STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company **Application for Review of Alternative Regulation Plan**	))))	**Docket No. 98-0252**
Illinois Bell Telephone Company **Petition to Rebalance Illinois Bell Telephone Company's Carrier Access and Network Access Line Rates**	)))))	**Docket No. 98-0335**
Citizens Utility Board, *People of the State of* Illinois **v.** **Illinois Bell Telephone Company**	)))))	**Docket No. 00-0764** **(Consol.)**

SBC ILLINOIS' OPPOSITION TO PETITION FOR INTERLOCUTORY REVIEW

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SBC ILLINOIS' OPPOSITION TO PETITION FOR INTERLOCUTORY REVIEW

Illinois Bell Telephone Company ("SBC Illinois" or "the Company"), by its attorney, hereby files its Opposition to the Government and Consumer Intervenors' ("GCI") Petition for Interlocutory Review of the Administrative Law Judge's February 23, 2005 Ruling on the scope of this proceeding on remand from the Appellate Court.

I. INTRODUCTION

This proceeding is being conducted pursuant to the opinion of the Illinois Appellate Court reversing and remanding certain of the Commission's findings in its Alternative Regulation Plan Review Order adopted on December 30, 2002. *Illinois Bell Telephone Company v. Ill. Comm. Comm.*, 352 Ill. App. 3d 630 (2d Dist. 2004). The only issue in dispute is the scope of the Commission's authority to reexamine the existing record and/or reopen the record to accept new evidence relative to the imposition of an infrastructure spending requirement on SBC Illinois. The Appellate Court held that the Commission's imposition of an

annual spending requirement was "completely unsupported by the record" because there was "simply no evidence to support that particular figure." *Id.* at 642. The Court noted that the Commission did not "hear any evidence as to how this specific level of funding or any level of funding, for that matter, was the appropriate amount going forward or how this amount would achieve the statutory goals for alternative regulation." *Id.* Accordingly, the Court reversed the network spending requirement and remanded the case "to the Commission with directions to enter an order consistent with this opinion." *Id.*

GCI, the Commission Staff and SBC Illinois took differing views on the scope of the Commission's authority in this proceeding. After reviewing the positions of the parties and the terms of the Appellate Court's opinion, the Administrative Law Judge concluded that the opinion does not authorize reexamination of the infrastructure spending requirement based either on the existing record or additional evidence. Therefore, under established state law principles, the Ruling concludes that the Commission is required to delete the infrastructure spending obligation from its 2002 Order. Ruling at 20-21, 24-25. GCI challenges this ruling, contending that the Commission has the discretion to either reinstate the $600 million annual spending obligation based on the existing record or, in the alternative, reopen the record to take additional evidence and conduct hearings to establish a new spending obligation. GCI Petition at 2.

GCI's Petition for Interlocutory Review should be denied. It is moot and should be dismissed on procedural grounds. If the Commission reaches the merits of GCI's arguments at this time, the Administrative Law Judge's ruling is correct and should not be changed. GCI has raised nothing new and has identified no error in the Administrative Law Judge's analysis. In fact, the positions taken by GCI are inconsistent with Illinois law generally on the scope of the

Commission's authority in a remand proceeding and the terms of the Appellate Court's opinion in this particular case.

II. GCI'S PETITION FOR INTERLOCUTORY REVIEW IS UNTIMELY AND SHOULD BE DENIED

GCI's Petition for Interlocutory Review is procedurally improper and should be denied. The purpose of interlocutory review is to allow parties to obtain timely review of an Administrative Law Judge's ruling before a case is presented to the Commission for a final decision on the merits. Typically, this procedure is invoked when the ruling significantly impacts discovery or the evidentiary case that the affected party wishes to present, such that the party cannot be made whole if the issue is deferred until the conclusion of the docket. Absent these circumstances, objections are – and should be – brought to the Commission's attention in the party's Exceptions. 83 Ill. Adm. Code § 200.830. Indeed, the Commission's rules make clear that failure to file for interlocutory review in no way constitutes a waiver of the party's objection to a ruling. 83 Ill. Adm. Code § 200.520 ("... failure to seek immediate review shall not operate as a waiver of any objection to such ruling").

