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August 1, 2005

Mrs. Blanca S. Bayó
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No.: 050387-TP
In re: Petition of Supra Telecommunications and Information Systems, Inc.
to Review BellSouth Promotional Tariffs

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Partial Motion to Dismiss and Answer, which we ask that you file in the captioned docket.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,


James Meza III (BSS)

Enclosures

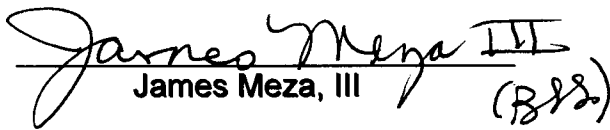
cc: All Parties of Record
Jerry D. Hendrix
R. Douglas Lackey
Nancy B. White

CERTIFICATE OF SERVICE
Docket No.: 050387-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via
Electronic Mail and FedEx this 1st day of August, 2005 to the following:

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James Meza, III (BLS)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Supra Telecommunications) Docket No. 050387-TP
And Information Systems, Inc. to Review)
BellSouth's Promotional Tariffs)
_____) Filed: August 1, 2005

BELLSOUTH'S PARTIAL MOTION TO DISMISS AND ANSWER

BellSouth Telecommunications, Inc. ("BellSouth") submits this Partial Motion to Dismiss and Answer to the Amended Petition filed by Supra Telecommunications and Information Systems, Inc. ("Supra") on July 21, 2005. As explained below, the Florida Public Service Commission ("Commission") should deny Supra's request for cancellation, suspension, postponement, and/or other modification of any of BellSouth's promotions and dismiss, as a matter of law, Supra's request that (1) the Commission find that BellSouth has an obligation to resell its promotional offerings under federal law; and (2) the Commission conduct a hearing in 45 days.

INTRODUCTION

Supra's Complaint is designed solely to insulate Supra from the rigors of a competitive marketplace. Supra attempts to achieve this competitive nirvana by suggesting that certain BellSouth promotional activities violate Florida and federal law. Supra's allegations are meritless. And, Supra's attempt to prevent BellSouth from competing should be summarily rejected, especially in light of Supra's own promotional activities. Indeed, in the recent past and continuing today, Supra has competed against BellSouth and other carriers for Florida consumers by offering "free" service for a month, "200 minutes of free Long Distance", a waiver of connection fees, gifts that exceed \$300 in value, or even a free Mercedes. Supra's Complaint also ignores the fact that, as illustrated below, promotional offerings are an established and effective

method that virtually all carriers employ to compete for customers in the highly competitive communications market.

- MCI offers two months of “**free service**” to new customers that sign up for its Neighborhood Plan. In addition, new customers of the Neighborhood Plan receive “3,000” airline miles with Northwest Airlines;
- AT&T offered new customers who switch to AT&T local service a **\$25 credit** on their long distance bill;
- Z-Tel (now Trinsic) offered one month of **free service** of its Z-Line Home Unlimited for new customers who switch to Z-Tel service (a value of \$49.99). In addition, Trinsic provides customers with unlimited bill credits for referring customers;
- ClearTel is offering new residential customers one month of free service;
- Momentum Telecom offers its customers a **\$20 credit** for referring a customer and has previously offered a chance to win **\$10,000** for referrals;
- Vonage offers new customers a “**Free First Month of Service!**”, a value up to \$24.99;
- AT&T’s CallVantage offers the “first month free” upon signing up for its Service Plan. CallVantage previously offered new customers a **\$120 credit** for six months worth of service;
- Sprint offers a \$30 Target Gift Card upon signing up for one of its Solutions Packages.
- Most of these carriers do not charge any conversion or switching fees.

This Commission has already determined in In re: Petition for Expedited Review and Cancellation of BellSouth Telecommunications, Inc.’s Key Customer Tariffs, Docket

No. 020119-TP, Order No. PSC-03-0726-FOF-TP, June 19, 2003 (Key Customer Order) that winback efforts, like the promotions at issue herein, benefit Florida consumers.¹ Specifically, the Commission held the following in the Key Customer Order:

We believe a win-back promotion such as the Key Customer offering is not, in and of itself, detrimental. In fact, win-back promotions can be very beneficial to Florida consumers by giving them a choice of providers with varied services at competitive prices.²

In support of this finding, the Commission cited In the Matter of Implementation of the Telecommunications Act of 1996, FCC Order 99-223 (Sept. 3, 1999), wherein the Federal Communications Commission (“FCC”) held:

Winback facilitates direct competition on price and other terms, for example, by encouraging carriers to “out bid” each other for a customer’s business, enabling the customer to select the carrier that best suits the customer’s needs.

