

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking into the Review of the  
California High Cost Fund-A Program.

Rulemaking 11-11-007  
(Filed November 10, 2011)

**REPLY COMMENTS OF THE UTILITY REFORM NETWORK ON ALJ RULING  
SEEKING COMMENT ON GENERAL GUIDELINES FOR ALLOWING WIRELINE  
COMPETITION IN AREAS SERVED BY SMALL LOCAL EXCHANGE CARRIERS**

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## I. INTRODUCTION

The Utility Reform Network (“TURN”) hereby submits reply comments on the November 8, 2019 *Administrative Law Judges’ Ruling Seeking Comment on General Guidelines for Allowing Wireline Competition in Areas Served by Small Local Exchange Carriers* (“Ruling” or “Competition Ruling”). On November 19, 2019, ALJ McKenzie served an electronic ruling that granted an extension of time to January 6 and January 21, 2020, respectively, to file comments in response to the Ruling; therefore, these reply comments are timely.

As discussed in opening comments, TURN supports the Commission’s work to craft criteria and guidelines for its analysis of applications for competitive entry. The stakes are high for customers in Small LEC territory and for California ratepayers that support subsidies currently flowing to A-Fund companies. Like TURN, CCTA and the Small LECs point to key Commission policies and principles that should serve as the basis for the framework governing competitive access into the Small LEC areas. Yet, certain of the proposals made by CCTA and the Small LECs, as well as the TDS companies, are not in the best interest of Small LEC customers and do not support key public policies, and should be rejected.

## II. DISCUSSION

### **A. The Commission has the Authority and Jurisdiction to Structure Competitive Entry**

#### *1. Hearings are not necessary*

The Small LECs argue that the Commission must hold hearings before it can modify its Phase 1 decision to allow competitive entry into Small LEC territory.<sup>1</sup> The Small LECs point to Public Utilities Code Section 1708, that requires the Commission to hold hearings before it can modify a prior decision that was adopted through an evidentiary hearing. While the Commission

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<sup>1</sup> Small LEC Opening Comments at p. 3.

held hearings on competitive access in Phase 1, the Small LECs read the Commission’s 2014 Phase 1 Decision too narrowly. It is not the case that “*any action* to open an Independent Small LEC territory to competition”<sup>2</sup> in Phase 2 must be supported by hearings. Indeed, the lengthy discussion regarding the issue of competitive entry in D.14-12-084 includes findings that the issue was merely “not ripe” due to a lack of requests for entry by CLECs and a lack of exemption requests by the Small LECs<sup>3</sup> and that competitive entry was not appropriate “at this time.”<sup>4</sup> The Commission clearly anticipated that it would make “a final determination” on competitive entry in Phase 2 of this proceeding.<sup>5</sup> The Commission further found that the necessary analysis for competitive entry would also consist of a case-by-case review of future requests for competition in Small LEC areas, which is exactly what has been announced in this phase of the proceeding.<sup>6</sup>

Far from modifying or reversing its 2014 Decision, the Commission is moving forward with the findings and legal conclusions it made in 2014, and has requested comments on the need for a further review of the impacts of competitive entry and the adoption of a “baseline of conditions,” framework, and rules associated with potential competitive entry.<sup>7</sup> Thus, there is no need for further hearings on competitive entry in this proceeding.<sup>8</sup>

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<sup>2</sup> Small LECs Opening Comments at p. 3.

<sup>3</sup> D.14-12-084 at p. 47, 53, COL 42.

<sup>4</sup> D.14-12-084 at p. 45, COL 9, 40.

<sup>5</sup> D.14-12-084 at p. 58, OP 5, 7.

<sup>6</sup> D.14-12-084 at p. 58-59; See also, ALJ Ruling Seeking Comment on General Guidelines for Allowing Wireline Competition (“Competition Ruling”), November 8, 2019 at p. 2; CCTA Opening Comments at p. 4 (case-by-case analysis is consistent with the “location specific” analysis contemplated by the 2014 Decision).

