



Agenda Date: 10/11/23
Agenda Item: 8E

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 1st Floor
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

CLEAN ENERGY

IN THE MATTER OF A NEW JERSEY SOLAR)	ORDER ON MOTION FOR
TRANSITION PURSUANT TO P.L. 2018, C.17)	RECONSIDERATION
)	
IN THE MATTER OF THE PETITION OF CANAL ROAD)	DOCKET NO. QO19010068
SOLAR PARTNERS FOR AN EXTENSION OF THE)	
EXPIRATION DATE IN THE TRANSITION INCENTIVE)	
PROGRAM FOR ITS PROJECT AT 701 RANDOLPH)	
ROAD NJSTRE1547265156)	
)	DOCKET NO. QO22070462
IN THE MATTER OF THE PETITION OF CANAL ROAD)	
SOLAR PARTNERS FOR AN EXTENSION OF THE)	
EXPIRATION DATE IN THE TRANSITION INCENTIVE)	
PROGRAM FOR ITS GROUND MOUNT PROJECT AT)	
701 RANDOLPH ROAD NJSTRE1547265757)	DOCKET NO. QO22070471

Parties of Record:

Howard O. Thompson, Esq., Russo Tumulty Nester Thompson & Kelly, LLP, on behalf of Canal Road Solar Partners, LLC

Brian O. Lipman, Esq., Director, New Jersey Division of Rate Counsel

BY THE BOARD:

By Order dated November 9, 2022, the New Jersey Board of Public Utilities (“Board”) denied a series of petitions seeking extensions of time for registration within the Transition Incentive (“TI”) Program.¹ On November 30, 2022, Howard O. Thompson, Esq. filed a Motion for Reconsideration (“Motion”) on behalf of Canal Road Solar Partners, LLC (“Petitioner”) regarding two (2) petitions denied by the November 2022 Order.

BACKGROUND

On May 23, 2018, Governor Murphy signed the Clean Energy Act of 2018, L. 2018, c. 17 (N.J.S.A. 48:3-87.8 *et al.*) (“Clean Energy Act” or “Act”), into law. In pertinent part, the Clean Energy Act directed the Board to adopt rules and regulations closing the Solar Renewable Energy Certificate

¹ In re a New Jersey Solar Transition Pursuant to P.L. 2018, c. 17, BPU Docket Nos. QO19010068 *et al.*, Order dated November 9, 2022 (“November 2022 Order”).

("SREC") Registration Program ("SRP") to new applications once the Board determines that 5.1 percent of the kilowatt-hours of electricity sold in the State of New Jersey ("State") by third party suppliers and basic generation service providers is generated by solar electric power generators connected to the distribution system ("5.1% Milestone"). The Clean Energy Act also required the Board to complete a study evaluating how to modify or replace the SRP to encourage the continued efficient and orderly development of solar renewable energy generating sources throughout the State and to reduce the cost of achieving the State's solar energy goals ("Capstone Report").

On December 6, 2019, the Board established the TI Program to provide a bridge between the legacy SRP and the to-be-developed Successor Solar Incentive ("SuSI") program.² The TI Program Rules, N.J.A.C. 14:8-10.1 *et seq.*, allow eligible projects to receive Transition Renewable Energy Certificates for each megawatt-hour of electricity produced through solar generation. The TI Program portal opened to new applications on May 1, 2020, and, pursuant to Board Order dated January 8, 2020, remained open to new registrations until the establishment of the SuSI Program.³ The TI Program rules do not provide for automatic or administrative extensions to the projects' conditional registration "expiration dates."⁴

By Order dated July 29, 2020, the Board granted projects registered in the TI Program on or before October 30, 2020 an extension of time in which to reach commercial operation through October 30, 2021.⁵ By the July 2020 Order, the Board found that the solar industry was, at that time, adjusting to significant changes caused by both the COVID-19 pandemic and changes in solar incentive programs and that, under those circumstances, waiving the Board's rules to permit additional time for project completion appropriately balanced the needs of the solar industry with the cost to the ratepayers.

