

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1631

In the Matter of

PUBLIC UTILITY COMMISSION OF
OREGON,

Petition for Partial Waiver of OAR 860-
089-0500(2)

NORTHWEST & INTERMOUNTAIN
POWER PRODUCERS COALITION
COMMENTS ON PACIFICORP
D/B/A/ PACIFIC POWER'S
PETITION FOR PARTIAL WAIVER

I. INTRODUCTION

The Northwest & Intermountain Power Producers Coalition (“NIPPC”) respectfully submits these Comments for consideration by the Oregon Public Utility Commission (the “Commission” or “OPUC”) in the matter of PacifiCorp, d/b/a Pacific Power’s (“PacifiCorp’s”) Petition for Partial Waiver of OAR 860-089-0500(2). On December 9, 2020, PacifiCorp submitted its petition, specifically so it could begin negotiating power purchase agreements (“PPAs”) with developers on its final 2020 All-Source Request for Proposal (“RFP”) shortlist before PacifiCorp asks the Commission to acknowledge the bids from the shortlist.¹ NIPPC recommends that the Commission reject the petition for the reasons explained in the Comments below. As explained below, NIPPC recommends that in the alternative, the Commission consider providing PacifiCorp and bidders additional time to negotiate.

¹ Petition for a Partial Waiver of OAR 860-089-0500(2) at 1 [hereinafter Petition].

First, these comments provide a comprehensive historical background regarding the utility requirement to obtain Commission acknowledgement of its shortlist before beginning substantive negotiations with any individual bidder. The context for why the shortlist acknowledgement rule exists will help the Commission understand that the rule is an important part of its overall competitive procurement policies, which were designed to mitigate against utility bias toward resource ownership. This historical context is also necessary to understand that the Commission adopted the rule in lieu of *other* proposed changes to the competitive procurement process. When the Commission originally adopted the shortlist acknowledgement guideline (over the utilities' objection), the Commission had already rejected several NIPPC proposals within the same docket to directly mitigate against utility bias. Given that the Commission did not adopt other, more rigorous ratepayer and market participant protections, the Commission should not now waive the shortlist acknowledgement rule.

Second, the purpose of shortlist acknowledgement is simple. To prevent utility bias, the Commission found it appropriate to review a utility's RFP shortlist to ensure that the utility did not act in a biased manner in selecting its shortlist. Specifically, the rules require the Commission to make a finding that the utility's selected shortlist appears reasonable and was determined in a manner consistent with the competitive procurement rules before beginning negotiations with those bidders. Therefore, a utility should not begin or come close to finalizing negotiations with a shortlist bidders when the Commission has yet to analyze the shortlist to determine if it is reasonable and selected consistent with the rules.

Third, these comments explain why PacifiCorp has not met its burden of proof to demonstrate that there is good cause to waive this rule. In sum, PacifiCorp did not address the good cause standard in the context of waiving the shortlist acknowledgement rule, nor did it provide a reason to waive the rule consistent with the standard in this context. Thus, the Commission should deny PacifiCorp's petition.

NIPPC notes that, in principle, it is generally beneficial to both utilities and independent power producers ("IPPs") to have more time to negotiate a contract. For an IPP, short deadlines can make negotiations with a monopsony utility more difficult, and they can provide more leverage to the utility. More time can also provide an opportunity to resolve issues. The potential value to all parties of providing ample time for negotiations deserves some consideration. Therefore, in the alternative to granting PacifiCorp's waiver, NIPPC recommends that , the Commission consider providing PacifiCorp and bidders additional time to negotiate by: 1) shortening the current schedule and having the Commission issue its acknowledgement order earlier; and/or 2) extending the dates at the back end of the RFP to allow additional time for negotiations, to the extent such time would still align with taking advantage of federal tax incentives and similar external constraints. NIPPC has not discussed these proposals with PacifiCorp, Staff, and other stakeholders and would welcome a discussion regarding their merit and feasibility.

Through these comments, NIPPC is not opining on the reasonableness of the RFP or any particular bids. NIPPC submits these comments to assert that the Commission should not change or waive core substantive aspects of its competitive procurement policies or rules, absent extraordinary circumstances creating good cause to do so.

