

COMMONWEALTH OF PENNSYLVANIA



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September 30, 2016

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
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Re: Petition of UGI Penn Natural Gas, Inc.
for a Waiver of the Distribution System
Improvement Charge Cap of 5% of Billed
Distribution Revenues and Approval to
Increase the Maximum Allowable DSIC to
10% of Billed Revenues
Docket No. P-2016-2537594

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Reply Brief
in the above-referenced proceeding.

Copies have been served per the attached Certificate of Service.

Respectfully submitted,

/s/ Erin L. Gannon

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Attachment

cc: Honorable Angela T. Jones
Certificate of Service
226110

CERTIFICATE OF SERVICE

Petition of UGI Penn Natural Gas, Inc. :
for a Waiver of the Distribution System :
Improvement Charge Cap of 5% of Billed : Docket No. P-2016-2537594
Distribution Revenues and Approval to :
Increase the Maximum Allowable DSIC :
to 10% of Billed Revenues :

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate's Reply Brief, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 30th day of September 2016.

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of UGI Penn Natural Gas, Inc. for a :
Waiver of the Distribution System :
Improvement Charge Cap of 5% of Billed :
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Increase the Maximum Allowable DSIC to :
10% of Billed Revenues :

REPLY BRIEF OF THE
OFFICE OF CONSUMER ADVOCATE

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Dated: September 30, 2016

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I. INTRODUCTION

Act 11 of the Public Utility Code requires that the Distribution System Improvement Charge (DSIC) cannot exceed 5 percent of amounts billed to customers under the utility's distribution rates. 66 Pa. C.S. § 1358(a)(1). On September 22, 2016, the parties to this proceeding filed their Main Briefs regarding UGI Penn Natural Gas, Inc.'s (UGI-PNG or the Company) request that the Commission waive the 5 percent cap and increase the maximum DSIC to 10 percent of billed distribution revenues. The Company argues in its Main Brief that its Petition should be approved for the same reasons the Commission approved a 5 percent DSIC and because a higher cap might extend the number of months that the Company can use the DSIC between base rate cases.

The Office of Consumer Advocate (OCA) and Office of Small Business Advocate (OSBA) have demonstrated through witnesses and briefs, however, that UGI-PNG has not satisfied the statutory standard. Act 11 authorizes waiver if necessary "to ensure and maintain adequate, efficient, safe, reliable and reasonable service." 66 Pa. C.S. § 1358(a)(1). There is no evidence that UGI-PNG's infrastructure poses significant safety and reliability issues or that the current pace of its replacement efforts is unacceptable and potentially harmful to the public. The Company is on schedule to replacing all of its target mains within 30 years. UGI-PNG has not filed a base rate case in more than 7 years and has never utilized a Fully Forecasted Future Rate Year (FFRY). These facts support the OCA and Office of Small Business Advocate (OSBA) recommendation to deny the Petition.

The OCA discussed many of the arguments forwarded by UGI-PNG in its Main Brief and will not repeat those arguments here. Failure to discuss a particular point or argument in this Reply Brief should not be interpreted as agreement with that point or argument. Also, the OCA

will not address each separate finding of fact or conclusion of law advanced by UGI-PNG. Since many of the findings of fact or conclusions of law rest on the interpretations of the Act forwarded by the Company, each must fall as must their interpretation of Act 11. Likewise, the OCA will not address the specific tariff changes proposed in the tariff appended to UGI-PNG's Petition. To the extent they are inconsistent with the OCA's position, the proposed changes should be rejected.

II. REPLY ARGUMENT

A. UGI-PNG Has Not Met Its Burden for Approval of the Grant of a Waiver of the 5 Percent Cap.

1. The Standard for Waiver Requires Different Evidence than the Standard for Approval of an LTIP or Charging a 5 Percent DSIC.

