

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

INVESTIGATION OF THE FAILURE OF	)	CASE NO.
TRACFONE WIRELESS, INC. TO FILE	)	2011-00322
REQUIRED REPORTS	)	

ORDER

TracFone Wireless, Inc. (“TracFone”), a prepaid wireless reseller, has represented to the Commission that it is not a utility under the definition of KRS 278.010(3) because it does not own or operate any facilities in Kentucky. On that basis, TracFone has refused to comply with KRS 278.140 and KRS 278.150, which require the filing of an annual report of gross annual intrastate earnings and the payment of an annual assessment based on those earnings, respectively. As discussed below, we find that TracFone meets the statutory definition of “utility” as set forth in KRS 278.010(3)(e), which includes any person that “owns, controls, operates or manages any facility used for or in connection with . . . the transmission or conveyance over wire, air, or otherwise, of any message by telephone or telegraph for the public, for compensation . . . .” Thus, TracFone must comply with the requirements of KRS 278.140 and KRS 278.150.

BACKGROUND

1. Procedural History.

TracFone is a Mobile Virtual Network Operator (“MVNO”) and operates as a prepaid wireless reseller. Consequently, it does not build out certain of its own facilities, such as towers and switches, in the areas in which it operates. In order to provide

service, TracFone purchases wholesale finished wireless services in large quantities at wholesale rates from facilities-based wireless providers (AT&T Mobility, Sprint, Verizon Wireless, and Bluegrass Cellular) and resells those services to its end users on a prepaid basis.<sup>1</sup>

Historically, the Commission had been silent regarding its regulation of prepaid wireless-resellers. In 2007 the Commission declined a request by facilities-based wireless providers to assert jurisdiction over pre-paid wireless providers, finding that the facilities-based providers had not presented a sufficient case to justify an administrative proceeding to investigate prepaid wireless-resellers.<sup>2</sup>

In 2009, TracFone petitioned the Commission to be designated as an eligible telecommunications carrier (“ETC”) in order to receive federal Lifeline support.<sup>3</sup> During the proceeding in Case No. 2009-00100, TracFone completed the telecommunications registration form as required by KRS 278.542(2) for “telephone utilities.” TracFone, however, claims that Commission Staff directed it to report \$0 revenue on its gross annual reports.<sup>4</sup> There is nothing in the record of Case No. 2009-00100 to support this claim.

On October 12, 2011, the Commission ordered TracFone to show cause why it should not be penalized for its failure to file a report of its gross operating revenues

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<sup>1</sup> TracFone's Response to Commission Staff's First Request for Information at 2. (Filed Oct. 1, 2012.)

<sup>2</sup> Case No. 2007-00409, *Petition for an Investigation Into the Utility Assessments Paid by Kentucky RSA#3 Cellular General Partnership* (Ky. PSC Dec. 26, 2007.)

<sup>3</sup> Case No. 2009-00100, *Petition of TracFone Wireless, Inc. for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Kentucky for the Limited Purpose of Offering Lifeline and Link Up Service to Qualified Households*. (Ky. PSC. Nov. 24, 2010).

<sup>4</sup> Letter filed on October 19, 2011 in Case 2011-00322 dated October 18, 2011, from Richard B. Salzman, Executive Vice President and General Counsel.

derived from intra-Kentucky business for the year ending December 31, 2010, as KRS 278.140 requires. The Show Cause Order set the matter for hearing, but allowed TracFone, in lieu of appearing at the hearing, to admit the allegations, file the required report, waive its right to a hearing, and pay a penalty of \$250.00.

On October 19, 2011, TracFone submitted a written response, by letter, to the Show Cause Order that included a payment of the \$250.00 penalty and the required report. TracFone, in that report, listed that it had 291,480 customers in Kentucky, but no gross intrastate revenues. In its letter, TracFone argued that it was not a utility and, therefore, was under no legal obligation to submit a report of gross operating revenues.

