STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Complaint of Freedom Ring Communications, LLC d/b/a BayRing Communications Against Verizon New Hampshire Regarding Access Charges	)	DT 06-067

JOINT OBJECTION TO FAIRPOINT'S MOTION TO CERTIFY INTERLOCUTORY TRANSFER STATEMENT

The Competitive Carriers[1] object to the Motion to Certify Interlocutory Transfer Statement ("Motion to Certify") filed by Northern New England Telephone Operations LLC d/b/a FairPoint Communications Inc. ("FairPoint"), and respectfully request that the New Hampshire Public Utilities Commission ("Commission") deny it. In its Motion to Certify, FairPoint once again seeks to stall the progress of this docket by asking the Commission to transfer to the Supreme Court several "questions of law" that, as set forth below, do not meet the requirements for interlocutory transfer and plainly can be resolved by the Commission. The Commission should therefore deny the Motion to Certify.

I. BACKGROUND AND INTRODUCTION

On March 21, 2008, the Commission ordered Verizon New Hampshire ("Verizon") to cease billing carrier common line ("CCL") charges under its Tariff NHPUC No. 85 ("Tariff No.

[1] The "Competitive Carriers" filing this Objection are Freedom Ring Communications, LLC d/b/a BayRing Communications, Sprint Communications Company, L.P. and Sprint Spectrum, L.P. ("Sprint"), AT&T Corp., and Choice One of New Hampshire Inc., Conversent Communications of New Hampshire, LLC, CTC Communications Corp., and Lightship Telecom, LLC, all of which do business as One Communications ("One Communications").

85") for calls that did not involve a Verizon end user or a Verizon-provided local loop (Order No. 24,837). Among other bases for its determination, the Commission stated:

> Verizon further argues, however, that the CCL rate element is a contribution element not dedicated to the common line or designed to recover any costs of the common line itself. We disagree. Based on the record before us, we find that the CCL rate element was intended to recover and, in fact, does recover a portion of the costs of the local loop or common line. As a result, we find that the CCL charge may be applied only when Verizon provides the use of the common line.[2]

On March 31, 2008, FairPoint acquired Verizon's utility franchise. As part of the acquisition, FairPoint adopted Verizon's existing tariff and agreed "to honor the terms of a final order in Docket No. DT 06-067 on a going-forward basis."[3] FairPoint moved to intervene in this proceeding on April 21, 2008, agreeing to accept the record already established "as is."[4]

On May 7, 2009, after reviewing the Commission's tariff interpretation *de novo*, the New Hampshire Supreme Court reversed Order No. 24,837, concluding that the plain language of the tariff allowed FairPoint to apply the CCL charge on any switched-access service, even when FairPoint's common line was not used.[5] The Court declined to extend its analysis beyond the plain language of the tariff, stating that "[b]ecause we find the tariff's language to be plain and unambiguous, we will not look beyond it to determine its intent."[6]

On August 11, 2009, the Commission directed FairPoint to modify its tariff and file specific amendments within thirty days reflecting the Commission's original judgment—that the CCL charge only applies when FairPoint common line or local loop services are involved (Order No. 25,002). On September 10, 2009, FairPoint filed new tariff pages implementing the

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[2] Order No. 24,837 at 31.
[3] Order No. 24,823 at 75.
[4] Petition of Northern New England Telephone Operations LLC to Intervene (Apr. 21, 2008) at 2. The Commission granted this motion on August 8, 2008, in Order No. 24,886.
[5] *Appeal of Verizon New England d/b/a Verizon New Hampshire*, 158 N.H. 693, 697–8 (2009).
[6] *Id.* at 697.

Commission's order. In conjunction with that filing, however, FairPoint also filed a second proposed amendment increasing the "Interconnection Charge" contained in a separate section of Tariff No. 85. FairPoint claimed that this unprompted increase would offset its "losses" from eliminating the CCL charge for certain calls and render the two modifications "revenue neutral."[7]

The parties, including FairPoint, subsequently filed a series of motions, oppositions, and requests, and on October 16, 2009, the Commission suspended the procedural schedule in order to consider the various filings before it. Shortly thereafter, FairPoint filed for bankruptcy, and the Commission indefinitely stayed the proceedings until FairPoint concluded its restructuring.

