

THE STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

ENERGYNORTH NATURAL GAS CORP. d/b/a LIBERTY UTILITIES

Docket No. DG 17-198

PETITION FOR APPROVAL OF FIRM SUPPLY AND TRANSPORTATION

AGREEMENTS AND THE GRANITE BRIDGE PROJECT

**AMENDED MOTION OF REPSOL ENERGY NORTH AMERICA CORPORATION IN
SUPPORT OF LIBERTY UTILITIES' MOTION FOR PROTECTIVE ORDER AND REPLY TO
OPPOSITION OF THE OFFICE OF THE CONSUMER ADVOCATE**

I. INTRODUCTION

By this Motion, and pursuant to N.H. Code of Administrative Rules Puc 203.08 and Puc 203.10, Repsol Energy North America Corporation ("RENA") hereby amends its March 14, 2018 filing ("RENA Motion") in which it moved in support of the Motion for Protective Order filed by Liberty Utilities ("EnergyNorth Natural Gas") Corporation d/b/a/ Liberty Utilities ("Liberty") to protect RENA's confidential information in this docket, moved independently for confidential protection of such information, and opposed the request by the Office of Consumer Counsel ("OCA") to publicly release such information.

For the reasons stated below, RENA amends its Motion to request protection of its confidential information from all intervenors during the course of this proceeding, such that this confidential information would be available only to the New Hampshire Public Utilities Commission ("Commission"), its Staff, and the OCA. The petitions for intervention

and recent data requests make clear that potential intervenors seek the confidential contractual and pricing terms of RENA's offer of supply to Liberty, and other similar contractual and pricing terms that RENA provided to Liberty ("RENA Confidential Information"), which Liberty raised in its Petition and pre-filed testimony. Any release of this RENA Confidential Information to competitors, potential competitors and other intervenors would constitute an invasion of RENA's privacy and disadvantage RENA in the competitive marketplace, and should be prohibited. Furthermore, such protection encourages the just resolution of the proceeding and will not cause undue delay.

II. PROCEDURAL BACKGROUND

On December 22, 2017, Liberty filed a petition for Commission approval of Liberty's decision to proceed with the Granite Bridge Project, a project involving the construction of an intrastate natural gas pipeline between the Joint Facilities owned by Maritimes & Northeast Pipeline, L.L.C. ("MNE") and Portland Natural Gas Transmission System ("PNGTS") and the Tennessee Gas Pipeline Company, L.L.C. ("TGP") Concord Lateral, and the construction of a liquefied natural gas ("LNG") facility in Epping, New Hampshire ("Petition").

Liberty's Petition also requested Commission approval of a supply contract with Engie Gas & LNG, LLC ("ENGIE") and a precedent agreement for firm transportation capacity with PNGTS. Concurrent with its Petition, Liberty filed a Motion for Protective Order to protect certain categories of confidential information contained in the Petition including: (a) pricing and delivery terms of proposed and existing supply and capacity contracts; (b) estimated costs for TGP to upgrade the Concord Lateral; (c) regulatory approval dates and other sensitive contract terms; (d) cost calculations for the Granite

Bridge Project; and (e) reasons for choosing ENGIE over another supplier. Liberty Motion at ¶ 2.

The OCA notified the Commission that it will be participating in this proceeding “on behalf of residential ratepayers consistent with RSA 363:28” on January 2, 2018. On February 9, 2018, the OCA filed an Opposition to Liberty’s Motion for Protective Order and advocated for the release of all the information contained in Liberty’s Petition to the general public.

Numerous potential intervenors followed suit, at least two of whom filed petitions to intervene on the grounds of full disclosure of this confidential financial information. On March 6, 2018, Pipe Line Awareness Network (“PLAN”) petitioned to intervene in this matter on the grounds that Liberty’s redacted financial analysis will dictate the rates charged to PLAN members as customers of Liberty, and that its members will be financially impacted by the ENGIE and PNGTS contracts. PLAN Petition at ¶¶ 9-11. Also on March 6, 2018 the Conservation Law Foundation (“CLF”) petitioned to intervene in this matter on the grounds that, *inter alia*, it has “a strong interest in ensuring that the facts of the agreements and capital investments proposed in this proceeding are fully aired.” CLF Petition at ¶ 4.

