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DEPARTMENT OF
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**BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATIONS
FOR PERMIT NOS. 63-34079 AND 63-
34080 IN THE NAME OF CHRIS EMMERT

**MUNICIPAL PROVIDERS'
PETITION TO INTERVENE**

TABLE OF CONTENTS

INTRODUCTION	3
STANDARDS	3
STATEMENT OF INTERESTS	4
DISCUSSION	5
I. The Municipal Providers have a direct and substantial interest in the proceeding.....	5
II. Municipal Providers accept the case as they find it.....	6
III. The Municipal Providers' interests are not adequately represented by existing parties.	7
IV. The Municipal Providers have a substantial reason for delay.	8
V. This is a live matter.....	9
VI. Municipal Providers have coordinated their response.....	10
VII. Summary.....	10
CERTIFICATE OF SERVICE	13
Exhibit A Order Denying Idaho Cities' Petition for Limited Intervention (Mar. 26, 2014).....	18
Exhibit B Order Granting Late Request to Participate (Aug. 21, 2015)	22

INTRODUCTION

COMES NOW the City of Meridian and the City of Caldwell, by and through their attorney Honsinger Law, PLLC, the City of Nampa and Suez Water Idaho Inc., by and through their attorneys Givens Pursley LLP, the City of Eagle, by and through its attorneys Moore Smith Buxton & Turcke, Chartered, the City of Boise, by and through its attorney Abigail R. Germaine, and the City of Kuna, by and through its attorney Richard T. Roats (collectively “Municipal Providers”) and hereby submit this petition to intervene in the above captioned matter.

This matter involves two applications for permit (Nos. 63-34079 and 63-34080) filed by Applicant Chris Emmert on May 8, 2015 and September 25, 2015, respectively. The applications were protested by the Boise Project Board of Control (“Protestant” or “Boise Project”). The Hearing Officer issued his *Preliminary Order Approving Applications for Permit* (“*Preliminary Order*”) on June 19, 2017. On June 30, 2017, the Protestant timely filed *Boise Project Board of Control’s Petition for Reconsideration of Preliminary Order Approving Applications for Permit* (“*Petition for Reconsideration*”). Municipal Providers seek intervention to oppose the *Petition for Reconsideration* and to participate in any further proceedings or appeals in this matter.

STANDARDS

Entities not applicants or protestants in a proceeding before the Idaho Department of Water Resources (“IDWR” or “Department”) who claim a “direct and substantial interest may petition for an order from the presiding officer granting intervention to become a party.” IDAPA 37.01.01.350. Normally, petitions to intervene must be filed at least 14 days prior to the hearing in a proceeding. However, petitions to intervene filed after that time may be granted upon a showing of “substantial reason for delay.” IDAPA 37.01.01.352. A petition to intervene

showing “a direct and substantial interest in any part of the subject matter of a proceeding” that “does not unduly broaden the issues” may be granted by the presiding officer “subject to reasonable conditions, unless the applicant’s interest is adequately represented by existing parties.” IDAPA 37.01.01.353.

STATEMENT OF INTERESTS

Six of the Municipal Providers (the Cities of Meridian, Nampa, Caldwell, Kuna, Eagle, and Boise) are municipal corporations and subdivisions of the State of Idaho. Each of these cities holds municipal and/or other ground water rights under which it diverts water for delivery to municipal customers within its service area. Suez Water Idaho Inc. is a regulated public utility that holds municipal and other ground water rights under which it diverts water for delivery to its customers within its certificated area, which includes parts of the Cities of Boise, Eagle, Garden City, and Meridian, as well as parts of unincorporated Ada County.

Water is provided by the Municipal Providers to customers throughout the Treasure Valley for various purposes, including domestic in-home use, irrigation of homes and public spaces, commercial use, industrial use, and aesthetic and environmental use, among others. These are described collectively as municipal uses.

