

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 506

PHASE II

In the Matter of)	JOINT SUPPLEMENTAL
)	COMMENTS
)	OF
Rulemaking to Amend and Adopt)	T-MOBILE WEST CORPORATION,
Permanent Rules in OAR 860,)	D/B/A T-MOBILE, NEW CINGULAR
Divisions 024 and 028 Regarding Pole)	WIRELESS PCS, LLC, SPRINT
Attachment Use and Safety.)	SPECTRUM L.P., AND NEXTEL
)	WEST CORP.

INTRODUCTION

At the October 12, 2006 workshop, the Commissioners requested comments regarding pole owner claims that there are “additional” costs associated with wireless attachments to poles that would not be recovered through the proposed pole attachment rental rate¹ or through non-recurring charges, including make-ready work charges.² T-Mobile West Corporation, d/b/a T-Mobile (“T-Mobile”), New Cingular Wireless PCS, LLC (“Cingular”), Sprint Spectrum L.P., and Nextel West Corp. (“Sprint Nextel”) (collectively “the Wireless Carriers”) respectfully submit these joint supplemental comments in response to that request. The short answer to the question posed by the Commissioners is that, under the proposed rules, pole owners will be fully

¹ See Staff’s Proposed Pole and Conduit Attachment Rules, appended to the Notice of Proposed Rulemaking Hearing, filed with the Secretary of State June 15, 2006 (hereinafter “Staff’s Proposed Rules”), OAR 860-028-0110.

² See Staff’s Proposed Rules, OAR 860-028-0020(11) and OAR 860-028-0110(3).

compensated for wireless attachments consistent with Oregon’s statutory scheme.³ There is simply no basis for applying a different rental rate to attachments made by wireless carriers.

To date, the pole owners have submitted no written evidence of “additional” costs that would warrant using a different rental rate formula for wireless attachments. When the issue was discussed at the workshop held October 26, 2006, the pole owners could only speculate that there *may* be additional costs associated with wireless attachments based on: 1) replacement of poles blown over during storms; 2) damage to poles from the introduction of insects caused by drilling; and 3) additional training for electrical workers.⁴ As discussed more fully below, each of these potential costs is accounted for in the proposed rental rate. This is consistent with the approach taken in the State of Utah, which includes wireless attachments under a rental rate formula that is fundamentally identical to the rental rate methodology proposed in this docket. The Commission should, therefore, adopt rules that make clear that the proposed rental rates apply to wireless attachments.

The Wireless Carriers look forward to addressing any other “evidence” of additional costs that the pole owners may bring forward at the Rulemaking Hearing scheduled for November 8, 2006.

COMMENTS

I. The Proposed Rental Rate Formula Will Fully Compensate the Pole Owners

The proposed rules calculate the rental rate in a manner that will fully compensate pole owners for wireless attachments. The pole owners do not dispute that they currently recover *all* installation-related costs associated with wireless attachments, including the costs of changing

³ See ORS 757.279 – 757.282, and 759.660-757.665.

⁴ The Wireless Carriers are confident that, after ten years of experience with wireless attachments, the pole owners are familiar with the costs associated with wireless attachments and have raised all those costs they perceive may not be appropriately recovered under the proposed rental rate formula.

out poles, through non-recurring “make-ready” charges. This would continue to be true under the proposed rules.⁵ Instead, the pole owners have asserted that the proposed recurring rental rate would not allow them to recover costs associated with: 1) replacement of poles blown over during storms; 2) damage to poles from the introduction of insects caused by drilling; and 3) additional training for electrical workers. This claim is simply not accurate. Each of these purported “additional” costs is accounted for in the “general and administrative” and “maintenance” components of the “carrying charge”, and reflected in the proposed per foot recurring rental rate.⁶

For example, a pole owner’s annual cost of replacing *all* poles knocked down as a result of storms is captured in the costs it files with the Federal Energy Regulatory Commission (hereinafter “FERC”).⁷ All entities who attach to the utility’s poles share in those costs on a per foot basis, whether or not a particular entity is attached to any given pole that falls during a storm.⁸ The same is true regarding costs associated with insect-related pole damage. All users of poles, including the pole owners, drill holes that increase the risk of insect infestation. As with storm-related pole replacement costs, the costs associated with replacing poles damaged by insects are reflected in the utility’s FERC accounts, and *all* entities who attach to the utility’s poles will share in those costs on a per foot basis under the proposed rental rate. With respect to the pole owners’ claims of “additional” training costs, the utilities’ costs for training are captured in the related FERC accounts, and the costs are recovered through the carrying charges that are included in the per foot rental rate.