Act 11 does not give the Commission authority to waive the 5 percent DSIC cap unless, without the waiver, the utility cannot ensure and maintain adequate, efficient, safe, reliable and reasonable service. 66 Pa. C.S. §1358(a)(1). Specifically, Section 1358 states:

(1) Except as provided under paragraph (2), the distribution system improvement charge may not exceed 5% of the amount billed to customers under the applicable rates of the wastewater utility or distribution rates of the electric distribution company, natural gas distribution company or city natural gas distribution operation. The commission may upon petition grant a waiver of the 5% limit under this paragraph for a utility in order to ensure and maintain adequate, efficient, safe, reliable and reasonable service.

66 Pa. C.S. § 1358(a)(1) (emphasis added). For the reasons discussed in the OCA's Main Brief and below, the evidence in this proceeding does not support a finding that the incremental DSIC revenue is necessary for UGI-PNG to ensure and maintain adequate, efficient, safe, reliable and reasonable service. OCA St. 1 at 6-8; OCA St. 1R at 2-3; OCA St. 1S at 2-4; OCA M.B. at 5-10; OSBA M.B. at 5-20.

In its Main Brief, UGI-PNG argues that, having met the requirements to charge a DSIC under Section 1353 or approval of an LTIP under Section 1352, the Company is not required to provide any additional evidence to establish need for waiver under Section 1358. PNG M.B. at 9-13; 66 Pa. C.S. §§ 1352, 1353(a), 1358(a)(1). The Company states:

[T]he spending that results from an LTIP that ensures and maintains adequate, efficient, safe, reliable, and reasonable service is sufficient to support a request to increase the DSIC rate cap to recover spending on the projects in that plan.

...

It would be nonsensical for the Commission to approve the modified LTIP and then, within a few short months, reject the petition for waiver under the exact same standard.

PNG M.B. at 11-12. Its witness, William McAllister, further simplified UGI-PNG's proposed standard for waiver in his criticism of Bureau of Investigation and Enforcement (I&E) witness Patel's position, stating that increases in the DSIC cap should be "driven by the revenue requirements resulting from the Commission-approved LTIP." PNG St. 1R at 3-4. Thus, in the Company's view, the only question for the Commission is how high the DSIC cap should be set, which is effectively a mathematical equation dependent on the utility's level of spending. PNG M.B. at 14-15.

The Company does recognize that there is a ceiling – a point where the cap is high enough that the utility could avoid base rate review for too long or the bill impact would be too much. UGI-PNG M.B. at 22-23. In its view, waiting to file a base rate case for 7 or more years is a reasonable balance between the use of base rate and DSIC recovery. PNG M.B. at 22; Pa. P.U.C. v. UGI Penn Natural Gas, Inc., Docket No. R-2008-2079660, Order (Aug. 27, 2009) (PNG 2009). Likewise, it is the Company's opinion that a \$0.56 increase per month per 1% increase in the DSIC is not burdensome. PNG M.B. at 22; PNG St. 1R at 4-5. UGI-PNG's "balancing" test to determine a ceiling, however, only bears on where to set the DSIC rate above 5 percent. The Company claims that the question whether to set the cap above 5 percent is predetermined once the Commission approves a utility's LTIP and DSIC. The Company's interpretation of the statutory standard for waiver fails on three fronts.

Contrary to UGI-PNG's claim, the statutory standards for establishing an LTIP under Section 1352, a DSIC under Section 1353, and a waiver under 1358 are not "the same." Section 1352 requires a utility to submit an LTIP in order to be eligible to recover costs through the

DSIC. 66 Pa. C.S. § 1352. For Commission approval, the statute requires evidence regarding type, age, location, quantity of eligible property, schedule for and cost of projected replacements, and a showing of acceleration and how implementation of the plan “will ensure and maintain adequate, efficient, safe, reliable and reasonable service.” 66 Pa. C.S. § 1352(a)(1)-(7). Section 1353 authorizes the Commission to approve a DSIC with a 5 percent cap in order to “provide for the timely recovery of the reasonable and prudent costs incurred to repair, improve or replace eligible property” and requires an initial tariff, evidence that the DSIC is in the public interest and will facilitate utility compliance with applicable statutes and regulations, an approved LTIP, certification that a base rate case has been filed within 5 years and any other information required by the Commission. 66 Pa. C.S. § 1353(a), (b)(1)-(4). In contrast, Section 1358(a)(1) contains no similar list of requirements nor provides any limitations on the evidence the Commission will require for waiver of the DSIC cap. 66 Pa. C.S. § 1358(a)(1). See OCA St. 1S at 3; OSBA M.B. at 6.