The Municipal Providers all have a substantial and direct interest in this proceeding and a substantial reason for their delay in submitting a petition to intervene. As explained below and more fully in the contemporaneously filed *Municipal Providers’ Brief in Opposition to Petition for Reconsideration*, the Protestant’s recently filed *Petition for Reconsideration* seeks a determination by the Hearing Officer that is contrary to Idaho’s prior appropriation doctrine and maximum use doctrine and that may negatively affect the Municipal Providers’ exercise of their water rights and their ability to acquire new appropriations.

The concerns raised by these Municipal Providers are not unique. They are applicable to all municipal providers and, indeed, to all ground water users across the State. The Municipal Providers seek to address significant policy considerations that the Hearing Officer should weigh before making a decision on the Protestant's *Petition for Reconsideration*.

DISCUSSION

I. THE MUNICIPAL PROVIDERS HAVE A DIRECT AND SUBSTANTIAL INTEREST IN THE PROCEEDING.

The Municipal Providers are concerned with the direction of this proceeding after issuance of the *Preliminary Order* on June 19, 2017. In the *Preliminary Order*, the Hearing Officer determined that the Applicant's proposed diversions of ground water would induce seepage of water from Lake Lowell stored by Protestant, and that the Applicant was therefore required to provide mitigation water to the Protestant to compensate for the induced seepage. The Hearing Officer also determined that the Protestant's evidence fell short of establishing a similar hydraulic connection between the Protestant's canals and the ground water, and therefore did not require the Applicant to mitigate for seepage losses in those canals.

In its *Petition for Reconsideration*, the Protestant argues that evidence in the record enables the Hearing Officer to require mitigation for induced seepage from its canals caused by the Applicant's ground water pumping (and therefore indirectly invites the Hearing Officer to find a connection between the Protestant's canals and the ground water.) This argument is of great concern to the Municipal Providers because irrigation canals owned by the Boise Project and other irrigation entities criss-cross the areas throughout which the Municipal Providers divert ground water through their own wells.

If the Hearing Officer agrees with the Protestant's argument that the Applicant's ground water pumping induces seepage from the Protestant's canals and that such induced seepage

requires that mitigation be provided, the Municipal Providers are concerned that the same reasoning could be turned against any of the Municipal Providers in any proceeding involving an application for a ground water right. The Municipal Providers are similarly concerned that the reasoning could be used to assert that their pumping pursuant to existing ground water rights requires mitigation for induced seepage from the myriad canals overlying aquifers on which they rely. The Municipal Providers could be significantly impacted by any such decision from the Hearing Officer. This constitutes a “direct and substantial interest” in this proceeding.

II. MUNICIPAL PROVIDERS ACCEPT THE CASE AS THEY FIND IT.

The Municipal Providers do not seek in any way to broaden the issues or expand the evidence in this proceeding. Specifically, they accept the record as they find it and will not seek to introduce new evidence at this stage of the proceeding.¹ They are concerned with the issues raised in the *Petition for Reconsideration*, that is, the issues of seepage from canals and facilities allegedly induced by ground water pumping, and the resulting mitigation that the Department may require.² These issues are existing and present in this proceeding and the Municipal Providers do not seek to broaden the scope of the proceeding beyond the issues in which they are substantially interested.

¹ The Municipal Providers reserve the right, however, to offer their own evidence in the event the Hearing Officer allows other parties to offer additional evidence.

² The Municipal Providers intend to focus their intervention on broad principles of law—including the maximum use doctrine—regarding requirements for mitigation of injury to water rights, rather than disputation of the various expert reports and technical conclusions. *See* their brief filed herewith. Those principles of law, of course, have ramifications that go beyond canal mitigation. Likewise, the principles of law urged by Protestant in its *Petition for Reconsideration* have implications that go far beyond the mitigation of the canals involved here.

III. THE MUNICIPAL PROVIDERS' INTERESTS ARE NOT ADEQUATELY REPRESENTED BY EXISTING PARTIES.

The Municipal Providers' interests are directly adverse to those of the Protestant.

