

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1072

(CONSOLIDATED WITH NOS. 05-1290 AND 07-1198)

JAMES A. KAY, JR.

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA

Appellee.

ON APPEAL OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. *Parties:*

All parties, intervenors, and amici appearing below and in this Court are listed in the Corrected Brief for Appellants.

B. *Rulings Under Appeal:*

In Case No. 03-1072: *In the Matter of Application of James A. Kay, Jr.*, 18 FCC Rcd 2366 (2003) (JA).

In Case No. 05-1290: *In the Matter of James A. Kay, Jr.*, 18 FCC Rcd 7585 (2003) (JA), *reconsideration denied*, 20 FCC Rcd 12228 (2005) (JA).

In Case No. 07-1198: *In the Matter of Marc D. Sobel*, 20 FCC Rcd 9288 (2005) (JA), *reconsideration denied*, 22 FCC Rcd 8961 (2007) (JA).

C. *Related Cases:*

The orders on review have not previously been before this Court. Counsel are not aware of any other related cases before this or any other court.

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GLOSSARY

<i>Kay-Cordaro Order on Review</i>	<i>In the Matter of James A. Kay, Jr.</i> , 18 FCC Rcd 7585 (2003) (JA), <i>reconsideration denied</i> , 20 FCC Rcd 12228 (2005) (JA)
<i>Kay-Cordaro Staff Order</i>	<i>In re Application of James A. Kay, Jr.</i> , 16 FCC Rcd 20183 (2001) (JA)
<i>Kay-Padilla Order on Review</i>	<i>In the Matter of Application of James A. Kay, Jr.</i> , 18 FCC Rcd 2366 (2003) (JA)
<i>Orders on Review</i>	<i>In the Matter of Application of James A. Kay, Jr.</i> , 18 FCC Rcd 2366 (2003) (JA); <i>In the Matter of James A. Kay, Jr.</i> , 18 FCC Rcd 7585 (2003) (JA), <i>reconsideration denied</i> , 20 FCC Rcd 12228 (2005) (JA); <i>In the Matter of Marc D. Sobel</i> , 20 FCC Rcd 9288 (2005) (JA), <i>reconsideration denied</i> , 22 FCC Rcd 8961 (2007) (JA)
<i>Sobel Order on Review</i>	<i>In the Matter of Marc D. Sobel</i> , 20 FCC Rcd 9288 (2005) (JA), <i>reconsideration denied</i> , 22 FCC Rcd 8961 (2007) (JA)
<i>Sobel Recon. Order on Review</i>	<i>In the Matter of Marc D. Sobel</i> , 22 FCC Rcd 8961 (2007) (JA)
station KKT934 license	radio station license proposed for assignment to appellant Marc Sobel from M.R. Groff
station WIK902 license	radio station license proposed for assignment to appellant James Kay from Francisco Padilla
station WNXR890 license	radio station license proposed for assignment to appellant James Kay from Vince Cordaro

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ON APPEAL OF ORDERS OF THE
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ISSUE PRESENTED

Whether the Federal Communications Commission reasonably dismissed applications to assign private land mobile radio station licenses that became ineligible for assignment because, while the assignment applications were pending, the licensees failed to submit renewal applications in accordance with agency rules and thus the subject licenses expired.

STATUTES AND REGULATIONS

Pertinent statutory provisions and regulations are set forth in the addendum to this brief.

COUNTERSTATEMENT

I. STATUTORY AND REGULATORY BACKGROUND

The private land mobile radio station licenses at issue in this consolidated appeal authorized operations for a five-year term.¹ Under the agency's rules, a licensee desiring to operate beyond the license term specified in its authorization is required to file a written application for license renewal during the license term. The timing requirements for such a renewal application have changed over the years. Prior to 1998, a renewal application was timely if it was filed no earlier than 90 days but no later than 30 days before the end of the license term.² In 1998, the Commission revamped its licensing procedures for wireless services and adopted the current rule 1.949, which requires that renewal applications "be filed no later

¹ Private land mobile radio service is telecommunication by means of radio waves between base stations and land mobile stations, or between land mobile stations. The service, which does not offer interconnection to the public-switched telephone network, is used, for example, for taxicab dispatch.

² 47 C.F.R. § 1.926(b) (1996) ("applications for renewal of license must be made during the license term and should be filed within 90 days but not later than 30 days prior to the end of the license term"). This provision was in force when two of the three licenses at issue in this case expired. During this same period, the Commission's rules included section 1.926(c), which allowed private land mobile radio station licensees to request reinstatement of an expired license up to 30 days after its expiration. 47 C.F.R. § 1.926(c) (1996).

than the expiration date of the authorization for which renewal is sought, and no sooner than 90 days prior to expiration.”³

Under the agency’s rules, a license “automatically terminate[s], without specific Commission action, on the expiration date specified therein, unless a timely application for renewal is filed.”⁴ Similarly, under former section 90.149(b) of the Commission’s rules, a license was deemed to have automatically canceled on the date specified on the license if the licensee failed to file a timely reinstatement application.⁵ Once a license expires, it is a nullity and thus cannot be assigned.⁶

³ 47 C.F.R. § 1.949(a). This rule was the result of a 1998 rulemaking, in which the Commission also eliminated the reinstatement provision discussed in the previous footnote, 47 C.F.R. § 1.926(c) (1996). In its place, the Commission adopted a renewal reminder letter process through which the Commission provides licensees with pre-expiration notification 90 days prior to license expiration. *In the Matter of Biennial Regulatory Review*, 13 FCC Rcd 21027, 21070-72 (¶¶ 95-97) (1998). In adopting the renewal reminder letter process, the Commission emphasized that its “decision to use this reminder letter as a convenience to licensees does not in any way absolve licensees from timely filing their renewal applications,” and the Commission reminded licensees that they “are responsible for knowing the terms of their licenses and for filing a timely renewal application if they seek to operate beyond that term.” *Id.* at 21071 (¶ 96). The third of the licenses at issue in this case expired in 2002, and thus was subject to the revised rules.

