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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Rocky Mountain Power's Application to Increase the Deferred EBA Rate through the Energy Balancing Account Mechanism	Docket No. 18-035-01

HEARING BRIEF OF THE UTAH ASSOCIATION OF ENERGY USERS

Pursuant to the order of the Public Service Commission of Utah ("Commission") following the February 5, 2019 hearing in this matter, Intervenor Utah Association of Energy Users ("UAE") hereby files its Hearing Brief regarding the matters discussed at the February 5 hearing in this docket.

LEGAL STANDARD

This matter is governed by the intersection of the Commission's general rate-making powers described in Utah Code § 54-4-4 ("Rate Statute") and the Commission's power to allow Rocky Mountain Power ("RMP" or "Company") to recover costs through an energy balancing account mechanism set forth in Utah Code § 54-7-13.5 ("EBA Statute"). Pursuant to the Rate Statute, if the Commission determines after a hearing that utility rates are unjust, unreasonable, discriminatory, preferential, or insufficient, the Commission shall "determine the just,

reasonable, or sufficient rates" and order the imposition of such rates. Utah Code § 54-4-4(1). Pursuant to the EBA Statute, the Commission may permit the Company to establish an energy balancing account to recover certain "prudently incurred costs as determined and approved by the commission." Utah Code § 54-7-13.5 (2)(b) & (d). When the Commission is asked to determine if certain utility costs are "prudently incurred," as is the case here, then the Rate Statute sets forth the standard for the Commission to apply:

> (a) If, in the commission's determination of just, reasonable, or sufficient rates, the commission considers the prudence of an action taken by a public utility or an expense incurred by a public utility, the commission shall:
> (i) ensure just and reasonable rates for the retail ratepayers of the public utility in this state;
> (ii) focus on the reasonableness of the expense resulting from the action of the public utility judged as of the time the action was taken;
> (iii) determine whether a reasonable utility, knowing what the utility knew or reasonably should have known at the time of the action, would reasonably have incurred all or some portion of the expense, in taking the same or some other prudent action; and
> (iv) apply other factors determined by the commission to be relevant, consistent with the standards applied in this section
> (b) The commission may find an expense fully or partially prudent, up to the level that a reasonable utility would reasonably have incurred.

Utah Code § 54-4-4(4).

DISCUSSION

At the February 5, 2019 hearing, the testimony of witnesses from the Company and from the Division of Public Utilities ("Division") focused on the actions of the Company with respect to the following seven outages:

- Craig Unit 2 (May 23, 2017). Testimony indicated that this forced outage resulted from a missing plug on the South side of the collector bell end of the generator that may have come loose and fallen out after maintenance to remove and install those plugs. Craig Unit 2 is operated by Tri-State Generation and Transmission ("Tri-State"). For the work in question, Tri-State hired General Electric ("GE"), who in turn hired a subcontractor to remove and install the plugs. In addition to the fact that

an outage was required to replace a plug that had just been removed and replaced, testimony was introduced to the effect that no root cause analysis was performed and there was very little information available regarding the cause of the outage.

- Dave Johnston Unit 3 (April 25, 2017). Testimony indicated that this outage resulted from tube failures in the reheat superheater due to the Company having previously installed non-conforming material in the tubing.

- Dave Johnston Unit 3 (September 19, 2017). Testimony indicated that this outage resulted from tube leaks in the reheat superheater due to the Company having previously implemented explosive deslagging practices.

- Huntington Unit 1 (May 3, 2017). Testimony indicated that this outage resulted from a boiler tube leak due to dissimilar metal welds, which had caused three other such failures since 2008.

- Jim Bridger Unit 2 (January 17, 2017). Testimony indicated that this outage resulted from water freezing in the water-cooled spacer tubing due to a gap in the Company's inspection procedures, which resulted in a Company employee failing to notify management that one of the tubes was not being heated.

- Jim Bridger Unit 3 (October 13, 2017). Testimony indicated that this outage resulted from a wire that had been damaged during installation coming into contact with water flowing from a broken flange in a cooling tower into the underground wire vault containing the wire. The testimony suggested that the wire likely was damaged when it was initially pulled when the plant was built 40 years ago.

