

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Technology Transitions)	GN Docket No. 13-5
)	
Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers)	RM-11358
)	
Special Access for Price Cap Local Exchange Carriers)	WC Docket No. 05-25
)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services)	RM-10593
)	

**REPLY COMMENTS OF XO COMMUNICATIONS, LLC ON THE
TECH TRANSITIONS FURTHER NOTICE OF PROPOSED RULEMAKING**

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SUMMARY

The initial comments on the Further Notice of Proposed Rulemaking (“FNRPM”) confirm that the Commission should take the steps that XO Communications, LLC (“XO”) advocated in its opening comments: adopt a one-year advance notice requirement before an incumbent local exchange carrier (“ILEC”) discontinues a service used as a wholesale input and codify objective good faith criteria that apply to dealings between ILECs and competitors following a notice of copper retirement.

The Commission should amend Section 63.71 of its rules to require the ILECs to provide one year’s advance notice to wholesale customers of a planned discontinuance, reduction, or impairment of service used as a wholesale input. Several commenters explain that wholesale carrier customers of the ILECs need at least this much time to conduct multiple tasks to prepare their networks and customers for a discontinuance with minimum disruption.

Contrary to the arguments of several ILECs, the existing provision in the Commission’s rules that allows for removal of an application from streamlined processing does not provide adequate incentive for ILECs to the to give customers sufficient advance notice of discontinuance to allow them to make the transition without customer disruption. That provision, while important, is an insufficient remedy to a wholesale customer that has concerns about the implications of a discontinuance. Without an advance notice requirement, there is no guarantee that ILEC advance notice will be provided, let alone be sufficient to allow competitors to undertake the necessary tasks to prepare for the discontinuance in a timely fashion. Moreover, ILEC reliance on existing provisions under the Section 214 approval process are misplaced because the issue is not whether the discontinuance can be opposed, and potentially not receive streamlined approval once an application is filed, but more what purposes a one-year advance

notice requirement would serve in all cases of discontinuance (XO proposes that the advance notice requirement should apply whether or not a Section 214 approval will be required.). In addition to the foregoing, an advance notice requirement will encourage ILECs and their wholesalers to collaborate ahead of a discontinuance to allow for a smooth transition, ensure that ILECs are able to complete a “meaningful evaluation” of whether a Section 214 application must be filed, decrease the likelihood that an impacted party would need to seek Commission intervention, and reduce the chances a planned discontinuance would be delayed.

The record supports the Commission’s proposal in the *FNPRM* to enumerate objective criteria to help guide determinations of whether an ILEC has worked in “good faith” with interconnecting entities following notice of a copper retirement. XO and a number of other commenters explain that adoption of such criteria will affirmatively encourage carriers to work together ahead of any copper retirement to minimize potential disruption to end users. The criteria proposed by XO, INCOMPAS and Preferred Long Distance should be included. The claims by ILECs that objective criteria are unnecessary to enforce the good faith obligation and case-by-case determination of conduct is preferred are an effort to undermine effective scrutiny of whether they are meeting the good faith requirement. A case-by-case development of good faith criteria would prolong uncertainty over what is expected of the parties and weaken the value of the good faith requirement the Commission has adopted. As a practical matter, the adoption of good faith criteria now would better facilitate cooperation between ILECs and interconnecting entities ahead of any copper retirement, reduce the potential need to for competitors to have to resort to the complaint process, and allow enforcement (if needed) to proceed expeditiously, which is critical given the short time frames applicable to the copper retirement process. As such, the Commission should adopt non-exclusive good faith criteria at

the outset that clarify the rights and obligations of ILECs and interconnecting entities. In addition, the Commission should adopt a procedure to ensure that complaints regarding ILECs' compliance with the good faith requirement can be resolved promptly to allow administration of timely and effective relief, when required.

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XO Communications, LLC (“XO”), by its attorneys, hereby submits its reply comments on the Further Notice of Proposed Rulemaking in the above-referenced proceeding.¹

In its initial comments, XO urged the Commission to amend its rules to require the incumbent local exchange carriers (“ILECs”) to provide one year’s advance notice to wholesale customers of a planned discontinuance, reduction, or impairment of service used as a wholesale input, whether or not a Section 214 approval will be required.² Further, XO supported the Commission’s proposal to enumerate objective criteria to help guide determinations of whether

¹ *Technology Transitions, et al.*, GN Docket No. 13-5 *et al.*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 15-97 (rel. Aug. 7, 2015) (“*Tech Transitions Order*” or “*FNPRM*,” depending on context).