On March 22, 2012, the Commission, in response to TracFone's October 19, 2011 letter, issued an Order finding that TracFone met the statutory definition of a utility as set forth in KRS 278.010(3). The Order also allowed TracFone an opportunity to supplement its arguments as to why it is not a utility as defined in KRS 278.010(3)(e).

On April 16, 2012, TracFone filed its response to the March 22, 2012 Order. In its response, TracFone reiterated its contention that it was not a utility under KRS 278.010(3)(e) and also argued that the Commission's determination that TracFone was a utility was inconsistent with previous Commission precedent established in Case No. 2007-00409. TracFone asserted that while it owns and leases certain items, such as office space and office supplies, in its office in Miami, Florida, it does not own or lease any facilities in Kentucky for the transmission or conveyance of messages in Kentucky and is not a utility under state law.<sup>5</sup>

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<sup>5</sup> Response of TracFone Wireless, Inc. at 3.

In response to a Commission Staff request for information, TracFone maintained that it does not control or otherwise use the facilities that complete the calls of its customers. It argues that the underlying carrier (e.g., AT&T Mobility) controls the entire process, from the call initiation to call completion, and is solely responsible for the operation and management of the network and transmission of calls.

The Commission conducted a formal hearing for April 25, 2013. At the hearing, TracFone presented one witness, Karen Levine, Senior Vice-President, who testified to TracFone's operations. TracFone subsequently filed a post-hearing brief. The record is complete and the case is ripe for a decision.

2. TracFone's Business Model.

TracFone provides service by purchasing wireless telecommunications services at wholesale prices from its underlying wireless providers.<sup>6</sup> TracFone describes this as purchasing service in one market (wholesale) and selling it in another market (prepaid retail) and refers to this as "arbitrage."<sup>7</sup> Under this arbitrage model, TracFone sets its own rates, independent from the retail rates charged by its underlying carriers.

In order to become a TracFone customer, a prospective customer purchases a TracFone<sup>8</sup> handset from a retail vendor, such as Walmart or CVS, which, in turn, has purchased those handsets from TracFone.<sup>9</sup> TracFone provides advertising and signage

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<sup>6</sup> Because TracFone relies upon the equipment of its underlying carriers, it cannot provide service in areas in which the underlying carriers do not provide service. Testimony of Karen E. Levine, April 25, 2013 Hearing at 10:15:45.

<sup>7</sup> Closing Argument of Mitchell F. Brecher, April 25, 2013 Hearing at 10:49:03.

<sup>8</sup> TracFone also provides service under the additional names of: Safelink, Net10, Straight Talk, TelCell USA, and Simple Mobile. Testimony of Karen E. Levine, April 25, 2013 Hearing at 10:10:00.

<sup>9</sup> *Id.* at 10:11:40.

to the retail vendors.<sup>10</sup> TracFone, however, does not advertise for the underlying carrier.<sup>11</sup>

The handsets are the property of the customer, not of TracFone. However, a customer cannot use TracFone's service unless the customer is using a TracFone-provided handset.<sup>12</sup> The customer can purchase cards containing prepaid minutes that TracFone provides to the vendors.<sup>13</sup> Customers can also purchase handsets and prepaid calling minutes directly from TracFone's website, which TracFone maintains and controls.<sup>14</sup>

A customer initiates service with TracFone by calling TracFone. TracFone captures the serial number of the handset and sends a service request, via computer, to the underlying carrier for a phone number and activation of that line. The underlying carrier responds to TracFone with a notice that the line has been activated and provides the telephone number for the handset.<sup>15</sup> TracFone stores the customer's number in its system so that if a customer purchases air time, TracFone knows who the customer is and that the customer has an active number.<sup>16</sup>

In reselling these services, and charging its own rates, TracFone is the only "underlying" carrier that Kentucky customers consider for purposes of payment.

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<sup>10</sup> *Id.* at 10:12:14.

<sup>11</sup> *Id.* at 10:10:00.

<sup>12</sup> TracFone's Response to Commission Staff's First Request for Information at 1.

<sup>13</sup> Testimony of Karen E. Levine, April 25, 2013 Hearing at 10:12:00.