<sup>7</sup> D.14-12-084 at p. 59. The Commission ordered the Broadband Study to provide a baseline of conditions, but has subsequently determined that additional comments are necessary. Fourth Amended Scoping Memo, March 22, 2019, p. 4; Competition Ruling, November 8, 2019, at p. 2-3.

<sup>8</sup> The Commission may determine that hearings are necessary in the individual application proceedings for competitive entry by the CLECs.

2. *Commission is not preempted from adopting conditions on competitive entry*

CCTA acknowledges that the Commission will determine competitive entry on a case-by-case basis, citing to the recent Comcast Application for entry into parts of Ponderosa territory as an example such a fact-specific review.<sup>9</sup> CCTA also argues that, therefore, “it is wrong for the Commission to impose any blanket conditions on CLEC entry into Small LEC service areas pursuant to Section 253(b) of the Communications Act.”<sup>10</sup> CCTA argues that provisions of Section 251 should control and that any conditions placed on competitive entry by the Commission would be in error.<sup>11</sup>

Yet CCTA fails to address the Commission’s finding in 2014 that it has a duty to balance several interests when considering CLEC entry into Small LEC territory,

We acknowledge that competition is an important goal in the territories covered by the CHCF-A program, but we must balance that objective with other goals such as federal and state universal service in 47 U.S.C. Section 254 and Public Utilities Code Section 871, and the public safety, reliability, affordability, and economic development goals of California state law.<sup>12</sup>

The Commission further ruled that Section 251 was not relevant to the analysis of competitive entry in 2014, in part, because there had been no bona fide requests for interconnection and unbundling under Section 251(c).<sup>13</sup> Further, the Commission found no requests from CLECs to Small LECs for elements offered under Section 251(b) and also found that Small LECs were generally complying with requirements for traffic exchange under Section 251(a).<sup>14</sup> Similarly,

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<sup>9</sup> CCTA Opening Comments at p. 4.

<sup>10</sup> CCTA Opening Comments at p. 8.

<sup>11</sup> CCTA Opening Comments at p. 4-10.

<sup>12</sup> D.14-12-084 at p. 38

<sup>13</sup> D.14-12-084 at p. 42-43, FOF 45-48, COL 42.

<sup>14</sup> *Id.*

the Commission found that none of the Small LECs had requested an exemption from 251 obligations under Section 251(f).<sup>15</sup>

CCTA's opening comments do not address the Commission's 2014 findings and conclusions, nor do they provide information or evidence that those conclusions regarding the applicability of Section 251 obligations have significantly changed. Indeed, CCTA confirms that the Commission's prior findings regarding the absence of requests for competitive access pursuant to Section 251 remain true today.<sup>16</sup> CCTA further describes the growth of wireless and broadband communications options, independent of any reliance on interconnection and unbundling under Section 251.<sup>17</sup> Moreover, CCTA fails to acknowledge the distinction that the Commission is not considering any specific requests for competitive access pursuant to Section 251 in this proceeding, but instead requests input on the general framework and conditions for competitive entry to uphold key policies as espoused in Section 253(b) and Commission precedent and public policies.

Nondiscriminatory and competitively neutral conditions supporting a state's authority to preserve and advance universal service, for example, are not mutually exclusive or in direct conflict with the interconnection and unbundling obligations under Section 251. CCTA does not address the Commission's concerns, as stated in 2014, regarding the need to balance policy considerations in rural and high cost areas of the state, except to point out that the Commission already has "dozens" of requirements in place.<sup>18</sup> While Section 253 requires that state conditions

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<sup>15</sup> *Id.*

<sup>16</sup> CCTA Opening Comments at p. 5 (Rural exemption from obligations under Section 251c is "largely inapplicable" because CLECs typically do not seek rights under Section 251c).

<sup>17</sup> CCTA Opening Comments at p. 14-17.

<sup>18</sup> CCTA Opening Comments at p. 8. (Citing to a single decision that adopts a narrow General Order with only a few consumer protections).

must be nondiscriminatory and must uphold public service goals, CCTA fails to demonstrate that the Commission is preempted or otherwise prohibited from designing a framework and imposing conditions on wireline voice entry into Small LEC territories.