² *See* Comments of XO Communications, LLC, GN Docket No. 13-5 *et al.*, 3-11 (Oct. 26, 2015) (“XO Comments”).

an ILEC has worked in “good faith” with interconnecting entities following notice of the retirement and it proposed a series of objective criteria.³ Both of these measures, which a number of other commenters support, would facilitate better coordination between competitors and their ILEC vendors, make the technology transition go more smoothly, and reduce the potential for disruption to end user customers.

In their comments, ILECs contend that the existing regulatory frameworks for wholesale TDM discontinuance and copper retirement, as modified in the *Technology Transitions Order*, are sufficient to address the interests of the ILECs’ wholesale customers and interconnecting entities, as well as their retail customers. However, as discussed herein, these commenters overlook the benefits of adequate notices of discontinuance and the adoption of objective good faith copper retirement criteria. The ILECs also understate the harm that is likely to occur during the transitions without adoption of these measures. The proposals XO advocates would, with minimal burdens, foster communication and collaboration between the parties and further the Commission’s objectives pronounced in the *Technology Transitions Order*.

I. THE PURPOSES SERVED BY AN ADVANCE NOTICE OF THE PLANNED DISCONTINUANCE OF WHOLESALE SERVICE CANNOT BE MET THROUGH PROCEDURAL MEASURES PROPOSED BY THE ILECS

A. A One-Year Notice Will Permit Wholesale Customers to Prepare Their Networks and Their End-User Customers for the Transition in the Face of a Wholesale Discontinuance

As XO explained in its initial comments, in response to learning that a wholesale input on which it relies will be discontinued, it would need a minimum of twelve months to complete the necessary tasks in anticipation of the discontinuance where there is a build and at least seven

³ See *id.* at 12-19.

months when there is no build involved to transition customers and its network.⁴ Other commenters also explained the need for an extended advance notice when wholesale services are to be discontinued so competitors can prepare for a wholesale discontinuance.⁵ For instance, INCOMPAS, which effectively supports a one-year advance notice requirement prior to any ILEC Section 214 discontinuance application, states “[f]or a competitive carrier to replace the TDM equipment at its customer’s premises and at its network edge, it must know, well in advance, what specific technology has been chosen by the ILEC to replace the DS1 or DS3 TDM service being discontinued, in addition to rates, terms and conditions for provision of this service.”⁶ Further, another commenter proposed an advance notice period of eighteen months based on concerns similar to those raised by XO.⁷

⁴ *See id.* at 6-10. XO would engage in a sequence of steps to transition its services and customers prior to the discontinuance, including: identifying the scope of customers that will be impacted; analyzing options for transitioning customers; developing a proposed network redesign; obtaining corporate approval for the redesign and any capital funding required; engaging in equipment and network engineering and implementing the build (for transitions that will involve some measure of new construction); working with customers and preparing to groom customers over; and moving the customers over once the new build is operational. Although some of these steps can be completed simultaneously, the overall gains do not mitigate the need for at least seven to twelve months to handle any transition. *See id.* at 9. Even in the event of a modest discontinuance, factors out of XO’s control, such as negotiating access rights with building owners and landlords, can delay these processes significantly. *See id.* at 8. Additional time may also be needed for network redesigns, whether or not there is a build, if the discontinuance is larger in scale as XO would need to secure additional resources or spread its existing resources to complete the above-enumerated steps. *See id.* at 9-10.

⁵ *See, e.g.*, Comments of INCOMPAS, GN Docket No. 13-5 et al., 4 (filed Oct. 26, 2015) (“INCOMPAS Comments”); *see* Comments of Preferred Long Distance, Inc., GN Docket No. 13-5 et al., 7 (filed Oct. 26, 2015) (“PLD Comments”).

⁶ INCOMPAS Comments at 5-6.

