Rosemary Chiavetta, Secretary
PA Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Reply to Sunoco Pipeline, L.P.'s Exceptions to Initial Decision, Docket Nos. P-2014-2411941, et seq.

Dear Secretary Chiavetta,

Enclosed for filing please find the Clean Air Council's Reply to Sunoco Pipeline, L.P.'s Exceptions to the Initial Decision in the above-referenced matters, along with a Certificate of Service.

Dated: August 29, 2014

/s/ *Augusta Wilson*

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BEFORE THE
COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of Sunoco Pipeline L.P. for a	:	
Finding That the Situation of Structures to	:	Docket Nos. P-2014-2411941,
Shelter Pump Stations and Valve Control	:	2411942, 2411943, 2411944,
Stations is Reasonably Necessary for the	:	2411945, 2411946, 2411948,
Convenience and Welfare of the Public	:	2411950, 2411951, 2411952, 2411953, 2411954, 2411956, 2411957, 2411958, 2411960, 2411961, 2411963, 2411964, 2411965, 2411966, 2411967, 2411968, 2411971, 2411972, 2411974, 2411975, 2411976, 2411977, 2411979, 2411980.

CLEAN AIR COUNCIL'S REPLY TO EXCEPTIONS OF SUNOCO PIPELINE, L.P. TO INITIAL DECISION

I. Introduction

Pursuant to 52 Pa. Code § 5.535(a), the Clean Air Council ("Council") submits the following Reply to Exceptions of Sunoco Pipeline, L.P. ("SPLP") Amended Petitions for a Finding That the Situation of Structures to Shelter Pump Station and Valve Control Stations is Reasonably Necessary for the Convenience and Welfare of the Public ("Amended Petitions").

On March 21, 2014, Sunoco Pipeline, L.P. filed a petition with the Pennsylvania Public Utility Commission ("Commission") pursuant to 52 Pa. Code § 5.41 and 53 P.S. § 10619 requesting that the Commission find that the buildings to shelter 18 pump stations and 17 valve control stations along Sunoco's proposed Mariner East pipeline are reasonably necessary for the convenience or welfare of the public and therefore exempt from any local zoning ordinance. The petitions indicated that the Mariner East pipeline involved the construction of new pipeline

facilities and use of existing pipeline facilities to transport ethane and propane, both natural gas liquids ("NGLs"). The Mariner East pipeline would originate in Houston, Pennsylvania and terminate at Sunoco's Marcus Hook Industrial Complex ("MHIC") in Claymont, Delaware. Numerous parties filed comments, protests, and petitions to intervene in response to SPLP's request.

On May 8, 2014, SPLP filed 31 separate amended petitions ("Amended Petitions"), one for each of the townships in Pennsylvania in which SPLP would seek to carry out construction and operation of its proposed Mariner East pipeline. The Amended Petitions alleged that the proposed Mariner East pipeline would still originate in Houston, Pennsylvania, but would now deliver propane to the MHIC and also to Sunoco's Twin Oaks facilities, located in Delaware County, Pennsylvania. According to the Amended Petitions, SPLP previously suspended or abandoned interstate service along certain portions of its existing Mariner East pipeline but will now be seeking to resume intrastate service so that it can deliver propane through the pipeline to the Twin Oaks facilities for further distribution to third party storage facilities or distribution terminals.

The Clean Air Council timely intervened as a party in these proceedings and filed preliminary objections to SPLP's Amended Petitions.

On July 23, 2014 Administrative Law Judges ("ALJs") David A. Salapa and Elizabeth H. Barnes served an Initial Decision with respect to each of the above-captioned petitions. That Initial Decision sustained the preliminary objections of the Council as well as those of the other environmental groups who intervened and filed objections by correctly holding that SPLP's proposed Mariner East project was not a public utility service and that the Commission therefore

did not have jurisdiction to hear the Amended Petitions. The Initial Decision ordered that SPLP's Amended Petitions be dismissed and the dockets pertaining to those Amended Petitions closed. SPLP timely filed exceptions to the ALJs' Initial Decision ("SPLP Exceptions").