⁴ 47 C.F.R. § 1.955.

⁵ 47 C.F.R. § 90.149(b) (1996) (“If no application for reinstatement has been filed as specified in this Part, the authorization shall be deemed to have been automatically cancelled on the date specified on the authorization.”). Also, former section 1.926(b) provided that “[i]n any case in which the licensee has, in accordance with the provisions of this chapter, made timely and sufficient application for renewal of license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined.” 47 C.F.R. § 1.926(b) (1996).

⁶ See *In the Matter of James A. Kay, Jr.*, 18 FCC Rcd 2366, 2367 ¶ 5 (2003) (“*Kay-Padilla Order on Review*”) (“[I]t is axiomatic that an expired license cannot be assigned”) (JA), citing *In the Matter of Transit Mix Concrete and Material Co.*, 16 FCC Rcd 15005, 15006 (¶ 2) (2001) (“*Transit Mix*”).

A valid license is eligible for assignment from the licensee to another entity upon written application to the Commission and a finding by the Commission that the public interest, convenience, and necessity will be served by the assignment.⁷ “Unless and until the Commission acts favorably on an assignment application, the proposed assignee has no legal right with regard to the station, including applying for a reinstatement or renewal of license.”⁸ Thus, “[a] Commission licensee remains subject to [Commission] rules, including operational and renewal provisions, even where an assignment or transfer of control application is pending for the underlying license.”⁹ If the Commission consents to the assignment of license, the assignee assumes the license as it was held by the former licensee, including the same expiration date specified on the license.

II. FACTUAL BACKGROUND

A. James A. Kay, Jr. v. FCC, No. 03-1072 (Kay-Padilla Order on Review)

On June 13, 1991, the Commission authorized Francisco Padilla (“Padilla”) to operate station WIK902, Los Angeles, California, for a term of five years.¹⁰ Appellant James Kay (“Kay”) filed an application to assign (and to modify) the license from Padilla on April 11, 1994.¹¹ The assignment and modification application was still pending on June 13, 1996, the

⁷ See 47 U.S.C. § 310(d).

⁸ *Transit Mix*, 16 FCC Rcd at 15007 (¶ 5). “To hold otherwise,” the Commission found, “would effectively legitimize an assignment of license for which the Commission had not approved,” and “would be contrary to our precedent concerning unauthorized transfers.” *Id.*

⁹ *In the Matter of James A. Kay, Jr.*, 18 FCC Rcd 7585, 7586 ¶ 5 (2003) (“*Kay-Cordaro Order on Review*”) (JA); *In the Matter of Marc D. Sobel*, 20 FCC Rcd 9288, 9290 ¶ 5 (2005) (“*Sobel Order on Review*”) (JA).

¹⁰ *Kay-Padilla Order on Review* ¶ 2 (JA).

¹¹ *Id.* (JA).

expiration date specified on the Station WIK902 license. In accordance with agency rules, the station WIK902 license expired on June 13, 1996, because no renewal application was filed.¹²

On December 4, 2000, a routine, computer-generated letter was sent to Kay notifying him that the assignment and modification application was dismissed because the license for station WIK902 had expired.¹³ The staff subsequently denied Kay's petition to reconsider the dismissal.¹⁴

The Commission denied Kay's petition for review.¹⁵ It found that "the license for Station WIK902 expired" because "Padilla failed to file a timely renewal application for Station WIK902."¹⁶ Thus, as the Commission explained, "[t]here was nothing for Padilla to assign to Kay, and therefore nothing for Kay to modify."¹⁷ This appeal, *James A. Kay, Jr. v. FCC*, No. 1072, followed.

B. James A. Kay, Jr. v. FCC, No. 05-1290 (Kay-Cordaro Order on Review)

On November 4, 1991, the Commission authorized Vince Cordaro ("Cordaro") to operate Station WNXR890, Newbury Park, California, for a term of five years, ending on November 4, 1996.¹⁸ On May 6, 1994, Kay filed an application to assign the Station WNXR890

¹² *Id.* ¶ 5 (JA); *see also* 47 C.F.R. § 90.149(b) (1996) (a license automatically cancels on the expiration date specified on the license unless a renewal application is filed).

¹³ *Id.* ¶ 3 (JA).

¹⁴ Petition for Reconsideration (filed Jan. 2, 2001) (JA); *In the Matter of Application of James A. Kay, Jr.*, 17 FCC Rcd 5951 (JA).

¹⁵ *Id.* ¶ 8 (JA).

¹⁶ *Kay-Padilla Order on Review* ¶ 5 (JA).

¹⁷ *Id.* (JA).

¹⁸ Station WNXR890 License (JA).

license from Cordaro to Kay.¹⁹ The assignment application was still pending on November 4, 1996, the date on which the station WNXR890 license expired because Cordaro failed to file an application to renew the license.²⁰ Thus, on September 24, 2000, the staff dismissed Kay's assignment application because the underlying license had expired.²¹

The staff denied Kay's petition to reconsider the dismissal.²² The Commission then denied his application for review.²³ Noting that the arguments for review "raised in this case are identical to arguments that Kay previously raised and we rejected in the recently decided *Kay-Padilla* case," the Commission reiterated that "a pending assignment application does not extend the expiration date of an underlying Commission license."²⁴ Thus, "[a]s a result of Cordaro's failure to renew his authorization – a fact that Kay does not dispute – the license for station WNXR890 expired on its own terms."²⁵ "Because an expired license cannot be assigned," the Commission found that the staff "correctly applied our rules when it dismissed the assignment application."²⁶

¹⁹ *Kay-Cordaro Order on Review* ¶ 2 (JA).