On May 4, 2011, the Commission issued Order 25,219, addressing the various motions filed in October 2009 and stating the issues remaining to be addressed in this docket.[8] The Commission emphatically declared, however, that the parties may not "re-litigate the purpose or propriety of the CCL charge."[9] Quoting the passage from Order 24,837 reproduced above, the Commission stated "that conclusion was not addressed or overturned by the Supreme Court, which based its analysis on the terms of the tariff alone."[10]

On May 27, 2011, FairPoint filed its Motion to Certify, requesting that the Commission certify several questions of law to the Supreme Court and stay all proceedings in this docket until the Court rules on those questions. The questions of law FairPoint argues the Court must resolve are whether the *Verizon* Court overturned or vacated the finding quoted by the Commission in Order No. 25,219, whether the Commission's Order effectively estops FairPoint from re-

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[7] Comments and Conditional Request for Hearing (Aug. 28, 2009) at 1.
[8] The Competitive Carriers believe that the Commission erred in several aspects of that order and are filing a Motion for Reconsideration contemporaneously with this Objection.
[9] *Id.* at 7.
[10] *Id.*

litigating the finding, and whether the finding was actually a dictum and hence irrelevant to this proceeding.[11]

II. DISCUSSION

FairPoint interprets Supreme Court Rule 9(1)(d) as a two-prong test for interlocutory transfer requiring the movant to show (1) whether a substantial basis exists for a difference of opinion on an issue; and (2) whether immediate review would materially advance the proceeding, protect a party from harm, or clarify an issue of general legal importance.[12] Even assuming that FairPoint can show that these conditions are met (which it cannot), meeting these conditions does not automatically justify transfer. The Commission possesses discretion regarding whether to transfer questions of law, and the Supreme Court possesses discretion to decline to accept an interlocutory transfer, even if all of the conditions of Rule 9(1)(d) are met.[13] However, none of the "questions of law" FairPoint proposes fulfill any of the requirements of the rule and hence the Commission must deny the Motion to Certify.

The Commission must deny FairPoint's Motion to Certify because the factual question of whether the CCL charge is a contribution rate element was properly resolved in Order No. 24,837 and there is no substantial basis for arguing that the Supreme Court's decision vacated the Commission's finding on the issue. Not only did FairPoint fail to challenge the finding in its appeal, thereby waiving any right to do so now, but the Court specifically declined to review any of the Commission's factual findings, leaving those findings indisputably intact. This point is underscored by the language of the Court's decision: "[f]indings of fact by the PUC are

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[11] *See* Interlocutory Transfer Without Ruling at 3.
[12] *See* Motion to Certify at 4–5.
[13] *See* RSA 365:20 ("the commission *may* . . . transfer to the supreme court . . . any question of law" (emphasis added)), Sup. Ct. R. 9(1) ("[t]he supreme court may, in its discretion, decline to accept an interlocutory transfer . . .").

presumed *prima facie* lawful and reasonable."[14] A plain reading of the Court's decision reveals that the Court did nothing to disturb the Commission's findings of fact.

Even if, as FairPoint argues, the Supreme Court implicitly vacated the Commission's factual findings, it did not eliminate the extensive evidentiary record produced in this docket, and the Commission is not precluded from reaching factual conclusions based on the existing record. Since the Commission is free to reach an identical conclusion based on the extensive record before it, it also follows that the Commission does not violate the Court's mandate by quoting an undisturbed factual conclusion from its earlier Order. This conclusion is supported by RSA 541-A:31, VI(b), which provides that the record in a contested case includes, among other things, all rulings in the case.

Finally, FairPoint has failed to present any compelling arguments why interlocutory transfer would materially advance this proceeding, protect an involved party from irreparable harm, or resolve an issue of general legal importance. Indeed, the opposite is true—granting FairPoint's Motion to Certify would substantially delay the progress of this docket, harm the Competitive Carriers, and burden the Supreme Court with an issue of limited legal interest.