- Dave Johnston Unit 4 (March 17, 2017). Testimony indicated that this outage resulted from the work of a contractor, hired by the Company to replace a Control Rotor Main Oil Pump Impeller, installed the wrong impeller, which required the entire assembly to be shipped back to the contractor's shop and be installed correctly and then shipped back to the plant.

UAE sets forth the following principles to guide the Commission's decision with respect to whether the Company's costs associated with these seven outages were "prudently incurred."

I. THE COMPANY BEARS THE BURDEN OF PROVING THAT THE COSTS IT SEEKS TO RECOVER WERE PRUDENTLY INCURRED

For the Company to recover costs associated with the outages, Utah law imposes on the Company the burden of demonstrating that those costs were prudently incurred. The EBA

Statute only permits costs to be included in the energy balancing account if those costs are prudently incurred, *see* Utah Code § 54-7-13.5(2)(b), and only allows the Commission to permit the Company to recover its "prudently incurred costs as determined and approved by the commission." *Id*. § 54-7-13.5(2)(d). The Utah Supreme Court has ruled that "[t]he utility bears the burden of presenting the evidence necessary to support the Commission's" findings with respect to a rate order, stating that "'[i]n the regulation of public utilities by governmental authority, a fundamental principle is: The burden rests heavily upon a utility to prove it is entitled to rate relief and not upon the Commission, the Commission staff, or any interested party or protestant, to prove the contrary.'" *Comm. of Consumer Services v. Public Service Comm'n*, 2003 UT 29, ¶ 14, 75 P.3d 481 (quoting *Utah Dep't of Bus. Regulation v. Public Service Comm'n*, 614 P.2d 1242, 1245 (Utah 1980)). "The utility must therefore put forth substantial evidence to establish that its proposed increase is 'just and reasonable.' The Commission, in turn, bears responsibility for holding the utility to its burden." *Id*.

In this docket, this Commission is asked to determine whether certain costs associated with the Company's actions, are "prudently incurred costs" under the EBA Statute. Courts in other jurisdictions have considered disputes like those at issue in this docket and have identified the regulatory principles at issue when state utility commissions are asked to determine whether a utility's costs are "prudently incurred." For example, in *Commonwealth Electric Company v. Department of Public Utilities*, 491 N.E.2d 1035 (Mass. 1986) the Supreme Judicial Court of Massachusetts, in affirming an order of the Massachusetts Department of Public Utilities disallowing certain replacement power costs associated with an electric utility on the grounds

that it had acted imprudently, stated the following principles about the risks of an electric utility and its ratepayers:

> The utility and its shareholders are protected from the risks associated with competition. The shareholders are protected, however, only from risks normally due to competition, not from all risks. They must, just as must shareholders of a competitive private corporation, accept the risks of the company's failure. ***Failure could be due to the negligence or incompetence or simply unfortunate decisions of the company's directors, to the imprudence of its contractors, or to conditions entirely external, such as the oil shortages of the last decade.*** The shareholders cannot automatically shift those risks to the ratepayers. ***The ratepayers are not the guarantors of the company's success.***

Id. at 1039-1040 (emphasis added). Similarly, in *Gulf States Utilities Co. v. Louisiana Public Service Comm'n*, 689 So.2d 1337 (La. 1997), the Louisiana Supreme Court noted that, "[b]ecause customers of a monopolistic enterprise do not have the choice to take their business to a more efficient provider, market forces provide no incentive to utilities to act prudently. Therefore, the utility's only motivation to act prudently arises from the prospect that imprudent costs may be disallowed." *Id*. at 1345 n.9 (internal quotation marks omitted).

In proceedings such as the one before this Commission, utilities often seek to import tort law principles of fault and liability to the determination of whether the utility should bear the responsibility of increased fuel costs or replacement power costs. *See, e.g.*, *Nucor Steel v. Public Utility Comm'n of Texas*, 26 S.W.3d 742, 751-52 (Tex. Ct. App. 2000) (upholding commission's "rejection of tort law principle on the grounds that tort law and fuel reconciliations have different histories and purposes."); *Commonwealth Elec. Co.*, 491 N.E.2d at 1039 (Mass. 1986) (rejecting utility's tort-based arguments and relying on rationales based in utility regulatory policy). Tort law principles do not properly transfer to the EBA proceeding before this court. In a tort case, a plaintiff bears the burden of demonstrating that a defendant acted unreasonably or breached