The Council respectfully submits that the ALJs' Initial Decision was well-reasoned and correctly decided, that its Conclusions of Law and its reasoning should be adopted by the Commission, and that SPLP's exceptions should be dismissed.

II. Replies to Exceptions

a. Reply to SPLP Exception No. 1

1. The ALJs' finding in the Initial Decision that SPLP's proposed Mariner East pipeline services does not meet the definition of a public utility service under the Public Utility Code, 66 Pa.C.S. § 102, was correct. SPLP has not alleged facts sufficient to show that the proposed project would meet the definition of a public utility regulated by the Commission under the Public Utility Code.
2. SPLP is seeking a finding from the Commission pursuant to § 619 of the Municipalities Planning Code exempting SPLP from local zoning ordinances in 31 municipalities across Pennsylvania. Section 619 of the MPC allows the Commission to grant an exemption for "any existing or proposed building, or extension thereof, used or to be used by a public utility corporation, if, upon petition of the corporation, the Pennsylvania Public Utility Commission shall, after a public hearing, decide that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public." 53 P.S. § 10619.
3. The term "public utility corporation" is not defined in the MPC. However, the term is defined in Pennsylvania's Business Corporation Law ("BCL"), as:

> "Any domestic or foreign corporation for profit that (1) is subject to regulation as a public utility by the Public Utility Commission or an officer or agency of the United States; or (2) was subject to such regulation on December 31, 1980, or would have been so subject had it been then existing."
>
> 15 Pa. C.S. § 1103.

4. General rules of statutory construction require that the term "public utility corporation" in the MPC be interpreted consistently with its definition in the BCL. *See* 1 Pa. C.S. § 1932. Therefore, in order for the Commission to grant SPLP an exemption pursuant to § 619, SPLP must either be a public utility subject to regulation by the Commission, or by a federal agency.

5. The Initial Decision was correct in holding that SPLP's proposed Mariner East pipeline project does not meet the definition of a public utility under Pennsylvania's Public utility code. SPLP argues that it would be providing a service to the public because a small amount of propane – 5,000 barrels out of the pipeline's daily capacity of more than 70,000 barrels – would be delivered to its Twin Oaks facility, from which point a small class of third-party shippers could in theory distribute the product to Pennsylvania consumers. However, SPLP's unsupported assertions that it plans to use a small fraction of the product being transported through a pipeline that is undeniably primarily designed and intended to provide interstate service for eventual shipping to foreign markets is insufficient to allow SPLP to transform its project into a public utility service for Pennsylvanians.

6. Although the Amended Petitions filed by SPLP modify its proposed project to allow for the possibility that a small amount of propane transported through the pipeline might ultimately be delivered to Pennsylvania consumers, the Amended Petitions do not contain any pleadings that affirmatively state any change in the primary purpose of the proposed

project, nor do they contain any pleadings indicating that any propane delivered to SPLP's Twin Oaks facility by the proposed pipeline would definitely be delivered to Pennsylvania customers.

7. SPLP's Amended Petitions are artfully phrased. They indicate that 5,000 barrels of propane would – initially – be delivered to the Twin Oaks facility, from which point it is *possible* that propane could then be delivered via third party distributors intrastate to Pennsylvania residents. *See* Amended Petitions at 2. It is equally possible based on SPLP's statements in the record that all 5,000 barrels might simply be temporarily stored at Twin Oaks and later shipped to other states or to international markets.

8. SPLP uses the same type of broad and vague language in its Exceptions as it attempts to argue that its proposed project would be "for the public" because it will be delivering propane intrastate. For example, SPLP states that its proposed project "will provide transportation service of mixed ethane and propane . . . to the Marcus Hook Industrial Complex and the Twin Oaks facility and will increase the capacity of propane that is *capable* of being transported by pipeline, *whether via interstate or intrastate movements*, and *available* for delivery or use in Pennsylvania." SPLP Exceptions at 13. Asserting that the proposed Mariner East pipeline might deliver some propane that could potentially be available for delivery to customers in Pennsylvania is very different from an affirmative pleading to the effect that some amount of propane will in fact ultimately be delivered to the Pennsylvania public.

