

Information Center, *shall send* a copy of the *Sixth Further Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

51. *It is further ordered*, that the Emergency Petition for Immediate Revision of Instructional/Informational Materials Relative to Form 323, filed on September 14, 2011 by Fletcher, Heald & Hildreth, P.L.C., *is dismissed*.

Federal Communications Commission.

Cecilia Sigmund,

Acting Associate Secretary.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket Nos. 07-294, 06-121, 02-277, 04-228; MM Docket Nos. 01-235, 01-317, 00-244; FCC 09-92]

Promoting Diversification of Ownership in the Broadcasting Services

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission seeks comment on whether to collect information from holders of equity interests in a licensee that would be attributable but for the single majority shareholder exemption and from holders of interests that would be attributable but for the higher EDP thresholds adopted in the *Diversity Order*, published May 16, 2008, for purposes of determining attribution of certain interests in eligible entities.

DATES: The Commission must receive written comments on or before February 14, 2013 and reply comments on or before March 1, 2013. Written comments on the Paperwork Reduction Act (PRA) proposed information collection requirements must be submitted by the public, Office of Management (OMB) and other interested parties on or before March 18, 2013.

ADDRESSES: You may submit comments, identified by MB Docket No. 07-294, by any of the following methods:

- *Federal Communications Commission's Web Site:* <http://fjallfoss.fcc.gov/ecfs2/>. Follow the instructions for submitting comments.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format

documents, sign language interpreters, CART, etc.) by email: FCC504@fcc.gov or phone 202-418-0530 or TTY: 202-418-0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Judith Herman of the Media Bureau, Industry Analysis Division, at (202) 418-2330. For additional information concerning the Paperwork Reduction Act information collection requirements contained in the *Notice of Proposed Rulemaking* contact Cathy Williams at (202) 418-2918 or send an email to PRA@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Fifth Notice of Proposed Rulemaking* in MB Docket No. 07-294 is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street SW., Washington, DC 20554. These documents will also be available via ECFS (<http://fjallfoss.fcc.gov/ecfs/>) and may be purchased from the Commissions copy contractor, BCPI, Inc. at their Web site <http://www.bcpi.com> or call 1-800 378-3160.

Initial Paperwork Reduction Act of 1995 Analysis

This *Notice of Proposed Rulemaking* may result in a new or revised information collection requirement. If the Commission adopts any new or revised information collection requirements, the Commission will publish a notice in the **Federal Register** inviting the public to comment on the requirement, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3501-3520). In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), the commission seeks further comment on how it might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

I. Introduction

1. The Commission seeks comment on whether to collect information from holders of equity interests in a licensee that would be attributable but for the single majority shareholder exemption and from holders of interests that would be attributable but for the higher EDP thresholds adopted in the *Diversity Order*, published May 16, 2008, 73 FR

28361, for purposes of determining attribution of certain interests in eligible entities. In the *323 Order*, 74 FR 25163 (2009), the Commission determined that, in order to measure the extent of minority and female ownership of broadcast outlets and assess the need for and effectiveness of any policies designed to promote minority and female ownership, it is important to obtain information on holders of certain nonattributable interests, as well as on holders of attributable interests. The Commission concluded that while it considers only attributable interest holders in determining whether licensees are in compliance with our media ownership rules, the balance struck in defining what interests should be counted for purposes of implementing our ownership rules may not be appropriate for collecting data on interests held by minorities and women. As noted above, we did not receive comments on this issue prior to adopting these conclusions. Therefore, in order to obtain a complete record on this question, we are commencing a Further Rulemaking on whether to expand the reporting requirements to include certain nonattributable entities. Specifically, we seek comment on whether to collect information from holders of equity interests in a licensee that would be attributable but for the single majority shareholder exemption and from holders of interests that would be attributable but for the higher EDP thresholds adopted in the *Diversity Order* for purposes of determining attribution of certain interests in eligible entities.

2. The single majority shareholder exemption provides that a minority shareholder's voting interests will not be attributed where a single shareholder holds more than 50 percent of the outstanding voting stock of the corporation in question. In the *323 Order*, the Commission explained why reporting of information about minority shareholders in a corporation with a single majority shareholder is important: "For purposes of assessing levels of minority ownership * * * we believe that we should err on the side of comprehensiveness based on criticisms of the current collection scheme. The minority interests that are exempt from attribution under the single majority shareholder exemption can be quite substantial—nearly 50%. Including these interest holders would make the data set more complete and help determine whether nonattributable interests could be a source of attributable minority and female owners in the future. Thus, collection of this

information will be useful in assessing whether we need to take additional measures to increase minority ownership and in justifying any measures that we decide to take.” The FCC proposes to require that voting stock interests that would be attributable but for the single majority stockholder exemption be reported on the biennial Form 323.

