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1999 DEC 17 AM 9 22  
PLANNING DEPT.  
COUNTY OF HAWAII

BEFORE THE COUNTY OF HAWAII  
PLANNING COMMISSION

In the matter of an Application for a	)	SPP NO. 99-0012
Special Permit Application of	)	County of Hawaii Planning
	)	Department's Proposed Findings
USCOC OF HAWAII 3, INC.	)	of Fact, Conclusions of Law and
DBA UNITED STATES CELLULAR	)	Decision and Order
Request: Allow a telecommunication tower,	)	
antennas, appurtenant equipment building,	)	
and security fence, including a driveway	)	
access on approximately 1,250 square feet	)	
of Land situated in the State Land Use	)	
Agricultural District	)	
Tax Map Key: (3) 4-5-10: Portion of 81	)	
	)	
	)	

PLANNING DEPARTMENT'S PROPOSED  
FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

Pursuant to the authorization of the Planning Commission on November 16, 1999, seven members of the Planning Commission and its counsel Frederick Giannini, presided over a contested case hearing on the subject matter on December 14, 1999. In attendance were USCOC of Hawaii 3, Inc., dba United States Cellular, their counsels Roy A. Vitousek III and

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Donna Y.L. Leong; Intervenor Edwin N. Freitas, its counsel Michael J. Matsukawa; and the County of Hawaii Planning Department, its counsel Gerald Takase.

The County of Hawaii Planning Department, by its Planning Director, Virginia Goldstein (hereinafter Planning Director), by and through its undersigned counsel, pursuant to the Planning Commission's instructions, and having considered the parties' evidence of record and arguments, hereby submits its proposed findings of fact, conclusions of law, decision and order in the above-entitled matter.

I. Findings of Fact

A. Procedural Background

1. On September 23, 1999 US Cellular filed an application for a special permit under Chapter 205, Hawaii Revised Statutes with the County of Hawaii Planning Department, requesting to allow for a telecommunication tower and antenna, an appurtenant prefabricated communication equipment building, a security fence and accessory structures, including a driveway access on approximately 1,250 square feet of land situated in the State Land Use Agricultural District. The property is located approximately one mile south (mauka) of the Mamalahoa Highway, Nienie, Hamakua, Hawaii, TMK: 4-5-10: Portion of 81.

2. The applicant's applied for a Special Permit in order to legitimize the existing tower and conform to a recent State of Hawaii Supreme Court ruling filed on May 20, 1999. Judge J. Nakayama affirmed the circuit court's order reversing the board of appeals conclusion that HRS, Section 205-4.5(1) permits cellular telephone towers as of right in the state land use district. Therefore, a Special Permit must be obtained in order to establish a cellular telephone tower on State Land Use Agricultural lands. Prior to this ruling, the Planning Department considered telecommunication towers as a permitted use falling under HRS, Section 205-4.5(a)(7) which states "public, private and quasi-public utility lines and roadways, transformer stations, communications equipment buildings, . . . ."

3. The Planning Commission held a public hearing on the subject application on November 16, 1999, Conference Rooms B&C, Aupuni Street, Hilo, County and State of Hawaii.

4. At the public hearing, the Planning Commission considered the completed petition of Intervenor Edwin N. Freitas, to intervene as a party and his request for standing in a contested case hearing under Rule 4 of the Planning Commission.

5. After consideration of the Intervenor's petition and the supporting testimony, the Planning Commission voted to admit the Intervenor as a party to the proceeding and to conduct the proceeding on the subject application in the manner provided by Chapter 91, HRS, and Rule 4 of the Planning Commission (contested case hearing).

6. The Planning Commission voted that the entire Planning Commission would serve as Hearing Officers.

7. Intervenor, through its counsel, Michael Matsukawa filed its statement of issues, lists of witnesses and list of exhibits on November 29, 1999.

8. The Applicant, through their counsel Roy A. Vitsousek III and Donna Y.L. Leong, filed their statement of issues, list of witnesses and list of exhibits on November 24, 1999.