If the evidentiary burden is the same for a utility to receive an LTIP, charge an initial DSIC and receive a waiver, then every utility that qualifies for a DSIC automatically and immediately qualifies for a waiver of the cap upon request. OSBA stated similarly:

If simply exceeding the cap is sufficient justification for a waiver, there is obviously no point to including the cap as a basic consumer protection within the legislation.

OSBA St. 1 at 8. This is inconsistent with the rules of statutory construction, which dictate that all provisions of a statute should be given effect. See 1 Pa. C.S. § 1921(a). The very fact that there is a statutory cap on the amount that can be recovered through the surcharge is an indication that the General Assembly intended the Commission to require additional evidence to establish the necessity of a waiver. 66 Pa. C.S. § 1358(a)(1). This is supported by the legislative

history addressing the DSIC, which shows that the 5 percent cap was an important consideration in gaining approval of Act 11. See OSBA M.B. at 11-12.

One of the key components of the bill is the consumer protections part that puts a 5% cap on the DSIC. Now, not only does this cap protect ratepayers from exorbitant utility bills but it insures that the DSIC provided for in this legislation does not replace rate cases in Pennsylvania. It was never intended to do that.

Pa. Legis. J.– Senate at 72 (Jan. 25, 2012) (emphasis added).

The Senate placed a cap of 5 percent on that amount that utilities can automatically raise their rates and also required them to have filed a base-rate case within the previous 5 years.

Pa. Legis. J. – House at 155 (Feb. 7, 2012) (emphasis added);

While affording utilities the tools that they need to make their updates to their systems, this is creating, as I said earlier, good family-sustaining jobs, and this bill ensures that consumers are protected as we move forward. They include a 5-percent cap that would be imposed upon the amount collected from consumers.

Pa. Legis. J. – House at 157 (Feb. 7, 2012) (emphasis added); see also Pa. Legis. J.– House at 155, 157; Pa. Legis. J.– Senate at 73 (Jan. 25, 2012) (testimony by additional legislators); OSBA M.B. at 10-12. The Company’s position, that the explicit 5 percent restriction is only a placeholder until the utility exceeds that level of spending, cannot stand.

The Company’s position is also inconsistent with Commission precedent. The Commission has found that inclusion of property in the LTIP is not dispositive of whether the cost of that project will be afforded DSIC recovery. In its review of the first investor-owned utility LTIP, the Commission stated:

Act 11 requires that, for costs to be DSIC-eligible, the work underlying those costs must have been contemplated within the utility’s LTIP; it does not specify that all LTIP work and costs must be DSIC-recoverable or that inclusion of such work would warrant rejection of the LTIP.

Accordingly, we will approve the inclusion of customer-owned service lines as part of their LTIP. Inclusion in the LTIP does not necessarily qualify customer-owned service lines, or any other expenditure, as DSIC-recoverable property.

Therefore, we shall refer the matter of DSIC recovery of customer-owned service line expenditures to the OALJ.

Petition of Columbia Gas of Pennsylvania, Inc. for Approval of its LTIP, Docket No. P-2012-2338282, Order at 10-11, 27 (Mar. 14, 2013). The Commission reaffirmed that inclusion of property in an LTIP is not dispositive of whether the cost of that project will be afforded DSIC recovery. In approving UGI-PNG's initial LTIP, it stated:

The issues of eligibility and cost recovery, for all property claimed as DSIC-eligible, are to be addressed and resolved in the subsequent DSIC petition and calculation.

Petition of UGI Penn Natural Gas, Inc. for Approval of its LTIP, Docket No. P-2013-2398835, Order at 24 (Sept. 11, 2014); see also Petition of Peoples Natural Gas Co. LLC for Approval of its LTIP, Docket No. P-2013-2344596, Order at 43 (May 23, 2013); Petition of Peoples TWP for Approval of its LTIP, Docket No. P-2013-2344595, Order at 42-43 (May 23, 2013). Accordingly, the fact that the Commission approved UGI-PNG's modified LTIP is not dispositive of whether the 5 percent DSIC cap will be waived. See OCA St. 1S at 2-3; OSBA M.B. at 6.