A. The Supreme Court Did Not Reverse or Vacate the Commission's Factual Finding That the CCL Charge Is Not a Contribution Element and FairPoint Is Estopped from Challenging That Finding.

FairPoint primarily takes issue with the Commission's statement in Order No. 25,219 that its factual finding that the CCL charge was not intended to be a general contribution element "was not addressed or overturned by the Supreme Court."[15] While FairPoint cannot argue that the Commission's finding was actually addressed by the Court, which explicitly declined to look

[14] *Verizon*, 158 N.H. at 695.
[15] Order No. 25,219 at 7.

beyond the plain language of the tariff to determine the tariff's intent,[16] FairPoint claims that the Court nonetheless implicitly overturned the Commission's finding when it reversed the Commission's decision.[17] However, since the Court did not address the Commission's finding, it remains indisputably intact, and since FairPoint did not appeal the Commission's finding when it had the opportunity to do so, it is estopped from challenging it now.

i. The Commission's findings of fact are prima facie lawful and were not reversed or overturned by the Supreme Court.

In any appeal before the Supreme Court, "all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable."[18] Moreover, "findings of fact will not be disturbed if they are supported by competent evidence in the record upon which the board's decision reasonably could have been made."[19] Overturning a finding of fact requires a "clear preponderance of the evidence," and the burden of proving such a preponderance rests on the party seeking to challenge the finding of fact—here, FairPoint.[20] Recognizing these principles, the Supreme Court—in 2009—distinctly declined to consider the Commission's factual findings, expressly noted that the Commission's findings of fact are presumed *prima facie* lawful and reasonable, and instead only reviewed the Commission's interpretation of the plain language of the tariff *de novo*.[21]

Nonetheless, FairPoint contends that the Supreme Court's decision vacated the Commission's factual findings announced in Order No. 24,837, citing cases from courts in

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[16] *Verizon*, 158 N.H. at 697 ("Because we find the tariff's language to be plain and unambiguous, we will not look beyond it to determine its intent.").
[17] Motion to Certify at 5.
[18] RSA 541:13.
[19] *Appeal of Kehoe*, 141 N.H. 412, 415 (1996) (internal citations omitted).
[20] RSA 541:13.
[21] *Verizon* at 695.

several other states.[22] However, the cases cited by FairPoint are largely decisions overturning trial court judgments—many of them resulting from jury verdicts—and thus involve situations distinctly different from administrative adjudications. Moreover, FairPoint overstates the actual reach of the holdings in those cases.[23] FairPoint's reliance on *Corliss*,[24] the only New Hampshire case it cites, is even more tenuous. In *Corliss*, the Supreme Court reinstated a jury verdict—*and the jury's findings of fact*—while reversing the trial court's entry of judgment contrary to the jury's verdict (J.N.O.V., or "judgment notwithstanding the verdict") after finding that the trial court failed to properly consider evidence.[25] Hence, *Corliss* actually contradicts FairPoint's position, illustrating that factual findings *survive* appellate decisions.

Furthermore, FairPoint's assertion that the Supreme Court reversed not only the Commission's interpretation of the tariff, but also its factual findings, blatantly ignores the standard of review the Court described. The Court stated that "[a] party seeking to set aside an order of the PUC has the burden of demonstrating that the order is contrary to law or, by a clear preponderance of the evidence, that the order is unjust or unreasonable."[26] Since FairPoint did not appeal the Commission's contribution element finding, it did not present *any* evidence controverting that finding to the Court, so it is impossible for the Court to have found a preponderance of evidence against that finding.

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[22] Motion to Certify at 5–6.
[23] For example, FairPoint cites *People v. Lagiss*, 223 Cal. App. 2d 23 (1963), for its quotation that after a reversal on appeal, "the original judgment ceases to exist," but the *Lagiss* decision also distinguishes cases "where the issue on appeal was severable [and thus] the broad expression 'judgment is reversed' will be confined to the issues arising upon appeal," *id.* at 48, a substantial qualification of the proposition FairPoint intends the case to represent.
[24] *Corliss v. Mary Hitchcock Memorial Hospital*, 127 N.H. 225 (1985).
[25] *Corliss*, 127 N.H. at 227.
[26] *Verizon* at 695.

ii. FairPoint is now estopped from challenging the Commission's lawful finding that the CCL charge is not a contribution element.