Although the Municipal Providers' interests are generally aligned with those of the Applicant, the Applicant is unable to adequately represent the Municipal Providers' interests.

The Applicant is a private party engaged in a for-profit enterprise. The Applicant did not file a petition for reconsideration nor exceptions. Presumably it determined that further litigation is not worth the candle. Given its limited, private perspective, it may be economically rational to pay the cost of the mitigation rather than the cost of further litigation. This is the nub. Protestant is seeking to establish far-reaching precedent in the context of an isolated contested case with an opponent with a limited litigation budget who will not be affected by the application of the decision in other contexts.

The Municipal Providers, in contrast, are public and regulated entities whose concerns reach across the public they serve. They divert and deliver vastly more ground water from many more wells—hundreds of them—than sought by the Applicant. A decision requiring mitigation of a small percentage of ground water diversions might be undesirable but ultimately acceptable to the Applicant. Such requirements, however, would carry far greater consequences for the Municipal Providers and the many thousands of citizens and businesses they serve.

The Municipal Providers have obligations to their customers and constituents that the Applicant cannot practically or legally fulfill. The Applicant has his farm and looks forward to putting this water case behind him. Municipal Providers have an obligation to serve all who come to their service areas now and into the future. They cannot simply determine that their population is large enough. Accordingly, they must continually plan for future growth, which

includes the acquisition of additional ground water rights. What may be the last mitigation requirement the Applicant will face represents the tip of the iceberg for Municipal Providers.

Moreover, if mitigation water is not available in a particular year, that will inflict an economic penalty on the Applicant. But the Municipal Providers cannot simply “take the hit” and forgo diversion for a season under their existing rights. Municipal Providers have an ongoing obligation to serve.

For all of these reasons, the Applicant simply cannot be expected to adequately represent the Municipal Providers’ concerns regarding the issues raised in this proceeding and the troubling precedents that could be set.

IV. THE MUNICIPAL PROVIDERS HAVE A SUBSTANTIAL REASON FOR DELAY.

The period within which a petition for intervention is normally filed has passed. However, the Hearing Officer may grant a delayed petition for intervention upon a showing of substantial reason for delay. The Municipal Providers were unaware that a potential mitigation requirement for canal seepage induced by ground water pumping was even an issue in this proceeding until the *Preliminary Order* was issued. Boise Project raised only issues related to the effects of ground water pumping upon its Lake Lowell water rights in its *Protest*. The *Preliminary Order* found the evidence presented here did not establish a direct hydraulic connection between ground water and the canals. Consequently, the order did not require mitigation for canal losses. With the filing of Boise Project’s *Petition for Reconsideration*, the Municipal Providers are now aware of the potential that the Hearing Officer could find that ground water pumping induces seepage from canals and that mitigation may be required for such impacts. That significantly expands the potential impact of this decision. Because it was impossible for the Municipal Providers to be aware of this potential until Boise Project’s *Petition*

for Reconsideration, the Municipal Providers have shown a substantial reason for their delay in seeking intervention into this proceeding.

In any event, the delay in intervention is outweighed by the public interest in allowing the Hearing Officer and the Department to hear the concerns of these Municipal Providers who serve and represent the interests of much of the Treasure Valley and who wish to inform the decision maker of the far-reaching policy implications of this seemingly “small” case.

V. THIS IS A LIVE MATTER.

This petition to intervene stands in sharp contrast to the petition to intervene that was denied by Director Gary Spackman in *In the Matter of Distribution of Water to Water Right Nos. 36-02551 and 36-07694 (Rangen, Inc.)* dated Mar. 26, 2014 (copy attached as Exhibit A). In that proceeding, a group of cities in the Magic Valley filed an untimely petition to intervene in a conjunctive management delivery call proceeding. Unlike the Emmert matter, this delivery call was highly publicized and well known throughout the water user community. Even more significantly, the Magic Valley cities did not seek to intervene until after the final order was issued and after a timely petition for reconsideration was fully briefed and decided.

