UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Limiting Authorizations to Proceed with Construction Activities Pending Rehearing	)))	Docket No. RM20-15-001

MOTION TO INTERVENE AND JOINT BRIEF ON ORDER NO. 871-A, ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING AND CLARIFICATION, AND PROVIDING FOR ADDITIONAL BRIEFING 174 FERC ¶ 61,050 (January 26, 2021)

INTRODUCTION

The Niskanen Center and affected landowners[1] the New Jersey Conservation Foundation, Hopewell Township, Catherine Holleran, Megan Holleran, Richard Averitt, Stacey McLaughlin, Craig McLaughlin, Deb Evans, Ron Schaaf, Evans Schaaf Family LLC, Bill Gow, Wendy McKinley, Pamela Ordway, Clarence Adams, Linda Christman, Roy Christman, Lorraine Mineo, and Joseph Plechavy (collectively, "Landowners"), respond to the Federal Energy Regulatory Commission's (the "Commission", or "FERC") Order No. 871-A, *Order Addressing Arguments Raised on Rehearing and Clarification, and Providing for Additional Briefing*, 174 FERC ¶ 61,050 (January 26, 2021), and respectfully move for intervention in the above-referenced proceeding.

[1] As defined in 18 CFR 157.6(d)(2). These affected landowners own property along the Atlantic Coast, Constitution, Pacific Connector, and PennEast pipeline routes.

Landowners commend the Commission's reconsideration of Order No. 871. In the midst of pending litigation against it in *Allegheny Def. Project v. Fed. Energy Regulatory Comm'n,* 964 F.3d 1 (D.C. Cir. 2020), FERC hastily issued Order No. 871 without notice and comment and without any input from those most affected by construction and rehearing issues—landowners. It is telling that *only* industry groups were able to mobilize in time to file requests for rehearing on, and subsequent petitions for review of, Order 871. *See, e.g. Request for rehearing of Kinder Morgan, Inc.* Accession # 20200709-5194 (July 9, 2020); *Motion to Intervene and Request for Clarification or, in the Alternative, Rehearing of the Interstate Natural Gas Association of America,* Accession # 20200709-5190 (July 9, 2020).

While Order 871 addressed notices to proceed with construction ("NTPs"), as Chairman Glick noted in his partial dissent, the Order did not address the even more serious issue of landowners being subject to eminent domain before they could seek judicial review of a certificate order. (See below, pp. 15-16.) *Limiting Authorizations to Proceed with Constr. Activities Pending Rehearing*, 171 FERC ¶ 61201, 62427 (2020) (Commissioner Glick, dissenting P. 2) (noting dissent in part because Order No. 871 did nothing to address concern that pipelines should not be able to condemn land before landowners could go to court).

Landowners appreciate that the Commission now seeks comment on this issue as well. (See below, pp. 15-16) It is fundamentally unjust for pipeline companies to be allowed to drag landowners into court for condemnation proceedings, with the

significant risk of the *immediate* loss of possession via preliminary injunction[2] and the attendant destruction of their property, before landowners can seek judicial relief. Landowners thank FERC for now taking the time to facilitate and consider landowners' input as an essential step towards ensuring a more balanced, transparent, and efficient Section 7 certificate application process for all parties, including industry groups.

I. REHEARING ISSUES THAT FERC NEEDS TO ADDRESS.

FERC needs to address rehearing issues outside of those enumerated if it hopes to remedy the egregious imbalance of power between landowners and pipeline companies before FERC. Landowners believe that understanding these issues is critical to inform FERC's consideration of the issues explicitly raised.