The ultimate goal of FairPoint's Motion to Certify is to circumvent the clear statement in Order No. 25,219 that "[t]he Commission will not entertain further argument about this conclusion"[27] and will not re-litigate the contribution element question in pursuit of FairPoint's claimed right to revenue-neutral tariff modifications.[28] It is important to note that when FairPoint petitioned for intervention in this docket on April 21, 2008, it agreed to take the record in this docket "as is." [29] FairPoint is thus barred from seeking to re-litigate matters determined prior to its intervention. Moreover, established principles of law support the Commission's above-quoted statement and bar FairPoint from achieving this goal.

The doctrine of collateral estoppel, also known as issue preclusion[30], bars a party from re-litigating previously resolved issues "so that at some point litigation over a particular controversy must come to an end."[31] Collateral estoppel applies when three basic conditions are met: the issue that the party to be estopped seeks to litigate must be identical to the previously

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[27] Order No. 25,219 at 7.

[28] Motion to Certify at 8 ("If the Commission is going to establish a policy that CCL may not be a contribution element, FairPoint believes that it is entitled to be heard on this issue.").

[29] Petition of Northern New England Telephone Operations LLC To Intervene, paragraph 7 (April 21, 2008).

[30] While there are technically two forms of issue preclusion -- "collateral estoppel," barring parties from re-litigating factual issues previously resolved in different actions, and "direct estoppel," barring re-litigation of factual issues previously resolved in the same action -- the tests for each form are essentially identical and their outcome here is the same. Additionally, "the traditional distinction between direct and collateral estoppel should not of itself control the answer to any particular question of issue preclusion, and certainly does not warrant any effort to draw fine lines of claim definition merely to discover whether the estoppel may be direct or collateral." 18 Arthur Miller & Charles Alan Wright, Federal Practice & Procedure (s) 4418 (2d ed.). Consequently, the term "collateral estoppel" is used here for simplicity, but this Objection does not address whether the current proceeding is the same or different as that in which Order No. 24,837 was issued.

[31] *Stewart v. Bader*, 154 N.H. 75, 80 (2006). The principle of collateral estoppel extends to administrative findings. *Farm Family Mutual Ins. Co. v. Peck*, 143 N.H. 603, 605 (1999).

resolved issue, the earlier action must have finally resolved the issue on the merits, and the party to be estopped must have been a party in the earlier action or in privity with a party in the earlier action.[32] Here, all three conditions are indisputably met.

The issue FairPoint seeks to re-litigate—whether the CCL charge in the tariff is a contribution element—is clearly an issue which has already been litigated and resolved. It is beyond question that the argument was squarely before the Commission; indeed, it was squarely before the Commission because FairPoint's predecessor, Verizon, presented evidence to the Commission on this issue, and argued this issue extensively in its Brief. The Competitive Carriers similarly presented evidence on the issue and argued the issue in their Briefs. That FairPoint seeks to re-litigate a conclusion that the Commission literally copied from a past Order conclusively fulfills the first requirement of the collateral estoppel test.

The second prong of the estoppel test—whether the issue was decided on the merits—is obviously satisfied as well. The Commission rendered a factual conclusion on this issue—*specifically in response to Verizon's argument*—in its Order.[33] Evidence on both sides of the issue was placed before the Commission, the issue was fully briefed and the subject of cross-examination, and the Commission consequently decided the issue on the merits.

Finally, the third prong of the test—whether the party to be estopped appeared in the earlier action or was in privity with a party appearing in that action—is also satisfied. FairPoint purchased Verizon's franchise and adopted Verizon's tariffs. These actions put it in privity with Verizon and there is no divergence of interests between the two. Accordingly, FairPoint is collaterally estopped from re-litigating whether the CCL charge is a contribution element.

