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**Comments of the National Energy Marketers Association
On the Proposed Energy Information Administration (EIA)
Form EIA-411, "Coordinated Bulk Power Supply Program Report," Form
EIA-412, "Annual Electric Industry Financial Report," Form EIA-423, "Cost
and Quality of fuels for Electric Plants," Form EIA-826, "Monthly Electric
Sales and Revenue Report with State Distributions," Form EIA-860, "Annual
Electric Generator Report," Form EIA-861, "Annual Electric Power
Industry Report," and Form EIA-906, "Power Plant Report"**

The National Energy Marketers Association (NEM) hereby submits Comments on the proposed above-referenced forms of the Energy Information Administration ("EIA") as published in the March 13, 2001, Federal Register.

NEM is a national, non-profit trade association representing both wholesale and retail marketers of energy and energy-related products, services, information and technologies throughout the United States. NEM's membership includes: small regional marketers, large traditional international wholesale and retail energy suppliers (as well as wind and solar power), billing and metering firms, Internet energy providers, energy-related software developers, risk managers, energy brokerage firms, information technology providers and both manufacturers and suppliers of advanced distributed generation. Our membership has both affiliated and unaffiliated companies. NEM members will be significantly affected by this rulemaking.

By the terms of this proposed rulemaking, EIA proposes the modification and extension of existing electric power surveys as well as the introduction of new surveys. EIA proposes a revision to Form EIA-861-Annual Electric Power Industry Report to change schedule 2B to be completed by regulated and unregulated companies and to change schedule 3 to require reporting of revenue from unbundled customers and the cost of wholesale purchases. EIA proposes to rename and revise Form EIA-412-Annual Electric Industry Report to reflect a new requirement that unregulated power producers provide annual plant cost data and that the scope of the survey be increased to include all steam electric generators with an electric generator nameplate of 25,000 kilowatts or larger and gas turbine and hydro plants with a nameplate rating of 10,000 kilowatts or larger. EIA proposed revisions to Form EIA-826 to change the name of the form from Monthly Electric Utility Sales and Revenue Report with State Distributions to Monthly Electric Sales and Revenue Report with State Distributions to collect data on retail sales and revenue from a sample of electric utilities, electric service providers, and distribution companies. EIA proposes the revision of Form EIA-411-Coordinated Bulk Power Supply Program Report to expand the data collected on transmission assets.

Form EIA-860-Annual Electric Generator Report is a new form to be completed by all electric generating plants that have or will have a nameplate rating of 1 megawatt or more and are operating or planned within 5 years of the year of the form. Form EIA-423-Cost and Quality of Fuels for Electric Plants is a new form to be completed by non-FERC jurisdictional entities to report cost and quality of fossil fuels delivered for electric power generators. Form EIA-906-Power Plant Report is a new proposed form to combine the data elements reported on Form EIA-759-Monthly Power Plant Report and Form EIA-900-Monthly Nonutility Sales for Resale Report.

EIA also discussed the future collection of data associated with distributed generation. Although a proposed survey to capture such data was not included in

the proposed rulemaking, EIA explained that such a requirement could be included in its final proposal.¹ Any such reporting requirement imposed on distributed generation is subject to the same analysis set forth herein.

This rulemaking would improperly impose significant and costly new reporting and record-keeping burdens on unregulated entities that were never intended by Congress. Requiring unregulated entities to develop, design and construct the systems necessary to report the data requested by EIA, if and when available, plus the imposition of the significant ongoing costs necessary to produce, verify and store the data required to comply with this rulemaking, exceeds the statutory authority of EIA expressly set forth in the Federal Energy Administration Act of 1974² and the Department of Energy Organization Act.³

In addition, the microeconomic costs on the energy industry plus the macroeconomic impacts on the U.S. economy of this proposed rulemaking render this proposal a "major rule." As such, EIA has failed to comply with the requirements of Executive Order 12291 and the Regulatory Flexibility Act by issuing this proposed rulemaking without a proper cost-benefit analysis required for major rules. Consequently, NEM urges EIA to rescind the Proposed Survey and reformulate and recast its data collection efforts in compliance with its statutory authority, Executive Order 12291, the Regulatory Flexibility Act, and the NEM recommendations set forth in Part IV below.