<sup>14</sup> *Id.* at 10:12:25.

<sup>15</sup> *Id.* at 10:19:55-10:21:15.

<sup>16</sup> *Id.* at 10:21:47.

TracFone provides customer support and limited technical support, and if a customer experiences service or technical issues, the customer contacts TracFone's customer or technical support, not the underlying carrier.<sup>17</sup> TracFone also directs the underlying carrier as to if and when service is to be suspended, discontinued, or terminated for a customer's number.

TracFone is also responsible for porting numbers in and out of TracFone's system. When a customer requests to port a number from a current provider to TracFone, TracFone submits the request to the underlying carrier.<sup>18</sup> If a TracFone customer desires to have its number ported to another carrier, that carrier contacts TracFone and TracFone initiates the request to TracFone's underlying carrier to complete the port.<sup>19</sup>

TracFone maintains no buildings or equipment in Kentucky.<sup>20</sup> TracFone's primary office is located in Miami, Florida.<sup>21</sup> The primary single-story office building contains between 10 and 50 offices and has approximately 650 employees.<sup>22</sup>

### 3. TracFone's Argument.

TracFone argues that the only issue in this proceeding is a legal question: "whether or not TracFone fits within the statutory definition of a utility under the laws of

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<sup>17</sup> *Id.* at 10:12:40.

<sup>18</sup> A customer may make the request to port a number through TracFone's website or via a customer service agent. *Id.* at 10:24:00.

<sup>19</sup> *Id.* at 10:22:40.

<sup>20</sup> Prefiled testimony of Karen E. Levine ("Levine Prefiled Testimony") at 1, lines 16-17.

<sup>21</sup> Testimony of Karen E. Levine, April 25, 2013 Hearing at 10:24:30.

<sup>22</sup> *Id.* at 10:43:15.

the Commonwealth.”<sup>23</sup>

TracFone asserts that it is not a utility. In its October 18, 2011 letter, TracFone stated that:

TracFone does not remit a Report of Gross Operating Revenue Derived from Intra-Kentucky Business for the Year Ended December 31, 2010 because TracFone is not a “utility” as the term is statutorily defined. . . . KRS 278.010(3)(f) defines “utility” as “any person . . . who **owns, operates, or manages** any facility used or to be used for or in connection with . . . (c) the transmission or conveyance of any message by telephone or telegraph to the public for compensation.” (Emphasis added). . . . TracFone does not own operate, or manage any facility used for the transmission of messages in Kentucky. TracFone does provide commercial mobile radio services (CMRS) to Kentucky consumers. However, it does so on a resale basis only. That is, TracFone purchases CMRS from wireless carriers who do own, operate or manage such facilities and who, therefore, are utilities under Kentucky law.<sup>24</sup>

TracFone asserts that because it provides service solely on a resale basis, it cannot own, control, operate, or manage any facilities used in connection with providing telecommunications service.<sup>25</sup> TracFone argues that, although the definition of “facility” in KRS 278.010(11) is comprehensive, it must be read in the light of the specific definition of “utility.”<sup>26</sup>

TracFone concedes that it does own and lease property and equipment that it uses to conduct its business. The equipment consists of, *inter alia*, office space, furniture, office supplies, computers etc. TracFone, however, argues that these items

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<sup>23</sup> Post-Hearing Brief of TracFone Wireless at 1 (Filed May 15, 2013) (“Post-Hearing Brief”).

<sup>24</sup> Letter from Richard B. Salzman, Executive Vice President and General Counsel, TracFone Wireless, Inc. to the Public Service Commission 1 (Oct. 18, 2011).

<sup>25</sup> Post-Hearing Brief at 2.

<sup>26</sup> *Id.* at 3.

are “not used or useable in connection with the transmission or conveyance over wire, in air, or otherwise telephonic or telegraphic messages.”<sup>27</sup> TracFone concludes that, although it does control, manage or own certain “facilities,” TracFone is not a utility because those facilities are not used to transmit or convey telephone or telegraph messages.<sup>28</sup>

TracFone asserts that the underlying carriers control all aspects of TracFone’s calls, including the assignment of numbers and the switching and routing of calls.<sup>29</sup> The underlying carriers own, control, and operate all of the equipment, such as towers, switches, etc., that are used to route and terminate calls.