3. As is the case now, whether the holders of these direct or indirect interests in licensees that are held in vertical ownership chains will have to file a Form 323 themselves or will simply have their interest reported on a Form 323 filed by another entity would depend on the nature of the shareholder. Individuals holding such interests in licensees or in entities that hold interests in licensees would be reported on the Form 323 filed by the entity in which they hold the interest and would not have to file a form themselves. Corporations, partnerships, or other entities holding such interests in licensees or in entities that directly or indirectly hold interests in licensees, however, would both be reported on the Form 323 filed by the entity in which they hold the interest and would be required to file a Form 323 on their own behalf, using the same biennial Form 323 as all other filers would use and following the same format and instructions. The distinction made here between individuals and entities for purposes of the Form 323 filing obligation is the same distinction that applies under the current rules. The Commission seeks comment on this proposal.

4. Under the Commission’s EDP standard, an interest is deemed attributable if, aggregating both equity and debt, the interest exceeds 33 percent of the total asset value (all equity plus all debt) of a broadcast station licensee, cable television system, daily newspaper or other media outlet subject to the Commission’s broadcast multiple ownership or cross-ownership rules—and the interest holder also: (1) Holds an attributable interest in another media outlet in the same market that is subject to the multiple or cross-ownership rules; or (2) supplies over 15 percent of the total weekly broadcast programming hours of the station in which the interest is held. In the *Diversity Order*, the Commission adopted a mechanism to allow an interest holder to exceed the 33 percent threshold without triggering attribution if the investment would enable an “eligible entity” (as that term is defined in the *Diversity Order*) to acquire a broadcast station, provided that: (1) The combined equity and debt of the interest

holder in the eligible entity is less than 50 percent; or (2) the total debt of the interest holder in the eligible entity does not exceed 80 percent of the asset value of the station being acquired by the eligible entity and the interest holder does not hold any equity interest, option or promise to acquire an equity interest, option or promise to acquire an entity interest in the eligible entity or any related entity.

5. In order to obtain more complete ownership data, the Commission proposes that interest that would be attributable but for the recently adopted EDP exemption for certain investments in eligible entities be reported on the biennial Form 323. In the *323 Order*, the Commission noted that it “did not premise its relaxation of the EDP attribution rule on a finding that such an interest holder is unable to exert significant influence in the licensee but rather on a policy decision that relaxing the EDP rule is necessary to facilitate access to capital by eligible entities, including minority- and female-owned businesses.” The Commission also noted that it already has determined that interests that exceed 33 percent EDP threshold confer on the interest holder an ability to influence a licensee’s operations. While we do not believe there are many ownership interests held pursuant to this exemption, they are clearly interests within the scope of our concern in this proceeding. For this reason, we propose to require that they be reported. With respect to which interest holders will be reported and which will also file Form 323, we propose to apply the same distinction discussed in paragraph 18 of the *5th FNPRM*. Thus, individuals holding these interests would have to be reported by the entity in which the interest is directly held but would not themselves have to file the separate ownership reports and be reported by the entity in which the interest is directly held.

6. Will collection of race, ethnicity, and gender data on the holders of these two nonattributable interests further the Commission’s goals to obtain reliable data on the precise status of minority and female ownership? NAB suggests that information from nonattributable entities will not provide the Commission with any useful information on the current status of minority and female ownership of broadcast stations. We seek comment on this view. NAB states that by excluding these interests from its attribution rules, the Commission has already determined that such interests fail to confer sufficient influence over a licensee’s operations. Therefore, NAB questions

how the ownership information will further the Commission’s stated goals. We seek comment on NAB’s position and on all aspects of our proposals.

7. We also seek comment on any adverse consequences of requiring reporting of individuals holding these nonattributable interests and of requiring entities holding these nonattributable interests to file separate Form 323s. We seek comment specifically on NAB’s concern that the reporting requirement will deter investment in the broadcast industry by increasing investors’ administrative and financial burdens and by requiring disclosure of information that they would otherwise consider private. CBS argues that the potential costs and other burdens of compliance with these reporting requirements could persuade nonattributable investors to invest elsewhere or even divest their existing ownership interests. We seek comment on these contentions. In the *323 Order*, the Commission explained that our attribution rules seek to identify financial interests in licensees that convey the potential and incentive to exert significant influence over core licensee functions, and thus should be counted under the multiple ownership rules. At the same time, however, the Commission noted that it has sought to target the attribution rules precisely so as to avoid impeding capital flow to broadcasters. The Commission concluded that, in this instance, the concern about impeding capital flow does not apply, and noted that the Commission’s goal is to collect information so that we can accurately assess and effectively promote diversity of ownership in the broadcast industry. We seek comment on whether a reporting requirement of non-attributable interests would adversely affect capital investment in broadcasting.