9. Similarly, SPLP's exceptions state that the function of the Mariner East project would be to transport Natural Gas Liquids "from the Marcellus Shale to markets in Pennsylvania *and elsewhere*," SPLP Exceptions at 14, and the Exceptions describe the primary purpose

of the project as being "to provide much needed take-away capacity for natural gas liquids derived from the Marcellus Shale, and provide shippers with a transportation method in which to reach local, *regional and international markets*." SPLP Exceptions at 19.

10. Indeed, as was the case in the Amended Petitions, *see* Amended Petitions at 2, SPLP admits in its Exceptions that its Twin Oaks facility "operates in conjunction" with the MHIC, and indeed is "part of" the MHIC. SPLP Exceptions at 13. This is further evidence that propane delivered to the Twin Oaks facility could easily simply be stored there and later delivered back to the MHIC for processing and export to foreign markets. SPLP makes no affirmative statements to the contrary. Rather, SPLP consistently hedges to avoid making any affirmative statement that any propane flowing through its proposed pipeline would *in fact* be destined for any Pennsylvania consumers. This result is always presented as only one among multiple possibilities, all the rest of which do not involve delivery of any product or service to the public of Pennsylvania. SPLP's unsupported assertions that its amendment of its proposed project to include delivery of propane to its Twin Oaks facility was motivated by a substantial shortage of propane in Pennsylvania, and that it anticipates in future – after the completion of an entirely new pipeline – that it will have the capacity to deliver significant amounts of propane to Pennsylvania, are simply not enough to support a conclusion that SPLP's currently proposed project will provide any service "for the public" of Pennsylvania.
11. Moreover, SPLP has conceded that at best the intrastate capacity of its proposed Mariner East project would be limited to no more than 10% of the pipeline capacity, with 90% already committed to firm interstate shippers. SPLP Exceptions at 28-29. In addition,

SPLP has made clear that it only intends to use the proposed pipeline project under consideration to transport propane for a limited period of time. SPLP will seek to build an entirely new pipeline, which it refers to as Mariner East 2. "Upon completion of the second phase of Mariner East, SPLP will be able to convert existing pipeline to ethane-only transportation . . . ." SPLP Exceptions at 22; *see also* Sunoco Pipeline, L.P. State-Only Operating Permit Application for Cramer Station, Submitted to Pennsylvania Department of Environmental Protection, May 20, 2014, Appendix B (stating, in application relating to pumping station planned for Mariner East project that "[f]rom July 2015 on the [Mariner East] pipeline is slated for pure liquid ethane."). In other words, the proposed project currently under review by the Commission would at best only deliver a small amount of propane intrastate in Pennsylvania for a short and defined period.

12. SPLP relies heavily on *Drexelbrook Associates v. Pennsylvania Public Utility Commission*, 212 A.2d 237 (Pa. 1965), to support its contention that it would be providing service "to the public." In *Drexelbrook*, the Pennsylvania Supreme Court held that the public or private character of the enterprise does not depend upon the number of persons by whom it is used, but upon whether or not it is open to the use and service of all members of the public who may require it. *Drexelbrook* at 435 (citing *Borough of Ambridge v. Pa. Pub. Serv. Comm'n*, 165 A. 47, 49 (Pa. Super. 1933)). The ALJs' Initial Decision was correct in holding that SPLP's proposed Mariner East project does not meet the test in *Drexelbrook*. The already-existing firm limits on the amount of intrastate service the Mariner East 1 project can ever provide in and of themselves belie SPLP's assertion that it is committed to providing intrastate service to any and all members of the

public who may require it. As SPLP has readily acknowledged, intrastate capacity on Mariner East 1 would be limited to no more than 10% of the capacity of the pipeline. The remaining 90% of the pipeline's capacity is already firmly committed to interstate shippers. SPLP Exceptions at 14, 28-30. In other words, the reality of SPLP's proposed project is that it would, at best, serve a limited number of highly specialized intrastate shippers using a fraction of the capacity of the interstate pipeline. This is simply insufficient to meet the definition of a public utility service being provided to Pennsylvania consumers. *See also Independent Oil and Gas Ass'n of Pennsylvania v. Pennsylvania Pub. Utility Comm'n*, 789 A.2d 851, 854 (Pa. Comm. Ct. 2002) ("Clearly, the General Assembly has excluded natural gas suppliers from the definition of "public utility" when the [natural gas suppliers] use the distribution services of natural gas distribution companies.").