TracFone argues that, nationwide, TracFone is only considered a utility in two of the 53 United States territories and states in which TracFone provides service.<sup>30</sup> Only California and Indiana treat TracFone as a utility under their respective state laws. TracFone states that it is designated as an ETC and provides Lifeline service in 43 States, including Kentucky, and was designated by the state commissions as an ETC in 33 of those states. TracFone argues that this is evidence that being designated as an ETC does not “render a company a utility under state law.”<sup>31</sup>

TracFone also argues that if wireless resellers are to be considered utilities under Kentucky law, the Legislature would have to amend KRS Chapter 278 to include

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Levine Prefiled Testimony at 2, lines 13-14.

<sup>30</sup> Post-Hearing Brief at 6.

<sup>31</sup> *Id.* at 7.

wireless resellers in the definition of what is a utility.<sup>32</sup> TracFone asserts that in some jurisdictions, a company's status as a utility does not depend upon whether or not the company owns, controls, or operates facilities in the state. TracFone, as an example, points to the Communications Act of 1934, which considers a company to be under the Federal Communications Commission's ("FCC") jurisdiction as long as the company holds itself to provide service.<sup>33</sup> TracFone, however, argues that the Commission does not have the power to revise statutes, including the statutory definition of a utility.<sup>34</sup>

TracFone states that nothing has changed since 2007, when the Commission, in Case No. 2007-00409, declined to determine whether wireless resellers and prepaid wireless providers should be considered utilities under state law. TracFone argues that because neither the law nor TracFone's method of doing business has changed, there is no reason for the Commission to revisit the issue and reverse its previous decision.

### DISCUSSION

Based on the evidence of record and being otherwise sufficiently advised, the Commission finds that this case hinges upon a legal interpretation of both KRS 278.010(3)(e) and KRS 278.010(11).

KRS 278.010(3)(e) defines a telecommunications utility as:

Any person . . . who owns, controls, operates, or manages any facility used or to be used for or in connection with:

(e) The transmission or conveyance over wire, in air, or otherwise, of any message by telephone or telegraph for the public, for compensation. . . .

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 7-8, *citing*, 47 U.S.C. § 153 (10).

<sup>34</sup> *Id.* at 8.

KRS 278.010(11) defines a facility as including:

[A]ll property, means, and instrumentalities owned, operated, leased, licensed, used, furnished, or supplied for, by, or in connection with the business of any utility.

It is undisputed that TracFone provides telecommunications service to the public for compensation. Thus, if TracFone owns, controls, operates or manages any facility, etc., *used for or in connection* with telecommunications services, then it is a utility and subject to the Commission's jurisdiction.

TracFone concedes that it owns, controls and operates facilities, i.e., its office in Miami, Florida, and the computers that are used to communicate to the underlying carriers, etc., in order to fulfill the needs of its customers. The crux is whether or not these facilities are used in connection with "the transmission or conveyance over wire, in air or otherwise, of any message . . . for the public, for compensation . . . ."

The term "connection" is defined as [t]he state of being connected or joined; union by junction, . . . by dependence or relation . . . ." <sup>35</sup> Although the facilities that TracFone owns in Miami are not physically connected to the towers, switches, etc. of the underlying carrier, they are used in connection with the provision of telecommunications service. But for the use of the facilities, TracFone would not be able to provide service to its customers. In other words, the provision of service to TracFone's customers is dependent upon the use of TracFone's facilities in its Miami (and other) offices.

In reselling wireless services, TracFone's Kentucky customers consider TracFone their wireless carrier for customer-service issues. TracFone uses its own facilities to provide customer service and manage its customers in the same manner

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<sup>35</sup> Black's Law Dictionary 302 (6<sup>th</sup> Ed. 1990).

that prepaid wireless network-based carriers do. Even though TracFone utilizes wholesale contracts with its underlying carriers for the use of towers, switches etc., the ownership of such facilities in Kentucky is not a statutory requirement for classification as a public utility. In TracFone's case, it relies upon its wholesale agreements to provide services to its customers, and based upon this, we find that TracFone is a utility as defined by KRS 278.010(10)(3)(e) and is subject to our jurisdiction.

