

**SOAH DOCKET NO. 582-13-5326
TCEQ DOCKET NO. 2012-1799-AIR-E**

EXECUTIVE DIRECTOR OF THE	§	BEFORE THE
TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY,	§	STATE OFFICE
 Petitioner	§	
v.	§	OF
CITGO REFINING AND CHEMICALS	§	
COMPANY, L.P.,	§	ADMINISTRATIVE
 Respondent	§	HEARINGS

**RESPONDENT’S EXCEPTIONS TO THE PROPOSAL FOR
DECISION AND PROPOSED ORDER**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE REBECCA SMITH
("ALJ") AND COMMISSIONERS:

The Respondent, CITGO Refining and Chemicals Company, L.P. ("CITGO"), files these exceptions to the ALJ's Proposal for Decision ("PFD") and Proposed Order ("Order") for the ALJ's reconsideration and for the Commissioner's consideration. CITGO respectfully recommends that the PFD and Order be revised consistent with findings that the claims of the Executive Director ("ED") regarding two alleged violations and the associated proposed penalty and corrective action are without merit and are not supported by the record in the case.

SUMMARY

This case was brought for one reason – CITGO's alleged failure to report an emissions event within 24 hours of discovery. But for the alleged reporting violation, the ED would not have brought this case based on the findings in the investigative report that CITGO had satisfied all the other elements for the affirmative defense. CITGO submits that the alleged emissions event, Incident No. 156293 ("Incident") did not constitute an emissions event. The emissions during the Incident did not constitute unauthorized emissions. Alternatively, CITGO timely reported the Incident. Alternatively, CITGO's untimely report did not preclude CITGO from asserting an affirmative defense. Alternatively, CITGO's voluntary supplemental leak detection program provided CITGO immunity from this enforcement action. Alternatively, the proposed penalty should be reduced based on a statutory limitation on penalty enhancement attributed to compliance history. Alternatively, the penalty should be reduced based on "other factors as justice may require."

Quite simply, this case should never have been brought by the ED. The facts are undisputed that CITGO, through a voluntary leak detection program that included daily monitoring, found and stopped emissions of air contaminants from a leaking heat exchanger 9 days earlier than would have occurred through compliance with the conditions in CITGO's permit, which only required monthly monitoring¹. In spite of the legislative mandate to encourage these types of proactive fugitive leak detection programs, the ED has brought this punitive action based on CITGO's alleged 15-hour delay in reporting an emissions event.

EXCEPTIONS

1. The ALJ erred in the characterization of the CITGO's voluntary supplemental VOC leak detection program as a "routine" test.²

The ALJ dismisses and diminishes the significance of CITGO's voluntary leak detection program by referring to it as "routine". In addition to the monthly El Paso Stripper ("EPS") test, required by the Special Condition No. 4 ("SC4") Permit No. 5418A ("Permit"), CITGO conducts a daily monitoring program to proactively provide early detection of volatile organic compound ("VOC") leaks in Cooling Tower No. 10 ("CT10"). This early leak detection program consists of a daily test for total organic carbon ("TOC") in the return water line to CT10³. The daily TOC test is designed to detect hydrocarbon leaks in the CT10 return water⁴. As shown in this case, through this early warning program, CITGO is able to detect, find and repair equipment leaks earlier than under the requirements of SC4⁵. CITGO's daily TOC testing program is a very effective VOC leak detection method that is not required by TCEQ rule, order or permit, or any other regulatory authority⁶. The daily test is anything but "routine."

2. The ALJ erred in finding "that Special Condition 4 contains an air emission limit and that the ED established that CITGO exceeded that limit, thereby violating the Permit, the Federal Permit, and the statute and rules cited" by the ED.⁷

CITGO agrees with the ALJ that the fugitive leak detection and repair requirements of SC4 contains an "air emission limit", but CITGO disagrees with the findings and conclusion of the ALJ as to the legal effect of the one isolated sentence referring to the VOC concentration exceeding 5 parts per million by weight

¹ Tr. at 117 (Johnson on cross)

² PFD at 2

³ R-6 (CITGO's Practice for Monitoring Cooling Tower TOCs) and Tr. at 144-6 (Cheesman on direct)

⁴ Id.