9. The Planning Department filed its statement of issues, list of witnesses and list of exhibits on November 24, 1999.

10. A site inspection and contested case hearing was held on December 14, 1999 in Honokaa.

B. Substantive Facts

11. The landowners of the subject property are Patrick Chambers and Ellen Thompson. The applicants, USCOC of HAWAII, Inc. dba US Cellular, have an irrevocable license in the property for the proposed tower and appurtenant uses.

12. The 150-foot monopole tower, appurtenant 180 square foot prefabricated equipment building and security fence has existed on the subject property since 1997. The free-standing, self-supporting, monopole structure lies on a concrete base that is less than one-foot thick and located on the southerly corner of the subject property. The bottom half of the tower is painted green and the top half remains the gray color of the galvanized steel. Three 9-foot long omni-directional antennas and one 15-foot lightning rod are mounted vertically on a platform at the very top. The subject 1,125 square foot area where the tower and building are situated is

surrounded by a six-foot high chain link fence with barbed wire on the top of the fence. Plans submitted with the application indicate that the tower is approximately 31 feet from the adjacent property boundary of TMK: 4-5-10:10 and approximately 40 feet from the adjacent roadway.

13. According to Planning Department files, Final Plan Approval was secured on August 28, 1997 for a 150-foot monopole tower with satellite dishes installed at different heights and a panel antenna with platform at the top. According to the application, the monopole tower was constructed in 1997 with the panel antenna and only one satellite dish. Building permits were not required by the Department of Public Works, Building Division.

14. The Hawaii Public Utilities Commission granted US Cellular a Certificate of Public Convenience and Necessity as a domestic Cellular Telephone Communications Service Common Carrier under Docket No. 6684.

15. According to the applicant, the subject site was selected as the parcel is level and buildable. It is at a relatively high elevation of 1,885 feet and suitable for linkage to other US cellular network facilities by line-of-sight. This site allows US Cellular to provide more complete coverage through its island-wide system, by providing telephone service to residents who were unable to install telephones through land-line systems. This location allows US Cellular to provide cellular telephone service to Honokaa to the north, parts of Kukuihaele to the northwest and the east-west corridor of the Hawaii Belt Highway along the north side of the island, including the road towards Waimea and the road towards Ookala. Cellular telephone service to fishermen and boaters in the ocean covering most offshore areas from Waimanu Valley to Paauilo, but excluding Waipio and an area one-half mile out to sea because of the terrain of the area. According to the applicant, the proposed tower is an integral part of US Cellular's island-wide communication network. This network involves an orderly plan to meet actual needs that minimizes the cost of providing the utility of telecommunications through rational development. Power and access is already available to the site as the owners reside on the property.

16. A US Cellular employee periodically monitors the tower, antennas and its appurtenant equipment.

17. According to the application, access to the tower site is from an existing

private road onto a driveway on the property, covering approximately 125 square feet of land.

18. Presently access to the private road is chained and US Cellular is using the Chamber's driveway to access the tower.

19. The existing tower is a low maintenance facility that is not anticipated to generate traffic that will adversely affect the area. The tower is not continuously staffed, except for maintenance and repair.

20. The subject property is designated as Urban Expansion. on the Land Use Pattern Allocation Guide Map. The General Plan document also identifies the Ahualoa Road area (TMK 4-5-10) as an example of natural beauty. The following goals, policies and standards of the General Plan Land Use Element, Public Utilities and Economic Element of the General Plan would be applicable.

21. The Northeast Hawaii Community Development, adopted by the County Council by Ordinance No. 445, effective June 26, 1979, names the Ahualoa Scenic Drive and Nienie area as an area of natural beauty.

22. The subject parcel does not fall within the SMA.

23. The subject property is bordered by Kalehua Road to the east and a private road to the south.. The owners have a residence on the subject land that is located on the northwestern portion of the subject property. There are eucalyptus and banana trees on the subject property and in the vicinity of the tower.

24. The property is at an elevation of approximately 1,885 feet. There are two retaining walls on the property. The upper wall ranges between 3.5 feet to 10 inches in height and is approximately 34.5 feet long. The lower retaining wall to the north and makai sides of the property ranges in height from 2.5 to 3.75 feet and is approximately 34 feet long. The owners have a residence on the subject property that is located on the northwestern portion of the property. There are eucalyptus and banana trees on the subject property and in the vicinity of the tower.

