



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE  
REFER TO OUR FILE  
C-2014-2431410

September 10, 2015

**Via E-filing**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

Re: Pennsylvania Public Utility Commission, Bureau of Investigation  
and Enforcement v. HIKO Energy, LLC  
Docket No. C-2014-2431410

Dear Secretary Chiavetta:

Enclosed please find the Exceptions of the Bureau of Investigation and Enforcement in the above-referenced proceeding. Copies have been served on the parties of record in accordance with the Certificate of Service.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read "Stephanie M. Wimer".

Stephanie M. Wimer  
PA Attorney ID No. 207522

Michael L. Swindler  
PA Attorney ID No. 43319

Enclosure

cc: As per certificate of service  
Honorable Elizabeth H. Barnes  
Honorable Joel H. Cheskis  
[ra-OSA@pa.gov](mailto:ra-OSA@pa.gov)

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility  
Commission, Bureau of Investigation  
and Enforcement

v.

HIKO Energy, LLC

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Docket No. C-2014-2431410

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EXCEPTIONS OF THE  
BUREAU OF INVESTIGATION AND ENFORCEMENT

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Michael L. Swindler  
Deputy Chief Prosecutor  
PA Attorney ID No. 43319

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Bureau of Investigation & Enforcement  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
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Dated: September 10, 2015

## I. INTRODUCTION

On August 21, 2015, the Initial Decision of presiding Administrative Law Judges (ALJs) Elizabeth H. Barnes and Joel H. Cheskis was issued in the instant proceeding. The Initial Decision grants the Bureau of Investigation and Enforcement's (I&E) Complaint, in part, and denies it, in part. Specifically, the presiding ALJs granted I&E's Complaint in finding 14,689 discrete violations of the Commission's regulation at 52 Pa. Code § 54.4(a) committed by HIKO Energy, LLC (HIKO or Company)<sup>1</sup> between January and April 2014, which was the period of time affected by the polar vortex.<sup>2</sup> Despite a well-reasoned analysis of each of the ten factors to be considered when determining an appropriate civil penalty to be assessed for each of the 14,689 violations found, the ALJs failed to translate these findings into a civil penalty amount representative of their own findings.

Section 54.4(a) of the Commission's regulations states in pertinent part:

- (a) EGS prices billed must reflect the marketed prices and the agreed upon prices in the disclosure statement.

52 Pa. Code § 54.4(a). The presiding ALJs correctly found that HIKO made a "deliberate and intentional business decision"<sup>3</sup> to overcharge customers enrolled in a Price Offering, which provided that customers would experience a guaranteed rate for the first six monthly billing cycles that would be 1-7% less than the local electric distribution

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<sup>1</sup> HIKO is a jurisdictional electric generation supplier (EGS) licensed by the Commission at Docket No. A-2012-228994 to operate in the service territories of all electric distribution companies in Pennsylvania.

<sup>2</sup> I.D. at 35 and 65.

<sup>3</sup> I.D. at 40.

company's (EDC) price to compare (PTC).<sup>4</sup> The details of the Price Offering were established in a Disclosure Statement and Welcome Letter that HIKO issued to customers.<sup>5</sup>

The presiding ALJs further correctly found that the decision to overcharge customers enrolled in the Price Offering "appear[s] to have come from HIKO's top executive and management, rather than the actions of subordinate employees."<sup>6</sup> The presiding ALJs also properly concluded that "each HIKO overcharge equates to one violation"<sup>7</sup> and that there were a total of 14,689 occurrences of overcharging.<sup>8</sup>

Despite finding that HIKO made a deliberate and intentional decision at the executive level to overcharge customers enrolled in the Price Offering on 14,689 occasions, the presiding ALJs nevertheless denied I&E's requested civil penalty in the amount of \$1,000 per violation for a total civil penalty of \$14,689,000, and instead imposed a civil penalty in the amount of \$125 per violation for a total civil penalty of \$1,836,125.<sup>9</sup>

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<sup>4</sup> Hereinafter referred to as "Price Offering."

<sup>5</sup> I.D. at 15.

<sup>6</sup> *Id.*

<sup>7</sup> I.D. at 31.

<sup>8</sup> I.D. at 33.