Some commenters argue that ILECs should be restricted from engaging in winback campaigns, as a matter of policy, because of the ILEC’s unique historic position as regulated monopolies. Several commenters are concerned that the vast stores of CPNI gathered by ILECs will chill potential local entrants and thwart competition in the local exchange. We believe that such action by an ILEC is a significant concern during the time subsequent to the customer’s placement of an order to change carriers and prior to the change actually taking place. . . However, once a customer is no longer obtaining services from the ILEC, the ILEC must compete with the new service provider to obtain the customer’s business. We believe that such competition is in the best interest of the customer and see no reason to prohibit ILECs from taking part in this practice.

Because winback campaigns can promote competition and result in lower prices to consumers, we will not condemn such practices absent a showing they are truly predatory.

¹ See Key Customer Order at 40.

² Id.

FCC Order 99-32 at ¶¶ 68-70 (emphasis added). Contrary to the FCC's express finding authorizing ILECs to compete for former customers, Supra's Complaint is a calculated effort to prohibit BellSouth from **competing and providing Florida consumers with choices and lower prices** and thus should be rejected.

PARTIAL MOTION TO DISMISS

Supra's Complaint essentially consists of two counts: (1) BellSouth's service offerings, when combined with the subject promotions, violate Sections 364.3381 and 364.051(5), Florida Statutes because they result in BellSouth providing service below its costs; and (2) BellSouth is violating its federal resale obligations contained in the Telecommunications Act of 1996 (the "Act") by not making these promotions available for resale ("Resale Count"). See Complaint at ¶¶ 26-34. For the following reasons, the Commission does not have authority to address the Resale Count.

A. Standard for Motion to Dismiss.

A motion to dismiss questions whether the complaint alleges sufficient facts to state a cause of action as a matter of law. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In disposing of a motion to dismiss, the Commission must assume all of the allegations of the complaint to be true. Heekin v. Florida Power & Light Co., Order No. PSC-99-10544-FOF-EI, 1999 WL 521480 *2 (citing to Varnes, 624 So. 2d at 350). In determining the sufficiency of a complaint, the Commission should confine its consideration to the complaint and the grounds asserted in the motion to dismiss. See Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958).

B. The Commission Does Not Have Subject Matter Jurisdiction To Resolve the Resale Count.

Furthermore, in order to hear and determine a complaint or petition, a court or agency must be vested not only with jurisdiction over the parties, but also with subject matter jurisdiction to grant the relief requested by the parties. See Keena v. Keena, 245 So. 2d 665, 666 (Fla. Dist. Ct. App. 1971). Subject matter jurisdiction arises only by virtue of law – it must be conferred by constitution or statute and cannot be created by waiver or acquiescence. Jesse v. State, 711 So. 2d 1179, 1180 (Fla. 2nd Dist. Ct. App. 1998). This Commission, therefore, must dismiss a complaint or a petition to the extent that it asks the Commission to address matters over which it has no jurisdiction or to the extent that it seeks relief that the Commission is not authorized to grant. See, e.g., Order Granting Motion to Dismiss (PSC-01-2178-FOF-TP) in Docket No. 010345-TP (Nov. 6, 2001) (granting BellSouth’s Motion to Dismiss AT&T’s and FCCA’s Petition for Structural Separation because “the Petitions fail to state a cause of action upon which relief can be granted. Namely, we have neither Federal nor State authority to grant the relief requested, full structural separation.”); Order Denying Complaint and Dismissing Petition (PSC-99-1054-FOF-EI) in Docket No. 981923-EI (May 24, 1999) (dismissing a complaint seeking monetary damages against a public utility for alleged eavesdropping, voyeurism, and damage to property because the complaint involved “a claim for monetary damages, an assertion of tortious liability or of criminal activity, any and all of which are outside this Commission’s jurisdiction.”).