⁵ See Staff Proposed Rules, OAR 860-028-0110(3).

⁶ See Staff’s Proposed Rules, OAR 860-028-0020(3) and 860-028-0110(2).

⁷ Though not filed with FERC, such replacement costs would similarly be appropriately included in the rental rate carrying charge when the pole owner is a telecommunications utility.

⁸ Given the fact that wireless carriers typically attach to fewer poles than do wireline telecommunications providers and cable providers, wireless carriers will often be helping, through their per foot rental charges, to defray pole replacement costs for poles to which they are not attached.

In short, the hypothetical “additional” costs that the pole owners have attempted to identify will be reflected in the proposed rental rate. There is no basis for suggesting that a different recurring rental rate be applied to wireless attachments.

II. The Utah Commission Applies a Similar Rental Rate Formula To Wireless Attachments

The Utah Public Service Commission (hereinafter “Utah PSC”) recently revised its pole attachment rules and has implemented a default rental rate that is fundamentally the same as that proposed in this docket.⁹ While the Utah PSC’s rules contain some rebuttal presumptions (e.g., average pole height, etc.) that vary slightly from those set forth in the proposed rules, the underlying methodology is the same. All attaching entities pay on a per foot basis, and the per foot rate is calculated by multiplying the pole cost by the carrying charge and dividing by the usable space on the pole.¹⁰ The Utah PSC pole attachment rules expressly apply this formula to wireless attachments.¹¹ This Commission should follow the example set forth in the Utah PSC’s rules. There is no reason to discriminate against wireless attachments.

CONCLUSION

The Commission should reject arguments by the pole owners that the rental rate formula in the proposed rules is inappropriate for wireless attachments. The examples of “additional” costs that the pole owners have raised are red herrings. As demonstrated above, the proposed rental rate compensates the pole owners for any such costs. The Commission should follow the approach taken by the Utah PSC in its recently revised pole attachment rules. The Wireless

⁹ Appended hereto as Attachment A is a copy of the Utah PSC’s pole attachment rules.

¹⁰ See Utah Admin. Code R746-345-5.

¹¹ Utah Admin. Code R746-345-1(B)(1). The Utah PSC rules make clear that a wireless carrier is charged for the amount of space the attachment renders unusable, excluding vertical attachments that do not render the space unavailable for other attachments. Utah Admin. Code R746-345-5(A)(2)(d)(v) – (e)(vi). The same result is reached under the definition of “authorized attachment space” under the proposed rules.

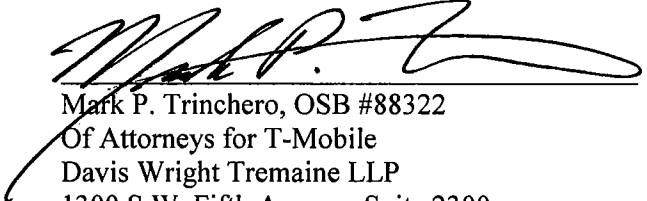
Carriers look forward to the opportunity to address any other "additional" costs that the pole owners may raise at the November 8, 2006 Rulemaking Hearing in this docket.

Respectfully submitted this 6th day of November, 2006.

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Home

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Rule R746-345. Pole Attachments.

As in effect on October 1, 2006

Table of Contents

- R746-345-1. Authorization.
- R746-345-2. General Definitions.
- R746-345-3. Tariffs and Contracts.
- R746-345-4. Pole Labeling.
- R746-345-5. Rental Rate Formula and Method.
- R746-345-6. Dispute Resolution.
- KEY
- Date of Enactment or Last Substantive Amendment
- Notice of Continuation
- Authorizing, Implemented, or Interpreted Law

R746-345-1. Authorization.