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[32] *Stewart* at 80–81.
[33] Order No. 24,837 at 31.

FairPoint's arguments, extending the Court's decision well beyond its stated reach and proposing to fully re-litigate a settled issue, cannot realistically be deemed a "substantial basis" for interlocutory transfer. Consequently, the Commission should deny the Motion to Certify.

B. The Supreme Court Did Not Disturb the Record in This Docket and Did Not Preclude the Commission from Restating or Remaking its Factual Findings.

i. The Supreme Court left the record in this docket undisturbed.

As noted above, in any appeal before the Supreme Court, "all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable."[34] Specifically, "findings of fact will not be disturbed if they are supported by competent evidence in the record upon which the board's decision reasonably could have been made,"[35] and "issues that have once been properly tried are not again submitted to a jury, unless it is necessary to do justice."[36]

The clear weight of precedent dictates the conclusion that the Commission's findings of fact were undisturbed by the Supreme Court. This conclusion is even more obvious when considering that FairPoint did not appeal the issue it now complains of to the Supreme Court, despite its ability to do so. FairPoint has failed to present any argument credibly refuting the obvious conclusion that the full record of evidence before the Commission remains undisturbed even after the Court reversed Order No. 24,837.

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[34] RSA 541:13.
[35] *Appeal of Kehoe*, 141 N.H. 412, 415 (1996) (internal citations omitted).
[36] *Dow v. Latham*, 80 N.H. 492, 496 (1922). Although *Dow* addressed the factual findings of a jury, the same deference applies to administrative triers of fact, such as the Commission.

ii. Restating prior factual conclusions is consistent with the Court's mandate.

"Generally, a trial court is free upon remand to take such action as law and justice may require under the circumstances as long as it is not inconsistent with the mandate and judgment of [the appellate court]."[37] FairPoint acknowledges the existence of this principle in its discussion of the "law of the case" doctrine, which "prevents re-litigation only of issues actually decided in prior appeals."[38] In other words, if the Supreme Court's ruling leaves an issue unresolved and the Court does not provide any further instructions to the trial court or administrative agency in its mandate, the lower court or agency is free to resolve the issue "as law and justice may require."

This is precisely the case here. Even if the Supreme Court's decision vacated the Commission's contribution element finding, the Court did not restrict the Commission's ability to revisit the issue and did not instruct the Commission to reach a new or different conclusion on it. Since FairPoint cannot present any new arguments on the issue of contribution, an issue embedded in a docket more than twenty years old, there is no substantial basis on which the Commission would alter its previous finding and no justification for interlocutory transfer. Consequently, the Commission should deny FairPoint's Motion to Certify.

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[37] *Auger v. Town of Strafford*, 158 N.H. 609, 613 (2009) (internal quotation omitted).

[38] Motion to Certify at 6 (emphasis removed). FairPoint's citation of the "law of the case" doctrine is a straw man argument, made apparently on the belief that the Commission invoked the doctrine in its statement that "[we] will not entertain further argument about this conclusion." In reality, FairPoint fallaciously argues the inverse of the doctrine—that is, if an issue was *not* decided in a prior appeal, it *must* be able to be re-litigated—without offering any justification for why that proposition must be true.

iii. The Commission's finding that the CCL charge is not a contribution element is not a dictum.

FairPoint also argues that the Commission's finding was unnecessary to its holding in Order No. 24,837 and hence "no longer binding in this proceeding."[39] According to FairPoint, now that such a finding would not bind the Commission, FairPoint is entitled to re-litigate the finding. However, simply because the Commission did not rest its judgment on a particular factual conclusion,[40] does not automatically mean that the conclusion is a dictum or has no force in future proceedings. As discussed above, the Commission has analyzed the issue of contribution following the presentation of substantial amounts of evidence, testimony, and argument by parties on both sides of the proceedings. FairPoint's suggestion that the Commission's proper resolution of an issue presented and discussed by the parties in the proceeding is mere dicta is disingenuous at best.