I. THE RULEMAKING IS SUBSTANTIVELY INVALID

A. THE PROPOSED RULEMAKING IS INCONSISTENT WITH THE INTENT OF CONGRESS AND EXCEEDS THE POWERS GRANTED TO THE ENERGY INFORMATION ADMINISTRATION BY 42 U.S.C. § 7135, 15 U.S.C. § 796, and 15 U.S.C. § 772.

EIA's authority to propose this rulemaking is governed by statute.⁴ NEM asserts that the collection of data from the Proposed Surveys from unregulated entities,

¹ 66 Fed. Reg. 14564 (2001).

² 15 U.S.C.S. § 761 et. seq.

³ 42 U.S.C.S. § 7101 et. seq.

many of whom are small entities as that term is defined by the Administrative Procedures Act⁵ and the Small Business Act,⁶ is improper and exceeds the statutory authority granted to EIA.

In this rulemaking, EIA relies on its authority to collect certain information from "major energy producing companies,"⁷ which does not include the unregulated energy and energy service providers that would be subject to the reporting and record-keeping requirements of this rulemaking. Energy producing companies, as that term was intended by Congress, are defined as "persons"⁸ engaged in:

- (i) ownership or control of mineral fuel resources or nonmineral energy resources;
- (ii) exploration for, or development of, mineral fuel resources;
- (iii) extraction of mineral fuel or nonmineral energy resources;
- (iv) refining, milling, or otherwise processing mineral fuels or nonmineral energy resources;
- (v) storage of mineral fuels or nonmineral energy resources;
- (vi) the generation, transmission, or storage of electrical energy;
- (vii) transportation of mineral fuels or nonmineral energy resources by any means whatever; or
- (viii) wholesale or retail distribution of mineral fuels, nonmineral energy resources or electrical energy.⁹

EIA is also authorized by statute to require reports from, "any person who is engaged in the production, processing, refining, transportation by pipeline, or distribution (at other than the retail level) of energy resources. . . (emphasis added)."¹⁰ Section 772 of the Energy Administration Act provides EIA with the authority to collect information from, "all persons owning or operating facilities or business premises who are engaged in any phase of energy supply or major energy

⁴ 42 U.S.C.S. § 7135 (h)(1); 15 U.S.C.S. § 796(b)(1), 15 U.S.C.S. § 772(b).

⁵ 5 U.S.C.S. § 601 (6).

⁶ 15 U.S.C.S. § 632(a).

⁷ 42 U.S.C.S. § 7135 (h)(1)(A).

⁸ The term "person" is defined by 15 U.S.C.S. 796(e) as, "any natural person, corporation, partnership, association, consortium, or any entity organized for a common business purpose, wherever situated, domiciled, or doing business, who directly or through other persons subject to their control does business in any part of the United States."

⁹ 42 U.S.C.S. § 7135 (h)(6)(A).

¹⁰ 15 U.S.C.S. § 796 (b)(1)(A).

consumption."¹¹ This section of the Act does reference reporting by marketers however, that discussion is limited to reducing the reporting burden for, "small marketers and distributors of petroleum products,"¹² not electricity or natural gas. If Congress had intended the Section 772 of the Energy Administration Act to pertain to small marketers and distributors of electricity it would have made an explicit reference to those entities in that Section as well.

It is clear that Congress has always intended regulated transmission, distribution and generation entities to be subject to EIA reporting and record-keeping requirements. Absent an amendment by Congress to the above-referenced statutes, the data collection effort represented in this rulemaking should continue to be directed to those entities. Unregulated energy and energy service providers, many of whom operate solely at the retail level, are simply not among the entities Congress intended to be subjected to the regulatory burdens imposed by EIA in this rulemaking.

EIA is charged with ensuring, "Congress, the states and the public have access to and are able to obtain reliable energy information."¹³ However, the Surveys, as proposed, will result in far less reliable and less valid data at a far higher cost to small entities, the unregulated segment of the energy industry, and the U.S. economy in general, than would occur if EIA revised this proposed rulemaking consistent with its statutory authority. EIA's 1999 Electric Sales and Revenue Report admits that data collected from unregulated power marketers is not useful because of the differences in implementation of retail choice programs in the various states.¹⁴ The Report itself admits, the data reported cannot be readily and validly compared. Consequently, the extension and imposition of such reporting requirements on unregulated entities is clearly not consistent with EIA's statutory charge.

¹¹ 15 U.S.C.S. § 772(b).

¹² 15 U.S.C.S. § 772(h).

