IN THE
INDIANA SUPREME COURT

CAUSE NO. _____

SOLARIZE INDIANA, INC.,	)	**Indiana Court of Appeals Cause No. 20A-EX-01384**
Appellant (Objector below),	)	
v.	)	**Appeal from Indiana Utility Regulatory Commission**
SOUTHERN INDIANA GAS AND ELECTRIC COMPANY, dba VECTREN ENERGY DELIVERY OF INDIANA, INC., INDIANA UTILITY REGULATORY COMMISSION and INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR,	)	**30-Day Filing Nos. 50331 & 50332**
Appellees (Petitioner, Administrative Agency & Statutory Party below).	)	**Hon. James F. Huston, Chairman Hon. Sarah E. Freeman, Hon. Stefanie Krevda, Hon. David Ober, Hon. David E. Ziegner, Commissioners**

PETITION TO TRANSFER OF SOLARIZE INDIANA, INC.

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STATEMENT OF THE ISSUES

The Indiana Utility Regulatory Commission ("Commission") utilizes a summary procedure to approve certain noncontroversial utility submissions, without a hearing. A screening step is used to determine if a submission is actually noncontroversial, by which an interested entity may file an objection asserting the utility proposal violates "applicable law." The utility here made two related submissions under that process, relating to treatment of customer-owned generation facilities such as rooftop solar, and an interested party filed objections asserting violations of federal law. The Commission nevertheless found the utility proposals were noncontroversial, and granted summary approval without a hearing. In a published opinion, the Court of Appeals affirmed. This appeal raises three issues:

1. Whether the asserted violations of federal law were properly disregarded by the Commission on the theory that the objector did not also allege violations of Indiana law.

2. Whether the utility filings could be treated as noncontroversial on the ground that the asserted violations of federal law could be raised in a different proceeding or through a different mechanism.

3. Whether a reply filed by the objector properly supported the objection, where it was filed within the objection period, responded to the utility's arguments, and explained the violations of federal law that were previously raised.

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I. BACKGROUND AND PRIOR TREATMENT OF ISSUES

For utility proposals affecting regulated rates and services, the statutory process calls for formally docketed proceedings before the Commission, with a developed record, an evidentiary hearing, and an order on the merits. See Ind. Code §§8-1-2-54 to -61. In defined circumstances, however, certain noncontroversial submissions may be approved through a "30-day filing" process. See 170 Ind. Admin. Code §1-6-1 et seq. Only *noncontroversial* filings may be approved through that process. Id. §§1(b), 1(e). A filing is controversial if a written objection is submitted alleging, among other grounds, a violation of "applicable law." Id. §7. If such an objection is submitted at least three days prior to the approval date, and is not resolved between the parties, the filing is not eligible for summary approval under the 30-day filing process. Id. §7(d).

This appeal concerns two concurrent 30-day filings by Southern Indiana Gas and Electric Company, d/b/a Vectren Energy Delivery of Indiana, Inc. ("Vectren"). See App. II at 30-55, 56-69. Both concerned service arrangements for customers with their own generation equipment, such as rooftop solar installations. One filing proposed a revision to the regulated price at which Vectren is required to purchase electricity produced by customer-owned facilities but not used by the customer. The second was a proposed alternative standard contract defining service terms for such customers. Both filings were subject to regulatory approval, and in both instances Vectren sought to use the 30-day filing process on the premise that the proposals were noncontroversial.

Solarize Indiana, Inc. ("Solarize Indiana") subsequently filed a written objection to the two Vectren filings, asserting among other points that the Vectren proposals were non-compliant with applicable federal law. See App. II at 91-95. Solarize Indiana is a non-profit organization devoted to promoting the use of solar power in Indiana, especially small-scale "rooftop" solar facilities used by homeowners, small businesses and non-profit organizations such as churches and schools. Id. at 91. The objection asserted that the Vectren proposals deviated from the requirements of the Public Utilities Regulatory Policies Act ("PURPA"), a federal statute establishing standards for dealings between electric utilities and customer-owned generating facilities. Id. at 92-94. See also 16 U.S.C. §824a-3. Vectren filed a response, arguing that there was no showing of a violation of "Indiana law" and that PURPA was inapplicable. See App. II at 142-46. Three days later, Solarize Indiana submitted a reply explaining the asserted PURPA violations in greater detail. Id. at 147-53.

