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June 18, 2021

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Birdsboro Kosher Farms, et al. v. Pennsylvania American Water Company
Docket Numbers: P-2021-3026165, C-2021-3026163, P-2021-3026180, C-
2021-3026178

Dear Secretary Chiavetta:

Enclosed please find Pennsylvania American Water Company's Brief on the Material Question in the above-captioned matter.

Thank you and please contact me if you have any questions or concerns.

Very truly yours,

STEVENS & LEE



Michael A. Gruin

Enclosures

Cc: Office of Special Assistants (via email)
Joseph O'Keefe, Esq. (via email)

Allentown • Bergen County • Bala Cynwyd • Cleveland • Fort Lauderdale • Harrisburg • Lancaster • New York
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A PROFESSIONAL CORPORATION

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Birdsboro Kosher Farms Corporation, et al.	:	
	:	P-2021-3026165
	:	C-2021-3026163
v.	:	
Pennsylvania-American Water Company	:	
(water)	:	
Birdsboro Kosher Farms Corporation, et al.	:	
	:	P-2021-3026180
	:	C-2021-3026178
v.	:	
Pennsylvania-American Water Company	:	
(wastewater)	:	

**BRIEF OF PENNSYLVANIA-AMERICAN WATER COMPANY ON MATERIAL
QUESTION**

Pennsylvania-American Water Company (“PAWC” or “Company”) hereby files its Brief in support of its position on the Material Question that was certified by presiding Administrative Law Judge Christopher Pell (“ALJ Pell”) on June 11, 2021 in this matter.

ALJ Pell certified the following material question to the Pennsylvania Public Utility Commission (“Commission”):

Whether the presiding Administrative Law Judge correctly denied the expedited petition for interim emergency relief requesting that Pennsylvania-American Water Company be directed to immediately restore wastewater services to Birdsboro Kosher Farms Corporation pending a resolution of the underlying billing dispute between the parties.

Suggested Answer: Yes

For the reasons set forth below, PAWC respectfully requests that the Commission issue an Order which answers the Material Question in the affirmative, and confirms that ALJ Pell

correctly denied the expedited petition for interim emergency relief filed by Birdsboro Kosher Farms Corporation, Birdsboro Kosher Meats, LLC and PWCH, LLC (collectively “BKF” or “Petitioner”). ALJ Pell properly denied the request for interim emergency relief because the Petitioner failed to submit any evidence to satisfy its burden of proving by a preponderance of the evidence that it has met the four criteria for interim emergency relief as required in the Pennsylvania Public Utility Commission (“PUC” or “Commission”) regulations at 52 Pa. Code § 3.6.

I. INTRODUCTION AND BACKGROUND

This matter relates to combined Formal Complaints and Petitions for Interim Emergency Relief filed by BKF with respect to PAWC’s domestic water service and industrial wastewater service to BKF’s poultry processing plant in Birdsboro, Pennsylvania. However, BKF’s counsel clarified on the record at the June 4, 2021 Prehearing Conference that the only emergency relief BKF was seeking at this time was the restoration of industrial wastewater service to its plant, because PAWC restored the domestic water service prior to the Prehearing Conference.¹

A review of the testimony and evidence in the record makes it clear that BKF failed to prove an entitlement to restoration of its industrial wastewater service on an emergency basis. BKF submitted no evidence whatsoever to support a finding that its need for relief is immediate or that its purported injury is irreparable. That shortcoming alone requires denial of the BKF’s request for emergency relief under the clear criteria for granting emergency relief as outlined in 52 Pa. Code § 3.6. Furthermore, the limited evidence that BKF did submit does not support any finding that it has a clear right to relief or that its requested relief is not injurious to the public interest. To the contrary, the evidence in the record demonstrates that:

¹ See Prehearing Conference Transcript

- 1) PAWC lawfully terminated industrial wastewater service to BKF's facility based on the non-payment of undisputed wastewater bills that accumulated over the course of a year.²
- 2) As of June 1, 2021, there was a total unpaid balance of \$521,403.25 on BKF's wastewater account. Since PAWC began billing BKF in May of 2020 for industrial wastewater service from October 24, 2019 to May 12, 2021, PAWC has issued invoices for wastewater service charges in the amount of \$493,999.63, and Industrial Pretreatment Program ("IPP") Surcharges in the amount of \$134,811.18, yet BKF has only made total payments of \$109,000 for its industrial wastewater service.³
- 3) BKF did not make a single payment on its wastewater bills until PAWC issued its fourth wastewater invoice to BKF, by which time the unpaid balance had risen to \$259,918.79.⁴
- 4) Although not required by law or regulation, PAWC, prior to initiating the termination process, provided BKF with a payment arrangement, which BKF immediately broke; additionally, PAWC offered multiple other payment arrangements to BKF, which were rejected by BKF.⁵
- 5) PAWC issued multiple written notifications to BKF to inform BKF of the balance due and of the ability to obtain payment terms.⁶
- 6) Prior to terminating industrial wastewater service to BKF's plant, PAWC provided all required written notices pursuant to Commission regulations and Orders. PAWC also made personal contact with BKF regarding the pending termination.⁷

² Testimony of PAWC witness Cheryl DiSanti, N.T. 172-185, PAWC Exhibits 1 and 7

³ Testimony of PAWC witness Cheryl DiSanti, N.T. 172-175 and PAWC Exhibit 1

⁴ See Testimony of PAWC witness Cheryl DiSanti, N.T. 178, and PAWC Exhibit 7, at page 17

⁵ See Testimony of PAWC witness Cheryl DiSanti, N.T. 181-182, PAWC Exhibit 7, at page 21 and Petitioner's Exhibit 15

⁶ See Testimony of PAWC witness Tawana Dean, N.T. 222-223 and PAWC Exhibit 9

⁷ See Testimony of PAWC witnesses Tawana Dean, N.T. 223-224, and James Gable, N.T. 208-209

- 7) BKF never raised any questions or concerns regarding PAWC's wastewater bills until it received multiple notices of termination from PAWC, and there is no record of BKF submitting disputes of any of the bills.⁸
- 8) While BKF identified several questions and requested clarifications regarding a few of PAWC's wastewater bills following the issuance of the termination notices, PAWC promptly provided BKF with the clarifications requested.⁹
- 9) BKF has attempted to cast doubt on the accuracy of certain IPP Surcharges that were issued by PAWC, but its allegations were proven to be based on incorrect and faulty assumptions and were completely rebutted by PAWC's witnesses.¹⁰
- 10) Furthermore, the IPP Surcharges that BKF has only recently questioned comprise less than one-third of the total outstanding balance,¹¹ and BKF's CEO acknowledged on the record that some portion of BKF's unpaid balance is not disputed.¹²
- 11) The record is completely devoid of any evidence of immediate or irreparable harm to BKF as a result of the termination of industrial wastewater service. BKF's plant is continuing to operate by using an alternate process for disposing of wastewater, and in fact remains so busy that it cannot find enough workers to keep up with its demand.¹³
- 12) BKF has demonstrated an ongoing inability to comply with the requirements of its IPP Permit, which has severe impacts on the PAWC wastewater treatment plant.¹⁴

⁸ See Testimony of Petitioner witness Angel Gilpin, N.T. 130, and PAWC witness Cheryl DiSanti, N.T. 180

⁹ See Petitioner's Exhibits 15 and 16 and Testimony of PAWC witness Cheryl DiSanti, N.T. 180

¹⁰ See Testimony of PAWC witnesses David Seltzer, James Gable and Kristen May, N.T. 146-162, 201-215, and 230-249

¹¹ See Testimony of PAWC witness Cheryl DiSanti, N.T. 176 and PAWC Exhibit 1

¹² See Testimony of Petitioner witness Solomon Wieder, N.T. 80-81

¹³ See Testimony of Petitioner witness Solomon Wieder, N.T. 67, 73

¹⁴ Petitioner Exhibit 12 and testimony of PAWC witness Kristin May, N.T. 245-247

13) Restoration of wastewater service to the BKF facility without payment for services rendered by PAWC would result in continued accumulation of arrearages to the detriment of PAWC and PAWC's ratepayers.¹⁵