13. The proposed project also does not meet the standards set out by the Commission's own policy statement on determining public utility status. The Commission set forth several factors that it will consider in making such a determination:

> **§ 69.1401. Guidelines for determining public utility status – statement of policy.**
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> * * *
>
> (c) *Fact based determination.* The Commission will consider the status of a utility project or service based on the specific facts of the project or service and will take into consideration the following criteria in formulating its decision:
>
> (1) The service being provided by the utility project is merely incidental to nonutility business with the customers which creates a nexus between the provider and customer.

> (2) The facility is designed and constructed only to serve a specific group of individuals or entities, and others cannot feasibly be serviced without a significant revision to the project.
>
> (3) The service is provided to a single customer or to a defined, privileged and limited group when the provider reserves its right to select its customers by contractual arrangement so that no one among the public, outside of the selected group, is privileged to demand service, and resale of the service is prohibited, except to the extent that a building or facility owner/operator that manages the internal distribution system servicing the building or facility supplies electric and related electric power services to occupants of the building or facility. See 66 Pa. C.S. 102 and 2803 (relating to definitions).
>
> * * *

52 Pa. Code § 69.1401.

14. Just as with the *Drexelbrook* standard, the proposed project fails to meet the third of these criteria because the project would indeed ultimately serve a defined, privileged and limited group and would not in reality be available to any member of the Pennsylvania public who was privileged to demand service. The proposed project also fails with respect to second of the three criteria set forth in the guidelines. As it was originally proposed in SPLP's initial petition, SPLP's Mariner East pipeline project was designed and constructed to serve only a specific set of customers who would transport the NGLs from SPLP's Marcus Hook facility to foreign markets. In order to develop a proposed pipeline project that could feasibly service members of the Pennsylvania public who might wish to take advantage of the service, SPLP had to revise its entire project proposal and submit Amended Petitions to the Commission in which SPLP revised its proposed project to include the diversion of propane to an entirely new facility. This is in contrast to, for example, the situation in the *Laser* case decided by the Commission – also heavily relied on by SPLP in its Exceptions – where one of the things the Commission relied on in finding that the project at issue there met the definition of public utility service was

that any and all interested customers could easily connect to the spine of the proposed gathering pipeline system without any significant construction or revision to the proposed design of the project. *See Application of Laser Northeast Gathering Company, LLC for Approval to Begin to Offer, Render, Furnish, or Supply Natural Gas Gathering and Transporting Service by Pipeline to the Public in Certain Townships of Susquehanna County, Pennsylvania*, A-2010-2153371, Opinion and Order, May 19, 2011, at 16.

15. SPLP's proposed project, on the other hand, fits clearly into the second of the Commission's three criteria for determining that a project is not a public utility project. It was designed to serve only a specific group of entities – large shippers serving foreign markets – and had to be significantly revised through the Amended Petitions in order to even feasibly serve the Pennsylvania public.

16. The facts here also differ significantly from those in *Laser* in that Laser was prepared to furnish service to "'any and all' natural gas producers operating in its proposed service territory." *Laser* at 6. Indeed, in that case Laser testified that it would serve "any and all potential customers needing to move gas through the pipeline system . . . [including] large capital, largely capitalized producers, small capitalized producers, individual landowners owning wells . . . [and] landowner groups." *Laser* at 25. SPLP simply cannot make the same type of claim here with respect to its proposed Mariner East project.

17. For all these reasons, the Administrative Law Judges' initial decision was correct in finding that the proposed project would not provide service "for the public" and does not meet the definition of "public utility" under the Public Utility Code. SPLP's Exception No. 1 should be denied.

b. Reply to Exception No. 2

18. The ALJs' finding in the Initial Decision that SPLP is not a "public utility corporation" as defined by the Business Corporation Law, 15 Pa. C.S. § 1103 was also correct and should be adopted by the Commission.