⁷ *See* PLD Comments at 7 (“In order to efficiently manage its resources, including the outlay for new equipment, competitive carriers need as much lead time as possible and be given as much information as possible about the change from a TDM-based to a new IP-based product offering. PLD’s proposed eighteen (18) month timeline will allow competitive carriers enough time to evaluate, select, purchase, install and test the new

B. Removing a Section 214 Application from Streamlined Processing under Certain Circumstances Would Not Be an Adequate Substitute for Sufficient Advance Notice

Several ILEC commenters argue against adoption of an advance notice requirement, claiming that the current Section 214 discontinuance rules will provide sufficient protections against a potentially harmful wholesale service discontinuance.⁸ CenturyLink, for example, suggests that ILECs have “strong incentives to notify customers well in advance of a Section 214 filing in situations where customers will need extra time to accommodate the discontinuance [because] [i]f they fail to give customers adequate time, one or more of those customers are likely to oppose the application, or ask for additional time, which will lead to an even longer discontinuance process.”⁹ CenturyLink fails, however, to indicate what it would consider “well in advance,” or to substantiate the alleged incentives. Even for argument’s sake if such incentives exist for discontinuance of services to *retail* customers, there is no evidence to suggest or reason to believe that they would extend to *wholesale* customers, who are also the ILECs’ competitors. It is much more likely that the ILECs’ primary incentives in the latter case would be to undermine their competitors’ market shares and to give no more notice than legally required. Finally, even assuming *arguendo* there is some incentive for an ILEC to give wholesale customers advance notice before a Section 214 application is filed, absent a regulatory requirement, there is no guarantee that such advance notice will be provided or sufficient to allow competitors to undertake the necessary tasks which XO and others have described to

equipment necessary to interface with the new IP-based product both at the customer premises as well as at the carrier's edge.”).

⁸ See 47 C.F.R. § 63.71(d). The period offered by streamlined processing – 30 days for non-dominant carriers and 60 days for dominant carriers – would never, in and of itself, be adequate notice.

⁹ Comments of CenturyLink, GN Docket No. 13-5 et al., 35 (filed Oct. 26, 2015).

prepare for the discontinuance in a timely fashion.¹⁰ Nor is there any indication such *advance notice* would be consistently defined across large ILECs.

ITTA and USTelecom advocate that removing an application from streamlined processing, rather than requiring advance notice in all cases, is a sufficient remedy for a CLEC that has concerns about the implications of a discontinuance.¹¹ This position echoes AT&T's similar assertion in previous comments.¹² This is a clear attempt to shift the burden regarding the impact of the discontinuance to the CLECs. These arguments fail for several reasons. ILECs determine, in the first instance, whether a Section 214 application will be filed. Thus, it may be that not all wholesale discontinuances will involve a Section 214 application, and for those that do not, the position of ITTA, USTelecom, and AT&T provides no comfort to competitors that must prepare. As XO has shown, in the case of *any* discontinuance of a wholesale input, affected competitors will have to engage in a variety of resource-intensive and time-consuming tasks to transition their networks and prevent customer disruptions. Thus, the need for advance notice

¹⁰ CenturyLink's comments do, however, confirm XO's understanding that ILECs can provide notice "well in advance" of a discontinuance, and as such, implementing a one-year requirement should not create an unreasonable burden on the ILECs.

¹¹ See Comments of ITTA, GN Docket No. 13-5 et al., 8 (filed Oct. 26, 2015) ("[t]o the extent it would serve a legitimate public interest objective to provide customers with additional time to take certain actions in connection with a proposed discontinuance, the Commission has the option to remove a Section 214 application from streamlined processing."); see also Comments of the United States Telecom Association, GN Docket No. 13-5 et al., 15 (filed Oct. 26, 2015) ("[t]he approval process has built-in safeguards such as FCC authority to condition discontinuance, including delaying it, where the public interest would be served.").