II. PROCEDURAL HISTORY

PAWC was served with BKF's Formal Complaint docketed for water services on June 1, 2021, and the Formal Complaint docketed for wastewater services on June 2, 2021. In accordance with the Commission's regulation at 52 Pa. Code § 3.6(a), an evidentiary hearing was scheduled for June 7, 2021 before ALJ Pell. Pursuant to a Prehearing Order issued on June 3, 2021, a Prehearing Conference was held on June 4, 2021, and both parties submitted their proposed hearing exhibits that same day.

At the Prehearing Conference on June 4, 2021, counsel for BKF confirmed that the domestic water service to the facility had been restored; therefore, the sole remaining emergency relief requested by BKF was restoration of its industrial wastewater service that had been terminated by PAWC on May 20, 2021.

The evidentiary hearing was held on June 7, 2021 as scheduled. BKF presented the testimony of Solomon Wieder, Angel Gilpin, Art Heckman, and Carlos Urieta. BKF offered nine exhibits, seven of which were admitted into the record. (P-11, P-12, P-13, P-15, P-16, P-18, and P-19). PAWC presented the testimony of Kristin May, James Gable, David Seltzer, Tawana Dean, and Cheryl DiSanti. PAWC offered ten exhibits which were all admitted into the record. (R-1, R-2, R-3, R-5, R-6, R-7, R-8, R-9, R-10, and R-13).

On June 11, 2021, ALJ Pell issued the Order Denying Petition for Issuance of an Interim Emergency Order, which certified the material question to the Commission.

¹⁵ See Testimony of PAWC witness Tawana Dean, N.T. 222-226

III. APPLICABLE LEGAL STANDARDS

Section 3.6(a) of the Commission's regulations (52 Pa. Code § 3.6(a)) permits a party to petition the Commission for an interim emergency order during the course of a proceeding. The petition must establish facts to demonstrate that:

1. The Petitioner's right to relief is clear.
2. The need for relief is immediate.
3. The injury would be irreparable if relief is not granted.
4. The relief requested is not injurious to the public interest.

If the foregoing criteria are met, a presiding officer may issue an Order granting the relief sought, which Order shall become effective immediately upon issuance by the presiding officer. Pursuant to 52 Pa. Code § 3.10(b), "When the presiding officer rules upon the petition for an interim emergency order, the presiding officer will also certify the question of the grant or denial of relief to the Commission as a material question in the form set forth in 52 Pa. Code § 5.305 (relating to interlocutory review of a material question submitted by a presiding officer). Thereafter, the parties and the Commission follow the procedures in 52 Pa. Code § 5.305...."

Under Section 332(a) of the Public Utility Code, 66 Pa.C.S. § 332(a), "the proponent of a rule or order has the burden of proof." It is well-established that "[a] litigant's burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible." Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n, 578 A.2d 600, 602 (Pa.Cmwlt. 1990). The preponderance of evidence standard requires proof by a greater weight of the evidence. Commonwealth v. Williams, 557 Pa. 207, 732 A.2d 1167 (1999). This standard is satisfied by presenting evidence more convincing, by even the smallest amount, than that presented by another party. Brown v. Commonwealth, 940 A.2d 610, 614 n.14 (Pa.Cmwlt. 2008).

Any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence. Met-Ed Indus. Users Grp. v. Pa. Pub. Util. Comm'n, 960 A.2d 189, 193 n.2 (Pa. Cmwlth. 2008) (citing 2 Pa.C.S. § 704). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Borough of E. McKeesport v. Special/Temporary Civil Serv. Comm'n, 942 A.2d 274, 281 n.9 (Pa. Cmwlth. 2008) (citation omitted). Although substantial evidence must be “more than a scintilla and must do more than create a suspicion of the existence of the fact to be established,” Kyu Son Yi v. State Bd. of Veterinary Med., 960 A.2d 864, 874 (Pa.Cmwlth. 2008) (citation omitted), the “presence of conflicting evidence in the record does not mean that substantial evidence is lacking.” Allied Mech. and Elec., Inc. v. Pa. Prevailing Wage Appeals Bd., 923 A.2d 1220, 1228 (Pa.Cmwlth. 2007) (citation omitted).