GCI's Petition for Interlocutory Review is moot. Although it was filed within 21 days of the date of the Administrative Law Judge's Ruling as specified in Section 200.520, the Administrative Law Judge's Proposed Order had already been issued four days earlier. Once the Proposed Order issued, GCI should have presented its objections to the Ruling in its Exceptions, and abandoned the procedural path of interlocutory review. Indeed, it will have to file Exceptions on this issue to preserve its position in any event. Under these circumstances, a Petition for Interlocutory Review is no longer appropriate and it should not be considered.

There is no substantive purpose to GCI's Petition for Interlocutory Review. Every issue that GCI raised in its Petition could just have easily been raised in Exceptions. Moreover, their

Petition does not necessarily result in a more expedited Commission ruling, as compared to filing Exceptions. Although the Administrative Law Judge must file a report with the Commission within 14 days of the Petition under Section 200.520, nothing in the rules obligates the Commission to rule on the Petition by any particular date. Absent the Petition, the Post-Exceptions Proposed Order would likely have gone to the Commission only a week or two later than the report.

Thus, the only *material* effect of GCI's Petition is to impose wholly unnecessary administrative burdens on the Administrative Law Judge, Staff and the other parties. Responses to the Petition are due within 7 days of the filing (i.e., on March 23). Exceptions to the Proposed Order are due two days later – on March 25. Since GCI will have to present the same arguments in its Exceptions, SBC Illinois and the other parties will *also* have to file replies to these Exceptions on April 4 that are duplicative of their responses to the Petition. The Administrative Law Judge will have to prepare both the report to the Commission required by Section 200.520 *and* the Post-Exceptions Proposed Order, with whatever briefing document accompanies it.

Parties should be discouraged from using procedures that simply double the work load for everyone involved with no gain in either administrative efficiency or procedural fairness. Although Section 200.520 does not on its face preclude GCI from filing its Petition, nothing in Section 200.520 obligates the Commission to rule on it ("On review of a Hearing Examiner's ruling, the Commission may . . . take any other just and reasonable action with respect to the ruling, such as declining to act on an interlocutory basis"). 83 Ill. Adm. Code 200.520(b). Since GCI's Petition was moot before it was ever filed, it should be denied.

III. THE COMMISSION DOES NOT HAVE THE DISCRETION TO RE-IMPOSE A MULTI-BILLION DOLLAR INFRASTRUCTURE SPENDING OBLIGATION ON SBC ILLINOIS

In the event that the Commission addresses GCI's objections on the merits, its Petition should be denied as well. GCI contends that the Commission has ". . . substantial discretion on remand to modify its orders based on the existing record or to reopen for additional evidence." GCI Petition at 8. GCI is incorrect. As the Administrative Law Judge's ruling properly concludes, the *Appellate Court* – not the Commission – determines the scope of the remand proceeding and the options open to the Commission. Both trial courts and the Commission must follow appellate court mandates. *In re Marriage of Jones*, 187 Ill. App. 3d 206, 215 (1st Dist. 1989); *Citizens Utils. Co. of Ill. v. Illinois Pollution Control Bd.*, 213 Ill. App. 3d 864, 866 (3d Dist. 1991) ("[T]he trial court may only do those things directed in the mandate; it has no authority to act beyond the mandate's dictates."). Where the mandate is specific, "it is the duty of the trial court to carry it into execution and not to look elsewhere for authority to change its meaning or direction." *David v. Russo*, 119 Ill. App. 3d 290, 295 (1st Dist. 1983), citing *Fisher v. Burks*, 285 Ill. 290, 292 (1918); *Cook v. Moulton*, 1896 WL 2412, at *2 (Ill. App. Ct. 1896) (where mandate required that a decree be entered in accordance with the court's opinion, "[n]o new testimony was necessary in order to comply"). These principles have been followed in Commission proceedings. *See, Illinois Consol. Tel. Co. v. Aircall Communications, Inc.*, 101 Ill. App. 3d 767, 770 (4th Dist. 1981) (where circuit court reversed and remanded order, the "remandment was for the purpose of determining which of the two [providers of paging services] was to obtain the certificate, not for the purpose of taking omitted evidence"); *City of Alton v. Alton Water Co.*, 25 Ill. 2d 112, 115 (1962) (explaining that an "order of this court directing that a cause be remanded to the Commission does not automatically require additional hearings or

evidence"). In fact, it is reversible error for the Commission to reopen the record and allow the introduction of new evidence unless permitted to do so by the Appellate Court. *Rapid Truck Leasing, Inc. v. Ill. Comm. Comm.*, 107 Ill. App. 3d 624 (4th Dist. 1982).