¹³ 15 U.S.C.S. § 796(a).

¹⁴ Energy Information Administration, Electric Sales and Revenue 1999 (October 2000), Appendix C, Unregulated Retail Sales, pages 245-46.

Moreover, regulated entities continue to be the most statistically accurate source for reliable and valid data. The data that such regulated entities have provided and can continue to provide to EIA will be far more reliable, valid data at a far lower cost and economic impact on the U.S. economy. NEM urges EIA to rescind this proposed rulemaking and reissue the Proposed Surveys in a manner consistent with its statutory authority and the recommendations set forth in Part IV below.

II. THE RULEMAKING AS PROPOSED IS PROCEDURALLY INVALID

A. THE PROPOSED RULEMAKING DOES NOT COMPLY WITH EXECUTIVE ORDER 12291 OR THE REGULATORY FLEXIBILITY ACT.

In this rulemaking, EIA attempts to expand its statutory authority to collect information from unregulated energy and energy service providers that do not fall within the statutory definition of "major energy producing companies." As noted above, such an expansion was never intended by Congress and exceeds EIA's rulemaking authority under the above-cited statutes. Not only is this rulemaking an impermissible expansion of statutory authority, but as more fully explained below, this rulemaking constitutes a "major" "legislative" rulemaking that has not complied with proper administrative procedures for major rules.¹⁵

A "major rule" is defined in Section 1 of Executive Order 12291¹⁶ as:

[A]ny regulation likely to result in:

- (1) An annual effect on the economy of \$100 million or more;
- (2) A major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or
- (3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

¹⁵ Exec. Order No 12291, 46 Fed. Reg. 13,193 (1981) [hereinafter EO 12291]; 5 U.S.C.S. § 601 et. seq.

¹⁶ EO 12291, Section 1.

NEM asserts that this proposed rulemaking will have an impact in excess of \$100 million, increase energy prices to consumers and will have significantly adverse impacts on competition. Consequently, the Regulatory Flexibility Act and Section 3 of Executive Order 12291, require EIA to perform an analysis of the impact of the proposed rule on the industry, small entities, energy prices and competition prior to proposing the rule. NEM asserts that such analyses have not been performed.

Virtually every other industry that has deregulated has experienced an average price reduction of approximately forty-percent. Annual impacts on the U.S. economy associated with energy price competition range in the tens of billions of dollars per year. Energy and energy service providers are the driving force of price competition in a deregulated energy market. The compliance costs of the Proposed Surveys will cause many of the proposed respondents to leave the market, go out of business, be discouraged to enter or delay entry into the market, and/or be unable to effectuate the business plans necessary to implement effective competition in a deregulated energy market. In essence, this proposed rulemaking is a tax directly on competition. As such, the Proposed Survey could easily have an annual impact on the U.S. economy that exceeds the standards set for a major rulemaking.

In addition, under current competitive conditions, many of the costs of this rulemaking may be passed through to consumers in the form of higher energy prices. Moreover, investments, productivity, competition and innovation in the industry will be negatively impacted. Lastly, resources that would have been directed into developing new products and services to enhance competition will have to be diverted into reporting record-keeping burdens.

In the instant matter, the Proposed Surveys are an agency statement of particular applicability and future effect on the electric industry. EIA appears to intend to impose the new and modified Proposed Surveys as a mandatory requirement on unregulated energy and energy service providers, presumably with penalties for

non-compliance. Imposition of such a requirement represents a proposed rulemaking that has not been issued in conformance with administrative law. EIA has published notice of the new and revised Proposed Surveys in the Federal Register as an "agency information collection activity." This characterization may not have provided the public with sufficient notice and opportunity to comment as required by Section 553 of the APA.¹⁷

The Energy Administration Act specifically states that those engaged in energy supply or major energy consumption shall make available information, "as the Administrator may prescribe by regulation or order (emphasis added)."¹⁸ The statute explicitly recognizes that EIA must follow the proper administrative procedures for promulgating a rule¹⁹ or issuing an order²⁰ when it endeavors to impose information collection requirements. Furthermore, Section 796 of the Federal Energy Administration Act,²¹ authorizes EIA, "to require, by rule, any person who is engaged in the production, processing, refining, transportation by pipeline, or distribution (at other than the retail level) of energy resources to submit reports (emphasis added)." As discussed *infra*, the Proposed Surveys are a proposed rulemaking, and therefore, EIA must adhere to the administrative laws set forth in the APA and stay within the statutory authority granted to it in the Federal Energy Administration Act.

