

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

In the Matter of:)	
)	
Grande Communications' Petition For)	WC Docket No. 05-283
Declaratory Ruling Regarding Intercarrier)	
Compensation For IP-Originated Calls)	

**REPLY COMMENTS
OF THE
UNITED STATES TELECOM ASSOCIATION**

Its Attorneys:

James W. Olson
Indra Sehdev Chalk
Jeffrey S. Lanning
Robin E. Tuttle

607 14th Street, NW, Suite 400
Washington, DC 20005-2164
(202) 326-7300

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SUMMARY

Today, many local exchange carriers (LECs), including many USTelecom members, perform terminating access services on the public switched telephone network (PSTN) for voice communications that were originated using Internet Protocol (IP) under the same terms and conditions as they do for all other PSTN voice communications. The Commission's access charge rules and those LECs' tariffs provide the appropriate compensation framework for the services provided. Apparently, however, Grande Communications does not bill access charges for terminating IP-originated voice communications on the PSTN.

Grande seeks Commission authority in its petition in this docket to go beyond its own practice of not billing access charges, and would require other LECs to adopt Grande's approach by providing PSTN termination of IP-originated voice communications at reciprocal intercarrier compensation rates, which are much lower than the rates offered by the LECs actually performing the PSTN termination services. Grande seeks Commission authority for this arbitrage despite the fact that it is not performing the PSTN termination services for which it would obtain discounts. In fact, Grande would not even offer the information service by which it claims the benefit of avoiding access charges.

Grande's Petition is, in fact, nothing more than an attempt to gain special regulatory treatment and help other carriers avoid lawful access charges. Like other such self-serving requests in recent years, the Grande Petition attempts to exploit the intersection between Voice over Internet Protocol (VoIP) service and traditional telecommunications networks to skew the playing field in favor of one class of parties. More importantly, Grande's Petition offers no overall public interest benefits; instead, it simply seeks to reduce costs for some customers while ultimately raising costs for others, particularly the customers of small and rural LECs.

In these Reply Comments, USTelecom responds to the erroneous and misguided arguments of the parties supporting the Grande Petition. Specifically, USTelecom shows that:

1. the Grande Petition would create a “call laundering” service that would only harm the public interest;
2. Grande proposes a misguided policy, and its Petition is misleading;
3. Grande cannot unilaterally alter other local exchange carriers’ (LECs) access services when it establishes arrangements for the joint provision of access;
4. contrary to the claims of some parties, IP-originated voice communications are subject to access charges on the public switched telephone network (PSTN); and
5. the Commission must firmly and quickly reject the Grande Petition to preserve the foundation for competitive, deregulated markets.

Accordingly, the Commission should reject Grande’s Petition and clearly explain that it does not countenance such attempts to avoid lawful access charges.

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REPLY COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

Grande Communications stylizes its petition in this docket (the Grande Petition) as a simple request for a declaratory ruling rather than the dramatic alteration in intercarrier compensation that it actually is seeking. The United States Telecom Association (USTelecom),¹ filed comments opposing the Grande Petition and, taken together, other parties' comments also opposed Grande's request overwhelmingly. In these Reply Comments, USTelecom responds to the erroneous and misguided arguments of the parties supporting the Grande Petition. Specifically, USTelecom shows that: (1) the Grande Petition would create a "call laundering" service that would only harm the public interest; (2) Grande proposes a misguided policy, and its Petition is misleading; (3) Grande cannot unilaterally alter other local exchange carriers' (LECs) access services when it establishes arrangements for the joint provision of access; (4) contrary to the claims of some parties, IP-originated voice communications are subject to access charges on the public switched telephone network (PSTN); and (5) the Commission must firmly and quickly reject the Grande Petition to preserve the foundation for competitive, deregulated markets.

¹ USTelecom is the nation's leading trade association representing communications service providers and suppliers for the telecom industry. USTelecom's carrier members provide a full array of voice, data, and video services across a wide range of communications platforms.