On March 7, 2018 RENA petitioned to intervene in this matter on the grounds that, *inter alia*, Liberty’s Petition states that it “investigated a number of alternatives to its preferred supply strategy which included the evaluation of imported LNG supplies from RENA.” RENA Petition at ¶ 4 (citing the pre-filed testimony of Mr. William R. Killeen and Mr. James M. Stephens (“Killeen/Stephens Pre-filed Testimony”)).

At the March 9, 2018 Initial Prehearing Conference, the Commission heard oral argument regarding Liberty's Motion for Protective Order. At that conference, counsel for RENA maintained that Liberty referred RENA directly in the Killeen/Stephens Pre-filed Testimony, and that Liberty appears to have included RENA Confidential Information in its Petition. Hearing Transcript at 22:5-20. RENA stated that it is seeking to protect in this proceeding any confidential information exchanged with Liberty that is subject to a confidentiality agreement. Hearing Transcript at 22:12-20. In light of the fact that some of the information at issue is RENA's proprietary information, the Commission granted RENA and other entities leave to file additional comments on Liberty's Motion and the OCA's Opposition by March 13, 2018, and to file responses by March 16, 2018. RENA filed its Motion on March 14, 2018.¹ The Commission has not yet made a determination on Liberty's Motion for Protective Order or RENA's Motion.

Subsequent to RENA's Motion, on March 16, 2018, Liberty updated its confidentiality request, stating that it will shortly make a replacement filing that will remove the redactions on Liberty-generated information that supports the cost estimate for the Granite Bridge Project, but that will leave confidential the commercially sensitive information of RENA and other third parties. Liberty Update at ¶ 2. Liberty further requested that the Commission rule that, in addition to precluding public disclosure, any competitive entities granted intervention shall also not have access to redacted commercially sensitive information. Liberty Update at ¶ 4.

¹ RENA's late-filing, and the late-filings of other parties, were waived by the Clerk of the New Hampshire Public Utilities Commission due to Federal Express's failure to deliver on March 13, 2018 as a result of the snow storm. March 19, 2018 telephone call between S. Tracy and Jody Carmody, Clerk of the New Hampshire Public Utilities Commission.

Liberty made its Replacement filing on April 10, 2018, which included a replacement to the pre-filed direct testimony of Mr. William R. Killeen and Mr. James M. Stephens (“Killeen/Stephens Pre-filed Replacement Testimony”). This testimony again identified RENA as a gas supply alternative that Liberty considered, and included redacted pricing and cost information for RENA’s supply. Killeen/Stephens Pre-filed Replacement Testimony at 183R-185R, 192R-196R; Killeen/Stephens Pre-filed Testimony, Exhibit WRK/JMS-6 at 14, 17, 20, 23, 26, 29, 32, 35, 38, 41, 44, 47, 50, 53, 56, 59, 62, and 65; Killeen/Stephens Pre-filed Testimony, Exhibit WRK/JMS-7 at 14, 17, 20, 23, 26, 29, 32, 35, 38, 41, 44, 47, 50, 53, 56, 59, 62, and 65.

Shortly thereafter, on April 27, 2018, PLAN submitted its First Set of Data Requests, which requested RENA’s Confidential Information as follows:

12. Reference: Exhibit WRK/JMS-7. Please provide the fixed cost, variable cost and fuel assumptions for the “Repsol 40” supply resource and the “Repsol to 101” transportation resource that were used in the SENDOUT analysis.
13. Reference: Exhibit WRK/JMS-7. Why is the “Repsol” supply resource constrained at a 40- day supply?

CLF filed its data requests on May 1, 2018, and also requested RENA’s Confidential Information as follows:

- CLF 1-5. Has the Company considered potential environmental impacts of ENGIE, Repsol, and/or TCPL/PNGTS natural gas contracts? If so, please provide all materials related to these analyses or considerations.
- CLF 1-6. Has the Company considered potential public health impacts of ENGIE, Repsol, and/or TCPL/PNGTS natural gas contracts? If so, please provide all materials related to these analyses or considerations.