8. We seek comment on whether expanding the reporting requirements to include the two non-attributable interests we have identified will result in undue burdens on licensees, and in particular, small entities. The Commission recognized that it must balance the goal of collecting more comprehensive and more accurate data with the goal of minimizing burdens on respondents. In the *323 Order*, the Commission explained that broadcasters are familiar with and accustomed to keeping records in accordance with the Commission’s existing attribution rules, which provide useful, fairly bright-line criteria to determine which interests must be reported and which interests do not need to be reported. CBS suggests that broadcasters often do not possess

the reportable information because publicly traded companies may have limited knowledge of the demographic information of a majority of shareholders, and may not know the underlying beneficial owners when the stocks are held by banks or other financial institutions. We seek comment on whether licensees or other entities required to file revised Form 323 currently possess information on minority shareholders of single majority shareholder corporations. If not, what is the burden of collecting this information? Will licensees, parent corporations, or other entity filers have to obtain specialized counsel and conduct additional surveys to comply with the reporting requirement, as suggested by CBS? We seek comment on whether the benefits of obtaining comprehensive minority and female ownership data outweigh the increased burden on respondents. Are alternatives available to reduce the filing burden without reducing the accuracy or completeness of the data?

9. We also seek comment on NAB's suggestion that, if the Commission adopts the reporting requirement discussed above, it should limit the reportable information to race, gender, and ownership percentage of the nonattributable investors, rather than full reporting of their names, addresses, familial relationships, and other media holdings. Would data thus limited provide the Commission and outside researchers with sufficient information to conduct studies? If information on nonattributable media holdings is omitted, as suggested by NAB, would the Commission lack sufficient information to accurately determine the universe of minority and female ownership in broadcasting?

II. Procedural Matters

10. *Ex Parte Rules*. The proceeding this *5th Further Notice of Proposed Rulemaking* initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the

presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

11. *Comments and Reply Comments*. Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

■ **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.

■ **Paper Filers:** Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

■ **All hand-delivered or messenger-delivered paper filings** for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street SW., Room TW-A325, Washington, DC 20554. The filing hours

are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of *before* entering the building.

■ **Commercial overnight mail** (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

■ **U.S. Postal Service first-class, Express, and Priority mail** must be addressed to 445 12th Street SW., Washington, DC 20554.

12. *People with Disabilities:* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

Initial Regulatory Flexibility Analysis

13. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"), the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible economic impact on small entities by the policies and rules proposed in this *Fifth FNPRM*. The RFA, see 5 U.S.C. 601-612, was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Public Law 104-121, Title II, 110 Stat. 857 (1996). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the first page of this document. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").

14. *Need for, and Objectives of, the Proposed Rules*. The *Fifth FNPRM* invites comment on proposed revisions to FCC Form 323 that would require entities that hold financial interests that would constitute attributable interests in the licensee (1) but for the single majority shareholder attribution exemption or (2) the higher Equity/Debt Plus threshold adopted in the Diversity Order for purposes of attributing certain interests in eligible entities to file ownership reports biennially and would require reporting in biennial ownership reports of individuals that hold such interests. Consistent with current filing requirements, an individual holding an ownership interest is not required to file Form 323. The objective of the information collection is to obtain comprehensive ownership data to further the Commission's goal to design

policies to advance diversity in the broadcast industry.

15. *Legal Basis.* This *Fifth FNPRM* is adopted pursuant to sections 1, 2(a), 3, 4(i)–(j), 257, and 303(r), of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152(a), 153, 154(i, j), 257, 303.

16. *Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply.* The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental entity” under Section 3 of the Small Business Act. In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definition of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.” A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

17. *Television Broadcasting.* In this context, the application of the statutory definition to television stations is of concern. The Small Business Administration defines a television broadcasting station that has no more than \$14 million in annual receipts as a small business. Business concerns included in this industry are those “primarily engaged in broadcasting images together with sound.” This category description states: “These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public.” In the *Fifth NPRM*, the Commission noted that upon review of the BIA Kelsey Inc. Media Access Pro Television Database, as of August 14, 2009 there were about 923 (72 percent) of the 1,289 commercial television stations in the United States with revenues of \$14 million or less. These statistics will be updated in a subsequent FRFA. The Commission notes that in assessing whether a business entity qualifies as small under the above definition, business control affiliations must be included.

