BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of the Dayton Power and Light Company for an Increase in Electric Distribution Rates.	)))	Case No. 15-1830-EL-AIR
In the Matter of the Application of the Dayton Power and Light Company for Approval to Change Accounting Methods.	)))	Case No. 15-1831-EL-AAM
In the Matter of the Application of the Dayton Power and Light Company for Tariff Approval.	))	Case No. 15-1832-EL-ATA

REPLY BRIEF
BY
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Marketers (the Retail Energy Supply Association and IGS Energy) want to increase what consumers pay to DP&L if those consumers do not switch their electric generation service to marketers. Bad idea. The Marketers' scheme is the latest version of their regulatory offensive against energy utilities' standard offers—and against Ohio consumers who benefit from the standard offer. Consumers benefit from the market price of the competitively-bid standard service offer when they select it for their energy, and they benefit from it as a price to compare when they are shopping for marketer offers.

The Settlement between DP&L, OCC, the PUCO Staff and others—which the Marketers oppose—protects DP&L's standard offer and the benefit that all consumers receive from it. But the Marketers propose, through the testimony of Edward Hess, to require DP&L to charge its Standard Service Offer ("SSO") customers more for electric distribution service. The Marketers' scheme would be implemented through two new riders.[1] All customers would receive a credit on their bills through a new "credit rider."[2] The total amount of the credit rider ($11.4 million) would then be charged back to customers through an avoidable rider—but only SSO customers would pay this avoidable rider.[3] The result would be that SSO customers would pay more for their electric service. This is because under the Marketers' proposal, the Marketers' customers would receive a discount on their distribution service, and SSO customers would pay for that discount.

The Marketers claim that their proposal is justified based on the (false) narrative that their customers are being penalized by paying for generation service twice: once to their marketer and once through DP&L's distribution rates. This simply is not true. Shopping customers pay their marketer for generation. SSO customers pay DP&L for their SSO generation. All customers pay DP&L for distribution service, which does not include a generation component. No one is paying twice for generation. Of course, despite their claimed justification, the Marketers' proposal is better for marketer profits.

The PUCO should reject the Marketers' self-serving proposal to artificially increase distribution charges to SSO customers. This anti-market approach violates basic principles of economic competition by giving marketers an unfair competitive advantage over the SSO. And the Marketers' plan would increase the SSO that is a price to compare for all consumers considering marketer offers, meaning that higher-priced marketer offers would appear more attractive to consumers.

Their plan does not benefit customers or the public interest. To the contrary, it would affirmatively and materially harm customers by increasing the cost of the market-

[1] RESA/IGS Ex. 2 (the "Hess Testimony") at 5:5-10.

[2] *Id.* at 5:6-8.

[3] *Id.* at 5:8-10.

based SSO, which is a critical default generation service available to all customers—shopping and non-shopping alike.

I. RECOMMENDATIONS

A. The PUCO should reject the Marketers' proposal to unjustly and unreasonably increase the cost that standard service offer customers pay for distribution service.

Marketer witness Edward Hess proposes a multi-step reallocation process designed to increase the cost of the standard service offer and thus make shopping more appealing to customers (to the benefit of the Marketers who sponsor his testimony). But the PUCO need not delve into the details of his assumptions and calculations (which as discussed below, are flawed). Instead, the PUCO should reject the very premise of the Marketers' proposal because it ignores the fundamental fact that *all* customers benefit from the standard service offer and thus *all* customers should pay for the distribution costs associated with the SSO.

1. The Marketers' proposal is unlawful because it requires the PUCO to create new riders in a base rate case, which would constitute unlawful single-issue ratemaking.

A long line of Ohio Supreme Court cases emphasizes the PUCO's status as a creature of statute that can exercise only the authority granted to it by the Ohio General Assembly.[4] In base rate cases like this one involving DP&L, the PUCO must following the "detailed, comprehensive and ... mandatory ratemaking formula under R.C. 4909.15."[5] That mandatory ratemaking formula does not include single-issue ratemaking,

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[4] *See, e.g., Ohio Bell Tel. Co. v. PUCO*, 17 Ohio St. 2d 45, 47 (1969) ("The commission is a creature of statute and has only those powers given to it by statute."); *In re Ohio Power Co.*, 144 Ohio St. 3d 1, 9 (2015).