Six weeks after those submissions were completed, the Commission's Energy Division presented a set of "Utility Articles" to the Commission for approval. See App. II at 10-29. The Utility Articles addressed seven different 30-day filings, including the two Vectren filings. Id. at 21-27. The Utility Articles included "General Counsel Analysis and Findings" that addressed the objections. Regarding Solarize Indiana's PURPA objections, the General Counsel analysis stated the Vectren filings were made pursuant to 170 Ind. Admin. Code 4-4.1 ("Rule 4.1"), which implemented Ind. Code ch.

8-1-2.4 ("Chapter 2.4"), which implemented PURPA, and concluded that absent an alleged violation of Rule 4.1 the objection was not sufficient. Id. at 23-24, 26. The General Counsel analysis also suggested the PURPA objections could be raised through a request for a rulemaking or in a distinct Vectren proceeding. Id. Based on that analysis, the Energy Division recommended approval of the Vectren proposals as 30-day filings. Id. at 24, 27.

On June 24, 2020, the Commission entered a one-page order approving the 30-day filings. See App. II at 9. The order stated: "There are no controversial filings in the Utility Articles approved today." Id. On that basis, the Commission granted summary approval to all the 30-day filings, including the two Vectren filings, without a hearing. Id. Solarize Indiana timely appealed.

The Court of Appeals issued a published opinion on January 29, 2021, affirming the Commission order. The Court agreed that PURPA is applicable law, but endorsed the Commission's position that the objection was insufficient because Solarize Indiana "identified no conflict between the cited Indiana authorities and PURPA." See Slip Op. at 20. The Opinion then found that a suggested rulemaking and proposal to consolidate the 30-day filings with another Vectren proceeding did not establish any violation of law, and that a separate objection raised by a different party was insufficient as well. Id. at 21-23. The Opinion did not address the substance of the PURPA objections,

instead finding that the supporting detail in Solarize Indiana's reply submission was untimely and hence waived. Id. at 23-24. Solarize Indiana now seeks transfer.

II. REASONS FOR GRANTING TRANSFER

This appeal raises an important issue of fundamental law: the Commission, by approving the Vectren proposals on the fiction they were noncontroversial, refused to recognize asserted violations of federal law and effectively concluded only a violation of Indiana law could be used to demonstrate controversy. In PURPA, Congress established federal requirements binding on electric utilities and charged state agencies with responsibility to enforce those provisions. Indiana enacted its own legislation promoting corresponding energy policies, but did not purport to overrule or supersede PURPA. The Commission is bound by statute to enforce not only Indiana law but also "all other laws" governing the regulation of public utilities. The 30-day filing rule states a valid objection may be based not only on a Commission rule but a violation of any "applicable law." PURPA is controlling law throughout the nation. A state agency does not have discretion to disregard asserted violations of federal law.

The lengths to which Vectren and the Commission went to avoid the merits of the PURPA violations are underscored by additional errors. The Commission directed Solarize Indiana to raise the PURPA objections instead through a requested rulemaking or in a distinct Vectren proceeding, neither of which would cure the summary approval granted to the two Vectren filings in dispute, which did not comply with federal law

but were treated as noncontroversial. The Court of Appeals, furthermore, found the PURPA objections deficient because Solarize Indiana's reply was supposedly untimely, even though the Commission confirmed it considered and addressed that reply, the reply was submitted well within the objection period, it responded to arguments made by Vectren, and it substantiated objections that were already asserted previously. The PURPA objections were properly presented and should not have been bypassed.

A. The Commission Erroneously Disregarded the PURPA Objections While Approving the Filings as Noncontroversial

PURPA was enacted in 1978 to establish federal energy policies in key respects, in particular promoting cogeneration and small power production facilities used by consumers for self-supply as an alternative to purchases from utilities. See 16 U.S.C. §§2611, 824a-3. Such customer-owned resources, including rooftop solar installations, are referred to as "qualifying facilities" or "QFs." Id. §§796(17)(C), (18)(B). The Commission's website recognizes that rooftop solar installations fall within the protections of PURPA:

> The Public Utilities Regulatory Policy Act ("PURPA"), Indiana Code chapter 8-1-2.4, and 170 IAC 4-4.1 are all still applicable; and the Commission has reviewed and, as appropriate, approved (and will continue to review and approve as appropriate) avoided cost rates for qualifying facilities. Net metering and distributed generation customers are in simplistic terms a subset of PURPA facilities and may choose to be treated as a member of the broader universe of qualifying facilities under PURPA, . . .