It should also be noted that unlike many marketers of retail telecommunications services, who merely solicit customers on behalf of and in the name of specific underlying carriers, TracFone does not hold itself out as an agent for any of its underlying carriers. Services are solicited solely by and in the name of TracFone. Rates and conditions of service are established and enforced solely by TracFone. Requests for services are initiated and administered solely by TracFone. Service is discontinued/terminated at the sole discretion of TracFone, and all usage, tracking, accounting, customer service, and any and all other customer relations are performed solely by TracFone. From TracFone's customers' perspective, TracFone is the entity that provides telephone service to its customers, not the underlying carrier.<sup>36</sup> All of these customer services are provided in connection with the transmission or conveyance of messages by telephone.

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<sup>36</sup> The United States Court of Appeals for the Sixth Circuit has a similar understanding of TracFone's relationship with its customers:

The end user is the customer who uses the phone service . . . . [A] customer who purchases a TracFone product contacts TracFone to activate the service, and TracFone supplies the coverage. TracFone is the company that provides such service to the end user, whether those services are purchased directly from TracFone or through a third-party retailer and then, subsequently, activated by TracFone.

*Kentucky Commercial Mobile Radio Service Emergency Telecommunications Bd. v. TracFone Wireless, Inc.*, 712 F.3d 905, 913 (6th Cir. 2013) (Citations omitted.)

The Commission has previously distinguished between a reseller and a simple marketer of telecommunications service, determining that the latter is not a utility. In Case No. 93-239,<sup>37</sup> the Commission initiated an investigation into The Furst Group, Inc. ("Furst Group") to determine if Furst Group had violated KRS 278.020 and 278.160. Furst Group had notified the Commission that it had been providing utility service in Kentucky without having received a certificate of public convenience and necessity and without having filed a tariff. Furst Group functioned as an exclusive marketer for AT&T Communications, Inc. ("AT&T"), and sold and marketed AT&T's service pursuant to AT&T's federal tariff. Furst Group did not purchase the service from AT&T, but received a commission from AT&T based on the minutes of use of the customer. AT&T was responsible for billing customers and its name appeared on the bill along with the Furst Group.

The Commission found that Furst Group did not purchase tariffed services and, therefore, Furst Group could not repackage or increase the price charged for services. Based on these findings, the Commission concluded that Furst Group did not qualify as a "reseller" of telecommunications service. Furst Group was merely acting as an agent for AT&T, was not a reseller of telecommunications service, and could not be considered a utility under state law.

Kentucky courts have recognized that the technology used or the method by which telephone service is provided, does not exempt an entity from being considered a utility. The Court of Appeals, in interpreting a taxation statute, noted that:

It is apparent that many of the communications technologies utilized today by . . . telephone companies are not the same

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<sup>37</sup> Case No. 93-239, *The Furst Group, Alleged Violations of Commission Regulations KRS 278.020 and KRS 278.160* (Ky. PSC Mar. 31, 1994).

technologies that were used at the time of the statute adoption. *This fact does not mean that telephone companies become something else simply because they use improved communication techniques.*<sup>38</sup>

In this case, just because TracFone utilizes a technology (wireless resale) that was not in existence when KRS 278.010(3) was enacted does not mean that TracFone is not a utility under Kentucky law. TracFone meets the current statutory definition of a utility and no statutory change is necessary to reach this conclusion.