I. GRANDE'S PROPOSAL WOULD CREATE A "CALL LAUNDERING" SERVICE THAT WOULD ONLY HARM THE PUBLIC INTEREST.

Today, many LECs, including many USTelecom members, perform terminating access services on the PSTN for voice communications originated using Internet Protocol (IP) under the same terms and conditions as they do for all other PSTN voice communications. The Commission's access charge rules and those companies' tariffs provide the appropriate compensation for the services provided. Apparently, however, Grande Communications does not bill access charges for terminating IP-originated voice communications on the PSTN.

The Grande Petition seeks Commission authority for Grande to go beyond its own practice of not billing access charges to offer a service that would force other LECs to provide PSTN termination of IP-originated voice communications at reciprocal compensation rates, which are lower than those offered by the LECs actually performing the PSTN termination services. Grande seeks Commission authority for this arbitrage despite the fact that it is not performing any of the PSTN termination service for which it is obtaining discounts. Grande is not even offering the information service for which it seeks an exemption from access charges.

Grande's Petition is, in fact, nothing more than an attempt to gain special regulatory treatment and avoid lawful access charges. Like other such self-serving requests in recent years,² the Grande Petition attempts to exploit the intersection between Voice over Internet Protocol (VoIP) service and traditional telecommunications networks to skew the playing field in favor of one class of parties. More importantly, Grande's Petition offers no overall public interest benefits; instead, it simply seeks to reduce costs for some customers while ultimately raising

² *Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket No. 03-266 (Dec. 23, 2003) (*Level 3 Forbearance Petition*); *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, Memorandum Opinion & Order, 19 FCC Rcd 7457 (2004).

costs for others, particularly the customers of small and rural LECs. Accordingly, the Commission should reject Grande's Petition and clearly explain that it does not countenance such attempts to avoid lawful access charges.

II. GRANDE PROPOSES A MISGUIDED POLICY, AND ITS PETITION IS MISLEADING.

The Grande Petition is misguided and misleading in at least three ways: (1) its is stylized as a simple request for a declaratory ruling but seeks a dramatic alteration in intercarrier compensation; (2) it seeks to compel other LECs to follow Grande's legal theory although the Commission has not done so (and should not so rule); and (3) it purports to concern its receipt of certification but actually seeks to force other LECs to alter dealings with their own customers.

Grande stylizes its petition as a simple request for a declaratory ruling rather than the dramatic alteration in intercarrier compensation that it actually seeks. Parties submitting comments in support of Grande's Petition similarly understate or fail to discuss the import of the ruling they seek. For example, NuVox Communications, XO Communications, and Xspedius Communications (the Joint CLEC Commenters) support the Grande Petition with the claim that it does not seek guidance on the application of access charges to particular traffic,³ while stating that the Grande Petition would require LECs to treat traffic from a self-certified ESP or self-certified VoIP originated traffic as "local traffic for intercarrier compensation purposes and ... not assess access charges on such traffic"⁴ In fact, as AT&T observes,⁵ Grande actually seeks revisions to the access charges rules in a declaratory ruling, as the Commission would have to substantially alter its rules to preclude LECs from assessing lawful tariffed charges when they

³ Comments of NuVox Communications, XO Communications, and Xspedius Communications (Joint CLEC Commenters), at 2.

⁴ *Id.*

⁵ AT&T Comments, at 14. *See also*, Alltel Comments, at 3.

provide originating or terminating access services. Not only would this be a monumental change, it would be a truly bad outcome for consumers and providers alike as it would frustrate comprehensive intercarrier compensation reform and inhibit broadband deployment.

