BEFORE THE

PUBLIC UTILITY COMMISSION OF OREGON

IN PACIFICORP, dba PACIFIC POWER's Application to Reduce the Qualifying Facility Contract Term and Lower the Qualifying Facility Standard Contract Eligibility Cap	CASE NO. UM 1734 JOINT MOTION TO DISMISS OF THE COMMUNITY RENEWABLE ENERGY ASSOCIATION AND THE RENEWABLE ENERGY COALITION **REQUEST FOR EXPEDITED TREATMENT**

I. INTRODUCTION AND SUMMARY

Pursuant to OAR 860-001-420(3), the Community Renewable Energy Association ("CREA") and the Renewable Energy Coalition ("REC") (collectively "Movants") move the Public Utility Commission of Oregon ("OPUC" or "Commission") to dismiss PacifiCorp's Application to Reduce the Qualifying Facility Contract Term and Lower the Qualifying Facility Standard Contract Eligibility Cap ("Application").

PacifiCorp effectively asks for an administrative repeal of the must-buy provisions of the Public Utility Regulatory Policies Act of 1978 ("PURPA") and associated state law by shortening the contract term to a length that would be far too short to ever compensate Oregon qualifying facilities ("QF") for capacity or support financing to construct a new QF. PacifiCorp further seeks to undermine the State's attempts to promote favorable policies for renewable resources under 20 megawatts ("MW") in capacity by lowering the eligibility cap for standard avoided cost rates from 10 MW to 100 kilowatts ("kW") for wind and solar QFs. *See* ORS 469A.210 (requiring the Commission to implement policies that will achieve a goal of eight percent of Oregon load served by renewable resources under 20 MW in capacity by 2025). The

Commission already rejected less draconian and far-reaching requests on these same two issues a little over a year ago in Phase I of docket UM 1610.

This Motion seeks dismissal of PacifiCorp's Application to re-litigate these two issues. The Application is an impermissible collateral attack on the final order in docket UM 1610, Order No. 14-058. It is additionally a collateral attack on the ongoing proceedings in Phase II of docket UM 1610, which contravenes the parties' agreed-to and approved issues list for that proceeding and significantly prejudices Movants' rights to represent their interests in that proceeding. PacifiCorp's collateral attack threatens to undermine the finality of the Commission's orders and unduly advantage well-funded utility parties that can engage in repeated litigation of select issues whenever they are dissatisfied with the results of a final order. The Commission should promptly dismiss PacifiCorp's Application.

II. REQUEST FOR EXPEDITED TREATMENT

Movants respectfully request expedited treatment of this Motion, with responses due within seven days of this Motion and a reply due within four days of responses. Pursuant to OAR 860-001-420(6), Movants certify that Movants attempted to contact PacifiCorp, Commission Staff, Northwest and Intermountain Power Producers Coalition ("NIPPC") and Cypress Creek Renewables, LLC, via e-mail and/or telephone. Counsel for PacifiCorp stated that PacifiCorp opposes expedited treatment. Counsel for Commission Staff communicated to Movants that Staff reserves its right to support or oppose expedited treatment after reviewing the Motion. Counsel for NIPPC and Cypress Creek Renewables, LLC each indicated to Movants that they support expedited treatment of this Motion. NIPPC further indicated that it supports dismissal of the Application.

Expedited treatment is necessary because the ongoing proceedings in this docket prejudice Movants' ability to formulate positions and participate in Phase II of docket UM 1610. As explained below, the outcome of a request to lower the eligibility cap and shorten contract terms for PacifiCorp affects multiple issues in Phase II of docket UM 1610. If this docket will proceed on the merits it will drastically alter the issues and dynamics of Phase II of docket UM 1610. Indeed, that is why these two issues – the eligibility cap and the contract length – were included in Phase I of docket UM 1610.

PacifiCorp waited until the day before opening testimony was due in Phase II of docket UM 1610 to file its Application. By the date of PacifiCorp's filing in this docket, Movants had already prepared their testimony in docket UM 1610 based on the assumption that the 10-MW eligibility cap and 15-year term for fixed avoided cost rates would remain unchanged for PacifiCorp for purposes of evaluating all issues in Phase II. The remaining steps in Phase II of docket UM 1610 are response testimony due on July 10, 2015, reply testimony due on July 31, 2015, and legal briefing and a hearing to follow in August and September. Without expedited treatment of this Motion, Movants and other parties will be forced to re-litigate Phase I of docket UM 1610 in this new docket, while at the same time addressing the more detailed Phase II without knowing if the Commission will maintain the current size threshold and contract term for PacifiCorp.

