

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

STATE CORPORATION COMMISSION

Before Commissioners: Brian Moline, Chair
Robert E. Krehbiel, Commissioner
Michael C. Moffet, Commissioner

DEC 16 2005

 Docket Room

In the Matter of a General Investigation)
Addressing Requirements for Designation) Docket No. 06-GIMT-446-GIT
of Eligible Telecommunications Carriers.)

**COMMENTS OF THE
CITIZENS' UTILITY RATEPAYER BOARD**

COMES NOW the Citizens' Utility Ratepayer Board (CURB) and files the following comments in this docket related to the Kansas Corporation Commission's (KCC or Commission) October 26, 2005, Order Opening Docket and Requesting Comments regarding the Commission's requirements for designation of eligible telecommunications carriers (ETC).

I. INTRODUCTION

1. In the Order Opening Docket and Requesting Comments, the Commission requested parties to file comments on the Order and requested parties to address issues specified in Staff's September 29, 2005, memorandum.

2. CURB submits the following comments in response to the Commission's request. CURB will not comment on each issue, but reserves the right to respond to all issues in reply comments and in any other forum in this docket.

3. Generally CURB supports the positions put forth by the Federal Communications Commission (FCC) in their Report and Order dated March 17, 2005 in CC Docket No. 96-45,

captioned “In the Matter of Federal-State Joint Board on Universal Service.”¹ (FCC ETC Order). The FCC ETC Order explicitly states that it “addresses the **minimum** requirements for a telecommunications carrier to be designated as an ‘eligible telecommunications carrier’ or ‘ETC.’”² (Emphasis added.) Therefore, the possibility of additional requirements imposed by the KCC, or by Kansas statute, are both contemplated and acceptable.

II. ISSUES FROM THE ALLTEL AND RCC ORDERS.

4. The following issues reference the issues listed in paragraph 5 of the Commission’s Order Opening Docket and Requesting Comments.

A. Minimum Local Usage.

5. CURB recommends that a minimum number of local usage minutes be established and that the minimum be set at the average number of local usage minutes of the incumbent local exchange carrier. The FCC states,

We encourage state commissions to consider whether an ETC offers a local usage plan **comparable** to those offered by the incumbent in examining whether the ETC applicant provides adequate local usage to receive designation as an ETC. In addition, although the Commission has not set a minimum local usage requirement, there is nothing in the Act, Commission’s rules, or orders that would limit state commissions from prescribing some amount of local usage as a condition of ETC status. (Emphasis added.)³

6. The obvious difficulty is in quantifying what constitutes “comparable” local usage⁴. While the FCC and Staff put forth options that could be incorporated, such as local

¹ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 05-46, 20 FCC Rcd. 6371 (rel. March 17, 2005) (FCC ETC Order).

² FCC ETC Order, at ¶ 1.

³ *Id.*, ¶ 34 (citing *Federal-State Joint Board on Universal Service*, Recommended Decision, CC Docket No. 96-45, 19 FCC Rcd 4257, 4258, ¶ 2 (2004)).

⁴ Staff suggests parties should comment on whether it is sufficient to determine that an ETC’s local usage plan is reasonable or whether the Commission must determine that the plan is comparable to the ILEC’s local usage. Common definitions of comparable do not imply equality and therefore, in this context, CURB does not see any reason to expand on, or diminish, the FCC’s language.

calling plan size or free calls to government or social agencies, all alternatives to a calculated average local usage appear to be subjective and subject to interpretation. To firmly establish filing requirements for ETCs, CURB recommends fixed, quantifiable local usage minutes which, at a minimum, should be equal to the average number of local usage minutes of the incumbent local exchange carrier.

B. Per-Minute Blocking For Wireless Carriers.

7. This issue illustrates exactly why there should be adequate minutes of use in a CETCs basic local service offering. The practical effect of per-minute blocking of basic local service is to disconnect the service. If the consumer cannot reach emergency or social agencies, the essence of universal service has been lost. However, if per-minute of use blocking is not provided to Lifeline customers, those Lifeline customers will risk incurring additional charges (potentially substantial, as additional minutes are often as high as \$.45 a minute) for usage beyond that covered by the calling plan. As a result, CURB supports a free per-minute blocking option for Lifeline customers for local usage.