GCI contends that the Commission may reissue its December 2002 order specifying in more detail the evidence supporting the capital spending requirement, citing to *City of Alton v. Alton Water Co.*, 25 Ill. 2d 112, 115 (1962). GCI Petition at 8. *City of Alton* does not help GCI. In the original appeal in *Alton*, the Appellate Court had remanded a rate proceeding to the Commission with express instructions to reconsider certain issues relative to rate base, income tax expense and increased income from improved meter maintenance under standards established by the Court. *City of Alton v. Comm. Comm.*, 19 Ill. 2d 76, 82, 91-93 (1960). The issue on appeal from this remand proceeding – the opinion to which GCI cites – is whether the Commission was *obligated* to reopen the record and take additional evidence on those issues. *City of Alton v. Alton Water Co., supra*, at 114-15. The Appellate Court concluded that new hearings were not required because the Commission's decisions on remand were supported by the existing record. *Id.* at 116, 117, 120-21.

City of Alton has no bearing on the issues in this proceeding. Here, the Appellate Court in this proceeding did *not* instruct the Commission to reconsider the network spending issue – based either on the existing record or new evidence. The Appellate Court simply reversed the Commission's requirement in *toto* and ordered the Commission to issue an order consistent with the opinion. No further analysis of the issue was authorized, much less required, by this opinion, and the Administrative Law Judge's ruling properly so concludes. Ruling at 20-21.

GCI's continued insistence that the Commission can ignore the mandate of the Court and re-justify the spending obligation based on the existing record is particularly egregious. The

issue on appeal was whether there was sufficient *evidence in the record* to support the capital spending requirement – not the adequacy of the Commission's *findings* on this issue. CUB and the AG directly participated in the appeal and presented to the Appellate Court all of the evidence which they believed supported the Commission's investment requirement. The Appellate Court unequivocally concluded that the spending obligation was "completely unsupported by the record" because there was "simply no evidence to support that particular figure." *Illinois Bell Telephone Company* at 642. The Appellate Court accordingly reversed the Commission's decision under Section 10-201(c)(iv)A. It did *not* remand the proceeding for further findings or analysis under Section 10-201(e)(iii). Thus, the specific spending obligation adopted by the Commission in 2002 and the record supporting it are legally defunct. This is the law of the case and it is binding on the Commission and the parties. *See e.g., People v. Abata*, 165 Ill. App. 3d 184, 187-88 (2d Dist. 1988).

GCI further contends that the Supreme Court's decision in *Hartigan v. Ill. Comm. Comm.*, 117 Ill. 2d 120, 142-43 (1987) provides the Commission with the requisite discretion. GCI Petition at 8-10. GCI is, again, incorrect. As the Administrative Law Judge concluded, the *Hartigan* language on which GCI relies simply telescopes separate processes into a single high level discussion. Ruling at 23. In other words, the *Hartigan* language is a generic description of the range of options open to the Appellate Court on review of a Commission decision. It is *not* a ruling on the Commission's authority in any specific case. This is underscored by the fact that the *issue* before the Supreme Court was the dividing line between judicial instructions that constitute judicial rulemaking – which is *not* permitted – and judicial instructions that properly guide the Commission in the remand proceeding – which *are* permitted. *Id.* at 142-43. That is not the issue here. In any specific remand proceeding, the Appellate Court will have selected

one of the options set out in *Hartigan*; and, once it has done so, the Commission must comply with the directions set forth in the opinion reversing or remanding its decision.[1]

GCI contends that the Administrative Law Judge's analysis conflicts with *Illinois Bell Telephone Company v. Ill. Comm. Comm.* 283 Ill. App. 3d 188 (2d Dist. 1996), which held that a court may not substitute its judgment for the Commission's or direct a specific factual result on remand. GCI Petition at 10-11. As the Supreme Court stated in *Hartigan*:

> "The test is whether the court, through its opinion or order, limits or encroaches on the Commission's discretion in its ratemaking function. If the court's directive prohibits the Commission from considering or taking certain action in setting rates otherwise within the lawful scope of the Commission's authority, the court has engaged in judicial ratemaking and has acted improperly." 117 Ill. 2d at 143.