In other words, by the time the Magic Valley cities filed their petition, the case was dead. This was called out as the reason for denial of the petition.

The Cities have not demonstrated good cause or any other reason to grant the untimely Petition as there is nothing for the Cities to further participate in before the Department with respect to this proceeding. . . . Because the petitions for reconsideration have been denied, there are not further proceedings related to the Curtailment Order for the Cities to participate in.

Order Denying Idaho Cities’ Petition for Limited Intervention, *In the Matter of Distribution of Water to Water Right Nos. 36-02551 and 36-07694 (Rangen, Inc.)* at page 2 (Mar. 26, 2014).

The Municipal Providers' posture is the opposite. They seek to intervene in a live case in which their brief (or answer) has been timely filed.³

VI. MUNICIPAL PROVIDERS HAVE COORDINATED THEIR RESPONSE.

In order to minimize the burden of their intervention on the Applicant, the Protestant, the Hearing Officer, and the Department, the Municipal Providers have endeavored to coordinate their efforts and speak with one voice. This is reflected in this joint petition and the accompanying joint brief. Likewise, the Municipal Providers have met the deadline for filing their brief, and do not anticipate seeking any further extensions of time or special treatment due to their intervention.

VII. SUMMARY

Upon learning of the Hearing Officer's *Preliminary Order* and the Protestant's *Petition for Reconsideration*, the Municipal Providers quickly organized and responded to this issue within the 14-day timeframe provided by the rules for responding to motions within an administrative proceeding before IDWR. IDAPA 37.01.01.270.02; see also, 37.01.01.260.03 and 37.01.01.565. They are submitting a unified response that will not require any of the parties or the Hearing Officer to reply separately to arguments made by multiple parties. Their briefing will be valuable in assisting the Hearing Officer to consider the long-term effects and policy considerations related to the issues of ground water pumping impacts on storage and delivery facilities. They have established a direct and substantial interest in this proceeding, and they

³ In *In the Matter of Distribution of Water to Water Rights Held by Members of the Big Wood & Little Wood Water Users Association Diverting from the Big Wood River*, the Director granted a late request for participation despite the fact that the intervenors were informed by the Department of the deadline for filing and nonetheless missed the deadline. (Copy attached as Exhibit B.) Here, in contrast, Municipal Providers received no notice from the Department with respect to this proceeding and the startling expansion of its scope subsequent to the protest. They have nonetheless promptly filed their petition and brief (aka answer) in opposition to the Protestant's petition for reconsideration within the 14-day deadline set by the Department's rules.

have shown a substantial reason for delay. They are not seeking to broaden the issues, and the Applicant does not adequately represent their interests in this proceeding. Accordingly, the Hearing Officer should grant the Municipal Providers' *Petition to Intervene*.

Respectfully submitted this 14th day of July, 2017.

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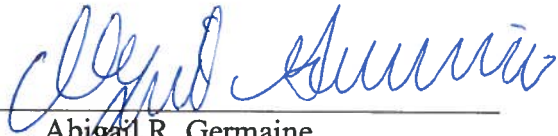
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Christopher H. Meyer

Exhibit A **ORDER DENYING IDAHO CITIES' PETITION FOR LIMITED INTERVENTION
(MAR. 26, 2014)**

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF	)	CM-DC-2011-004
WATER TO WATER RIGHT NOS. 36-02551	)	
AND 36-07694	)	ORDER DENYING IDAHO
	)	CITIES' PETITION FOR
(RANGEN, INC.)	)	LIMITED INTERVENTION
	)	
_____	)	

BACKGROUND

On January 29, 2014, the Director ("Director") of the Idaho Department of Water Resources ("Department") issued the *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call; Curtailing Ground Water Rights Junior to July 13, 1962* ("Curtailment Order").

On February 14, 2014, the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell ("Cities") filed their *Petition for Limited Intervention* ("Petition") seeking to intervene in the proceeding.