A. Authorization of Rules -- Consistent with the Pole Attachment Act, 47 U.S.C. 224(c), and 54-3-1,54-4-1, and 54-4-13, the Public Service Commission shall have the power to regulate the rates, terms and conditions by which a public utility, as defined in 54-2-1(15)(a) including telephone corporations as defined in 54-2-23(a), can permit attachments to its poles by an attaching entity.

B. Application of Rules -- These rules shall apply to each public utility that permits pole attachments to utility's poles by an attaching entity.

1. Although specifically excluded from regulation by the Commission in 54-2-1(23)(b), solely for the purpose of any pole attachment, these rules apply to any wireless provider.

2. Pursuant to these rules, a public utility must allow any attaching entity nondiscriminatory access to utility poles at rates, terms and conditions that are just and reasonable.

C. Application of Rate Methodology -- The rate methodology described in Section R746-345-5 shall be used to determine rates that a public utility may charge an attaching entity to attach to its poles for compensation.

R746-345-2. General Definitions.

A. "Attaching Entity" -- A public utility, wireless provider, cable television company, communications company, or other entity that provides information or telecommunications services that attaches to a pole owned or controlled by a public utility.

B. "Attachment Space" -- The amount of usable space on a pole occupied by a pole attachment as provided for in Subsection R746-345-5(B)(3)(d).

C. "Distribution Pole" -- A utility pole, excluding towers, used by a pole owner to support mainly overhead distribution wires or cables.

D. "Make-Ready Work" -- The changes to be made to a pole owner's poles, its own pole attachments, the existing pole attachments of other attaching entities, or the existing additional equipment associated with such attachments, which changes may be needed to accommodate a proposed additional pole attachment. Such make-ready work is coordinated by the pole owner and is performed by the owners of the poles or owners of the pole attachments and additional equipment or as otherwise agreed to by these owners.

E. "Pole Attachment" -- All equipment, and the devices used to attach the equipment, of an attaching entity within that attaching entity's allocated attachment space. A new or existing service wire drop pole attachment that is attached to the same pole as an existing attachment of the attaching entity is considered a component of the existing attachment for purposes of this rule. Additional equipment that is placed within an attaching entity's existing attachment space, and equipment placed in the unuseable space which is used in conjunction with the attachments, is not an additional pole attachment for rental rate purposes. All equipment and devices shall meet applicable code and contractual requirements. Pole attachments do not include items used for decorations, signage, barriers, lighting, sports equipment, or cameras.

F. "Pole Owner"-- A public utility having ownership or control of poles used, in whole or in part, for any electric or telecommunications services.

G. "Secondary Pole" -- A pole used solely to provide service wire drops, the aerial wires or cables connecting to a customer premise.

H. "Secondary Pole Attachment" -- A pole attachment to a secondary pole.

I. "Wireless Provider" -- A corporation, partnership, or firm that provides cellular, Personal Communications Systems (PCS), or other commercial mobile radio service as defined in 47 U.S.C. 332 that has been issued a covering license by the Federal Communications Commission.

R746-345-3. Tariffs and Contracts.

A. Tariff Filings and Standard Contracts -- A pole owner shall submit a tariff and standard contract, or a Statement of Generally Available Terms (SGAT), specifying the rates, terms and conditions for any pole attachment, to the Commission for approval.

1. A pole owner must petition the Commission for any changes or modifications to the rates, terms, or conditions of its tariff, standard contract or SGAT. A petition for change or modification must include a showing why the rate, term or condition is no longer just and reasonable. A change in rates, terms or conditions of an approved tariff, standard contract or SGAT will not become effective unless and until it has been approved by the Commission.

2. The tariff, standard contract or SGAT shall identify all rates, fees, and charges applicable to any pole attachment. The tariff, standard contract, and SGAT shall also include:

a. a description of the permitting process, the inspection process, the joint audit process, including shared scheduling and costs, and any non-recurring fee or charge applicable thereto;

b. emergency access provisions; and

c. any back rent recovery or unauthorized pole attachment fee and any applicable procedures for determining the liability of an attaching entity to pay back rent or any non-recurring fee or charge applicable thereto.

B. Establishing the Pole Attachment Relationship -- The pole attachment relationship shall be established when the pole owner and the attaching entity have executed the approved standard contract, or SGAT, or other Commission-approved contract.

