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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan.	))))))	Case No. 13-2385-EL-SSO
In the Matter of the Application of Ohio Power Company for Approval of Certain Accounting Authority.	)))	Case No. 13-2386-EL-AAM

APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT OF INTERSTATE GAS SUPPLY, INC.

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan.	))))))	Case No. 13-2385-EL-SSO
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APPLICATION FOR REHEARING
OF
INTERSTATE GAS SUPPLY, INC.

Pursuant to R.C. 4903.10 and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), intervenor Interstate Gas Supply, Inc. ("IGS") hereby applies for rehearing from the opinion and order issued by the Public Utilities Commission of Ohio ("Commission") on February 25, 2015 (the "Order"), whereby the Commission approved, subject to certain modifications, the electric security plan ("ESP") proposed by Ohio Power Company ("AEP Ohio") in its application in this proceeding. As grounds for rehearing, IGS respectfully submits that the Order is unreasonable and unlawful in the following particulars:

1. The Commission erred in authorizing AEP Ohio to establish a placeholder Purchased Power Adjustment ("PPA") rider that would set the level of compensation AEP Ohio would receive for wholesale energy and capacity because the Federal Power Act preempts the Commission from regulating the price of wholesale of energy and capacity.

2. The Commission erred in finding that the PPA satisfied the three mandatory criteria for the inclusion of a non-bypassable generation-related rider as a provision of an ESP set forth in R.C. 4928.143(B)(2)(d).

3. The Commission erred in authorizing AEP Ohio to establish the PPA rider because the PPA rider provides AEP Ohio with an anticompetitive subsidy in connection with its OVEC assets in violation of R.C. 4928.02(H), which prohibits the Commission from providing guaranteed cost recovery for a competitive service.

4. The Commission erred in authorizing AEP Ohio to establish the PPA rider because approval of the PPA rider allows AEP Ohio to evade the corporate separation requirements contained in R.C. 4928.17 by providing an undue preference and a competitive advantage to AEP Ohio in the form of a guaranteed cost recovery for an unregulated service and because approval of the rider facilitates the abuse of market power.

Pursuant to Rule 4901-1-35(A), OAC, a memorandum in support more fully explaining these grounds for rehearing is attached hereto.

WHEREFORE, IGS respectfully requests that the Commission grant its application for rehearing, reconsider its finding that a placeholder PPA rider should be established, and modify the ESP as previously approved by requiring AEP Ohio to eliminate the PPA rider from its tariff.

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BEFORE
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MEMORANDUM IN SUPPORT
OF
APPLICATION FOR REHEARING
OF
INTERSTATE GAS SUPPLY, INC.

INTRODUCTION:

In 1999, the General Assembly passed Amended Substitute Senate Bill 3 ("SB 3"), which restructured Ohio's electricity market. SB 3 left behind cost-based regulation of generation supply and embraced the concept that Ohio's future lies with competitive electric markets and policies that promote retail competition. Indeed, in the opinion and order approving AEP Ohio's last ESP, the Commission specifically found that "[t]he most significant of the non-quantifiable benefits *[of the ESP]* is the fact that in just under two and a half years, AEP-Ohio will be delivering and pricing energy at market prices."[1]

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[1] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form*

Now, almost exactly two and a half years later, the Order in this case threatens to deny customers the promised benefit that the Commission previously touted. In place of the market-based generation rates favored by the General Assembly, the Order authorized AEP to establish a non-bypassable Power Purchase Agreement ("PPA") rider "to be used as a hedge against future market volatility in order to stabilize customer rates."[2] To its credit, the Commission did not permit AEP Ohio to impose a cost-recovery charge at this time – the rider rate was set at zero – on the ground that evidence did not support a finding that the PPA would provide a net benefit to customers.[3] However, by approving the PPA as a placeholder rather than rejecting the concept out of hand, the Commission has opened the door to AEP Ohio and others to take a second bite of the apple based on the misguided notion that a rider of this type, "if properly conceived, has the potential to supplement the benefits derived from the staggering and laddering of the SSO auctions."[4]

A little common sense will go a long way here. Financial hedging is, by its very nature, a gamble. But, unlike the typical wager, in this instance, the party placing the bet – AEP Ohio – has nothing at risk because it is gambling with ratepayer-supplied funds, not with its own money. Even worse, in this scenario, the bettor still collects even when the customer comes up a loser because AEP Ohio's ultimate shareholders are not only

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of an Electric Security Plan, Case Nos. 11-346-EL-SSO, *et al.* (Opinion and Order dated August 8, 2012), at 76.