For each of these reasons, the Company's interpretation of the statutory standard for waiver must be rejected. The standard for waiving the statutory DSIC cap is not the same as the standard for approval of an LTIP or establishing a 5 percent DSIC. The Company must provide additional evidence showing that, without the waiver, it cannot "ensure and maintain adequate, efficient, safe, reliable and reasonable service." 66 Pa. C.S. § 1358(a)(1). As discussed below, UGI-PNG has not met that burden in this proceeding.

2. UGI-PNG Has Not Satisfied the Statutory Standard to Waive the 5 Percent DSIC Cap.

The OCA considered a range of evidence bearing on the statutory need for waiver, including the current condition of UGI-PNG's infrastructure, the current and projected pace of replacement, the Company's history of base rate case filings, and its ability to fund its aggressive replacement program without a waiver of the DSIC cap. See OCA M.B. at 7 to 10. In particular, the OCA considered the following:

1. There has been no showing that the current state of PNG's infrastructure poses significant safety and reliability issues or that the current pace of the PNG's replacement efforts is unacceptable and potentially harmful to the public. OCA St. 1 at 6-8; OCA St. 1R at 2-3; OCA St. 1S at 4; OCA M.B. at 5-10; OSBA M.B. at 5-20.
2. UGI-PNG is on track to replace all of its cast iron mains within 14 years and its bare steel mains within 30 years – even with a 5 percent DSIC cap. PNG Exh. WJM-4; OCA St. 1 at 6 (citing PNG response to OCA Set I-1).
3. There has been growth in UGI-PNG's loads and customer count since the Company's most recent base rate case. OSBA St. 1 at 12-13, Table IEC-2; 2016 Order at 6.
4. The Company's most recent base rate case was filed in 2009 and did not use a FFRY. PNG 2009.
5. The year 2015 was the first full year UGI-PNG's DSIC was in place. OCA St. 1R at 2.
6. UGI-PNG has made progress in reducing risk with a DSIC capped at 5 percent. OCA St. 1R at 2.
7. The Company has undertaken significant cost reduction efforts since its last base rate case. OSBA St. 1 at 13 (citing PNG response to OSBA-I-6).
8. At UGI-PNG's current level of spending, a 5 percent cap would provide roughly 18 to 26 months of DSIC recovery. OSBA St. 1 at 11-12, Table IEC-1. Use of a FFRY increases this estimate to 30 to 36 months. Id.
9. UGI-PNG does not commit to any stay out if the DSIC cap is increased above 5 percent. PNG St. 1R at 12; see OCA St. 1 at 8.

Based on the record, the OCA recommends that the Commission deny waiver of the 5 percent cap because UGI-PNG has failed to show that the incremental DSIC revenue is necessary to ensure and maintain adequate, efficient, safe, reliable and reasonable service.

3. UGI-PNG Has Not Demonstrated Need for a 10 Percent DSIC Cap.

If the Commission determines that UGI-PNG meets the standard for a waiver of Section 1358(a)(1), the OCA submits that the Commission should not exercise its discretion to increase the DSIC cap to 10 percent of billed distribution revenues. There is no specific or concrete benefit to customers from authorizing a 100 percent increase to the DSIC charge on their distribution bills.

In the OCA's Main Brief, the OCA addresses the basis of UGI-PNG's request for a DSIC increase to 10 percent, which is based on the tenuous claim that having a 10 percent DSIC cap might allow the Company to extend the time between base rate filings and, as a result, reduce rate case expense. OCA M.B. at 11-13; UGI-PNG St. 1 at 10. In the Company's Main Brief, it acknowledges that raising the DSIC cap may have no impact at all on the timing of its base rate case filings and does not commit to any stay out. PNG M.B. at 27-28; see OCA St. 1 at 8. If there is no actual change in the frequency of rate cases, there will be no effect on service – or rates. The OCA has also shown that the goal of extending the time between base rate cases can be accomplished by using the FFRY mechanism. 66 Pa. C.S. § 315(e); OCA M.B. at 12; see also OSBA St. 1 at 11-12, Table IEC-1. UGI-PNG has not filed a base rate case for 7 years and has never used the FFRY option that was created in tandem with the DSIC. Accordingly, and for the additional reasons discussed in the prior section, the Company has not shown that it is just and reasonable for the DSIC rate to increase up to 10 percent. 66 Pa. C.S. § 1301; see also OCA M.B. at 8-11.