### 3. *Conditions are necessary*

CCTA also argues that the Commission should not exercise any authority it might have to impose conditions, because such conditions will be unnecessary and potentially harmful to the development of competition.<sup>19</sup> However, CCTA also acknowledges that, “no one knows or can reasonably predict what will occur [when CLECs are allowed entry to Small LEC territory] because each Small LEC is different and CLEC entry is likely to proceed differently in each Small ILEC’s service territory.”<sup>20</sup> As both TURN and the Small LECs discuss in opening comments, the adoption of targeted conditions will protect consumers in Small LEC territory, support meaningful competition, support reliable and affordable service in Small LEC territory, and do not conflict with the case-by-case analysis called for in the ALJ Ruling.<sup>21</sup> In fact, the adoption of a framework in this proceeding will put CLECs on notice that the Commission will apply this framework to each CLEC application to uphold key public policies and principles.

TURN agrees with CCTA that broader market trends make it difficult to demonstrate direct causality of harm to Small LECs from new entry for wireline voice competition.<sup>22</sup> Yet, CCTA’s discussion of the statistics and examples of current intermodal offerings in Small LEC areas are exactly the types of evidence that demonstrate the need for critical analysis and conditions on competitive entry.<sup>23</sup> CCTA’s claim that it is “untenable” to consider customer and

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<sup>19</sup> CCTA Opening Comments at p. 10-12.

<sup>20</sup> CCTA Opening Comments at p 11.

<sup>21</sup> TURN Opening Comments at p. 6-7, 9-11; Small LECs Opening Comments at p. 5-8.

<sup>22</sup> CCTA Opening Comments at p. 14-15

<sup>23</sup> CCTA Opening Comments at p. 14-16

revenue impacts from increased authority for CLECs to compete for wireline voice customers<sup>24</sup> is, itself, an overreach. Indeed, based on the marketplace in California to date, it is reasonable to expect that additional competition from all technologies, especially granting CLECs' the authority to bundle wireline local voice with services currently being offered in the most lucrative markets in Small LEC areas, will cause further revenue loss to the Small LECs.<sup>25</sup> CCTA refuses to acknowledge the likely zero-sum game that expanded competitive entry will cause. Combined with the high costs of service and limited customer base in Small LEC service areas, the most likely outcome is that Small LECs will experience declining revenues and rising unit costs that will fall to the A-Fund to counterbalance.

When CLECs are successful – such as the potential for Comcast in Tesoro Viejo- then Small LECs lose customers, potential business opportunities, and revenue.<sup>26</sup> The potential public interest of competitive entry to at least some Small LEC consumers will only be recognized if it is implemented in a fair and measured way with specific conditions that account for the unique circumstances in these areas. For example, Small LECs have an obligation to serve as COLRs and to maintain their networks even in the face of lost customers and revenue, on the mere chance that the CLEC will exit and their customers may return. The history of these

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<sup>24</sup> CCTA Opening Comments at p. 14 (argument supported by citations to highly criticized Mission Consulting Study which finds that revenue impacts are unknown “by virtue of CPUC regulations” and the limits on pricing flexibility. (at p. 41) CCTA fails to acknowledge the very next paragraph which finds that benefits to consumers from competitive entry are also “unknown” and that competition “may not necessarily result in substantial benefit to the general customer base.”

<sup>25</sup> TURN Opening Comments on Fourth Amended Scoping Memo, May 21, 2019 at p. 4-6, Roycroft Declaration at p. 24-30.

<sup>26</sup> CCTA's response to the Ruling's question regarding impact of competitive entry, argues that the Tesoro Viejo agreement with Comcast will have no impact on Ponderosa because it is a greenfield development of new customers, and thus no existing customers will be lost is shortsighted and self-serving. CCTA Opening Comments at p. 12. Although difficult to specifically predict and quantify, it is undeniable that if approved, Ponderosa will lose significant potential business opportunities to Comcast that will impact the company's bottom line.

service territories strongly suggests that no other carrier would step in to provide service in areas of their territories that are difficult and expensive to serve, with costs spread out over only a small base of customers. Therefore, conditions on competitive entry must balance the COLR obligations and pricing restrictions placed on the Small LECs with the advantages of incumbency and subsidies flowing to the Small LECs; while, acknowledging that CLECs enjoy pricing flexibility, and are free to offer the most lucrative customers only the most lucrative services.