some duty owed to another and, if the plaintiff carries that burden, the defendant pays damages. In this proceeding, "the utility is seeking to *avoid* responsibility for fuel costs and pass them on to consumers," but the utility bears the burden of demonstrating that it acted prudently. *Nucor Steel*, 26 S.W.3d at 751. "Unlike the plaintiff in a tort case, a utility seeking reconciliation need not prove that another acted unreasonably but must instead establish that the *utility itself* acted reasonably." *Id*. "[T]ort law and fuel reconciliations have different histories and purposes," and this Commission should decline to import tort law principles into this proceeding.

II. THE COMMISSION MUST FOCUS ITS INQUIRY ON THE FACTS KNOWN AT THE TIME THE COMPANY MADE THE DECISION THAT CAUSED THE COSTS TO BE INCURRED

The Rate Statute directs the Commission to focus its inquiry on the facts known at the time the Company took the action that caused the costs to be incurred. Utah Code § 54-4-4(4)(a)(iii) states that the Commission, in considering the prudence of an action taken by Company, "shall . . . determine whether a reasonable utility, knowing what the utility knew or reasonably should have known at the time of the action, would reasonably have incurred all or some portion of the expense, in taking the same or some other prudent action." Utah Code § 54-4-4(4)(a)(iii). *See also Gulf States Utilities Co.*, 689 So.2d at 1346 (La. 1997) ("[T]he proper standard for determining whether a utility was imprudent is whether objectively that utility acted reasonably under the circumstances, because only the utility, and not the ratepayer, is in a position to minimize imprudence and maximize efficiency."). That is, "with regard to outage related replacement power costs, the Company must demonstrate that its decisions and actions that lead to the outage were prudent." *Entergy Gulf States, Inc. v. Louisiana Public Service Comm'n*, 726 So.2d 870, 876 (La. 1999).

To carry this burden, the Company should present contemporaneous evidence in support of its claim that the action that caused the outage was reasonable when taken. A utility that fails to present "contemporaneous evidence to support its decision-making process faces a heavy burden; the Commission will subject its after-the-fact justifications to rigorous review." *Texas Indus. Energy Consumers v. Public Utility Comm'n of Texas*, 2018 WL 3353225, at *5 (Tex. Ct. App. July 10, 2018) (reversing Commission's determination that utility acted prudently when it continued to build "ultra-supercritical" coal plant despite drastically falling gas prices when utility "failed to implement any process to evaluate whether continued construction of the Turk Plant made economic sense in the face of changed circumstances."). "The lack of documentation impedes the Commission's ability to determine whether the utility conducted a reasoned investigation of all relevant factors and alternatives before reaching its decision." *Id*.

RMP seeks to pass on to ratepayers the increased costs associated with the seven outages identified in Section I, above. For each of these outages, the Company must demonstrate that it acted prudently. In determining whether to allow the Company to increase rates to account for these outages, the Commission must, for each outage, consider what the Company knew or should have known at the time of the action that caused the outage and should place particular emphasis on documentation created or that existed at the time those actions were taken. For instance, with respect to the April 23, 2017 outage at Dave Johnston Unit 3, the Commission should focus its inquiry on whether the Company has demonstrated that its decision to install the non-conforming tubing material that ultimately caused the failures in the reheat superheater was prudent at the time that the decision was made. RMP did not provide any contemporaneous documentation, which "impedes the Commission's ability to determine" whether RMP acted

prudently when the material was installed. *Id*. Rather, the Company testified that it did not know when the nonconforming material was installed or why. [Hearing Tr. at 85:6-14].

Similarly, with respect to the September 19, 2017 outage at Dave Johnston Unit 3, the Commission should focus its inquiry on whether the Company has demonstrated that it was prudent to use explosive deslagging methods and whether the Company made prudent decisions regarding the use of different types of detonation cords. With respect to the outage at Huntington 1, the Commission should focus its inquiry on whether the Company demonstrated that acted prudently both when it installed the welds at issue and when it elected not to replace the dissimilar metal welds before the outage in 2017.