²⁰ *Id.* ¶ 5 (JA); *see also In re Application of James A. Kay, Jr.*, 16 FCC Rcd 20183, 20184 ¶ 5 (2001) ("*Kay-Cordaro Staff Order*") ("Cordaro failed to file for renewal for call sign WNXR890, did not request reinstatement of his license, and did not seek a waiver of the Commission's late-filed reinstatement provision.") (JA).

²¹ *Kay-Cordaro Order on Review* ¶ 2 (JA).

²² Petition for Reconsideration (filed Nov. 3, 2000) (JA); *Kay-Cordaro Staff Order* ¶ 7 (JA).

²³ *Kay-Cordaro Order on Review* ¶ 8 (JA).

²⁴ *Kay-Cordaro Order on Review* ¶ 5 (JA).

²⁵ *Id.* (JA).

²⁶ *Id.* (JA).

On May 19, 2003, Kay filed a petition for reconsideration of the Commission's order.²⁷ Finding that the petition did not "rely on any new facts or changed circumstances as required under Commission rules," the staff dismissed Kay's petition as repetitious.²⁸ The Commission affirmed.²⁹ This appeal, *James A. Kay, Jr. v. FCC*, No. 05-1290, followed.

C. Marc D. Sobel v. FCC, No. 07-1198 (Sobel Order on Review)

On June 9, 1994, appellant Marc Sobel ("Sobel") filed an application to assign the license for station KKT934, Montrose, California, from M.R. Groff ("Groff") to Sobel.³⁰ On September 16, 1997, the Commission granted renewal of the KKT934 license for a five-year term, expiring September 16, 2002.³¹ The assignment application remained pending.

On June 24, 2002, the Commission sent Groff a routine renewal letter reminding him that the license for station KKT934 would expire on September 16, 2002, unless he timely filed a renewal application.³² Groff failed to file a license renewal application, and thus the license for station KKT934 expired by its own terms on September 16, 2002.³³

²⁷ Petition for Reconsideration (filed May 19, 2003) (JA); see also Erratum to Petition for Reconsideration (filed June 23, 2003) (JA).

²⁸ *In the Matter of James A. Kay, Jr.*, 19 FCC Rcd 2938 (2004) (JA).

²⁹ *In the Matter of James A. Kay, Jr.*, 20 FCC Rcd 12228 (2005) (JA).

³⁰ *Sobel Order on Review* ¶ 2 (JA).

³¹ Station KKT934 License (JA).

³² *See Sobel Order on Review* ¶ 2 (JA); see also *supra* n.2.

³³ *Id.* (JA); see also 47 C.F.R. § 1.955 (a license automatically cancels on the expiration date specified on the license unless a renewal application is filed).

On January 12, 2003, the staff dismissed Sobel’s pending assignment application because the station KKT934 license had expired.³⁴ The staff then denied Sobel’s petition for reconsideration,³⁵ and the Commission denied his application for review.³⁶ Noting that the “arguments raised in this case are identical to arguments previously raised and rejected in our *Kay-Padilla* and *Kay-Cordaro* decisions,” the Commission again explained that “[a] Commission licensee remains subject to our rules, including operational and renewal provisions, even where an assignment or transfer of control application is pending for the underlying license.”³⁷ As “licensee for Station KKT934,” the Commission said, “Groff was responsible for filing a renewal application notwithstanding the pending assignment application.”³⁸ Thus, “[a]s a result of Groff’s failure to renew his authorization – a fact that Sobel does not dispute – the license for Station KKT934 expired on its own terms.”³⁹ The Commission later dismissed Sobel’s petition for reconsideration as repetitious because it was not supported “with any new facts or changed circumstances that have not previously been addressed.”⁴⁰ This appeal, *Marc D. Sobel v. FCC*, No. 07-1198, followed.

³⁴ *Sobel Order on Review* ¶ 2 (JA).

³⁵ Petition for Reconsideration (filed Feb. 11, 2003) (JA); *In the Matter of Marc D. Sobel*, 19 FCC Rcd 2190, 2192 ¶¶ 6-7 (2004) (JA).

³⁶ *Sobel Order on Review* ¶ 5, ¶ 9 (JA and).

³⁷ *Id.* ¶ 5 (JA).

³⁸ *Id.* (JA).

³⁹ *Id.* (JA).

⁴⁰ *In the Matter of Marc D. Sobel*, 22 FCC Rcd 8961, 8766 ¶ 12 (2007) (“*Sobel Recon. Order on Review*”) (JA).

SUMMARY OF ARGUMENT

The assignment applications at issue here were properly dismissed because the licensees allowed the licenses to expire at the end of their terms by failing to file renewal applications. As a matter of both consistent Commission precedent and simple logic, a license that has expired cannot be assigned.

Contrary to appellants' suggestion, Section 9(b) of the Administrative Procedure Act, 5 U.S.C. § 558(c), has no application here. According to that provision, a timely filed application to *renew* a license would have prevented expiration until a final determination was made on the renewal application. Contrary to appellants' view, however, an application to *assign* a license is a different type of application and therefore plainly does not trigger the protections of Section 9(b). In particular, Section 9(b) requires that the triggering application be filed by an entity that is already the licensee and is requesting authorization to continue as such. An application to assign the license, on the other hand, requests authorization for an entity that is not already the licensee.