### **B. Small LECs' Proposed Conditions Do Not Strike a Proper Balance**

In its opening comments, TURN proposes a minimum set of conditions that it believes the Commission should apply during the individual CLEC application review processes to ensure that competitive entry will advance the Commission's public policy principles of universal service, competitive access, and broadband access.<sup>27</sup> TURN's proposed conditions include must-serve obligations within the CLEC's defined service area,<sup>28</sup> compliance with existing service quality regulations and emergency calling services,<sup>29</sup> filing requirements for rates and changes and notice requirements for rate increases and facility buildout,<sup>30</sup> limits on exclusivity agreements,<sup>31</sup> and enforcement of an updated set of consumer protection rules based on D.95-07-054.<sup>32</sup> Because CLECs will be unlikely to make essential voice and broadband services available throughout Small LEC service areas, the Small LECs must continue to serve on a

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<sup>27</sup> TURN Opening Comments at p. 3-4. See also, Small LEC Opening Comments at p. 5.

<sup>28</sup> TURN Opening Comments at p. 6 (see also D.95-07-054, Appendix A)

<sup>29</sup> TURN Opening Comments at p. 7.

<sup>30</sup> TURN Opening Comments at p. 7, 16.

<sup>31</sup> TURN Opening Comments at p. 10.

<sup>32</sup> TURN Opening Comments at p. 13-16.



nondiscriminatory basis to provide access to affordable and reliable basic service and robust broadband to all customers.

The Small LECs acknowledge the impact from competitive entry of wireline voice services and make their own proposals for conditions to mitigate these impacts. While TURN notes the similarities between its proposals and the Small LECs' general framework and some of their proposed conditions,<sup>33</sup> TURN finds that many of the Small LECs' conditions go too far and fail to strike a proper balance between consumer protection and meaningful competition in the Small LEC service areas.

*1. Small LEC proposed conditions*

TURN agrees with the Small LECs that it is unnecessary to require CLECs to serve as Carriers of Last Resort in the Small LEC areas where CLECs apply for entry.<sup>34</sup> However, the Small LECs propose a "must serve" requirement throughout each *exchange* where a CLEC proposes to serve, including a requirement to offer all of the elements of basic service.<sup>35</sup> TURN believes that a requirement such as this raises significant entry barriers and lacks support in the record. A local exchange area in a Small LEC service area could encompass hundreds of square miles and include difficult terrain and widely dispersed customers. Currently, CLECs are required to ensure that their local voice customers can receive and complete calls throughout an exchange, but are not required to serve an entire exchange.<sup>36</sup> The Small LECs are rate regulated and receive millions of dollars of subsidies to serve these high cost areas. In some areas, the Small LECs' proposal essentially amounts to imposing COLR obligations for CLECs, resulting

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<sup>33</sup> Small LEC Opening Comments at p. 6-8.

<sup>34</sup> Small LEC Opening Comments at p. 6, 10.

<sup>35</sup> *Id*

<sup>36</sup> D.95-07-054 at Appendix A (CLEC Rules); D.12-12-038, Appendix A (basic service rules)

in needless duplication and potentially higher costs of supporting universal service objectives. Moreover, TURN has seen no evidence that the market for wireline phone service in many of these exchanges can support multiple basic service providers.<sup>37</sup> Therefore, TURN urges the Commission to reject the Small LECs' proposal and, instead, impose a must-serve requirement in the CLEC service area as defined by the CLEC in its application for entry. During the fact-specific review of that application, stakeholders can argue whether the CLEC has appropriately defined its service area in a nondiscriminatory manner as supported by the CLEC rules.