25. The subject property is designated as Other Important Lands under the ALISH system.

26. The area of the proposed use is in Zone "X", areas outside the 500-year

flood plain.

27. The subject property is designated with a soil type of Honokaa silty clay loam (HTD or HsD).

28. The Land Study Bureau Soil Rating is "D" or Poor.

29. According to the applicant, no known drainage channels are found within the property.

30. The island of Hawaii is divided into zones according to the degree of hazard from lava, with Zone 1 being the area of greatest and Zone 9 being of the least hazard. The subject property falls within the area rated as Lava Flow Hazard Zone 8, areas where none of their surfaces were covered by lava within the past 750 years.

31. According to the applicant, there are no archaeological or historic sites on the property. A field inspection was conducted Bob Rechtman Ph.D. of Paul H. Rosendahl, Ph.D., Inc. who reported no observation of archaeological resources as well as none having been previously identified in the immediate vicinity. His conclusion was that the placement of the tower did not adversely affect historic properties.

32. There are banana trees and eucalyptus trees on the property. Prior to the construction of the tower, the site was covered with a thick growth of grass and citrus trees. A botanical survey report dated September 14, 1999 was prepared by Phillip Conley who reported no siting of threatened or endangered species in or around the site.

33. The parcel is heavily vegetated, however, the base of the tower is clearly visible from the adjoining properties to the west - Antoinette Freitas, etal, TMK: 4-5-10:10 and Edwin Freitas, TMK: 4-5-10:17. The top portion of the tower is visible from properties that are mauka, as they are at higher elevations than the property and also from various areas along Kalehua Road, Old Mamalahoa Highway and the Hawaii Belt Road. The existing tower is located mauka of the Hawaii Belt Road and visible from a distance from the intersection of the Old Mamalahoa Highway/Hawaii Belt Road intersection. Visual impacts are essentially limited to those individuals with homes in the immediate surrounding vicinity or those who travel Kalehua Road.

34. Other than painting of the tower, US Cellular provided little evidence of

its attempt to mitigate the impact of the tower with no evidence as to the position of the tower on the property or as to the selection of the type of tower used.

35. Based on the General Plan policy, US Cellular also took little action to "fit" its surroundings or conceal" the tower from public view.

36. Noise will be emitted from an air conditioner to maintain temperature and humidity in the equipment building. However, it is anticipated that noise will be inaudible from farther than 100 feet, except under extraordinarily quiet conditions.

37. According to the applicant, the operation of the radio antennas will not present health hazards or cause interference with other electronic appliances and equipment. The cellular radio antenna operates at a ultra-high frequency radio wave band between 800-900 megahertz. The pattern of the antenna is directed towards the horizon and not downward, therefore, the radio frequencies near the base of the tower is minimal. Reviews of scientific literature by the environmental Protection Agency (EPA), the National Institute of Occupational safety and Health (NIOSH), the American National Standards Institute (ANSI) and the National Council on Radiation Protection and Measurements (NCRP) have been conducted by the applicant. None of these agencies have identified harmful health effects associated with low power densities and the ultra-high frequency of the cellular radio wave transmissions. The tower was designed to and comply with Federal Communication Commission's (FCC) guidelines.

38. The Telecommunications Act of 1996, Section 704, which amended portions of the 1934 Act, prohibits local authorities from regulating the placement of cellular towers based on environmental effects, more specifically radio frequency emissions, as long as those towers comply with the FCC's guidelines.

39. Immediate surrounding properties to the east and west are also zoned A-5a and range between .895 to 5 acres in size and used for cattle grazing and dwellings. Properties immediately across the subject property on Kalehua Road and east of the subject property are larger lots, ranging in size from approximately 10 and 17 acres. There is an existing dwelling on TMK: 4-5-10:10, whereby, a building permit was applied for on January 13, 1998 and final inspection was secured on January 19, 1999.

40. Access to the subject property is from the Hawaii Belt Road onto the Old

Mamalahoa Highway. The property is located on Kalehua Road approximately 3 miles from the Hawaii Belt Road intersection. The property is also bordered by a road that has been paved to a width of approximately 10 feet. According to the Department of Public Works, records indicate that this road is private. This private road has served as access for the tower until recently. According to U.S. Cellular, they have presently secured permission from the subject property landowner (Chambers) to utilize the existing dwelling driveway on the northern section of the property to access the tower.