Even if, *arguendo*, an assignment application fell within the scope of Section 9(b), appellants' argument would still fail. Section 9(b) requires that an application sufficient to invoke its protection against license expiration be "timely" filed "in accordance with agency rules." In this case, the assignment applications upon which appellants base their Section 9(b) argument do not satisfy the Commission's rules for preventing license expiration because they were filed too early.

Appellants' only argument not based on their erroneous reading of Section 9(b) is that the Commission unlawfully discriminated against them, but that contention is also meritless. They do not cite any instance in which the Commission treated assignment applications for expired

licenses differently from those filed by appellants. In fact, dismissal of such assignment applications has been the proper and consistent agency response in this situation.

ARGUMENT

I. STANDARD OF REVIEW

To prevail on appeal, Kay and Sobel must establish that the *Orders on Review* are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”⁴¹ “Under this ‘highly deferential’ standard of review, the court presumes the validity of agency action.”⁴² To withstand the challenge to agency action, the Commission need only articulate a “rational connection between the facts found and the choice made.”⁴³ The court is not at liberty to set aside an agency’s interpretation of its own regulations unless that interpretation is plainly inconsistent with the language of the regulations and the court “need not find that the agency’s construction is the only possible one, or even the one that the court would have adopted in the first instance.”⁴⁴

Kay and Sobel’s primary argument on appeal is that Section 9(b) of the Administrative Procedure Act, 5 U.S.C. § 558(c), prevented the expiration of the licenses, which were the subject of assignment applications at the time, until a final determination had been made on those applications. The Court’s consideration of the applicability of this statutory provision, which is

⁴¹ 5 U.S.C. § 706(2)(A).

⁴² *LaRouche’s Committee for a New Bretton Woods v. FCC*, 439 F.3d 733, 737 (D.C. Cir. 2006), quoting *Cellco Partnership v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004).

⁴³ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁴⁴ *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm.*, 789 F.2d 26, 30 (D.C. Cir. 1986) (en banc).

not in the Communications Act, is *de novo*. See *Professional Operator Reactor Society v. NRC*, 939 F.2d 1047, 1051 (D.C. Cir. 1991).

II. THE COMMISSION REASONABLY INTERPRETED AND APPLIED ITS RULES WHEN IT DISMISSED THE ASSIGNMENT APPLICATIONS.

A. Kay's and Sobel's Assignment Applications Were Properly Dismissed Because the Underlying Licenses Expired in Accordance with the Commission's Rules and Were Not Eligible for Assignment.

The Commission has in place “[p]rocedures and specific applications . . . for specific functions.” *Kay-Padilla Order on Review* ¶ 7 (JA). Under the assignment application procedures the Commission had in place when the applications at issue were filed, the proposed assignee completed and filed FCC Form 574. FCC Form 574, which is no longer used, was a general application form that required the applicant to indicate, by selecting the appropriate box, whether the application was for (1) a new station, (2) modification, (3) assignment, (4) reinstatement, or (5) renewal. (JA). When the proposed assignee completed FCC Form 574 to seek assignment, the licensee-assignor would either file FCC Form 1046, or a comparable letter, which certified “his desire to assign all right, title, and interest in and to such authorization.” 47 C.F.R. § 90.119(a)(4) (1994).

It is undisputed that neither Padilla, Cordaro nor Groff filed an application for renewal of license as they were required to do to permit operation beyond the expiration date specified on the license.⁴⁵ As such, in accordance with agency rules, the licenses for stations WIK902,

⁴⁵ 47 C.F.R. § 1.955; 47 C.F.R. § 90.149(b) (1996). Upon grant of a renewal application, the Commission does not grant a “new license;” instead, the grant extends the licensee’s operational authority for another term.

WNXR890 and KKT934, each expired on the date specified on the respective license. *Kay-Padilla Order on Review* ¶ 5 (JA); *Kay-Cordaro Order on Review* ¶ 5 (JA); *Sobel Order on Review* ¶ 5 (JA).

It is also undisputed that Kay and Sobel followed the Commission’s procedure for filing an assignment of license application, rather than any other type of application: each sought the assignment of an existing license; each specifically designated his application as “an assignment;” and each “application was treated accordingly.” *See Sobel Recon. Order on Review* ¶ 7 n.24 (JA); *see also Kay-Padilla Order on Review* ¶ 7 (“The application that was submitted sought only to assign and modify the license for Station WIK902.”) (JA).

Yet, Kay and Sobel now assert that “although nominally styled as a request for consent to license assignment,” the application each filed “is more properly deemed an ‘application for a renewal or a new license . . . with respect to an activity of a continuing nature’.” *E.g.*, *Corrected Brief for Appellants* at 7-8. The Commission reasonably rejected this attempt to recharacterize the procedural choices made by appellants. *Kay-Padilla Order on Review* ¶ 7 (JA); *Kay-Cordaro Order on Review* ¶ 6; *Sobel Order on Review* ¶ 6; *Sobel Recon. Order on Review* ¶ 8.

The Commission was unmoved by the “unsupported assertion that the assignment application should have been considered a new facilities application . . . , when ‘by its very terms, the application sought the assignment of an existing license, as opposed to a license for a new station.’” *Sobel Recon. Order on Review* ¶ 8 (JA), *citing Kay-Padilla Order on Review* ¶ 7 (JA). The Commission also rejected appellants’ argument regarding “the ‘newness’ of the assignee’s application on FCC Form 574 vis-à-vis the assignor’s existing authorization.” *Corrected Brief* at 18. As the Commission explained, the “fact that the Commission had different filing requirements for license assignors and assignees – and the fact that assignees and

new licensees were required to file the same technical information – does not convert an application for assignment into an application for a new license.” *Sobel Recon. Order on Review* ¶ 8 (JA).