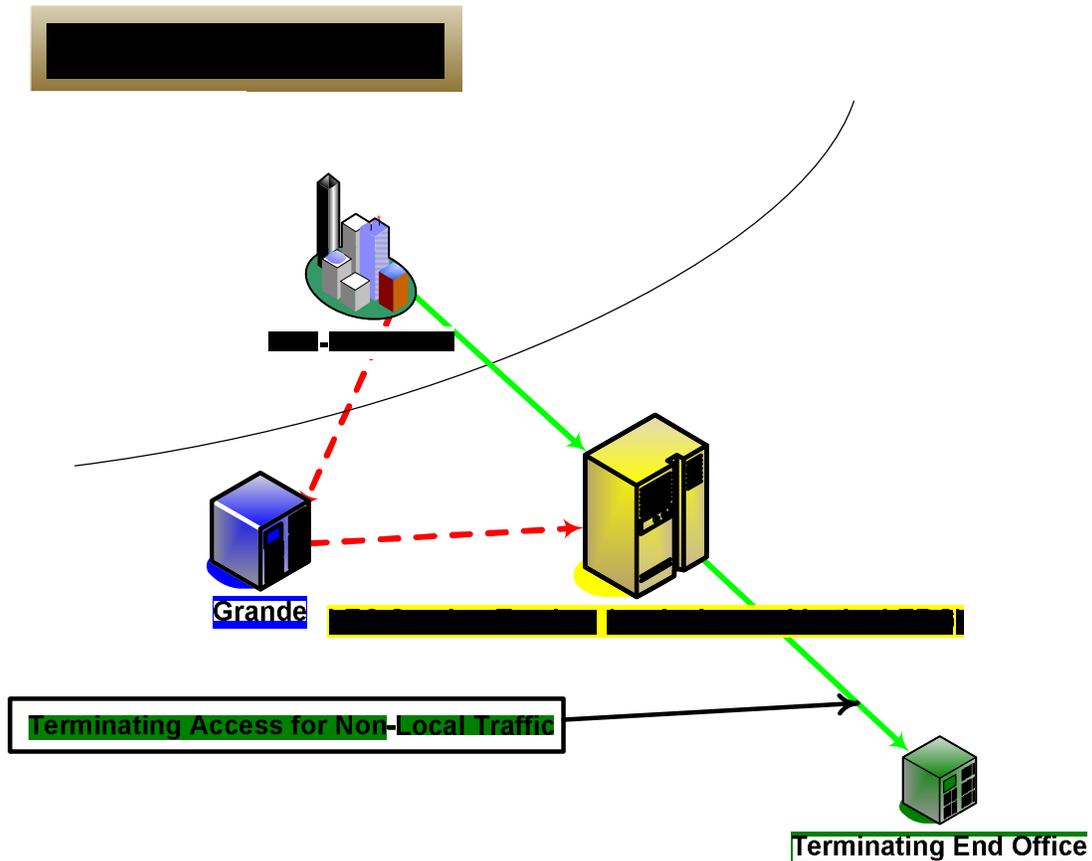
Grande cannot force its desired outcome on other LECs when the Commission has not ruled (and should not rule) as Grande would like. Ultimately, Grande is seeking to obtain through declaratory ruling what the Commission has not granted through a proper rulemaking proceeding. Parties supporting the Grande Petition complain that LECs are engaging in improper “self help” when they seek access charges when they terminate IP-originated voice communications and the Commission has not affirmatively ruled that such charges apply. These complaints have it exactly backwards. It is the interexchange carriers that are attempting to engage in improper self help by avoiding currently lawful access charges through deceptive routing arrangements. Grande’s petition is, therefore, procedurally improper and it would be reversible error for the Commission to grant the requested “relief.” Moreover in the absence of affirmative Commission guidance, LECs must apply access charges—the ESP Exemption is just that, an exemption from the usual rule (which, as explained below, does not apply in this case).

Certification is not the issue because Grande is seeking to force other LECs to alter their dealings with their own customers (Grande already is free to rely on certifications with respect to its dealings with its own customers). Grande’s Petition claims to be seeking approval of a technique for dealing with legal uncertainty, and parties supporting the petition similarly claim that they are not looking for a substantive ruling by the Commission. This simply is not the case, however, as there is no need for Commission action in advance of its substantive decision. Grande is free to accept its customer representations when deciding whether or not *it* will apply access charges when it terminates traffic. Grande is not free, however, to force other LECs to

accept representations made to Grande. More importantly, Grande cannot use such a scheme to resell other LECs' termination services at a discount. Instead, those other LECs must be free to collect the applicable terminating access charge elements when they perform such services, whether the traffic comes to them directly or through Grande's call laundering service.

