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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In re Application of:)
)

Sirius Satellite Radio Inc.)
Request for Special Temporary Authority)
_____)

File No. SAT-STA-20010724-00064

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**Opposition of Sirius Satellite Radio Inc.
to AT&T Wireless Services, Inc. Application for Review**

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SUMMARY

The Federal Communications Commission ("FCC" or "Commission") should dismiss or deny AT&T Wireless Services, Inc.'s ("AWS") request for Commission review of the International Bureau's decision to grant Sirius Satellite Radio Inc. ("Sirius") special temporary authority ("STA") to operate a nationwide network of satellite digital audio radio service ("satellite DARS") terrestrial repeaters in the 2320 to 2332.5 MHz band.

AWS' application must be dismissed because it contains several serious procedural defects. Notably, AWS lacks standing in this proceeding because it no longer intends to provide fixed wireless services in adjacent WCS spectrum and thus the issues raised in its application are moot. Similarly, the Commission's adoption of terrestrial repeater rules will obviate the arguments raised in AWS' application for review. AWS also does not meet the basic requirements for applications for review, set forth in Section 1.115 of the Commission's Rules; AWS' application for review fails to present clear questions for Commission consideration and factors supporting such review. It also impermissibly relies on new questions of fact, which the International Bureau has not passed upon.

Even if the Commission forgives these procedural shortfalls, AWS' application is substantively without merit and must be denied. The International Bureau acted appropriately in granting Sirius' STA by *Order* and *Modified Order* on September 17, 2001 and October 15, 2001, respectively, pursuant to its delegated authority contained in Section 309(f) of the Communications Act of 1934, as amended, and Section 25.120 of the Commission's Rules. The International Bureau rightly held that the delay in

concluding the four-year old terrestrial repeater rulemaking established “extraordinary circumstances” such that grant of an STA would serve the public interest by allowing Sirius to provide and consumers to receive uninterrupted satellite DARS pending the adoption of final rules. Issuance of temporary authority was also consistent with the FCC’s long-standing recognition that terrestrial repeaters were a key component of satellite DARS.

Moreover, the International Bureau correctly found that Sirius disclosed the “full particulars” of its proposed operations. This Commission simply should not tolerate AWS’ erroneous claims that Sirius has failed to make the requisite disclosures, including those established by the *Sirius STA Order* relating to *all* (2 kW or below as well) of Sirius’ repeaters. AWS conveniently omits a critical fact that on September 25, 2001, counsel for Sirius sent AWS’ counsel a letter detailing all required information.

In its *Sirius STA Orders*, the International Bureau made clear that Sirius’ authority was not without limit and included several conditions designed to address interference concerns raised by WCS (including AWS), MDS, and ITFS licensees, issues that will, no doubt, be revisited by the Commission in its terrestrial repeater rulemaking proceeding. Sirius welcomes these new rules, as an important next step to finalizing the regulatory framework for satellite DARS. However, absent these long-awaited rules, the Commission should not reverse the International Bureau’s decision that Sirius should be afforded temporary authority to operate its licensed facilities and provide satellite DARS service to the public.

Accordingly, Sirius respectfully requests that this Commission dismiss or deny AWS’ application for review.

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obviate the arguments raised in AWS' application for review. Furthermore, the Commission should dismiss summarily AWS' request on the basis of its numerous procedural deficiencies, notably the failure to present a clear question for Commission consideration or any factors supporting such review. Even if the Commission forgives these procedural defects, AWS' application is substantively without merit and should be denied.

I. BACKGROUND

On July 24, 2001, Sirius submitted to the International Bureau a procedurally and substantively sound request for STA under Section 25.120 of the Commission's Rules, including a detailed statement of how the STA would serve the public interest.

Following a round of comments and replies, the International Bureau granted Sirius' STA by Order and Modified Order on September 17, 2001 and October 15, 2001, respectively.