Without good cause, PacifiCorp’s proposal to waive this rule belongs in a generic proceeding, not this RFP.

II. BACKGROUND

This policy requiring a utility to ask the Commission to acknowledge its final shortlist of RFP bidders was promulgated in 2014, during a Commission investigation in Docket No. UM 1182. UM 1182 was opened in 2004 after NIPPC petitioned the Commission to open an investigation into the utilities competitive bidding process.² After the Commission adopted its original competitive bidding guidelines, the Commission investigated the potential bias in utility resource acquirement favoring utility-owned generation resources over PPAs.³ This ownership vs. buy investigation was in a separate docket (UM 1276), in which the Commission had found that “bias exists due to the nature of ratemaking, which provides a utility the opportunity to earn return on plant investments but not on PPAs.”⁴ However, UM 1276 did not investigate the scope of that bias, particularly in the context of the Commission’s competitive bidding guidelines.⁵ As a result, in 2011, the Commission re-opened UM 1182 to examine the bias’s effect on the competitive bidding process and develop a comprehensive accounting of the risks related to the utilities’ self-bid bias when utilities issue an RFP.⁶

² *In re Pub. Util. Comm’n of Or. Investigation Regarding Competitive Bidding*, Docket No. UM 1182, Initial Application (Dec. 3, 2004).

³ Docket No. UM 1182, Order No. 13-204 at 1 (June 10, 2013).

⁴ *Id.* at 1-2. (referring to *In re an Investigation to Address Potential Build-vs.-Buy Bias*, Docket No. UM 1276, Order No. 11-001 at 5 (Jan. 3, 2011)).

⁵ *Id.* at 2.

⁶ *Id.*

1. The Commission Did Not Adopt NIPPC’s Recommendation to Mitigate Utility Bias Through Bid Adders

UM 1182 included numerous phases that revised the competitive bidding guidelines several times over the decade in which the proceeding was open. In 2011-2012, the investigation focused on the comparison of utility-owned resources and PPAs. The parties involved in the investigation, which consisted of the utilities, trade associations, customer advocates, public interest groups, and Commission Staff, participated in a workshop on November 18, 2011, where they collectively identified “12 potential comparative risk items for both utility benchmark resources and PPAs.”⁷ That list of risks included:

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|----------------------------------|--|
| 1. Construction Cost Over-Runs | 7. Counterparty Risk |
| 2. Environmental Regulatory Risk | 8. Changes in Allowed Return on Equity |
| 3. Heat Rate Degradation | 9. Changes in Forced Outage Rates |
| 4. Increases in Fixed O&M Costs | 10. Verify Output, Heat Rate and Power Curve |
| 5. Wind Capacity Factor Error | 11. End Effect, and |
| 6. Capital Additions | 12. Construction Delays ⁸ |

At a later workshop, Staff asked all parties to reduce the list to two or three items to initially address and the parties submitted comments with their recommendations as to what to the Commission should address first.⁹ NIPPC initially opposed reducing the list of its concerns, but after it became clear that the Commission would have a two-stage investigation, NIPPC suggested that the Commission initially consider cost overruns (Issue 1), heat rate degradation (Issue 3), the increases in fixed O&M Costs (Issue 4), and

⁷ Docket No. UM 1182, Order No. 13-204 at 2; Docket No. UM 1182, Ruling at 2-3 (May 30, 2012); Docket No. UM 1182, NIPPC Comments at 3 (Mar. 19, 2012).

⁸ Docket No. UM 1182, Order No. 13-204 at 2.

⁹ Docket No. UM 1182, Ruling at 3 (May 30, 2012).

the wind capacity factor error (Issue 5).¹⁰ The Administrative Law Judge initially only selected three items to analyze, but after several other stages of the proceeding, including a request for certification from NIPPC, the Commission eventually asked parties to provide testimony on Construction Cost Over-Runs, Heat Rate Degradation, Wind Capacity Factor Error, and Counterparty Risk.¹¹ As a party to the investigation, NIPPC submitted testimony on those risk factors.