C. Billing Standards.

8. Regarding the threshold issue of whether billing standards apply to wireless carriers, the FCC states:

We conclude that CMRS carriers should no longer be exempt from 47 C.F.R. §64.2401(b)'s requirement that billing descriptions be brief, clear, non-misleading and in plain language. In creating this exemption in 1999, the Commission relied upon the fact that the record did not indicate a high volume of complaints in the CMRS content. The Commission's more recent data indicates that complaints regarding wireless "billing & rates" and "marketing and advertising" have increased significantly since that time. For example, in 1999, the Commission received only a few dozen complaints regarding wireless billing. In 2004, the Commission received approximately 18,000 complaints about wireless carrier practices in these categories. This trend is supported by the recent comments of a .

number of states and consumers in this proceeding. Although we acknowledge that this increase may be due in part to the significant increase in wireless subscribers since 1999, we also believe it is demonstrative of consumer confusion and dissatisfaction with current billing practices.

Though we remove the exemption from 47 D.F.R. §64.2401(b) for CMRS providers, and thereby erase any ambiguity regarding the necessity of CMRS carriers to provide clear and non-misleading billing information to their customers under our rules, we recognize that states may wish to play a role in enforcing rules against CMRS and other interstate carriers providing misleading billing information. At a minimum, we emphasize that no action that we take in this Second Report and Order and Declaratory Ruling below limits states' authority to enforce their own generally applicable consumer protection laws, to the extent such laws do not require or prohibit use of line items, nor limits a state's ability to assess taxes or create, for example, a state-specific universal service fund to which carriers must contribute. In the Second Further Notice below, we seek comment on specifically where to draw the line between the Commission's jurisdiction and states' jurisdiction over the billing practices of CMRS and other interstate carriers.⁵

9. Clearly the FCC and states have seen an increase in billing complaints regarding wireless carriers. The FCC has not exempted, and in fact in some cases has re-imposed, billing standards for wireless carriers. It is also clear that the FCC has not exempted states from imposing billing standards on wireless carriers.

10. In addition, wireless carriers that have chosen to be designated as ETCs have the added responsibilities and regulation imposed as universal service providers. As a result, there should be no argument whether ETCs are subject to state regulation and billing standards.

D. Carrier Of Last Resort Responsibilities.

11. K.S.A. 66-2009 requires the incumbent, or its successor, to be the carrier of last resort (COLR). At this time, this appears to be the best assurance to customers of always-available service. However, Section 214(e)(4) of the Federal Act states, "A State commission shall permit an eligible telecommunications carrier to relinquish its designation as such a carrier

⁵ *In the Matter of Truth-In-Billing and Billing Format*, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking (Truth-In-Billing Order), 20 FCC Rcd. 6448, 6456, 6458 (March 18, 2005).

in any area served by more than one eligible telecommunications carrier.” Because the Commission is required under the Federal Act to allow an ETC to relinquish its designation as an ETC when an area is served by more than one ETC, the impact on the ability of the incumbent to meet its carrier of last resort obligations must be considered in all ETC applications. Therefore, CURB recommends that COLR requirements be considered in the public interest standard for all ETC applications. In addition to the requirement to be prepared to serve all customers within the designated service area, the ETC applicant should address COLR requirements from their perspective.

E. Build-Out Plans.

12. Generally CURB supports the KCC and FCC requirements. However, a review of the usefulness of annual mapping requirements and quarterly reports is timely and CURB looks forward to reviewing the comments of the affected ETCs.

13. The Commission also requests parties to determine what constitutes “a reasonable request for service.” CURB submits that any request for service within the service area, by a verifiable party and subject to the normal customer screening processes, constitutes a reasonable request. Certainly in the case of wireless customers, location becomes less of an issue, but requests for service at the fringe of the coverage area still presents a problem. However, the current KCC and FCC requirements covering the steps an ETC must follow to provide service, or to report requests that cannot be filled, appear adequate:

If the ETC's network already passes or covers the potential customer's premises, the ETC should provide service immediately. (footnote omitted) In those instances where a request comes from a potential customer within the applicant's licensed area but outside its existing network coverage, the ETC should provide service within a reasonable period of time if service can be provided at reasonable cost by: (1) modifying or replacing the requesting customer's equipment; (2) deploying a roof-mounted antenna or other

equipment; (3) adjusting the nearest cell tower; (4) adjusting network or customer facilities; (5) reselling services from another carrier's facilities to provide service; or (6) employing, leasing, or constructing an additional cell site, cell extender, repeater, or other similar equipment. (footnote omitted) We believe that these requirements will ensure that an ETC applicant is committed to serving customers within the entire area for which it is designated. If an ETC applicant determines that it cannot serve the customer using one or more of these methods, then the ETC must report the unfulfilled request to the Commission within 30 days after making such determination. (footnote omitted).⁶

F. Application Of Termination Fees.

14. Termination fees should not apply to the basic local service portion of the ETC service. If the ETC cannot distinguish the basic local service portion then either a standalone basic local service must be provided or a surrogate could be developed such as a percentage of the total bill. Inevitably, this leads to the requirement that the termination fees in the service agreement must be clearly stated and presented at the time of service initiation. Customers must be informed in clear and unequivocal language the termination liabilities they face and how those differ from buying basic local service from an incumbent provider.

15. CURB urges the Commission to require ETCs to offer at least one plan that (1) does not require a customer to enter into a long-term contract and (2) does not have a termination fee.

III. ISSUES RAISED IN THE FCC ORDER.

A. Emergency Situations.

16. The same showing of emergency capabilities presented to the FCC should be filed in Kansas. Since the report already exists it should be a simple matter to file it in Kansas. At this time CURB will not designate a specific time period for back-up power. Instead, the

⁶ FCC ETC Order, ¶ 22.

Commission should require all ETCs to state how long their back-up power is engineered to last for each location that has back-up power. If there is an obvious shortfall, or a weak link, it must be corrected. If the engineered back-up times are inadequate the Commission must take remedial action.

B. Consumer Protection And Service Quality Standards.

17. CURB's position is that all companies providing universal service should be subject to the same consumer protection and service quality standards. If some of the standards are not appropriate because of the nature of the service provided, the burden is on the affected ETCs to explain why the standards are inappropriate.⁷

C. Equal Access.

18. CURB agrees that pending reviews of this issue make addressing this issue untimely. CURB does recommend that, regardless of the ultimate outcome of this issue, ETCs be required to make full disclosure of their policy, and the resulting consumer impact, at the time of the initial request for service.

D. Public Interest Issues.

19. The Commission's Order at page 8, paragraph 16, requests comments on the following issues regarding determination of the public interest in designating an ETC:

- Issue 1) Should the Commission consider increased consumer choice and advantages and disadvantages of an ETC's service offerings for both state and federal purposes?
- Issue 2) Should the Commission adopt a population density analysis for both state and federal purposes and if so should a bright line test be established?

⁷ See, CURB Comments filed Dec. 15, 2004, and Reply Comments filed Jan. 25, 2005 in Docket No. 05-GIMT-187-GIT.

Issue 3) Should the Commission consider the impact of designation of an additional ETC on the size of the federal USF and the KUSF, and if so should the Commission examine the per-line support amount that would be ported to the competitive ETC?

20. CURB will provide some preliminary comments on these issues, although there could be changes or updates in our position based on our subsequent review of the initial comments of other parties.

1. Issue 1 - Consumer Choice and Advantages and Disadvantages of an ETC's Service Offerings.

21. Section 214 (e)(2), (6) of the Federal Telecommunications Act of 1996 states that for areas served by a rural incumbent LEC, more than one ETC *may* be designated if this would serve the public interest. Also, under section 214 (e) (2) of the Act, the FCC and state commission must determine that an ETC designation is consistent with the public interest, convenience and necessity. CURB agrees with the FCC ETC Order, that the public interest benefits of a specific ETC designation must be analyzed,

...in a manner consistent with the purposes of the Act itself, including the fundamental goals of preserving and advancing universal service; ensuring the availability of quality telecommunications services at just, reasonable, and affordable rates; and promoting the deployment of advanced telecommunications and information services to all regions of the nation, including rural and high-cost areas.⁸

22. The FCC further noted with approval in the FCC ETC Order that the Commission and state commissions have used additional factors to analyze whether the designation of an additional ETC is in the public interest, including availability of new choices for consumers, affordability, quality of service, service to unserved customers, comparison of benefits to public cost, and consideration of material harm.⁹

⁸ FCC ETC Order, ¶ 40 (citing 47 U.S.C. § 254(b), 47 U.S.C. § 254(b)(1), and 47 U.S.C. § 254(b)(3)).