In response to the Cities' Petition, on February 19, 2014, Rangen, Inc. ("Rangen") filed its *Memorandum in Opposition to the Idaho Cities' Petition for Limited Intervention* and the *Affidavit of J. Justin May in Opposition to the Idaho Cities' Petition for Limited Intervention*.

ANALYSIS

As the Cities acknowledge, the Petition was untimely filed. Specifically, Rule of Procedure 352 provides that, to be considered timely, a petition to intervene must be: "[F]iled at least fourteen (14) days before the date set for formal hearing, or by the date of the prehearing conference, whichever is earlier, unless a different time is provided by order of notice." IDAPA 37.01.01.352. Rangen initiated the water call at issue in this case in 2011. The prehearing conference was held on January 19, 2012. The formal hearing on this matter took place in May 2013. The Cities did not file their Petition until February 14, 2014, well after the formal hearing on this matter.

However, Rule of Procedure 352 provides that "[t]he presiding officer may deny or conditionally grant petitions to intervene that are not timely filed for failure to state good cause

**ORDER DENYING IDAHO CITIES' PETITION
FOR LIMITED INTERVENTION - Page 1**

for untimely filing, to prevent disruption, prejudice to existing parties or undue broadening of the issues, or for other reasons." IDAPA 37.01.01.352. Even a timely-filed petition to intervene may be denied when the interests of the party seeking intervention are already adequately represented in the proceeding. IDAPA 37.01.01.353.

The Cities assert the Petition "is sought for the limited purpose of supporting the Idaho Ground Water Appropriators, Inc.'s, *Petition to Stay Curtailment and Request for Expedited Decision*, dated February 11th, 2014." *Petition* at 1. The Cities contend that "nothing currently contemplated by the Petitioners will disrupt the proceedings, prejudice any existing party, or unduly broaden any of the current issues presented." *Id.* at 5. The Cities argue:

Intervention will permit the Cities to participate in this action which directly relates to their water use and will allow the Cities to propose a mitigation plan tailored to the unique circumstances of the Cities and the municipal water rights they own. The scope of the [Curtailment] Order, the unique aspects of municipal water rights compared to other types of water rights, including irrigation rights, and the lack of the Cities' direct participation in the proceedings to date constitute good cause for the untimely filing of the Petition as required by Rule of Procedure No. 352.

Id. at 5.

The Cities have not demonstrated good cause or any other reason to grant the untimely Petition as there is nothing for the Cities to further participate in before the Department with respect to this proceeding. After the Director issued the Curtailment Order, the Idaho Ground Water Appropriators, Inc. ("IGWA") timely filed *IGWA's Petition for Reconsideration* ("IGWA Petition"), Rangen timely filed *Rangen, Inc.'s Motion for Reconsideration and Clarification* ("Rangen Motion"), and the City of Pocatello ("Pocatello") timely filed *City of Pocatello's Motion to Reconsider* ("Pocatello Motion"). On March 4, 2014, the Director issued an *Order on Reconsideration* denying the IGWA Petition and Pocatello Motion and denying the Rangen Motion except for the request to clarify the basis for the amounts designated in the mitigation phase-in. Because the petitions for reconsideration have been denied, there are no further proceedings related to the Curtailment Order for the Cities to participate in.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED as follows:

The Idaho Cities' Petition for Limited Intervention is DENIED.

DATED this 26th day of March, 2014.


GARY SPACKMAN
Director

**ORDER DENYING IDAHO CITIES' PETITION
FOR LIMITED INTERVENTION - Page 2**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of March, 2014, the above and foregoing document was served on the following by providing a copy in the manner selected:

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**ORDER DENYING IDAHO CITIES' PETITION
FOR LIMITED INTERVENTION - Page 3**

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Deborah J. Gibson
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**ORDER DENYING IDAHO CITIES' PETITION
FOR LIMITED INTERVENTION - Page 4**

Exhibit B **ORDER GRANTING LATE REQUEST TO PARTICIPATE (AUG. 21, 2015)**

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHTS HELD BY
MEMBERS OF THE BIG WOOD & LITTLE
WOOD WATER USERS ASSOCIATION
DIVERTING FROM THE BIG WOOD
RIVER