Overall, NIPPC proposed that the Commission “adopt predetermined, quantitative generic bid adjustments to proposed utility-owned resources” to account for the four risk factors the Commission asked the parties to provide evidence on.¹² NIPPC explained that using bid adders would level the playing field for all bidders and ensure that any utility self-build bid properly accounted for cost and performance contingencies that independent power producer (“IPP”) bidders had to incorporate into their bids.¹³ Furthermore, under NIPPC’s proposal, an independent evaluator would be “required to include bid adders to address the risk of construction cost over-runs, heat rate degradation, and lower wind capacity factors.”¹⁴ The adders would be part of the price evaluation for any bids resulting in utility ownership of a plant “unless the utility can prove that its self-build bid properly mitigates the risk addressed by the adder.”¹⁵ The Citizen’s Utility Board (“CUB”) supported some of NIPPC’s proposals, but concluded

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Id.

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Docket No. UM 1182, Order No. 13-204 at 2.

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Id. at 3.

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Id.

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Id.

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Id.

overall that an IPP should be required to demonstrate whether its PPA bid contains any terms that could mitigate risks created by the adder. The utilities and Commission Staff opposed the proposed adders, arguing that introducing the bid adjustments would introduce, as opposed to remove, any bias in the bid selections process, which could result in the utilities acquiring high-cost resources.¹⁶

In rejecting NIPPC's specific proposals, the Commission first explained that because the comparative risks associated with different resource options are generally dependent on the facts specific to each particular bid, we generally focus on improvements that are qualitative in nature. Although we will also consider quantitative changes, such as the use of generic bid adjustments, we would require persuasive evidence that the proposed adder accurately captures the risk addressed by the adder.¹⁷

Applying that qualitative framework to the parties' proposals to mitigate risk from construction cost over-runs, the Commission declined NIPPC's proposal to use a generic bid adder, finding that the proposal "would apply bid adders to all benchmark resources equally, regardless of the facts presented by each bid."¹⁸ The Commission concluded that using generic bid adders would only distort the independent evaluators' comparative analysis. In regards to the generic bid adders for heat rate degradation, wind capacity factor errors, and counter party risks, the Commission similarly rejected the generic bid adder proposal; citing the inability to qualitatively evaluate the individual characteristics of each resource and the inability to accurately quantify bid adders for forecasted wind capacity incentives.¹⁹ Though the Commission declined to adopt NIPPC's generic bid

¹⁶ *Id.* at 4.

¹⁷ *Id.* at 9.

¹⁸ *Id.* at 9.

¹⁹ *Id.* at 10.

adder proposal, the Commission acknowledged that there were still eight remaining risk items to evaluate in the next investigation phase.²⁰

In the next phase of the investigation, the Commission again decided not to explicitly account for the remaining risk factors in the competitive bidding process. Instead, the Commission ordered the IE to provide analysis on those risk factors in a qualitative manner so the Commissioners could consider those risks upon RFP acknowledgement. While additional analysis by the IE was an improvement, out of the items at issue in the proceeding to investigate and mitigate against utility bias, the Commission made no substantive changes to specifically address any of the risk factors.

2. The Commission Adopted NIPPC’s Proposal for Shortlist Acknowledgement Instead of Other Changes to the Competitive Bidding Process

The Commission did eventually adopt one of NIPPC’s proposals, which has significantly improved Oregon’s competitive procurement process. In the next and final phase of investigating risk factors within the existing competitive bidding guidelines, the Commission asked the parties to provide testimony on eight remaining factors still needing evaluation.²¹ NIPPC, the utilities (PacifiCorp, Portland General Electric Company (“PGE”), and Idaho Power Company (“Idaho Power”)), and Commission Staff all submitted comments on the risk factors.²²

NIPPC’s Comments made two recommendations on how to improve the RFP process. It first recommended requiring “*mandatory Commission acknowledgement of*

²⁰ *Id.* at 11.

²¹ Docket No. UM 1182, Order No. 14-149 at 2.