A. The Commission needs to define "construction."

FERC needs to clearly define what activities a certificate holder may engage in without needing an NTP, and which activities require it. Without adopting a clear,

[2] *See, e.g.*, *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell*, 915 F.3d 197, 223 (4th Cir. 2019) (upholding district court's grant of immediate possession through preliminary injunction); *Transcon. Gas Pipe Line Co., LLC v. Permanent Easements for 2.14 Acres & Temp. Easements for 3.59 Acres in Conestoga Twp., Lancaster Cty., Pennsylvania*, 907 F.3d 725, 741 (3d Cir. 2018) (same); *Transwestern Pipeline Co. v. 17.19 Acres of Prop. Located in Maricopa Cty.*, 550 F.3d 770, 777 (9th Cir. 2008) (obtaining immediate possession by preliminary injunction is appropriate where a pipeline company first obtains an order of condemnation). As the D.C. Circuit noted in *Allegheny* (964 F.3d at 8), the Atlantic Sunrise Pipeline obtained partial summary judgment and a possessory injunction within six months of filing its condemnation case (condemnation filed "less than two weeks" after February 3, 2017, and summary judgment and injunction "in August" 2017).

commonsense definition of what "construction" or "construction activities" are, it is likely that many of the issues that arise out of FERC's authorizations to commence with 'construction' before landowners can go to court will remain exactly the same—*e.g.* trees could be cut down and land destroyed for projects that are never built. *E.g.,* the Constitution Pipeline,[3] and the recent Atlantic Coast Pipeline.[4] Under FERC's current practice, activities that will permanently alter or destroy land are easily defined as 'pre-construction' activities, and thus not subject to a Notice To

[3] FERC approved construction for the Constitution Pipeline Project ("Constitution") on December 2, 2014. *Constitution Pipeline, Co., LLC*, 149 FERC ¶ 61,199 (2014) (Certificate Order), *reh'g denied*, 154 FERC ¶ 61,046 (2016). The cancellation of the Constitution Pipeline Project was announced on February 24, 2020. *Update 1-Williams cancels N.Y. Constitution natgas pipeline* (Feb. 24, 2020). https://www.reuters.com/article/williams-constitution-natgas/update-1-williams-cancels-n-y-constitution-natgas-pipeline-idUSL2N2AO11B. However, before the cancellation, Constitution commenced construction and eminent domain proceedings against landowners. On just one farm, Constitution cut down more than 550 trees, many of which were sugar maples. Scott Blanchard, *Constitution Pipeline project ends as builder cites 'diminished' return on investment* (Feb. 25, 2020) https://stateimpact.npr.org/pennsylvania/2020/02/25/constitution-pipeline-project-ends-as-builder-cites-diminished-return-on-investment/.

[4] FERC approved construction of the Atlantic Coast Pipeline ("ACP") on October 13, 2017. Atlantic Coast Pipeline, LLC & Dominion Energy Transmission, Inc. 161 FERC ¶ 61,042 (2017) (Certificate Order), reh'g denied, 164 FERC ¶ 61,100 (2018). On July 5, 2020, the cancellation of ACP was announced. Dominion Energy and Duke Energy Cancel the Atlantic Coast Pipeline (Feb. 16, 2021) *https://news.dominionenergy.com/2020-07-05-Dominion-Energy-and-Duke-Energy-Cancel-the-Atlantic-Coast-Pipeline*. The cancelled ACP installed approximately 31.4 miles of pipe and completed an additional 82.7 miles of clearing and grading. *See* Atlantic Coast Pipeline's Disposition and Restoration Plan at 1 (Dec. 16, 2020) *https://atlanticcoastpipeline.com/resources/docs/public_acp%20disposition%20and%20restoration%20plan.pdf*. Additionally, ACP has performed approximately 222.5 miles of tree felling and of this approximately 108.4 miles of trees are still lying on the right-of-way where they were cut. Id. About 600 landowners have felled trees on their property. *Id.* at 17.

Proceed. There is no standardization, and the definition of what constitutes 'construction' vs. 'preconstruction' is determined on a "case-by-case basis" by the Office of Energy Projects:

> Staff makes the determination whether to issue a notice to proceed for any particular activity on a case-by-case basis, after reviewing the proposed activity and the applicant's explanations of how it has complied with the requirements of the Commission's order that are prerequisites to conducting the activity in question. Activities needing a notice to proceed can range from tree felling, use of construction yards, mobilization of construction equipment, to construction of facilities.

FERC 28(j) Letter, *Allegheny,* Doc. 1841025 (May 4, 2020).

