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8 BEFORE THE STATE OF WASHINGTON
9 ENERGY FACILITY SITE EVALUATION COUNCIL
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16 In the Matter of Application No. 99-1:
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19 SUMAS ENERGY 2 GENERATION
20 FACILITY
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**SE2'S RESPONSE TO
CFE/WHATCOM COUNTY MOTION
TO REOPEN RECORD**

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24 **I. INTRODUCTION**
25

26 Almost five months after the hearing, the Counsel for the Environment (CFE) and
27 Whatcom County have asked the Council to reopen the adjudicatory record to allow
28 additional evidence regarding seismic concerns, an issue they could have, but did not, raise
29 earlier. The motion is ill founded. The CFE and Whatcom County fail to establish any
30 grounds for reopening the hearing – in particular, they fail to establish that, exercising
31 reasonable diligence, they could not have discovered Dr. Easterbrook's information prior to
32 the hearing. In addition, the CFE and Whatcom County's effort to show that the proffered
33 information would materially affect EFSEC's deliberations relies on mischaracterizations and
34 exaggerations of the statements in Dr. Easterbrook's sworn affidavit, and ignores existing
35 evidence in the record as well as SE2's commitment to address seismic issues in detail during
36 the engineering design phase of the project.
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1 area.² All parties were plainly on notice that seismic activity was a potential issue. Whether
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3 to investigate or pursue that issue was their choice. It appears that the CFE and Whatcom
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5 County chose not to. Neither apparently made any effort to contact an expert prior to the
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7 adjudicatory hearing.

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9 Professor Easterbrook and his colleagues, as he himself acknowledges, have been
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11 researching seismic activity in the Sumas area for five years. He does not claim that
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13 information regarding the Sumas area was discovered only within the past month. Surely,
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15 Professor Easterbrook could have provided an opinion regarding seismic risks associated
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17 with the proposed project and site last summer -- had he been asked.³ The CFE and
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19 Whatcom County do not claim otherwise. It appears, however, that they simply did not
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21 pursue the issue.

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23 The EFSEC hearing is an adjudication – an adversarial proceeding. Parties have the
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25 obligation to identify and pursue issues of concern to them *at the hearing*. Parties to an
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27 adjudication are not and should not be permitted to simply reopen a hearing if they happen to
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29 overlook something or change their minds or their strategy after the record is closed. Such a
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31 procedure would lead to absurd results – hearings might never end. In permitting processes,
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33 opponents could draw out an adjudication indefinitely – frustrating the rights of the applicant.
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38 ² See Application § 2.15.2 ("The Western Washington and Southwestern British Columbia
39 region, which surrounds S2GF, is characterized as one of high seismic hazard to the potential for
40 strong earthquake ground motion. The site is in seismic zone 3 of the 1997 Uniform Building
41 Code"), Application § 3.1.2.1.
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44 ³ As a professor at Western Washington University in Bellingham, and given his work in the
45 Sumas area, Professor Easterbrook would have been a logical person to contact for information about
46 seismic issues related to the SE2 project. Neither the CFE nor Whatcom County explains how or
47 why they learned of Professor Easterbrook's research now or why they were unable to discover it
before the hearing.

1 In analogous situations, courts routinely deny requests to reopen proceedings to introduce
2 evidence that could with reasonable diligence have been obtained earlier. Cf. CR 59 (a)(4)
3 (authorizing a new trial based on newly discovered evidence only when "he could not with
4 reasonable diligence have discovered and produced [it] at the trial"); Isla Verde Int'l
5 Holdings, Inc. v. City of Camus, 99 Wash. App. 127,142, 990 P.2d 429, 437-38 (1999);
6 Holaday v. Merceri, 49 Wash. App. 321, 329, 742 P.2d 127, 131 (1987).
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12 If they had acted with reasonable diligence, the CFE and Whatcom County could have
13 discovered and presented the current information at the hearing. The fact that they forgot or
14 chose not to do so does not entitle them to reopen the hearings now and further delay the
15 EFSEC process.
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21 **2. The CFE and Whatcom County fail to show that Professor**
22 **Easterbrook's information would materially affect EFSEC's**
23 **deliberations.**
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25 In an effort to convince the Council to reopen the record, the CFE and Whatcom
26 County's attorney mischaracterize Professor Easterbrook's sworn statement and exaggerate
27 the significance of his research to the SE2 project. Their reason for doing so is obvious.
28 Without these embellishments, Professor Easterbrook's statements do not offer information
29 that would materially affect EFSEC's deliberations such that the hearing should be reopened.
30 Cf. CR 59 (a) (new trial granted only if alleged cause for new trial, including newly
31 discovered evidence, would "materially affect the substantial rights of such parties.").
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39 Purportedly relying on Professor Easterbrook's work, the CFE and Whatcom County
40 assert that "hazards associated with building a large industrial complex which stores
41 hazardous materials on or in close proximity to active faults is not something one can
42 engineer around." Motion at 3. They also state "Dr. Easterbrook makes clear that you cannot
43 engineer around the risks associated with building a large industrial complex on or near an
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1 active fault, therefore its [sic] not a question of how to build but can or should it be built at
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3 all." Motion at 3. These extreme statements are both wrong and *not* supported by Professor
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5 Easterbrook's affidavit. First, these bold allegations ignore the fact that thousands of
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7 buildings and facilities are constructed "on or near active faults" in Western Washington, and
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9 that the earthquake risks are addressed through engineering measures. Second, Professor
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11 Easterbrook merely noted that "*there are times* when engineering *alone* cannot fully address
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13 and remove all geologic risk." Easterbrook Affidavit at 3, lines 11-13 (emphasis added).
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15 Professor Easterbrook did not indicate that the proposed SE2 site presented one of those
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17 occasions. Professor Easterbrook did not even purport to have any knowledge, experience or
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19 training in seismic engineering.