III. THE COMPANY MUST DEMONSTRATE THAT IT ACTED PRUDENTLY EVEN WHEN THE OUTAGE IS CAUSED BY "HUMAN ERROR"

The Company's obligation to demonstrate that it acted prudently applies in situations when the outage was the result of human error. "The rule does not require the utility to show that its conduct was free from human error; rather, it must show it took reasonable steps to safeguard against error." *Hamm v. South Carolina Public Service Comm'n*, 352 S.E.2d 476, 478 (S.C. 1987). "[H]uman error rarely shields the utility from responsibility." *AEP Texas Cent.*, 286 S.W.3d at 481 (internal quotation marks omitted). State utility commissions with processes similar to the EBA proceeding before this Commission have determined that if the utility

In *Virginia Electric & Power Co. v. Division of Consumer Counsel*, the Virginia Supreme Court upheld a ruling by the Virginia utility commission denying the utility's application to recover approximately $4.7 million in increased fuel costs resulting from a mistake made by a data interpreter that caused a forced outage at a nuclear power plant due to a steam generator tube leak. *Virginia Elec. & Power Co.*, 265 S.E.2d 697, 700-701 (Va. 1980). After it became

aware of certain issues causing the failure of steam generator tubes, the utility instituted a new inspection program. The program produced positive results, but during the program a data interpreter incorrectly indicated that at steam generator tube had been inspected when, in fact, it had not. *Id*. at 699. The court rejected the utility's argument that the commission "should have considered the overall performance of the program designed to eliminate the problems associated with tube denting," noting that "the overall performance of the program . . . was not at issue." *Id*. at 700. Rather, "[t]he issue before the Commission was whether [the utility's] management was imprudent in failing to provide a check upon the interpreter, who the company knew worked long hours and whose work was critical to avoidance of costly shutdowns." *Id*. The court ruled that there was sufficient evidence for the commission to find that the utility failed to act prudently and, as such, upheld the commission's determination disallowing the increased fuel costs. *See also Entergy Gulf States, Inc.*, 726 So.2d at 878-880 (finding that outages the utility claimed were due to "human error" were caused by failures of the utility's procedures).

Similarly, the Maryland Public Service Commission found that an electric utility failed to demonstrate that it acted prudently when errors committed by its employees during a planned outage to repair a generator, causing an extended outage and resulting in increased replacement power costs. *See In re Baltimore Gas & Elec. Co.*, 1986 WL 1299803 (Md. P.S.C. Dec. 2, 1986). The Maryland commission declined the utility's application to recover replacement power costs incurred when two of its workers inadvertently left rags in the generating equipment during maintenance and repair activities. The commission ruled that, while the utility should not be held accountable for every instance of human error if the utility has implemented management

practices to prevent such error, even prudent management systems do not shield the utility from responsibility if the human error exhibits "inattention or carelessness."

Like the utilities in *Virginia Electric & Power Co.* and *Baltimore Gas & Electric Co.*, the Company may claim that certain increased costs should be passed to ratepayers because those costs were incurred due to "human error." For example, the Company may claim that the January 17, 2017 outage at Jim Bridger Unit 2 was caused by "human error," and that the Company should, therefore, be permitted to recover the costs associated with that outage. As noted above, the Company may not pass increased costs to ratepayers merely by claiming "human error." Rather, the Company must demonstrate that it "took reasonable steps to safeguard against error." *Hamm*, 352 S.E.2d at 478. In this instance, the Company testified that its employee did not notify management when his inspection revealed that electricity was not flowing through the tubes, which means that there was no heat to keep the tube lines from freezing. [*See* Hearing Tr. at 68:8-70:15]. Testimony indicated that the heat tracing procedures in place at the time did not require employees to notify management or write a work order for repair when the employee became aware that the equipment was not working correctly. [*Id*. at 70:6-15]. While the Company may claim that the employee's failure to notify management of the equipment failure was "human error," the Commission must determine whether the employee's actions were permitted by Company procedures at the time and whether those procedures were prudent if they allowed the employee's actions or the result of those actions.

Similarly, the Company has claimed that the error of its contractor in installing the wrong impeller, leading to the March 17, 2017 outage at Dave Johnston Unit 4, was the result of "human error," rather than imprudence. [*See* Dec. 2018 Response Testimony of Dana M. Ralson

at lines 331-335]. As noted in more detail in Section IV.A., below, this outage *was* the result of imprudence by the contractor, who took on more work than its personnel could handle and failed to hire sufficient personnel to properly manage the task. The outage was caused by the imprudence of the contractor and, for the reasons set forth in Section IV.A., that imprudence can be imputed to the Company.

