utility” for that matter. For their part, the electric utilities have already gone on record affirmatively stating that ILECs cannot be treated as attaching entities for purposes of Section

²⁶ Notice at ¶23.

²⁷ USTA has the same objections against applying proportional apportionment to conduit. See, e.g. Notice at ¶41. (“[W]e believe that each entity using one half-duct be counted as a separate attaching entity.”)

224.²⁸ If the Commission is going to treat any Section 224-defined utility as an attaching entity, then it should treat all utilities similarly.

Furthermore, if the Commission is going to treat ILECs as attaching entities for cost allocation purposes, then the Commission must extend to ILECs the protections afforded to attaching entities in Section 224 *vis à vis* agreements with other utilities. The Commission must be consistent in its interpretation of the statute. It cannot interpret the law differently within the very same statutory section in order to serve two separate ends. If the Commission is going to treat any Section 224-defined utility as an attaching entity then it must treat all Section 224-defined utilities as attaching entities. If the Commission treats any Section 224-defined utility as an attaching entity, then it must extend to it the protections afforded to all attaching entities.

VII. Government Attachments Should Not Be Counted For Purposes Of Allocating The Costs Of Other Than Usable Space.

USTA does not agree with the Commission that the pole owner alone should bear the costs of government public pole attachments.²⁹ Doing so imposes a penalty upon the pole owner

²⁸ See, e.g., Reply Comments of American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Florida Power and Light, and Northern States Power Company (AEP *et al.*) at p. 18 (filed August 11, 1997) (“The plain language of §224 precludes ILECS from being treated as attaching entities.”) See also Reply Comments of Edison Electric Institute and UTC, The Telecommunications Association (EEI and UTC) at p. 10 (filed August 11, 1997) (“Congress specifically evidenced its intent that the broadening of the pole attachment legislation beyond cable attachments to include telecommunications attachments was not meant to encompass attachments by ILECs.”)

²⁹ Notice at ¶124.

based solely on the fact that the pole owner received municipal permission to occupy the public right-of-way before the subsequent attachers. But for the existence of the pole owner, every other attacher on a pole would otherwise have to install its own pole and thereby be subject to the same public interest requirement. The costs of the government attachments should be borne equally by pole owner and attachers. Accordingly, government attachments should not be counted for purposes of allocating the costs of other than usable space. The costs would be allocated through the non-usable space component. By doing so, pole owners would bear the largest portion of the costs of government attachments, i.e. one third plus self-imputation, while the attachers would share a smaller but reasonable share of the costs.

VIII. With Respect To The Average Number Of Attachments On A Pole, The Commission Should Allow Pole Owners To Develop Presumptive Averages.

USTA believes that pole owners should be allowed to develop presumptive averages of their own, based on the information they possess.³⁰ USTA agrees that if the Commission adopts this proposal, that a pole owner should be required to provide to attachers the methodology and information it used to develop its presumption. Updating such averages should take place on a periodic basis to be determined by the pole owner. Requiring the pole owner to constantly update its averages to account for every new attachment would impose large administrative costs that would far outweigh any corresponding benefits. Pole owners already have their own established schedules for examining and surveying their poles. Allowing the pole owner to overlay average

³⁰ Notice at ¶26.

pole attachment updates onto these existing surveys provides for a reasonable and timely method for periodically updating the presumptive average.

Because geography and population density greatly affect pole distribution patterns, pole owners should also be allowed to develop averages for areas that share similar characteristics. A great deal of latitude should be allowed, within reason, for establishing different areas. The size of the area, be it statewide or something larger or smaller, should be left to the pole owner. Pole owners should also be allowed to differentiate between urban, rural, and suburban areas. Allowing the development of different averages for different areas would facilitate administrative ease without significantly compromising accuracy. Moreover, it would assist in alleviating any additional record keeping requirements that might otherwise unnecessarily burden smaller pole owners.³¹

IX. Miscellaneous Items

A. The Commission Should Resolve Rights-Of-Way Attachment Complaints On A Case-By-Case Basis.

At this point, USTA believes that the Commission should resolve rights-of-way complaints on a case-by-case basis. A methodology would be more appropriate if the Commission had greater degree of exposure to such complaints. However, given the Commission's admittedly limited experience,³² any attempt to impose a methodology at this point

³¹ See, Notice at ¶72.

³² Notice at ¶42.

in time would be premature. Moreover, unlike access to poles and conduit, it is not clear that there is sufficient demand for access to rights-of-way such that adopting a methodology would be worthwhile.

B. Any Rate Hike Phase-In Must Become Effective On The First Day The New Rules Take Effect.

USTA agrees with the Commission's proposed phase-in of any attachment rate increases that may result from adoption of the new formula. However, USTA would note that the Notice is somewhat ambiguous about the timing of the phase-in. Specifically, USTA agrees that increases should be phased in at the beginning of the five years using annual increments of one-fifth. The ambiguity arises when the Commission proposes that the increment "be added to the rate in each of the subsequent five years."³³ This gives the impression that the first phase-in would not occur until after the first full year Section 224(e)(4) applies, i.e., not until February 8, 2002. Because the new formula becomes effective on February 8, 2001, the first annual increment should also go into effect on that date. Annual increment phase-in's should be prospective, not retrospective.

CONCLUSION

For the above-stated reasons, USTA urges the Commission to adopt rules favoring pre-complaint dispute resolution. The Commission should treat third party overlashers as attaching entities for purposes of allocating the costs of the other than usable space. Moreover, the

³³ Notice at ¶44.

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Commission must abide by Congressional intent by allocating the costs of the other than usable space through equal, not proportional, apportionment. The Commission must not treat Section 224-defined utilities differently from one another. Finally, the Commission should allow pole owners to develop presumptive averages based on the information they possess.

Respectfully submitted,

UNITED STATES TELEPHONE ASSOCIATION

BY Hance Haney

Its Attorneys

Mary McDermott
Linda Kent
Keith Townsend
Hance Haney

Todd Colquitt, Director
Legal & Regulatory Affairs

U.S. Telephone Association
1401 H Street, NW, Suite 600
Washington, DC 20005
(202) 326-7249

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