The Commission, therefore, must determine whether the Legislature has granted it any authority to find that BellSouth is in violation of its federal resale obligations under

the Act. In making these determinations, the Commission must keep in mind that the Legislature has never conferred upon the Commission any general authority to regulate public utilities, including telephone companies. See City of Cape Coral v. GAC Util., Inc., 281 So. 2d 493, 496 (Fla. 1973). Instead, “[t]he Commission has only those powers granted by statute expressly or by necessary implication.” See Deltona Corp. v. Mayo, 342 So. 2d 510, 512 n.4 (Fla. 1977); accord East Central Regional Wastewater Facilities Oper. Bd. v. City of West Palm Beach, 659 So.2d 402, 404 (Fla. 4th Dist. Ct. App. 1995) (noting that an agency has “only such power as expressly or by necessary implication is granted by legislative enactment” and that “as a creature of statute,” an agency “has no common law jurisdiction or inherent power . . .”).

Moreover, any authority granted by necessary implication must be derived from fair implication and intendment incident to any express authority. See Atlantic Coast Line R.R. Co. v. State, 74 So. 595, 601 (Fla. 1917); State v. Louisville & N. R. Co., 49 So. 39 (Fla. 1909). Finally, “any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it.” State v. Mayo, 354 So. 2d 359, 361 (Fla. 1977). As explained below, Supra cannot demonstrate that the Commission has the authority to grant the specific relief Supra requests.

As can be seen by a cursory review of Chapter 364, Florida Statutes, the Legislature has not granted the Commission any authority to determine whether a carrier has violated federal law. Moreover, while the Commission has authority under the Act in Section 252 arbitration proceedings to interpret and resolve issues of federal law, including whether or not the arbitrated issues comply with Section 251 and the FCC regulations prescribed pursuant to Section 251, the Act does not grant the Commission

with any general authority to resolve and enforce purported violations of federal law. See e.g., 47 U.S.C. § 251.

The Commission addressed this exact issue in Order No. PSC-03-1892-FOF-TP, issued on December 11, 2003, in Docket No. 030349-TP, In re: Complaint by Supra Telecommunications and Information Systems, Inc. Against BellSouth Telecommunications, Inc. Regarding BellSouth's Alleged Use of Carrier-to-Carrier Information ("Sunrise Order"). In the Sunrise Order, the Commission held that "[f]ederal courts have ruled that a state agency is not authorized to take administrative action based solely on federal statutes" and that "[s]tate agencies, as well as federal agencies, are only empowered by the statutes pursuant to which they are created." See Sunrise Order at 3 (citations omitted). The Commission further noted, however, it can construe and apply federal law "in order to make sure [its] decision under state law does not conflict" with federal law. Id. at 3-4. Accordingly, in the Sunrise Order, the Commission determined that it "cannot provide a remedy (federal or state) for a violation of" federal law but that the Commission can interpret and apply federal law to ensure that its decision under state law does not conflict with federal law. Id. at 5. The Commission noted that any "[f]indings made as a result of such federal law analysis would not, however, be considered binding on the FCC or any court having proper jurisdiction" Id.

The Commission echoed these same principles in Order No. PSC-04-0423-FOF-TP (Docket No. 031125-TP), wherein it dismissed a request by a CLEC to find that BellSouth violated federal law. Based on the Sunrise Order, the Commission dismissed

the federal law count of the complaint, holding “[s]ince Count Five relies solely on a federal statute as the basis for relief, we find it appropriate to dismiss Count Five.” Id.

Here, Supra asserts that “BellSouth Refuses to Allow Supra to Resell its Promotions in Violation of 47 USCA § 251.” See Complaint at 14; ¶ 7. In support of this alleged obligation, Supra cites generally to and primarily relies upon the Act, 47 U.S.C. § 251(c)(4), and FCC rules and decisions. Id. at ¶ 31. Further, Supra does not allege in any manner that the purported obligation to provide promotions at resale exists under state law.³ Simply put, Supra asks this Commission to declare that BellSouth has certain resale obligations under federal law related to its promotions. Pursuant to the Commission precedent cited above and Florida law, the Commission lacks jurisdiction to make such a finding. Accordingly, BellSouth requests that the Commission dismiss Supra’s Amended Complaint to the extent it seeks a finding that BellSouth has violated federal law or has an obligation under federal law to make its promotions available for resale.