19. SPLP's argument in support of its Exception No. 2 appears to misconstrue the ALJs' decision. SPLP argues that the Initial Decision incorrectly held that SPLP cannot be regulated both at the federal level by FERC as an interstate carrier and at the state level by the Commission as an intrastate carrier. This is simply not what the Initial Decision held. Rather, the Initial Decision held that in the context in which SPLP is regulated at the federal by an agency of the United States, it is regulated as a common carrier and not as a public utility. *See* Initial Decision at 20.

20. In order for the Commission to make the finding SPLP is seeking under § 619 of the MPC, SPLP must be a "public utility corporation" as that term appears in § 619. *Id.*

21. The term "public utility corporation" is not defined in the MPC. However, the term is defined in Pennsylvania's Business Corporation Law ("BCL"), as:

> "Any domestic or foreign corporation for profit that (1) is subject to regulation as a public utility by the Public Utility Commission or an officer or agency of the United States; or (2) was subject to such regulation on December 31, 1980, or would have been so subject had it been then existing."
>
> 15 Pa. C.S. § 1103.

22. As detailed above, the Initial Decision was correct in finding that SPLP's proposed project does not meet the definition of a public utility subject to regulation by the Commission as such. The Initial Decision then turned to the question of whether SPLP meets the second part of the definition, being a "domestic or foreign corporation for

profit that . . . is subject to regulation as a public utility by . . . an officer or agency of the United States."

23. In this case, the federal agency that regulates SPLP is the Federal Energy Regulatory Commission ("FERC"). As SPLP itself acknowledged in its original petition, SPLP is regulated by FERC pursuant to the Interstate Commerce Act ("ICA"). Original Petition at 5-8. The ICA explicitly applies to common carriers and not to public utilities. 49 U.S.C. § 1 (1988). Moreover, SPLP itself has repeatedly acknowledged that it is regulated by FERC as a common carrier. *See e.g.*, Original Petition at 5-8; Petition for Declaratory Order of Sunoco Pipeline, L.P., Accession No. 20121207-5161 at 8-9 (Dec. 7, 2012) (Docket No. OR13-9-000).

24. Thus, SPLP's extensive arguments that it meets the definition of "public utility corporation" under the BCL because it may be regulated federally and at the state level at the same time are simply inapposite. SPLP does not meet the second part of the BCL's definition of "public utility corporation" because it is regulated by FERC, an agency of the United States, as a *common carrier* and not as a public utility.

25. SPLP's argument that the Initial Decision erred in relying on the York County Court of Common Pleas' decision in *Sunoco Pipeline, L.P. v. Loper*, No. 2013-SU-4518-15 (Feb. 24, 2014) is unavailing for the same reason. SPLP argues that the decision in *Loper* is irrelevant because at the time of the decision SPLP "had not yet proposed to provide intrastate service," and thus the Court of Common Pleas could not consider whether SPLP could be simultaneously regulated at the federal level as an interstate carrier and at the state level by the Commission. Exceptions at 30-31. However – again – the holding in *Loper* was not, as SPLP seems to suggest, that SPLP did not qualify as a public utility

corporation because it could not be both an interstate and an intrastate carrier at the same time. Rather, *Loper* held that SPLP did not meet the second part of the BCL's definition of "public utility corporation" because it was regulated by an agency of the United States under the ICA as a common carrier and not as a public utility. *See Loper* at 5 ("In the current case, Plaintiff [SPLP] is regulated under the Interstate Commerce Act . . . as a common carrier, and not as a public utility. It is therefore not entitled to condemn property pursuant to Pennsylvania Business Corporation Law.").

26. For these reasons, the ALJs' Initial Decision was correct in finding that SPLP does not meet the definition of "public utility corporation" under Pennsylvania's BCL, and SPLP's Exception No. 2 should be denied.

c. Reply to Exception No. 4[1]

27. Although the ALJs' Initial Decision did not reach several other objections advanced by the Clean Air Council and other environmental groups because it found a lack of subject matter jurisdiction based on its holding that SPLP's proposed Mariner East project did not meet the definition of "public utility corporation" in the MPC, those preliminary objections were meritorious and should be considered and sustained by the Commission.