See https://www.in.gov/iurc/files/2017-10-11-IURC-GC-Response-to-Questions-re-GAO-2017-2.pdf, pp. 3-4.

Under PURPA, electric utilities are required both to provide standby service when a QF has an outage and to purchase excess QF power that is not used by the customer. See 16 U.S.C. §824a-3(a). The prices for that must-buy obligation are determined by reference to the utility's avoided costs for alternative energy supplies. Id. §§824a-3(b), (d).

PURPA requires "each State regulatory authority" to establish standards consistent with federal law, including rules instituted by the Federal Energy Regulatory Commission ("FERC"). See 16 U.S.C. §§824a-3(a), (f)(1). As explained in Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742, 751 (1982), PURPA "requires each state regulatory authority and nonregulated utility to implement FERC's rules." See also id. at 759 (QF provision "has the States enforce standards promulgated by FERC"). The FERC regulation governing the prices that utilities must pay for QF power is set forth at 18 C.F.R. §292.304.

By Indiana statute, the Commission has the power and the duty to enforce not only Indiana provisions but also "all other laws" relating to public utilities. See Ind. Code §8-1-2-115. The Commission first adopted regulations implementing PURPA in 1981. See In re Adoption and Promulgation of Rules and Regulations, 1984 WL 994597 (Ind. U.R.C. Oct. 5, 1984) at *4-5 (reciting history). The following year, the General

Assembly enacted Chapter 2.4, which like PURPA adopted a policy encouraging alternate energy production facilities. See Ind. Code §8-1-2.4-1. Also like PURPA, Chapter 2.4 included provisions requiring electric utilities to provide standby services and to purchase excess power from eligible customer-owned facilities. Id. §§4-6. Those provisions are similar but not identical to the corresponding PURPA requirements. Compare 16 U.S.C. §§824a-3(b), (d); 18 C.F.R. §292.304. Nothing in Chapter 2.4 expresses an intent to displace or supersede PURPA requirements.

In 1984, the Commission adopted Rule 4.1 as a distinct set of regulations implementing Chapter 2.4. See 1984 WL 994597 at *5; 170 Ind. Admin. Code §4-4.1-1 et seq. The next year, the Commission repealed the earlier regulations implementing PURPA. See 6 Ind. Reg. 766 (1985). Rule 4.1 has not been materially revised since 1984. See Commission Brief at 18.

The reasoning adopted below relies on a false syllogism: Rule 4.1 implements Chapter 2.4, Chapter 2.4 implements PURPA, hence absent a claimed violation of Rule 4.1 the PURPA objections are not valid. See App. II at 23-24, 26. The Court of Appeals expressly endorsed the Commission's theory that PURPA is not "a basis for an objection separate from asserting a violation of Rule 4.1." See Slip Op. at 20 (quoting Commission Brief at 33-34). However, a daisy chain of implementation does not establish that the lack of a Rule 4.1 objection automatically demonstrates compliance with PURPA. The provisions serve similar policies, but are not identical. Compare 170 Ind. Admin. Code

§§4-4.1-8 to -11 with 18 C.F.R. §292.304. There is nothing illogical in asserting a PURPA violation without also alleging non-compliance with Rule 4.1.

The contention that a valid objection can only be based on a violation of Commission rule contravenes the express terms of the 30-day filing regulation. The relevant provision states objections may be based on a violation of "applicable law," a Commission order, ***or*** a Commission rule. See 170 Ind. Admin. Code §1-6-7(b)(2)(A). The disjunctive grammar contradicts the suggestion that a violation of federal law is insufficient unless accompanied by an objection based on a Commission rule. Unquestionably, PURPA is "applicable law." See Slip Op. at 20. An asserted PURPA violation, therefore, precludes summary approval of a 30-day filing as noncontroversial.

