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March 27, 2024

VIA ELECTRONIC FILING

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

Re: Orpheus and Kimberly Hanley v. Pennsylvania Power Company
Docket No. C-2023-3041147

Dear Secretary Chiavetta:

Enclosed, please find the Reply of FirstEnergy Pennsylvania Electric Company (“Penn Power Rate District¹”) to the Exception of Orpheus and Kimberly Hanley regarding the above-referenced matter.

Please contact me if you have any questions regarding this matter.

Very truly yours,



Tori L. Giesler

TLG/mlr

Enclosures

c: As Per Certificate of Service
Office of Special Assistants (via email at ra-OSA@pa.gov)

¹ On January 1, 2024, FirstEnergy Corp.'s Pennsylvania operating companies (i.e., Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company) merged into FirstEnergy Pennsylvania Electric Company (“FE PA”). Due to the merger transaction, FE PA became successor in interest to all matters previously belonging to the individual Pennsylvania operating companies. As such, the customers of the former Pennsylvania Power Company have their own separate and distinct rate district under FirstEnergy Pennsylvania Electric Company’s tariff.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Orpheus and Kimberly Hanley,	:	
	:	
Complainants,	:	
	:	
v.	:	Docket No. C-2023-3041147
	:	
Pennsylvania Power Company,	:	
	:	
Respondent.	:	

**REPLY EXCEPTIONS OF PENNSYLVANIA POWER COMPANY TO THE
EXCEPTION OF ORPHEUS AND KIMBERLY HANLEY**



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I. INTRODUCTION

FirstEnergy Pennsylvania Electric Company, on behalf of its Penn Power Rate District² (the “Company”) hereby files its Reply to the Exceptions of Orpheus and Kimberly Hanley (“Complainants”). The Complainants filed their Exceptions to the February 7, 2024, Initial Decision (“ID”) rendered by Administrative Law Judge Alphonso Arnold III (the “ALJ”) on February 27, 2024.³ The ID sustained the Company’s Preliminary Objections to the Complaint; the ALJ treated the Company’s Preliminary Objections as a Motion for Judgement on the Pleadings and dismissed the Complaint with prejudice.⁴ In doing so, the ALJ held that the instant Complaint is barred by *res judicata*, collateral estoppel, and 66 Pa.C.S. § 316 because of the Commission’s final action at Docket No. C-2016-2557487.⁵

² On January 1, 2024, FirstEnergy Corp.'s Pennsylvania operating companies (i.e., Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company) merged into FirstEnergy Pennsylvania Electric Company. Due to the merger transaction, the affected operating companies' tariffs were consolidated into a single tariff, with each former operating company's rates becoming its own rate district. As such, the customers of the former Pennsylvania Power Company have their own separate and distinct rate district under FirstEnergy Pennsylvania Electric Company’s tariff.

³ The Complainants’ Exceptions were served via Secretarial Letter on the Company on March 13, 2024, as the Complainants did not serve the Company with their Exceptions. In the Secretarial Letter serving the Exceptions, a Replies to Exceptions date was set for March 27, 2024.

⁴ ID, at 15.

⁵ See *Orpheus and Kimberly Hanley v. Pa. Power Co.*, Docket No. C-2016-2557487 (Initial Decision issued Oct. 24, 2018), *request to reopen proceedings denied* (Opinion and Order entered Dec. 19, 2019), *petition for rehearing or reconsideration denied* (Opinion and Order entered Aug. 27, 2020) (“*First Complaint*”). In the *First Complaint* proceeding, like the instant proceeding, the Complainants disputed the proposed installation of a smart meter by the Company at the Complainants’ property at 11569 Lakeland Drive, Conneaut Lake, PA 16316 (“Service Address”). The *First Complaint’s* Initial Decision found that the Complainants failed to make a prima facie case that : (a) Act 129 of 2008, 66 Pa. C.S. § 2806.1, et seq. (“Act 129”) does not mandate the installation of a smart meter; (b) smart meter technology creates privacy concerns; and (c) the proposed smart meter installation poses health and safety issues. Specifically, the *First Complaint’s* ID determined that the Complainants’ unsubstantiated testimony was insufficient to support a finding that the Company’s installation of a smart meter is not mandated by the Code, or Commission Order, or that the smart technology utilized by [the Company] creates privacy and safety concerns in violation of the Code or its Commission-approved Smart Meter Deployment Plan.