The Appellate Court did not encroach on the Commission's authority here. It simply reversed a Commission finding for lack of evidence – which is precisely what Section 10-201(e)(iv)A contemplates and permits. If GCI were correct, then the Appellate Courts could never simply reverse a Commission finding: the Commission would always have the ability to reopen the record and reconsider an issue that was reversed on appeal. This would make a nullity out of Section 10-201(c)(iv)A. GCI's position simply does not represent the law in Illinois and should be rejected.

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[1] Even in the *Hartigan* litigation, the Court provided very specific directions that contemplated the taking of additional evidence. For example, the Supreme Court's opinion provided as follows:

"Because the Commission relied on the presumption of reasonableness, rather than an affirmative showing of reasonableness through the audit performed by ADL and specific evidence of reasonableness, the cause must be remanded to the Commission . . . In determining on remand whether sufficient evidence of reasonableness has been presented, the Commission may consider the present record in the light of the requirements of section 30.1 as expressed in this opinion, *or require the presentation of such further evidence as may be necessary for it to make a proper determination.*" *Id.* at 136 (emphasis added).

"The record on appeal contains extensive evidence concerning the audit standards that apply to the type of audit required by section 30.1. On remand, the Commission may determine from the evidence presented which, if any, of those standards meet the generally accepted auditing standards requirement contained in section 30.1, *or the Commission may require further evidence of standards in order to make that determination.*" *Id.* at 141 (emphasis added).

GCI contends that the Appellate Court decision did not include "specific instructions" which are binding on the Commission and, therefore, that the Commission may proceed to reexamine the spending requirement. GCI Petition at 13-14. GCI is misreading the Court's opinion and reversing what should be the relevant presumptions. As any review of past Appellate Court orders demonstrates, the courts are clear when the Commission is being asked to reexamine an issue. Even if they give less explicit instructions than those in *Hartigan*, they still make clear that further "proceedings" are anticipated. See e.g., *City of Alton*, *supra*. The Appellate Court here did none of those things. It reversed the requirement outright and simply directed the Commission to issue an "order" consistent with the opinion. An "order" is an "order" – it is not further evidentiary proceedings. Moreover, although the Court found that the Commission had the *authority* to impose a network spending obligation in appropriate circumstances, it did not find that such a condition was *required* to meet the dictates of Section 13-506.1. Therefore, there is no basis on which one can infer that the Court contemplated further evidentiary proceedings.

IV. SBC ILLINOIS DID NOT ACCEPT THE $600 MILLION ANNUAL INVESTMENT REQUIREMENT

Whatever the merits of GCI's legal arguments regarding the scope of the Commission's authority in this proceeding – and SBC Illinois does not believe that they have any – GCI's contention that SBC Illinois somehow "accepted" a continuing investment obligation beyond the five-year extension mandated in the SBC/Ameritech *Merger Order* has no basis whatsoever. GCI Petition at 14-17. The testimony and cross-examination to which GCI points in support of its arguments must be viewed in the context of the investment issue as it stood at the outset of this review proceeding. In the SBC/Ameritech *Merger Order*, the Commission required that the five-year, $3 billion investment obligation in SBC Illinois' 1994 Alternative Regulation Plan

Order be extended for another five years. However, the amount of that investment obligation was made subject to adjustment in this proceeding:

> "AI shall renew and extend the five-year network infrastructure modernization program previously established in its Alt. Reg. Plan. The investment shall total at least $3 billion *subject to adjustment in the Commission's subsequent review of the AI Alt. Reg. Plan.* The five-year extension shall commence in the year 2000 or in the first calendar year following the merger closing date. AI will retain the flexibility to structure and apportion the total network investment over the five-year period." *Order in Docket No. 98-0555*, adopted September 23, 1999, at 240 (emphasis added).

SBC Illinois was further required to provide the Commission with formal notification that it "accepted" the conditions imposed on it by the *Merger Order*, which it did. *Id.* at 260.