B. The Statutory Standard for Waiver Is Consistent with a Proactive Approach to Infrastructure Investment.

UGI-PNG argues that Section 1358(a)(1) does not require an actual showing of “need” for waiver of the DSIC cap because that standard would discourage the proactive replacement of infrastructure and is impossible for any utility to meet. PNG M.B. at 17-18. Both arguments fail.

1. UGI-PNG Can Recover the Costs of Eligible, Proactive Improvements Through Base Rate Cases and a 5 Percent DSIC.

The Company argues that the OCA’s position would deny funding under Section 1353 for proactive improvements intended to provide the safe, adequate and reasonable service required by Section 1501, thereby putting the two statutes at odds and endangering the public. PNG M.B. at 17-18 (citing Hess v. Pa. P.U.C., 107 A.3d 246, 262 (Pa. Commw. 2014) (Hess)); 66 Pa. C.S. §§ 1353, 1501. In Hess, the Court rejected the argument that approval for a project should be denied because the electric utility had not shown that service was currently or imminently inadequate, *i.e.* an “absolute necessity.” The Court agreed that approval for a utility to condemn property (under 15 Pa. C.S. § 1511) should be granted on the basis that the utility had shown that it had a current problem that should be addressed to avoid or minimize future outages (under 66 Pa. C.S. § 1501). Hess at 261-62. Thus, the Court did not require the utility to show “absolute necessity” under Section 1501 in order to receive relief under 15 Pa. C.S. § 1511. UGI-PNG argues that, for the same reason, it cannot be required to show “absolute necessity” or “extraordinary circumstances” for the cap waiver to be granted. PNG M.B. at 18.

The disposition of Hess does not apply to the instant case, however, because the Commission has approved UGI-PNG’s plan for improvements and no party is arguing if or when the improvements are needed or that the costs should not be recovered. The OCA position supports the Company making improvements required by Section 1501 and recovering those

costs in base rates. The OCA's position also supports recovery of those costs through the DSIC mechanism, up to the 5 percent cap. The only issue is where (not whether) the incremental costs will be recovered – through a base rate case or through a surcharge that is higher than the statutory 5 percent cap. The Company's suggestion that the OCA position endangers the public is, thus, false.

I&E takes a similar position that the DSIC cap should be waived in order to permit a “proactive” approach. I&E M.B. at 11-14. As discussed, the OCA position regarding the statutory standard for waiver is consistent with utilities making all necessary improvements and recovering the costs of those improvements in rates. The OCA's position only requires additional evidence establishing need, according to the standard set forth in the Public Utility Code, when the utility seeks additional surcharge recovery rather than base rate recovery through the waiver of the statutory cap intended to protect consumers. 66 Pa. C.S. § 1358(a)(1).

2. UGI-PNG's Ability to Fund Its Infrastructure Replacement Program Without a Waiver Is Basis to Retain the Statutory 5 Percent Cap.

UGI-PNG argues in its Main Brief that utilities should not have to show actual “need” for a waiver of the DSIC cap. PNG M.B. at 13-17. The Company contends that every utility has the ability to file a base rate case to fund its infrastructure improvement program and, therefore, such a standard is impossible to meet. Id. at 17. It argues instead that the standard should be less stringent, citing to the Commission's decisions in Aqua and PGW. Id. at 15-16; Petition of Aqua Pa., Inc., 2009 PaPUC LEXIS 263, *27-28 (Aqua); Petition of Philadelphia Gas Works, Docket No. P-2015-2501500, Order at 41-42 (Jan. 28, 2016) (PGW).