There is evidence that FERC also believes that "construction" activities, as defined, should not include actions that permanently alter the land—such as tree-clearing or ground-disturbing activities. The recent Certificate for the Pacific Connector pipeline states: "Jordan Cove and Pacific Connector must receive written authorization from the Director of OEP before commencing construction of any Project facilities, *including* any tree-felling or ground-disturbing activities." *Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP*, 170 FERC ¶ 61,202 (March 19, 2020), Environmental Condition 11, p. 133 (emphasis added). In other words, the Commission felt the need – for the first time in Landowners' experience -- to include "tree-felling or ground-disturbing activities" as part of "construction", as opposed to "preconstruction activities."

Landowners thus believe that the first thing the Commission should do is define what it means by "construction".[5] Landowners believe that this definition should be: "such activities that include, but are not limited to, any land altering, ground-disturbing, or tree-felling activities," and that any such "construction" requires a Notice to Proceed. With respect to required geotechnical boring and other surveying activities that involve minor alterations or extractions from land, such activities are not included in this definition or subject to a Notice to Proceed with construction. Landowners use "construction" in this sense in these comments.

This will avoid the nightmare scenario where any action short of placing the pipe in the trench could be artificially deemed "preconstruction" activities—and thus not "construction" activities requiring an NTP and subject to Order 871 or 871-A's protections. Currently, as described above, such activities have been allowed and simply treated as potential enforcement questions, causing irreparable injury to land. *See, e.g., Delaware Riverkeeper v. FERC*, 857 F.3d 388, 395 (D.C. Circuit 2017) (cutting trees is a "pre-construction activity.").

Landowners note that other federal agencies do not have a problem defining what constitutes "construction" for purposes of their regulatory programs, *e.g.*, the Environmental Protection Agency's definitions of "construction," "commence as

[5] Clearly defining 'construction' would also potentially clarify restoration activities, wherein FERC directs a pipeline to restore a site to 'preconstruction conditions.' *See, e.g.* Atlantic Coast Pipeline CO P219 (noting pipeline commitment to restore stream beds sand banks to "preconstruction conditions").

applied to construction," and "begin actual construction" under the Clean Air Act's New Source Review program. There, "construction means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in emissions" (40 C.F.R. 52.21(b)(8)), while "commence as applied to construction":

> . . . means that the owner or operator has all necessary preconstruction approvals or permits and either has: (i) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or (ii) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

40 C.F.R. 52.21(b)(9). And "begin actual construction":

> means, in general, initiation of physical onsite construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

40 C.F.R. 52.21(b)(11). EPA has gone even further than just regulatory definitions, such as the agency's 22-page draft regulatory guidance entitled "Interpretation of 'Begin Actual Construction' Under the New Source Review Preconstruction Permitting Regulations" (March 25, 2020).[6]

[6] *Available at:* https://www.epa.gov/sites/production/files/2020-03/documents/begin_actual_construction_032520_2.pdf) (last visited Feb. 16, 2021).

EPA also maintains libraries with dozens of its case-by-case guidance decisions further clarifying what constitutes "commence construction," *Commence Construction,* EPA, https://www.epa.gov/nsr/commence-construction (last visited Feb. 16, 2021), and "begin actual construction." *Begin Actual Construction,* EPA, https://www.epa.gov/nsr/begin-actual-construction-0 (last visited Feb. 16, 2021).

Like EPA's creation of a finely nuanced structure, distinguishing, for example, between a "physical change . . .that would result in a change in emissions," a "continuous program of actual on-site construction," and "onsite construction activities . . . which are of a permanent nature," the Commission should be able to clearly define which actions necessary to build a pipeline are "construction" for purposes of requiring the Commission to issue an NTP.

B. Even after *Allegheny*, Serious Issues Remain Under the Current Request for Rehearing Regime.

A landowner aggrieved by a FERC certificate order must first seek rehearing with the Commission as a precondition to obtaining judicial review of the order. 15 U.S.C. § 717r(a)-(b). The landowner must apply for rehearing within 30 days of the issuance of a certificate order. 15 U.S.C. § 717r(a). The Commission then has 30 days to "act upon" the request for rehearing. *Id.* Even if FERC fails to take any of the enumerated actions "within thirty days after [the rehearing request] is filed," the "application may be deemed to have been denied" and on Day 31, after requesting rehearing, a landowner may seek judicial review. *Allegheny,* 964 F.3d at 3-4 (holding

that tolling orders were "not the kind of action on a rehearing application that can fend off a deemed denial and the opportunity for judicial review").