A public utility's Commission-approved tariff is prima facie reasonable, has the full force of law and is binding on the utility and the customer. 66 Pa.C.S. § 316, Kossman v. Pa. Pub. Util. Comm'n, 694 A.2d 1147 (Pa.Cmwlth. 1997), and Stiteler v. Bell Telephone Co. of Pennsylvania, 379 A.2d 339 (Pa.Cmwlth. 1977).

IV. ARGUMENT

A. ALJ Pell Correctly Determined that BKF Has Not Proven the Existence of an Emergency.

As ALJ Pell noted, a petitioner is not entitled to interim emergency relief when there is no evidence of an emergency.¹⁶ The Commission's regulation at 52 Pa. Code § 3.1 defines an emergency as “A situation which presents a clear and present danger to life or property or which is uncontested and requires action prior to the next scheduled public meeting.” In this case, BKF has presented no evidence that the termination of PAWC's wastewater service constitutes an

emergency. Following the termination of the wastewater service, BKF was able to immediately implement an alternative process for disposing of its wastewater. BKF's plant is continuing to operate by using an alternate process for disposing of wastewater, it did not miss a day of production, and the plant remains so busy that it cannot find enough workers to keep up with its demand.¹⁷ While BKF testified this alternative process may be more expensive than wastewater service from PAWC¹⁸, BKF provided no evidence whatsoever that the use of this alternative process presents a clear and present danger to life or property. The Pennsylvania Department of Environmental Protection (DEP) is fully aware of BKF's alternative process for the disposal of wastewater, and while DEP has imposed certain reporting and other administrative requirements on BKF, DEP has not prohibited BKF from using the alternative wastewater disposal process.¹⁹

B. ALJ Pell Correctly Determined that the Petitioner Has Not Proven a Clear Right to Relief.

BKF never articulated a clear justification for its position that the termination of wastewater service was improper. BKF does not deny that its unpaid balance is over \$500,000, and BKF admits that a portion of the balance is undisputed.²⁰ Only after receiving PAWC termination notices in April 2021 did BKF seek clarification about its bills. PAWC responded to all of those questions more than seven days before termination of service. Now, with its complaint, BKF is attempting to retroactively challenge certain aspects of PAWC's wastewater bills and turn minor billing discrepancies into justifications for its non-payment of over a half million dollars. BKF's challenges to PAWC's wastewater bills are addressed one by one below:

¹⁶ See, Peoples Natural Gas Co., 555 A.2d 288, 291 (Pa. Cmwlth. 1989)

¹⁷ See Testimony of Petitioner witness Solomon Wieder, N.T 67, 73-74

¹⁸ N.T. 63-64, 74, 135

¹⁹ See Petitioner Exhibit 19

²⁰ N.T. 81 (“**Q.** So you do acknowledge that there are some bills that are not in dispute, is that correct? **A.** That is correct.”)

1. PAWC did not issue its first invoice to BKF until May 11, 2020, and that bill contained charges covering the period from the acquisition of the Exeter wastewater system in October 2019 through May 6, 2020. The wastewater reflected on the bill incorrectly identified the charges as a Surcharge for IPP rather than wastewater usage charge. PAWC witnesses DiSanti and Gable acknowledged and explained the circumstances that caused the delay in billing.²¹ PAWC also explained how it obtained the meter readings to obtain the consumption volumes used to calculate the billing for the wastewater usage charges (i.e., from the same influent meter that Exeter Township had utilized when it owned the system) and how it provided the consumption volume to BKF upon request.

2. PAWC issued two IPP Surcharges to the BKF domestic water account instead of its wastewater account. This was raised and addressed in Petitioner's Exhibits 15 and 16. PAWC acknowledged this error. It should be noted that PAWC did not subsequently bill the wastewater account for those two IPP Surcharges, which actually resulted in lower charges to BKF for industrial wastewater service. See PAWC Exhibit 1.