By Order dated June 24, 2021, the Board found that the solar industry required further time to adjust to the requirements of the Clean Energy Act and the impacts of the COVID-19 pandemic and granted projects registered in the TI Program on or before the effective date of the June 2021 Order a six (6)-month extension to the deadline established by N.J.A.C. 14:8-10.4.⁶

² In re a New Jersey Solar Transition Pursuant to P.L. 2018, c. 17, BPU Docket No. QO19010068, Order dated December 6, 2019.

³ In re a New Jersey Solar Transition Pursuant to P.L. 2018, c. 17, BPU Docket No. QO19010068, Order dated January 8, 2020 ("January 2020 Order").

⁴ The conditional registration "expiration dates" are also referred to as the registration deadline.

⁵ In re a New Jersey Solar Transition Pursuant to P.L. 2018, c. 17 – Order Providing Extensions to Solar Transition Projects, BPU Docket Nos. QO19010068 and QO20070484, Order dated July 29, 2020 ("July 2020 Order").

⁶ In re a New Jersey Solar Transition Pursuant to P.L. 2018, c. 17 – Order Addressing Requests for Extension for Projects in the Solar Transition Incentive Program, BPU Docket Nos. QO19010068 & QO21060883, Order dated June 24, 2021 ("June 2021 Order").

On July 9, 2021, Governor Murphy signed L. 2021, c. 169 into law, directing the Board to immediately initiate a proceeding to develop and launch the SuSI Program, among other requirements. By Order dated July 28, 2021, the Board announced the closure of the TI Program in anticipation of the opening of the SuSI Program.⁷ By Order dated July 28, 2021, the Board opened the SuSI Program.⁸

By Order dated January 26, 2022, the Board waived N.J.A.C. 14:8-11.4(b) which requires receipt of conditional registration in the Administratively Determined Incentive (“ADI”) Program prior to beginning construction on a solar facility.⁹ By the January 2022 Order the Board permitted projects with a valid TI Program registration and that already commenced construction to apply for the ADI Program.

By Order dated June 8, 2022, the Board granted a conditional extension in the TI Program to ESNJ-KEY-GIBBSTOWN, LLC, subject to a showing that certain specified conditions applied.¹⁰ By the Gibbstown Order, the Board found good cause to grant a conditional extension to the petitioner’s project because the project was electrically and mechanically complete, secured all necessary permits, and was prevented from meeting its TI Program deadline by a unilateral agreement change made by the electric distribution company (“EDC”) to the interconnection requirements. By the Gibbstown Order, the Board further established a process by which petitioners similarly situated may apply for extensions to their TI Program registration, subject to their making a similar showing.

On July 27 and July 29, 2022, the Petitioner filed petitions for extension of the completion deadlines for two (2) projects: a 0.5 megawatt (“MW”) rooftop project (“Rooftop Project”) with registration number NJSTRE1547265156, BPU Docket No. QO22070462 and a 1.5 MW ground mount project (“Ground Mount Project”) with registration number NJSTRE1547265757, BPU Docket No. QO22070471 (collectively, “Projects”). The Projects are located at New Jersey-American Water Company, Inc.’s (“NJAW”) Canal Road Water Treatment Plant in Somerset, New Jersey. The Rooftop Project received TI Program conditional acceptance on July 28, 2021, with an expiration date of July 28, 2022. The Ground Mount Project received TI Program conditional acceptance on July 30, 2021, with an expiration date of July 30, 2022. The Petitioner requested three-month extensions of the deadlines to complete the Projects due to local township permit approval delays and Public Service Electric and Gas Company’s (“PSE&G”) inability to complete building service disconnects during July 2022 due to an unexpected heat wave.

By Order dated August 17, 2022, the Board denied 15 petitioners’ requests to extend the deadlines for their projects in the TI Program as unsupported by the record and inconsistent with

⁷ In re a New Jersey Solar Transition Pursuant to P.L. 2018, c. 17, BPU Docket No. QO19010068, Order dated July 28, 2021 (“SuSI Program Order”).

⁸ In re a Solar Successor Incentive Program Pursuant to P.L. 2018, c. 17, BPU Docket No. QO20020184, Order dated July 28, 2021.

⁹ In re a New Jersey Solar Transition Pursuant to P.L. 2018, c. 17, BPU Docket No. QO19010068, Order dated January 26, 2022 (“January 26 Order”).