⁹ *Id.*

23. In addition to the basic public interest standards in the Act, CURB agrees with the FCC that fact-specific public interest analysis is also warranted such as those raised by the FCC.

24. As part of any fact-specific public interest examination, CURB believes that the Commission should consider increased consumer choice and advantages and disadvantages of an ETC applicant's service offerings when performing a public interest analysis. The FCC ETC Order states that the public interest examination for ETC applicants should consider:

- 1) the benefits of increased consumer choice;
- 2) the unique advantages and disadvantages of the competitor's service offering; and
- 3) the impact of the designation on the universal service fund.¹⁰

25. CURB agrees that all of these issues should be evaluated in determining ETC designation. However, CURB does not believe that specific rules or criteria should be established for evaluating the impact of consumer choice or the unique advantages and disadvantages of the competitor's service offerings. At this early stage, it is best to preserve maximum discretion and judgment regarding these issues. This will benefit the public interest and provide maximum flexibility for all parties to evaluate these issues in ETC applications. In addition, there may be unique conditions regarding various competitors that do not translate to standardized rules or criteria for evaluation - - at least in the short-run. Therefore, at least initially, ETC applications should be evaluated on a case-by-case basis. If the examination of several initial ETC applications results in consistent analysis, criteria and findings, then perhaps this information can be used to shape formal rules or criteria for ETC evaluation in the future.

26. CURB does not believe that consumers necessarily benefit from the mere existence of increased choices. These increased consumer choices have to be weighed against

¹⁰ FCC ETC Order, ¶ 18. The issue of the impact on the universal service fund will be addressed later in these comments, so that issues are addressed in the same order set forth by the Commission.

the advantages and disadvantages of the particular competitor's service offering, the potential impact on the state universal service fund, and other issues. In the *Virginia Cellular ETC Designation Order*, the FCC found that although an additional carrier in a non-rural area complies with the eligibility requirements in section 214(e)(1) of the Act, this would not necessarily be consistent with the public interest in every case.¹¹

27. The FCC ETC Order states that, "the value of increased competition, by itself, is unlikely to satisfy the public interest test."¹² In addition, the FCC ETC Order sets forth various advantages and disadvantages of an ETC applicant service offering, including:

- a) advantage - the benefits of mobility that wireless carriers provide in geographically isolated areas;
- b) advantage - the possibility that an ETC designation will allow customers to be subject to fewer toll charges;
- c) advantage - the potential for customers to obtain services comparable to those provided in rural areas, such as voicemail, numeric paging, call forwarding, three-way calling, call waiting, and other premium services; and
- d) disadvantage – the potential for dropped call rates and poor coverage.¹³

28. CURB agrees with the above potential advantages and disadvantages set forth by the FCC. CURB would also recommend that the Commission's public interest examination include consideration of whether the applicant is an affiliate of an existing incumbent RLEC, and whether the applicant is merely reselling existing local services of the incumbent RLEC.

¹¹ *Federal-State Joint Board on Universal Service, In re Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier In the Commonwealth of Virginia*, Memorandum Opinion and Order, CC Docket No. 96-45, 19 FCC Rcd 1563, 1575, ¶ 27. (rel. Jan. 22, 2004),

¹² FCC ETC Order, ¶ 44

¹³ FCC ETC Order, ¶ 44

2. Issue 2 – Population Density Analysis and Bright-Line Test.

29. The FCC has stated that it will conduct a “creamskimming” analysis in areas where the ETC applicant seeks designation below the study area level of an RLEC.¹⁴ This analysis will compare the population density of each wire center in which the ETC applicant seeks approval against that of wire centers in the study area where the ETC does not seek designation. The FCC will deny ETC status if it determines that the potential for creamskimming is contrary to the public interest. The FCC strongly encourages state commissions to consider the same factors in their public interest reviews.¹⁵