3. PAWC's calculation of the IPP Surcharges for the third Quarter of 2020 initially contained a calculation error. But, as PAWC witness May testified and as reflected in PAWC Exhibit 8 at pages 3-5, this error was self-identified and corrected.

4. BKF's challenged some of the IPP Surcharges based on sampling issues. BKF's witnesses insisted that something was improper about PAWC's sampling processes for its IPP inspections. While these witnesses made vague and unsupported allegations about "skewing" and "manipulating" samples, they provided no evidence or objective criteria that in any way invalidated the PAWC sampling methodology. By contrast, PAWC provided evidence from witnesses with extensive knowledge, experience, training and licenses who testified that 1) the

²¹ N.T. 176, 202-204

sampling was done in full compliance with PAWC's tariff and BKF's IPP Permit, 2) the methodology of the sampling was appropriate and consistent with how it had been done when Exeter Township owned the system, and 3) that 24-hour wastewater samples were obtained on a random mix of days when the plant was generating wastewater.²² The Petitioner repeatedly attempted to allege that it was somehow improper to collect samples on Fridays, because the plant is not actively processing on Fridays. This argument is flawed for several reasons. First, as PAWC witnesses May and Seltzer explained, the 24-hour sample is picked up on Friday but captures wastewater from Thursday into Friday. Secondly, while the plant may not be processing on Fridays, it is still generating wastewater for cleaning and other functions. See Testimony of Petitioner witness Wieder. And, PAWC's witness explained that IPP results and surcharge calculations are not based on a single day's test results but are based on the average up to 14 separate samples taken on multiple days of several weeks over the course of a calendar quarter. See Testimony of PAWC witness May, N.T. 238-240, and PAWC Exhibits 5, 6 and 8.

5. In its post-hearing Brief, BKF argued that it was improper for PAWC to utilize an influent meter rather than an effluent meter to calculate wastewater usage at the BKF plant. However, PAWC's witness explained that the influent meter had always been used to measure usage at the BKF plant dating to when the wastewater was provided by Exeter Township, and that the effluent meter is not configured for billing purposes.²³

6. BKF's post-hearing Brief referenced the Commission's regulation at 52 Pa. Code § 65.7 as requiring metered water service and alleged that PAWC was not adhering to this requirement. This argument is erroneous for several reasons. First, the regulation cited by BKF

²² See Testimony of Kristin May and David Seltzer, N.T. 169-170, 238-240

²³ N.T. 150-153

does not apply to wastewater services, which is the type of service at issue here. Secondly, the fact is that PAWC did provide metered wastewater services to BKF, utilizing the influent meter just as Exeter Township had done previously.²⁴

7. BKF's post-hearing Brief also made references to alleged violations of Exeter Township Code and the Pennsylvania Religious Freedom Protection Act (71 P.S. § 2404, et seq.) ("PRFPA") as grounds for its right to relief. PAWC denies that any such violations occurred, but in any event, the Commission clearly does not have jurisdiction over either the Exeter Township Code or the PRFPA. It is well-settled that the Commission may not exceed its jurisdiction and must act within it. City of Pittsburgh v. Pa. PUC,⁴³ A.2d 348 (Pa. Super. 1945). As a creation of the state legislature, the Commission possesses only the authority that the state legislature has specifically granted to it in the Code. (66 Pa. C.S. §§ 101, et seq.). The Commission's jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. Feingold v. Bell, 383 A.2d 791 (Pa. 1977). As such, BKF's claims related to the Exeter Township Code and the PRFPA cannot form the basis for a right to relief.

ALJ Pell correctly determined that the Petitioner has not met its burden of proving by a preponderance of the evidence that its account balance is wrong. But, for argument's sake, if Petitioner was given the full benefit of every doubt, and even if the initial May 11, 2020 invoice (\$148,660.75) and the Third Quarter 2020 IPP Surcharge (\$102,923.66, as revised) were both completely excluded from the account balance, the unpaid balance would still be **\$269,818.84**. (See PAWC Exhibit 1). BKF has never even attempted to explain why PAWC is not permitted to terminate service for such a large unpaid balance.