[5] *Columbus S. Power Co. v. PUCO*, 67 Ohio St. 3d 535, 537 (1993).

as the PUCO recently recognized: "single-issue ratemaking ... is not authorized by R.C. Chapter 4909."[6]

The Supreme Court of Ohio, in *Pike Natural Gas Company v. PUCO*, found that the PUCO can only approve a single-issue adjustment clause when authorized by statute.[7] There, the utility proposed an excise tax adjustment clause that would have allowed it to "pass through immediately to its customers any increase in state excise taxes resulting from increased gas costs."[8] The Court found that this adjustment clause—the same as a "rider" using today's terminology—was unlawful because there was no statute specifically authorizing it.[9]

To implement their proposal to shift costs from shopping customers to SSO customers, the Marketers recommend that the PUCO create two new riders: a credit rider for all customers and an avoidable rider that only SSO customers pay.[10] Under the Marketers' proposal, these riders would be set initially in this rate case and then adjusted every six months thereafter.[11] That is, the riders would be periodically adjusted in separate proceedings and outside the context of a base rate case.[12] The Marketers do not propose that the entirety of DP&L's base distribution rates be addressed each time these newly-proposed riders are updated.[13]

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[6] *In re Application of [FirstEnergy] for Authority to Provide for a Standard Service Offer*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing ¶ 290 (Oct. 12, 2016).

[7] 68 Ohio St. 2d 181, 183 (1981).

[8] *Id.*

[9] *Id.* at 183-87.

[10] Hess Testimony at 5:5-10. *See also* IGS Brief at 23-24.

[11] Hess Testimony at 19:11-12 ("I recommend that every 6 months Dayton re-calculate both the credit rider and the avoidable rider to ensure it is not over- or under-recovering costs."); Tr. Vol. I at 125:77-9.

[12] Tr. Vol. I at 125:10-13.

[13] *See generally* Hess Testimony.

Adjusting individual rate components periodically between rate cases is the definition of single-issue ratemaking. And because single-issue ratemaking is not allowed under R.C. Chapter 4909, the PUCO lacks statutory authority to approve the Marketers' proposed riders.

2. The standard service offer benefits all customers. All customers should pay the distribution costs associated with it.

The Marketers propose, through witness Hess, that distribution costs be shifted from shopping customers to SSO customers based on his theory that certain distribution costs are related exclusively to the SSO.[14] Ignoring for the moment the numerous technical deficiencies in such a proposal (which are discussed below), the proposal fails for a more fundamental reason: all customers benefit from the SSO, so it is just and reasonable for all SSO-related distribution costs to be allocated to the distribution function and paid by all customers.

DP&L is required by law to provide a standard service offer: "[A]n electric distribution utility shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive retail electric services to maintain essential electric service to customers, including a firm supply of electric generation service."[15] This statute is unambiguous: the SSO must be available to all customers, all the time. It serves as the default service for those customers who do not want to shop, and it provides a safety net for customers when their supplier fails to

[14] Hess Testimony at 4:14-5:4, Exhibit JEH-1.

[15] R.C. 4928.141(A).

provide service for any reason, including the supplier's bankruptcy.[16] This undeniably benefits even those customers who shop, because they could, at any moment, need or want to revert to the SSO.

In fact, Mr. Hess agrees with OCC witness Willis[17] and PUCO Staff witness Smith[18] that all customers benefit from the SSO, stating: "The availability of the SSO service does benefit the customers who have shopped, yes."[19]

This should be both the beginning and the end of the PUCO's analysis of this issue. All customers benefit from the statutorily-required SSO, so distribution costs that DP&L incurs to provide a standard service offer should be paid by all customers. This alone should convince the PUCO to deny the Marketers' unfair plan to artificially increase the costs that SSO customers pay for distribution service.