Given that the relevant license terms ended without any pending request for renewal, the licenses terminated. The Commission therefore properly found that there was nothing left to assign, and it dismissed the assignment applications. The agency’s straightforward interpretation of its own licensing rules was clearly reasonable and should be affirmed.

B. An Assignment Application Is Not an “Application for Renewal or a New License” Within the Meaning of Commission Rules or Section 9(b) of the Administrative Procedure Act.

In their attempt to avoid this obvious result, Kay and Sobel now continue their attempt to recast each assignment application at issue as an “application for a renewal or a new license” in an effort to bring Section 9(b) of the Administrative Procedure Act, 5 U.S.C. § 558(c), into play. Armed with their retroactively transformed applications, they contend that Section 9(b) prevented the licenses at issue from expiring. This attempt to rewrite history fails.

As explained by this Court, under Section 9(b), applications whose pendency prevents an underlying license from expiring are applications that propose a continuation of activity by “the current [license] holder” through, depending on agency practice, either a renewal of an earlier license or the replacement of that license with a “new license[] issued to the current holder.” *Miami MDS Co. v. FCC*, 14 F.3d 658, 660 (D.C. Cir. 1994) (“*Miami MDS*”) (citations omitted). An assignment application, however, proposes to allow an entity other than “the current holder” of the license to engage in the relevant activity and thus is not an application that invokes the protection of Section 9(b).

Moreover, Section 9(b) on its face requires that triggering applications be filed by the entity that is already “the licensee.” By contrast, Section 310(d) of the Communications Act provides that it is “the proposed . . . assignee” who is regarded as “making application under section 308.” 47 U.S.C § 310(d).⁴⁶ Thus, Section 9(b) does not apply here because none of the FCC Form 574 assignment applications, on which appellants base their argument, was filed by “the licensee.” Rather, by filing the assignment applications, Kay and Sobel were seeking to become “the licensee,” and, more importantly, “the licensee” was effectively seeking not to continue the existing operation. Also, as appellants acknowledge, Commission grant of an assignment application “authorize[s] the assignee to ‘continue the activity for which’ the assignor had been previously licensed.” Corrected Brief at 19. As such, the assignee does not receive a “new license,” but assumes the existing license as it was held by the assignor, including the same operational parameters and expiration date specified on the license. Thus, where Section 9(b) refers to applications for a “new license,” it is referring only to such applications that are filed by entities “who already have regularly issued licenses” in order to protect them “from the serious hardships occasioned both to them and the public by expiration of a license before the agency finds time to pass upon its renewal.” *Kay-Cordaro Staff Order* ¶ 6 (JA), *citing Miami MDS* (internal quotations omitted).⁴⁷

⁴⁶ In fact, neither Section 308 nor 310(d) of the Communications Act references grant of a “new license” to an assignee or transferee. Instead, Section 310(d) requires the Commission to determine whether the proposed assignee has the qualifications required under Section 308.

⁴⁷ See also *Kay-Padilla Order on Review* ¶ 7 (“[T]he subject application was neither for a renewal of a license nor for a new license as contemplated by the APA.”) (JA); *Kay-Cordaro Order on Review* ¶ 6 (“[W]e reject the notion that a license assignment should be treated as synonymous to an initial grant or a license renewal for the purpose of this [Section 9(b) of the APA] statutory provision.”) (JA); *Sobel Order on Review* ¶ 6 (same) (JA).

Appellants' reliance on *Pan-Atlantic Corp. v. Atlantic Coast Line*, 353 U.S. 436 (1957) ("*Pan-Atlantic Corp.*") is misplaced. See Corrected Brief at 16. The "timely and sufficient application to continue the existing operation" about which the Supreme Court spoke there (*id.* at 439), refers to an application that seeks to continue the existing operation beyond the point at which that authorization would otherwise end. An assignment application, by contrast, proposes only that the agency authorize the assignee to assume the existing license as it was held by the assignor, including the same expiration date specified on the license. Moreover, in *Pan-Atlantic Corp.*, the Supreme Court noted, as this Court did in *Miami MDS*, that the purpose of Section 9(b) is "to protect a person with a license from the damage he would suffer by being compelled to discontinue a business of a continuing nature, only to start it anew after the administrative hearing is concluded." 353 U.S. 439. Applying Section 9(b) to the assignment applications filed by Kay and Sobel – who had no authorization to conduct business with these licenses – does not serve that fundamental purpose.

C. Even if Appellants' Assignment Applications Were Deemed Applications for Renewal or for New Licenses, They Were Untimely.

Even if, *arguendo*, the assignment applications could be recharacterized as applications for renewal or new licenses, they would not trigger the protections of Section 9(b). To qualify under that provision, an application must be "timely and sufficient . . . in accordance with agency rules." 5 U.S.C. § 558(c). The relevant Commission rule at the time of the expiration of the Padilla and Cordaro licenses, which had been proposed for assignment to Kay, provided that "[a]ll applications for renewal of license must be made during the license term and should be filed *within 90 days* but no later than 30 days prior to the end of the license term." 47 C.F.R. §

1.926(b) (1996) (emphasis added). The relevant rule at the time of the expiration of the Groff license, which had been proposed for assignment to Sobel, similarly provided that “[a]pplications for renewal of authorizations in the Wireless Radio Services must be filed no later than the expiration date of the authorization for which renewal is sought, *and no sooner than 90 days prior to expiration.*” 47 C.F.R. § 1.949(a) (2002) (emphasis added).