1. Exception -- The pole owner and attaching entity may voluntarily negotiate an alternative contract incorporating some, all, or none of the terms of the standard contract or SGAT. The parties shall submit the negotiated contract to the Commission for approval. In situations in which the pole owner and attaching entity are

unable to agree following good faith negotiations, the pole owner or attaching entity may petition the Commission for resolution as provided in Section R746-345-6. Pending resolution by the Commission, the parties shall use the standard contract or SGAT.

C. Make-Ready Work, Timeline and Cost Methodology -- As a part of the application process, the pole owner shall provide the applicant with an estimate of the cost of the make-ready work required and the expected time to complete the make-ready work as provided for in this sub-section. All applications by a potential attacher within a given calendar month shall be counted as a single application for the purposes of calculating the response time to complete the make-ready estimate for the pole owner. The due date for a response to all applications within the calendar month shall be calculated from the date of the last application during that month. As an alternative to all of the time periods allowed for construction below, a pole owner may provide the applicant with an estimated time by which the work could be completed that is different than the standard time periods contained in this rule with an explanation for the anticipated delay. Pole owners must provide this alternative estimate within the estimate timelines provided below. Applicants that wish to consider self-building shall inform the pole owner at the time of application that they are considering the self-build option, if available, and they would like a two-alternative make-ready bid. The pole owner and each existing attaching entity are responsible to determine what portion, if any, of the make-ready work their facilities require which may be performed through a self-build option and what conditions, if any, are associated with such self-build option. In the first alternative, the pole owner and attaching entities would be responsible for all necessary make-ready work. For the second alternative, the pole owner and attaching entities will identify what make-ready work they will perform, if any, with an associated cost estimate, and also identify what make-ready work, if any, the owner is agreeable to have performed through a self-build option and the conditions, if any, for such self-build option.

1. For applications up to 20 poles, the pole owner shall respond with either an approval or a rejection within 45 days. At the same time as an approval is given, a completed make-ready estimate must be provided to the applicant explaining what make-ready work must be done, the cost of that work, and the time by which the work would be finished, that is no later than 120 days from receiving an initial deposit payment for the make-ready work.

2. For applications that represent greater than 20 poles, but equal to or less than .5% of the pole owner's poles in Utah, or 300 poles, whichever is lower, the time for the pole owner's approval and make-ready estimate shall be extended to 60 days, and the time for construction will remain at a maximum of 120 days.

3. For applications that represent greater than the number of poles calculated in section 3(2)(C)(2) above, but equal to or less than 5% of the pole owner's poles in Utah, or 3,000 poles, whichever is lower, the time for the approval and make-ready estimate shall be extended to 90 days, and the time for construction will be extended to 180 days.

4. For applications that represent greater than 5% of the pole owner's poles in Utah, or 3,000 poles, whichever is lower, the times for the above activities will be negotiated in good faith. The pole owner shall, within 20 days of the application, inform the applicant of the date by which the pole owner will have the make-ready estimate and make-ready construction time lines prepared for the applicant. If the applicant believes the pole owner is not acting in good faith, it may appeal to the Commission to either resolve the issue of when the make-ready estimate and construction period information should be delivered or to arbitrate the negotiations.

5. If the pole owner rejects any application, the pole owner must state the specific reasons for doing so. Applicants may appeal to the Commission if they do not agree that the pole owner's stated reasons are sufficient grounds for rejection.

6. For all approved applications, the applicant will either accept or reject the make-ready estimate. If it accepts the make-ready estimate and make-ready construction time line, the work must be done on schedule and for the estimated make-ready amount, or less, and the applicant will be billed for actual charges up to the bid amount.

7. Applicants must pay 50% of the make-ready estimate in advance of construction, and pay the remainder in two subsequent installment payments: an additional 25 percent payment when half of the work is done and the balance after the work is completed. Applicants may elect to pay the entire amount up front.

8. An applicant may, at its own discretion, exercise any of the self-build options given for the required make-ready work subject to the conditions made.

9. An applicant may reject a make-ready estimate if it wishes to contest, before the Commission, that the make-ready estimate or make-ready construction time line is not prepared in good-faith, or is unreasonable or not in the public interest.