3. The PUCO should give no weight to Mr. Hess's testimony because he ignored the changes that the Settlement made to the Staff Report.

The Settlement[20] modifies the assumptions and calculations that were included in the Staff Report in this case. Mr. Hess's testimony, however, ignores all of these modifications and instead relies on calculations using old data from the Staff Report. His testimony should be afforded no weight. Mr. Hess's testimony was not updated to address the Settlement or the PUCO's criteria for considering settlements.

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[16] R.C. 4928.14 ("The failure of a supplier to provide retail generation service to customers within the certified territory of an electric distribution utility shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer...").

[17] OCC Ex. 1 (the "Willis Testimony") at 8:9-17 (it is important to "preserv[e] for consumers the benefit of the competitively bid standard service offer").

[18] Tr. Vol. II at 324:16-18 ("Q. And do you believe the retail customers benefit from the SSO? A. Yes.").

[19] Tr. Vol. I at 154:7-10.

[20] Joint Ex. 1.

First, the Settlement makes five different adjustments to DP&L's operating expenses: (i) a $5.6 million adjustment to reflect employee labor costs, (ii) a $1.9 million adjustment for property tax expense, (iii) a $5 million adjustment for vegetation management, (iv) a $1.5 million adjustment for energy efficiency, and (v) a $329,000 adjustment for miscellaneous general expenses.[21] Mr. Hess accounted for none of these adjustments in his testimony.[22]

Second, the Settlement changed the gross-revenue conversion factor ("GRCF") that was used in the Staff Report. The Staff Report's 1.549732 GRCF was based on the old 35% federal income tax rate and not the current 21% rate under the federal Tax Cuts and Jobs Act of 2017.[23] Under the Settlement, the applicable GRCF is 1.275097.[24] Mr. Hess used the 1.549732 GRCF in his analysis.[25] And he admitted that the results of his analysis would be different had he used the correct GRCF.[26]

Third, in his analysis, Mr. Hess used a rate of return that was based on the Staff Report's midpoint rate of return of 7.75%.[27] But the Settlement proposes a 7.27% rate of return, not 7.75%.[28] Mr. Hess did not update his analysis to use the Settlement's proposed rate of return. In fact, he testified that he is incapable of doing the necessary calculations

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[21] Settlement at 5-6.

[22] Tr. I. at 140:13-141:4 (Hess cross examination) ("Q. Did you account for any of these adjustments when you made your allocations in any of the exhibits to your testimony? A. I did not.").

[23] Settlement at Exhibit 1 (Schedule A-1 using a gross revenue conversion factor of 1.275097); Staff Report at Schedule A-1 (using a gross revenue conversion factor of 1.549732).

[24] Settlement at Exhibit 1 (Schedule A-1).

[25] Tr. Vol. I at 142:10-14 ("Q. So you did not update this – the GRCF in your analysis to account for the fact that there's a different gross revenue conversion factor under the Stipulation? A. I did not.").

[26] Tr. Vol. I at 145:11-18.

[27] Hess Testimony at Exhibit JEH-3; Tr. Vol. I at 144:5-22.

[28] Settlement at Exhibit 1.

using the Settlement's proposed rate of return, and that he did not even know what rate of return was used in the Settlement.[29]

Mr. Hess's testimony is not relevant because it is based on numbers from the Staff Report that have been changed under the Settlement. Mr. Hess (and the Marketers) had a month after the Settlement was filed to update his analysis to account for the Settlement.[30] For reasons unknown, he ignored the Settlement and instead relied on old numbers that are no longer applicable to this case. The PUCO should give no weight to Mr. Hess's testimony.

4. The errors in Mr. Hess's testimony make it unreliable.

Mr. Hess proved himself an unreliable witness by filing testimony that contains numerous errors.