30. CURB agrees with the FCC that some kind of density analysis should be performed to test for creamskimming in rural study areas of RLECs. The FCC determined that the potential for creamskimming occurs when an ETC applicant seeks approval in a disproportionate share of the higher-density wire centers in an RLECs service area, and creamskimming is not an issue if the ETC applicant seeks ETC designation for an entire rural service area.¹⁶ Because the support for each line is based on the RLEC’s average costs for serving the entire service territory (unless the RLEC has disaggregated its support), the ETC who services a disproportionate share of higher-density wire centers may receive more support than is reflective of the RLECs cost of serving that wire center. Because line density is a significant cost driver, the highest density wire centers are the least costly to serve, and ETC’s could unfairly benefit by serving only the low-cost areas while RLECs have to provide service to the entire area. In order to avoid burdening the universal service fund and ensure that RLECs are not

¹⁴ FCC ETC Order, ¶¶ 3, 18, 41, 48-53.

¹⁵ FCC ETC Order, ¶ 41.

¹⁶ FCC ETC Order, ¶ 49.

harmful by the effects of cream-skimming, the FCC strongly encourages states to examine the potential for cream-skimming in wire centers of RLECs.¹⁷

31. Consistent with the FCC's position, CURB agrees that cream-skimming could burden the KUSF and negatively impact Kansas RLECs. CURB agrees that cream-skimming should be evaluated in Kansas ETC applications, but CURB does not recommend a specific methodology for evaluating cream-skimming at this time. Some evaluation needs to be performed in order to evaluate and distinguish between densely and less-densely populated wire centers of RLECs. An ETC may find it beneficial to serve only an area that approximates the more densely populated "city limits" of a rural area versus the entire surrounding area. CURB will continue to examine the cream-skimming analysis performed by the FCC in the *Virginia Cellular ETC Designation Order* and the *Highland Cellular ETC Designation Order*.¹⁸ A standardized measure of population densities in rural areas should be adopted and used as part of this analysis. Also, the potential for cream-skimming is lessened if there is disaggregated support for those higher cost areas of the RLEC service territory. However, it may be costly and time consuming to disaggregate support for each RLEC service territory.

32. The FCC rejected a bright-line test for determining whether cream-skimming concerns are present.¹⁹ CURB would like to evaluate specific RLEC and competitor arguments in this area before it reaches a final conclusion on this issue. However, CURB does agree with the FCC that any rigid bright-line test may not be flexible enough to evaluate population density issues on a case-by-case basis for each ETC applicant.

¹⁷ *Id.*

¹⁸ *Federal-State Joint Board on Universal Service, In re Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, Memorandum Opinion and Order, CC Docket No. 96-45, 19 FCC Rcd. 6422 (rel. Apr. 12, 2004).

¹⁹ FCC ETC Order, ¶ 53.

3. Issue 3 – Impact of ETC Designation on the KUSF and Per-Line Support Ported to ETCs.

33. CURB believes that part of the public interest evaluation should include consideration of the benefit of additional competition versus the negative impact on the KUSF. CURB previously noted that ETCs which creamskim or provide no substantial competitive benefits to consumers could cause a burden on the KUSF. Consistent with the FCC's position, CURB believes that the impact of ETC applicants on the size and sustainability of the KUSF, the impact on competition, and the impact of public interest issues generally should all be evaluated on a case-by-case basis.

34. CURB believes that the amount of per-line support ported to ETCs is a very important issue. The amount of per-line support ported to ETCs can impact the size and sustainability of the KUSF. The FCC states that if the per-line support is high enough, the state may be justified in limiting the number of ETCs in that study area because funding multiple ETCs in these areas could impose strains on the universal service fund.²⁰

35. The most precise measure of per-line support would be based on an RLEC or ETC's specific cost of providing service in the designated service areas using the carrier's specific technology and cost of providing service. However, it may be difficult, time-consuming, and costly to determine the specific cost of each ETC wireless or cable competitor to provide service in a specific service territory. Also, the competitor may oppose evaluation and determination of its specific costs. If the Commission determines evaluating and determining the specific costs of each ETC is too difficult, time-consuming, and costly, then per-line support should be based on the RLEC's cost.

²⁰ FCC ETC Order, ¶ 55.