41. Water is not required for the proposed use.

42. No sewage will be disposed of on the property.

43. Only electrical utilities are needed for the project, which are already available to the site. Police, fire and emergency services are available at Honokaa.

44. There were no major objections or concerns expressed by agencies reviewing the application.

45. The Intervenor and Ahualoa Association researched other locations in the Ahualoa area to place the cellular tower which would have been acceptable to area residents.

46. At an early stage, during the clearing of project site for the tower, the Intervenor had notified the Applicant that his daughter was constructing a dwelling near the property line, and asked the Applicant to reconsider the location of the tower.

47. Substantial written and oral testimony, including petitions and letters, was provided in support and in opposition to the existing telecommunications tower.

## II. Conclusions of Law

1. The Special Permit process established by the state legislature under Section 205-6, HRS, is a conditional use system which authorizes the Planning Commission (where the affected area is less than 15 acres in area) to issue Special Permit for the establishment of certain uses in the State land Use Agricultural District.

2. Under Section 205-6, HRS, the Planning Commission may issue a Special Permit for a use that the Planning Commission finds is unusual and reasonable.



3. By its own Rule 6, the Planning Commission established decision criteria for determining whether a proposed use meets the unusual and reasonable standard of Section 205-6, HRS.

4. The Planning Director, finds the proposed use is consistent with six (6) of the seven (7) guidelines listed in Rule 6-3(b)(5).

a. **The proposed use would promote the effectiveness and objectives of Chapter 205, Hawaii Revised Statutes, as amended.** The State Land Use Law and Regulations are intended to preserve, protect and encourage the development of lands for those uses to which they are best suited in the interest of the public welfare of the people of the State of Hawaii. In the case of the Agricultural District, the intent is to preserve or keep lands of high agricultural potential in agricultural use. Based on a ruling by Judge J. Nakayama of the State of Hawaii Supreme Court, filed on May 20, 1999, the circuit court's order reversing the board of appeals conclusion that HRS, Section 205-4.5(1) permits cellular telephone towers as of right in the state land use district. Therefore, a Special Permit is now required in order to establish a cellular telephone tower on State Land Use Agricultural lands." The applicant requests to legitimize an existing 150-foot high telecommunications tower, several 9-foot long omni-directional antennae and one 15-foot long lightning rod with appurtenant equipment building, propane tank and generator. The existing tower site covers approximately 1,125 square feet with 125 square feet of land for a driveway access covering approximately 1,250 square feet, upon which the owner granted the Applicant an irrevocable license . The subject parcel is approximately 2 acres in size and owned by Patrick Chambers and Ellen Thompson. The soils are classified "D" or Poor and the lands are classified as Other Important Lands under the ALISH designation. There are eucalyptus and banana trees on the subject property in the vicinity of the tower. No active agricultural activities will be diminished. Therefore, the proposed development would not remove significant lands from agricultural use and would not be contrary to the objectives of the State Land Use Law for the Agricultural District.

b. **The desired use will not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, police and fire protection.** The existing telecommunication tower and related improvements will not require

additional services. Only electrical utilities are required for the proposed use, which is already available to the site. Access to the site is via the Hawaii Belt Road onto the Old Mamalahoa Highway. The property is on Kalehua Road approximately 3 miles from the Hawaii Belt Road intersection. It is also bordered by a road that has been paved to a width of approximately 10 feet. As this access is in dispute and the applicant would be required to designate a determined access upon submittal of plans for Final Plan approval. Traffic is expected to be minimal due to the fact that the tower will only require periodic maintenance and repair. Agencies did not express any concerns regarding the tower operations.

c. **Unusual conditions, trends and needs have arisen since the district boundaries and regulations were established.** In more recent years, the cellular phone industry has become an important means of communication due to its convenience. On the Big Island, it has become a service to communities where previously telephone service was not available. In this particular location, the tower will also allow cellular telephone service to Honokaa to the north, parts of Kukuihaele to the northwest and the east-west corridor of the Hawaii Belt Highway along the north side of the island, including the road towards Waimea and the road towards Ookala. Service would also be available to fishermen and boaters in the ocean covering most offshore areas from Waimanu Valley to Paauilo, but excluding Waipio and an area one-half mile out to sea because of the terrain of the area. According to a recent Supreme Court Ruling, securing a special permit would be the procedure to follow in order to establish a cellular phone tower within the State Land Use Agricultural District.