All of the testimony provided by SBC Illinois' witnesses on the subject of network investment was related to this second five-year obligation. Because the $3 billion amount had been made subject to adjustment, SBC Illinois made clear in testimony that it was not contesting the spending commitment mandate in the *Merger Order*.[2] Because the Commission had just extended the investment obligation for an additional five years, SBC Illinois made clear in testimony that it did not believe that the issue of network spending needed to be addressed again in this proceeding. It was in *that* context that Mr. O'Brien testified that the "Commission already specified the manner in which this commitment should be carried forward under alternative regulation." GCI Petition at 14 (citing to Mr. O'Brien's direct testimony). Nothing in Mr. O'Brien's testimony even remotely suggested that the Company was agreeing to extend the commitment *beyond* the second five-year term specified in the *Merger Order*.

GCI contends that an attachment to Mr. O'Brien's testimony somehow implied that the investment obligation would continue beyond the *Merger Order*. GCI Petition at 15. The

[2] Although SBC Illinois initially proposed that investments made by AADS should "count" toward the $3 billion total, it subsequently withdrew that proposal. GCI Petition at 15; Am. Ill. Ex. 3.0 (O'Brien Direct) at 19; Am. Ill. Ex. 3.1 (O'Brien Rebuttal) at 20-21.

"Infrastructure Development" language cited by GCI was included in a red-lined version of the 1994 Plan document ("Appendix A" to the original 1994 Order) which showed the changes proposed by the Company on a going-forward basis. Am. Ill. Ex. 3.1 (O'Brien Rebuttal), Schedule 1 at 6-7. No reasonable person could possibly have construed this language as a commitment to continue the *Merger Order* obligation beyond its expiration. This provision was copied *verbatim* from the original Appendix A and, by its express terms, was limited to the ". . . *first* five year period of the plan" (emphasis added). The first five-year period of the Plan had expired at the end of 1999.

Finally, Mr. O'Brien did *not* accept an extension of the *Merger Order* condition in cross-examination. GCI Petition at 16-17. Mr. O'Brien clearly understood the questions as asking whether SBC Illinois was seeking to modify the *Merger Order* condition in this proceeding; in response to both Mr. Goldenberg and Mr. Manshio, he testified that SBC Illinois was not "seeking to modify" and did not plan "to change that commitment in this docket." His testimony did not even touch on the question whether the *Merger Order* commitment should be further extended beyond its five-year term, much less accept such a proposition.[3]

SBC Illinois' view of the record is clearly supported by both GCI's own contemporaneous conduct and by the Proposed Orders issued at the time. Rather than propose an extension of the *Merger Order* obligation in testimony, GCI recommended instead that SBC Illinois be required to spend at least $29 per access line annually in the Wire and Cable Account over the duration of the Plan. This proposal was summarily rejected for lack of evidentiary

[3] If either Mr. Goldenberg or Mr. Manshio actually intended to ask the Company for its position on further extending the *Merger Order* condition – which SBC Illinois doubts – it would have been incumbent on them to do so in a straightforward and explicit manner. Parties should not attempt to foist billion dollar investment obligations on a regulated company through oblique cross-examination that was clearly understood by the witness as being directed at a more limited issue.

support in every one of the five Proposed Orders issued by the Administrative Law Judge. Significantly, all five of those orders stated explicitly that, with the rejection of the $29/line proposal, SBC Illinois was subject to *no* capital spending requirement (beyond the five-year extension mandated by the *Merger Order*). For example, the Administrative Law Judge's initial Proposed Order issued on May 22, 2001, stated as follows:

> "We reject GCI/City's proposal to have Ameritech Illinois invest at least $29 per access line annually, in the "Wire and Cable" account. The GCI/City has not established that this level of spending is reasonable or appropriate on a forward-looking basis. It simply reflects the amount which Ameritech Illinois spent in 1996. Nor has GCI established that the particular "Wire and Cable" account is any more relevant to service quality than any of the other Plant in Service accounts. *Finally, a capital spending requirement is inconsistent with the nature of alternative regulation. The Commission has adopted service quality measures and benchmarks that will assure adequate service quality in the future. What is required to have Ameritech Illinois achieve the mandated level of service is a decision best left to the Company.* It will either rise or fall on the basis of such decisions." *Hearing Examiner's Proposed Order* dated May 22, 2001, at 142 (emphasis added).