As explained herein, the Complainants' Exceptions are without merit and should be denied. Accordingly, the Company respectfully requests that the Pennsylvania Public Utility Commission ("Commission") deny the Complainants' Exceptions and adopt the ID without modification.⁶

II. REPLY TO EXCEPTION NO. 1: THE ALJ PROPERLY HELD THAT THE COMPLAINT IS BARRED BY THE DOCTRINES OF RES JUDICATA, COLLATERAL ESTOPPEL, AND SECTION 316 OF THE CODE

In their Exceptions, the Complainants do not contemplate nor address the basis for the ID's dismissal of their Complaint with prejudice. Indeed, the ID held that:

Complainants are barred from bringing this Complaint by virtue of the Commission's final action at Docket No. C-2016-2557487. Respondent's Preliminary Objections, treated as a Motion for Judgment on the Pleadings, will be granted. The Commission is granted discretion to dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest. 66 Pa.C.S. § 703(b), 52 Pa. Code § 5.21(d). A hearing is necessary only to resolve disputed questions of fact, and when the question presented is one of law, the Commission need not hold a hearing. *Lehigh; Edan Transp. Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa. Cmwlth 1993).⁷

The Complainants' Exceptions do not contend that *res judicata* does not apply to the instant Complaint. Further the Complainants' Exceptions do not address or dispute that the Complaint is barred by collateral estoppel. Similarly, the Complainants' Exceptions do not contend that the ID mistakenly applied the provisions of Section 316 of the Code, 66 Pa.C.S. § 316, to the instant Complaint. As such, the Company respectfully submits that the Complainants failed to take Exception to the ultimate grounds for dismissal of the Complaint and, therefore, the Complainants' Exceptions should not be considered. In the event that they are considered, the Company addresses

⁶ The Complainants failed to number each of their Exceptions as required by the Commission's regulations, and even repeat the numbering for other Exceptions. *See* 52 Pa. Code § 5.533(b) (stating "[e]ach exception must be numbered"). Therefore, the Company treats every bold heading to be an individual Exception, other than the "Introduction" and "History" Sections (*See* Complainants' Exceptions, pp. 1-4). Moreover, there is substantial overlap in the Complainants' Exceptions. Accordingly, the Company responds to the Complainants' Exceptions by subject matter rather than individually by the number of the Exception.

⁷ ID, at 12.

the Complainants' meritless Exceptions in Section III of these Replies, *supra*.⁸ The Company addresses the basis for dismissal of the instant Section II(A)-(C) below.

As noted previously, this is the second smart meter related Complaint filed by the Complainants against the Company. On or around July 19, 2016, the Complainants filed their *First Complaint* against the Company at Docket No. C-2016-2557487, also challenging the Company's planned installation of a smart meter at the Service Address. The Commission dismissed the Complainants' claims made in the *First Complaint* regarding the Company's planned installation of a smart meter at the Service Address with prejudice. *See Orpheus and Kimberly Hanley v. Pa. Power Co.*, Docket No. C-2016-2557487 (Initial Decision issued Oct. 24, 2018), *request to reopen proceedings denied* (Opinion and Order entered Dec. 19, 2019), *petition for rehearing or reconsideration denied* (Opinion and Order entered Aug. 27, 2020). Through the instant Complaint, the Complainants have filed another Complaint against the Company regarding the Company's planned installation of a smart meter at the Service Address, in an attempt to relitigate an already fully litigated issue.

A. The Complaint is Barred by Section 316 of the Public Utility Code.

Pursuant to 66 Pa. C.S. § 316, the instant Complaint is barred by the Orders in the *First Complaint* proceeding. Section 316 states, in relevant part:

Whenever the [c]ommission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.

66 Pa.C.S. § 316.

⁸ The Company notes that the Complainants signal their awareness of their *First Complaint*, as they append the entirety of their Main Brief submitted in that proceeding to their Exceptions. As the Complainants' appended brief is not an Exception, nor takes specific issue with any of the ID's findings or conclusions, the Company respectfully submits that it should not be considered. Moreover, the Complainants' brief at Docket No. C-2016-2557487 was already considered by the Commission in its dismissal of the *First Complaint*.

