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March 13, 2020

Via ECFS

Marlene J. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street SW
Washington, DC 20554

Re: Metropolitan Edison Company, Pennsylvania Electric Company, and Penn Power Company's Motion for Leave to File Response to Reply (Proceeding Number 19-354; Bureau ID Number EB-19-MD-008)

Ms. Dortch:

Please find attached the Public Version of Metropolitan Edison Company, Pennsylvania Electric Company, and Penn Power Company's Motion for Leave to File a Response to the Reply filed by Verizon Pennsylvania LLC and Verizon North LLC in Proceeding Number 19-354; Bureau ID Number EB-19-MD-008.

Sincerely,

Timothy A. Doughty
Attorney for Metropolitan Edison Company, Pennsylvania Electric Company, and Penn Power Company

Enclosures

cc: Rosemary McEnery, Enforcement Bureau
Anthony DeLaurentis, Enforcement Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Verizon Pennsylvania LLC and Verizon North LLC,	)	
Complainants,	)	**Proceeding Number 19-354**
v.	)	**Bureau ID Number EB-19-MD-008**
Metropolitan Edison Company, Pennsylvania Electric Company, and Penn Power Company,	)	
Defendants	)	

METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC COMPANY, AND PENN POWER COMPANY'S MOTION FOR LEAVE TO FILE RESPONSE TO REPLY

Defendants Metropolitan Edison Company ("Met-Ed"), Pennsylvania Electric Company ("Penelec"), and Pennsylvania Power Company ("Penn Power") (collectively, "FirstEnergy"), pursuant to Section 1.729 and Section 1.732(c) of the Commission's Rules, 47 C.F.R. §§1.729, 1.732(c), respectfully submit the following Motion for Leave to File a Response to the Reply filed by Verizon Pennsylvania LLC and Verizon North LLC ("Verizon") on March 3, 2020. In support of this Motion, FirstEnergy states as follows:

Section 1.732(c) permits the Commission to require the submission of additional information that is "appropriate for a full, fair, and expeditious resolution of the proceeding."[1] Such additional information is necessary because Verizon's Reply contains an alarming number

[1] 47 C.F.R. §1.732(c).

of misstatements of fact, misstatements of the law, and mischaracterizations of FirstEnergy's positions. These misstatements and mischaracterizations go well beyond placing a "spin" on the facts and law, but instead are misleading to the Commission and prejudicial to FirstEnergy. Accordingly, FirstEnergy respectfully submits that the public interest in ensuring a full, fair and expeditious resolution of this proceeding supports granting FirstEnergy's Motion.

The numerous misstatements and mischaracterizations are identified below, and it is these misstatements and mischaracterizations alone to which FirstEnergy seeks leave to respond. Following each misstatement, FirstEnergy briefly indicates why it is a misstatement, and requests leave to submit a fuller explanation with complete citations in its subsequent Response.

FirstEnergy's Policy Statement

1. "FirstEnergy thinks it is 'not good public policy' for the Commission to create 'greater rate parity between [I]LECs and their telecommunications competitors' to 'energize and further accelerate broadband deployment.'"[2]
2. "As for 'energizing' and 'accelerating' broadband deployment, FirstEnergy respectfully submits that [reducing rates paid electric utilities] does not further broadband deployment to unserved and underserved areas and is not good public policy."[3]

These are gross misstatements and misquotes of FirstEnergy's Answer, and FirstEnergy said nothing of the kind.

Field Audit Expense

3. "FirstEnergy next points to a previously unannounced plan to conduct a field audit of its own network and surmises it may be able to defray the cost by imposing about a [redacted] per pole charge on Verizon's competitors. But FirstEnergy may never conduct such an audit and its license agreements [redacted] on Verizon's competitors. Moreover, the cost itself is guesswork, based on unsubstantiated costs related to an undocumented field audit in Ohio."[4]

[2] Reply Legal Analysis in Support of Verizon's Pole Attachment Complaint, *Verizon Pennsylvania LLC and Verizon North LLC v. Metropolitan Edison Company, Pennsylvania Power Company, and Penn Power Company*, Proceeding Number 19-354, Bureau ID Number EB-19-MD-008 at 5 (filed Mar. 3, 2020) ("Reply Legal Analysis").
[3] *Id*. at n.11.
[4] *Id*. at 3.