¹⁰ In re a New Jersey Solar Transition Pursuant to P.L. 2018, c. 17 – In re Request for an Extension of Time to Complete NJSTRE1545046932 in Transition Incentive Program – 480 South Democrat Road, Gibbstown, NJ ESNJ-KEY-GIBBSTOWN, LLC, BPU Docket Nos. QO19010068 and QO22030156, Order dated June 8, 2022 (“Gibbstown Order”).

the interim nature of the TI Program.¹¹ By the Bulk Denial Order, the Board encouraged the petitioners to withdraw their TI registrations and submit registrations in the ADI Program if unable to complete the projects by their existing TI Program deadlines. Finally, by the Bulk Denial Order, the Board waived N.J.A.C. 14:8-11.4(b) with respect to the projects addressed by the Bulk Denial Order, thereby allowing those projects to commence commercial operation and construction without first obtaining a notice of conditional registration in the ADI Program.

By Order dated August 17, 2022, the Board granted an extension to the registration period for public entity projects, taking into account the longer timelines necessary in contract negotiation and permitting for these types of projects.¹²

By the November 2022 Order, the Board denied an additional 28 petitions for TI Program deadline extensions, including those for the Projects. By the November 2022 Order, the Board encouraged the petitioners to withdraw their TI registrations and submit ADI Program registrations and waived N.J.A.C. 14:8-11.4(b) with respect to those projects.

MOTION FOR RECONSIDERATION

By the Motion, the Petitioner contends that, in the November 2022 Order, the Board failed to appreciate the significance of the arguments made in its initial July 2022 petitions for extension. First, the Petitioner claimed that the Board did not appreciate that governmental approval delays from the Franklin Township Planning Board (“Township”) were unreasonable and not within the control of the Petitioner or its contractor. The Petitioner asserted that municipal site plan approval was delayed for three (3) months, from November 2021 to March 2022, when the Township either had no other matters on its agenda, did not take action on the Projects, or cancelled its meetings altogether. This resulted in a delay of nine (9) months from the time the Township began discussing the projects with the Township in June 2021 to the final, March 2022, approval. The Petitioner noted that this delay parallels the delay considered in the Board’s decision on Formosa Plastics’ motion for an extension which saw a five (5) to six (6)-month lag time between oral and written township approval.¹³ The Petitioner, therefore, argued that the Board should grant its extension.

¹¹ In re a New Jersey Solar Transition Pursuant to P.L. 2018, c. 17, BPU Docket Nos. QO19010068, *et al.*, Order dated August 17, 2022 (“Bulk Denial Order”).

¹² In re a New Jersey Solar Transition Pursuant to P.L. 2018, c. 17, BPU Docket No. QO19010068, Order Granting Extensions to Public Entities Seeking an Incentive Pursuant to the Solar Transition Incentive Program, Order dated August 17, 2022.

¹³ In re Formosa Plastics, U.S.A. – Verified Petition for Emergent Relief to Extend Construction Deadline, BPU Docket No. QO19040444, Order dated July 10, 2019 (“Formosa Plastics”).

Second, the Petitioner argued that the Board did not fully appreciate the significance of the July 2022 heat wave and PSE&G's resultant inability to complete its tie-in work and interconnection shutdown necessary to complete the Petitioner's projects. The Petitioner argued that the heat wave and its effects were unforeseeable and outside their and their contractor's control, and their resultant project delays should not be understood as cause to deny the extension. The Petitioner further argued that significant weather events warrant relief, citing the Board's decision regarding severe winter storms in its April 15, 2015 Order on Nautilus Solar SW BOE, LLC and asserted that the Board ignored precedent set by this Order.¹⁴

Third, the Petitioner argued that the Board failed to appreciate the duty performed by the Petitioner's customer, NJAW, as a regulated public utility and that such public utilities should be granted special deference in considering their requests for "what is needed for the public utility to fulfill its duty to provide safe and reliable service."

Fourth, the Petitioner argued that its projects should, because its customer is a public utility, be treated as near-equivalent to public entity projects and thus be eligible for the public entity waiver granted via the Board's August 17, 2022 Order granting extensions to public entities in the TI Program.