d. **The lands upon which the proposed use is sought is unsuited for the uses permitted in the district.** The property presently has a dwelling in which the landowners reside in. The existing tower is located on the southern corner of the subject property. In the vicinity are eucalyptus and banana trees. However, there is no active ongoing agricultural activity. The parcel is determined to be Prime or Unique agricultural lands by the ALISH map. It also has a soil rating of "D" or Poor. Therefore, no agricultural activity will be diminished and no significant lands will not be taken out of use.

e. **The use will not substantially alter or change the essential character of the land and the present use.** The subject property is wooded with eucalyptus and

banana trees in the vicinity of the existing tower. The tower is located on a 1,250 square foot of land area on the approximately 2 acre parcel and would not substantially alter the essential character of the land or the owner's use of the property.

f. **The proposed use is not contrary to the General Plan and other documents as design plans.** The subject parcel falls within an area designated as Urban Expansion on the General Plan LUPAG Map. The General Plan and the Northeast Hawaii Community Development Plan also designates the area as an example of natural beauty, however, no detail requirements are set forth. The proposed request would complement and be consistent with, among others, the following goals, policies and standards of the General Plan:

*Land Use Element*

- \* Designate and allocate land uses in appropriate proportions and in keeping with the social, cultural and physical environments of the County.
- \* The County shall encourage the development and maintenance of communities meeting the needs of its residents in balance with the physical and social environment.

*Economic Element*

- \* Provide residents with opportunities to improve their quality of life.
- \* County shall provide an economic environment which allows new, expanded, or improved economic opportunities that are compatible with the County's natural and social environment.

*Public Utilities*

- \* Ensure that adequate, efficient and dependable public utility services will be available to users.
- \* Provide utilities and service facilities which minimize total cost to the public and effectively service the needs of the community.

5. The Planning Director, however, finds that the subject request is not consistent with the following Special Permit criteria.

a. **The desired use will not adversely affect the surrounding properties.** Based on a site inspection and the contested case hearing held on December 14, 1999 by the Planning Commission, the Planning Director believes that the request does have a substantial visual impact on the immediate adjacent property TMK:4-5-10:10. The monopole is located approximately 30 feet from the property boundary of TMK: 4-5-10:10. According to testimony received, the 150 foot monopole is also visible from other properties within the immediate vicinity. The green color of the lower section of the steel tower does not blend in naturally with the surrounding area and is clearly visible from the adjacent TMK: 4-5-10:10. The sheer size and bulk of the tower make it difficult to conceal the tower in the present location. Discussion at the contested case hearing also noted that other alternative sites may be available with lesser visual impacts and that Mr. Freitas and immediate surrounding landowners and other community residents desired an open discussion with the applicant in order to reach an amenable solution to the problem. In addition, the record reflects that substantial testimony and objections or concerns were received from the community.

6. As a remedy and solution, the Planning Director recommends that approval of the request be subject to the applicant relocating the tower to another section of the subject property where there are lesser visual impacts to immediate adjacent landowners. In addition, the tower should be repainted a brown color, or a mixture of colors that would naturally blend in with the existing eucalyptus trees. As an alternative to relocating the tower to another section of the property, the tower at the existing location may be replaced by a lattice-type tower, painted brown or a mixture of colors that would naturally blend in with the existing eucalyptus trees, along with the planting of vines on the tower.


### III. Decision and Order

Based on the foregoing Findings of Fact and Conclusions of Law, the Planning Director recommends that the application of USCOC of Hawaii, Inc., dba US Cellular, for a Special Permit to allow the Applicant to use the project site for a telecommunications tower, antenna and

appurtenant equipment building, propane tank and generator be approved by the Planning Commission, provided however, that the Applicant shall be responsible to observe and comply with the conditions of approval affixed hereto and which, by this reference, are incorporated herein and made a part of the Special Permit granted to the Applicant. This favorable recommendation does not, however, sanction the specific plans submitted with the application as they may be subject to change given code and regulatory requirements of the affected agencies.