Under Section 316 of the Public Utility Code, a complainant is prohibited from raising issues that were previously decided. *See Moore, Jr. v. PECO Energy Co.*, Docket No. C-2012-2309932, 2012 Pa. PUC LEXIS 1251, at *12 (Initial Decision dated July 18, 2019), *adopted without modification*, Docket No. C-2012-2309932 (Order entered Oct. 24, 2012); *see also Denlinger v. PPL Elec. Utils. Corp.*, Docket No. C-2019-3014786 (Initial Decision issued Feb. 24, 2020), *adopted without modification*, Docket No. C-2019-3014786 (Order entered May 21, 2020). Section 316 precludes a collateral attack upon a Commission order which has not been reversed upon appeal. *See Lehigh Valley Power Comm. v. Pa. PUC*, 563 A.2d 548, 556 (Pa. Cmwlth. 1989) (citing 66 Pa. C.S. § 316). The *First Complaint* Order rejecting the Complainants' arguments relating to the Company's installation of a smart meter at the Service Address has not been set aside, annulled, or otherwise overturned. *See Orpheus and Kimberly Hanley v. Pa. Power Co.*, Docket No. C-2016-2557487 (Initial Decision issued Oct. 24, 2018), *request to reopen proceedings denied* (Opinion and Order entered Dec. 19, 2019), *petition for rehearing or reconsideration denied* (Opinion and Order entered Aug. 27, 2020).

The ID correctly held that the Complainants' claims in the instant Complaint are barred by Section 316 of the Code. As clearly explained by the ALJ:

Furthermore, Complainants' Complaint is also barred pursuant to 66 Pa.C.S. § 316 as it raises the same issues before the Commission a second time. The Commission's Opinion and Order dismissing the 2016 complaint with prejudice remains conclusive upon all parties to that proceeding, which includes Complainants and Respondent.⁹

The Complainants' Exceptions do not take issue with this holding and, to the extent that the Complainants' Exceptions are considered to take issue with the ID's Section 316 finding, such arguments should be rejected as unfounded and meritless.

⁹ *ID*, at p. 12.

B. The Complaint is Barred by the Doctrine of *Res Judicata*.

Similar to the Complainants' failure to address the instant Complaint's dismissal on Section 316 grounds, the Complainants also do not dispute that the Complaint is barred by the doctrine of *res judicata*, *i.e.*, a ground in which the Complaint was dismissed. Indeed, the Complainants' claims related to the Company's planned installation of a smart meter at the Service Address were or could have been raised and ruled on in the *First Complaint*.

Res judicata, or claim preclusion, prevents a future suit between the same parties on the same cause of action after a final judgment is entered on the merits of the action. *See PMA Ins. Grp. v. Workmen's Comp. Appeal Bd. (Kelley)*, 665 A.2d 538 (Pa. Cmwlth. 1995), *appeal denied*, 1996 Pa. LEXIS 619 (Pa. 1999). *Res judicata* "prohibits parties involved in a prior litigation from subsequently asserting claims in a later action that were raised, or could have been raised, in the previous adjudication." *Hillgartner v. Port Auth.*, 936 A.2d 131, 141(Pa. Cmwlth. 2007) (quoting *Montella v. Berkheimer Assocs.*, 690 A.2d 802 (Pa. Cmwlth. 1997)). *Res judicata* also "shields parties from the burden of re-litigating claims with the same parties, or parties in privity with the original litigant, and serves to protect the courts from inefficiency and confusion that re-litigation fosters." *Id.* (emphasis added) (citation omitted).

For the doctrine of *res judicata* to apply, a party must demonstrate: (1) identity of issues, (2) identity of causes of action, (3) identity of persons and parties to the action, and (4) identity of the quality or capacity of the parties suing or being sued. *Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1313, 1316-17 (Pa. Super. 1983). As the ID correctly held, the instant Complaint is barred by *res judicata* because in the *First Complaint* and the instant Complaint: (1) the issues relate to the Company's planned installation of a smart meter at the Service Address; (2) the cause of action is a formal complaint involving the Company's planned installation of a smart

meter at the Service Address; (3) the parties in the prior action and the instant proceeding are the same (*i.e.*, Orpheus and Kimberly Hanley and the Company); and (4) the Complainants and respondent in the *First Complaint* and instant Complaint are the same and, therefore, have identical quality or capacity.

The ID correctly and completely walked through a *res judicata* analysis, holding that:

All four conditions required for a finding of *res judicata* have been met: 1) the issues are identical (both complaints pertain to the installation of a smart meter at Complainants' home); 2) the causes of action are identical (complainants in both complaints wish to opt-out of smart meter installation, arguing that Act 129 does not mandate smart meter installation and that installation of a smart meter would violate Section 1501 of the Code); 3) the persons and parties to the action are identical (both complaints involve Orpheus and Kimberly Hanely [sic] as Complainants and the Pennsylvania Power Company as Respondent); and 4) the quality and capacity of the parties suing or sued are also identical (as the parties are the same in both complaints, the quality and capacity of the parties suing or sued are identical).¹⁰

Again, the Complainants do not dispute that *res judicata* bars the instant Complaint. As such, the Company submits that the Complaint should be dismissed on *res judicata* grounds, as well as pursuant to the grounds discussed in Sections II(A), *supra*, and II(C), *infra*.