¹² See Reply Comments of AT&T, GN Docket No. 13-5 et al., 33 (filed Mar. 9, 2015). In their most recent comments, AT&T and Verizon urged the Commission to revise its Section 214 discontinuance process to provide greater "certainty" to discontinuing carriers, in particular by allowing for automatic approval of applications that meet certain criteria. See Comments of AT&T, GN Docket No. 13-5 et al., 14-16 (filed Oct. 26, 2015); see also Comments of Verizon, GN Docket No. 13-5 et al., 3-4, 6-9 (Oct. 26, 2015). XO questions the merits of these proposals. If, however, the Commission decides to enact them, a one-year advance notice requirement is a small but necessary concession to mitigate the risks inherent with automatic approval.

exists in the event of any proposed discontinuance, regardless of whether the ILEC seeks Commission approval of the discontinuance. Accordingly, the issue is not whether the discontinuance can be opposed, and therefore should not receive streamlined approval once an application is filed, but more what purposes a one-year advance notice requirement would serve in all cases. The one-year notice will facilitate timely communications between ILECs and their wholesale customers, to the benefit of end users and competition. Moreover, the one-year notice will help ILECs in carrying out their duties to conduct a “meaningful evaluation” and determine if a Section 214 application is required.¹³

If the ILEC decides not to seek approval, an aggrieved CLEC’s only option is to seek emergency intervention from the Commission, a process that is expensive and time-consuming for the parties and the Commission.¹⁴ An advance notice requirement would eliminate the need for such intervention in most instances by allowing CLECs sufficient time to prepare their customers and networks for a disruption-free transition, even if the ILEC does not seek Commission approval of the discontinuance. The advance notice requirement will also afford carriers the opportunity to resolve any underlying issues related to a discontinuance without first seeking Commission intervention. By the same token, if a challenge is mounted against the ILEC’s decision not to file, the advance notice period will facilitate a better record for the

¹³ See *Tech Transitions Order* ¶ 114. Ahead of the planned discontinuance, the ILEC is required to make a “meaningful evaluation” about whether discontinuance of the wholesale service used by carrier customers as an input into their own services will constitute a discontinuance, reduction, or impairment of retail end user service. In conducting this evaluation, ILECs must “us[e] all information available, including information obtained from carrier-customers.” See *Tech Transitions Order* ¶¶ 105, 119.

¹⁴ In addition to having discretion over whether to file an application for approval of a wholesale discontinuance, the ILEC will not be required to present documentation to support its determination. See *Tech Transitions Order* ¶ 124.

Commission to consider the issue in a timely fashion. Finally, the advance notice will reduce the potential for disputes in the event a Section 214 application is filed.

Requiring CLECs, in the absence of an advance notice requirement, to rely solely on their ability to seek Commission relief on a case-by-case basis after Section 214 applications are filed would increase the chances for customer disruption as well as create regulatory uncertainty. Moreover, this framework would likely result in greater Commission engagement during the transition process and increase administrative costs for the ILECs, CLECs, and the Commission. By contrast, a one-year advance notice requirement will create greater stability throughout the transition process, facilitate inter-carrier communications, ensure that ILEC evaluations of whether a Section 214 application is needed are sufficiently meaningful, and likely reduce the need for CLECs to pursue Commission intervention in the first instance. XO stresses, however, that the procedural mechanisms described by the ILEC commenters should still be available to CLECs in appropriate circumstances, but the likelihood they would need to be invoked would be reduced if there is a one-year advance notice requirement of wholesale inputs.

II. OBJECTIVE CRITERIA ABOUT WHAT FAILS TO MEET THE GOOD FAITH REQUIREMENT WILL CLARIFY PARTIES' RIGHTS AND OBLIGATIONS, FACILITATE INTER-CARRIER COLLABORATION, AND COMPLEMENT THE ACTION TAKEN BY THE COMMISSION IN REFORMING THE COPPER RETIREMENT RULES

As XO explained in its initial comments, implementing good faith criteria is consistent with Commission precedent in other areas where a good faith obligation exists¹⁵ and will encourage carriers to collaborate effectively ahead of any copper retirement to minimize potential disruption to end users.¹⁶ Like XO, several other commenters support the

¹⁵ See XO Comments at 15.