[2] Order at 8.

[3] Order at 24-25.

[4] *Id.* at 25.

assured of cost recovery, but of a return on their investment even if the investment in question proves to be uneconomic as a source of generation supply. Moreover, because there can never be any assurance upfront that a hedge will be successful – otherwise, it would not be a gamble -- the Commission, rather than protecting the public interest, becomes the operator of a casino and, thus, will bear one hundred percent of the responsibility if the ultimate result is a net loss for customers. Yes, the Commission did set out a number of factors it will consider in evaluating a future PPA-type proposal,[5] but none of these factors have anything to do with protectng ratepayers from the effect of hedge that fails to produce a benefit for customers.

The whole purpose of opening the Ohio electric market to competition was to provide customers with options. Customers that place a high value on rate stability can select a long-term, fixed-price product from a CRES provider. Customers with more risk tolerance may choose to go with a variable rate option. But the point is that it is the customer – the party with actual skin in the game – that should be making these decisions, not AEP Ohio and not this Commission. Further, as the Commission staff has explained, customers that elect not to shop are also protected from wholesale price volatility by virtue of the staggering and laddering of SSO auctions. Approval of a PPA rider rate would pull the rug from under the competive model favored by the General Assembly by requiring all customers, shoppers and non-shoppers alike, to subsidize AEP Ohio's OVEC generation assests even though the goal of the competitive model is to assure a level playing field. Is hedging, *per se*, a bad thing? Of course not. But it is an activity that

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[5] *Id.*

should not be funded directly by ratepayers through a Commission-approved non-bypassable rider that may or may not provide them with a net benefit.

In setting the PPA rider rate at zero, the Commission may have believed that it was simply keeping its options open. However, kicking the can down the road by basing its decision on a AEP Ohio's failure to shoulder its burden of proof in this case will almost certainly result in extensive and costly litigation that could have been avoided had the Commission found the PPA proposal to be unlawful and unreasonable as argued by IGS and nearly every other party to this proceeding. IGS urges the Commission to revisit the question of its legal authority to authorize the PPA rider, to find that its approval of the PPA rider in concept was unlawful and unreasable on one or more of the following grounds, and to order AEP Ohio to remove the PPA rider from its tariff.

FIRST GROUND FOR REHEARING:

> The Commission erred in authorizing AEP Ohio to establish a placeholder Purchased Power Adjustment ("PPA") rider that would set the level of compensation it would receive for wholesale energy and capacity because the Federal Power Act preempts the Commission from regulating the price of wholesale of energy and capacity.

In its Order, the Commission declined to address intervenor arguments that approval of the PPA rider would violate federal law, stating, "(t)he Commission declines to address constitutional issues raised by the parties in these proceedings, as, under the specific facts and circumstances of these cases, such issues are best reserved for judicial

determination."[6] IGS does not dispute that the Commission does not have authority to decide constitutional questions, but this is, by no means, a case of first impression. Moreover, the Commission most certainly has the authority, and, indeed, the responsibility, to determine whether it has jurisdiction to approve a proposal advanced in a Commission proceeding. Here, the Commission knows from abundant, longstanding precedent that it does not have jurisdiction over the pricing of wholesale energy and capacity, a matter that is unquestionably subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC").[7]

The PPA rider, in any form, would require the Commission to regulate the wholesale price of capacity and energy and would undermine Reliability Pricing Model ("RPM") approved by the FERC. The federal courts have struck down arrangements in other states that are very similar to the placeholder PPA rider authorized in the Order, holding that such arrangements undermine FERC's authority to establish a wholesale competitive pricing mechanism and that, accordingly, state regulatory commissions are preempted by federal law from approving mechanisms of this type.

PJM's RPM sets a uniform price for electric generation at various locations throughout the PJM footprint. Such prices are set by competitive processes. In its order approving the RPM, FERC stated "in a competitive market, all suppliers will be paid the

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[6] Order at 26.