Each of these statements is incorrect.

4. "I also did not see provisions in FirstEnergy's license agreements [redacted]"[5]

The vast majority, if not every one, of the CATV and CLEC agreements provided to Verizon in discovery, as well as the MCI agreement attached to Verizon's Complaint, have provisions [redacted].

Rates Charged to Verizon's Competitors

5. "Claiming it need not comply with the new telecom rate formula absent a Commission decision specific to a particular company, FirstEnergy admits it forces some CLECs to pay far more than the properly calculated new telecom rate."[6]

FirstEnergy admitted no such thing and CLECs are not "forced" to do anything.

Negotiations for a New Agreement and New Rates

6. "FirstEnergy's defiance of the legal limits on rental rates reveals another flaw in one of its overarching arguments—specifically, that the joint use agreement rates should stand because Verizon declined to transfer all its poles to FirstEnergy as a precondition for negotiating the just and reasonable rates required by law. There is no requirement that Verizon 'transition … out of the pole owning business' to obtain a competitively neutral new telecom rate—let alone a requirement that Verizon give away more than 130,000 poles in Pennsylvania and Maryland to have the opportunity to try to negotiate one."[7]

FirstEnergy never made such arguments, never imposed such a precondition, and never stated Verizon should "give away" its poles.

7. "Through more than seven years of negotiations, FirstEnergy refused to make an offer that would materially change the joint use agreement rates and the net rental payment it receives."[8]

This statement is incorrect. FirstEnergy offered Verizon the new telecom rate, offered Verizon the old telecom rate, and in addition offered Verizon nearly a 30% rate reduction.

[5] Reply Aff. of Stephen C. Mills at ¶11 (VZ00816) (Mills Reply Aff.).
[6] Reply Legal Analysis at 6-7.
[7] *Id.* at 7.
[8] *Id.* at 19.

8. "[D]espite the years of effort I devoted to seeking a good faith settlement, FirstEnergy never considered a deal possible. I learned for the first time reading FirstEnergy's Answer that it thinks 'there is not enough guidance in the 2011 Pole Attachment Order for the parties to negotiate a resolution of this issue without a pole attachment complaint proceeding establishing whether the ILEC in any particular case is 'comparably situated.'"[9]

This statement is incorrect and quoted out of context as it refers only to determining in advance how the Commission might rule.

Prior Notice of Overlashing

9. "Until early 2018, pole owners had no lawful right to require prior notice before overlashing."[10]

This statement is incorrect.

Bargaining Leverage

10. "As FirstEnergy explains, without the joint use agreements, Verizon would need to construct a duplicative pole line or underground its facilities to deploy facilities in the future — prohibitively expensive and practically impossible options given local preferences and restrictions."[11]
11. "FirstEnergy argues its bargaining power does not pose a credible threat because FirstEnergy cannot force Verizon to relocate its existing facilities because of the evergreen provisions in the joint use agreements and because regulatory authorities would frown upon duplicative pole lines."[12]
12. "FirstEnergy explains why this is so: because Verizon's alternative to the joint use agreement rates is exponentially costlier, '[f]rom an economic perspective, it makes no sense whatsoever' for Verizon to incur the alternate costs instead.[13]

These statements are erroneous and appear designed to mislead. FirstEnergy argued FirstEnergy, not Verizon, would need to build duplicative pole lines to get off of Verizon's poles, argued it would be impossible, not frowned upon, to build a duplicate pole line, and did not analyze at all Verizon's costs for such a pole line.

13. "FirstEnergy's overarching argument is that its pole ownership majority does not show bargaining power because, absent joint use, it would be economically and legally difficult for FirstEnergy to deploy its facilities elsewhere. The Commission

[9] Mills Reply Aff. at ¶27 (VZ00824).
[10] Reply Legal Analysis at 35.
[11] *Id.* at 16.
[12] *Id.* at 21.
[13] *Id.* at 22.