¹⁶ See *id.* at 13-15.

implementation of good faith criteria identifying actions or behavior that Commission will deem inconsistent with the good faith obligation.¹⁷ Several commenters offer specific criteria that are similar in many respects to those advanced by XO.¹⁸ INCOMPAS and Preferred Long Distance, for example, propose that a failure by the ILEC to respond to a reasonable request for information within a certain timeframe, a failure to respond to a reasonable request for a meeting or teleconference, or a refusal by an ILEC to execute a written agreement regarding a copper retirement, among other things, all demonstrate a lack of good faith.¹⁹ XO supports these positions. However, the criteria proposed by XO and others are not exclusive, and their adoption should not foreclose the ability of an interconnecting carrier to bring a complaint based on other grounds alleging an ILEC has failed to act in good faith in the case of a copper retirement.

In their comments, AT&T and USTelecom assert that the adoption of good faith criteria is unnecessary. XO respectfully disagrees. In enacting the good faith requirement, the Commission “recognize[d] the importance of information flow to competitors’ abilities to ensure that a retirement of copper facilities does not disrupt service to their end users.”²⁰ As such, the purpose of the requirement is to encourage ILECs and interconnecting entities to collaborate ahead of a copper retirement. XO fully supports this goal. Enacting specific criteria to implement the good faith obligation will only facilitate such collaboration by establishing the boundaries of the requirement from the outset. The existence of objective criteria from the start

¹⁷ See Comments of the Michigan Public Service Commission, GN Docket No. 13-5 et al., 13-14 (filed Oct. 26, 2015); *see also* Comments of Edison Electric Institute, GN Docket No. 13-5 et al., 11-12 (filed Oct. 26, 2015). *See also* XO Comments at 15-19.

¹⁸ See INCOMPAS Comments at 11-12; PLD Comments at 13; *see also* Comments of WorldNet Telecommunications Inc., GN Docket No. 13-5 et al., 2-3 (filed Oct. 26, 2015).

¹⁹ See INCOMPAS Comments at 11-12; *see also* PLD Comments at 13.

²⁰ *Tech Transitions Order* ¶ 32.

is thus likely to reduce carrier complaints and case-by-case inquiries to the Commission as to whether a particular action or inaction is consistent with the Commission’s expectation of good faith.

AT&T claims “the existing requirements that oblige carriers to provide specific information” have not changed and “[t]here is no evidence that ILECs are not complying with these requirements.”²¹ This may be true. However, because the pace of copper retirement is expected to accelerate as the transition proceeds, the Commission acknowledged in the *Tech Transitions Order* that “the pace and impact of copper retirement necessitate[d] changes” to the copper retirement rules.²² One of those changes was adoption of the good faith requirement. Objective criteria will encourage collaboration and information exchange between ILECs and interconnecting entities to ensure that the ever-increasing number of copper retirements do not have a negative impact on end user customers.²³

USTelecom states that implementing objective criteria might “add[] unnecessary burden and layers to effectively what is a simple requirement to share information.”²⁴ This concern is misguided. The good faith criteria that XO and others have proposed would not result in any increased burden or layers of obligations. Rather, they would simply clarify the existing good

²¹ See Comments of AT&T, GN Docket No. 13-5 et al., 18 (filed Oct. 26, 2015).

²² *Tech Transitions Order* ¶ 13.

²³ Additionally, AT&T fails to account for the fact that to the extent the information sharing requirement has not changed, interconnecting entities are no longer permitted to object to the timing of a copper retirement. Rather, an aggrieved party is only permitted to allege that an ILEC has failed in its good faith obligations and perhaps obtain relief in the form of a delay of the retirement as a result. This places a premium on parties and the FCC to be able to address good faith breach claims rapidly. Implementing objective criteria against which to measure this obligation will ensure not only expeditious consideration of claimed breaches but also that the process is carried out in a fair and balanced manner.

²⁴ See Comments of United States Telecom Association, GN Docket No. 13-5 et al., 15-17 (filed Oct. 26, 2015) (“USTelecom Comments”).

faith obligation and facilitate collaboration between ILECs and interconnecting entities so that copper retirements occur within minimal disruption to end users and competition. USTelecom further alleges that compliance with the good faith requirement “is better suited to evaluation using a case-by-case approach.”²⁵ However, for reasons previously explained, proceeding without criteria in favor of a case-by-case approach would raise a higher hurdle to bringing a complaint, because of the uncertainty of outcome, and the behavior that constitutes bad faith would only slowly be articulated much deeper into the tech transitions process, potentially weakening the value of a good faith obligation. A case-by-case approach would also cause the Commission and parties to incur increased administrative oversight and costs. A preferable alternative would be to adopt objective good faith criteria at the outset that clarify the rights and obligations of ILECs and interconnecting entities.²⁶