III. BACKGROUND

PacifiCorp asks to reduce the eligibility cap for standard avoided cost rates from 10 MW to 100 kW for wind and solar QFs, and to shorten the maximum contract term for all QF power

purchase agreements ("PPA") from 15 years to three years. Both of these issues were recently raised and resolved by the Commission in Phase I of docket UM 1610.

In Order No. 14-058, the Commission declined to lower the eligibility cap for standard avoided cost rates and to shorten the maximum length of QF PPAs. Order No. 14-058 at 1-2. PacifiCorp availed itself of the opportunity to present its position on these issues. *See* OPUC Docket UM 1610 PacifiCorp/200, Griswold/5-6, 31-33 (recommending that that the fixed-price period for all QF PPAs be reduced from 15 years to the 10 years); *id* at 3, 16-21 (recommending that the eligibility cap for standard avoided cost rates be reduced from 10 MW to 3 MW). In contrast, QF parties argued for favorable terms for QFs. *See* OPUC Docket UM 1610 CREA/100, Hilderbrand/30 (recommending a contract term with fixed rates be increased to 20 years); *id.* at 11-13 (testifying that lowering the eligibility cap would stop QF development in Oregon and be contrary to the directive in ORS 469A.210 to promote renewable projects sized up 20 MW). The Commission maintained its pre-existing policies on these issues in Order No. 14-058.

Now, a little over a year after the order became final, PacifiCorp seeks even more sweeping relief than it failed to convince the Commission to adopt in Order No. 14-058, by asking to lower the eligibility cap to 100 kW for wind and solar QFs and to shorten the contract length for all QF PPAs to three years.

IV. ARGUMENT

A. PacifiCorp's Application Is an Impermissible Collateral Attack of Order No. 14-058.

PacifiCorp acknowledges that its Application contravenes Order No. 14-058. PacifiCorp did not appeal or otherwise seek any modification of Order No. 14-058. Moreover, PacifiCorp

fails to request to have Order No. 14-058 rescinded, suspended, or amended, and fails to argue that such relief would be appropriate under ORS 756.568, or any other provision of Oregon law that might allow for such an action. The Application is unquestionably a collateral attack on Order No. 14-058.

Collateral attacks on final orders are disfavored for obvious reasons, including avoidance of endless litigation, and the public interest in final adjudication of controversies. *See* Am. Jur. 2d, *Judgments* at § 739 (2008); *see also Oregon v. Guzek*, 546 U.S. 517, 526-27 (2006) ("The law typically discourages collateral attacks...."); *Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.").

These principles apply fully to administrative proceedings. The Federal Energy Regulatory Commission ("FERC") recently explained that a "collateral attack is an 'attack on a judgment in a proceeding other than a direct appeal' and is generally prohibited.'" *Louisville Gas & Electric Co.*, 144 FERC ¶ 61,054, at P 12 (2013) (quoting *Wall v. Kholi*, 131 S.Ct. 1278, 1284 (2011)). In *Louisville Gas & Electric Co*., FERC rejected Southern Companies' "attempt to challenge the FERC's findings in Order No. 1000 as applied to Southern Companies, notwithstanding that Southern Companies raised, and the Commission rejected, the same arguments in the Order No. 1000 proceedings." *Id.* As with PacifiCorp's proposal to lower the eligibility cap and shorten the contract length here, that attempt was an "improper collateral attack upon the Commission's findings in Order No. 1000 and therefore must be rejected." *Id.*