<sup>9</sup> I.D. at 1 and 62. The presiding ALJs also denied I&E's requested relief in the form of revoking HIKO's license to do business as an EGS in Pennsylvania due to the fact that the Company agreed to perform various corrective measures and provide consumer relief in a separate but concurrent proceeding initiated by the Office of Attorney General (OAG) and Office of Consumer Advocate (OCA). I.D. at 60; *Commonwealth of Pa. et al. v. HIKO Energy, LLC*, Initial Decision dated August 21, 2015, at Docket No. C-2014-2427652. (Hereinafter referred to as the OAG/OCA case). Notably, the ALJs stated that they "only" denied I&E's requested relief pertaining to revocation of HIKO's EGS license because of the agreed-upon relief provided in the settled OAG/OCA case. But for the OAG/OCA case, HIKO's EGS license would have been revoked. I.D. at 62. The presiding ALJs further denied I&E's request for consumer refunds and deemed it to be moot as refunds are being granted in the OAG/OCA case. I.D. at 1-2.

I&E files these Exceptions to the August 21, 2015 Initial Decision of ALJs Barnes and Cheskis with respect to the \$125 civil penalty imposed per violation. Although the total civil penalty of \$1,836,125 is facially large when considered in a vacuum, the evidence in the case, as well as the presiding ALJs' own sound analysis of HIKO's misconduct by a detailed review of each of the ten *Rosi*<sup>10</sup> factors supports the imposition of a civil penalty much greater than \$125 per violation.

## II. I&E EXCEPTIONS

### **The Record and the Presiding ALJs' Analysis of the *Rosi* Factors Supports the Imposition of a Civil Penalty Greater than \$125 Per Violation**

For the reasons described in greater detail below, I&E respectfully submits that the record of the case as well as the presiding ALJs' comprehensive discussion of the factors used by the Commission to evaluate the appropriateness of a civil penalty demonstrate that a "per violation" civil penalty of \$125 falls well short of the "per violation" penalty warranted in this case. While the aggregate civil penalty of \$1,836,125 appears substantial on its face, it is conservative compared to the total civil penalty that would result from a "per violation" civil penalty supported by the evidence and the ALJs' findings.

Section 3301(a) of the Public Utility Code (Code) authorizes the Commission to impose a civil penalty of up to \$1,000 per violation of the Code, Commission regulation or order. 66 Pa.C.S. § 3301(a). Additionally, the Commonwealth Court has held that the

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<sup>10</sup> The present standard for the imposition of a civil penalty was developed in *Rosi v. Bell-Atlantic - - Pennsylvania, Inc. and Sprint Communications, L.P.*, Docket No. C-00992409 (Order entered March 16, 2000) and is promulgated in a Policy Statement at 52 Pa. Code § 69.1201. These factors and standards are hereinafter referred to as the "*Rosi* factors."

Commission may impose a civil penalty of up to \$1,000 for each and every discrete violation of the Code or regulation, regardless of the number of violations that occur.<sup>11</sup>

The Commission promulgated a Policy Statement<sup>12</sup> at 52 Pa. Code § 69.1201 as a guideline that sets forth ten factors that are to be considered when evaluating whether and to what extent a civil penalty for violating a Commission order, regulation or statute is warranted. While the *Rosi* factors are evaluated for both litigated and settled proceedings involving violations of the Code and Commission regulations, Section 69.1201(b) of the Policy Statement notes that these factors and standards are applied in a more strict fashion in a litigated proceeding (like this one) and without the flexibility afforded in a settled proceeding. 52 Pa. Code § 69.1201(b). The purpose of applying these ten factors to the facts and circumstances of each case is to establish where, in the range of \$0 to \$1,000, the civil penalty for a particular violation, if any, should fall.

In their Initial Decision, the presiding ALJs thoroughly evaluated each of the ten *Rosi* factors in relation to the evidence submitted in the case. The ALJs' analysis supports a civil penalty greater than \$125 per violation. In their review, the ALJs consistently found that a minimum penalty was not warranted. Yet, from a range of \$0 to \$1,000, the ALJs settled on the incongruous minimum "per violation" civil penalty of \$125.

For example, in evaluating the first factor pursuant to 52 Pa. Code

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<sup>11</sup> *Newcomer Trucking, Inc. v. Pa. Pub. Util. Comm'n*, 531 A.2d 85, 87 (Pa. Cmwlth. 1987).

<sup>12</sup> A policy statement does not establish a "binding norm," but announces the agency's tentative intentions for the future. *Pa. Human Relations Comm'n v. Norristown Sch. Dist.*, 374 A.2d 671, 679 (Pa. 1977).