In these orders, the bureau determined that issuance of temporary authority was consistent with the FCC's long-standing recognition that terrestrial repeaters were a key component of the intended service.³ Moreover, because the FCC had not yet concluded

³ *Satellite CD Radio, Inc., Application for Authority to Construct, Launch, and Operate Two Satellites in the Satellite Digital Radio Service*, 13 FCC Rcd 7971, 7994 (1997) (Order and Authorization), modified by *Sirius Satellite Radio, Inc. for Minor Modification of License to Construct, Launch and Operate a Non-Geostationary Satellite Digital Audio Radio Service System*, 16 FCC Rcd 5419 (2001) (Order and Authorization). In fact, the Commission has expressly defined the satellite DARS service to include such terrestrial augmentation. Satellite DARS is defined as "[a] radiocommunications service in which audio programming is digitally transmitted by one or more space stations directly to fixed, mobile, and/or portable stations, and which may involve complementary repeating terrestrial transmitters." 47 C.F.R. § 25.201. See also *Establishment of Rules and Policies for the Digital Audio Radio Service in the 2310-2350 MHz Frequency Band*, 12 FCC Rcd 5754, 5770 (1997) (Report and Order Memorandum Opinion and Order and Further Notice of Proposed Rulemaking) ("*Terrestrial Repeater NPRM*") (stating "[i]t has been widely known and discussed in the record that DARS providers will need to rely on terrestrial repeaters and gap fillers.>").

its four year old terrestrial rulemaking proceeding, the agency concluded that Sirius' STA presented "extraordinary circumstances" and would serve the public interest by enabling Sirius to begin its initial commercial rollout and thus allowing consumers to receive uninterrupted nationwide satellite DARS service, pending the outcome of the agency's rulemaking.⁴ The International Bureau also made clear that Sirius' authority was not without limit by including several conditions designed to address interference concerns raised by WCS (including AWS), MDS, and ITFS licensees.⁵ On October 23rd, AWS decided to cease using its WCS spectrum, thus eliminating any legitimate interest in Sirius' operation of terrestrial repeaters in adjacent spectrum.⁶

II. THE COMMISSION SHOULD DISMISS AWS' APPLICATION FOR REVIEW BECAUSE IT IS PROCEDURALLY DEFICIENT

The Commission should dismiss without hesitation AWS' application for review based on its failure to follow routine procedures clearly set forth in the Commission's

⁴ *Terrestrial Repeater NPRM*, 12 FCC Rcd at 5810-12. Sirius has been testing various possible sites for terrestrial repeaters since October 14, 1999 pursuant to its experimental license, call sign WA2XXE. Sirius expects to continue to employ its experimental license to complete testing of its service nationwide. Sirius has not received any interference complaints as a result of its terrestrial repeater transmissions.

⁵ The Bureau also granted a similar request for STA by XM Radio, Inc. See *XM Radio, Inc. Application for Special Temporary Authority to Operate Satellite Digital Audio Service Complementary Terrestrial Repeaters*, File No. SAT-STA-20010712-00063, 2001 FCC LEXIS 4930, DA 01-2172 (Sept. 17, 2001) (Order and Authorization) ("*XM STA Order*"); *XM Radio, Inc. Application for Special Temporary Authority to Operate Satellite Digital Audio Radio Service Complementary Terrestrial Repeaters*, File No. SAT-STA-20010712-00063, DA 01-2384 (Oct. 15, 2001) (Order) ("*XM STA Modification Order*"). AWS filed a near-identical application for review of this STA on October 17, 2001. *AT&T Wireless Services, Inc. Application for Review*, File No. SAT-STA-20010712-00063 (Oct. 17, 2001).

⁶ Letter from William M. Wiltshire, Counsel For AT&T Wireless Services, Inc. to Magalie R. Salas, Secretary, FCC, IB Docket No. 95-91 (dated Oct. 29, 2001), attaching AT&T Wireless Press Release (dated Oct. 23, 2001) ("*AWS Letter and Press Release*").

Rules. As discussed below: (1) AWS is not aggrieved by grant of STA to Sirius;⁷ (2) AWS' application lacks a clear statement of questions posed and fails to identify factors supporting Commission consideration of those questions;⁸ (3) AWS' application relies on new facts;⁹ and (4) AWS' application omits proof of service.¹⁰ Given these significant procedural flaws, the Commission should dismiss AWS' application on its face, with prejudice.