C. The Complaint is Barred by the Doctrine of Collateral Estoppel.

Similar to the Complaint being barred under Section 316 of the Code and under the doctrine of *res judicata*, the Complaint is also barred by the doctrine of collateral estoppel. Collateral estoppel, or issue preclusion, prevents re-litigation of an issue of fact or law between the same parties upon a different claim or demand. *See Fiore v. Commonwealth*, 508 A.2d 371, 374 (Pa. Cmwlth. 1986).

The doctrine of collateral estoppel, or issue preclusion, applies where: (1) “[a]n issue decided in a prior action is identical to the one presented in a later action”; (2) “[t]he prior action

¹⁰ ID, pp. 11-12.

resulted in a final judgment on the merits”; (3) “[t]he party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action”; and (4) “[t]he party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action.” *Rue v. K-Mart Corp.*, 713 A.2d 82, 84 (Pa. 1998) (emphasis added) (citations omitted).

The instant Complaint is barred by collateral estoppel because in the *First Complaint* and the instant Complaint: (1) the issues are about the Company’s planned installation of a smart meter at the Service Address; (2) the *First Complaint* was adjudicated on the merits; (3) the parties in the prior action and the instant proceeding are the same (*i.e.*, Orpheus and Kimberly Hanley and the Company); and (4) in the prior action, the Complainants had a full and fair opportunity to raise claims and litigate issues regarding the Company’s planned installation of a smart meter at the Service Address.

The ID correctly walked through this analysis, holding that:

[A]ll four conditions required for a finding of collateral estoppel have also been met: 1) the issue decided in the prior adjudication is identical with the one presented in the later action (both complaints pertain to the installation of a smart meter at Complainants’ home); 2) there was a final judgment on the merits (the Commission entered an Opinion and Order dismissing the 2016 complaint with prejudice); 3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication (both complaints involve Orpheus and Kimberly Hanely [sic] as Complainants); and 4) the party against whom the plea is asserted has had a full and fair opportunity to litigate the issues in question in the prior action (the Complainants participated in an evidentiary hearing in the 2016 complaint matter where they had the opportunity to present their case).¹¹

Like Section 316 of the Code and *res judicata*, the Complainants do not take issue with the ID’s findings related to collateral estoppel. To the extent that they do, the ID clearly and correctly applied the concept of collateral estoppel barring the instant Complaint on account of the fully

¹¹ ID, p. 12.

litigated *First Complaint* involving the same issue(s), same Complainants and Respondent, and the same Service Address. As such, the Company respectfully submits that the ID's findings and dismissal of the Complaint on collateral estoppel grounds should be adopted without modification.

III. REPLY TO EXCEPTION NO. 2: THE ALJ PROPERLY APPLIED THE COURT'S HOLDING IN *POVACZ II* IN HOLDING THAT ACT 129 MANDATES THE SYSTEM-WIDE INSTALLATION OF SMART METERS

See ID at 7.

The entirety of the Complainants' arguments levied through their Exceptions to the ID focus on the mistaken premise that Act 129 does not mandate the installation of smart meters system-wide. (*See* Complainants Exceptions, pp. 5-16.) While the ID found that the Complainants' allegations related to a purported violation by the Company of Section 1501 of the Public Utility Code, 66 Pa.C.S. § 1501, were legally insufficient, the Complaint was not dismissed with prejudice on that ground. However, the Company will address the Complainants' arguments on this point here.

The Complainants' requested relief cannot be granted by the Commission because the Company's customers are not permitted to opt-out of or rescind smart meter installation. Through the Complaint and throughout their exceptions, the Complainants request that the Company allow them to opt-out of installation of a smart meter at the Service Address. The Company is legally required to install the smart meters by the Public Utility Code, the Commission's orders, and the Company's Commission-approved Smart Meter Deployment Plan. *See* 66 Pa.C.S. § 2807(f); *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company for Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Order June 9, 2010). On June 24, 2009, the Commission issued its Smart Meter Implementation Order, which set forth requirements for the smart meter plans and

procedures for the submission, review, and approval of the smart meter plans. *See Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Order entered June 24, 2009).