> rejected this argument based on '[s]tandard economic theories.' FirstEnergy's witness agrees: he accepts there are 'analyses of bargaining power based on relative harm from foreclosure (i.e., which party has more to lose).'"[14]

FirstEnergy argued it would be impossible, not "difficult," to deploy elsewhere, the Commission never addressed this argument much less rejected it, and FirstEnergy's witness certainly did not agree.

Verizon Request to Purchase Poles

14. "FirstEnergy tries without support to justify its refusal by alleging Verizon's pole purchase effort was not in 'good faith.'"[15]
15. "But Verizon tried for more than two years to purchase poles, identified the quantity it sought, and offered to facilitate the transfer using a standard pole purchase process. FirstEnergy's counsel tried to avoid a sale with unfounded claims about Verizon's maintenance of its pole plant, and FirstEnergy makes similar allegations now. The criticism is misplaced. Verizon has a robust wood pole inspection and maintenance program and prioritizes the safety and reliability of its pole network."[16]

FirstEnergy supported its argument that Verizon's pole purchase was not in good faith by noting FirstEnergy requested proof of Verizon's inspection program which Verizon never provided; and Verizon's witness now indicates its inspection program began only in 2018.

Verizon is Not Comparably Situated

16. "FirstEnergy walked away from the 24 alleged advantages it insisted upon in June 2018 and now points to just three."[17]
17. "Once faced with Verizon's complaint, FirstEnergy changed its tune again—now claiming the joint use agreement rates are justified by three alleged advantages and not the 24 it asserted when the parties were negotiating."[18]

FirstEnergy mentioned those advantages during negotiations, continues to believe most apply, and explained FirstEnergy lacks discovery sufficient to prove many of them and that others are *de minimis*.

18. "FirstEnergy claims it needs 'a thorough inspection of all of the[ ] facilities' of 'both Verizon and its competitors,' an analysis of 'confidential and highly sensitive claims settlement information' for 'both Verizon and its competitors,' and 'depositions of key Verizon personnel and extensive document production' to see whether

[14] *Id.* at 20-21.
[15] *Id.* at 25.
[16] Reply Legal Analysis at 25.
[17] *Id.* at 26.
[18] *Id.*

> FirstEnergy is better able 'to modify the terms and conditions of its license agreements with cable company and CLEC attachers' than it is able to modify the terms of the joint use agreements."[19]

These misleading and nonsensical quotes are not FirstEnergy's claims at all.

19. "FirstEnergy tries to buttress its make-ready analysis with a table of make-ready costs FirstEnergy says it charged Verizon as compared to the [redacted] FirstEnergy licensees requiring the most make-ready work during the last two years."[20]

FirstEnergy did not select those requiring the most make-ready; it selected those filing the most applications, i.e., most actively engaged in expanding broadband deployment into new markets.

20. "In 2009, FirstEnergy represented ILECs 'incur $11.50 less per pole … in annual make-ready expenses than their CLEC competitors, and $0.88 less per pole … than their Cable Company competitors.'"[21]

In the filing that Verizon claims contradicts FirstEnergy's Answer, these pole costs were clearly identified as pole costs of PPL Electric Utilities, a member of the Coalition of Concerned Utilities, not pole costs of FirstEnergy.

21. "FirstEnergy's 2009 numbers are also inflated; FirstEnergy now admits some licensees with 'the largest number of attachment applications during the past two years' required [redacted] of make-ready when converted into a per-pole charge. Because FirstEnergy has license agreements with over [redacted] licensees, many of which have established networks, most of FirstEnergy's licensees paid even less."[22]

The 2009 numbers were from PPL, not FirstEnergy. The [redacted] figures were outliers well below the average, Verizon does not know how much other FirstEnergy licensees paid, and FirstEnergy can provide the Commission whatever additional information it would like.

22. "FirstEnergy did not provide 'backup or itemization' to verify its claims, show what work was performed, or prove the amounts charged were paid, making it impossible to know the full extent of the flaws in its analysis."[23]

FirstEnergy can provide Verizon and the Commission whatever backup and itemization they would like.