III. GRANDE CANNOT UNILATERALLY ALTER OTHER LECs' ACCESS SERVICES WHEN IT ESTABLISHES ARRANGEMENTS FOR THE JOINT PROVISION OF ACCESS.

The following diagram illustrates the call laundering scheme that would develop if Grande's Petition were granted.



Two things are apparent from this diagram.

First, Grande's proposed interposition in the call flow would not change the fundamental non-local, interstate nature of the call. Under the end-to-end approach the Commission uses, the call remains a non-local and interstate call; it is not converted into "two calls" or a local call through the additional routing. Accordingly, as explained by Time Warner Telecom, the call remains a "real-time human-to-human oral conversation," which was excluded at the outset from the enhanced service provider exemption to intercarrier access charges (the ESP Exemption).⁶

Second, under its proposal, Grande and the other LEC would be engaged in the joint provision of terminating access, and Grande would not be replacing, or competing with, the relevant LEC terminating access service. The joint provision of access is subject to well-established rules and industry practices, and referring to those rules and practices demonstrates that Grande's proposal is highly irregular. Moreover, there is no business or public policy reason why the LEC should be required to charge a different rate for the functions it performs just because the traffic was routed through Grande's network rather than directly to the LEC.

Grande cannot prevent another LEC from jointly providing access on its customary terms and conditions. Grande has no right to force its treatment of jointly-provided access on the other LEC in the access arrangement. Therefore, even if Grande chooses not to bill access charges on IP-originated voice communications traffic, the terminating LEC remains free to do so for the access charge elements used to terminate the calls. As a responsible telecommunications service provider, Grande would be obliged to work with the LEC if necessary to identify the relevant

⁶ Time Warner Telecom Comments, at 5 (quoting *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No.20828, 77 FCC 2d 384, 421 ¶ 98 (1980); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, 11 FCC Rcd 21,905, 21,958 ¶ 107 (1996)).

traffic. In any event, Grande cannot disguise the traffic and comply with section 201⁷ as doing so clearly would be an unreasonable practice.

Moreover, Grande offers no justification for the idea that LECs with which it is interconnected and jointly-providing access services should have to accept without question certifications made to Grande about the nature of traffic that is ultimately terminated on those LECs' networks rather than on Grande's network. Grande is, in effect, seeking to act as the judge of the nature of the traffic and, simultaneously, to deprive those subsequently receiving the traffic of any remedy should Grande's acceptance of certification ultimately prove to be mistaken. This makes no sense, among other reasons, because it creates perverse incentives to misjudge traffic⁸ and it deprives carriers of their commercial rights.⁹ Consequently, Grande's Petition should be rejected on this basis in addition to many others.

IV. CONTRARY TO THE CLAIMS OF SOME PARTIES, IP-ORIGINATED VOICE COMMUNICATIONS ARE SUBJECT TO ACCESS CHARGES ON THE PSTN.

Several parties join Grande in claiming in their comments that IP-Originated voice communications are exempt from access charges when terminated on the PSTN. This proposition is wrong for at least three reasons: (1) the Commission has not granted, and should not grant special treatment to IP-originated voice communications on the PSTN; (2) IP-originated voice communications traffic is subject to access charges after conversion to the PSTN; and (3) Grande does not have standing to claim the ESP Exemption, and its contracts/tariffs with IXCs do not govern the access relationship between those IXCs and terminating LECs when Grande is interposed as a joint provider of terminating access.

⁷ 47 U.S.C. § 201.

⁸ *E.g.*, AT&T Comments, at 10.

⁹ *See, e.g.*, Qwest Comments, at 4.