C. Supra’s Request for a Hearing in 45 Days Should Be Dismissed.

In addition, Supra’s attempt to invoke Section 364.059(1)(a)’s 45 day hearing schedule should be summarily rejected because that statute is currently inapplicable to BellSouth. Specifically, Section 364.059 provides that only if a company has elected, pursuant to Section 364.051(6), “to have its local telecommunications services treated the same as its nonbasic service” does the 45 day hearing schedule apply. See Section

³ In fact, the only state statutes cited by Supra throughout the entire complaint is Sections 364.01, 364.08, 364.051, 364.059, 364.285, and 364.3381. None of these statutes deal with or refer to the resale of promotions or resale in general. Supra does rely on state law to suggest that the promotions in question constitute “direct telecommunications service.” See Complaint at ¶ 40. This suggestion, however, is ancillary to the principal allegation raised by Supra -- that BellSouth is in violation of its federal resale obligations (and not state law obligations).

364.059(1). Section 364.051(6) provides that it is triggered only “[a]fter a local exchange telecommunications company that has more than 1 million access lines in service has reduced its intrastate switched network access rates to parity. . .” BellSouth is not operating under either of these statutes and thus the 45 day hearing schedule contained in 364.059(1)(a) does not apply.

Moreover, even if it did apply to BellSouth, the 45 day hearing schedule is only applicable when a company is seeking a stay of a price reduction for basic service. Supra is not seeking a stay of any BellSouth basic service price reduction in its Complaint, and BellSouth, in fact, is not reducing prices for basic services. Thus, Supra’s reliance on Section 364.059 is factually inapplicable as well. For these reasons, the Commission should dismiss Supra’s request for a hearing in 45 days pursuant to Section 364.059, Florida Statutes.

ANSWER

1. BellSouth admits that Supra is a competitive local exchange carrier (“CLEC”) certificated by the Commission. The remainder of Paragraph 1 requires no response from BellSouth.

2. Paragraph 2 of the Amended Complaint requires no response from BellSouth.

3. BellSouth admits Paragraph 3 of the Amended Complaint.

4. BellSouth denies Paragraph 4 of the Amended Complaint, except to admit that the Commission’s December 2004 Annual Report on Competition speaks for itself and is the best evidence of its terms and conditions.

5. BellSouth denies the allegations contained in Paragraph 5 of the Amended Complaint.

6. BellSouth denies the allegations contained in Paragraph 6 of the Amended Complaint, except to admit that BellSouth filed the tariffs represented in Exhibits A-F of the Amended Complaint. Those tariffs speak for themselves and are the best evidence of their terms and conditions.

7. BellSouth denies the allegations contained in Paragraph 7 of the Amended Complaint, except to admit that BellSouth's promotions are not available for resale under federal law. BellSouth further states that, as set forth above in the Motion to Dismiss, the Commission does not have jurisdiction to address this allegation.

8. BellSouth denies the allegations contained in Paragraph 8 of the Amended Complaint, except to admit that BellSouth has two service offerings named Complete Choice and Preferred Pack. BellSouth denies Supra's description of these service plans but admits that the terms and conditions as well as the description of each service plan are contained in BellSouth's tariffs, which speak for themselves and are the best evidence of their terms and conditions. BellSouth also admits that it does collect a \$6.50 End User Common Line Charge from its end users who subscribe to the subject service plans.

9. BellSouth denies the allegations contained in Paragraph 9 of the Amended Complaint, except to admit that the FCC has determined that unbundled local switching is no longer a UNE.

10. BellSouth denies the allegations contained in Paragraph 10 of the Amended Complaint, except to admit that BellSouth uses several different promotions in

an attempt to compete for Florida consumers. Some of the promotions may be combined with other promotions while other promotions, including a number of those identified by Supra, cannot. The terms and conditions associated with each promotion are contained in BellSouth's tariffs, which are the best evidence of their terms and conditions.