[7] "A wealth of case law confirms FERC's exclusive power to regulate wholesale sales of energy in interstate commerce, including the justness and reasonableness of the rates charged." *PPL Energy Plus v. Nazarian*, Case Nos. 13-2419, 13-2424 at 7 (4th Cir. Ct. Appeals) (2014) (citing Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988)).

same price,"[8] and that "(i)n a competitive market, prices do not differ for new and old plants or for efficient and inefficient plants."[9] Thus, RPM rewards efficient sellers and drives inefficient sellers out of business.[10] The RPM Order also specifically holds that cost-of-service regulation is contrary to RPM because it does not provide incentives to minimize costs or maximize revenue, noting that "sellers *[of cost based generation]* have far weaker incentives to minimize costs under cost-of-service, because regulation forces a seller to reduce its prices when the seller reduces its cost."[11]

Moreover, the purpose of *uniform* locational electric pricing is to support infrastructure investment throughout PJM's footprint. The uniform clearing price is intended to provide a transparent price signal three years in advance in order for market participants to respond.[12]

Indeed, federal courts have held that arrangements similar to the PPA rider approved by the Commission undermine the RPM construct and are preempted by federal law. The Third and Fourth Circuits recently determined that state commissions cannot approve purchased power contracts between distribution utilities and wholesale generators that ensure that the generator receives a set amount of compensation that

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[8] ER05-1410-001 Entry 32 Order Denying Rehearing and Approving Settlement Subject to Conditions (Dec. 22, 2006) (hereinafter "RPM Order").

[9] RPM Order at 57.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 59.

differs from that which the generator can obtain from market-based wholesale revenues.[13] The courts aptly named such arrangements "contracts for differences" because the contracts require the distribution utility to pay the difference between the wholesale market revenue and the cost-based revenue requirement.[14]

As the Third Circuit stated, a contract for difference is unlawful because it "supplements what the generators receive from PJM with an additional payment financed by payments from electric distribution companies . . . Because electricity distribution companies do not participate in PJM's capacity auction, and because PJM still pays generators the auction clearing price *[the contract for differences]* artfully steps around the capacity transactions facilitated by PJM."[15] The court further stated that "(i)f FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject."[16]

The PPA rider is no different than the contracts for differences that were rejected by the Third and Fourth Circuits. The PPA rider compensates AEP Ohio for the difference between generation assets' market-based wholesale revenues and a cost-based revenue

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[13] *PPL Energy Plus v. Nazarian* at 7-10 ("The scheme thus effectively supplants the rate generated by the auction with an alternative rate preferred by the state . . . . The fact that it does not formally upset the terms of a federal transaction is no defense, since the functional results are precisely the same."); *PPL Energy Plus v. Solomon* at 24-29, Case No. 13-4330 (3rd Cir. Ct. Appeals) (2014).

[14] *PPL Energy Plus v. Nazarian* at 6; *PPL Energy Plus v. Soloman* at 24.

[15] *PPL Energy Plus v. Soloman*, p. 28 Case No. 13-4330 (3rd Cir.) (Sep. 11, 2014).

[16] *Id.* (quoting Miss. Power & Light Co. v Miss. ex rel. Moore, 487 U.S. 354, 377 (1988) (Scalia, J., concurring)).

requirement. Such arrangements replace the amount of compensation that the market participant is intended to receive under RPM.

Moreover, even if the Commission is not directly preempted from approving the PPA rider, FERC could very well require that any ratepayer subsidy be deducted from the capacity revenues received from the OVEC generation. In a recent decision, FERC determined that subsidies provided for demand response must be included when bidding demand response into the New York Independent Operator ("NYISO") capacity markets.[17] FERC stated, "where the *[resource]* has agreed to accept a percentage of the market clearing price with a guarantee of a minimum monthly payment in return for a capacity obligation, that minimum payment, **coupled with other benefits or subsidies, is a reasonable proxy for the SCR's net cost of providing that capacity, which would be difficult to determine, and thus is a reasonable Offer Floor.**"[18]

The above reasoning may apply to the PPA at issue in this proceeding. Requiring PPA-related generation resources to include subsidies in their offer floor would increase the likelihood, or potentially ensure, that the resources do not clear in capacity auctions. Thus, it is possible that the Commission could place customers on the hook for a cost-based revenue requirement without a market-based capacity revenue stream to offset it. The prospect of saddling customers with such a one-sided deal is not in the public interest.

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[17] *New York Independent System Operator, Inc.*, FERC Docket Nos. EL07-39-006, *et al.*, 150 FERC ¶ 61,208, Order on Clarification, Rehearing, and Compliance Filing at 14-15 (Mar. 18, 2015).

[18] *Id.* at 11 (quoting New York Independent System Operator, Inc., FERC Docket Nos. *et. al.*, EL07-39-006, 131 FERC ¶ 61,170, Order, at 133 (May 20, 2010) (emphasis added)).