⁵ Id.

⁶ Id.

⁷ PFD at 4

(“ppmw”) in SC4. The PFD and Order are grounded on the ALJ’s conclusion of the legal effect of the following sentence in SC4:

Emissions from the cooling tower are not authorized if the VOC concentration of the water returning to the cooling tower exceeds 5 ppmw.

The ALJ found that this one sentence in SC4 should be read in isolation and interpreted to mean that emissions from CT10 during the Incident were *unauthorized emissions* when the VOC concentration of the water returning to CT10 exceeded 5 ppmw. This case evaporates if the emissions from CT10 during the Incident did not meet the definition of “unauthorized emissions”; there are no violations in this case – no emissions event, no reporting obligation.

CITGO respectfully submits that this one sentence from SC4 should be construed in the context of the entire permit provision⁸ as well as in the context of other similar VOC leak detection and repair (“LDAR”) programs contained in the Permit. When read as a whole, the meaning of that one sentence becomes both clear and consistent with the intent of TCEQ leak detection and repair programs. SC4 is found in the section of the Permit that is entitled “Operational Limits”. A fair reading of SC4 makes clear that SC4 establishes operational requirements and work practices to find and fix leaks in the 33 heat exchangers associated with CT10. The 5 ppmw VOC concentration is an action level informing CITGO to find the leaking equipment and stop the leak immediately with no delay of repair while initiating a control shutdown of the operations associated with CT10.

⁸ ED 2 at 9 (Permit No. 5418A, Special Condition 4) which provides:

The volatile organic compounds (VOC) associated with cooling tower water shall be monitored monthly for VOC leakage from heat exchangers with an approved air stripping method. All sampling and testing methods shall be subject to approval of the Texas Commission on Environmental Quality (TCEQ) Executive Director prior to their implementation. For all sampling required by this condition, the sample port for the water returning from the heat exchangers to the cooling tower shall be located on the top of the horizontal section of the water line returning to the cooling tower. (4/06)

The minimum detection level of the overall testing system shall be no greater than 0.15 part per million by weight (ppmw) VOC (concentration VOC in water entering the cooling tower). The minimum detection limit for the air stripped VOC shall be no greater than 2.50 parts per million by volume (ppmv) (concentration VOC in the stripping air). Calibration standards shall include at least zero ppmv and 10 ppmv VOC in air (as methane). Cooling water VOC concentrations above 0.15 ppmw indicate faulty equipment.

The appropriate equipment shall be maintained so as to minimize fugitive VOC emissions from the cooling tower. Faulty equipment shall be repaired at the earliest opportunity but no later than the next scheduled shutdown of the process unit in which the leak occurs.

Emissions from the cooling tower are not authorized if the VOC concentration of the water returning to the cooling tower exceeds 5 ppmw. The VOC concentrations above 5 ppmw are not subject to extensions for delay of repair under this permit condition. The results of the monitoring and maintenance efforts shall be recorded, and such records shall be maintained for a period of two years. The records shall be made available at the request of TCEQ personnel.

The 5 ppmw VOC concentration must be read in the context of the lower action level contained in SC4. If the VOC concentration is above 0.15 ppmw but not in excess of 5 ppmw, CITGO is required to find and repair the leaking equipment at the earliest opportunity but not later than the next scheduled shutdown of the process unit in which the leak occurs.

The VOC concentration in the isolated sentence specifies that there is no “delay of repair” of the source of VOC leak when the VOC concentration exceeds 5 ppmw. That sentence is one part of the operational requirements for CT10. When the VOC concentration exceeds 5 ppmw, CITGO must find and stop the leak with no delay. With the VOC concentration above 5 ppmw, CITGO must initiate shutdown of the affected unit and CT10. When CITGO follows through with finding and repairing the leak upon exceeding 5ppmw, CITGO has performed as the permit intended and there are no unauthorized emissions.

SC4 is intended to address fugitive leaks from the 33 heat exchangers associated with CT10. SC4 very clearly sets forth monitoring and operating conditions and work practices for the detection and repair of leaking equipment associated with CT10. The VOC concentrations in the water returning to CT10 are action levels directing investigation and repair as well as operational requirements. Like other requirements for leak detection and repair, so long as CITGO complied with the operational requirements and work practices prescribed in the permit, which may include a shutdown of CT10 and the affected unit, the emissions from CT10 during the Incident were “not unauthorized.”