The OPUC has emphasized the importance of finality to its orders and bars against re-litigation. *See In re Ascertaining the Unbundled Network Elements that must be Provided by Incumbent Local Exchange Carriers to Requesting Telecommunications Carriers Pursuant to 47 C.F.R. - 51.319*, Docket Nos. UT 138 & UT 139 (Phase III), Order No. 03-085 at 14-16 (Feb. 5, 2003). There, the Commission rejected Verizon's attempt to re-litigate an issue decided in Phases I and II of telecommunications proceedings when raised again in Phase III only a few years later based on new information developed in another proceeding, docket UM 773. The Commission explained that re-litigation "would require, among other things, a comprehensive review of the UM 773 record, which alone comprises several thousand pages. . . . An undertaking of this magnitude would result in a lengthy delay in the disposition of this matter." *Id.* at 16 n. 58. The Commission concluded that the other parties "will be prejudiced if Verizon is allowed to relitigate this issue." *Id.* at 17. The same is true here, where PacifiCorp proposes to re-litigate Phase I of docket UM 1610 after Phase II has commenced.

All of the factors at issue in the cases cited above weigh in favor of rejecting PacifiCorp's collateral attack of Order No. 14-058. Multiple parties and the Commission expended vast sums of time and effort to arrive at the final outcome of Order No. 14-058. PacifiCorp's collateral attack threatens to undermine confidence in the finality of the Commission's decisions and advantage well-funded utilities with an unlimited budget to re-litigate these issues until they finally win. The Commission should not allow PacifiCorp to pick and choose issues it lost in Phase I of docket UM 1610 and force interested parties to again re-litigate those issues at this time.

PacifiCorp's Application contains misplaced arguments that provide no justification for this collateral attack. PacifiCorp makes misleading comparisons between the cumulative capacity of solar QF contracting inquiries to *average* Oregon load. PacifiCorp does not allege, however, that there are significant Oregon solar QFs online. As of July 2014, Oregon had only three solar QFs with a total capacity of 124 kW. *Investigation into Effectiveness of Solar Programs in* Oregon, Prepared by the OPUC at 11 (July 1, 2014).[1] It appears that there are less than 200 kW of solar QFs actually on line in Oregon. PacifiCorp's comparisons overlook that far more QFs seek contract pricing than actually ever achieve commercial online status, and additionally that a comparison between nameplate capacity and average load is highly misleading, especially for a low capacity factor resource like solar that only produces energy during high-load daytime hours. Moreover, because PacifiCorp's avoided cost rates are so low at the present time and will soon be decreasing in docket UM 1729, it is difficult to imagine any harm that would occur even if some of the alleged solar QFs were able to complete construction and sell to PacifiCorp at these low rates. In fact, PacifiCorp itself appears to acknowledge that now is a good time to acquire solar resources prior to expiration of available federal tax credits because on May 27, 2015, PacifiCorp released a request for proposals ("RFP") for long-term solar resources, with a contract term of 25 years.[2]

PacifiCorp argues that the Idaho Public Utilities Commission ("Idaho Commission") reduced the term of fixed-price PURPA PPAs to five years for solar and wind QFs larger than

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[1] Available online at http://www.puc.state.or.us/electric_gas/Solar%20Report%202014.pdf (last accessed June 1, 2015).

[2] *See* http://www.pacificorp.com/sup/rfps/RFP2015s.html (last accessed June 1, 2015). Unlike QF PPAs, however, PacifiCorp's RFP provides an option for the Company to own and rate-base the solar resource.

100 kW pending completion of a docket considering a permanent reduction to the PPA term. *See Application* at 14. PacifiCorp fails to note, however, that the relief PacifiCorp seeks here is far broader than even the temporary relief it obtained in Idaho because PacifiCorp asks the OPUC to shorten the contract term to *three* years for *all QFs* – not just wind and solar QFs. In other words, PacifiCorp's requested relief would preclude any Oregon QF – even non-wind and non-solar QFs – from obtaining a PURPA PPA of duration longer than three years. This relief is also far broader than the relief requested in Idaho Power Company's recent request in docket UM 1725 to lower the eligibility cap to 100 kW for wind and solar QFs and to shorten the contract term for non-standard rates to two years.