11. BellSouth denies the allegations contained in Paragraph 11 of the Amended Complaint, except to admit that the subject promotion exists and that its description and conditions are contained in BellSouth's tariff, which is the best evidence of its terms and conditions.

12. BellSouth denies the allegations contained in Paragraph 12 of the Amended Complaint, except to admit that the subject promotions exist and that their description and conditions are contained in BellSouth's tariffs, which are the best evidence of their terms and conditions.

13. BellSouth denies the allegations contained in Paragraph 13 of the Amended Complaint, except to admit that the subject promotion exists and that its description and conditions are contained in BellSouth's tariff, which is the best evidence of its terms and conditions.

14. BellSouth denies the allegations contained in Paragraph 14 of the Amended Complaint, except to admit that the subject promotion exists and that its description and conditions are contained in BellSouth's tariff, which is the best evidence of its terms and conditions.

15. BellSouth denies the allegations contained in Paragraph 15 of the Amended Complaint, except to admit that some of the promotions may be combined

with other promotions while other promotions, including some of those identified by Supra, cannot. The terms and conditions associated with each promotion are contained in BellSouth's tariffs, which are the best evidence of their terms and conditions.

16. BellSouth denies the allegations contained in Paragraph 16 of the Amended Complaint.

17. BellSouth denies the allegations contained in Paragraph 17 of the Amended Complaint, except to admit that Sections 364.01(4)(i), 364.3381, and 364.0519(1)(a) Florida Statutes speaks for themselves and are the best evidence of their terms and conditions. BellSouth denies that any of these statutes have been violated or that Section 364.059(1)(a) is applicable to the instant proceeding.

18. BellSouth denies the allegations contained in Paragraph 18 of the Amended Complaint, except to admit that Sections 364.3381(3) and 364.01(4)(g), Florida Statutes speak for themselves and are the best evidence of their terms and conditions.

19. BellSouth denies the allegations contained in Paragraph 19 of the Amended Complaint, except to admit the existence of Docket No. 990043-TP and that the Commission voted on matters filed in Docket No. 990043-TP. The documents filed in Docket No. 990043-TP and orders or findings of the Commission speak for themselves and are the best evidence of their terms and conditions. BellSouth states, however, that Docket No. 990043-TP is inapplicable to this proceeding.

20. BellSouth denies the allegations contained in Paragraph 20 of the Amended Complaint, except to admit that TELRIC rates, in general, require BellSouth to provide its services to CLECs below its costs.

21. BellSouth denies the allegations contained in Paragraph 21 of the Amended Complaint.

22. BellSouth denies the allegations contained in Paragraph 22 of the Amended Complaint.

23. BellSouth denies the allegations contained in Paragraph 23 of the Amended Complaint.

24. BellSouth denies the allegations contained in Paragraph 24 of the Amended Complaint.

25. BellSouth denies the allegations contained in Paragraph 25 of the Amended Complaint.

26. BellSouth denies the allegations contained in Paragraph 26 of the Amended Complaint, except to admit that Sections 364.3381 and 364.051(5)(c), Florida Statutes speak for themselves and are the best evidence of their terms and conditions.

27. BellSouth denies the allegations contained in Paragraph 27 of the Amended Complaint.

28. BellSouth denies the allegations contained in Paragraph 28 of the Amended Complaint, except to admit that for some promotions there are no term requirements.

29. BellSouth denies the allegations contained in Paragraph 29 of the Amended Complaint.

30. BellSouth denies the allegations contained in Paragraph 30 of the Amended Complaint, except to admit that the quoted language from Order No. PSC-03-

0726-FOF-TP is a partial quote from the Commission's Order. That Order speaks for itself and is the best evidence of its terms and conditions.

31. Paragraph 31 of the Amended Complaint contains Supra's description of what it believes BellSouth's obligations are under federal law to make its promotional offerings available for resale. The legal authority cited by Supra speaks for itself and thus do not require a response from BellSouth. To the extent one is required, the allegations are denied. And, as set forth more fully in BellSouth's Motion to Dismiss, the Commission does not have the authority to find BellSouth in violation of its resale obligations under federal law, as requested by Supra.