Mr. Hess's calculations are internally inconsistent. On his Exhibit JEH-1, he proposed that $11,235,576 be shifted from shopping to SSO customers, and he claimed that this number was derived from his Exhibit JEH-2.[31] But that number is nowhere to be found on Exhibit JEH-2.[32] When asked about the discrepancy on cross-examination, Mr. Hess admitted that he filed the wrong Exhibit JEH-2 with his testimony.[33] At the beginning of his direct examination, Mr. Hess's counsel asked if he had any corrections

[29] Tr. Vol. I at 144:23-145:13.

[30] *See* Settlement (dated June 18, 2018); Hess Testimony (dated July 16, 2018).

[31] Hess Testimony at Exhibit JEH-1.

[32] *Id.* at Exhibit JEH-2.

[33] Tr. Vol. I at 150:11-151:5 (Hess cross examination) ("I don't think JEH-2 was the one that should have been filed. ... JEH-2 was updated. I don't think this is the updated schedule."). *See also* Tr. Vol. I at 150:18-22 ("MR. HEALEY: ... I'd like the record to reflect that [Mr. Hess] filed the wrong exhibit with his testimony and didn't catch it. EXAMINER PRICE: I think that's pretty clear on the record now.").

to his testimony.[34] Mr. Hess responded that he did not.[35] Yet on cross examination, when the error was brought to his attention, he was able to immediately pinpoint two data points among the hundreds on Exhibit JEH-2 as the source of the error.[36] Thus, it appears that Mr. Hess was already aware of this error but declined to fix it when asked by his counsel.

Mr. Hess made other mistakes as well. For example, on several occasions, he used stale data without explanation. In calculating his proposed rider rates, he used revenue data from December 31, 2015 and customer count numbers from March 31, 2016, even though more recent data is available.[37] Mr. Hess's calculations on Exhibit JEH-1 suggest that residential customers used 2.76 trillion kWh in a single year,[38] but Mr. Hess admitted on cross examination that he meant 2.76 billion, not trillion.[39] And as described above, Mr. Hess's calculations are based on data from the Staff Report that has been modified in the Settlement, thus making all of his calculations inaccurate.[40] The PUCO should not rely on an analysis that contains unsupportable assumptions and mathematical errors.

5. The Marketers' proposal would cause residential customers to pay cross subsidies.

Not only does the Marketers' proposal unreasonably shift costs from shopping customers to SSO customers, but it results in unreasonable interclass subsidies paid by

[34] Tr. Vol. I at 116:11-12.

[35] Tr. Vol. I at 116:13.

[36] Tr. Vol. I at 150:17-151:5.

[37] Hess Testimony at Exhibits JEH-1 and JEH-4; Tr. Vol. I at 150:7-10 ("Q. And you're aware that there's more recent data on shopping statistics available, correct? A. Yes.").

[38] Hess Testimony at Exhibit JEH-1 (showing 2,761,000,000 MWH sales to residential customers).

[39] Tr. Vol. I at 149:3-18.

[40] *See supra* § I.A.2.

residential consumers. Under the Marketers' proposal, residential SSO customers would pay an additional $10.5 million in distribution costs.[41] Under the Marketers' proposed credit rider, however, residential customers would receive a total credit of only $10.2 million.[42] Thus, about $300,000 in costs would be shifted from commercial and industrial customers to residential customers, which is an unreasonable cross-subsidy.

6. Mr. Hess unreasonably assumed that some distribution costs should be borne exclusively by SSO customers but that zero distribution costs should be borne exclusively by shopping customers.

Mr. Hess's testimony relies on the flawed belief that some distribution costs pertain exclusively to the SSO and thus should be paid exclusively by SSO customers. But even if one were to adopt this erroneous view, the flip side would be that some distribution costs pertain exclusively to shopping and thus should be paid exclusively by shopping customers. Mr. Hess calculates $11.4 million in SSO-related distribution costs to be assigned exclusively to SSO customers, but he claims that there are $0 in shopping-related costs that should be assigned exclusively to shopping customers.[43] This makes no sense.