Accordingly, RENA hereby amends its March 14, 2018 Motion to include a request for protection of RENA Confidential Information in Liberty’s April 10, 2018 Replacement filing and to extend its original request that competitor or potential competitor intervenors

do not have access to RENA Confidential Information to *all* intervenors in the proceeding (other than the OCA).

III. LEGAL STANDARD

New Hampshire's Right-to-Know Law is embodied in RSA Chapter 91-A, Access to Governmental Records and Meetings. Among other things, this law provides public access to governmental records in the possession, custody or control of public bodies or agencies, except as otherwise prohibited by statute or RSA 91-A:5. *See* RSA 91-A:4,I. RSA 91-A:5 contains exemptions to the public access requirements for certain governmental records enumerated in the statute, including an exemption for records pertaining to confidential, commercial, or financial information. RSA 91-A:5, IV. The statute also provides an exemption for "other files whose disclosure would constitute an invasion of privacy." *Id.*

Under the precedent set forth in *Professional Firefighters of New Hampshire v. Local Government Center, Inc.*, the Commission must first determine whether the information is confidential, commercial, or financial information, and whether disclosure would constitute an invasion of privacy. *Professional Firefighters of New Hampshire v. Local Government Center, Inc.*, 159 N.H. 699, 707 (N.H. 2010).

The New Hampshire Supreme Court has set forth a three-step analysis for the Commission to determine whether disclosure of public records constitutes an invasion of privacy under RSA 91-A:5. First, the Commission should evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. *Lambert v. Belknap County Convention et al.*, 157 N.H. 375, 382-83 (N.H. 2008).

Second, the Commission should assess the public's interest in disclosure. *Id.* at 383. Disclosure of the requested information should inform the public about the conduct and

activities of their government. *Id.* In other words, the purpose of the law is “to provide the utmost information to the public about what its government is up to.” *Lamy v. N.H. Pub. Utils. Comm’n*, 152 N.H. 106, 111, 872 A.2d 1006, 1011 (N.H. 2005) (internal citations and quotation marks omitted). “If disclosing the information does not serve this purpose, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released.” *Id.*

Third, the Commission should then balance the public interest in disclosure against the government’s interest in nondisclosure and the individual’s privacy interest in nondisclosure. *Lambert*, 157 N.H. at 383. “[T]he central purpose of the Right-to-Know Law ‘is to ensure that the Government’s activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed.’” *Lamy*, 152 N.H. at 113 (quoting *U.S. Dept. of Justice v. Reporters Committee*, 489 U.S. 749, 774 (1989)). “[A] continuingly effective, functioning competitive marketplace is essential, as was recognized by the legislature when it created the RSA 91-A:5(IV) exemption for confidential, commercial, and financial information.” *In Re New England Tel. & Tel. Co.*, 80 N.H.P.U.C. 437 (Jul. 10, 1995); *see also In Re Freedom Ring Commc’ns, LLC*, 82 N.H.P.U.C. 454 (June 2, 1997). “When the sole public interest in disclosing the information is only tangentially related to the central purpose of the Right-to-Know Law, [the New Hampshire Supreme Court] decline[s] to accord it great weight.” *Id.*

IV. LIBERTY'S REQUEST FOR PROTECTIVE ORDER WITH RESPECT TO RENA SUPPLY PRICING OR OTHER CONFIDENTIAL RENA INFORMATION IN THIS PROCEEDING SATISFIES THE BURDEN FOR NON-DISCLOSURE

RENA urges the Commission to protect any of RENA's pricing information and other RENA proprietary information as confidential in this proceeding because: (a) it is confidential commercial information in which RENA has a privacy interest that would be invaded by disclosure; (b) access to RENA Confidential Information by the intervenors in this proceeding is not required to be informed of the Commission or the OCA's activities; and (c) the harm to RENA, Liberty, and Liberty's customers from such disclosure outweigh the public interest in the release of the information.