Fifth, the Petitioner argued that the Board's decision to deny a minimal extension is arbitrary, capricious, and unreasonable, and that the rules regulating the TI Program is an unjust creation and/or error of law because the Petitioner's projects were sufficiently advanced to the point of near-completion and the alternative offered by the Board falls short of reasonable.

Sixth, the Petitioner argued that "the underlying theory of the [November 2022 Order] – i.e. that no regulation was created or continued to allow for extensions of the commercial operations deadline – is an unjust creation and/or error of law and retroactive rulemaking," denying reasonable project extensions meant to reduce costs on a "post-facto basis." The Petitioner noted that the TI Program was designed to follow the requirements of the predecessor program and that it is "too convenient" for the Board to assert that no TI Program extensions should be granted on an equitable basis. The Petitioner noted that this is especially salient because the ADI Program allows the administrator to grant a six-month extension on a case-by-case basis, thus showing an arbitrary inconsistency in administration from program-to-program. The Petitioner additionally noted that the opportunity to register in the SuSI Program imposes a significant penalty in the form of lost revenue, especially when the delays were out of the Petitioner's control, and that this ultimately imposes a penalty on New Jersey ratepayers because the Petitioner's projects sought to cut costs for a regulated public utility.

Finally, the Petitioner argued that the two (2) solar projects were sized such that their co-location, or the Ground Mount Project's size of 6.15 MW alone, would be too large to fit within the ADI Program's 5 MW project size cap. As such, the Petitioner argued that it has no options other than the TI program to complete the Projects.

¹⁴ In re Nautilus Solar SW, BOE, LLC for an Extension of a Solar Renewable Energy Certificate (SREC) Purchase and Sale Agreement Regarding Sussex Wantage NJ Board of Education (SRP-04900) with Jersey Central Power and Light, BPU Docket No. EO13020078V, Order dated April 15, 2015.

DISCUSSION AND FINDINGS

The Board has long supported New Jersey's solar industry. It endeavors, at all times, to support the industry's continued growth while at the same time minimizing the costs to ratepayers to the greatest extent possible. As a part of pursuing these twin goals, the TI Program rules and the timelines contained therein were designed to provide a smooth transition to the SuSI Program. As such, the TI Program was designed to be a limited bridge between the SRP and the SuSI Program. N.J.A.C. 14:8-10.1.

Following extensive review of the Motion, the underlying petitions, and Staff's prior recommendations, the Board **HEREBY FINDS** that nothing in the Petitioner's Motion requires the Board to modify or otherwise reconsider its decision. A motion for reconsideration requires the moving party to allege "errors of law or fact" that were relied upon by the Board in rendering its decision. N.J.A.C. 14:1-8.6(a)(1). Generally, a party should not seek reconsideration based upon mere dissatisfaction with a decision. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis"; or (2) it is obvious that the finder of fact did not "consider, or failed to appreciate, the significance of probative, competent evidence." Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the action was arbitrary, capricious, or unreasonable. D'Atria, 242 N.J. Super. at 401. However, this Board will not modify an Order in the absence of a showing that the Board's action constituted an injustice or that the Board misunderstood or failed to take note of a significant element of fact or law. In re the Petition of Public Service Electric & Gas Company for Approval of its Clean Energy Future – Energy Efficiency ("CEF-EE") Program on a Regulated Basis, BPU Docket Nos. GO18101112 and EO18101113, Order dated November 13, 2019; In re Michael Manis and Manis Lighting, LLC—New Jersey Clean Energy Program Renewable Energy Incentive Program, BPU Docket No. QS14040316, Order dated April 15, 2015.

Absent a legislative restriction, administrative agencies have the inherent power to reopen or to modify and rehear prior decisions, e.g., In re Trantino Parole Application, 89 N.J. 347, 364 (1982). As to the Board, N.J.S.A. 48:2-40 provides that the Board may, at any time, revoke or modify its orders. See Twp. of Deptford v. Woodbury Terrace Sewerage Corp., 54 N.J. 418, 425 (1969); see also N.J.A.C. 14:1-8.6(b). Further, an administrative agency may invoke its inherent power to rehear a matter "to serve the ends of essential justice and the policy of the law." Handlon v. Town of Belleville, 4 N.J. 99, 106-107 (1950). In addition, administrative agencies may invoke the power to reappraise and modify their prior determinations "to protect the public interest and thereby to serve the ends of essential justice." Trap Rock Industries, Inc. v. Sagner, 133 N.J. Super. 99, 109 (App. Div. 1975).