This interpretation becomes clear if read in conjunction with the requirements if leaks above 0.15 ppmw but less than 5 ppmw are observed. Leaks above 0.15 ppmw are also “not authorized” as the permit requires them to be repaired at the earliest opportunity. Such emissions are not allowed to continue indefinitely. TCEQ has never maintained however, that such emissions are “unauthorized emissions” subject to the reporting requirements. In both cases, emissions are required to be addressed, but the permit specifies different timeframes in which the leak must be repaired. In either case, however, the magnitude of the emission does not establish whether the emission was unauthorized. The emission is unauthorized if CITGO fails to act within the timeframe specified by the permit. In this case, CITGO acted timely, so there were no unauthorized emissions.

The operational requirements and work practices in SC4 constitute an air emission limitation. Emissions in compliance with an air emission limitation do not meet the definition of “unauthorized emissions,” which is defined at 30 TAC § 101.1(107) as follows:

emissions of any air contaminant except carbon dioxide, water, nitrogen, methane, ethane, noble gases, hydrogen, and oxygen that

exceed any air emission limitation in permit, rule, or order of the commission or as authorized by Texas Clean Air Act, § 382.0518(g)⁹.
(emphasis added)

Although neither the Texas Clean Air Act (“TCAA”) nor the TCEQ rules provide a definition of emission limitation, the term is defined in the Federal Clean Air Act at Section 302(k)¹⁰, which provides:

The terms “emission limitation” and “emission standard” mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions on a continuous basis, including any requirement relating to the *operation or maintenance* of a source to assure continuous emission reduction, and any design, equipment, *work practice or operational standard* promulgated under this chapter.
(emphasis added)

Clearly, SC4 establishes operational requirements and work practices that meet this definition of an emission limitation. So long as CITGO complied with the monitoring, leak investigation and repair requirements of SC4, CITGO maintained compliance with SC4 and the emissions from the Incident did not exceed the applicable emission limitation and therefore could not constitute unauthorized emissions.

The facts in this case are not in dispute. CITGO complied with the operational requirements and work practices of SC4. CITGO monitored the cooling tower return water. CITGO detected a leak. Because the VOC concentration level was greater than 5 ppmw, CITGO investigated and found the leak expeditiously with no delay of repair. As CITGO was investigating, finding and stopping the leak, CITGO had begun a controlled shutdown of the units associated with CT10.¹¹

The ALJ relied on the testimony of Jeffery Grief that the language in SC4 is an emission limit and was intended to be when written. CITGO agrees with the statement provided that it applies to SC4 in its entirety and not just the one isolated sentence. On cross-examination, Mr. Grief stated that the TCEQ was in the process of clarifying the language for cooling tower permit special conditions and the maximum allowable emission rate tables (“MAERT”) to specify maximum emission rates for fugitive emissions¹². CITGO would assert that, if the earlier language (e.g. SC4 in the Permit) was in need of clarification, CITGO should not be penalized in a punitive enforcement action based on ambiguous or vague permit

⁹ Tab-T (30 TAC § 101.1)

¹⁰ 42 U.S.C. § 7602(k)

¹¹ Tr. at 147 (Cheesman on direct)

¹² Tr. 185-187

conditions. Before being penalized, CITGO has a right to fair notice of TCEQ requirements. *See Christopher v. SmithKline Beecham Corp.*, 132 S.Ct 2156, 2167 (2012), a U.S. Supreme Court opinion upholding the principle that “agencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires.’”

3. The ALJ erred in finding that the “Incident was an emissions event that was required to be reported.”¹³

An emissions event must include unauthorized emissions. As discussed above, the emissions from the Incident did not constitute unauthorized emissions. Based on the definition of “emissions event” at 30 TAC § 101.1(28)¹⁴, if there are no unauthorized emissions, there can be no emissions event. CITGO complied with the operational requirements and work practices of SC4. Emissions during the Incident were not unauthorized.