The other dimension of the Commission's rationale – besides a view that PURPA is not "applicable law" or the fiction that Rule 4.1 compliance conclusively establishes PURPA compliance – is that Indiana law has simply displaced the requirements of federal law here. That view is apparent in the Commission's assertion that PURPA has relevance only as "foundational law" from which Rule 4.1 was indirectly derived, but not as a continuing source of independently applicable legal obligations binding on utilities like Vectren. See Slip Op. at 20. That evident perspective is clearly incorrect. See U.S. CONST. art. VI, cl. 2 (federal law is the "supreme Law of the Land"); FERC v. Mississippi, 456 U.S. at 760-61 ("Any other conclusion would allow the States to disregard both the preeminent position held by federal law throughout the Nation, ...

and the congressional determination that the federal rights granted by PURPA can appropriately be enforced through state adjudicatory machinery.") (citation omitted).

Obviously, there is no reverse Supremacy Clause, by which States can supersede federal legislation by enacting their own laws with similar but distinct requirements. That is not to suggest, of course, that Chapter 2.4 or Rule 4.1 are unconstitutional or ineffective, because Indiana is free to supplement federal law with its own provisions governing Indiana utilities. Indeed, Chapter 2.4 adopts an Indiana policy that parallels the federal policy reflected in PURPA (compare Ind. Code §8-1-2.4-1 with 16 U.S.C. §824a-3), and at no point in the statutory text does the General Assembly express any goal to override or discontinue the operation of federal law. What Indiana cannot do, and did not do, is substitute Indiana-specific provisions for the terms of federal legislation on the same subject, thereby elevating Indiana law as the exclusive source of rights and obligations in derogation of federal law.[1] See Vote Solar v. Dept. of Public Service Regulation, 473 P.3d 963, 967-68, 975-83 (Mont. 2020) (noting Montana's "mini-PURPA" statute, but reversing State commission decision setting rate for utility purchases from QFs as non-compliant with PURPA standards).

[1] For example, Indiana has its own antitrust act (see Ind. Code ch. 24-1-2), but that does not mean the Sherman Act no longer has force and effect in Indiana. See Tiger Trash v. Browning-Ferris Industries, Inc., 560 F.2d 818, 826 (7th Cir. 1977) (treating claim under Indiana antitrust statute as pendent on federal antitrust claims).

The substance of the PURPA objections was not addressed by the Commission below, other than finding such objections irrelevant absent a claimed violation of Rule 4.1. The Court of Appeals did not suggest, either, that the Vectren filings were fully compliant with PURPA. After all, the ultimate merits were not adjudicated, because the context was a preliminary screening process to determine if the 30-day filings were actually noncontroversial. By granting summary approval without a hearing, the Commission simply declined to recognize the PURPA issues as a basis to establish controversy. There was no analysis or determination on the merits. It was more in the nature of a default judgment, in disregard of a party's pleaded objections.

While there was no ruling below on the substance of the PURPA objections, the violations asserted by Solarize Indiana raised serious issues warranting a hearing on a developed record in a formal proceeding. The issues include: a proposed one megawatt size requirement where PURPA has no minimum threshold; a failure to offer long-term pricing at predetermined prices, one of the three structures required under PURPA; a failure to reflect all components of Vectren's avoided costs, including transmission, line loss and emissions costs; and proposed pricing at a level far below what Vectren pays for alternative supplies. See Brief of Appellant at 29-32; Reply Brief at 15-23. In any event, where the Commission refused to consider the PURPA objections, treated the Vectren filings as noncontroversial, and granted summary approval without a hearing, the Order cannot be upheld on the basis that Vectren contests the asserted violations.

B. Efforts to Deflect the PURPA Objections to a Different Mechanism Cannot Justify Granting Summary Approval

While declining to consider the PURPA objections below, the Commission suggested that Solarize Indiana instead request a rulemaking and/or raise the PURPA issues in the separate Vectren proceeding. See App. II at 24, 26. On appeal, furthermore, Vectren argued Solarize Indiana should file a regulatory complaint or seek a Commission investigation in lieu of pursuing this appeal (see Vectren Brief at 28-32, 47), and the Commission asserted Solarize Indiana "needs to talk to the General Assembly" (see Commission Brief at 35). In the meantime, the Vectren 30-day filings were summarily approved on the theory they are supposedly noncontroversial. This appeal is the correct process to challenge that grant of approval.