The Commission has not granted, and should not grant special treatment to IP-originated voice communications on the PSTN. Grande's petition is like the Level 3 Forbearance Petition that was withdrawn nearly one year ago.¹⁰ Level 3 sought a Commission decision exempting IP-originated voice communications from access charges on the PSTN, but it withdrew its petition at the last minute.¹¹ The parallels between the two petitions expose the first fundamental misconception underlying the Grande Petition, namely the notion that rate-of-return regulated and price-cap regulated LECs should be required to terminate select classes of interstate voice communications at the rates that apply to the termination of local traffic in the absence of comprehensive intercarrier compensation reform. Not only would such discrimination skew competition, it is also directly contrary to current telecommunications policy. Under the present regulatory structure, LECs are expected to recover a substantial portion of their local network costs from intercarrier compensation, specifically access charges. Most of these LECs still face substantial rate regulation preventing them from raising other rates to make up for lost access revenue. Therefore, the Commission would do substantial harm if it were to facilitate massive access arbitrage as Grande requests.

If granted, the Grande Petition would frustrate progress toward comprehensive intercarrier compensation reform. First, it would grant some providers all of the benefits of reform and none of the costs; those providers would surely oppose any further reform as they would have nothing to gain. Indeed, Grande and companies that chose to offer similar services would be harmed by intercarrier compensation reform as the service proposed in the Grande Petition is nothing more than arbitrage, pure and simple. Second, if Grande's Petition were

¹⁰ *Level 3 Forbearance Petition*, WC Docket 03-266.

¹¹ Letter from John T. Nakahata, Counsel for Level 3, to Marlene H. Dortch, FCC, *Level 3 Forbearance Petition*, WC Docket No. 03-266 (Mar. 21, 2005).

granted, telecommunications service providers would have increased incentives to disguise traffic, which would further destabilize current intercarrier compensation arrangements.

Grande's Petition would also negatively impact broadband deployment, particularly in rural areas. USTelecom members are most often the carriers that build networks over which broadband services are provided. Yet, if Grande's request is granted, the result would be to take critical, and lawfully appropriate, revenue away from these network providers for the services they render. This will, in turn, reduce their ability to build and maintain such networks, which will frustrate the Commission's and President Bush's goals to expand broadband services throughout the country.

IP-originated voice communications traffic is subject to access charges after conversion to the PSTN. Parties claiming that IP-originated voice communications are exempt from access charges base their argument on an erroneous assertion that IP-originated voice communications are information service traffic covered by the ESP Exemption even when indistinguishable from conventional voice traffic on the PSTN. This assertion is wrong for the reasons USTelecom detailed in its Comments.¹² In addition, the ESP Exemption simply does not allow voice traffic to avoid access charges on the PSTN based on what that voice traffic used to be, or is destined to become. Therefore, when IP-originated voice traffic is terminated as circuit-switched voice traffic on the PSTN it is subject to access charges like all other circuit switched voice traffic. Any other rule would be illogical, and it would create substantial uneconomic arbitrage. In fact, the Commission has indicated that it supports such a policy of like treatment, writing that "any service provider that sends traffic to the PSTN should be subject to similar compensation

¹² USTelecom Comments, at 10-15 (*e.g.*, VoIP traffic is voice communications, not the provision of information; it uses the PSTN in the same manner as telecommunications; it undergoes no net protocol conversion (real-time voice conversation at both ends); and it is not a communication between an ISP and its end user).

obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network” and that “the cost of the PSTN should be borne equitably among those that use it in similar ways.”¹³

Grande does not have standing to claim the ESP Exemption, and its contracts/tariffs with IXCs do not govern the access relationship between those IXCs and terminating LECs when Grande is interposed as a joint provider of terminating access. Grande bases its claim on the ESP exemption, yet Grande admits that it provides only pure telecommunications service. Therefore, Grande does not have standing to claim the ESP exemption. More importantly, even if Grande and its customer (e.g., an interexchange carrier) have agreed that their relationship relates to information access (based on whatever certification they may agree to), this conclusion is not binding in any way on the LEC that ultimately terminates the traffic. Neither Grande nor its customer has standing or legal authority to impose legal interpretations or service definitions on other carriers. Instead, when the LEC ultimately terminates the traffic (as jointly-provided access), the terms of service are those set forth in the LEC’s tariffs. Therefore, companies sending traffic to Grande for ultimate termination on neighboring LEC networks would still be required to pay those LECs for terminating access services.