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[19] *Id.* at 27-28.
[20] *Id.* at 31.
[21] *Id.* at 32.
[22] Reply Legal Analysis at 32.
[23] *Id.*

23. "FirstEnergy made no effort to exclude costs it charged Verizon's competitors based on work FirstEnergy performed where FirstEnergy does not perform comparable work for Verizon."[24]

FirstEnergy had no need to perform such work for Verizon because unlike Verizon's competitors, Verizon was not making new attachments requiring make-ready.

24. "And Verizon did not, as FirstEnergy alleges, refer to these routine paperwork tasks as 'prejudicially detrimental' to an attacher's ability to quickly deploy. Instead, Verizon challenged FirstEnergy's attempt to impose pre-approval and engineering study requirements before 'overlashing to an existing cable'—requirements which, as detailed above, are unlawful."[25]

This is a misinterpretation of the email at issue.

25. "And FirstEnergy provided nothing to substantiate fees it says 'amount to [redacted] per application plus [redacted] per pole.'"[26]

FirstEnergy's witness attested to these charges. FirstEnergy can provide whatever further substantiation the Commission might request.

26. "FirstEnergy designed its field review to ensure Verizon would occupy more space than the one-foot space occupied presumption: it 'deemed [Verizon] to occupy six (6) inches of clearance above its highest usable space attachment and six (6) inches below its lowest usable space attachment.' This had the effect of adding six inches to the space Verizon occupied, as FirstEnergy already collects rent for the six inches of unusable space below Verizon's lowest attachment."[27]

These allegations misstate the Commission's rate rules, ignores the benefit of being the lowest attachment, and ignores that all other attaching entities effectively occupy six inches above and six inches below.

27. "There is no reason to conclude Verizon has required more space or more load capacity than its competitors."[28]

This contention ignores the declaration of FirstEnergy's witness.

28. "Any additional load or mid-span sag, which is endemic to all wireline aerial facilities, does 'not increase the amount of space actually occupied by the attachment' on the pole."[29]

[24] *Id.* at 32-33.
[25] *Id.* at 36.
[26] *Id.* at 37.
[27] *Id.* at 40.
[28] Reply Legal Analysis at 41.
[29] *Id.* at 42.

To the extent Verizon's sag is greater than other attachers' sags, Verizon's attachments require more pole space to not cause a clearance violation, thus preventing other competing attachers from occupying that space on the pole.

29. "FirstEnergy asks to charge Verizon rental rates as high as the unlawful rates FirstEnergy has imposed on some of Verizon's competitors."[30]

FirstEnergy's rates are not unlawful and are not imposed on anybody, and the rules require Verizon to pay rental rates of those with which Verizon is comparably situated.

Rate Calculations

30. "FirstEnergy argues it should be able to manipulate the Commission's new telecom rate formula to charge Verizon a 2019 new telecom rate in the [redacted] per pole range (based on 2018 cost data)."[31]

That is not FirstEnergy's argument; FirstEnergy does not believe the new telecom rate applies at all, but even if it does it is not 'manipulation' to use the appropriate input data.

31. "FirstEnergy does not specifically challenge Verizon's rate calculations for the 2011 through 2018 rental years, although it purports to 'reserve[] the right to perform further analysis.'"[32]

This allegation is incorrect. FirstEnergy specified all of Verizon's rate calculations appeared to have the same problems FirstEnergy identified in its year-end 2017 calculations.

32. "Second, FirstEnergy argues Verizon's 2019 rates did not explain how they comport with Commission rules by 'increas[ing] or decreas[ing] its GAAP-based rates by the "Implementation Rate Difference."' But I did explain my 'calculation of the proportional rate for the 2019 rental year reflects Verizon's transition to generally accepted accounting principles (GAAP) and includes the implementation rate difference referenced at 47 C.F.R. § 1.1406(e).' My calculation of the 2019 rate then shows the [redacted] Implementation Rate Difference and uses that Implementation Rate Difference to reduce the proportional rate for FirstEnergy's use of Verizon's poles."[33]

Mr. Calnon never showed how that [redacted] Implementation Rate Difference was calculated.

[30] *Id.* at 45
[31] *Id.* at 46.
[32] *Id.*
[33] Reply Aff. of Mark S. Calnon, PH.D. at para. 41 (VZ00849).