For example, one of Mr. Hess's prime examples of an alleged cost that should be allocated exclusively to SSO customers is call center costs.[44] According to Mr. Hess, when a customer calls DP&L to complain about the SSO, the costs that DP&L incurs responding to that call should be paid only by SSO customers.[45] But when a customer

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[41] Hess Testimony at Exhibit JEH-1.

[42] *Id.*

[43] Hess Testimony at Exhibit JEH-2. *See also* IGS Brief at 20-21.

[44] Hess Testimony at 8:15-9:2, 14:14-15.

[45] Tr. Vol. I at 128:6-13.

calls DP&L to complain about shopping, Mr. Hess does not believe that the costs that DP&L incurs responding to that call should be paid only by shopping customers.[46] This inconsistency highlights an approach that provides an unfair result that benefits Marketers at the expense of SSO customers.

On examination by Attorney Examiner Price, Mr. Hess testified regarding costs that DP&L incurs to implement supplier consolidated billing for shopping customers. He testified that he believes that all customers, including SSO customers, should pay for these costs because "non-shopping customers could benefit from this at some point in time."[47] He also admitted that the same is true for the SSO: all customers can benefit from the SSO at some point in time because it is available to all customers.[48] Yet despite the obvious parallel, he continued to insist that only SSO customers should pay for costs exclusively related to the SSO, but all customers should pay for costs exclusively related to shopping.

The Marketers' proposal would have the dubious achievement of artificially inflating consumers' cost of the SSO, inflating the SSO as a reference point for shopping customers trying to save money, and enabling higher prices for marketers competing against the SSO. The PUCO should reject this approach which harms, not helps customers.

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[46] Tr. Vol. I at 128:15-130:6.

[47] Tr. Vol. I at 165:6-13.

[48] Tr. Vol. I at 154:7-10 ("Q. SSO service does benefit customers who shopped, right? A. The availability of the SSO service does benefit the customers who have shopped, yes.").

B. The Settlement does not result in DP&L charging customers for competitive services through non-competitive distribution rates.

IGS states that the PUCO "has no authority to regulate or provide compensation to support competitive retail electric service through distribution rates."[49] This is true. But it is also irrelevant, because nothing in the Settlement requires the PUCO to regulate or provide compensation for competitive services through distribution rates.

The Settlement relates exclusively to non-competitive distribution charges to customers. Mr. Hess's own analysis demonstrates this. In calculating the amount that he proposes to shift to SSO customers, he bases his analysis on various distribution-related FERC accounts.[50] Notably, he does not claim that the expenses in these accounts should be included in DP&L's electric security plan ("ESP").

If Mr. Hess believed that the costs in question were costs for competitive services, then he would have testified that it was wholly improper to include them in distribution-related FERC accounts in the first place. But he does not challenge DP&L's inclusion of these costs in distribution accounts. This fatally undermines IGS's argument on brief that the Settlement would result in competitive costs being included in non-competitive distribution rates.[51]

IGS is right that the PUCO should not charge customers for competitive services through monopoly distribution rates. But in this case, the distribution rates in the Settlement do not include charges for competitive services. The Settlement complies with

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[49] IGS Brief at 34.

[50] Hess Testimony at Exhibit JEH-2.

[51] IGS Brief at 33-37.

the law by charging customers only for distribution-related services through base distribution rates.

C. R.C. 4928.143(B)(2)(g) does not require the PUCO to adopt the Marketers' proposal to increase costs to SSO customers.

IGS cites R.C. 4928.143(B)(2)(g) and suggests that it requires the PUCO to adopt the Marketers' unbundling proposal.[52] But IGS misreads this statute. It says nothing at all about how a utility may charge SSO or shopping customers for distribution service.