On appeal, Solarize Indiana has consistently focused on the error in disregarding the PURPA objections when summarily approving the Vectren filings. The Court of Appeals, nevertheless, devoted much of its analysis to addressing a possible request for a rulemaking or potential consolidation with the other Vectren proceeding, and to considering another party's objection that was not briefed on appeal. See Slip Op. at 21-23. With regard to the PURPA challenges, the Court of Appeals agreed with the Commission that PURPA is not a cognizable basis for objection apart from Rule 4.1 (id. at 20) and concluded the PURPA analysis in Solarize Indiana's reply below had been waived (id. at 23-24). Consequently, the Vectren filings were summarily approved as

noncontroversial and affirmed on appeal, although neither the Commission nor the Court of Appeals addressed the substance of the PURPA objections.

Concerning the rulemaking suggestion, Solarize Indiana had good reason to contend the Commission's rules were outdated, insofar as Rule 4.1 has not been materially revised since its adoption in 1984 despite major restructuring of energy markets and technological advances, including the widespread adoption of rooftop solar. See App. II at 94; Commission Brief at 18. That point, however, was in addition to, not instead of, the PURPA objections that the Commission declined to entertain. A request for a rulemaking would not remedy the summary approval already granted to the Vectren filings. See Blinzinger v. Americana Healthcare Corp., 466 N.E.2d 1371, 1375 (Ind. App. 1984) (rulemaking is prospective in orientation). Initiating a rulemaking is purely discretionary on the part of the agency, and not a mechanism to resolve the legal challenges to agency action presented below and here on appeal. See Ind. Code §4-22-2-23(d) (agency "may" consider comments regarding "the need for a rule"). The Commission hence cannot direct an objector to request a discretionary rulemaking as a substitute for resolving asserted violations of law bearing on utility proposals that are pending before it.

The Vectren filings at issue relate to tariffs concerning customer-owned generators within the scope of PURPA, Chapter 2.4 and Rule 4.1, while a separate Vectren proceeding sought to establish an excess distributed generation or "EDG" tariff

pursuant to a distinct statute, Ind. Code ch. 8-1-40. The Commission identified the EDG case as "the appropriate proceeding" to address the Solarize Indiana objections. See App. II at 24, 26. Given the similar issues, the Commission could have chosen to consolidate the 30-day filings with the EDG petition. See Ind. Trial Rule 42(a); 170 Ind. Admin. Code §1-1-19. But when Solarize Indiana intervened in the EDG proceeding and moved to consolidate, Vectren argued that "PURPA does not apply in this setting" and the Commission stated "PURPA related matters" were "not shown to be within the scope of this matter" and denied consolidation. See June 8, 2020 Vectren Response at 14; May 29, 2020 Docket Entry.[2] Clearly, the suggestion that the EDG proceeding was "the appropriate forum" to decide the objections raised by Solarize Indiana (see App. II at 24, 26) was not validated by Vectren or the Commission in the EDG docket. The repeated assertions that the PURPA objections should be left to another day or a different mechanism cannot excuse the summary approval of the filings at issue here, despite deviations from the requirements of federal law.

C. There Was No Waiver of the PURPA Objections

Solarize Indiana's objection to Vectren's 30-day filings asserted non-compliance with PURPA both generally and in specific respects, including the imposition of a one megawatt threshold for eligibility, the improper computation of avoided costs, and

[2] The pleadings and orders in the EDG proceeding, Cause No. 45378, are posted at https://iurc.portal.in.gov.

discriminatory treatment in relation to alternative power supplies. See App. II at 91-95, ¶¶2, 3, 7(E), 7(G). Vectren subsequently responded, arguing that Solarize Indiana failed to allege a violation of "Indiana law" and that "PURPA does not apply in this setting." Id. at 142-44. Three days later, Solarize Indiana submitted a reply, rebutting the Vectren arguments and supporting the previously raised PURPA objections. Id. at 147-53. In the approved Utility Articles, the Commission's General Counsel noted the 30-day filing rule did not provide for the submission of a reply, but at the same time did not strike the reply or indicate it could not be considered. Id. at 23, 26.