§ 69.1201(c)(1) related to whether the conduct at issue was of a serious nature, the presiding ALJs found that “it is undisputed that HIKO’s misconduct was serious, which results in a **higher penalty**.”<sup>13</sup> The presiding ALJs appropriately concluded that HIKO’s misconduct consisted of a “conscious decision to disregard the express terms of its Price Offering in order to ‘stay in business’ during the polar vortex despite the ramifications this decision had on its end user retail customers.”<sup>14</sup>

Similarly, when evaluating whether the resulting consequences of HIKO’s misconduct were of a serious nature pursuant to 52 Pa. Code § 69.1201(c)(2), the presiding ALJs’ correctly determined that serious consequences occurred because “there was some financial hardship experienced by the customers.”<sup>15</sup> In reasoning that the consequences were serious, the presiding ALJs noted that: (1) the average monthly overcharge that HIKO billed to customers was \$124;<sup>16</sup> (2) HIKO overbilled customers as much as 39 cents per kilowatt hour (kWh) representing up to 400% of the EDC’s PTC;<sup>17</sup> (3) the Commission’s Bureau of Consumer Services (BCS) received a number of complaints from consumers regarding HIKO’s overcharges;<sup>18</sup> (4) a number of customers cancelled their electric generation supply service provided by HIKO from January to April 2014;<sup>19</sup> and (5) the number of total overcharges that occurred was substantial.<sup>20</sup> After determining that the resulting consequences were serious, the presiding ALJs

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<sup>13</sup> I.D. at 38 (emphasis added).

<sup>14</sup> I.D. at 38; N.T. 165, 193.

<sup>15</sup> I.D. at 39.

<sup>16</sup> I.D. at 39; N.T. 210.

<sup>17</sup> I.D. at 12, 39; N.T. 83.

<sup>18</sup> I.D. at 39; I&E St. 1 at 8.

<sup>19</sup> I.D. at 13, 40; N.T. 192.

<sup>20</sup> I.D. at 39; Appendix C of I&E’s Main Brief.

considered that some overcharges were for less than one dollar and the alleged conduct did not constitute slamming.<sup>21</sup> Thus, the presiding ALJs concluded that this factor *may* warrant **less than the maximum** penalty of \$1,000 per occurrence.<sup>22</sup>

Regarding the third factor, which considers whether the conduct at issue was intentional or negligent pursuant to 52 Pa. Code § 69.1201(c)(3), the presiding ALJs' appropriately found that HIKO's misconduct was intentional and "**warrants a higher civil penalty.**"<sup>23</sup> Significantly, the presiding ALJs stated that:

[W]e find sufficient evidence to support a finding that in January – April 2014 HIKO made the deliberate and intentional business decision to violate the terms of its agreements with customers enrolled in the 1-7% guaranteed savings plan 14,689 times from January – April, 2014, four consecutive months.

I.D. at 40. This business decision was made by executives at the highest levels of the Company.<sup>24</sup> This is a critical finding. Thus, the misconduct is not the result of actions committed by employees or agents who were uncertain of or acted in contravention of a company policy. In fact, I&E is uncertain of any other instance wherein the executives of an EGS made a conscious and deliberate decision to violate the Commission's regulations by overbilling consumers for their own benefit, for the purported reason to allow the business to survive.

Regarding the fourth factor at 52 Pa. Code § 69.1201(c)(4), which concerns whether HIKO made any effort to modify its internal practices and procedures to address

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<sup>21</sup> I.D. at 39.

<sup>22</sup> *Id.* I&E avers that a finding of "warrants less than the maximum penalty" can easily be distinguished from the potential finding of "warrants a minimum penalty."

<sup>23</sup> I.D. at 42 (emphasis added).

<sup>24</sup> *Id.*

the conduct at issue, the presiding ALJs' correctly concluded that HIKO made no effort to voluntarily cease the overbilling.<sup>25</sup> Nevertheless, the ALJs found that since HIKO agreed to prospectively modify certain internal procedures as set forth in the settlement in the OCA/OAG case, this supports a civil penalty that is **less than the maximum.**<sup>26</sup> I&E submits that the only internal change that HIKO could have initiated to address the unlawful overbilling as it occurred would have been to hire new executives.

The fifth factor considers the impact of HIKO's misconduct, pursuant to 52 Pa.Code § 69.1201(c)(5). The presiding ALJs concluded that approximately 5,700 HIKO customers were affected by overcharges between January and April 2014.<sup>27</sup> The presiding ALJs further determined that a large number of customers decided to leave HIKO's electric generation supply service during the same time period. Therefore, since consumers were found to have been "adversely impacted" by HIKO's misconduct, this factor supports the imposition of a higher civil penalty.

The sixth factor at 52 Pa. Code § 69.1201(c)(6) examines the compliance history of a company. The presiding ALJs properly found that HIKO deliberately overcharged its customers during a period of time when HIKO's EGS license was conditional and subject to certain reporting requirements.<sup>28</sup> Further, the violations also occurred when HIKO failed to provide proof that a bond or other approved security amount was

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<sup>25</sup> I.D. at 43.