The problem is that even after *Allegheny,* FERC may still grant rehearing "for the express purpose of revisiting and substantively reconsidering a prior decision, . . . [when it] need[s] additional time to allow for supplemental briefing or further hearing processes." *Allegheny*, 964 F.3d at 16. (Or as Judge Griffith put it in his concurrence, "the Commission can grant rehearing *without* making a merits decision." *Allegheny*, 964 F.3d at 20 (Griffith, T., concurring) (emphasis in original.)).

If FERC permitted construction activities and eminent domain procedures to move forward while a certificate order was under such active reconsideration, landowners would find themselves in the exact position as they were in pre-*Allegheny*, or in a "Kafkaesque regime" where they are held in "seemingly endless administrative limbo while energy companies plow ahead seizing land and constructing the very pipeline that the procedurally handcuffed homeowners seek to stop." *Allegheny Def. Project v. FERC,* 932 F.3d 940, 948 (D.C. Cir.) (Millett, J., concurring), *reh'g en banc granted, judgment vacated*, 943 F.3d 496 (D.C. Cir. 2019), *and on reh'g en banc*, 964 F.3d 1 (D.C. Cir. 2020).

In other words, without proper and reasonable restraints (such as staying certificates until final resolution of requests for rehearing (including requests that FERC has granted), *Allegheny's* description of what happens to landowners under

tolling orders will just as easily apply when FERC grants rehearing before Day 31 in order to take briefing and/or further consider an issue:

> On top of that, the Commission and private certificate holders use its [certificate] orders to split the atom of finality. They are not final enough for aggrieved parties to seek relief in court, but they are final enough for private pipeline companies to go to court and take private property by eminent domain. And they are final enough for the Commission to greenlight construction and even operation of the pipelines. [Certificate] orders, in other words, render Commission decisions akin to Schrödinger's cat: both final and not final at the same time.

Allegheny, 964 F.3d at 10 (citations omitted).

This shifts all of FERC's responsibility to protect the public interest by avoiding irreparable landowner impacts to the varied courts entertaining condemnation proceedings. Moreover, those courts do so in the wake of FERC's routine denials of landowners' requests for stays of Certificate Orders with respect to condemnation force and effects. FERC's past practice of refusing to stay Certificates' effects signals to these courts that their role in administering condemnation proceedings is ministerial, at best, and those courts have heeded that message, treating any and all Certificates, however conditional or incipient, as unassailable, and a reasonable predicate even for quick-takes. It's time for a new message, and a new practice that instills and ensures public confidence in FERC's administration of its Gas Act duties and pipeline authorization practices.

As Chairman Glick has suggested, the appropriate path forward is for FERC to:

> adopt a practice of presumptively staying § 7 certificates pending commission action on the merits of any timely filed requests for rehearing. A practice along those lines would help protect landowners from an action seeking to condemn their property by delaying the issuance of the condition precedent for a condemnation action pursuant to the NGA. Only then will we have addressed the most glaring due process shortcomings associated with the Commission's use of tolling orders in NGA certificate proceedings.

Order 871 (Commissioner Glick, partial dissent P. 5) (citations omitted). This will ensure that landowners will be kept out of the potential "endless administrative limbo," where their property is taken, their land will permanently destroyed for projects that may never be built, and industry will have clarity on if and when to begin expending resources on condemnation hearings, and on what exactly comprises the approved route.

II. FERC'S ENUMERATED ISSUES AND SPECIFIC RESPONSES THERETO

FERC Question a: Should the Commission withhold authorizations to commence construction during the pendency of all rehearing requests? Alternatively, should the Commission withhold authorizations to commence construction only during the pendency of rehearing requests that raise certain issues or arguments? If the Commission were to limit such a rule to only certain issues or arguments, which issues or arguments should trigger that rule?

Landowners' Comment a: The Commission should not authorize any construction activities during the pendency of any landowner's rehearing request.