Finally, PacifiCorp's proposal as to the contract term should be rejected because, in addition to having been litigated and resolved at the OPUC very recently, PacifiCorp's new proposal is not consistent with PURPA. Extensive testimony in the Idaho proceeding demonstrates that the request to shorten the contract length to extremely short terms violates FERC's regulations that entitle QFs to elect to sell energy and capacity at a long-term fixed rate. *See, e.g.,* Direct Testimony of Adam Winner, Sierra Club and Idaho Conservation League, IPUC Case No. IPC-E-15-01 (filed April 23, 2015) (providing testimony by former FERC counsel who aided in the drafting of FERC's regulations and concluding that a two-year contract term violates those regulations); Direct Testimony of Don C. Reading, J.R. Simplot Co. and Clearwater Paper Corporation, IPUC Case No. IPC-E-15-01 (filed April 23, 2015) (reaching similar conclusions but without providing a legal opinion).[3] This testimony only provides further support for the positions set forth in Phase I of docket UM 1610. In fact, PacifiCorp itself testified in UM 1610

[3] Available online at: http://www.puc.idaho.gov/fileroom/cases/summary/IPCE1501.html .

that the "fundamental objective of the term of a QF contract is to enable eligible QFs to obtain adequate financing but also minimize the possible divergence of the QF contract prices from actual avoided costs." OPUC Docket UM 1610 PacifiCorp/200, Griswold/32. The OPUC's 15-year term complies with that objective, but a three-year term would violate PURPA.

B. PacifiCorp's Application Is an Impermissible Collateral Attack on Phase II of Docket UM 1610.

PacifiCorp's Application is also an unfair collateral attack on the proceedings in Phase II of docket UM 1610. The eligibility cap and contract length issues were issues that all parties agreed to have resolved in Phase I, *prior* to proceeding to the issues in Phase II, which address specific contracting processes, terms, and additional rate calculation issues. *See Ruling*, OPUC Docket No. UM 1610 (Dec. 21, 2012). PacifiCorp's Application upends this agreed-to process and requires parties to re-litigate two issues that PacifiCorp lost in Phase I at the same time the parties proceed to the rest of the issues in Phase II.

1. PacifiCorp's Application Violates PacifiCorp's Agreement As to the Issues to Be Addressed in Phase II of Docket UM 1610.

PacifiCorp's request is inconsistent with its agreement as to what issues will be addressed in Phase II of docket UM 1610. Several parties to UM 1610, including PacifiCorp, signed and filed a stipulation regarding the issues list for Phase II of docket UM 1610 on February 20, 2015. *See Joint Parties' Stipulation re: Issues List*, OPUC Docket No. UM 1610 (Feb. 20, 2015). As the stipulation indicates, the parties met at four different meetings over several months to negotiate the issues to be addressed and related substantive issues directly tied thereto before ultimately agreeing to "ask the Commission to consider five contested issues in addition to three of the four issues the Commission has already decided to consider in Phase II[.]" *Id.* at p. 3. Not

surprisingly, the issues *already resolved* in Phase I of the UM 1610 are not listed among the limited number of issues that the parties agreed to include in Phase II. *See id.* Exhibit A.

The parties to docket UM 1610 also specifically agreed that *Idaho Power* reserved the right to bring a separate case requesting changes to the eligibility cap, contract term, solar integration charges, and revision of Idaho Power's resource sufficiency period. *Id.* p. 4, ¶ I.[4] PacifiCorp reserved no such rights. No party agreed that PacifiCorp could effect an end-run around Phase II by filing the instant Application. The issues proposed in the stipulation were adopted by the Administrative Law Judges ("ALJ"), whose ruling also adopted dates to present those issues through testimony, briefing and an evidentiary hearing. *Ruling*, OPUC Docket No. UM 1610 (March 26, 2015). The ALJs' Ruling provided no basis for any party to subvert the process and limited issues set forth in Phase II by filing an Application to re-litigate certain issues from Phase I at the same time.

2. PacifiCorp's Application Prejudices Movants' Ability to Represent Movants' Interests in Phase II of Docket UM 1610.

PacifiCorp's end-run around the well-established procedures in docket UM 1610 substantially prejudices Movants because the disposition of the eligibility cap and the contract length issues materially impacts other issues in Phase II of docket UM 1610. The very existence of PacifiCorp's Application and any Commission proceeding to address its merits prejudices and harms Movants, and all the parties in Phase II of UM 1610. The parties' analysis of the issues in Phase II would have been different if they were aware that there was even a possibility of three-year contracts and/or a 100-kW eligibility threshold for wind and solar QFs. Some issues in UM 1610 become essentially irrelevant if there are only three-year contract terms. Conversely, other

[4] Idaho Power has now filed such a case in docket UM 1725.

issues become more important if there are short contracts and 100-kW eligibility thresholds for wind and solar QFs. Either way, the issues list would have been different, and the parties would have submitted very different (and likely additional) testimony in Phase II if there was a possibility of the Application being granted.

a. Certain Phase II Issues Are Irrelevant If There Are Extremely Short Contract Terms and Tiny Size Thresholds.