On December 31, 2012, Metropolitan-Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company (collectively, “the Companies”) filed their Joint Petition for Approval of their Smart Meter Deployment Plan in compliance with the *Smart Meter Implementation Order*, in which they requested that the Commission: (1) find that their proposed Deployment Plan satisfies the requirements of Act 129 and the Commission’s Implementation Order; (2) approve the Companies’ proposed procurement and deployment of approximately 2.1 million smart meters, over 98.5% of which should be installed by the end of 2019; (3) authorize the Companies to continue to recover smart meter costs; and (4) authorize the Companies to create a regulatory asset for their investment in their existing meters to be replaced by smart meters.¹²

On June 16, 2014, the Companies submitted their revised Smart Meter Deployment Plan, which, *inter alia*, accelerated the smart meter deployment schedule laid out in their original Deployment Plan. Under the Revised Deployment Plan, the Companies proposed to deploy 170,000 smart meters by the end of 2015.¹³ The Commission entered its Opinion and Order approving the Revised Deployment Plan on June 25, 2014. *See 2014 Smart Meter Order*.

Nothing in the Public Utility Code, the Commission’s orders and regulations, or the Company’s Smart Meter Deployment Plan states that a customer can opt-out of, or rescind, a smart meter installation, contrary to the Complainants’ assertions. Indeed, on August 16, 2022, the

¹² *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994 (Petition filed December 31, 2012).

¹³ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994, p. 8 (Order entered June 25, 2014) (“*2014 Smart Meter Order*”).

Supreme Court of Pennsylvania issued its Opinion affirming in part and reversing in part the Commonwealth Court’s decision in *Povacz I*.¹⁴ Specifically, the Supreme Court in *Povacz II* held that: (1) Act 129 mandates the systemwide installation of smart meters; (2) the PUC applied the correct burden of proof standard in the smart meter complaint cases arising under Section 1501 of the Public Utility Code; (3) an electric distribution company (“EDC”) cannot be required to provide an accommodation to a customer absent a Section 1501 violation; and (4) even if a smart meter complainant meets their burden of proof, the complainant is only “entitled to an accommodation to the extent allowed by Act 129 and a utility’s tariff.”¹⁵

The Complainants do not grapple with the Court’s holding in *Povacz II* in their Exceptions. (See Complainants’ Exceptions, pp. 5-16). Rather, they rely on an incorrect reading of Act 129, partially premised on the federal Energy Policy Act. This position is entirely meritless. As clearly and wholly explained by the Court in *Povacz II*:

Considering the overall goal of Act 129 to promote energy efficiency and conservation in Pennsylvania, the plain language of Section 2807(f)(2) mandates the system-wide installation of smart meter technology, including smart meters, with no opt-out provision.¹⁶

Therefore, the Company must install the smart meter at the Complainants’ Service Address. Moreover, even if the Complainants were to prove a Section 1501 violation – which they cannot and did not in the *First Complaint* proceeding – they would only be entitled to “an accommodation to the extent allowed by Act 129 and a utility’s tariff.”¹⁷ The only accommodation permitted under the Company’s Commission-approved tariff is installing the smart meter at a

¹⁴ *Povacz v. Pa. PUC*, 241 A.3d 481 (Pa. Cmwlth. 2020) (“*Povacz I*”).

¹⁵ See *Povacz v. Pa. PUC*, 280 A.3d 975, 1012-1014 (Pa. 2022) (“*Povacz II*”).

¹⁶ *Povacz II*, at 998.

¹⁷ *Povacz II*, at 1014.

different location at the customer's expense.¹⁸ This option has been available to the Complainants throughout this proceeding.

Therefore, the Complainants' Exception related to the mandatory installation of smart meters should be summarily denied, and the ID should be adopted without modification.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, and those set forth in the Initial Decision, the Exceptions of Orpheus and Kimberly Hanley should be denied.



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Date: March 27, 2024

Counsel for FirstEnergy Pennsylvania
Electric Company (Penn Power Rate District)

¹⁸ FirstEnergy Pennsylvania Electric Company Tariff Rule 4, Electric Pa. P.U.C. No. 1, Original Page 40 (“A Customer desiring the removal, relocation or change of Company facilities or interruption shall submit a request to the Company. The Company may accept or reject said request in its sole and exclusive discretion. If the Company accepts said request, the Customer shall pay in advance the Company’s total estimated cost for any Customer requested temporary interruption in the Customer’s service due to construction, maintenance or other activities.”).

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Orpheus and Kimberly Hanley,	:	
	:	
Complainants,	:	
	:	
v.	:	Docket No. C-2023-3041147
	:	
Pennsylvania Power Company,	:	
	:	
Respondent.	:	


CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of this document of FirstEnergy Pennsylvania Electric Company on behalf of its Penn Power Rate District upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Service by First Class Mail, postage prepaid, and electronic mail as follows:

Administrative Law Judge Alphonso Arnold III alphonarno@pa.gov	Orpheus and Kimberly Hanley P.O. BOX 539 Conneaut Lake, PA 16316
--	--

Dated: March 27, 2024



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