Each of these rules, with Section 9(b) obviously in mind, provided that renewal applications filed in compliance with the timing requirements therein would continue the effectiveness of the licenses for which renewal was sought until the agency acted on the renewal applications. By contrast, the assignment applications here (which appellants attempt to equate with applications for renewal or a new license under Section (b)) were filed years before the expiration of the relevant license terms. Each of the assignment applications at issue was filed in 1994. The two licenses proposed for assignment to Kay had expiration dates of June 13, 1996, and November 4, 1996, respectively; and the license proposed for assignment to Sobel, did not expire until September 16, 2002. As such, even if, *arguendo*, the applications were construed as seeking “renewal or a new license,” they were filed more than 90 days before the end of the license terms and were therefore not “timely and sufficient . . . in accordance with agency rules” for the purposes of satisfying Section 9(b).

D. Kay and Sobel’s Remaining Arguments Present No Basis for Reversing the Commission’s Decision.

Kay and Sobel argue that the procedural requirements in Sections 309(e) and 310(d) of the Communications Act preclude the Commission from dismissing the assignment applications without affording them a hearing. Corrected Brief at 21-23. Appellants do not dispute that if the licenses expired, the assignment applications were defective and properly subject to dismissal

without a hearing under *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). *See* Corrected Brief at 22 and n.32. Rather, appellants claim that the licenses did not expire, an argument premised on their erroneous interpretation of Section 9(b) of the APA. As shown above, Section 9(b) has no application here, and the licenses to be assigned expired at the end of their specified terms. The assignment applications therefore were properly dismissed without a hearing because there were no longer any licenses to be assigned.

Finally, Kay and Sobel apparently believe that if, in lieu of entering into license assignment agreements, they instead had obtained short-spacing consent letters from the same licensees and submitted those letters to the Commission in support of their applications for initial licenses, they could have effectively achieved the result they sought to achieve. *See* Corrected Brief at 23-25.⁴⁸ Under this approach, appellants contend, there would have been no adverse effects on their interests in the event that the licensees with whom they dealt failed to preserve their licenses. *Id.* From this, they reason that antidiscrimination principles prohibit the Commission from holding them to the consequences of their choice of the assignment option as the means for achieving their desired result. The argument fails.

When an agency provides a range of alternatives, each with its own costs and benefits, whereby a regulated entity can achieve a desired business result, an entity that chooses Option A, knowing the risks associated with that option, cannot later escape the consequences of that choice by pointing out that it could have chosen Option B but did not do so. The Commission is of course obligated to treat similarly situated parties similarly. But Kay and Sobel are not

⁴⁸ The Commission rejected this argument when Sobel raised it in his Petition for Reconsideration (at n.2) (JA). *Sobel Recon. Order on Review* ¶ 9 n.28 (JA). Kay did not make this argument in either of the two cases he has on appeal however, and he may not do so now, *see* 47 U.S.C. § 405(a).

similarly situated to parties that filed applications other than for assignment. Here the Commission found (and neither Kay nor Sobel disputes) that the assignment application each filed was not “treated any differently than any other similarly-filed assignment application.”⁴⁹

CONCLUSION

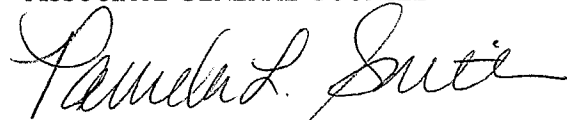
For the reasons above, the *Orders on Review* should be affirmed.

Respectfully submitted,

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⁴⁹ *Sobel Recon. Order on Review* ¶ 9 (JA).

February 19, 2008

STATUTORY APPENDIX

5 U.S.C. § 558

5 U.S.C. § 706

47 U.S.C. § 310

47 C.F.R. § 1.926(1996)

47 C.F.R. § 1.949(2002)

47 C.F.R. § 1.955(2002)

47 C.F.R. § 90.119(1994)

47 C.F.R. § 90.149(1996)

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 5. ADMINISTRATIVE PROCEDURE
SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

§ 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given--

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I--THE AGENCIES GENERALLY
CHAPTER 7--JUDICIAL REVIEW

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER III--SPECIAL PROVISIONS RELATING TO RADIO
PART I--GENERAL PROVISIONS

§ 310. License ownership restrictions

(a) Grant to or holding by foreign government or representative

The station license required under this chapter shall not be granted to or held by any foreign government or the representative thereof.

(b) Grant to or holding by alien or representative, foreign corporation, etc.

No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by--

(1) any alien or the representative of any alien;

(2) any corporation organized under the laws of any foreign government;

(3) any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;

(4) any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

(c) Authorization for aliens licensed by foreign governments; multilateral or bilateral agreement to which United States and foreign country are parties as prerequisite

In addition to amateur station licenses which the Commission may issue to aliens pursuant to this chapter, the Commission may issue authorizations, under such conditions and terms as it may prescribe, to permit an alien licensed by his government as an amateur radio operator to operate his amateur radio station licensed by his government in the United States, its possessions, and the Commonwealth of Puerto Rico provided there is in effect a multilateral or bilateral agreement, to which the United States and the alien's government are parties, for such operation on a reciprocal basis by United States amateur radio operators. Other provisions of this chapter and of subchapter II of chapter 5, and chapter 7, of Title 5 shall not be applicable to any request or application for or modification, suspension, or cancellation of any such authorization.

47 U.S.C.A. § 310 (cont'd)**(d) Assignment and transfer of construction permit or station license**

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

(e) Administration of regional concentration rules for broadcast stations

(1) In the case of any broadcast station, and any ownership interest therein, which is excluded from the regional concentration rules by reason of the savings provision for existing facilities provided by the First Report and Order adopted March 9, 1977 (docket No. 20548; 42 Fed. Reg. 16145), the exclusion shall not terminate solely by reason of changes made in the technical facilities of the station to improve its service.