The scope of issues in Phase II would be radically different if there are three-year contract terms and 100-kW size thresholds for wind and solar QFs. For example, there would be little to address regarding the following Phase II issues at this time:

- Who owns the Green Tags during the last five years of a 20-year fixed price PPA during which prices paid to the QF are at market?
- Should avoided transmission costs for non-renewable and renewable proxy resources be included in the calculation of avoided cost prices?
- Should the capacity contribution calculation for the standard non-renewable avoided cost prices be modified to mirror any change to the solar capacity contribution calculation used to calculate the standard renewable avoided cost price?
- Should the Commission revise the methodology approved in Order No. 14-058 for determining the capacity contribution adder for solar QFs selecting standard renewable avoided cost prices? If so, how?

As to the first issue listed above, the Commission's current policy allows QFs to enter into 20-year contract terms, with the last five years' prices based on the market prices. In Phase II, the Commission has been asked to resolve whether the QF or the utility retains the renewable energy certificates during this last five-year period of a 20-year renewable avoided cost contract. Obviously, if contracts are limited to three-year terms, this issue would be moot because there will be no 20-year contracts with a last five-year period. Notably, PacifiCorp raised this issue

and thus forced all parties to expend resources to respond to it already through opening testimony.

The remaining three of the issues listed above specifically address the calculation of rates during the resource deficiency period and would become completely irrelevant in the event that the Commission adopts a three-year contract length. The Commission's avoided cost rate methodology includes a resource sufficiency period with rates based on market prices, and a resource deficiency period with rates are based on the costs of a thermal or wind generation resource. The demarcation between resource sufficiency and deficiency is when the utility plans to acquire a new major resource. Except for rare circumstances, PacifiCorp's resource sufficiency periods have been longer than three years, are now close to a decade, and could become even longer in the future. Absent other changes in Commission policy, a three-year maximum contract term will have the practical impact of setting avoided cost rates in perpetuity on resource sufficiency market prices. There is no need to spend considerable stakeholder and Commission time and resources at this time litigating the appropriate capacity calculation or transmission costs for thermal or wind generation proxy resources if rates will always be based on market price estimates.

b. The Importance and Analysis of All Other Issues Will Be Impacted if PacifiCorp's Application Is Not Dismissed.

Other issues in Phase II of UM 1610 may become less important, including: 1) what is the appropriate forum to resolve disputed inputs and assumptions; and 2) when is there a legally enforceable obligation. In addition, the parties and the Commission would likely analyze and answer all the remaining issues differently if there are extremely short contract terms and size thresholds for standard rates and contracts.

Currently, avoided cost rates are based on inputs and assumptions that are drawn from the utilities' IRPs, gas and market price forecasts, methodologies approved by the Commission, and other factors. QFs and their advocates do not believe the current process is adequate because: 1) the IRP does not currently discuss or address how it impacts QF rates; 2) the utilities control the entire IRP process of developing inputs and assumptions; and 3) there is little to no opportunity to obtain a Commission resolution on key issues.

Most of the important issues regarding disputed inputs and assumptions impact the resource deficiency rates. For example, important issues include the demarcation of resource sufficiency and deficiency, the capacity value for wind and solar QFs, cost assumptions for wind and thermal proxy resources, production and other tax credits, etc. All of these issues become moot if there are three-year contract terms with no resource deficiency rates.

The Commission would still need to address some key inputs and assumptions regarding resource sufficiency rates, including gas and market prices forecasts. However, a different forum for addressing inputs and assumptions may be appropriate if there are only a couple, rather than if there are a dozen, important issues to resolve.