A. THE RENA INFORMATION AT ISSUE IN THIS PROCEEDING IS CONFIDENTIAL COMMERCIAL INFORMATION IN WHICH RENA HAS A PRIVACY INTEREST THAT WOULD BE INVADED BY DISCLOSURE

Liberty included multiple references to RENA Confidential Information in the supporting testimony filed with its Petition and with its Replacement filing. Specifically, in the Killeen/Stephens Pre-filed Replacement Testimony, Liberty states that it engaged in discussions with RENA for winter peaking supply and redacts the portion of the Liberty's analysis related to RENA's proposed contract terms. Killeen/Stephens Pre-filed Replacement Testimony at 195R-196R. Additionally, the SENDOUT® analyses attached to the Killeen/Stephens Pre-filed Testimony includes Alternative Case Analyses that contain redacted pricing and cost information for RENA's supply. Killeen/Stephens Pre-filed Testimony, Exhibit WRK/JMS-6 at 14, 17, 20, 23, 26, 29, 32, 35, 38, 41, 44, 47, 50, 53, 56, 59, 62, and 65; Killeen/Stephens Pre-filed Testimony, Exhibit WRK/JMS-7 at 14, 17, 20, 23, 26, 29, 32, 35, 38, 41, 44, 47, 50, 53, 56, 59, 62, and 65. Accordingly, it is reasonable to conclude that this proceeding will address RENA Confidential Information.

This information is confidential, proprietary commercial information that RENA has gone to great lengths to protect from release into the public domain, including negotiating and executing confidentiality agreements with the utilities and other potential customers to whom RENA provides such information, and retaining legal counsel in proceedings such as the one at hand to argue against the public release of such information.²

If the Commission were to allow disclosure of RENA Confidential Information to the intervenors in this proceeding, such disclosure would invade RENA's privacy interest. The RENA Confidential Information at issue in this proceeding is current (not stale) supply pricing and volume information, as well as other confidential information related to RENA's proposal to Liberty that would disadvantage RENA in the marketplace if it were released to the intervenors. These intervenors include competitors or potential competitors who are participating or actively monitoring this proceeding,³ and community action organizations such as PLAN that are comprised of a coalition of citizen members whose mission is to present the "overbuild" of fossil fuel infrastructure, including natural gas infrastructure.⁴ To the extent that this information is released to the public in this proceeding, either directly to RENA's competitors, or by an individual with access to the information making RENA's proprietary information publicly available on the internet, RENA's competitors would have a competitive advantage because they would be able to match RENA's terms or

² RENA is unable to access the confidential version of Liberty's Pre-filed Replacement Testimony as RENA has not yet been granted intervenor status in this proceeding. However, based upon the context in the unredacted portions of the testimony on the same page, it is reasonable to conclude that the redacted portions of the testimony relate to RENA's proposed commercial contract terms and pricing proposals.

³ Attorney Shope entered an appearance for ENGIE in this proceeding, and a representative of PNGTS attended the March 9, 2018 Case Conference.

⁴ PLAN Petition to Intervene at 3 (Mar. 6, 2018).

even underprice them going forward. Additionally, as discussed in more detail below, the disclosure of RENA Confidential Information will also adversely impact Liberty's customers. Accordingly, RENA has a strong privacy interest in the RENA Confidential Information that would be invaded by the disclosure of such information to intervenors and the public.

B. PUBLIC DISCLOSURE OF RENA CONFIDENTIAL INFORMATION IS NOT REQUIRED IN THIS CASE

Although RENA does not dispute that the intervenors have an interest in the Commission's review of Liberty's proposal, RENA respectfully submits that intervenor access to RENA Confidential Information is not required to be informed of the Commission or the OCA's activities.

It is an accepted principal that the New Hampshire's Right-to-Know Law is intended to allow its citizenry to be informed about the activities of their government. As the Supreme Court observed in *Lamy v. N.H. Public Utilities Commission*, "[t]he purpose of the law is to provide the utmost information to the public about what its government is up to," and "[i]f disclosing the information does not serve this purpose, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released." *Lamy v. N.H. Pub. Utils. Comm'n*, 152 NH 106, 111 (N.H. 2005) (internal citations and quotation marks omitted).