Allowing construction[7] to go forward during the pendency of such a rehearing request is fundamentally unjust because construction would permanently alter or destroy property before landowners have the opportunity to seek judicial relief, causing irreparable harm. *See Order* 871, Commissioner Glick's dissent, footnote 35. Landowners' positions are outlined in greater specificity below.

Where a project developer or shipper is the only party to seek rehearing, Landowners see no reason why FERC should not permit construction activities to move forward during rehearing.

FERC Question b: If the Commission were to adopt a rule of withholding authorizations to commence construction while rehearing is pending, should that rule apply to all orders pertaining to an NGA section 3 authorization or section 7 certificate or only a subset thereof?

Landowners' Comment b: As discussed above, Landowners believe authorization to construct should be withheld pending final resolution of any landowner rehearing requests in Section 7 proceedings.

FERC Question c (footnotes omitted): In its rehearing request, INGAA poses a number of hypotheticals regarding circumstances that may unfold following *Allegheny*. Please comment on how a rule withholding authorizations to commence construction during rehearing, if appropriate, should apply to those circumstances.

[7] As defined above, at p. 6.

INGAA rehearing questions:

1. Because Order No. 871 predates the Allegheny Defense decision and did not explicitly address the Commission's evolving practices as to "deemed denials," the Commission should amend § 157.23(a) to make clear that the prohibition on granting a notice to proceed does not apply once a request for rehearing has been deemed denied by virtue of the Commission taking no action within 30 days of the rehearing request. This clarification is appropriate because the D.C. Circuit explicitly recognized the "critical" difference between the Commission's prior "tolling-order approach" and its ability to modify an order after a "deemed denial"—i.e., the latter "ensures that the Commission's additional time for action comes with judicial superintendence and the opportunity for the applicant to seek temporary injunctive relief if needed under the ordinary standards for a stay."

Put simply, allowing a project developer to obtain an NTP after a rehearing request has been deemed denied—and the project opponent is free to go to Court and seek appropriate relief—presents none of the concerns that the Court identified with the Commission's prior tolling order practice. From the perspective of an affected landowner or other project opponent, then, such circumstances are indistinguishable from a situation where the Commission has already acted on the merits of a rehearing request.

Landowners Comment (c)(1): Landowners do not object to FERC issuing an NTP when requests for rehearing have been deemed denied. However, after a request for rehearing has been 'deemed denied,' FERC should not be permitted to issue an NTP, *and then* issue a subsequent order on rehearing. If FERC issues any subsequent rehearing order after a rehearing request has been 'deemed denied,' and there was an issuance of a Notice to Proceed with construction, that Notice to Proceed should be deemed invalidated as of the date of the filing of the rehearing order.

2. The Commission should also clarify whether Order No. 871 applies in some of the novel procedural circumstances contemplated in the Allegheny Defense opinion, such as where the Commission issues an order, allows rehearing requests to be denied by operation of law, modifies the order prior to filing the record in a Court of Appeals, and a party then seeks rehearing of the modified order. INGAA does not believe the Commission intended Order No. 871 to prohibit a notice to proceed in those circumstances, since by assumption the party seeking rehearing would have access to judicial review. The Commission should clarify that the Order's prohibition on issuing an NTP terminates once the Commission has allowed the rehearing request to be deemed denied by operation of law through the Commission's inaction—notwithstanding the possibility that the Commission might subsequently modify its order sua sponte before filing the record.

Answer (c)(2): As Landowners understand this hypothetical, the original Section 7 order has been superseded by a modified order, which is subject to rehearing. But, assuming that it was a landowner who sought rehearing of the original order and now seeks rehearing of the modified order, that landowner cannot seek judicial relief as to the modified order (which may still subject that landowner's property to eminent domain and an NTP) until the Commission resolves the new rehearing request. In other words, there is no reason why the second rehearing should be considered as any different than the rehearing of the original order, *i.e.*, that the Commission should not issue NTPs (or allow eminent domain) until the second rehearing is resolved.

FERC Question d: Should the Commission modify its practices or procedures to address concerns regarding the exercise of eminent domain while rehearing requests are pending before the Commission? If so, how?