The legally enforceable obligation issue would also be impacted by a reduced contract term. Under PURPA, QFs are allowed to sell power to utilities pursuant to a contract or a legally enforceable obligation. *See* 18 C.F.R. § 292.304(d). The concept of a legally enforceable obligation is intended to ensure that a QF can sell its power, even if the utility has refused to enter into a contract. *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, PP 32-37 (2011). A legally enforceable obligation essentially allows a QF to "lock in" current avoided cost rates, especially when a utility is delaying or otherwise imposing unreasonable terms and conditions. It may be

less important for QFs to have the ability to secure current avoided cost rates, if there are only three-year contract terms with avoided cost rates that change on at least an annual basis. Conversely, utilities should not be allowed to impose all the current steps and obstacles for forming a legally enforceable obligation if the rates will only be in effect for an extremely short period of time. Regardless, the analysis of what steps must be taken to obtain a legally enforceable obligation would be different if contract lengths were limited to three years.

c. Issues Related to Sufficiency Period Pricing and Non-Standard Rates Become Significantly More Important with Lower Size Thresholds and Shorter Contract Terms.

Other issues in Phase II become critical to the survival of QFs in a world without meaningful contract terms and with tiny size thresholds for standard rates. These include: 1) whether the market prices used during the resource sufficiency period sufficiently compensate for capacity; and 2) what is the most appropriate methodology for calculating non-standard avoided cost prices. In addition, Movants, and likely other QF parties, would have wanted to raise additional Phase II issues (and/or re-litigate other Phase I issues) if the issues in the Application are going to be considered by the Commission.

Resource sufficiency prices do not include any meaningful capacity payments, even when the QFs are causing the utilities to avoid or defer capacity acquisitions during the resource sufficiency period. CREA, REC, OneEnergy, and Obsidian proposed to partially remedy this problem by: 1) including in resource sufficiency rates the capacity costs of coal plant upgrades that retain existing utility capacity; and 2) better accounting in the IRP process for the value provided by existing QFs that renew their contracts. Without any contract years with resource deficiency rates that include capacity payments, QFs would never be paid for capacity, even

though they are causing the utilities to eventually avoid capacity acquisitions in both the sufficiency and deficiency periods.

Movants would also have made additional recommended revisions to avoided cost rate prices if there was a possibility of extremely short contract terms. For example, Washington currently has five-year contract terms; however, all QFs are paid a full capacity payment based on the costs of a thermal resource in all five years. Movants do not support five-year contract terms; however, Washington's approach at least ensures that all QFs are paid a capacity rate during each year of their (short) contracts. In addition, Idaho allows existing QFs that renew their contracts to be paid capacity payments from the beginning of the contract renewal. This makes sense because nearly all small existing QFs renew their contracts and the utilities plan on these projects renewing in their IRPs. These are other arguments could have been raised in Phase II.

The question of what method is used to calculate avoided cost rates for QFs above the size threshold would become more significant if the size threshold for wind and solar standard rates is 100 kW instead 10 MW. Wind and solar QFs have generally been content with the 10 MW size threshold, and thus did not address this issue in testimony in Phase II.[5] These parties would likely have addressed the non-standard pricing issue with more comprehensive testimony if they knew their rates would be negotiated or are subject to the vagaries of the utilities' complex power supply models.

[5] Notably, ORS 469A.210 directs the Commission to implement policies promoting renewable resources sized up to 20 MW. An argument could also be made that the 10-MW threshold for standard rates is too low to meet this statutory requirement.

In summary, PacifiCorp's Application significantly harms the parties in docket UM 1610 because it impacts all of the Phase II issues. Opening a proceeding to review the Application prejudices the parties because the parties would have analyzed the Phase II issues differently if there was even a possibility of a smaller size threshold and shorter contract term. In addition, parties and the Commission should not waste additional resources addressing Phase II issues that may become irrelevant. While PacifiCorp can recover all its costs of participating in regulatory proceedings from its ratepayers, QFs and their advocates fully pay for the considerable expenses of litigating (and re-litigating) these proceedings. The Commission should therefore dismiss PacifiCorp's Application to ensure that parties do not waste resources re-litigating unnecessary issues.

V. CONCLUSION

For the reasons set forth above, the Commission should promptly dismiss PacifiCorp's Application.

RESPECTFULLY SUBMITTED this 1st day of June, 2015.

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