Although USTelecom purports to oppose objective good faith criteria, it suggests that it “would support a few, common sense parameters to ensure that both parties act in good faith.” XO agrees with some of the proposals set forth by USTelecom. For instance, XO agrees that “[a]n interconnecting entity claiming that an ILEC has not acted in good faith has the burden of proof.”²⁷ XO would also accept, with certain modifications, the USTelecom recommendation

²⁵ See *id* at 16.

²⁶ USTelecom also asserts that the good faith criteria proposal is “flawed” because “[c]ompetitors seeking information have no corresponding requirement to act in good faith.” US Telecom Comments at 16. However, no such requirement is necessary for CLECs because they are most often simply the recipients of a notice of copper retirement for the purpose of preparing for it. Moreover, XO and other CLECs have proposed that an ILEC should be required to respond only to reasonable requests for information, thereby imposing a limit on the amount and types of information a CLEC can seek from the ILEC.

²⁷ See USTelecom Comments at 16.

that if a wholesale customer's requests for information are not reasonable,²⁸ then the ILEC's failure to respond should not constitute per se lack of good faith.²⁹ But the Commission should make it equally clear that the ILEC has the burden of showing the request of a CLEC for copper retirement-related information is not reasonable.

Finally, XO agrees with USTelecom's position that a 90-day delay of a copper retirement should only be imposed if there is a finding of bad faith,³⁰ but such finding should include any determination that an ILEC failed to meet one of the objective criteria or a finding of bad faith on other grounds. To allow determinations to occur quickly enough to impose a 90-day delay, if necessary, enforcement actions should be undertaken through a process that allows for expedited review of an allegation of bad faith well within the copper notice retirement period.³¹ The adoption of objective good faith criteria will allow for rapid resolution in the majority of anticipated "bad faith" scenarios.

The Commission should reject the other USTelecom proposals. In particular, USTelecom urges the Commission to adopt a rule that would state "[a]n ILEC that provides notice in accordance with the established notice requirements will be presumed to have acted in good faith."³² The notice requirement, however, is merely the threshold obligation and does not support a blanket finding that the ILEC has acted in good faith. It does not fully encompass the Commission's intent in establishing the good faith obligation, which is to "ensure that

²⁸ For example, a request not related to the copper retirement might be unreasonable. However, the Commission should make clear that requests regarding facilities or service alternatives to the copper network elements or copper-based services affected by the retirement, to name a few cases, would be reasonable.

²⁹ See USTelecom Comments at 16.

³⁰ See *id.* at 17.

³¹ See XO Comments at 19-20.

³² See USTelecom Comments at 16.

interconnecting entities still may obtain the information they need in order to accommodate the planned copper retirement without disruption of service to their customers.”³³ In other words, the good faith obligation extends to the period after notice of the retirement has been provided. As previously explained, ILECs are often the sole source of myriad information relating to a copper retirement, and as such, establishing a presumption of good faith simply based on providing the “where and when” would be inappropriate.³⁴

The Commission likewise should reject USTelecom’s proposal that “[a]n ILEC’s failure to provide information that is proprietary or confidential does not constitute per se lack of good faith.”³⁵ While XO is cognizant of the concerns ILECs have about the security of confidential and proprietary information, there are a number of well-established safeguards (i.e. a protective order or a limited non-disclosure agreement) that can be put in place to reduce the risk of improper disclosure of proprietary or confidential information.

³³ *Tech Transitions Order* ¶ 32.

³⁴ *See* XO Comments at 14-15.

³⁵ *See* USTelecom Comments at 16.

CONCLUSION

For the reasons set forth herein and in XO's initial comments, the Commission should (1) amend Section 63.71 of its Rules to require ILECs to provide at least one-year's advance notice of a discontinuance of services used as wholesale inputs by other providers; and (2) adopt objective criteria to evaluate whether an ILEC has comported with its obligation to act in good faith when sharing information with interconnecting entities ahead of a copper retirement.

Respectfully submitted,



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