(2) For purposes of this subsection, the term "regional concentration rules" means the provisions of sections 73.35, 73.240, and 73.636 of title 47, Code of Federal Regulations (as in effect June 1, 1983), which prohibit any party from directly or indirectly owning, operating, or controlling three broadcast stations in one or several services where any two of such stations are within 100 miles of the third (measured city-to-city), and where there is a primary service contour overlap of any of the stations.

CODE OF FEDERAL REGULATIONS
TITLE 47--TELECOMMUNICATION
CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A--GENERAL
PART 1--PRACTICE AND PROCEDURE
SUBPART F--PRIVATE RADIO SERVICES APPLICATIONS AND
PROCEEDINGS
APPLICATION FORMS AND PARTICULAR FILING REQUIREMENTS

§ 1.926 Application for renewal of license.

(a) Application for renewal of a station license shall be submitted on the appropriate FCC Form indicated below:

(1) Renewal of station or system authorizations in the Private Land Mobile Radio Services (part 90 of this chapter), the General Mobile Radio Service (part 95, subpart A of this chapter), and the Interactive Video and Data Service (part 95, subpart F of this chapter) shall be submitted on FCC Form 574-R when the licensee has received that Form in the mail from the Commission. If the licensee has not received the Commission-generated Form 574-R within sixty (60) days of expiration, application for renewal of station or system license shall be submitted on FCC Form 405-A.

(2) Renewal of marine coast station authorizations (s 80.19 of this chapter) and aviation ground station authorizations (s 87.33 of this chapter) must be submitted on FCC Form 452-R.

(3) Renewal of aircraft radio station authorizations and ship radio station authorizations shall be submitted on FCC Form 405-B.

(4) Renewal of an amateur operator license or a combined amateur operator/station license shall be submitted on FCC Form 610.

(5) Renewal of an amateur club, military recreation, or Radio Amateur Civil Emergency Service (RACES) station license shall be submitted on FCC Form 610-B.

(6) Renewal of station authorizations in the Private Operational Fixed Microwave Service (part 101 of this chapter) shall be submitted on such form as the Commission may designate by the public notice in accordance with the provisions of s 101.13 of this chapter.

47 C.F.R. § 1.926 (1996) (cont'd)

(b) All applications for renewal of license must be made during the license term and should be filed within 90 days but not later than 30 days prior to the end of the license term. In any case in which the licensee has, in accordance with the provisions of this chapter, made timely and sufficient application for renewal of license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined.

(c) Reinstatement of an expired license in the Private Land Mobile Radio Services may be requested up to thirty (30) days after the expiration date using FCC Form 574, 574-R or 405-A. See s 1.4.

SUBCHAPTER A--GENERAL
PART 1--PRACTICE AND PROCEDURE
SUBPART F--WIRELESS TELECOMMUNICATIONS SERVICES,
APPLICATIONS AND PROCEEDINGS
APPLICATION REQUIREMENTS AND PROCEDURES

§ 1.949 Application for renewal of license.

(a) Applications for renewal of authorizations in the Wireless Radio Services must be filed no later than the expiration date of the authorization for which renewal is sought, and no sooner than 90 days prior to expiration. Renewal applications must be filed on the same form as applications for initial authorization in the same service, i.e., FCC Form 601 or 605. Additional renewal requirements applicable to specific services are set forth in the subparts governing those services.

(b) Licensees with multiple authorizations in the same service may request a common day and month on which such authorizations expire for renewal purposes. License terms may be shortened by up to one year but will not be extended to accommodate the applicant's selection.

CODE OF FEDERAL REGULATIONS
TITLE 47--TELECOMMUNICATION
CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A--GENERAL
PART 1--PRACTICE AND PROCEDURE
SUBPART F--WIRELESS TELECOMMUNICATIONS SERVICES,
APPLICATIONS AND PROCEEDINGS
APPLICATION REQUIREMENTS AND PROCEDURES

§ 1.955 Termination of authorizations.

(a) Authorizations in general remain valid until terminated in accordance with this section, except that the Commission may revoke an authorization pursuant to section 312 of the Communications Act of 1934, as amended. See 47 U.S.C. 312.

(1) Expiration. Authorizations automatically terminate, without specific Commission action, on the expiration date specified therein, unless a timely application for renewal is filed. See § 1.949 of this part. No authorization granted under the provisions of this part shall be for a term longer than ten years.

(2) Failure to meet construction or coverage requirements. Authorizations automatically terminate, without specific Commission action, if the licensee fails to meet applicable construction or coverage requirements. See § 1.946(c) of this part.

(3) Service discontinued. Authorizations automatically terminate, without specific Commission action, if service is permanently discontinued. The Commission authorization or the individual service rules govern the definition of permanent discontinuance for purposes of this section. A licensee who discontinues operations shall notify the Commission of the discontinuance of operations by submitting FCC Form 601 or 605 requesting license cancellation.

(b) Special temporary authority (STA) automatically terminates without specific Commission action upon failure to comply with the terms and conditions therein, or at the end of the period specified therein, unless a timely request for an extension of the STA term is filed in accordance with § 1.931 of this part. If a timely filed request for extension of the STA term is dismissed or denied, the STA automatically terminates, without specific Commission action, on the day after the applicant or the applicant's attorney is notified of the Commission's action dismissing or denying the request for extension.

(c) Authorizations submitted by licensees for cancellation terminate when the Commission gives Public Notice of such action.

CODE OF FEDERAL REGULATIONS
TITLE 47--TELECOMMUNICATION
CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER D--SAFETY AND SPECIAL RADIO SERVICES
PART 90--PRIVATE LAND MOBILE RADIO SERVICES
SUBPART G--APPLICATIONS AND AUTHORIZATIONS

§ 90.119 Application forms.