28. Specifically, the Council advanced a preliminary objection on the grounds that, even if SPLP made a showing that its proposed project met the definition of "public utility corporation" under the MPC, its Amended Petitions must still be denied because it failed to meet the second of the MPC's requirements for the exemption sought – a showing that the proposed project is reasonably necessary for the convenience and necessity of the public. This was a meritorious objection, and it should be sustained.

[1] The Clean Air Council takes no position on SPLP's Exception No. 3.

29. SPLP argues that the decision from the Commonwealth Court of Pennsylvania in *Del-AWARE Unlimited, Inc. v. Pennsylvania Public Utility Commission*, 513 A.2d 593 (Pa. Cmwlth. 1963), holds that the Commission has no authority to make a determination as to whether the effects of the project as a whole are in the public interest – only whether the exact siting of the buildings advances the public convenience and necessity. *See* SPLP Exceptions at 34. This is a misinterpretation of the holding in the *Del-AWARE* case. As the Council pointed out in its Preliminary Objections, the Commonwealth Court's decision to limit its review in that case to the siting of the buildings involved hinged significantly on the fact that the predecessor of the Pennsylvania Department of Environmental Protection that existed at the time, the Department of Environmental Resources ("DER") had already done a thorough review of the environmental impacts of the proposed project at issue in the case, and that environmental review had been scrutinized and upheld by the Environmental Hearing Board. In that context, the Commonwealth Court was unwilling to disturb the work already done by ordering yet another full environmental review. *Del-AWARE*, 513 A.2d at 596.

30. Here, by contrast, no other environmental reviews or assessments of the proposed Mariner East project have been conducted. If the Commission were to grant SPLP's Amended Petitions, SPLP would be able to avoid the need to work with any local zoning hearing boards in any of the communities that would be affected by the project. This means that if the Commission were to grant the requested exemption without itself considering the environmental impacts of the project as a whole on the welfare of the public, the project would be constructed without any comprehensive environmental review whatsoever taking place. The Commission must follow the language of the

statute and require SPLP to make a showing that the proposed project is in fact in the public convenience and necessity.

31. Finally, SPLP advances two inconsistent arguments on this point. SPLP argues that the Commission does not have the authority to consider the impact on the public of the project as a whole, but it simultaneously argues that the issue is moot because the Commission has already decided in its 703(g) Opinion and Order that the proposed project as a whole would confer public benefits. SPLP Exceptions at 34-35. SPLP may not have it both ways. If the Commission has the authority to make a determination that the project as a whole would confer some benefit on the public, then SPLP must be required here to make a showing, not just that the project would confer some benefit on the public, but that the benefits as well as the damage to the environment and public health that would be created by the project, when considered as a whole, would advance the public welfare.

WHEREFORE, the Clean Air Council respectfully submits that the ALJs' Initial Decision was correct in dismissing SPLP's Amended Petitions and that the ALJs were correct in concluding that SPLP's proposed Mariner East project failed to meet the definition of a "public utility corporation" under the Municipal Planning Code. Additionally, the Initial Decision was correct in holding that the buildings SPLP proposes to build as part of Mariner East will not be used in public utility service. The Clean Air Council respectfully requests that the Commission adopt the ALJs' well-reasoned Initial Decision and each of its conclusions of law, and that it dismiss each of SPLP's Amended Petitions with prejudice. If the Commission does find that it

has jurisdiction, it should deny SPLP's Exception No. 4 and remand this matter to the Office of the Administrative Law Judge for rulings on the remaining preliminary objections.

Respectfully submitted,

Dated: May 29, 2014

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VERIFICATION

I, Augusta C. Wilson, hereby state that the facts above set forth in the Reply to Sunoco's Exceptions are true and correct (or are true and correct to the best of my knowledge, information, and belief) and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. 4904 (relating to unsworn falsification to authorities).

Dated: August 29, 2014

/s/ Augusta Wilson

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CERTIFICATE OF SERVICE

I, Augusta Wilson, do hereby certify that a true and accurate copy of the foregoing REPLY TO SUNOCO'S EXCEPTIONS TO INITIAL DECISION were served upon the following on August 29, 2014, pursuant to the requirements of 52 Pa. Code § 1.54(b)(3) (relating to service by a participant):

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