In this case, the disclosure of RENA Confidential Information does not materially advance the purpose of informing the intervenors of the Commission's and the OCA's activities. RENA Confidential Information is part of Liberty's alternative supply analysis that is a complex, computer generated model involving a variety of confidential commercial inputs. The Commission and the OCA's review of Liberty's analysis can be adequately

communicated to the intervenors and the public without requiring the release of such underlying confidential inputs to the intervenors. In fact, explaining the Commission's and the OCA's analysis without breaching the confidentiality of certain commercially sensitive information is an exercise that both the Commission and the OCA undertake on a regular basis. Although there is public interest in the overall proceeding given the high-profile nature of the proposal, there is no evidence that this case presents a unique situation in which protecting RENA Confidential Information as confidential would prevent the Commission and the OCA from adequately conducting its review and adequately communicating it to the intervenors and the public. Therefore, the disclosure of RENA Confidential Information does not materially advance the intervenors' and the public's understanding of what the Commission and the OCA are "up to" and merely serves to place RENA at a disadvantage with respect to its competitors in the marketplace.

Nor does disclosure of RENA Confidential Information to intervenors in this proceeding advance public participation, particularly given that the citizen group intervenors' interests are adequately represented by OCA. The OCA already is participating in this proceeding "on behalf of residential ratepayers consistent with RSA 363:28." Pursuant to that provision, OCA has the power and duty to intervene in any proceeding concerning rates, charges, tariffs, and consumer services in which the interests of residential utility consumers are involved. RSA 363:28(II). It is specifically charged with representing the interests of such residential utility consumers, and has authority to contract for outside consultants. RSA 363:28(II)-(III). What's more, New Hampshire statute commands that the filing party provide the OCA with copies of all confidential information filed with the Commission in adjudicative proceedings in which the OCA is a

participating party, and the OCA shall maintain the confidentiality of such information. RSA 363:28(VI).

Accordingly, the public interest is already served by the OCA, which receives all confidential information and has the power to contract for consultants to analyze that information. No additional public interest is served by also providing that information to other citizen groups, such as PLAN and CLF. Additionally, as discussed below, any tangential interests in “fully airing” the confidential financial information clearly is outweighed by the privacy interests in this proceeding.

C. THE HARM FROM DISCLOSURE OF RENA CONFIDENTIAL INFORMATION OUTWEIGHS ANY ALLEGED PUBLIC BENEFIT FROM ITS RELEASE

To the extent that the Commission finds that the intervenors and the public, nonetheless, have an interest in the disclosure of RENA Confidential Information, RENA respectfully submits that the harm resulting from the disclosure of this information, and the precedent it sets for future transactions, outweighs that disclosure interest. As discussed above, the disclosure of RENA Confidential Information to intervenors will place RENA at a competitive disadvantage in the marketplace. If this information is disclosed to intervenors in this proceeding, RENA’s competitors, who are participating in the proceeding will become aware of the sensitive, proprietary commercial details of RENA’s supply offerings and the prices offered for such supply. Furthermore, disclosure of RENA Confidential Information to community action groups who oppose natural gas infrastructure development such as PLAN and CLF, increase the likelihood that this information will be made available to the public through inadvertent disclosure. The resulting public availability of RENA Confidential Information will allow RENA’s competitors to develop alternative proposals that are specifically designed to undercut

RENA in the highly competitive market, thereby producing real competitive harm to RENA from disclosure.

Additionally, the disclosure of RENA Confidential Information will also adversely impact Liberty's customers. This long-term impact has been recognized by the Commission in prior orders. For example, in Order No. 24,842, the Commission stated that it "has a longstanding practice of according confidential treatment of pricing information in supply-related contracts at the request of a utility on the ground that public disclosure could ultimately force the utility to pay higher prices or agree to less advantageous terms, thus harming ratepayer interests." Order No. 24,842 at 4 (Apr. 4, 2008). This is because suppliers possessing the disclosed information would be aware of Liberty's expectations regarding gas supply arrangements and would be unlikely to propose such goods and services on terms significantly more advantageous to Liberty in the event that Liberty has to return to the marketplace for additional supply proposals either in the context of this proceeding or in a future circumstance. Additionally, to the extent that companies such as RENA are at risk of the disclosure of their confidential information if they negotiate with New Hampshire utilities such as Liberty, this may act as a disincentive for RENA and other companies who are concerned about their confidential information to participate in future negotiations with those utilities. As a result, Liberty and other New Hampshire utilities may end up with less supply options and higher overall costs resulting from less competition.