As explained in the November 2022 Order, the Board is mindful that its decisions have a public policy impact. It is in the nature of the evolving energy policy that situations change and require reevaluation. Under these circumstances, the Board considered the Petitioner's positions and, in so ruling, the Board emphasizes that it is not legally compelled to reconsider mere re-arguments, but it has exercised its discretion to consider all arguments on their merits.

Pursuant to N.J.A.C. 14:8-10.4, the Petitioner must have commenced commercial operations on its projects and submitted a post-construction certification package prior to the expiration of its conditional registrations. Pursuant to N.J.A.C. 14:8-10.4(f), the Petitioner's projects contain a 12-month registration expiration, with no provision for automatic or administrative extensions to the deadlines.¹⁵

Here, the Petitioner did not show that the Board made any error of fact or law in in the November 2022 Order or otherwise failed to appreciate the significance of probative, competent evidence. The Petitioner contended that it suffered an unforeseen nine (9)-month permitting delay preventing the Petitioner from beginning construction on the Projects. However, the Petitioner offered no evidence that it was unable to either account for permitting delays or otherwise pursue permits prior to its application for registration in the TI program. Additionally, the Petitioner argued that, because its delay was "completely parallel to the delay" in Formosa Plastics for which an extension was granted, it should receive a similar extension. However, Formosa Plastics sought an extension of time to complete a project in the SRP, which permitted extensions of time to complete under an SREC financing contract pursuant to a Board-approved stipulation. Here, the Petitioner requested an extension of time within the TI Program, for which there exists no such provision requiring the Board to waive its rules. As such, the Board **FINDS** that the Petitioner's Motion is not akin to the extension in Formosa Plastics and the delay does not warrant an extension under the TI Program. As such, the Board **FURTHER FINDS** Petitioner's argument that Board erred by inadequately considering the Township's delayed approval fails.

The Petitioner further argued that the Board failed to recognize the significance of the July 2022 heat wave preventing PSE&G from performing its interconnect shutdown. However, July heat waves are neither unprecedented nor unplanned for, as evidenced by PSE&G's policy regarding labor shutdowns during heat waves. As such, the Board **FURTHER FINDS** that the argument that the Board failed to fully account for this delay also fails.

The Petitioner further argued that the Board failed to adequately consider that its projects should be treated as "near equivalent to public entity projects" since NJAW, its customer, is a regulated public utility. However, classifying NJAW as a public entity would stretch the definition of public entity, as defined in the ADI Program rules at N.J.A.C. 14:8-11.2, beyond reason. N.J.A.C. 14:8-11.2 defines a public entity as "a customer that is a State entity, school district, county, county agency, county authority, municipality, municipal agency, municipal authority, or New Jersey public college or university." NJAW does not belong to any of the aforementioned classes and therefore does not qualify for an extension for public entity projects. As such, Board **FURTHER FINDS** that the argument that the Board should classify NJAW and the Petitioner as a "near equivalent" to a public entity and thus grant them greater deference than other applicants fails.

Lastly, the Petitioner argued that the Board failed to adequately consider that its projects would exceed the ADI Program size limit and, therefore, could only continue under the TI Program and that registration in the SuSI program would cause the Petitioner to see a significant loss in profit. While the Board is sympathetic to the Petitioner's position, expectation of a future denial of entry into the ADI program is inadequate justification for an extension of time to complete a project under the TI Program, especially because the instant projects are not public entity projects. Furthermore, lost revenue does not constitute an unforeseen event warranting a full waiver of the

¹⁵ The conditional registration expiration dates vary based on the type of project, with Community Solar and Subsection (t) projects having different timelines, as well as when the project registered in the TI Program relative to the 5.1% Milestone. See N.J.A.C. 14:8-10.4.

Board's rules. As such, the Board **FURTHER FINDS** that the Petitioner's argument that its programs would exceed the ADI Program size limit fails.