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21 Moreover, Professor Easterbrook does not purport to have conducted any site-specific
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23 research or project-specific analysis regarding the proposed SE2 project. See Easterbrook
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25 Affidavit. Professor Easterbrook does not offer any opinion that the SE2 facility presents
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27 unacceptable risks that cannot be addressed through seismic engineering. Id. In contrast,
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29 evidence introduced during the hearing demonstrates that the SE2 facility will be designed to
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31 satisfy seismic zone 3 requirements, and that, with respect to the diesel tank in particular,
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33 those requirements will "protect[] that tank from tipping over and collapsing in the event of
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35 an earthquake in the area." Tr. 1887-88 (Woltersdorf); see also Tr. 452 (Eaden).

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37 SE2 has already committed to assessing and addressing seismic risks during further
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39 design of the project.⁴ In doing so, SE2 hopes and intends to review and consider Dr.

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41 _____
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43 ⁴ Application § 2.15.2:

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 - A detailed geotechnical investigation will be undertaken to establish the areas

46 and extent of liquefiable soil layers in the proposed site of the facility, gas
47 pipeline, and the transmission lines.

1 Easterbrook's information. To that end, SE2 has repeatedly asked to review Professor
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3 Easterbrook's research and data since SE2 first learned about his statements approximately
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5 one month ago. He has yet to provide it. SE2 welcomes the opportunity to have its seismic
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7 experts review Professor Easterbrook's information and address any concerns it might raise.

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9 The false and exaggerated statements by the CFE and Whatcom County should be
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11 disregarded. The actual statements by Professor Easterbrook do not offer information that
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13 would materially affect EFSEC's deliberations.⁵ For this reason as well, the CFE and
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15 Whatcom County's motion fails.

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17 **3. The need for additional generating capacity and the need for SE2**
18 **justifies a prompt recommendation to certify SE2, not further**
19 **delay.**
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21 Recent developments and occurrences definitively demonstrate the need for additional
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23 energy generating capacity in Washington and the region. In the past few months, electricity
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- 34 • In areas where saturated liquefiable soils are present, some form of in situ
35 densification may be used to improve the liquefiable soils. Whenever depth to
36 non-liquefiable soils is not too great, over-excavation and replacement with non-
37 liquefiable soils may also be used. Alternatively, pile foundation support may be
38 used to transfer loads to competent soils below the liquefiable layers.
 - 39 • The design of the facilities, gas pipeline, and the transmission lines will be
40 according to seismic guidelines of the prevailing design standards. The design
41 will incorporate measures to enable the structures to reasonably withstand
42 anticipated ground motion.
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45 ⁵ If the Council decides to admit additional evidence regarding seismic issues, SE2 requests
46 an adequate opportunity for discovery regarding Professor Easterbrook's assertions, and an
47 opportunity to respond to the evidence.

1 prices have skyrocketed,⁶ government officials have warned of blackouts,⁷ utilities have
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3 curtailed service to industrial and commercial customers,⁸ industrial facilities have shut down
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5 due to high power costs,⁹ and the Governor has declared an energy supply alert.¹⁰ The
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7 Northwest Power Planning Council has issued reports attributing the price increases and
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9 shortage conditions to "an overall tightness of supply."¹¹ The Bonneville Power
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11 Administration (BPA) has announced that it needs to acquire an additional 3100 average
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13 megawatts to meet unexpected customer demand.¹² The Governor's office has announced
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15 that more power "alerts" are "virtually guaranteed" to occur in the future.¹³
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21 ⁶ In December 2000, peak electricity prices reached \$1400 - \$5000 per megawatt hour,
22 compared to typical prices ranging from \$25 to \$35 per megawatt hour a year ago. Declaration of
23 Charles Martin ¶ 3 and Exhibits A, B, C, D, F and G; Declaration of James Litchfield ¶ 3.
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25 In fact, as a result of these dramatic price increases, BC Hydro, British Columbia's
26 provincially-owned power utility, took in revenue of \$2.2 billion (CAN) from power exports in the
27 six months ending September 30, 2000 – an amount \$1.65 billion (CAN) higher than the year before.
28 Martin Declaration Ex. S and T. This windfall calls into question the BC government's motivation in
29 opposing the permitting of additional generating capacity in the United States.
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31 ⁷ Martin Declaration ¶ 5 and Ex. E.
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33 ⁸ Martin Declaration ¶ 5 and Exs. E and N.
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35 ⁹ For example, Georgia Pacific shut down its Bellingham paper mill laying off 800 workers;
36 Intalco has reduced production at its Whatcom County facility; Kaiser Aluminum has shut down its
37 Spokane smelter laying off 400-545 workers; and Goldendale Aluminum has drastically reduced
38 production at its facilities. Martin Declaration ¶ 4 and Exs. F, G, I, J, O and P.
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41 ¹⁰ Martin Declaration Ex. L.
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43 ¹¹ Litchfield Declaration ¶ 6 and Exs. B and C.
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45 ¹² Litchfield Declaration ¶ 7.
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47 ¹³ Martin Declaration ¶ 5 and Ex. E.