Rather than sidestepping the fundamental jurisdictional issue as it did in the Order, the Commission should squarely address this question on rehearing. Because the PPA rider would require the Commission to regulate wholesale prices exclusively within the jurisdiction of FERC, or otherwise saddle customers with significant and excessive above-market costs, the Commission, on rehearing, should order AEP Ohio to remove the PPA rider from its tariff.

SECOND GROUND FOR REHEARING:

> The Commission erred in finding that the PPA satisfied the three mandatory criteria for the inclusion of a non-bypassable generation-related rider as a provision of an ESP set forth in R.C. 4928.143(B)(2)(d).

As the Commission correctly recognized in its Order, the PPA rider can only be included as a provision of the AEP Ohio ESP if it is authorized by R.C. 4928.143(B)(1) or B(2). R.C. 4928.143(B)(1), which mandates the inclusion of "provisions relating to the supply and pricing of electric generation service," was not in play because the PPA rider is simply a hedging mechanism and, as such, would have no effect on either the physical supply of generation service or on the price of such service, notwithstanding that it would obviously affect the amount both shopping and non-non shopping customers would pay for generation service. Thus, the Commission looked to R.C. 4928.143(B)(2) for authority for the PPA rider, and ultimately hung its hat on R.C. 4928.143(B)(2)(d), which permits inclusion in an ESP of:

> Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service.

The Commission then parsed R.C. 4928.143(B)(2)(d) to identify three separate criteria that the PPA rider had to satisfy to qualify for inclusion in the ESP under this provision. The Commission concluded (1) that the PPA rider was a "charge," (2) that it "related to limitations on customer shopping for retail electric generation service," and (3) that it "would have the effect of stabilizing or providing certainty regarding retail electric service." Although no one would dispute that the PPA rider is a charge, the Commission's determination that the PPA rider satisfies the other two criteria is wide of the mark.

With respect to the second criterion, the Commission concedes that the PPA rider would impose no physical constraint on shopping, which is plainly the type of constraint the legislature had in mind when providing for the inclusion of terms and conditions related to limiting customer shopping for retail generation service.[19] However, the Commission then goes on to find that the PPA rider constitutes a "financial limitation" on shopping. This tortured interpretation of "limitation" has no basis in logic. Because PPA rider is non-bypassable, it will apply to both shopping and non-shopping customers. Thus, it is no more a limitation on shopping that it is a limitation on default service. On the other hand, if, by "financial limitation," the Commission means that the PPA rider would have a chilling effect on shopping, that may well be true, but that is plainly not a permissible objective under any reading of the statute and would be contrary to the state policy of promoting a robustly competitive electric market. Indeed, under the Commission's theory, any charge

[19] Order at 22.

could be described as a "financial limitation," which would make a mockery of the statutory criteria governing terms that can be included in an ESP. The Supreme Court of Ohio has already rejected similar interpretations of R.C. 4928.143(B)(2), stating, the Commission's "interpretation would remove any substantive limit to what an electric security plan may contain, a result we do not believe the General Assembly intended."[20]

The Commission's conclusion that the PPA rider will have the effect of stabilizing or providing certainty regarding retail electric service is also fatally flawed. First, the Commission expressly acknowledged that "the impact of the proposed PPA rider cannot be known to any degree of certainty" and that "the rider may result in a net cost to customers, with little offsetting benefit from the rider's intended purpose as a hedge against market volatility."[21] How, then, can the Commission say in the next breath that the rider will have the effect of stabilizing or providing certainty regarding retail electric service? Because it is impossible to know in advance whether rider will result in a charge or a credit, there is no basis for this conclusion. In fact, the customer that enters into a long-term fixed-price contract with a competitive provider because he/she values stability and certainty would, under the PPA rider, no longer have the ability to budget.

Moreover, approval of the PPA will inject uncertainty and instability into the retail electric market. Requiring customers to subsidize uneconomic generation will discourage market entry and the development of the competitive market.[22] This negative market

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[20] *In re Application of Columbus Southern Power*, 128 Ohio St. 3d 512, 521 (2011).

[21] Order at 24.

[22] IGS Ex. 1 at 4.

signal will reverberate into both the wholesale and retail electric markets.[23] The Commission should grant rehearing on this ground.

THIRD GROUND FOR REHEARING:

> The Commission erred in authorizing AEP Ohio to establish the PPA rider because the PPA rider provides AEP Ohio with an anticompetitive subsidy in connection with its OVEC assets in violation of R.C. 4928.02(H), which prohibits the Commission from providing guaranteed cost recovery for a competitive service.