<sup>26</sup> I.D. at 44 (emphasis added). Again, I&E avers that a finding of "warrants less than the maximum penalty" can easily be distinguished from the potential finding of "warrants a minimum penalty."

<sup>27</sup> I.D. at 44.

<sup>28</sup> I.D. at 45-46. See also *License Application of HIKO Energy LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Supplier of Retail Electric Power*, Docket No. A-2012-2289944 (Tentative Order entered June 7, 2012, Final Order entered July 2, 2012).

obtained.<sup>29</sup> Thus, the presiding ALJs appropriately concluded that the evidence of HIKO’s noncompliance weighs in favor of a **higher civil penalty**.<sup>30</sup>

When evaluating the seventh factor pursuant to 52 Pa. Code § 69.1201(c)(7), the presiding ALJs found that HIKO cooperated with I&E’s investigation. However, the presiding ALJs rightly observed that “mere cooperation, although a mitigating factor, is **not enough to warrant a minimal civil penalty**.”<sup>31</sup>

The eighth factor at 52 Pa. Code § 69.1201(c)(8) considers the amount of the fine or civil penalty necessary to deter future violations. “The size of the utility may be considered to determine an appropriate penalty amount.” *Id.* The ALJs then concluded that HIKO is not a “small” company. Therefore, based on this finding, this factor should weigh in favor of a larger civil penalty. Moreover, the deterrence factor in and of itself – whether regarding HIKO or all EGSs licensed in this Commonwealth – should warrant a higher civil penalty in order to adequately deter future violations.

In evaluating the ninth factor at 52 Pa. Code § 69.1201(c)(9) regarding previous Commission decisions in similar situations, the ALJs noted that there are not many fully litigated cases specifically regarding Section 54.4(a) of the Commission’s regulations, 52 Pa. Code § 54.4(a).<sup>32</sup> In reaching the conclusion that this factor weighs in favor of a **moderate** “per violation” civil penalty but a substantial total civil penalty higher than

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<sup>29</sup> I.D. at 46. *See also* 52 Pa. Code § 54.40.

<sup>30</sup> I.D. at 47.

<sup>31</sup> I.D. at 48 (emphasis added). *See also Pa. Pub. Util. Comm’n, Bureau of Investigation and Enforcement v. Columbia Gas of Pa., Inc.*, Docket No. M-2014-2306076 (Order entered December 18, 2014).

<sup>32</sup> I.D. at 50.

\$1,000,000, the presiding ALJs considered the record of the instant proceeding as well as the agreed-upon relief established in the settlement agreement in the OAG/OCA case.<sup>33</sup>

The tenth factor considers other relevant factors. 52 Pa. Code § 69.1201(c)(10). In response to HIKO's request that the polar vortex winter be considered as a relevant factor to mitigate its misconduct, the presiding ALJs stated as follows:

We acknowledge that certain external factors beyond HIKO's control contributed to a price increase in the spot market for electricity. However, there are many internal factors within the control of the company including, but not limited to: 1) the language contained in the welcome letter and disclosure statement regarding the guaranteed savings plan; 2) the decision on purchasing 100% of its energy supply on the spot wholesale market; 3) the decision to borrow \$20 million to satisfy PJM requirements and stay in business; 4) the decision to mark-up wholesale prices for guaranteed savings plan customers and other variable rate customers in Pennsylvania and other States; 5) the decision to pass through increased costs and overcharge the customers in the guaranteed savings plan; and 6) the decision to refund or not refund customers. **Consequently, we find little merit to HIKO's excuses regarding external factors.**

I.D. at 58 (emphasis added).

In addition, the presiding ALJs considered settlements that HIKO reached with Attorney Generals that have investigated HIKO's practices in Pennsylvania,<sup>34</sup> New Jersey<sup>35</sup> and New York.<sup>36</sup> However, the presiding ALJs found that the provisions of those settlement agreements are not controlling that there be a lower civil penalty

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<sup>33</sup> I.D. at 56. Again, I&E avers that a \$125 per violation civil penalty is not "moderate" in a range of \$0 to \$1,000.

<sup>34</sup> See OAG/OCA case.

<sup>35</sup> *John J. Hoffman, Acting Attorney General of the State of New Jersey, The New Jersey Board of Public Utilities, and Steven C. Lee, Acting Director of the New Jersey Division of Consumer Affairs v. HIKO Energy, LLC et al.*, Docket No. MER-C-32-14 (N.J. Super. Ct., Chancery Division, Mercer County) (Final Consent Judgment filed on January 5, 2015).