IV. THE COMPANY MUST DEMONSTRATE THAT IT ACTED PRUDENTLY EVEN WHEN AN OUTAGE IS CAUSED BY ERROR OF THE COMPANY'S SUBCONTRACTORS AND THIRD PARTY PLANT OPERATORS

Utilities may be denied cost recovery when the imprudence of a subcontractor or third-party operator result in outages or increased costs. As set forth below, the imprudence of a subcontractor or third-party operator may be imputed the utility even if the utility itself has not acted imprudently.

A. The Imprudence Of Subcontractors May Be Imputed To The Company

This Commission may impute the imprudence of a subcontractor who performs work on generation resources to the utility that owns the resource and may disallow any costs associated with that subcontractor's imprudence. Several states have found that it is appropriate utility regulatory policy to impute the imprudence of a subcontractor to a utility. For example, in *AEP Texas Cent. Co. v. Public Utility Comm'n of Texas*, the Texas Court of Appeals upheld a ruling by the Public Utility Commission of Texas disallowing $7.8 million in replacement power costs when a nuclear power plant was forced into an outage to replace four steam generators that were defectively manufactured by Westinghouse, the utility's contractor. *See AEP Texas Cent.*, 286 S.W.3d 450, 467-68 (Tex. Ct. App. 2008). The commission found that the utility did not act imprudently. *Id*. at 467. "However, the Commission determined that Westinghouse acted

imprudently, and it imputed Westinghouse's imprudence to TCC." *Id*. The Texas Court of Appeals affirmed this ruling, finding that "[t]he imprudence of a third-party vendor may be imputed to the utility, even if the utility has not acted imprudently.." *Id*. at 469. The court reasoned that, because the utility's ratepayers paid the utility's base rates during the period in question, "ratepayers are entitled to a reasonable level of performance from the resources that gave rise to those base rate costs." *Id*. (internal quotation marks omitted). *See also Commonwealth Elec. Co.*, 491 N.E.2d at 1041 ("[I]f the DPU can investigate only those actions taken by direct employees of the utility company, the work done by a subcontractor would be cloaked from oversight."); *Pennsylvania Public Utility Comm'n v. Philadelphia Elec. Co.*, 561 A.2d 1224, 1228 (Pa. 1989) (finding utility commission correctly disallowed replacement power costs incurred when utility's contractor manufactured defective coils finding that, as between utility and ratepayer, "a utility company is in a better position to prevent an occurrence or provide protection against any such occurrence.").

In *Hamm*, the South Carolina Supreme Court reversed a decision by the South Carolina Public Service Commission permitting an electric utility to recover additional fuel costs incurred as a result of a forced shutdown at a nuclear generating facility when seismic pipe supports installed by a contractor during a scheduled outage failed to meet Nuclear Regulatory Commission ("NRC") standards. *Hamm*, 352 S.E.2d at 478. The utility argued that it should be permitted to recover the increased fuel costs because it acted prudently by hiring the contractor. The commission agreed with the utility, finding that, by hiring a reputable contractor, it had "made a reasonable effort to minimize fuel costs, and ruled the utility could pass the additional fuel costs to its customers." *Id*. The South Carolina Supreme Court disagreed, finding that the

utility had shown only that it hired a contractor to perform the work, but had failed to demonstrate that it had "made any effort to insure the interim seismic pipe support modifications were made in compliance with NRC standards." *Id*. The *Hamm* court disallowed the increased fuel expenses, stating that "[a] utility cannot insulate itself from its responsibility . . . by delegating decision-making authority to a third party." *See also id*. ("If a utility was allowed to pass these costs along to its customers, it would have no incentive to minimize fuel costs.").