A. AWS Has No Standing to Request Commission Review Because It Is Not Aggrieved by the International Bureau's Action

AWS cannot claim that it is "aggrieved" by Sirius' operation of terrestrial repeaters pursuant to STA and thus has no standing to request review by the Commission. Under the Commission's rules, only a "person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission."¹¹ On October 29, 2001, AWS informed the Commission that it would "exit the fixed wireless business" in the WCS spectrum adjacent to Sirius' satellite DARS spectrum.¹² Thus, AWS cannot suffer any harm from Sirius' transmissions. Furthermore, AWS' intent to "warehouse" this spectrum for potential future use does not provide AWS the right to block the imminent provision of service by its spectrum

⁷ 47 C.F.R. §1.115(a).

⁸ 47 C.F.R. §1.115(b).

⁹ 47 C.F.R. §1.115(c).

¹⁰ 47 C.F.R. §1.47(g).

¹¹ 47 C.F.R. §1.115(a).

¹² *AWS Ex Parte Letter* at 1 and attached *Press Release* at 3.

neighbor.¹³ In any event, should AWS decide to use its spectrum, the Commission should require AWS to deploy equipment designed to reduce susceptibility to interference from satellite DARS terrestrial repeaters. In sum, because AWS will experience “no harm” now or in the future, there can be “no foul.”

B. The FCC Should Dismiss AWS’ Application For Failure to Articulate the Questions Presented and the Factors Warranting Commission Review

The FCC should dismiss AWS’ application for review because it fails to meet the Commission’s basic pleading requirements. Applications to the Commission for review of an action taken pursuant to delegated authority must include “a precise and plain statement of the questions presented for review” and specify the “factors warranting Commission consideration of the questions presented.”¹⁴ Rather than clearly stating the questions presented for review, however, AWS’ pleading regurgitates the same arguments presented to and denied by the International Bureau. AWS even summarizes and incorporates its initial comments on Sirius’ STA request in its application for review. In the absence of a particular question posed to the Commission, one can only guess that AWS would have the Commission review every aspect of the International Bureau’s decision to grant STA.

Furthermore, in lieu of specifying any “factors”¹⁵ supporting Commission review of this presumed broad scope, AWS jumps straight to the conclusion that the “Bureau

¹³ *Id.* (“AWS will continue to hold its WCS licenses...”).

¹⁴ 47 C.F.R. §§1.115(b)(1)-(2); *Arthur P. Baumgarden*, 11 FCC Rcd 4071, 4072 (1996) (Memorandum Opinion and Order); 47 C.F.R. §§ 1.115(b)(1)-(4).

¹⁵ Such factors include a “conflict with statute, regulation, case precedent or established Commission policy,” “question of law or policy which has not previously been resolved by the Commission,” “application of a precedent or policy which should be

acted in derogation of the Commission's rules" and that "grant of the STA was in clear violation of the Commission's rules."¹⁶ These conclusory assertions are unsubstantiated by even a single citation to FCC precedent. In fact, AWS' application for review is entirely devoid of factual or legal justification to support AWS' conclusion that the International Bureau erroneously granted STA to Sirius.¹⁷

Repeatedly, the Commission has dismissed applications for non-compliance with these fundamental pleading elements and should do so again here.¹⁸ It simply is not the responsibility of the Commission—or Sirius—to articulate the scope and basis of AWS' request for review. Consideration of AWS' request on the merits thus would impermissibly reduce applications for review to vehicles for "debating matters on which the tribunal has once deliberated and spoken."¹⁹

overturned or revised," an "erroneous finding as to an important or material question of fact," or "prejudicial procedural error." 47 C.F.R. §1.115(2)(b)(i)-(v).

¹⁶ *AWS application* at 1 and 5.

¹⁷ *AWS application* at 1.

¹⁸ *KOLA, Inc.*, 11 FCC Rcd 14297, 14302-303 (1996) (Memorandum Opinion and Order) (dismissing an application for review that is "itself procedurally deficient because it fails to comply with the Commission's requirements that such requests for Commission review set out both the *specific questions for review* and the *nature of the alleged errors made by the delegated authority*") (emphasis added); see also *Application of Pacific Telesis Mobile Services*, 11 FCC Rcd 19090 (1996) (Order); *Chapman S. Root Revocable Trust*, 8 FCC Rcd 4223 (1993) (Memorandum Opinion and Order).