All stakeholders knew or should have known that the Board intended the TI Program as a temporary bridge between the legacy SRP and the SuSI program. As such, they either knew or should have known that a one-year timeframe imposed by the TI Program would be challenging to meet. The interim nature of the TI Program has been consistently communicated since it was first proposed in 2019 and is defined in the TI Program rules. Those rules intentionally do not provide for extensions. The Petitioner registered in the TI Program with the knowledge that this program provided one year to achieve commercial operation and did not provide for any automatic extensions.

Accordingly, having carefully considered the Motion, the underlying petitions, and Staff's recommendations, the Board **FURTHER FINDS** that the Petitioner was on notice of time limitations in the TI Program rules at the time of their registrations and that the TI Program rules do not provide for extensions. As such, the Board **HEREBY DENIES** the Petitioner's Motion.

Furthermore, the ADI Program opened immediately after the TI Program closed. The ADI Program, unlike the TI Program, does provide an opportunity for a six-month extension. Incentive levels in the ADI Program were designed to be appropriate for projects completed in the timeframes requested by the Petitioner here without the expectation of the extension of the federal investment tax credit that was enacted in the Inflation Reduction Act of 2022. Additionally, the requirements for project completion in the ADI Program offer an opportunity for a six-month extension if registrants require more than one year to complete their respective projects. Larger projects akin to those proposed by the Petitioner have an avenue to receive incentives through the second prong of the SuSI Program: the Competitive Solar Incentive ("CSI") Program.¹⁶

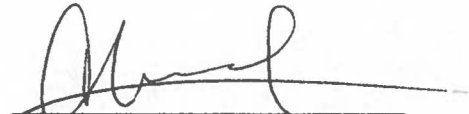
The Board **FINDS** that with the establishment of the SuSI Program, the circumstances faced by the Petitioner here are not equivalent to those prior registrants granted relief by the July 2020 and June 2021 Orders. Therefore, the Board **FINDS** the Petitioner's arguments that it should be entitled to relief now based on relief given to other projects by virtue of the July 2020 or June 2021 Orders are misplaced and unpersuasive. For the reasons stated above, the Board **HEREBY DENIES** the request for reconsideration of the November 2022 Order. The Board reiterates that the SuSI Program is open and accessible to these projects and **FINDS** that the SuSI Program provides the Petitioner with an alternative path to project completion.

¹⁶ In re Competitive Solar Incentive ("CSI") Program Pursuant to P.L. 2021, c. 169, BPU Docket No. QO21101186, Order dated December 7, 2022.

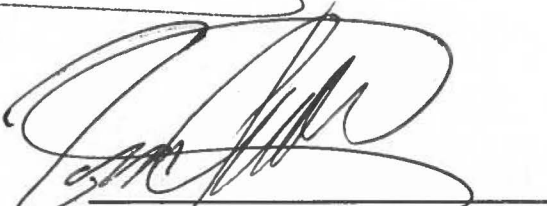
The effective date of this Order is October 18, 2023.


DATED: October 11, 2023

BOARD OF PUBLIC UTILITIES
BY:


CHRISTINE GUHL-SADOVY
PRESIDENT


MARY-ANNA HOLDEN
COMMISSIONER


DR. ZENON CHRISTODOULOU
COMMISSIONER


MARIAN ABDOU
COMMISSIONER

ATTEST:


SHERRIL GOLDEN
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities.

IN THE MATTER OF A NEW JERSEY SOLAR TRANSITION PURSUANT TO P.L. 2018, C.17 - DOCKET NO. QO19010068

IN THE MATTER OF THE PETITION OF CANAL ROAD SOLAR PARTNERS FOR AN EXTENSION OF THE EXPIRATION DATE IN THE TRANSITION INCENTIVE PROGRAM FOR ITS PROJECT AT 701 RANDOLPH ROAD NJSTRE1547265156 – DOCKET NO. QO220704462

IN THE MATTER OF THE PETITION OF CANAL ROAD SOLAR PARTNERS FOR AN EXTENSION OF THE EXPIRATION DATE IN THE TRANSITION INCENTIVE PROGRAM FOR ITS GROUND MOUNT PROJECT AT 701 RANDOLPH ROAD NJSTRE1547265757 – DOCKET NO. QO22070471

SERVICE LIST

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