<sup>36</sup> *In the Matter of the Investigation by Eric T. Schneiderman, Attorney General of New York, of HIKO Energy, LLC*, Case No. AOG#14-069 (Assurance of Discontinuance Pursuant to Executive Law § 63(15) filed July 6, 2014).

imposed in the instant fully litigated proceeding.<sup>37</sup> Therefore, little to no weight was given to any other relevant factor that might have served to mitigate I&E’s requested civil penalty for HIKO’s misconduct.

The below chart summarizes the conclusions of the presiding ALJs regarding each *Rosi* factor.

<b>Factor</b>	<b>ALJs’ Conclusion</b>
§ 69.1201(c)(1) – Whether conduct was of a serious nature.	Yes; results in a higher penalty. I.D. at 38.
§ 69.1201(c)(2) – Whether resulting consequences of HIKO’s conduct at issue were of a serious nature.	Yes; may warrant less than the maximum penalty per occurrence. I.D. at 39.
§ 69.1201(c)(3) – Whether conduct was deemed intentional or negligent.	Intentional; warrants a higher civil penalty. I.D. at 42.
§ 69.1201(c)(4) – Whether the Company made any effort to modify internal practices and procedures.	No effort made to address the misconduct while it occurred; agreed to prospectively change certain internal procedures; warrants less than the maximum penalty. I.D. at 43-44.
§ 69.1201(c)(5) – The number of customers affected and the duration of the violation.	Approximately 5,700 customers were adversely affected over four months. I.D. at 44.
§ 69.1201(c)(6) – HIKO’s compliance history.	The evidence of noncompliance weighs in favor of a higher civil penalty. I.D. at 47.
§ 69.1201(c)(7) – Whether the regulated entity cooperated with the Commission’s investigation.	Yes, however, mere cooperation is not enough to warrant a minimal civil penalty. I.D. at 48.
§ 69.1201(c)(8) – The amount of the civil penalty or fine necessary to deter future violations.	HIKO is not a small company. I.D. at 49.
§ 69.1201(c)(9) – Past Commission decisions in	This factor weighs in favor of a moderate per occurrence/violation civil penalty, but a substantial total

<sup>37</sup> I.D. at 60.

similar situations.	civil penalty higher than \$1,000,000. I.D. at 56.
§ 69.1201(c)(10) – Other relevant factors.	Little merit to HIKO’s excuses regarding external factors; decisions related to settled enforcement actions in Pennsylvania, New York and New Jersey are not controlling that there be a lower civil penalty issued in the instant fully litigated case. I.D. at 58-60.

When the ALJs’ analysis of each *Rosi* factor is read together, the resulting conclusion is that HIKO’s misconduct is more deserving of a higher civil penalty, even if the civil penalty is less than the maximum amount per violation. Pursuant to Section 3301(a) of the Code, 66 Pa.C.S. § 3301(a), the range of a permissible “per violation” civil penalty is \$0 (at the lowest) and \$1,000 (at the highest). The presiding ALJs determined that a civil penalty in the amount of \$125 per violation was appropriate. A civil penalty in the amount of \$125 per violation equals a mere 12.5% of the maximum and is not supported by the record or the presiding ALJs’ own analysis of HIKO’s misconduct. A civil penalty in the amount of \$125 per violation is not moderate and is *far* less than the maximum allowable civil penalty per violation of \$1,000.

It appears that the presiding ALJs determined that a total civil penalty in the amount of \$1,836,125 is appropriate based on two concepts that are irrespective of the *Rosi* factors: (1) \$1,836,125 represents approximately one-quarter (25%) of HIKO’s gross receipts in Pennsylvania for 2014; and (2) \$1,836,125 more closely reflects the amount that HIKO received as a result of the overcharges.<sup>38</sup> While \$1,836,125 appears to be large on its face, the amount is actually conservative when reduced to a “per violation” civil penalty. Thus, there appears to be a disconnect between the presiding ALJs’

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<sup>38</sup> I.D. at 49.

thorough analysis of the *Rosi* factors (where a moderate to higher civil penalty is found to be warranted) and the resulting minimum “per violation” civil penalty reached in the Initial Decision.

Therefore, the record in the instant case and the presiding ALJs’ analysis supports the imposition of a larger “per violation” civil penalty due to the many aggravating factors of HIKO’s deliberate and intentional decision to overcharge customers enrolled in the Price Offering on 14,689 separate occasions between January and April 2014.

### III. CONCLUSION

For the reasons set forth above, and for the reasons set forth in I&E's Main Brief, I&E respectfully submits that a "per violation" civil penalty larger than \$125 is warranted.

Respectfully submitted,



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Michael L. Swindler  
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Dated: September 10, 2015

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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