¹⁹ *Chapman S. Root Revocable Trust*, 8 FCC Rcd at 4224 ("By incorporating the Petition to Deny by reference into the Application for Review, NAACP is doing nothing more than attempting to relitigate the same matters which we heretofore considered and rejected in [sic] License Renewal Applications. It is well established in this regard that the Commission will not grant rehearing 'merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken.' (citation omitted).")

C. Commission Review Would Deny the International Bureau An Opportunity to Pass Upon AWS' Proffered New Facts

Commission review of AWS' application would also contradict the basic tenets of delegated authority because it relies on new facts. In accordance with Section 1.115(c) of its rules, the Commission does not grant applications for review that "rely on questions of fact or law upon which the designated authority [in this case the International Bureau] has been afforded no opportunity to pass."²⁰ The FCC interprets this requirement strictly and dismisses applications that attempt to rely on new facts to support arguments not previously presented to the delegated authority.²¹

In its application, AWS sets forth several new—and erroneous—questions of fact upon which the International Bureau has not yet had an opportunity to pass. For example, AWS relies on a statement issued by Sirius "*yesterday* [October 16, 2001]" to support reversal of a decision released by the International Bureau on September 17, 2001.²² Moreover, AWS claims that since issuance of STA to Sirius "[*t*o date]" it had not received certain information regarding Sirius' terrestrial repeater network.²³

²⁰ 47 C.F.R. §1.115(c).

²¹ *Application of Pacific Telesis Mobile Services*, 11 FCC Rcd at 19094 (citation omitted); *see also Heartland Radio, Inc.*, 11 FCC Rcd 1698, 1699 (1996) ("Our rules clearly provide that the Commission will not consider an argument like this one, which is based upon facts that the Bureau had no opportunity to consider."); *Canyon Area Residents*, 14 FCC Rcd 8152, 8154 (1999) (Memorandum Opinion and Order) ("We cannot allow a party to 'sit back and hope that a decision will be in its favor and, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.") (citation omitted).

²² *AWS application* at 3.

²³ *AWS application* at 5 (emphasis added). In fact, AWS did receive such information. *See supra* at 11-12.

Accordingly, because AWS proffers new questions of fact—and in turn the application of law—not previously passed upon by the International Bureau in connection with adjudicating Sirius' application for STA, the FCC should deny to hear AWS' application for review.²⁴

Finally, AWS did not include proof of service with its application for review—which is a pre-requisite to FCC action²⁵—or even number the pages of its pleading. Thus the Commission should dismiss AWS' half-hearted attempt to undo the International Bureau's grant of STA to Sirius.

III. ASSUMING, ARGUENDO, THAT THE COMMISSION EXCUSES THE PROCEDURAL FLAWS IN AWS' APPLICATION FOR REVIEW, IT SHOULD NONETHELESS BE DENIED ON THE MERITS

Even if the Commission excuses the procedural deficiencies in AWS' application for review, it should nonetheless be denied on the merits. As demonstrated below, the International Bureau correctly granted Sirius' STA request because it was supported by “extraordinary circumstances” and “contained the full particulars of the proposed operation.”²⁶

²⁴ If AWS truly wants to bring “new facts” to the agency, the appropriate vehicle is a petition for reconsideration by the International Bureau. 47 C.F.R. §1.115(c); 47 C.F.R. §1.106.

²⁵ 47 C.F.R. §1.115(f) (requiring applications for review, as well as oppositions and replies to these oppositions, to be submitted to all parties to the proceeding); 47 C.F.R. §1.47(g) (“Proof of service, as required in this section, shall be filed before action is taken.”); see *AWS Corp. v. Business Telecom, Inc., Sprint Communications Company, L.P. v. Business Telecom, Inc.*, FCC 01-282 n.30 (Sept. 27, 2001) (Order on Reconsideration) (noting that “Petitioners’ counsel improperly failed to serve the parties...on the same day that they submitted the Petition to the Commission, and failed to include a proper proof of service” and that “these service rule violations might have provided another independent basis for dismissing the Petition.”).