D. Pole Attachment Placement -- All new copper cable attachments shall be placed at the lowest level permitted by applicable safety codes. In cases where an existing copper attachment has been placed in a location higher than the minimum height the safety codes require, the pole owner shall determine if the proposed attachment may be safely attached either above or below the existing copper attachment taking account of midspan clearances and potential crossovers. If these attachment locations, above or below the copper cable, comply with the applicable safety code, the

attacher may attach to the pole without paying to move the copper cable. The owner of the copper cable may elect to pay the costs of having the cable moved to the lowest position as part of the attachment process, or it may elect to move the cable themselves prior to the attaching entity's attachment. If the copper cable must be moved in order for the attacher to be able to safely make its attachment, the attacher shall pay the costs associated with moving the existing copper cable.

R746-345-4. Pole Labeling.

A. Pole Labeling -- A pole owner must label poles to indicate ownership. A pole owner shall label any new pole installed, after the effective date of this rule, immediately upon installation. Poles installed prior to the effective date of this rule, shall be labeled at the time of routine maintenance, normal replacement, change-out, or relocation, and whenever practicable. Labels shall be based on a good faith assertion of ownership.

B. Pole Attachment Labeling -- An attaching entity must label its pole attachments to indicate ownership. Pole attachment labels may not be placed in a manner that could be interpreted to indicate an ownership of the utility pole. An attaching entity shall label any new pole attachment installed, after the effective date of this rule, immediately upon installation. Pole Attachments installed prior to the effective date of this rule shall be labeled at the time of routine maintenance, normal replacement, rearrangement, rebuilding, or reconstruction, and whenever practicable.

C. Exception -- Electrical power pole attachments do not need to be labeled.

R746-345-5. Rental Rate Formula and Method.

A. Rate Formula -- Any rate based on the rate formula in this Subsection shall be considered just and reasonable unless determined otherwise by the Commission. A pole attachment rental rate shall be based on publicly filed data and must conform to the Federal Communications Commission's rules and regulations governing pole attachments, except as modified by this Section. A pole attachment rental rate shall be calculated and charged as an annual per attachment rental rate for each attachment space used by an attaching entity. The following formula and presumptions shall be used to establish pole attachment rates:

1. Formula:

Rate per attachment space = (Space Used x (1/Usable Space) x Cost of Bare Pole x Carrying Charge Rate)

2. Definitions:

a. "Carrying Charge Rate" means the percentage of a pole owner's depreciation expense, administrative and general expenses, maintenance expenses, taxes, rate of return, pro-rated annualized costs for pole audits or other expenses that are attributable to the pole owner's investment and management of poles.

b. "Cost of Bare Pole" can be defined as either "net cost" or "gross cost." "Gross cost" means the original investment, purchase price, of poles and fixtures, excluding crossarms and appurtenances, divided by the number of poles represented in the investment amount. "Net cost" means the original investment, purchase price, of poles and fixtures, excluding crossarms and appurtenances, less depreciation reserve and deferred federal income taxes associated with the pole investment, divided by the number of poles represented in the investment amount. A pole owner may use gross cost only when its net cost is a negative balance. If using the net or gross cost results in an unfair or unreasonable outcome, a pole owner or attaching entity can seek relief from the Commission under R746-345-5 C.

c. "Unusable Space" means the space on a utility pole below the usable space including the amount required to set the depth of the pole.

d. "Usable Space" means the space on a utility pole above the minimum grade level to the top of the pole, which includes the space occupied by the pole owner.

3. Rebuttable presumptions:

a. Average pole height equals 37.5 feet.

b. Usable space per pole equals 13.5 feet.

c. Unusable space per pole equals 24 feet.

d. Space used by an attaching entity:

(i) An electric pole attachment equals 7.5 feet;

(ii) A telecommunications pole attachment equals 1.0 foot;

(iii) A cable television pole attachment equals 1.0 foot; and

(iv) An electric, cable, or telecommunications secondary pole attachment equals 1.0 foot.