On appeal, Vectren argued the initial objection was not specific enough and the reply was untimely. See Vectren Brief at 25-27. The Commission, by contrast, clarified that the reply was not stricken and was duly considered. See Commission Brief at 37-38. The Court of Appeals, nevertheless, analogized the submission process under the 30-day filing rule to appellate briefing standards, and on that basis concluded the points raised in the reply were waived. See Slip Op. at 23-24. That alternative rationale for disregarding the PURPA objections is misguided in several respects.

Unlike the appellate rules, in which the briefing schedule is delineated with particularity, the 30-day filing rule establishes an objection period that does not expire until three days before the given filing is approved by the Commission. See 170 Ind. Admin. Code §1-6-7(e). Here, the reply was submitted on May 8, 2020, and approval by the Commission did not occur until June 24th, over six weeks later. See App. II at 9, 147.

The purpose of the objection process is to determine if a 30-day filing is actually noncontroversial, and in this case the Commission had more than six weeks of advance notice regarding the PURPA objections, before nonetheless declaring the Vectren filings eligible for approval without a hearing. The appellate briefing rules serve the function of ensuring the preservation of error and the integrity of judicial review. See Ind. Appellate Rules 46(A)(8), 46(C). That framework is different in kind from a screening process using a notice period for objections to determine if a filing is controverted.

Furthermore, the 30-day filing rule expressly contemplates follow-up communications concerning asserted objections. Under one provision, a filing may be treated as noncontroversial despite an objection, if the objection is "resolved to the satisfaction of," among others, "the objector." See 170 Ind. Admin. Code §1-6-7(d). When Vectren responded to the Solarize Indiana objection, accordingly, it was entirely appropriate and consistent with the rule for Solarize Indiana to make a further filing to explain why Vectren's arguments did *not* resolve the objection to its satisfaction as the objector.[3] In addition, another provision permits the utility to withdraw a filing "at any time before it is presented to the commission for approval." Id. §7(c). As of May 8, 2020, Solarize Indiana still had opportunity to try to convince Vectren the filings should

[3] Notably, another objector, the OUCC, submitted separate objections, and after Vectren responded to that submission the OUCC made a further filing explaining why the Vectren response did not resolve its objections. Commission staff then sought further explanation, leading to yet another OUCC submission. See App. II at 80-87.

be withdrawn. The 30-day filing process is supposed to be "informal" (see Commission Brief at 11-12), contrary to the formalistic requirements of appellate briefing as relied on by the Court of Appeals.

Finally, it bears emphasis that the initial objection by Solarize Indiana properly asserted non-compliance with PURPA in multiple respects. See App. II at 91-94, ¶¶2, 3, 7(E), 7(G). That submission alone was sufficient to assert violations of "applicable law" precluding summary approval. See 170 Ind. Admin. Code §1-6-7(b). Where the question is whether a filing is eligible for summary approval without a hearing, the objector cannot be required to establish the ultimate merits as if a full evidentiary hearing had occurred. The judicial analogue here is notice pleading, not the strictures of appellate briefing. The Commission can no more disregard a duly presented objection than a court could dismiss a duly pleaded claim. Even on appeal, a reply brief may properly cite additional authorities on an issue previously raised and may respond to the opposing party's arguments. See Indiana Newspapers, Inc. v. Trustees of Indiana University, 787 N.E.2d 893, 912 n.22 (Ind. App.), transfer denied, 804 N.E.2d 750 (Ind. 2003).

III. CONCLUSION

When the Vectren filings were presented for approval, the Commission could not disregard the federal PURPA legal objections duly presented by Solarize Indiana. It

was error for the Commission to assert "[t]here are no controversial filings in the Utility Articles approved today" and grant summary approval anyway. See App. II at 9.

Transfer should be granted, the Court of Appeals opinion should be vacated, and the Commission order should be reversed.

Respectfully submitted,

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WORD COUNT CERTIFICATE

The undersigned counsel hereby verifies, in accordance with Ind. Appellate Rules 44 and 46, that except for those portions of the brief excluded from the word count, the foregoing *Petition to Transfer of Solarize Indiana, Inc.* contains 4,194 words as calculated by the word count function of the word processing software used to prepare the Petition.

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