Docket No. CM-DC-2015-001

IN THE MATTER OF DISTRIBUTION OF
WATER TO WATER RIGHTS HELD BY
MEMBERS OF THE BIG WOOD & LITTLE
WOOD WATER USERS ASSOCIATION
DIVERTING FROM THE LITTLE WOOD
RIVER

Docket No. CM-DC-2015-002

**ORDER GRANTING LATE REQUEST
TO PARTICIPATE**

BACKGROUND

On February 24, 2015, the Director ("Director") of the Idaho Department of Water Resources ("Department") received two conjunctive management water delivery call letters from counsel for members of the Big Wood & Little Wood Water Users Association. The letters allege senior surface water users on the Big Wood and Little Wood Rivers are being injured by water users diverting ground water hydraulically connected to the Big Wood and Little Wood Rivers. The letters request the Director regulate junior ground water users consistent with the prior appropriation doctrine.

The Director initiated new contested case proceedings and assigned each delivery call letter its own docket number. The Big Wood Delivery Call was assigned docket no. CM-DC-2015-001. The Little Wood Delivery Call was assigned docket no. CM-DC-2015-002.

On March 20, 2015, the Department sent letters to ground water users the Department identified as potentially affected by one or both of the above-described delivery calls, including Brian Lamar Smith and Diane Steffey-Smith ("the Smiths"). The purpose of the letters was to inform the water users of the delivery calls and notify them of a planned status conference. The letters invited the water users to file a written notice with the Department if they planned to participate in delivery call proceedings. The Department received over 100 notices of intent to participate.

The Department also published general notice of the delivery calls and the status conference in the Idaho Mountain Express and Camas Courier on March 25th, 2015 & April 1st, 2015; and the Times News on March 26th, 2015 & April 2nd, 2015.

ORDER GRANTING LATE REQUEST TO PARTICIPATE - Page 1

On May 13, 2015, the Director issued an *Order Governing Participation* ("Order") stating:

Holders of ground water rights that may be affected by one or both of the above-described delivery calls that have not filed a notice of intent to participate but wish to actively participate in the contested case proceedings must file with the Department a written notice of intent to participate in CM-DC-2015-001 or CM-DC-2015-002 or both cases, by May 27, 2015.

Order at 2 (emphasis in original). On June 1, 2015, the Department received a letter from the Smiths stating they "wish to participate in CM-DC-2015-001 and CM-DC-2015-002."

The Director will treat the Smiths' June 1, 2015, letter as a motion to grant a late request to participate in the Big Wood and Little Wood Delivery Call proceedings. As explained above, the Smiths are ground water users the Department identified as potentially affected by one or both of the above-described delivery calls. The Department received the Smiths' letter only a few days past the May 27, 2015, deadline established in the Order. Granting the Smiths' motion will not result in prejudice to other parties. The Director will grant the Smiths' motion.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Smiths' motion to grant a late request to participate in the Big Wood and Little Wood Delivery Calls is GRANTED.

DATED this 21st day of August 2015.


GARY SPACKMAN
Director

ORDER GRANTING LATE REQUEST TO PARTICIPATE . Page 2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 21st day of August 2015, I served a true and correct copy of the above and foregoing document by placing a copy of the same in the United States mail, postage prepaid and properly addressed and by e-mail to participants who have provided e-mail addresses to the Department for service to the following:

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ORDER GRANTING LATE REQUEST TO PARTICIPATE . Page 3

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ORDER GRANTING LATE REQUEST TO PARTICIPATE - Page 4

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ORDER GRANTING LATE REQUEST TO PARTICIPATE - Page 5

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ORDER GRANTING LATE REQUEST TO PARTICIPATE - Page 6

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ORDER GRANTING LATE REQUEST TO PARTICIPATE - Page 7

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ORDER GRANTING LATE REQUEST TO PARTICIPATE - Page 8