²⁴ N.T. 150-153

C. ALJ Pell Correctly Determined that BKF has not Proven Either Immediate Need or Irreparable Injury.

BKF failed to provide any evidence to demonstrate the need for immediate relief in order to avoid irreparable injury. BKF has confirmed that following the termination of its wastewater service on May 20, 2021, it resumed operations on Monday May 24, 2021 without missing a day of production.²⁵ BKF has found an alternative solution for the handling of its wastewater, and is making payment to a service provider to haul its wastewater away for disposal.²⁶ The Pennsylvania Department of Environmental Protection has not ordered BKF to cease its current process for handling its wastewater, and has instead directed BKF to submit a compliance plan to ensure that applicable regulations are met.²⁷ BKF's witnesses testified that its current process for handling wastewater is more expensive and requires more administrative oversight, but the fact that BKF's cost and administrative burden have increased does not amount to an immediate need for relief or an irreparable injury. It is well settled in the law that financial harm is not considered irreparable.²⁸ BKF is still operating and in fact is so busy that it cannot find enough workers to fulfill orders, according to its CEO. It is telling that BKF did not present any financial information to justify any inability to pay for the wastewater service provided by PAWC over the past 16 months.

²⁵ See testimony of Petitioner witness Solomon Wieder, N.T. 74

²⁶ See testimony of Petitioner witnesses Solomon Wieder and Angel Gilpin, N.T. 63-64, 74, 135

²⁷ See Petitioner Exhibit 19

D. BKF has not proven that its requested relief is not injurious to the public interest.

Not only has BKF not proven that its requested relief would not be injurious to the public interest, but the record in the case demonstrates that the relief BKF seeks (i.e., restoration of service without payment) would be affirmatively damaging to the public interest. As explained by PAWC witnesses May and Seltzer, BKF has a demonstrated track record of violating the requirements of its IPP Permit (PAWC Exhibit 3), which in turn puts additional costs on PAWC and its ratepayers and jeopardizes PAWC's compliance with its own NPDES permit (PAWC Exhibit 13) and N.T. 234-237. Furthermore, restoration of the industrial wastewater service to the BKF facility without payment for services rendered by PAWC would result in continued accumulation of arrearages to the detriment of PAWC and its ratepayers. Moreover, the granting of BKF's Petition has the potential of setting unintended precedent by the PUC. In this regard, a commercial or industrial customer could refuse to pay its utility bills for service rendered by a public utility, and after termination seek to have the PUC direct the public utility to restore the service under the guise of 52 Pa. Code § 3.6, which would have an injurious impact to the public interest throughout the Commonwealth of Pennsylvania. As ALJ Pell correctly noted, unpaid bills are included in a utility's uncollectible expenses, which all of its remaining customers must pay. Bolt v. Duquesne Light Co., Docket No. Z-8712758 (Opinion and Order entered April 8, 1988).

²⁸ See, e.g., Duquesne Interruptible Complainants v. Duquesne Light Co., Docket No. C-913424, (Order entered May 14, 1993) at 10 (citing Sameric Corporation v. Gross, 448 Pa. 497, 295 A.2d 277 (1972), Goadby v.

V. CONCLUSION

WHEREFORE, Pennsylvania-American Water Company respectfully requests that the Commission answer the Material Question in the affirmative, and hold that the presiding Administrative Law Judge correctly denied the expedited petition for interim emergency relief.

Respectfully submitted,



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COUNSELS FOR PENNSYLVANIA-
AMERICAN WATER COMPANY

June 18, 2021

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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v.	:	
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(wastewater)	:	

CERTIFICATE OF SERVICE

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

VIA ELECTRONIC MAIL

Joseph O'Keefe, Esq.
Sanders Law Firm
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Colorado Springs, CO 80903
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Michael A. Gruin

DATED: June 18, 2021