4. The ALJ erred in finding that “CITGO failed to timely file its emissions event report and therefore failed to establish its entitlement to the affirmative defense”.¹⁵

Although CITGO maintains that there was no reportable emissions event, CITGO demonstrated that, if the emissions from the Incident constituted a reportable emissions event, CITGO reported the emissions event within 24 hours of discovery in accordance with 30 TAC § 101.201¹⁶. CITGO reported the emissions event within 24 hours of determining that the leaking heat exchanger, the glycol knockout cooler (“GKC”), one of the 33 heat exchangers associated with CT10, could no longer serve its functional purpose. This determination of discovery in the context of fugitive equipment leaks is based on TCEQ rulemaking in 2001¹⁷ and subsequently issued guidance¹⁸ and the absence of a regulatory definition of discovery.

¹³ PFD at 8

¹⁴ Tab-T (30 TAC § 101.1)

¹⁵ PFD at 10 and 11

¹⁶ Tab-Y (30 TAC §. 101.201)

¹⁷ In response to comments in the rulemaking, TCEQ responded “unauthorized emissions may result from fugitive emissions from a piece of equipment or component. For example, *a complete failure of a component such that the component can no longer serve it functional purpose* would generally be considered an emissions event. (emphasis added) 27 TexReg 3475 (April 26, 2002) at 8512

¹⁸ This same language was incorporated into the TCEQ guidance as follows- “when the facility O/O [owner/operator] determines emissions from a fugitive component are the subject of an emissions event; (i.e. *the component completely fails such that it can no longer serve it functional purpose*) then those emissions should be recorded or reported according to the emissions event rules, including demonstration criteria, excessive emissions events, affirmative defense, and reportable quantities. (emphasis added) R-1 at 26 (Emissions Events Regional Investigation Protocol)

The ALJ erred in relying on the ED's argument that CITGO knew that CT10 was no longer serving its functional purpose once CITGO got the EPS test results back [on June 28, 2011 at 5:30 PM] and that it did not need to wait to find out which heat exchanger was leaking. CITGO would submit that there is no evidence in the record that supports a finding that CT10 could no longer serve its function purpose on that date. In fact, the source of the fugitive emissions during the Incident was not the result of any leak or mechanical breakdown in CT10 but such leak originated with the GKC heat exchanger. It was the GKC heat exchanger that could no longer serve its functional purpose. The record is undisputed that CITGO made this discovery and determination on June 29, 2011 at 5:00 PM and made its initial report on June 30, 2011 at 8:52 AM, well within the 24-hour reporting period.

Although CITGO maintains that emissions from the Incident were not unauthorized and therefore did not constitute an emissions event, CITGO is not precluded from asserting the affirmative defense under 30 TAC § 101.222(b). Where, as alleged here, an untimely report of an emissions event does not impair the TCEQ's ability to review the emissions event, the affirmative defense criteria are still available to CITGO. TCEQ has not claimed that the alleged untimeliness impaired its ability to review the Incident¹⁹. If CITGO would have had the benefits of the affirmative defense, this case would not have been brought. The untimely report would have been handled by the TCEQ with a notice of violation and not formal enforcement²⁰.

The ALJ erred in accepting the position of the ED that 30 TAC § 101.222(b)(1) distinguishes reporting omissions and inaccuracies from timeliness. CITGO would point out that § 101.222(b)(1) must read in the context of the statutory provision from which it was derived, § 382.0216(i). This section of the TCAA, which was enacted in 2001 to address emissions events and associated affirmative defenses context of reporting deficiencies, provides the following:

In the event the owner or operator of a facility fails to report an emissions event, the commissions shall initiate enforcement for such failure to report for the underlying emissions event itself. This subsection does not apply where an owner or operator reports an emissions event and the report was incomplete, inaccurate, or *untimely* unless the owner or operator knowingly or intentionally falsified the information report.
(emphasis added)

Contrary to the position of the ED and the finding of the ALJ, the Legislature intended that untimely reports be treated in the same manner other deficiencies

¹⁹ Tr. at 109-110 (Johnson on cross)

²⁰ Tr. at 124-124 (Johnson on redirect)

and omissions. CITGO does not take the position than initial report is not a violation if it is 15 hours late. It would remain a violation subject to appropriate enforcement action by the TCEQ but an untimely report that does not impair the TCEQ's ability to review the event does not preclude the assertion of the affirmative defense.