Like the utilities in *AEP Texas Cent.* and *Hamm*, RMP seeks to pass on to ratepayers the increased costs associated outages caused by the imprudence of contractors. For example, in the March 17, 2017 outage at Dave Johnston Unit 4, testimony indicates that the outage was caused when a contractor hired by the Company to replace a Control Rotor Main Oil Pump Impeller installed the wrong impeller, causing the entire rotor assembly to be sent back to the shop to be re-worked, thus extending the outage and requiring the Company to incur replacement power costs. Like the utility in *Hamm*, the Company did not provide any testimony or other evidence that it took steps to ensure that the contractor correctly performed the work. Indeed, the Company relied on the contractor to identify the error. [*See* Dec. 2018 Response Testimony of Dana M. Ralson at lines 313-317]. Rather, RMP testified that it became aware only after the incident that the contractor was not appropriately staffed for the work the Company hired the contractor to perform. [*See id*. at lines 323-330].

The contractor's actions in installing the wrong impeller were imprudent. The Commission should consider whether the Company or the ratepayers should bear the cost of the contractor's imprudence in this matter. As noted above, other states have found that a contractor's imprudence can be imputed to the utility because, as between the utility and the

ratepayers, the utility is in the better position to ensure that its contractors perform work in a prudent manner.

B. The Imprudence Of Third Party Operators May Be Imputed To The Company

This Commission may impute the imprudence of a third-party plant operator to a co-owner utility and may disallow costs associated with that operator's imprudence. At least one other state has found that it is appropriate utility regulatory policy to impute the imprudence of a third-party operator to a utility. In *Commonwealth Electric Co.*, the Supreme Judicial Court of Massachusetts affirmed the ruling of the Massachusetts Department of Public Utilities denying an electric utility's request to recover replacement power costs incurred as a result of the imprudence of the operator of a generating unit from which the utility acquired power, even when the utility itself was not found to have acted imprudently. *Commonwealth Elec. Co.*, 491 N.E.2d at 1039-42. The utility advanced tort law principles to support its argument that disallowance of replacement power costs based on the operator's imprudence was inappropriate absent a finding that the utility itself had been imprudent or that the utility had control over the operator. *Id*. at 1037-38. The court rejected the utility's arguments based in tort law, and instead "relied on policy rationales supporting the imputation of imprudence to the company," stating that "there should be uniform treatment of companies involved in the same project." *Id*. at 1039.[1] The court went on to note that to do otherwise would allow the utility to shield itself from

[1] The court further noted that

> [v]icarious liability—like other forms of strict liability—is imposed not because there is 'compelling evidence of control,' but rather because some properly authorized agency of government—court, legislature, or administrative body—has determined that such an allocation of responsibility will serve society's ends. The determination may rest on the judgment that it is more just to impose liability

any liability simply by engaging third parties (or creating related entities) to own and operate generation resources, a practice that "would create an untoward incentive for utilities to establish ownership forms that exempt them from liability." *Id*.

Like the utility in *Commonwealth Elecric Co.*, RMP seeks to pass on to ratepayers the costs associated with an outage at a generating unit operated by a third party. Specifically, RMP seeks recovery of costs associated with an outage at Craig 2, which is operated by Tri-State Generation & Transmission ("Tri-State"). That outage was caused when a leak developed from a missing bolt in the generator after work had been done to repair and replace those bolts. Tri-State hired General Electric to perform that work, who in turn hired a subcontractor. Because the Craig 2 outage involves a third-party operator and work performed by a subcontractor, in determining whether to allow or disallow the costs associated with the outage the Commission should apply principles discussed in this Section IV.B., as well as in Section IV.A., above.

CONCLUSION

UAE does not herein make recommendations as to whether the Commission should allow or disallow costs associated with the seven outages identified in Section I. Rather, UAE asserts that the principles set forth herein should guide the Commission's deliberations as to whether the Company has demonstrated prudence with respect to those outages and/or whether the imprudence of others can or should be imputed to the Company.

> on the party who entered the business knowing of the general hazards, rather than risk leaving the entire loss on the innocent injured party. As between the stockholders and the ratepayers of the company, it is the stockholders who are more aware of the general hazards of the business, and the ratepayers who are the more innocent parties."

Id. at 1038 n. 3 (internal quotation marks and citations omitted).

DATED this 1st day of March, 2019.

HATCH, JAMES & DODGE, P.C.

/s/

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Certificate of Service
Docket No. 18-035-01

I hereby certify that a true and correct copy of the foregoing Petition to Intervene was served by email this day 1st day of March, 2019, on the following:

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