Although FairPoint argues that "it is entitled to be heard" on the issue of contribution, it merely seeks to re-characterize evidence that the Commission already considered three years ago in Order No. 24,837. Ultimately, all of the facts related to contribution elements occurred over twenty years ago when the tariff was established and approved in DE 90-002. Additionally, Verizon presented, briefed, and argued the point already earlier in this docket. Verizon failed to convince the Commission that the CCL charge contains a contribution element, Verizon and

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[39] Motion to Certify at 8. This argument gives the Motion to Certify a somewhat confusing logical progression, in which FairPoint first ascribes enough importance to the contribution finding as to seek to bring this docket to a screeching halt and ask the Supreme Court to weigh in, and then proceeds to argue that the finding is irrelevant and unnecessary.

[40] That the Commission did not base its judgment in Order No. 24,837, at least in part, on the contribution finding, is a dubious claim. FairPoint manages to characterize the Commission's statement that "Verizon further argues, however, that the CCL rate element is a contribution element . . . *We disagree. . . . As a result*, we find that . . .," Order 24,837 at 31 (emphasis added), as not stating grounds on which the ensuing conclusion was based. However, whether the finding was crucial to the Commission's Order is irrelevant—FairPoint is still barred from re-litigating the finding.

FairPoint both failed to move to rehear the Commission's finding on the issue,[41] and FairPoint failed to appeal that finding to the Supreme Court. Thus, there is no substantial basis for granting FairPoint a fourth chance to make its case.

C. Contrary to FairPoint's Claims, Interlocutory Transfer Would Delay, Not Expedite, Resolution of This Docket.

FairPoint argues that the "second prong" of Supreme Court Rule 9(1)(d) is satisfied because Supreme Court review would materially advance the progress of this docket by avoiding the necessity of appealing the Commission's final order in this proceeding, resolve an issue important to the administration of justice, and generally prevent delay.

Yet FairPoint is likely to appeal *any* adverse final decision the Commission issues, and contrary to FairPoint's claims, such an appeal would not require the development of "a substantially new record"[42]—as in every appellate proceeding, the Court would rule solely on the evidence presented to the Commission.[43] FairPoint cannot credibly suggest that time needed for compilation of evidence and issuance of a Commission Order in this phase of this proceeding sufficiently justifies the extraordinary remedy of interlocutory transfer. FairPoint also argues that the survival of the Commission's contribution finding constitutes an issue of general importance in the administration of justice. FairPoint's justification for this claim, though, is simply that the issue influences the proceedings in this docket. This alone is not a sufficient justification for interlocutory transfer—otherwise, *every* interlocutory decision the Commission makes would be subject to such motions. And as stated above, there is no impetus to resolve

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[41] While Verizon and FairPoint both filed Motions for Rehearing (on March 28, 2008, and April 21, 2008, respectively), neither motion discussed or challenged the contribution finding and both were denied, Order No. 24,886 at 11.

[42] Motion to Certify at 9.

[43] RSA 541:14 ("No new or additional evidence shall be introduced in the supreme court, but the case shall be determined upon the record and evidence transferred . . .").

FairPoint's proposed questions *now*—FairPoint has the ability to appeal any final order the Commission issues.

Finally, FairPoint suggests immediately resolving the questions it proposes would ameliorate the "expense of burdensome delay and repeated efforts" in this docket. But FairPoint neglects to consider the burdensome delay of yet another extended stay on proceedings in this docket or the repetition inherent in asking the Supreme Court to consider issues that have already been briefed, considered, and resolved. Ultimately, granting FairPoint's Motion to Certify would cause far more damage to this proceeding than it would prevent.

WHEREFORE, the Competitive Carriers respectfully request that the Commission:

a. Deny FairPoint's Motion to Certify, and

b. Grant such further relief as it deems appropriate.

Respectfully submitted,

Date: June 3, 2011

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Joint Objection has on this 3rd day of June, 2011 either been mailed first class postage prepaid or e-mailed to the parties named on the Service List in the above-captioned matter.

Susan S. Geiger

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