5. The ALJ's erred in finding that CITGO's voluntary supplemental VOC leak detection program does not fall under the provision of § 382.401(e) of TCAA, and it is not immune from this enforcement action.²¹

Although CITGO maintains that the emissions from the Incident were not unauthorized and there was no emissions event, CITGO asserts that CITGO's voluntary supplemental VOC leak detection program provides immunity from this enforcement action pursuant to § 382.401(e) of TCAA. The evidence in the record demonstrates that through this voluntary program to detect VOC fugitive leaks at CT10, CITGO was able to detect the leaking equipment much earlier than simply following the permit requirements²². Recognizing the air quality benefits of voluntary supplemental leak detection programs, the Legislature encouraged them by providing for immunity against enforcement.

The ALJ interprets the limitation of the immunity provisions of § 382.401(e) in a constrained manner that would effectively do away with the immunity provision in the context of fugitive leak detection so long as the leak would have been detected eventually under the TCEQ's regulatory program. However, the statutory provision should be interpreted to focus on the "date of detection" in order to effectuate the air quality benefits of early detection and repair encouraged by the Legislature. By doing so, CITGO's voluntary program falls under the immunity provisions.

On June 28, 2011, CITGO detected a fugitive VOC leak in CT10 through the implementation of CITGO's voluntary program. On that date, the leak would not have been detected by the leak detection and repair requirements of SC4. The next leak detection monitoring scheduled for CT10 under the conditions of SC4 was July 8, 2011.²³ Because of CITGO's voluntary program, fugitive emissions from CT10 were reduced 8 days earlier than they would have otherwise – achieving the air quality benefits intended by the statutory immunity provision.

²¹ PFD at 12

²² Tr. at 117 (Johnson on cross)

²³ Tr. at 147 (Cheesman on direct)

6. The ALJ erred in finding that House Bill 2694 did not reduce the penalty amount or that the Code Construction Act requires the use of the 100% cap on the penalty enhancement attributed to compliance history. ²⁴

As the ALJ pointed out in the PFD, a component of the proposed penalty was an enhancement attributed to compliance history – a 300% upward adjustment of the base penalty. Clearly, the compliance history adjustment is part of the penalty. A cap on the compliance history enhancement to a percentage below 300% would be reduction in the penalty contrary to the finding of the ALJ.

House Bill 2694 amended § 5.754 of the Water Code by adding a new Subsection (e-1), which provides:

The amount of the penalty enhancement or escalation attributed to compliance history, may not exceed 100% of the base penalty for an individual violation as determined by the commission's penalty policy.

The effective date of HB 2694 was September 1, 2011.²⁵ The alleged violations in this case occurred in June 2011. CITGO is entitled to the penalty reduction benefit provided by the new statutory compliance history enhancement cap.

Although HB 2694 has a September 1, 2011 effective date, § 4.31 of HB 2694 expressly provided that certain amendments of the Water Code would apply only to events occurring after the effective date. Amended § 5.754(e-1) was not one of them. In addition, the Code Construction Act at § 311.031(b), Government Code provides:

If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment, revision, or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.

The Code Construction Act, applies to the Water Code and should control. Amended § 5.754(e-1) applies to this case. The proposed penalty enhancement on CITGO's compliance history may not exceed 100 percent of the base penalty.

The Executive Director calculated a base penalty of \$2,600²⁶. Using the ED's Penalty Calculation Worksheet and applying the 100 percent compliance history enhancement cap would result in a penalty of \$4,575.

²⁴ PFD at 14

²⁵ See Section 11.01 of HB 2694

²⁶ ED-7 (Penalty Calculation Worksheet)

The ALJ has erred by agreeing with the ED that the entire statutory revision must be considered. The ALJ referred to another amendment in HB 2694, which increased the maximum penalty amounts from \$10,000 a day for each violation to \$25,000 in § 7.052(c).²⁷ However, Section 4.31(b) of the HB 2694 provides that the changes to § 7.052(c) apply only to a violation that occurs on or after the effective date of the Act. The reference to the changes in the maximum penalty amount is not pertinent to an analysis of the applicability of the statutory cap on compliance history enhancements in this case.