²⁶ 47 U.S.C. §309(f); 47 C.F.R. §25.120.

A. The International Bureau Correctly Concluded that Sirius Demonstrated “Extraordinary Circumstances Requiring Temporary Operations”

AWS’ application for review alleges again that Sirius failed to demonstrate the requisite “extraordinary circumstances” to support grant of STA. To the contrary, Sirius explained that grant of an STA was dictated at this time by a four-year delay in the FCC adopting terrestrial repeater rules. In 1997 the Commission recognized “that DARS providers will need to rely on terrestrial repeaters and gap fillers” and sought initial comment on proposed service rules.²⁷ Subsequently, the Commission sought and received public comment on the satellite DARS licensees’ operation of terrestrial repeaters at least two more times over a four-year span. Yet, no rules have been issued.²⁸ Although Sirius indicated its strong preference to operate terrestrial repeaters pursuant to rules rather than STA, absent rules, it faced the imminent prospect of sacrificing quality of service or delaying initiation of high-quality nationwide satellite DARS.²⁹

After considering these arguments, the International Bureau agreed that the Commission’s failure to complete the terrestrial repeater rulemaking “has created the extraordinary circumstances required by the statute and our rules to justify grant of an STA.”³⁰ This determination is consistent with Section 309(f) of the Act, which delegates

²⁷ *Reply Comments of Sirius Satellite Radio Inc.* at 4 (filed Aug. 31, 2001) (“*Sirius Reply*”).

²⁸ *Sirius Reply* at 4.

²⁹ *Sirius Reply* at 5.

³⁰ *Sirius STA Order*, ¶ 7.

authority to grant STA requests, and past FCC precedent finding that delay of a Commission rulemaking can justify grant of STA.³¹

Furthermore, Sirius' application was not filed prematurely as AWS now alleges. As evidenced by this very proceeding, it can take several months to have an STA approved, upheld on appeal or review, and finalized. In fact, Sirius' STA application was first filed over three months ago on July 24, 2001. Perhaps in recognition of this practical reality, the rules contain no limits on how far in advance an application for STA may be filed. Furthermore, filing several months in advance is reasonable given that the International Bureau provides public notice and an opportunity to comment prior to granting requests for STA that exceed thirty days. Finally, the Sirius STA Order recognizes that this is not a routine satellite application; this STA will provide the missing link needed to allow Sirius to begin to offer services to subscribers.³²

Thus, because Sirius demonstrated the requisite "extraordinary circumstances" to support grant of an STA under Section 25.120 of the Commission's Rules, the International Bureau concluded appropriately that grant of STA was warranted and the request was timely. AWS' application for review should be denied.

B. The International Bureau Correctly Found that Sirius Provided the Commission with the "Full Particulars" of Its Proposed Operation of Terrestrial Repeaters

AWS makes several claims that Sirius failed to supply the "full particulars" of its proposed operation of terrestrial repeaters because it "provided no information

³¹ 47 U.S.C. § 309(f); *Amendment of Section 73.202*, 8 FCC 2d 484, 489 (1967) (First Report and Order) ("KMYR is still operating under an STA on the new frequency pending the outcome of the pending rulemaking proceeding.").

³² *Sirius STA Order*, ¶¶ 8-9.

concerning the low power repeaters” that it intends to operate.³³ AWS also falsely claims that Sirius has not fulfilled its responsibility to disclose to WCS, MDS, and ITFS licensees as well as the FCC, the location of its repeaters “despite a formal request made by AWS one month ago.”³⁴

However, in its STA application, Sirius provided complete information about all terrestrial repeaters it proposed to operate. For those repeaters above 2 kW, Sirius attached detailed information in Exhibit A to its application. In its original request for STA, Sirius did not provide data for any low-power repeaters (*i.e.*, EIRP of 2 kW or less) because it *had not yet* deployed these repeaters. Furthermore, opposing parties to the Sirius and XM STA proceedings had long disclaimed any desire to restrict or regulate such repeaters, and therefore the FCC did not need to consider these repeaters to “justify the temporary authority sought and the public interest therein,” which is the litmus test of the rule.³⁵ In the *Sirius STA Order*, the International Bureau concluded that “Sirius provided sufficient facts in its request to meet the standard required by the statute and our rules. . . . because the focus of the party’s technical interference objections has been on repeaters operating above 2 kW EIRP and because the particulars of those stations have been disclosed, Section 25.120’s requirements for specificity have been satisfied.”³⁶

³³ *AWS application* at 1-2.