²² *Id.* at 2.

the utilities' shortlists,” or alternatively, it recommended requiring “utilities to procure certain resources through RFPs that do not include a utility ownership option and where IPPs will exclusively compete with one another.”²³ Regarding the first recommendation, NIPPC explained:

that by presenting the shortlist to the Commission, the utilities would provide transparency into the process without unduly constraining utility management. Acknowledgement would also provide the Commission with important information to assess that the RFP will, in fact, deliver least cost, least risk resources to Oregon customers.²⁴

It is important for the Commission to acknowledge the shortlist before the utility begins negotiations with potential bidders to ensure that the utility only engages in substantive negotiations with bidders that Commission has determined are reasonable.

Both Commission Staff and the utilities responded by stating that the first recommendation regarding Commission acknowledgement was outside of the docket’s scope.²⁵ That said, Staff believed that NIPPC had suggested a reasonable change.²⁶ Staff recognized that while acknowledgement was not mandatory in the past, Staff “strongly supported acknowledgement of the shortlist of bidders.”²⁷

PacifiCorp argued that there was no need to change the requirement for Commission acknowledgement from discretionary to mandatory. Notably, PacifiCorp

²³ *Id.* at 3 (emphasis added) (The Commission accepted and adopted the first recommendation and rejected the second).

²⁴ *Id.* at 13 (NIPPC cited a PGE thermal RFP “as a negative example that could have been improved with shortlist acknowledgement, and Pacific Power’s previous RFP as a positive example where shortlist acknowledgement provided transparency.”).

²⁵ *Id.* at 12.

²⁶ *Id.* at 13.

²⁷ *Id.*

explained that “utilities need the flexibility not to seek acknowledgement of the shortlist when it is in customers’ best interests, for example due to timing.”²⁸

The Commission found that making Commission acknowledgement of the RFP shortlist mandatory instead of discretionary was a reasonable change that furthered the goal of the docket.²⁹ Thus, the Commission rejected PacifiCorp’s arguments. More specifically, the Commission explained that adopting this policy would

promote transparency in the utility procurement process by providing an established, upfront opportunity for parties and bidders to voice concerns with the bidding process[, which] will allow the Commission to timely review the IE’s closing report and address any issues the IE raises with the bidding process or the shortlist. We expect[ed] this additional oversight of the shortlist [to] address the impact of the bias throughout the RFP process, ultimately benefiting ratepayers by helping ensure the utility selects the most competitive bids.³⁰

The Commission addressed the utilities concerns regarding the effect this rule would have on the negotiation process by explaining that it:

believe[d] that requiring mandatory acknowledgement [would] provide incremental improvements to the RFP process *without causing undue burdens to the utility’s ability to conduct negotiations with top bidders...*[.] [C]ontrary to the utilities’ concerns over shortlist acknowledgement causing delay, [the Commission believed] that mandatory acknowledgement [would] provide a more streamlined and defined process. The certainty of mandatory acknowledgement should reduce instances when the Commission requires acknowledgement on a case-by-case basis, or holds additional proceedings to address concerns after the RFP process has concluded.³¹

28 *Id.*

29 *Id.* at 14.

30 *Id.*

31 *Id.* (emphasis added).

Concerned about the acknowledgement requirement causing delays, the Commission also modified one of its guidelines to allow for expedited review of a utility's shortlist for acknowledgement.³² Under the expedited review, the Commission would consider the shortlist at a public meeting within 60 days of receiving the utility's list.³³ Furthermore, if a utility were to find that even the expedited acknowledgement still interfered with its negotiation deadlines, the Commission agreed to allow the utility to petition to waive this acknowledgement requirement if the utility can show good cause.³⁴ To show good cause, the utility would need to show in its waiver that "the time required for a shortlist acknowledgement will preclude the ability to successfully complete negotiations with a top bidder, thereby causing harm to its ratepayers."³⁵

3. The Commission Included the Shortlist Acknowledgement Requirement into the Current Administrative Rules

These Commission guidelines were adopted in 2014, but the Commission acknowledgement rule was finalized as an OAR in 2018.³⁶ PacifiCorp had an opportunity the recent rulemaking to request that the Commission revise the guidelines or adopt a rule that changed the shortlist acknowledgement process, but it declined to do so.

When the Commission opened docket AR 600 as a rulemaking, parties were invited to submit comments on policy issues regarding allowances for diverse ownership of renewable energy resources. The Joint Utilities (PacifiCorp, PGE, and Idaho Power)

³² *Id.*

³³ *Id.*; OAR 860-089-0500(4).