“[Businesses] are affiliates of each other when one [business] controls or has the power to control the other or a third party or parties controls or has the power to control both.” The Commission’s estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the filing requirements for FCC Form 323, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

18. An element of the definition of “small business” is that the entity not be dominant in its field of operation. The Commission is unable at this time and in this context to define or quantify the criteria that would establish whether a specific television station is dominant in its market of operation. Accordingly, the foregoing estimate of small businesses to which the rules may apply does not exclude any television stations from the definition of a small business on this basis and is therefore over-inclusive to that extent. An additional element of the definition of “small business” is that the entity must be independently owned and operated. It is difficult at times to assess these criteria in the context of media entities, and the Commission’s estimates of small businesses to which they apply may be over-inclusive to this extent.

19. *Radio Broadcasting.* The Small Business Administration defines a radio broadcasting entity that has \$7 million or less in annual receipts as a small business. Business concerns included in this industry are those “primarily engaged in broadcasting aural programs by radio to the public.” According to Commission staff review of the BIA Kelsey Inc. Media Access Radio Analyzer Database as of August 14, 2009, there were about 10,660 (96 percent) of 11,100 commercial radio stations in the United States with revenues of \$7 million or less. These statistics will be updated in a subsequent FRFA. The Commission notes that in assessing whether a business entity qualifies as small under the above definition, business control affiliations must be included. “[Businesses] are affiliates of each other when one [business] controls or has the power to control the other, or a third party or parties controls or has the power to control both.” The Commission’s estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the ownership rules, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

20. In this context, the application of the statutory definition to radio stations is of concern. An element of the definition of “small business” is that the entity not be dominant in its field of operation. The FCC is unable at this time and in this context to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. Accordingly, the foregoing estimate of small businesses to which the rules may apply does not exclude any radio station from the definition of a small business on this basis and is therefore over-inclusive to that extent. An additional element of the definition of “small business” is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities, and the Commission’s estimates of small businesses to which they apply may be over-inclusive to this extent.

21. *Class A TV and LPTV stations.* The rules and policies adopted herein apply to licensees of Class A TV stations and low power television (“LPTV”) stations, as well as to potential licensees in these television services. The same SBA definition that applies to television broadcast licensees would apply to these stations. The SBA defines a television broadcast station as a small business if such station has no more than \$14.0 million in annual receipts. As of June 30, 2009, there were approximately 553 licensed Class A stations and 2,386 licensed LPTV stations. Given the nature of these services, the Commission will presume that all of these licensees qualify as small entities under the SBA definition. These statistics will be updated in a subsequent FRFA. The Commission notes, however, that under the SBA’s definition, revenue of affiliates that are not LPTV stations should be aggregated with the LPTV station revenues in determining whether a concern is small. The Commission’s estimate may thus overstate the number of small entities since the revenue figure on which it is based does not include or aggregate revenues from non-LPTV affiliated companies.

22. *Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements.* The Commission anticipates that changes in recording or recordkeeping requirements for commercial broadcast entities would result from the changes in the Commission’s Form 323 necessary to implement the proposal to collect additional investor information. Entities holding two types of nonattributable interests, as described in

the *Fifth FNPRM*, would be required to file Form 323, and individuals holding these interests would have to be reported on Form 323.

23. *Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered.* The RFA requires an agency to describe any significant alternatives that might minimize any significant economic impact on small entities. Such alternatives may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

24. As noted, the Commission is directed under law to describe any such alternatives it considers, including alternatives not explicitly listed above. The *Fifth FNPRM* seeks comment on the

tentative conclusion that obtaining certain nonattributable financial interests would further its goal to design policies to advance diversity in the broadcast industry. In the alternative, the Commission could defer until a later time collection of such information or not require reporting of such information. The *Fifth FNPRM* also seeks comment on whether the proposed data collection would impose a significant reporting, recordkeeping, or other compliance burden on commercial broadcast entities, especially smaller entities, and whether there are alternative ways to minimize burdens from this proposed reporting requirement.

25. *Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules*

None.

III. Ordering Clauses

26. Accordingly, *it is ordered* that, pursuant to the authority contained in sections 1, 2(a), 4(i)–(j), 257, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152(a), 154(i)–(j), 257, and 303(r), the *Fifth FNPRM* is adopted.

27. *It is further ordered* that, pursuant to the authority contained in sections 1, 2(a), 4(i, j), 257, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152(a), 154(i, j), 257, 303(r), *notice is hereby given* of the proposals described in this *Fifth FNPRM*.

28. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of the *Fifth FNPRM*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

29. *It is further ordered* that the Commission *shall send* a copy of the *Fifth FNPRM* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

Federal Communications Commission.

Cecilia Sigmund,

Associate Secretary (Acting).

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