R.C. 4928.02(H) declares that it is the policy of this state to:

> Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates.

As recounted by the Commission in its Order, numerous intervenors argued that approval of the PPA rider would run afoul of this policy by creating an anticompetitive subsidy that would flow to AEP Ohio's OVEC assets and provide a guaranteed cost recovery to AEP Ohio's ultimate shareholders, not to mention a guaranteed return on the OVEC investment.[24]

The Commission glosses over this argument in its Order, claiming that the PPA is a non-bypassable generation rate and that the statute only prohibits the recovery of

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[23] *Id.*; Constellation Ex. 1 at 13-14.

[24] Order at 18.

generation-related costs through distribution rates.[25] This rationale is wrong on several counts.

First, as the Ohio Supreme Court observed, "(p)ursuant to R.C. 4928.03 and 4928.05, electric generation is an unregulated, competitive retail electric service, while electric distribution remains a regulated, noncompetitive service pursuant to R.C. 4928.15(A)."[26] Thus, generation providers are no longer subject to the Commission's economic regulation, and the Commission cannot require customers to guarantee cost recovery and a return on generation assets in any event, whether through distribution rates or a generation-related hedging mechanism like the PPA rider. Such a result would plainly be at odds with the state policy codified in R.C. 4928.02(H).

Second, although the Commission characterized the PPA rider as a generation-related charge, even if, contrary to fact, the distinction between a distribution and charge and a generation charge had the significance the Commission attached to it in ruling on this issue, the PPA rider is imposed on all AEP Ohio distribution customers regardless of their choice of generation supply. Indeed, this charge does not pay for the cost of any generation that serves those customers, and customers will pay this charge solely as a result of the fact that they are distribution customers of AEP Ohio.[27] Thus, as a practical matter, the PPA rider is no different than a charge related to distribution service or any other non-competitive service. It is unthinkable that the General Assembly intended to

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[25] Order at 26.

[26] *Industrial Energy Users-Ohio v. Pub Util. Comm'n*, 2008-Ohio-990 at ¶6.

[27] IEU-Ohio Ex. 1b at 15-17, 26.

permit the Commission to create the anticompetitive subsidy that will result from approval of this charge simply based on the label placed on the charge. In short, it is unlawful for the Commission to require distribution customers to provide out-of-market compensation to support AEP's uneconomic investment in unregulated generation resources.

FOURTH GROUND FOR REHEARING:

> The Commission erred in authorizing AEP Ohio to establish the PPA rider because approval of the PPA rider allows AEP Ohio to evade the corporate separation requirements contained in R.C. 4928.17 by providing an undue preference and a competitive advantage to AEP Ohio in the form of a guaranteed cost recovery for an unregulated service and because approval of the rider facilitates the abuse of market power.

The placeholder PPA rider contemplates that AEP Ohio, an EDU, will enter into a cost-based purchase power agreement utilizing owned generation assets or, potentially, the generation assets of an affiliate. Although the Commision has temporarily excused AEP Ohio from its previous commitment to divest itself of its OVEC Entitlement assets, this does not relieve AEP Ohio from complying with the corporate separation requirements of R.C. 4928.17. Approval of the PPA rider would unlawfully allow AEP to evade these requirements.

R.C. 4928.17 provides that a corporate separation plan must prevent an EDU from providing a competitive advantage or preference to an affilate or portion of its buinses engaging in competitive activities, stating that, among other things, the plan "must satisf(y) the public interest in preventing unfair competitive advantage and preventing the abuse of market power" [R.C. 4928.17(A)(2)] and must be "sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric

service or nonelectric product or service." [R.C. 4928.17(A)(3)] R.C. 4928.01(A)(18) defines "market power" as the "the ability to impose on customers a sustained price for a product or service above the price that would prevail in a competitive market." Approval of the PPA rider violates each of these requirements.

There can be no question that the PPA rider could provide AEP Ohio with above-market compensation for unregulated generation assets. This above-market compensation unlawfully allows AEP to exercise market power and to provide an undue preference and competitive advantage to an unregulated internal business division. This is exactly the type of arrangement that corporate separation requirements are designed to prevent. Thus, rehearing should be granted on this ground.

WHEREFORE, IGS respectfully requests that the Commission grant its application for rehearing, reconsider its finding that a placeholder PPA rider should be established, and modify the ESP as previously approved by requiring AEP Ohio to eliminate the PPA rider from its tariff.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the following parties by electronic mail this 27th day of March 2015.

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