³⁴ *Id.*

³⁵ *Id.* at 14-15.

³⁶ *In Re Rulemaking Regarding Allowances for Diverse Ownerships pf Renewable Energy Resources*, Docket No. AR 600, Order No. 18-324 (Aug. 30, 2018).

argued that the goals of the docket would be “best achieved by adopting rules that establish and ensure a process that is non-discriminatory, fair and transparent.”³⁷ The Joint Utilities went on to explain that the Commission has already promoted fairness and transparency, in part, by adopting “a requirement that the utilities seek acknowledgement of their final shortlist of bidders, which it noted would improve transparency and provide a more streamlined and defined process for bidders.”³⁸

Staff also recommended promulgating a rule formalizing the acknowledgement requirement, when it included the requirement in its proposed draft rule.³⁹ The Joint Utilities commented on Staff’s decision to adopt the rule, but they did not object to adopting the requirement.⁴⁰ They only asked that the Commission remove the word “generally” from the portion of the rule that stated “The Commission will *generally* issue a decision on the request for acknowledgement within 60 days of receipt of the electric company's filing.”⁴¹ The utilities wanted to ensure that there would be expedited review of the shortlist to prevent delays.⁴²

In the end, the Commission declined to remove the word “generally” from the rule, adopting it as is and noting that “the entities representing bidders have not objected

³⁷ *In re Rulemaking Regarding Allowances for Diverse Ownership of Renewable Energy Resources*, AR 600, Joint Utilities’ Reply Comments on Policy Issues at 3 (Feb 26, 2018).

³⁸ *Id.* at 4.

³⁹ Docket No. AR 600, Staff Report, Att. 1 at 9 (Apr. 5, 2018).

⁴⁰ Docket No. AR 600, Joint Utilities’ Rulemaking Comments, Att. 1 at 16-17 (May 14, 2018).

⁴¹ *Id.* at 17 (emphasis added).

⁴² *Id.*

to this provision.”⁴³ That said, the Commission recognized “that there may be circumstances where it is appropriate to waive this requirement; such as where a shortlist is unusually limited.”⁴⁴

As these rules were formally adopted in 2018, this will be the first shortlist application that PacifiCorp submits to for Commission acknowledgement as part of the new competitive procurement rules.

III. COMMENTS

A. **The Competitive Bidding Rules Require that Acknowledgement Occur Before Negotiations with Bidders**

The Commission rules require that a utility seek acknowledgement of its shortlist, and that the “final shortlist of bid responses appears reasonable at the time of acknowledgement and was determined in a manner consistent with the rules in this division.”⁴⁵ Thus, the Commission first determines if the bidder list is reasonable and then determines if the utility conducted the RFP process consistent with the rules. The rules specifically require the electric company to “request that the Commission acknowledge the electric company’s final shortlist of bids *before* it may begin negotiations.”⁴⁶ Therefore, a utility can engage and negotiate with the bidders *only after* the Commission has determined that the list is reasonable and the process was fair. This process logically ensures that the utility does not begin negotiations with bidders that the Commission believes have been inappropriately selected to the shortlist, or if the

⁴³ Docket No. AR 600, Order No. 18-34 at 14 (Aug. 30, 2018).

⁴⁴ *Id.*

⁴⁵ OAR 860-089-0500(1).

⁴⁶ OAR 860-089-0500(2) (emphasis added).

Commission has found that the RFP was determined in a manner inconsistent with the rules.

B. PacifiCorp Has Not Shown Good Cause to Waive OAR 860-089-0500(2)

PacifiCorp’s petition does not meet the standard for showing good cause, which must be met before the Commission can waive the mandatory shortlist acknowledgement rule. Per Commission Order No. 14-149, to show good cause, a utility’s waiver must show that the “time required for a shortlist acknowledgement will preclude the ability to successfully complete negotiations with a top bidder, causing harm to its ratepayers.”⁴⁷ Per Commission Order No. 18-234, waiver may also be appropriate where a “shortlist is unusually limited.”⁴⁸

In its petition, PacifiCorp explains its position regarding why good cause has allegedly be shown:

Good cause exists to grant PacifiCorp’s request for partial waiver of OAR 860-089-0500(2) because allowing early negotiations can reduce months of negotiation time off the backend of the RFP process for those bidders included in the final shortlist; thereby, allowing bidders to move forward on development and financing, bringing these projects online sooner to the benefit of PacifiCorp customers.⁴⁹

First, PacifiCorp does not provide any support or explanation for what the “good cause” standard is in the context of waiving the requirement that a utility obtain short list acknowledgement prior to negotiating with the bidder. PacifiCorp’s explanation appears to assume that the good cause standard requires a showing of a benefit to ratepayers,

⁴⁷ Docket No. UM 1182, Order No. 14-149 at 14-15.

⁴⁸ Docket No. AR 600, Order No. 18-34 at 14.

⁴⁹ Petition at 4.

when the standard actually requires a utility to show why denying the petition would harm ratepayers.

Second, PacifiCorp's petition does not provide any explanation as to how denying this petition would harm its ratepayers, it does not explain how denying this petition would preclude it from completing negotiations with a top bidder, and it does not claim that its shortlist is unusually limited. Therefore, PacifiCorp has not shown that good cause exists for the Commission to waive the OAR requiring the Commission to acknowledge a utility's shortlist prior to beginning the PPA negotiation process.

C. The Commission Should Follow the Decision It Made in Its Rulemaking to Prevent Utility Bias in the Competitive Bidding Process

As this is PacifiCorp's first RFP process after the Commission's adoption of its competitive bidding rules in AR 600, and the first time PacifiCorp must have its shortlist acknowledged as part of those rules. Recall that the Commission adopted this requirement to

promote transparency in the utility procurement process by providing an established, upfront opportunity for parties and bidders to voice concerns with the bidding process[, which] will allow the Commission to timely review the IE's closing report and address any issues the IE raises with the bidding process or the shortlist. We expect[ed] this additional oversight of the shortlist [to] address the impact of the bias throughout the RFP process, ultimately benefiting ratepayers by helping ensure the utility selects the most competitive bids.⁵⁰

If the Commission approves PacifiCorp's petition now, PacifiCorp will start negotiating roughly six months before the Commission has been able to review the IE's

⁵⁰ Docket No. UM 1182, Order No. 14-149 at 14.

closing report, which is the opposite of what the Commission intended to occur when it approved the mandatory shortlist acknowledgement in UM 1182 and AR 600.

PacifiCorp's only objections to this mandate in UM 1182 and AR 600 were concerns regarding its ability to timely negotiate PPAs. The Commission considered its concerns and adopted an expedited schedule for approval (generally 60 days from shortlist submission to acknowledgement) to prevent any negative impacts on negotiations.

In PacifiCorp's 2020 RFP process, the Commission has scheduled a public meeting for consideration of acknowledgement 90 days from the date PacifiCorp must submit its shortlist for acknowledgement in compliance with this rule.⁵¹ Thus, PacifiCorp has skipped right over simply requesting the expedited 60-day schedule, and moved straight to requesting that the rule be waived entirely. PacifiCorp's petition does not explain why a 60-day expedited schedule would be an insufficient option for its PPA negotiations with its shortlist bidders.

Because this is the first time that PacifiCorp will apply to have to its RFP shortlist acknowledged by the Commission and PacifiCorp has not provided an explanation as to it why it must begin negotiations before submitting its shortlist, the Commission should follow its reasoning in UM 1182 and its decision to formalize the requirement in AR 600, and require PacifiCorp to submit its RFP shortlist for Commission acknowledgement before PacifiCorp can engage PPA negotiations with any bidders on that list.

⁵¹ *In re PacifiCorp Application for Approval of 2020 All-Source RFP*, Docket No. UM 2059, Staff's Partial Schedule for the Remainder of the RFP Proceeding at 1 (Aug. 11, 2020).

IV. CONCLUSION

For these reasons described above the Commission should deny PacifiCorp's Petition for Partial Waiver of OAR 860-089-0500(2) and adopt NIPPC's alternative recommendation that the Commission consider other options to provide PacifiCorp bidders additional time to negotiate their contracts.

Dated this 21st day of January 2021.

Respectfully submitted,

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