R.C. 4928.143(B)(2) is a list of the types of items that may be included in an electric security plan. Notably, subsection (B)(2) is discretionary and not limiting; it provides that an electric security plan "may provide" the enumerated provisions "without limitation."[53] In contrast, the immediately preceding subsection (B)(1) includes mandatory requirements for what must be included in an electric security plan.[54]

One of the things that an ESP *may* provide is a provision "relating to transmission, ancillary, congestion, or any related service required for the standard service offer, including provisions for the recovery of any cost of such service that the electric distribution utility incurs on or after that date pursuant to the standard service offer."[55] This is the statute that IGS cites, purportedly for the proposition that the law requires all SSO costs to be included in an ESP.[56] But this is not what the statute says.

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[52] *Id.* at 35.

[53] R.C. 4928.143(B)(2) ("The plan may provide for or include, without limitation, any of the following:..."). The Supreme Court of Ohio has ruled that the provision limits the types of items that may be included in an ESP to those enumerated in (B)(2), but not the amount that can be collected for each item. *In re Application of Columbus S. Power Co.,*128 Ohio St. 3d 512, ¶¶ 31-35 (2011).

[54] R.C. 4928.143(B)(1) ("An electric security plan shall include provisions relating to the supply and pricing of electric generation service.").

[55] R.C. 4928.143(B)(2)(g).

[56] IGS Brief at 35.

The statute merely says that a utility may, at its discretion, include in its electric security plan a request to recover SSO costs through the plan.

Indeed, DP&L does in fact charge customers a substantial amount for SSO service under its electric security plan. SSO customers are charged for their SSO generation costs through a bypassable generation rider called the Standard Offer Rate rider, not through base rates.[57] A typical residential SSO customer using 1,000 kWh per month would be charged $55.62 per month under this rider for its SSO generation charges.[58] These generation charges are paid exclusively by SSO customers, so there is no subsidy.

The PUCO should reject IGS's erroneous interpretation of R.C. 4928.143(B)(2)(g). This statute does not prohibit a utility from recovering distribution costs from customers simply because they are SSO customers.

D. State policies under R.C. 4928.02 support approval of the Settlement, not the Marketers' proposal to increase costs to SSO customers.

The Marketers' argue that state energy policies under R.C. 4928.02 support their proposal to increase costs to SSO customers and that the Settlement contradicts these policies.[59] The Marketers are wrong. The policies support the Settlement, and the Marketers' proposal would violate those state policies.

R.C. 4928.02(A) provides that it is state policy to ensure the "availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced

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[57] *See* DP&L Eighteenth Revised Sheet No. G10, *available at* https://www.puco.ohio.gov/emplibrary/files/docketing/tariffs/Electric/The%20Dayton%20Power%20and%20Light%20Company/PUCO%2017%20Generation.pdf.

[58] *Id.* ($0.0563604 * 750 kwh + $0.0533893 * 250 kwh = $55.617).

[59] RESA Brief at 7; IGS Brief at 37-39.

retail electric service." The Settlement supports this policy by protecting the SSO, which is a market-based generation offer available to all customers. The Settlement does not adopt the Marketers' proposal to increase costs to SSO customers, which would discriminate against SSO customers and result in unjust and unreasonable distribution charges to SSO customers.

R.C. 4928.02(B) provides that it is state policy to ensure the "availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs." The Settlement supports this policy because under the Settlement, customers retain the option to shop or to obtain generation from the competitively-priced SSO.

R.C. 4928.02(H) provides that it is state policy to ensure "effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa." The Marketers' proposal would violate this policy by artificially increasing the cost of the SSO, thus distorting the market for generation in Ohio.

II. CONCLUSION

The PUCO should approve the Settlement in this case because it passes the PUCO's three-prong test for settlements.[60] The PUCO should not modify the Settlement to adopt the Marketers' unjust and unreasonable proposal to artificially increase the cost that SSO customers pay for distribution service. The standard service offer is an

[60] *See* OCC Initial Brief (Aug. 17, 2018).

important option for all customers to use as a default generation service and as a price-to-compare when considering offers from marketers. It is competitively sourced, and market based. The Marketers' proposal would manipulate markets in their favor. The PUCO should reject their approach and approve the Settlement without modification.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply Brief was served on the persons stated below via electronic transmission, this 27th day of August 2018.

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