TracFone has noted that the Commission has previously declined to investigate the regulatory status of prepaid wireless providers in Kentucky. In that case, however, the Commission declined to open an investigation based upon deficiencies in the petition requesting the investigation, not based upon a finding of lack of jurisdiction based upon an application of KRS Chapter 278. In Case No. 2007-00409, RSA #3 Cellular General Partnership (“RSA #3”) petitioned the Commission to open an administrative investigation into the regulatory status of two pre-paid wireless providers: TracFone and Virgin Mobile USA, LLC (“Virgin Mobile”). The Commission denied RSA #3’s request finding, *inter alia*, that: (1) the Commission did not have enough information as to the number of wireless resellers; (2) RSA #3 had failed to provide evidence as to carriers similarly situated to TracFone and Virgin Mobile; (3) RSA #3 had failed to provide the structural and statistical information necessary to support a petition for an administrative case; and, (4) the Commission could not open an administrative case that singled out only two entities when the findings would apply to an unspecified

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<sup>38</sup> *Central Kentucky Cellular Telephone Co. v. Commonwealth, Revenue Cabinet*, 897 S.W.2d 601, 603 (Ky. App. 1995) (Emphasis added).

number of similarly situated carriers.<sup>39</sup> The Commission's decision to not investigate prepaid wireless carriers was based entirely on RSA #3's failure to state a *prima facie* case and not on a Commission determination that prepaid wireless resellers were not subject to Commission jurisdiction.

It is important to note that of the approximate 25 wireless resellers that are registered with the Commission, TracFone is the only one to refuse to file a gross annual report under KRS 278.140, or pay its annual assessment pursuant to KRS 278.150. Similarly situated wireless resellers such as Virgin Mobile and i-Wireless, LLC have filed their respective annual reports and paid their respective annual assessments since 2010, the year that they petitioned the Commission to be designated as ETCs. Dozens of other wireless resellers, whether designated as ETCs or not, also file the required reports and pay the annual assessments. There is no legal or equitable reason that TracFone should be treated differently from other similarly situated carriers.

#### CONCLUSION

As discussed, *supra*, TracFone controls, owns, or operates facilities that are used in connection with the conveyance of messages over telephones. But for these facilities, TracFone could not provide telecommunications service to its customers. Additionally, other wireless resellers file gross annual reports for intrastate revenues and the corresponding annual assessments, and TracFone should not be subject to different regulatory requirements from these similarly situated carriers. The weight of the evidence, as well as the plain language of KRS 278.010(3)(e) and 278.010(11), support the conclusion that TracFone is a utility under KRS Chapter 278.

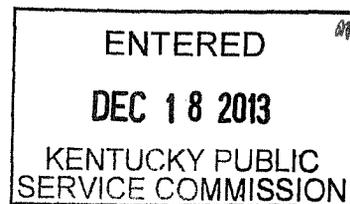
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<sup>39</sup> Case No. 2007-00409, *Petition for an Investigation Into the Utility Assessments Paid by Kentucky RSA#3 Cellular General Partnership* (Ky. PSC Dec. 26, 2007) at 2-3.

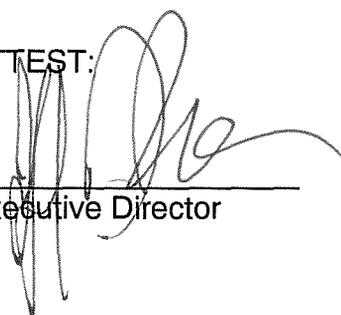
Based on the foregoing, IT IS HEREBY ORDERED that:

1. TracFone is a utility as defined by KRS 278.010(3)(e).
2. TracFone shall, within 30 days of the date of this Order, file with the Commission its report of gross earnings from intrastate business, as required by KRS 278.140, for the fiscal years ending in 2010, 2011, and 2012.
3. Upon receipt of TracFone's gross earnings reports, the Commission shall calculate TracFone's annual assessments for the fiscal years ending in 2010, 2011, and 2012.
4. TracFone shall, within 30 days of notification from the Commission of its liability for its annual assessments, pay its past due annual assessments, as required by KRS 278.150, for the fiscal years ending in 2010, 2011 and 2012.
5. TracFone shall comply in the future with the reporting requirements of KRS 278.140, and
6. TracFone shall comply in the future with the annual assessment requirements of KRS 278.150.

By the Commission



ATTEST:

  
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