Landowners Comment d: Landowners generally agree with Commissioner Glick that FERC should at least:

> [A]dopt a practice of presumptively staying § 7 certificates pending commission action on the merits of any timely filed requests for rehearing. A practice along those lines would help protect landowners from an action seeking to condemn their property by delaying the issuance of the condition precedent for a condemnation action pursuant to the NGA. Only then will we have addressed the most glaring due process shortcomings associated with the Commission's use of tolling orders in NGA certificate proceedings.

Order 871 (Commissioner Glick, partial dissent P. 5) (citations omitted).

As highlighted by Commissioner Glick, multiple courts have contemplated such a stay having the desired effect of protecting landowners along these lines. *Id.* at n. 35. FERC has continuously maintained that it lacks authority to administer or condition any eminent domain exercised under 717f(h). *See, e.g.*, *FERC Order Denying Petition for Declaratory Order*, FERC Docket CP20-518, Accession No. 20210119-3074 (January 19, 2021) (denying petition for an order declaring PennEast be prohibited from exercising eminent domain authority until PennEast Pipeline Company has received the necessary permits and authorizations to commence construction.) Landowners have argued that, to the contrary, the Commission can and should stay the Certificate to the extent it authorizes the pipeline to exercise eminent domain authority if it does not grant a full stay of the Certificate, given that FERC previously limited a certificate holder's use of eminent domain, as described in *Mid-Atlantic Express, LLC v. Baltimore County*, 410 Fed. Appx. 653, 657 (4th Cir. 2011). In that case, Environmental Condition 55 of FERC's § 7 Certificate stated that "Mid-Atlantic shall not exercise eminent domain authority granted under [the NGA] section 7(h) to acquire permanent rights-of-way on [residential] properties until the required site specific residential construction plans have been reviewed and approved in writing by the Director of [the Office of Energy Projects]" *See also* Order on Rehearing and Clarification and Denying Stay, 129 FERC ¶ 61,245 at ¶ 24 (Dec. 17, 2009) (certificate holder in *Mid-Atlantic* sought clarification of this eminent domain exercise condition, with FERC affirming that it had this authority.) If FERC had the authority to

condition use of eminent domain on obtaining further authorization from the Commission, it could exercise similar authority to condition the use of eminent domain on final resolution on rehearing or filing the record with the Court of Appeals.

FERC Question e: If the Commission retains the rule withholding authorizations to commence construction while rehearing is pending, at what point in time should projects be permitted, upon receipt of an appropriate authorization, to commence construction? For example, should the Commission set a specific time, such as 90 days after the filing for a request for rehearing, for the Commission to issue an authorization to proceed?

Landowners Comment e: It is unclear what circumstances are referred to here. If the Commission issued a "denied by operation of law" notice on Day 30, then a landowner would already have been free to seek judicial review, and the Commission could issue the NTP at any point after that. If, on the other hand, this refers to the situation addressed in section IB, above, where the Commission has granted rehearing in order to legitimately further consider the issue, but has not issued a final decision by Day 90, no NTP should be issued because it presents the same fundamentally unfair situation of allowing construction to proceed while landowners are barred from seeking judicial review.

Given the extremely abbreviated comment period, Landowners reserve the right to file additional and more detailed comments.

Respectfully submitted,

/s/ Megan C. Gibson
Megan C. Gibson
David Bookbinder
Niskanen Center
820 1st Street, NE Suite 675
Washington, DC 20002
(202) 810-9260
mgibson@niskanencenter.org

Counsel for Niskanen Center and Affected Landowners

/s/ Jennifer Danis
Jennifer Danis, Esq.
Morningside Heights Legal Services
Columbia Law School
435 W. 116th Street
New York, NY 10027
(212) 854-4291
jdanis@law.columbia.edu

Counsel for New Jersey Conservation Foundation

/s/ Steve Goodell
Steven P. Goodell, Esq.
Shareholder-Government
Parker McCay, P.A.
3840 Quakerbridge Rd, Suite 200
Hamilton, NJ 08619
(609) 896-4222
sgoodell@parkermccay.com

Counsel for Hopewell Township

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