FirstEnergy's Statistically Reliable Field Audit

33. "The second main flaw in FirstEnergy's 2019 rate calculations is its reliance on an unreliable and hurried review of a small subset of unidentified poles."[34]

The field audit was not hurried at all and was totally reliable as it used a statistically reliable survey sample.

34. "FirstEnergy received a master spreadsheet, photographs, and additional information from its contractor, and Verizon asked FirstEnergy to produce them. FirstEnergy instead withheld the information, making it impossible for Verizon or the Commission to test FirstEnergy's data for accuracy and reliability."[35]

FirstEnergy did not withhold anything, but instead properly responded to an interrogatory request that instead was an improper request for document production. FirstEnergy produced the results of its survey, and is in addition filing a separate motion for leave to supplement its Answer to provide all of the voluminous data, including more than 10,000 photographs, for Commission and Verizon review, to the extent the Commission deems it necessary and appropriate to do so.

35. "[T]he field review was completed in about a month's time by a contractor that admits '[t]hings like time pressure … are error precursors that can create situations ripe for error to occur.'"[36]

FirstEnergy's field audit was not hurried, and FirstEnergy's contractor never "admitted" it was hurried or that errors occurred.

36. "FirstEnergy also cannot rebut the presumptions because it did not design its field review to include 'only those poles in areas where [Verizon] is actually affixed' as required."[37]
37. "FirstEnergy admits the joint use agreements in Pennsylvania and Maryland cover 513,595 poles the parties jointly use, with FirstEnergy owning 381,118 and Verizon owning 132,477,288 but chose poles for the field review based on a set of [redacted] poles (about [redacted] more than the joint use network) that contained [redacted] FirstEnergy poles (about [redacted] more than FirstEnergy owns in the joint use network) and [redacted] Verizon poles (about [redacted] more than Verizon owns in the joint use network)."[38]

FirstEnergy's field audit included only poles that FirstEnergy and Verizon jointly use. FirstEnergy used its GIS database to identify those poles, which includes a greater number of joint use poles than the parties have invoiced each other for. The GIS database identifies more

[34] Reply Legal Analysis at 47.
[35] *Id.* at 48-49.
[36] *Id.* at 49.
[37] *Id.*
[38] *Id.* at 49-50.

joint use poles than do the parties' invoices because invoicing is the product of mutually-agreed annual recaps while the GIS database is built from operational records. The invoice numbers were mutually agreed upon in the 2009 MOUs, Verizon stated an audit must be done to verify those numbers, but no audit was ever performed. FirstEnergy is filing a separate motion to correct its responses to explain this difference in pole counts.

38. "FirstEnergy claims its facilities require [redacted] feet of space without the additional 3.33 feet of 'safety space' the Commission found is 'usable and used by the electric utility.'"[39]

This allegation is incorrect. FirstEnergy did count the 3.33 feet of safety space as part of the [redacted] feet of space required, as is specified in the FirstEnergy rate calculations cited by Verizon.

Misstatements of Law

39. "The 2011 standard required FirstEnergy to prove the rate disparity between Verizon and its competitors is justified by the value of any "net material competitive advantages" FirstEnergy provides Verizon under the parties' joint use agreements as compared to the terms and conditions FirstEnergy provides under its license agreements with Verizon's competitors."[40]

The Pole Attachment Order clearly requires an incumbent LEC to demonstrate that it is comparably situated and thus carries the burden of proof. Verizon also cites the Dominion Order, but fails to inform that the agreements in question were newly executed after the Pole Attachment Order.

40. "The Commission did not leave the presumption's effectiveness in the hands of electric utilities that, like FirstEnergy, have incentive to use their superior bargaining power to try to avoid it."[41]

Verizon not only misstates FirstEnergy's Answer by incorrectly claiming FirstEnergy argues that the parties must "agree that the presumption will apply," but Verizon also misstates the law by ignoring that Verizon at all times had the right to unilaterally terminate its agreement to trigger review.