DATED: Hilo, HAWAII, December 17, 1999.

COUNTY OF HAWAII PLANNING  
DEPARTMENT, by its Planning Director

by   
GERALD TAKASE  
Deputy Corporation Counsel  
Its Attorney  
Planning Department, County of Hawaii.

CONDITIONS OF APPROVAL  
Special Permit Application for  
USCOC of Hawaii, Inc. dba US Cellular

1. The applicant, successors or assigns shall comply with all of the stated conditions of approval.
2. The existing monopole tower shall be relocated to another section of the subject property that minimizes visual impacts to the immediate adjacent parcels, TMK: 4-5-10:10. The tower shall be repainted a brown color, or a mixture of colors that would naturally blend in with the existing eucalyptus trees. As an alternative to relocating the tower to another section of the property , the tower at the existing location may be replaced by a lattice-type tower, painted brown or a mixture of colors that would naturally blend in with the existing eucalyptus trees, along with the planting of vines on the tower.
3. Final Plan Approval for the relocated or newly designated tower and appurtenant uses shall be secured from the Planning Director in accordance with the Zoning Code Section 25-2-72 and 25-2-74 and 25-4-12. Plans shall identify existing and proposed structures, fire protection measures, roadway easements, driveway and parking areas, fencing and landscaping associated with the proposed uses. Tower and antenna plans shall be stamped by a structural engineer.
4. In conjunction with the submittal of plans for plan approval, the applicant shall submit evidence of the following to the Planning Director:
  - a. A written statement with a copy to the Police Department that the existing tower development shall not interfere with the County of Hawaii Public Safety Radio System.
  - b. A written statement that the applicant shall make space available on their tower for co-location of antennas or attachments, if this can be done without substantial interference to the applicant's use of the tower, at reasonable and nondiscriminatory rates.

5. Co-location or any expansion on the proposed tower and antenna as designed by a structural engineer shall be allowed within the parameters of the proposed building height and envelope as represented in Final-Plan Approval without further amendments to the permit.
6. Should any remains of historic sites, such as rock walls, terraces, platforms, marine shell concentrations or human burials be encountered, work in the immediate area shall cease and the Department of Land and Natural Resources-Historic Preservation Division (DLNR-HPD) shall be immediately notified. Subsequent work shall proceed upon an archaeological clearance from the DLNR-HPD when it finds that sufficient mitigative measures have been taken.
7. Comply with all applicable rules, regulations and requirements of the affected agencies for the development of the subject property, including the Federal Aviation Administration and Federal Communications Commission.
8. Within one year after permanent abandonment of the tower, the applicant or successors shall remove the tower, its antenna and appurtenant structures, down to, but not including any concrete foundation. The applicant shall provide written notification to the Planning Department of such removal.
9. Upon compliance with applicable conditions of approval, and prior to the issuance of a certificate of occupancy for any portion of the revised development, the applicant shall submit a status report, in writing, to the Planning Director.
10. An extension of time for the performance of conditions of the permit may be granted by the Planning Director upon the following circumstances:
  - A) Non-performance is the result of conditions that could not have been foreseen or are beyond the control of the applicant, successors or assigns, and that are not the result of their fault or negligence.
  - B) Granting of the time extension would not be contrary to the General Plan or the Zoning Code.
  - C) Granting of the extension would not be contrary to the original reasons for the granting of the permit.

- D) The time extension granted shall be for a period not to exceed the period originally granted for performance (i.e., a condition to be performed within one year may be extended for up to one additional year).



BEFORE THE COUNTY OF HAWAII  
PLANNING COMMISSION

In the Matter of the Contested Case Hearing

SPP No. 99-0012

of

CERTIFICATE OF SERVICE

USCOC of Hawaii 3, Inc., dba United States Cellular, to allow the construction of a telecommunication tower, antennas and appurtenant equipment building, and security fence in the State Land Use Agricultural District.  
TMK:(3)4-5-010:081 (portion).

PLANNING DEPT.  
COUNTY OF HAWAII

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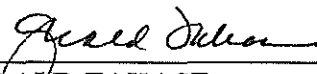
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document was served upon the following by hand delivery, on DEC 17 1999:

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