Thus, under the Proposed Orders, there would have been no network spending obligation specific to the Alternative Regulation Plan. Notably, the GCI parties did not take exception to this portion of the Proposed Order. GCI/City Brief on Exceptions, filed June 13, 2001. If they truly believed in 2001 that SBC Illinois had, in fact, agreed to a further extension of the *Merger Order* condition, surely they would have excepted to this language.

Finally, GCI complains that SBC Illinois did not object to an extension of the *Merger Order* requirement until its Application for Rehearing. *GCI Petition* at 14. This is hardly surprising. Since no one proposed an extension in their testimony or briefs, there was nothing to which SBC Illinois could have or should objected.[4] In other words, SBC Illinois did not object to this spending obligation until its Application for Rehearing because it was not on the table

[4] In contrast, SBC Illinois *did* object to GCI's $29/line investment proposal.

until the Commission injected it into the Order during its final deliberations. The Application for Rehearing represented SBC Illinois' first and only opportunity to contest it.

In short, it exceeds any legitimate bounds of advocacy for GCI to contend that SBC Illinois acted improperly in this proceeding or somehow "sandbagged" the Commission and the parties. GCI Petition at 15. GCI apparently has now concluded that it made a strategic blunder by not recommending extension of the $3 billion commitment itself or presenting evidence to support such an obligation. That does not make their error SBC Illinois' responsibility. GCI's transparent attempt to shift the blame should be rejected out of hand.

V. A NETWORK SPENDING OBLIGATION IS NOT REQUIRED FOR THE ALTERNATIVE REGULATION PLAN TO SATISFY THE PUBLIC INTEREST AND SECTION 13-506.1 OF THE ACT

GCI objects to the Administrative Law Judge's Ruling on the grounds that it overemphasizes service quality concerns as the basis for the network spending requirement and does not consider other policy objectives. GCI Petition at 20-22. GCI is ignoring the Appellate Court's opinion. Whatever range of objectives the Commission might have originally had for this spending obligation, the Appellate Court upheld the Commission's authority to impose such a condition on the Company on one basis and one basis only: service quality concerns. *Illinois Bell Telephone Company* at 641. The Appellate Court's opinion does not give the Commission the latitude to base a spending obligation on considerations other than service quality. Therefore, for purposes of this remand proceeding, the other objectives identified by the Commission in its 2002 Order and recited by GCI are legally irrelevant. Moreover, most of the Commission's discussion of service quality in that Order focused on the remedial effect of the new penalty-based incentive structure that it was adopting – not infrastructure spending. See e.g., *Order* at

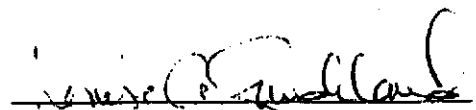
76, 80.[5] Thus, there is no basis for GCI's contention that the Alternative Regulation Plan cannot stand without the infrastructure spending obligation.

VI. CONCLUSION

In conclusion, GCI's Petition for Interlocutory Review should be denied on procedural grounds. In the alternative, it should also be denied on its merits. The ruling of the Administrative Law Judge is well-reasoned, reflects Illinois law on the scope of the Commission's authority in a proceeding on remand from an Appellate Court and properly implements the Appellate Court's opinion in this proceeding.

Respectfully submitted,

ILLINOIS BELL TELEPHONE COMPANY



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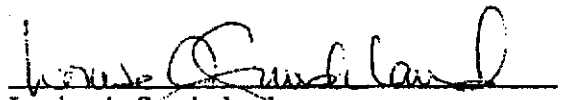
[5] Although the Commission expresses disappointment that SBC Illinois had not deployed advanced services more rapidly, the Commission recognized that this problem was addressed by the General Assembly when it enacted Section 13-517. Compare *Order* at 17-18, 49, 55, and *Order* at 80.

CERTIFICATE OF SERVICE

I, Louise A. Sunderland, an attorney, certify that a copy of the foregoing **SBC ILLINOIS' OPPOSITION TO PETITION FOR INTERLOCUTORY REVIEW** was served on the parties on the attached service list by U.S. Mail and/or electronic transmission on March 23, 2005.



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