32. BellSouth denies the allegations contained in Paragraph 32 of the Amended Complaint, except to admit that BellSouth's promotions are not available for resale under federal law. Again, however, as set forth more fully in BellSouth's Motion to Dismiss, the Commission does not have the authority to find BellSouth in violation of its resale obligations under federal law, as requested by Supra.

33. BellSouth denies the allegations contained in Paragraph 33 of the Amended Complaint, except to admit that resale is an obligation under the Act. However, as set forth more fully in BellSouth's Motion to Dismiss, the Commission does not have the authority to find BellSouth in violation of its resale obligations under federal law, as requested by Supra.

34. BellSouth denies the allegations contained in Paragraph 34 of the Amended Complaint, except to state that the FCC orders and rules cited therein speak for themselves and are the best evidence of their terms and conditions.

35. BellSouth denies the allegations contained in Paragraph 35 of the Amended Complaint.

36. BellSouth denies the allegations contained in Paragraph 36 of the Amended Complaint, except to admit that Docket No. P-110, Sub 72b exists at the North Carolina Utilities Commission ("NCUC") and that the orders of that state commission speak for themselves. And, as set forth more fully in BellSouth's Motion to Dismiss, the Commission does not have the authority to find BellSouth in violation of its resale obligations under federal law, as requested by Supra.

37. BellSouth denies the allegations contained in Paragraph 37 of the Amended Complaint, except to admit that quoted language is a partial quote from the NCUC's Order. That Order speaks for itself and is the best evidence of its terms and conditions. And, as set forth more fully in BellSouth's Motion to Dismiss, the Commission does not have the authority to find BellSouth in violation of its resale obligations under federal law, as requested by Supra.

38. BellSouth denies the allegations contained in Paragraph 38 of the Amended Complaint, except to admit that quoted language is a partial quote from the NCUC's Order. That Order speaks for itself and is the best evidence of its terms and conditions. And, as set forth more fully in BellSouth's Motion to Dismiss, the Commission does not have the authority to find BellSouth in violation of its resale obligations under federal law, as requested by Supra.

39. BellSouth denies the allegations contained in Paragraph 39 of the Amended Complaint, except to admit that quoted language is a partial quote from the NCUC's Order. That Order speaks for itself and is the best evidence of its terms and

conditions. And, as set forth more fully in BellSouth's Motion to Dismiss, the Commission does not have the authority to find BellSouth in violation of its resale obligations under federal law, as requested by Supra.

40. BellSouth denies the allegations contained in Paragraph 40 of the Amended Complaint, except to admit that quoted language is a partial quote from Order No. PSC0-1-1769-FOF-TL. That Order speaks for itself and is the best evidence of its terms and conditions. And, as set forth more fully in BellSouth's Motion to Dismiss, the Commission does not have the authority to find BellSouth in violation of its resale obligations under federal law, as requested by Supra.

41. BellSouth denies that Supra is entitled to any of the relief requested in the WHEREFORE clause.

42. Any allegation not expressly admitted herein (including any footnotes) is denied.

AFFIRMATIVE DEFENSES

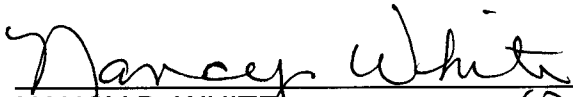
1. Supra's' Amended Complaint fails to state a cause of action upon which relief can be granted.

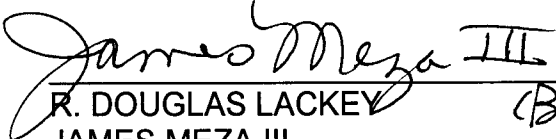
2. The Commission lacks subject matter jurisdiction to find that BellSouth is in violation of federal law.

WHEREFORE, for the foregoing reasons, BellSouth requests that the Commission grant BellSouth's Partial Motion to Dismiss and enter judgment in BellSouth's favor on all other counts.

Respectfully submitted this 1st day of August, 2005.

BELLSOUTH TELECOMMUNICATIONS, INC.


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