TURN supports the Small LECs' proposals that CLEC entry be conditioned on compliance with GO 133 service quality rules and all emergency service requirements.<sup>38</sup> Both TURN and the Small LECs emphasize the importance of conditions on CLEC entry that ensure CLEC customers throughout the serving area of the CLEC continue to have robust and reliable communications, even in emergency situations. This should include requiring CLECs to demonstrate that in newly approved entry into Small LEC territories, the networks they construct will continue to function during prolonged power outages. Most Small LEC customers are served by TDM networks that are supported by robust back-up power in central offices and at remote terminals. The Small LECs serve sparsely populated rural areas that are prone to power outages, whether caused by natural disasters or public safety power shutoffs. CLECs entering Small LEC territory are expected to target the most concentrated areas, and in many cases will construct new facilities. In light of the Commission's continued concerns regarding the

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<sup>37</sup> TURN Opening Comments on Fourth Amended Scoping Memo, May 21, 2019 at p. 5, Roycroft Declaration at p. 25.

<sup>38</sup> Small LECs Opening Comments at p. 6-7, 8.

resiliency of the communications network,<sup>39</sup> requiring sufficient back-up power in these new facilities to ensure reliability during a significant power outage should impose minimal burdens on the CLEC but huge benefits to customers in these fire-prone and isolated areas.

TURN also agrees that the CLECs should have reporting and notice requirements for facility deployment, service offerings, rates, and rate changes.<sup>40</sup> However, TURN finds that the Small LECs' proposed requirement that CLECs comply with General Order 77 and provide information to the Commission on affiliate transactions and cost allocation is an over reach. As rate-regulated entities with an opportunity to earn a reasonable rate of return and to receive millions of dollars in federal and state subsidies, it is appropriate that the Small LECs provide the Commission with information about their operations, management earnings, and executive functions to ensure that the carriers are meeting their obligations and properly accounting for ratepayer supported funding. The CLECs do not have these same benefits of incumbency or ratemaking considerations and, therefore, such reporting requirements are wholly unnecessary.

## *2. Calls for rate case reform overstep*

The Small LEC proposal for rate case reform goes beyond the scope of these comments and the Ruling.<sup>41</sup> Moreover, some proposals regarding rate reform are being considered in other parts of this proceeding.<sup>42</sup> The Commission must consider how competitive entry will impact Small LEC earnings, A-Fund subsidies, and COLR obligations as it considers proposals such as imputation, changes to true-up filings, expense caps and other rate case reforms. However, here again, the

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<sup>39</sup> See, D.19-08-025, ACR (November 13, 2019) and Phase 2 Scoping Memo (December 18, 2019), R.18-03-013 (Commission determined the criticality of sustaining and restoring essential communications functions, and delivery of critical services in disastrous conditions.)

<sup>40</sup> Small LEC Opening Comments at p. 6-7.

<sup>41</sup> Small LEC Opening Comments at p. 11, 13-14; See also TDS Opening Comments.

<sup>42</sup> Fourth Amended Scoping Memo.

Small LECs, along with the TDS companies, overstep by suggesting that approval of even the *potential* for competitive entry should automatically open the door to a “streamlined” process for Small LEC rate cases.

TURN would potentially support consideration of specific proposals for limited promotional pricing flexibility and small changes in rate case filing and advice letter obligations on a case-by-case basis in areas where CLECs are actively and aggressively competing. These types of changes would be targeted to mitigate the advantages that CLECs have with pricing and service related flexibility -- a more nimble Small LEC competitor could benefit customers in those areas with competition. However, any changes to the Small LECs’ rate case and advice letter requirements should be proportionate to the scope and scale of competitive access granted to the CLEC.

Unfettered “competition” between the CLEC and ILEC cannot be supported on the backs of the remaining Small LEC customers and California ratepayers who will likely experience rate increases, and subsidy increases, to offset the revenue losses from the lower rates and increased competition in that specific area. The Commission must continue to take a critical look at Small LEC revenue and expenses to ensure that these companies are not over earning and are earning the appropriate ratepayer funded subsidies, including A-Fund subsidy.