In addition, as a joint provider of access, Grande is required to provide the terminating LECs with the information necessary to bill for the access services they provide. Instead, Grande would have the Commission alter these settled practices and require LECs to provide terminating access services on terms and conditions chosen by Grande. Moreover, Grande’s proposed terms and conditions are inconsistent with Commission and industry billing practices

¹³ *IP-Enabled Services*, WC Docket No. 04-28, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4904 ¶ 61 (2004).

and would only invite fraud, waste, and abuse.¹⁴ This proves, yet again, the extent to which Grande's Petition is an effort to undermine current intercarrier compensation rules and practices without creating anything sustainable to take their place.

V. THE COMMISSION MUST FIRMLY AND QUICKLY REJECT THE GRANDE PETITION TO PRESERVE THE FOUNDATION FOR COMPETITIVE, DEREGULATED MARKETS.

Grande's conduct in this case, like other access avoidance schemes, is motivated by the arbitrage opportunities that motivated the Commission to initiate intercarrier compensation reform. As the Commission wrote, "the existing patchwork of intercarrier compensation rules ... is increasingly unworkable in the current environment and creates distortions in the market at the expense of healthy competition."¹⁵ Therefore, USTelecom supports positive intercarrier compensation reform toward more unified treatment of traffic deciding intercarrier compensation arrangements through commercial dealing where possible.¹⁶ Such reform is more achievable if current rules are enforced and all providers pay the lawful charges when they use access services.

In the meantime, and perhaps even more critically in a more market-oriented environment, there must be clear rules governing providers' rights, obligations, and options for enforcing tariffs and agreements. The limited enforcement of existing rules encourages providers to bend the rules or even knowingly break them and this, in turn, threatens the very

¹⁴ Alltel Comments, at 3; AT&T Comments, at 10; Cincinnati Bell Comments, at 5; USTelecom Comments, at 3-8; Verizon Comments, at 6.

¹⁵ *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 ¶ 3 (March 3, 2005).

¹⁶ Comments of the United States Telecom Association on the Further Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, CC Dkt. No. 01-92 (filed May 23, 2005).

foundation of the “pro-competitive, de-regulatory public policy framework”¹⁷ mandated by Congress and pursued by the Commission. Markets will not continue to develop and thrive in the face of blatant free riding and denials of responsibility for the systematic non-payment of lawful access charges.

Consequently, the Commission should take prompt steps to encourage more responsible conduct, and make it feasible for service providers to recover revenue lost due to unlawful access avoidance and “call laundering” arrangements. In particular, the Commission ought to act quickly to preserve the conditions for efficient markets by ruling that access charges may be assessed on IP-originated voice traffic when that traffic uses the PSTN. Under no circumstance, however, should the Commission grant Grande’s Petition, which would only further disrupt market competition among communications service providers.

VI. CONCLUSION.

Grande’s Petition is nothing more than an attempt to gain special regulatory treatment to benefit from avoiding lawful access charges. More importantly, Grande’s Petition offers no overall public interest benefits; instead, it simply seeks to lower costs for some customers while ultimately raising costs for others, particularly the local telephone service customers of small and rural LECs. In these Reply Comments, USTelecom shows that: (1) the Grande’s Petition would create a “call laundering” service that would only harm the public interest; (2) Grande proposes a misguided policy, and its Petition is misleading; (3) Grande cannot unilaterally alter other local exchange carriers’ (LECs) access services when it establishes arrangements for the joint provision of access; (4) contrary to the claims of some parties, IP-originated voice communications are subject to access charges on the public switched telephone network (PSTN);

¹⁷ H.R. Rep. No. 104-458, at 1 (1996).

and (5) the Commission must firmly and quickly reject the Grande Petition to preserve the foundation for competitive, deregulated markets. Accordingly, the Commission should reject Grande's Petition and clearly explain that it does not countenance such attempts to avoid lawful access charges.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

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Its Attorneys:

James W. Olson
Indra Sehdev Chalk
Jeffrey S. Lanning
Robin E. Tuttle

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