First, as discussed in Section A.2, *supra*, the Company's ability to file a traditional base rate case is only one reason supporting denial of its waiver request. Second, waiver of a statutory rate cap should be a last resort when a utility has exhausted other cost recovery

mechanisms. In the last four years, UGI-PNG gained use of a FFRY and a 5 percent DSIC. 66 Pa. C.S. §§ 315(e), 1358(a)(1). The Company states that it will continue to meet its replacement and spending targets, even if the DSIC cap remains at 5 percent. 2014 Order at 19; PNG Exh. WJM-4; OCA St. 1 at 6 (citing PNG response to OCA Set I-1).

The Company points to the Commission's decision to increase the DSIC cap for Aqua and PGW to support its argument against consideration of base rate recovery as an alternative. UGI-PNG M.B. at 14-17; Aqua at *27-28; PGW at 41-42. Both cases fail to show that UGI-PNG needs a waiver for purposes of Section 1358(a)(1).

Notably, Aqua was decided under a different statute that contained neither a cap nor a waiver provision. 66 Pa. C.S. § 1307(g). The case was also decided in 2009, before the FFRY existed. Even without the FFRY mechanism, the Commission only approved an increase to 7.5 percent. Aqua at *20. When the General Assembly created Act 11, it included that 7.5 percent cap and did not provide for any waiver. 66 Pa. C.S. § 1358(a)(2). Section 1358(a)(2) states:

A distribution system improvement charge granted to a water utility under former section 1307(g)... or this subchapter may not exceed 7.5% of the amount billed to customers.

Id. UGI-PNG seeks an increase to 10 percent in this proceeding even though it has not filed a base rate case in 7 years. In contrast, Aqua was filing base rate cases approximately every 2 years and reaching the 5 percent DSIC cap within 18 months. Petition of Aqua Pa., Inc., Docket No. R-2008-2079310, Recommended Decision at 14 (May 29, 2009). Moreover, Aqua's 5 percent DSIC had been in effect for 13 years. Aqua at *6-7. In contrast, the year 2015 was the first full year that UGI-PNG's DSIC was in place. OCA St. 1R at 2.

PGW is likewise distinguishable. The factual differences between PGW and UGI-PNG's situation are discussed at length in the OCA's Main Brief on pages 7 to 8 and 11 to 12. Relevant

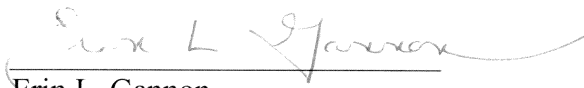
to the consideration of other sources of funding, the Commission determined that PGW's pace of replacement was "unacceptable and potentially harmful to the public" and approved a DSIC of 7.5 percent, in addition to waiving other provisions to allow PGW to recover infrastructure costs in advance of the funds being spent. PGW at 41-43, 68-69. The "urgency" and "exigent circumstances" that the Commission found to exist for PGW do not exist here. Indeed, the Commission noted that PGW's situation was "extremely unique" due to the condition of its system and its "cash flow" ratemaking methodology. Id. at 45. Significantly, UGI-PNG did not propose to increase its pace of replacement in its 2016 LTIP modification and is on track to completely replace/retire target mains in 30 years – whether or not the DSIC cap is increased above 5 percent. 2014 Order at 19; PNG Exh. WJM-4; OCA St. 1 at 6 (citing PNG response to OCA Set I-1).

For all of these reasons, the decisions in Aqua and PGW are not dispositive. UGI-PNG's ability to fund its infrastructure program without a waiver is properly considered along with the other evidence bearing on the Company's need for a waiver. While UGI-PNG does not currently "need" a DSIC above 5 percent, the Company's petition for waiver will not be dismissed with prejudice; it may be able to make the required showing in the future.

III. CONCLUSION

For the reasons set forth above, and in the OCA's Main Brief, the OCA submits that UGI-PNG's proposed 10 percent DSIC rate should be denied as filed. In addition, the proposed tariff supplement accompanying UGI-PNG's Petition should be rejected, consistent with these recommendations.

Respectfully Submitted,



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