The Code Construction Act controls and CITGO should receive the benefits of the penalty reduction through the application of the 100% compliance history enhancement cap.

7. The ALJ erred in not finding that the proposed penalty should be adjusted based on “other factors as justice may require.”²⁸

If there is a finding that CITGO does not receive the benefit of the immunity based on the voluntary supplemental VOC leak detection program, any penalty in this case should be adjusted downward to reflect CITGO’s voluntary leak detection program based on “other factors as justice may require.” The ED did not consider CITGO’s voluntary leak detection program in calculating the proposed penalty in this case²⁹. Specifically, there was no adjustment for “other factors as justice may require³⁰.” Based on the evidence in this case, as a matter of equity, the proposed penalty should be adjusted downward based on CITGO’s voluntary leak detection program. This voluntary program was effective in detecting the heat exchanger leak 9 days earlier than would have occurred under the terms of the Permit. CITGO should be encouraged to implement voluntary programs that result in air quality benefits. Penalizing CITGO in this case will send the wrong message to other regulated entities who may consider voluntary supplement program to enhance environmental performance. CITGO urges that consideration of the voluntary leak detection program should result in a substantial reduction in the proposed penalty, if not the total elimination of any penalty.

In spite of the uncontroverted testimony that the voluntary program was not considered by the ED in calculating the penalty, the ALJ concludes that CITGO benefited from the voluntary program because “a later-discovered leak could have resulted in increased duration and amount of contaminants released, possibly resulting in a higher proposed penalty.” Without the daily voluntary testing, how could anyone, including the ALJ, determine that leak detected by the monthly monitoring required by SC4 was a later-discovered leak? It defies logic.

²⁷ Section 4.10 of HB 2694

²⁸ PFD at 15

²⁹ Tr. at 119 (Johnson on cross)

³⁰ Id.

CONCLUSION

Based on the foregoing, CITGO respectfully requests that the ALJ reconsider the PFD and Order and the Commissioners adopt a revised PFD and Order with findings and conclusions that support the following:

(1) This enforcement action should be dismissed. CITGO complied with the operating limits and work practices of SC4, therefore, CITGO did not violate SC4 and the Permit.

(2) The emissions from the Incident do not constitute unauthorized emissions; therefore, the Incident was not an emissions event and CITGO had no reporting obligation and this enforcement action should be dismissed.

(3) Alternatively, the Incident was timely reported as an emissions event, which was discovered at 5:00 PM on June 29, 2011 when CITGO determined that the GKC could no longer serve its functional purpose. CITGO satisfied all the criteria to qualify for the affirmative defense under 30 TAC § 101.222(b); therefore, this enforcement action should be dismissed.

(4) Alternatively, even though the Incident was not timely reported, CITGO satisfied all of the applicable criteria to qualify for the affirmative defense under 30 TAC § 101.222(b). With the satisfaction of the criteria for the affirmative defense, this enforcement case should be dismissed and the alleged reporting violation should be addressed by the Executive Director as a notice of violation.

(5) Alternatively, CITGO's voluntary leak detection program for CT10 provides immunity from this enforcement action under § 382.401(e), Health and Safety Code; therefore, this enforcement action should be dismissed.

(6) Alternatively, the penalty in this case should be substantially reduced, if not eliminated, based on CITGO's voluntary lead detection program and actions taken to detect, find and fix the leaking GKC 9 days earlier that would have occurred under the Permit, based on the application of the Penalty Policy adjustment factor, "other factors as justice may require."

(7) Alternatively, the base penalty in this case should be reduced to reflect the application of the compliance history cap of 100 percent.

Respectfully submitted

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CERTIFICATE OF SERVICE

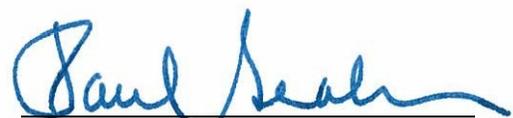
I hereby certify that on November 26, 2014, the original of the foregoing “Respondent’s Exceptions to the Proposal for Decision and Proposed Order” was electronically filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day, a true and correct copy of the foregoing Response was sent via electronic mail to:

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