(v) A wireless provider's pole attachment equals not less than 1.0 foot and shall be determined by the amount of space on the pole that is rendered unusable for other uses, as a result of the attachment or the associated equipment. The space used by a wireless provider may be established as an average and included in the pole owner's tariff and standard contract, or SGAT, pursuant to Section R746-345-3 of this Rule.

e. The space used by a wireless provider:

(i) may not include any of the length of a vertically placed cable, wire, conduit, antenna, or other facility unless the vertically placed cable, wire, conduit, antenna, or other facility prevents another attaching entity from placing a pole attachment in the usable space of the pole;

(ii) may not exceed the average pole height established in Subsection R746-345-5(A)(3)(a).

(iii) In situations in which the pole owner and wireless provider are unable to agree, following good faith negotiations, on the space used by the wireless provider as determined in Subsection R746-345-5(A)(3)(d)(v), the pole owner or wireless provider may petition the Commission to determine the footage of space used by the wireless provider as provided in Subsection R746-345-3(C).

f. The Commission shall recalculate the rental rate only when it deems necessary. Pole owners or attaching entities may petition the Commission to reexamine the rental rate.

4. A pole owner may not assess a fee or charge in addition to an annual pole attachment rental rate, including any non-recurring fee or charge described in Subsection R746-345-3(A)(2), for any cost included in the calculation of its annual pole attachment rental rate.

B. Commission Relief -- A pole owner or attaching entity may petition the Commission to review a pole attachment rental rate, rate formula, or rebuttable presumption as provided for in this rule. The petition must include a factual showing that a rental rate, rate formula or rebuttable presumption is unjust, unreasonable or otherwise inconsistent with the public interest.

R746-345-6. Dispute Resolution.

A. Mediation -- Except as otherwise precluded by law, a resolution of any dispute concerning any pole attachment agreement, negotiation, permit, audit, or billing may be pursued through mediation while reserving to the parties all rights to an adjudicative process before the Commission.

1. The parties may file their action with the Commission and request leave to pursue mediation any time before a hearing.

2. The choice of mediator and the apportionment of costs shall be determined by agreement of the parties. However, the parties may jointly request a mediator from the Commission or the Division of Public Utilities.

3. A party need not pay the portion of a bill that is disputed if it has started a dispute proceeding within 60 days of the due date of the disputed amount. The party shall notify the Commission if the dispute process is not before the Commission.

B. Settlement -- If the parties reach a mediated agreement or settlement, they will prepare and sign a written agreement and submit it to the Commission. Unless the agreement or settlement is contrary to law and this rule, R746-345, the Commission will approve the agreement or settlement and dismiss or cancel proceedings concerning the matters settled.

1. If the agreement or settlement does not resolve all of the issues, the parties shall prepare a stipulation that identifies the issues resolved and the issues that remain in dispute.

2. If any issues remain unresolved, the matter will be scheduled for a hearing before the Commission.

KEY

public utilities, rules and procedures, telecommunications, telephone utility regulation

Date of Enactment or Last Substantive Amendment

August 29, 2006

Notice of Continuation

August 8, 2003

Authorizing, Implemented, or Interpreted Law

54-4-13

Rule converted into HTML by the Division of Administrative Rules.

For questions regarding the *content* or *application* of rules under Title R746, please contact the promulgating agency (Public Service Commission, Administration). A list of agencies with links to their homepages is available at <http://www.utah.gov/government/agencylist.html>.

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CERTIFICATE OF SERVICE

AR 506

Phase II

I hereby certify on this 6th day of November, 2006, Joint Supplemental Comments of T-Mobile West Corporation, d/b/a T-Mobile, New Cingular Wireless PCS, LLC, Sprint Spectrum L.P., and Nextel West Corp were sent via UPS overnight mail to the Oregon Public Utility Commission.

A copy of the filing was also sent via US Mail to the service list which is attached.

DAVIS WRIGHT TREMAINE LLP

By: 

Mark P. Trincherro



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Public Utility Commission



eDockets

Docket Summary

Docket No: AR 506

Docket Name: JOINT USE AND SAFETY RULES

[Print Summary](#)

See also: AR 510

In the Matter of a Rulemaking to Amend and Adopt Permanent Rules in OAR 860, Divisions 024 and 028, Regarding Pole Attachment Use and Safety.

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ACTIONS

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W=Waive Paper service

**C=Confidential
HC=Highly Confidential**

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