41. "The Commission wisely chose *not* to apply different standards to different portions of the same complaint proceeding, but to apply the presumption to all time periods within its remedial authority."[42]

Verizon misstates the Commission's orders which clearly stated their prospective applicability, and further incorrectly argues in a footnote that because the Commission declared incumbent LECs entitled to just and reasonable rates in 2011 that the Third Report and Order extends back

[39] *Id*. at 58.
[40] Reply Legal Analysis at 3.
[41] *Id*. at 10.
[42] *Id*. at 13.

to the Pole Attachment Order. Of course, competitive LECs have been entitled to just and reasonable rates since the Telecommunications Act of 1996, and yet applicability of the Commission's new telecom rate formula did not extend back to 1996.

42. "Much more was required; as FirstEnergy admits, it has the burden to justify the lawfulness of its rates under the standard adopted in 2011 once Verizon makes a p*rima facie* case of their unreasonableness. Verizon made that showing and FirstEnergy does not argue otherwise."[43]

Verizon misstates FirstEnergy's argument, but also misstates the burden of proof imposed by the Commission. Verizon clearly bore the burden of proof before the presumption was established effective March 2019, as clearly stated by the Commission in the Pole Attachment Order and in the FPL Order. Further, the case Verizon cites for what constitutes a *prima facie* showing was a failure to state a claim challenge, not a burden of proof in which the Commission in the FPL Order held Verizon must do more than the merely assert rate disparity and dismissed Verizon's complaint for failing to prove that the rate disparity was greater than the benefits.

43. "But FirstEnergy asks for a different result here, arguing it agreed to discuss new rates for Verizon's existing attachments when Florida Power and Light did not. This distinction is irrelevant."[44]

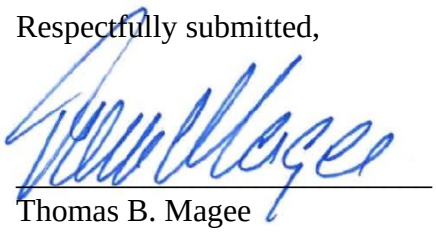
Verizon misstates the holding by pretending the fact pattern was irrelevant. In the FPL Order, the Commission specifically noted that Verizon had terminated the existing agreements but FPL invoked the evergreen clause to freeze rates for existing attachments. Verizon then doubles down by citing the Dominion Order regarding an inability to terminate but ignores the Commission specifically distinguishing on the basis of unique circumstances that involved new agreements and "were not simply extensions of long-standing agreements."

44. "FirstEnergy's negotiations thus confirm Verizon "genuinely lacks the ability to terminate" the existing rates and "obtain a new arrangement" that complies with the law."[45]

Verizon misstates the law because there is no legal requirement that FirstEnergy terminate the existing rates nor that it enter into a new joint use agreement with Verizon. Further, as noted above, FirstEnergy offered Verizon a CLEC agreement that was fully compliant with the law.

[43] *Id.* at 15.
[44] *Id.* at 18.
[45] *Id.* at 19-20.

Respectfully submitted,



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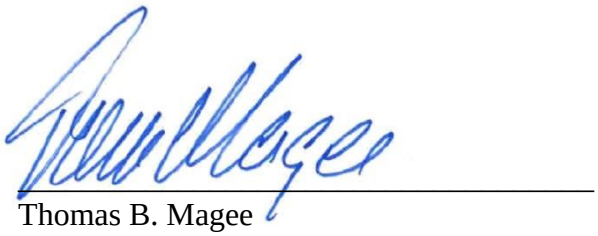
March 13, 2020

RULE 1.721(M) VERIFICATION

I, Thomas B. Magee, as signatory to this submission, hereby verify that I have read this Motion for Leave to File a Response to the Reply filed by Verizon Pennsylvania LLC and Verizon North LLC and, to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.



Thomas B. Magee

CERTIFICATE OF SERVICE

I, Timothy A. Doughty, hereby certify that on this 13th day of March 2020, a true and authorized copy of Metropolitan Edison Company, Pennsylvania Electric Company, and Penn Power Company's Motion for Leave to File a Response to the Reply filed by Verizon Pennsylvania LLC and Verizon North LLC was served on the parties listed below via electronic mail and was filed with the Commission via ECFS and via Hand Delivery (Confidential Version).

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/s/
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