36. The issue of per-line support also raises issues regarding how this amount is determined for RLECs and ETCs in the future, such as whether the amount should be based on embedded historical cost or based on incremental cost. Until June 30, 2006, K.S.A. 66-2008(e) provides for RLECs to receive support based on their embedded costs, although both SWBT and United receive support based on an incremental cost model.

37. At the minimum, CURB believes that RLECs and ETCs competing in RLEC service areas should receive support based on incremental costs under one or more of the following situations:

- a) the RLEC moves away from traditional ROR regulation (and adopts price caps, alternative regulation, or becomes deregulated);
- b) the RLEC owns or has common ownership interests in an ETC or another entity that competes for basic local service customers of the RLEC and serves the same geographic territory as RLEC;
- c) the RLEC receives a bona fide request for interconnection, services, or network elements and the KCC determines that such request is not unduly economically burdensome, is technically feasible, and is otherwise consistent with Section 254 of the Act.

38. CURB looks forward to reading the comments of other parties on these issues, and will respond after reviewing said comments.

E. Annual Certification Requirements.

39. The Commission requests comment on whether it should expand its ETC certification requirements to include the eight items required by the FCC set forth below:

- 1) Progress reports on five-year service quality improvement plan. This report will include a map detailing the progress in meeting targets set out in the initial plan, an explanation of how FUSF support has been used to improve service quality, coverage, capacity, signal quality, etc, and an explanation of why any targets were not met. Information to be provided at the wire center level.
- 2) Detailed information on any outage lasting at least 30 minutes for any facilities that an ETC owns, operates, leases, or otherwise utilizes that potentially affect at least 10% of the end users in a service area, or that could affect 911. "An outage is defined as a significant degradation in the ability of an end user to establish and maintain a channel of communications as a result of failure or degradation in the performance of a communications provider's network."²¹ The ETC must report: date and time of outage, description of the outage and resolution, particular services affected, geographic areas affected, steps taken to prevent it from happening again, and number of customers affected.
- 3) Number of service requests unfulfilled. The ETC must provide a detailed explanation of how it attempted to serve the potential customer.
- 4) Number of complaints per 1,000 handsets or lines.
- 5) Certification that the ETC is complying with quality of service standards.
- 6) Certification that the ETC is able to function in an emergency.
- 7) Certification that the ETC is offering a local usage plan comparable to that of the incumbent.
- 8) Certification that the carrier acknowledges that it may be required to provide equal access in the event that there is no other ETC in the service area.²²

40. Beginning October 1, 2006, those ETCs designated by the FCC are required to submit the eight certification requirements as part of their annual certification that they have spent their federal USF support as required.

41. CURB does not oppose implementation of the FCC's proposed annual certification requirements for all ETCs, as encouraged by the FCC. CURB believes that the burden remains with ETCs to explain why these certification requirements should not be implemented and CURB will consider these arguments in its reply comments.

²¹ FCC ETC Order, ¶ 69.

²² FCC ETC Order, ¶ 69.

IV. OTHER ISSUES.

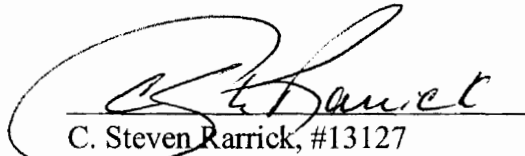
A. Service Options Available To Lifeline Customers.

42. CURB is concerned with the possibility of limited service offers to Lifeline customers by ETCs. The policy should be simple – all plans should be available and the discounts applied to those plans. CURB will review the comments of other parties and respond if necessary.

V. CONCLUSION

43. CURB appreciates the opportunity provided in this docket to submit comments on behalf of Kansas small business and residential ratepayers regarding the requirements for designation of ETCs in Kansas. CURB looks forward to assessing the comments of other parties.

Respectfully submitted,



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CERTIFICATE OF SERVICE

06-GIMT-446-GIT

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was placed in the United States mail, postage prepaid, or hand-delivered this 16th day of December, 2005, to the following:

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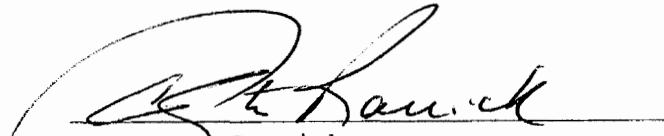
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