Accordingly, on balance, the harm resulting from the disclosure of RENA Confidential Information to intervenors and the public significantly outweighs any perceived benefit from its disclosure and such disclosure is not warranted.

V. ACCESS TO RENA CONFIDENTIAL INFORMATION UNDER THE PROTECTIVE ORDER SHOULD BE LIMITED TO THE COMMISSION, COMMISSION STAFF, AND THE OCA

The Commission has recognized the latitude it has under Puc 203.08(c) to withhold confidential information from all intervenors in a proceeding. *See, e.g., In Re Freedom Ring Commc'ns, LLC*, 82 N.H.P.U.C. 454, at *1 (June 2, 1997) (granting New England Telephone and Telegraph Company's ("NYNEX") Motion for Confidential Treatment of information sought in data requests). In *Freedom Ring Communications*, NYNEX requested protection from the public and from *all* parties other than the Commission, its Staff, and the OCA for information concerning current and future marketing strategies and competitive analysis of competition in New Hampshire, and NYNEX's assessments of its own and its competitors' specific competitive strengths and weaknesses. *Id.* The Commission granted this protection, finding that, the disclosure would compromise the business plans of NYNEX and provide competitors with information that NYNEX has invested time and resources to develop, thereby unfairly advantaging competitors and jeopardizing ongoing commercial relationships that NYNEX has nurtured. *Id.* The Commission recognized that this highly confidential treatment of proprietary information was not prohibited, and although unusual, such highly confidential protection has been accorded in the past and was appropriate in the *Freedom Ring Communications* proceeding. *Id.* Therefore, just as the Commission had the latitude to extend a highly confidential level of protection to the NYNEX information in the *Freedom Ring Communications* proceeding, the Commission may do so again here.

VI. ALTERNATIVELY, ACCESS TO RENA CONFIDENTIAL INFORMATION UNDER THE PROTECTIVE ORDER SHOULD BE LIMITED TO PARTIES WHO ARE NOT ACTUAL OR POTENTIAL COMPETITORS

As discussed above, the disclosure of RENA Confidential Information to competitors, potential competitors, or other intervenors will adversely affect RENA in the marketplace and thus access to such information should be limited to the Commission, the OCA and their staff. However, if the Commission declines to limit access to RENA's Confidential Information to the Commission, Commission Staff and OCA, RENA requests in the alternative that the Commission order that RENA Confidential Information shall not be accessible to any of RENA's competitors or potential competitors who are accorded party status and access to confidential information in the proceeding. Additionally, RENA would not object to an order preventing it from accessing ENGIE's proprietary and confidential pricing information or other confidential commercial terms related to ENGIE's supply proposals. This is consistent with an existing informal agreement that RENA has already made with ENGIE, in which both companies have agreed not to request access to each other's confidential financial and commercial information in this proceeding.

VII. CONCLUSION

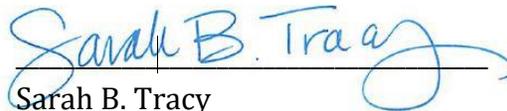
WHEREFORE, RENA respectfully requests the Commission to:

- A. Grant Liberty's Motion for Protective Order and RENA's amended supporting motion pursuant to N.H. Code Administrative Rule Puc 203.08, and protect as confidential RENA's supply pricing information, special contract terms, and any other RENA confidential and proprietary commercial or financial information related to RENA's supply proposal that may be addressed in this proceeding;

- B. Modify the Protective Order to ensure that no intervenors (other than the OCA) have access to RENA Confidential Information.
- C. Alternatively, modify the Protective Order to ensure that intervenors who have access to confidential information in this proceeding, but who are competitors or potential competitors of RENA (*e.g.*, ENGIE), do not have access to RENA Confidential Information.
- D. Grant any other relief that the Commission deems necessary, just and reasonable to implement the relief sought above.

Respectfully submitted,

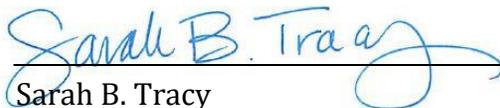
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Dated: May 17, 2018

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document will be sent via electronic mail to all persons on the Service List in Docket No. DG 17-198 on May 17, 2018.

By: 
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