The following application forms shall be used--

(a) Form 574 shall be used to apply:

(1) For new base, fixed, or mobile station authorizations governed by this part.

(2) For system authorizations, where the system meets the requirements of s 90.117.

(i) Application for a radio system may be submitted on a single Form 574.

(ii) If the control station(s) will operate on the same frequency as the mobile station, and if the height of the control station(s) antenna(s) will not exceed 6.1 meters (20 feet) above ground or an existing man-made structure (other than an antenna structure), there is no limit on the number of such stations which may be authorized. Items 1 through 5 of Form 574 shall be completed showing the frequency, the station class, the total number of control stations, the emission, and the output power of the highest powered control station. Applicants for all control stations in the 470-512 MHz band must furnish the information requested in Items 1-11 of Form 574.

(3) For modification or for modification and renewal of an existing authorization. (See s 90.135)

(4) For the Commission's consent to the assignment of an authorization to another person or entity. In addition, the application shall be accompanied by a letter from the assignor setting forth his desire to assign all right, title, and interest in and to such authorization, stating the call sign and location of the station, and that the assignor will submit his current station authorization for cancellation upon completion of the assignment. Form 1046 may be used in lieu of this letter.

(5) For reinstatement of an expired license. See also paragraphs (e)(1) and (h) of this section.

(b) With respect to the 806-824/851-869 and 896-901/935-940 MHz bands, all applications required by this section to be filed on Form 574 shall be accompanied by Form 574-A.

(c) With respect to the frequencies below 27.5 MHz, all applications required by this Section to be filed on Form 574 shall be accompanied by Form 574-B.

(d) Applications for stations on frequencies above 27.5 MHz in areas where international coordination is required may be accompanied by Form 574-B, but are not required to be. If the applicant files Form 574-B, the information concerning the proposed station that the Commission reports to the coordinating nation will be that provided on the Form. If the applicant does not file Form 574-B, the information concerning the proposed station

47 C.F.R. § 90.119 (1994) (cont'd)

that the Commission reports to the coordinating nation will be based on assumed technical characteristics determined by the Commission and described in instructions to Form 574. Specifically, the following stations are involved:

- (1) Those north of Line A, or east of Line C if the application is for a frequency between 30 MHz and 470 and 929 and 930 MHz. Lines A and C are defined in s 90.7.
- (2) Those requesting frequencies in the portion of the frequency bands allocated to both countries that overlap in the two geographical areas as defined in the U.S. Canada agreement, dated April 7, 1982, concerning the use of 800 MHz frequencies along the U.S.-Canada border.

(e) Form 405-A shall be used to:

- (1) Apply for license renewal (if the reinstatement of renewal does not involve the modification of the station or system license) when the licensee has not received renewal Form 574-R in the mail from the Commission within sixty (60) days of license expiration, and may be used to apply for reinstatement of an expired license (if the reinstatement does not involve the modification of the station or system license).
- (2) Notify the Commission of a change in the licensee's name or mailing address that occurs during the license term. (See s 90.135(b).)
- (3) Notify the Commission that the licensee has discontinued station operation and wishes to cancel the license. (See s 90.157.)

(f) A separate application shall be submitted on FCC form 703 whenever it is proposed to change, as by transfer of stock ownership, the control of a corporate licensee.

(g) Form 572, Temporary Permit to Operate a Part 90 Radio Station, should be properly executed if the applicant is eligible and desires to operate his station pending the processing of his formal application (See also ss 90.159, and 90.657).

(h) Form 574-R shall be used to apply for a renewal of an existing authorization and may be used to apply for reinstatement of an expired license, if the renewal or reinstatement does not involve the modification of the station or system license. (Form 574-R is generated by the Commission and is mailed to the licensee prior to the expiration of the license term).

CODE OF FEDERAL REGULATIONS
TITLE 47--TELECOMMUNICATION
CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER D--SAFETY AND SPECIAL RADIO SERVICES
PART 90--PRIVATE LAND MOBILE RADIO SERVICES
SUBPART G--APPLICATIONS AND AUTHORIZATIONS

§ 90.149 License term.

(a) Licenses for stations authorized under this part will be issued for a term not to exceed five (5) years from the date of the original issuance, modification, or renewal, except that the license term for stations licensed as commercial mobile radio service on 220-222 MHz, 929-930 MHz paging, Business Radio, and SMR frequencies shall be ten (10) years. Licensees shall have an additional thirty (30) days after the expiration of the license term to apply for reinstatement of expired licenses.

(b) If no application for reinstatement has been filed as specified in this Part, the authorization shall be deemed to have been automatically cancelled on the date specified on the authorization.

(c) Authorizations for stations engaged in developmental operation under subpart Q of this part will be issued upon a temporary basis for a specific period of time, but in no event to extend beyond 1 year from date of original issuance, modification or renewal.

(d) Nationwide authorizations under subpart T of this part will be issued for a term not to exceed ten years from the date of the original issuance, modification or renewal.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES A. KAY, JR., et al., Appellants,

v.

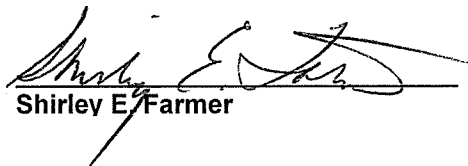
FEDERAL COMMUNICATIONS COMMISSION, Appellee.

Certificate Of Service

I, Shirley E. Farmer, hereby certify that the foregoing typewritten "Brief for The Federal Communications Commission" was served this 19th day of February, 2008, by mailing a true copy thereof, postage prepaid, to the following person at the address listed below:

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