³⁴ *Id.* at 1, 3.

³⁵ See *Sirius STA Order*, ¶ 12; Comments of AT&T Wireless Services, Inc. at 4 (filed Aug. 21, 2001) at 6-7; Opposition to STA Request of WorldCom, Inc. at 2 (filed Aug. 21, 2001); WCA Comments at 5-6; Metricom Comments at 8. Repeater under 2kW should be considered as falling within Sirius’ space segment license. *Cf.* 47 C.F.R. § 25.201 (definition of DARS).

³⁶ *Sirius STA Order*, ¶ 9.

However, and contrary to AWS' assertion, Sirius now has supplied all current information regarding repeater sites at or below 2 kW. In the *Sirius STA Order and STA Modification Order*, the International Bureau required Sirius to:

(1) make available to the WCS licensees and to the Commission, immediately upon request, the locations and technical parameters of all repeaters operating pursuant to this STA, *including those operating at or below 2 kW EIRP*; and (2) provide the name and telephone number of a point of contact to all WCS licensees and to WCA prior to commencing operation . . . to receive reports of actual interference and to take immediate action to correct it.³⁷

On September 18, 2001, AWS requested that Sirius provide this information. On September 25, 2001, Sirius sent a letter providing this information via email to AWS' counsel of record, Mr. Wiltshire, with a copy to the Commission. In that letter, Sirius stated that it "is investigating the deployment of several repeaters less than 2 kW prior to December 31, 2001. Sirius agrees to notify you once it has selected sites for such repeaters."³⁸ AWS' failure to review this information does not support its claim that the particulars were not provided.

AWS further complains that "the Bureau's analysis could be read to suggest the WCS licensees have 'waived' any objection to repeaters operating at or below 2kW" and that it is not "appropriate for the Bureau to make a ruling in this adjudicatory proceeding based on conjecture about what the Commission may decide in a pending rulemaking

³⁷ *Sirius STA Modification Order*, ¶ 14 (emphasis added). These notification requirements were extended to include notification to MDS and ITFS in the *Sirius STA Modification Order*.

³⁸ Letter from Carl R. Frank, Counsel for Sirius Satellite Radio Inc. to William M. Wiltshire, Counsel for AT&T Wireless Services, Inc. (dated Sept. 25, 2001).

proceeding.”³⁹ However, the International Bureau in its very order acknowledges that it has made no final determination regarding any terrestrial repeaters and that “[t]he issue of blanketing interference to WCS and MDS/ITFS systems will be further and more fully addressed in the final rules adopted by the Commission in its docketed terrestrial repeater rulemaking proceeding.”⁴⁰ Moreover, the STA is conditioned to expire within 180 days or “on the date on which permanent rules governing repeater operations become effective, whichever occurs first.”⁴¹

AWS also questions how it “is to identify an interfering transmitter operating at 2 kW” for purposes of notifying Sirius of “the specific source of interference.”⁴² Yet, AWS fails to note that Sirius has already disclosed the full details of all its existing terrestrial repeaters in an effort to provide AWS with the information it needs to monitor Sirius’ repeaters. Accordingly, Sirius provided the “full particulars” necessary to “justify the temporary authority sought and the public interest therein.” Thus, the Commission should deny AWS’ application for review on the merits.

³⁹ *AWS application* at 4.

⁴⁰ *Sirius STA Order*, ¶ 13.

⁴¹ *Sirius STA Order*, ¶ 17.

⁴² *AWS application* at 4.

IV. CONCLUSION

For the foregoing reasons, Sirius respectfully requests that the Commission dismiss or deny AWS' application for review of Sirius' STA.

Respectfully submitted,

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