### *3. TDS proposed conditions also overreach*

The TDS proposal provides a stark example of the risks to competitive entry and why some overarching rules and framework should be adopted. TDS is proposing that the Commission release these companies from many of their obligations to their customers so that they can

“meet” the CLECs on a theoretically level playing field.<sup>43</sup> TURN strongly urges the Commission to find that the appropriate policy approach is not to “dumb down” or degrade the protections for these vulnerable small LEC customers. Rather, the Commission should strive to strike the balance and design the framework to meet the policy goals of competition, while upholding broader policy goals for universal service, consumer protections, emergency services and access to broadband.

### **C. Proposed CLEC Rules Can Serve as a Starting Point**

TURN agrees with CCTA and the Small LECs that this is not the appropriate proceeding to consider changes to the current CLEC rules that would apply to all CLECs operating in the state.<sup>44</sup> However, TURN supports the use of the 1995 CLEC rules as the base or starting point of the rules and conditions the Commission adopts here that would then be applied to the Commission’s analysis of each CLEC entry application for Small LEC areas.<sup>45</sup>

TURN disagrees with CCTA’s argument that, because there is already intermodal competition within the Small LEC area, there is no need for rules or conditions on further CLEC entry,<sup>46</sup> including application of a revised version of these rules. As discussed above and in previous comments, precisely because the Small LECs serve as COLRs in areas where wireless and other wireline competitors serve the most lucrative customers, authorization of wireline voice competition that will make it easier to compete for the Small LECs’ basic service

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<sup>43</sup> TDS Opening Comments at p. 2, 3 (Calling for “regulatory parity” with the CLECs and calling for the Commission to provide Small LECs with pricing and contract flexibility and reporting akin to current LECs under the minimal Uniform Regulatory Framework obligations.)

<sup>44</sup> CCTA Opening Comments at p. 21-22; Small LECs Opening Comments at p. 14.

<sup>45</sup> TURN Opening Comments at p. 13-16.

<sup>46</sup> CCTA Opening Comments at p. 22-23

customers must be properly managed. Revising these 1995 rules is the most efficient and logical way to proceed.

While TURN agrees with the Small LECs that the 1995 rules are outdated,<sup>47</sup> the Commission does not have to start from scratch to develop a set of minimum requirements that incorporate necessary conditions on CLEC entry tailored to Small LEC areas. Beyond the fact that the rules are outdated, the Small LECs do not support their argument that starting with the 1995 rules will take more time than starting from scratch. With some changes to the current rules, plus incorporation of additional, more contemporary, rules and conditions discussed in opening comments, the Commission can move forward with a framework and set of conditions to protect Small LEC customers and all ratepayers in the face of competitive entry.<sup>48</sup> In its opening comments TURN highlighted some areas where the Commission could focus changes, but urge the Commission to take further comment on a staff set of proposed rules using the current rules as a starting point.<sup>49</sup>

### **III. CONCLUSION**

Even with further input from stakeholders, TURN remains concerned regarding the impact of competitive entry on Small LEC carriers' ability to provide reliable and affordable services in high cost areas. TURN finds that competitive entry must be built upon the proper regulatory framework that supports universal service, broadband access and meaningful

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<sup>47</sup> Small LECs Opening Comments at p. 14-15; TURN Opening Comments at p. 13, 15.

<sup>48</sup> For example, since 1995, the Commission has adopted several decisions imposing consumer protection and competitive neutrality rules including ETC Rules (Resolution T-17002); notice and exit rules on CLECs (D.10-07-024), cramming and slamming rules (D.10-10-034 and D.06-03-013), in language marketing rules (D.07-07-043), updated financial rules (D.13-05-035), and reporting requirements.

<sup>49</sup> For example, as discussed above, the Commission should consider requiring CLECs to demonstrate that the networks they construct will continue to function during prolonged power outages, similar to the Small LECs' TDM networks.

competitive choices for residential and small business customers, along with a ratesetting process that will look to set just and reasonable rates and allow Small LECs to continue to meet their COLR obligations. The Commission must further impose specific conditions addressing local conditions, consumer protections, and other requirements, competitive entry could benefit customers of Small LEC carriers.

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Respectfully submitted,

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