1 Moreover, government officials have been forced to waive environmental limits in
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3 order to enable the generation of more electricity to address the power crisis.¹⁴ In August
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5 2000, the Governor declared an "energy supply alert" to allow facilities to operate in excess
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7 of their air emissions limitations.¹⁵ In particular, Governor Locke allowed a Spokane-area
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9 facility to exceed its air emissions limits to generate power to help keep Bellingham Cold
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11 Storage operating.¹⁶ Martin Declaration ¶¶ 6 and Ex. L. In addition, as a result of the current
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13 energy crisis, the Columbia River hydroelectric facilities have been operated in excess of
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15 limitations designed to protect endangered salmon,¹⁷ and numerous less efficient and more
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17 polluting diesel generators have been put into operation.¹⁸

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19 These recent events reinforce the unanimous opinion of experts that testified during
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21 the adjudicatory hearing: more generating capacity is needed in the Northwest. Furthermore,
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23 the current energy emergency emphasizes that the sooner additional generating facilities
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25 become operational the better.

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27 SE2 is prepared to move quickly to try to help fill the urgent need for increased
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29 energy supplies with a facility operating within environmental regulations and limitations.
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33 ¹⁴ Martin Declaration ¶¶ 6 and Exs. K, L, and M; Litchfield Declaration ¶¶ 5, 7.

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35 ¹⁵ Under RCW 43.21G.040, the Governor has authority to declare an "energy supply alert"
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37 and suspend environmental regulations in order to address the power needs.

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39 ¹⁶ Ironically, several months ago, the CFE filed a brief proclaiming that "Washingtonians are
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41 tough" and, that therefore, there was no need to plan backup fuel supplies for cold snaps and power
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43 emergencies. We have now seen, however, the Washington Legislature, in enacting RCW
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45 43.21G.040, and the Governor, in utilizing his powers under that statute, recognize the importance of
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47 ensuring that an adequate supply of reasonably priced power is available to Washingtonians.

¹⁷ Litchfield Declaration ¶¶ 5, 7.

¹⁸ Martin Declaration ¶¶ 6 and Ex. Q.

1 When the demand for energy far outstrips the supply, like now, energy prices escalate
2 drastically. Martin Declaration ¶ 8. In these situations, businesses cannot afford to purchase
3 power and are forced to shut down and lay off employees. Id. SE2 could help resolve this
4 situation. With long-term contracts with regional businesses, the SE2 facility could provide
5 enough electricity to support hundreds of jobs. Id. For example, the Georgia Pacific plant in
6 Bellingham that closed in December 2000 and laid off 800 workers because of soaring
7 electrical costs uses about 40 megawatts of power – well within SE2's capability to provide.
8

9 Id.

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11 Indeed, several Western Washington and Whatcom County utilities and large
12 industrial power users (including Bellingham Cold Storage, FiberCloud, a high-speed Internet
13 data center, and others) have recently contacted SE2 to inquire about long-term agreements to
14 purchase reasonably priced power produced at the SE2 facility. Martin Declaration ¶ 7. Like
15 other businesses, these companies are interested in trying to strike long-term power purchase
16 agreements to avoid having to buy power on the increasingly volatile electricity spot market.
17

18 Id. In light of occurrences in the past few months, SE2 has determined that it will give
19 priority to regional businesses that want to enter into long-term power purchase agreements.
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21 Id. SE2 is beginning discussions with these entities now, and is actively seeking buyers. Id.
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23 The SE2 application, an application for a project that can help resolve the energy
24 crisis, has been pending for two years. During that time, the need for additional generation
25 facilities has grown more and more acute. Despite this undeniable need for power, the CFE
26 and Whatcom County now seek to further delay EFSEC's consideration of the SE2 project.
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28 Their request should be denied.
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III. CONCLUSION

Washington (and the entire Western United States) is currently experiencing an energy emergency, and the load-resource deficit in the Pacific Northwest is continuing to grow -- making prices unstable and threatening shortfalls. The sooner additional generating capacity comes on line the better. The CFE and Whatcom County's motion to reopen the hearing to pursue an issue they thought not worth addressing previously is inadequate on its face. In addition, however, it would unnecessarily delay progress towards helping to solve the energy crisis jeopardizing Washington State and the Northwest region. The CFE and Whatcom County motion to reopen should be denied, and the Council should promptly deliver a recommendation for certification of the SE2 project to the Governor.

DATED: January ____, 2001

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