B. EIA SHOULD HAVE PERFORMED A PRELIMINARY REGULATORY IMPACT ANALYSIS OF THE PROPOSED SURVEY.

NEM asserts EIA should have performed a preliminary Regulatory Impact Analysis²² in compliance with Executive Order 12291 before determining that the Proposed Survey is not a major rule. EIA has made time estimates for the completion of the Proposed Surveys but has failed to include among other things a statement of the potential numbers of respondents or a detailed analysis of the true

¹⁷ 5 U.S.C.S. § 553.

¹⁸ 15 U.S.C.S. § 772(b).

¹⁹ 5 U.S.C.S. § 553.

²⁰ 5 U.S.C.S. § 554.

²¹ 15 U.S.C.S. § 796(b).

costs involved with compliance.²³ NEM submits that EIA's time and cost estimates are woefully understated, and EIA has failed to fulfill its responsibility to properly analyze the impact of the Proposed Survey. Agencies are required to prepare a preliminary Regulatory Impact Analysis of a "major rule" and submit the Analysis to the Director of the Office of Management and Budget.²⁴ The Analysis must include a description of the potential costs and benefits of the proposed rule, and consideration of lower cost alternatives and legal reasons why those lower cost alternatives could not be used.²⁵ Inasmuch as EIA has not performed a preliminary Regulatory Impact Analysis of the Proposed Surveys, the Proposed Surveys should be rescinded and reissued consistent with the recommendations set forth in Part IV below.

C. EIA IS REQUIRED TO MINIMIZE BURDENS ON SMALL ENTITIES.

In addition to performing an initial Regulatory Flexibility Analysis, the Regulatory Flexibility Act requires EIA to minimize, "the impact of the proposed rule on small entities."²⁶ Additionally, the Department of Energy Organization Act requires EIA to, "give priority to the minimization of the reporting of energy information by small business."²⁷

This proposed rulemaking will have a disproportionate, unfair and unnecessary impact on small entities as that term is defined in the Administrative Procedure Act²⁸ and the Small Business Act.²⁹ The Proposed Surveys will impose significant one-time design, development, storage and hardware costs on thousands of small energy and energy service providers. In addition, this rulemaking will impose significant and unnecessary ongoing production, reporting, record-keeping, storage and compliance costs that could easily put many of these small entities out

²² *Id.* at Section 3 (c) (2).

²³ 66 Fed. Reg. 14566 (2001).

²⁴ EO 12291, Section 3 (c).

²⁵ EO 12291, Section 3 (d).

²⁶ 5 U.S.C.S. § 603 (a).

²⁷ 42 U.S.C.S. § 7135 (h)(1)(ii).

²⁸ 5 U.S.C.S. § 601 (6).

²⁹ 15 U.S.C.S. § 632 (a).

of business and/or render them unable to implement the business plans necessary to effectively compete in a deregulated energy market.

D. THE PAPERWORK REDUCTION ACT ASSUMES THAT EIA IS NOT EXCEEDING ITS STATUTORY AUTHORITY.

In addition to compliance with Executive Order 12291, and the Regulatory Flexibility Act, EIA must comply with the procedures set forth in the Paperwork Reduction Act for collection of information. The Paperwork Reduction Act also requires EIA to review the microeconomic and macroeconomic impacts of the Proposed Surveys³⁰ on the industry and the U.S. economy and to reduce the reporting burden on small entities to the extent practicable.³¹ The Proposed Surveys will exponentially increase the paperwork burden on unregulated energy and energy service providers, many of whom are "small entities."³²

The burden of the Proposed Surveys are further magnified because the nature of information requested is confidential and intrinsically linked to the competitive positioning of unregulated entities. The Proposed Surveys require reporting of information that is confidential and proprietary in nature and the release of which can subject NEM members to substantial contractual liability. Furthermore, in the competitive marketplace, price is one of the chief ways to differentiate suppliers and, as such, price information is acutely sensitive. NEM supports EIA's proposal to expand the types of data elements afforded confidential treatment assuming Congress amends the above statutes and expands EIA's reporting jurisdiction to include the unregulated entities covered in this rulemaking.³³ However, the release of this information may be contractually problematic despite EIA's treatment of same as confidential and will negatively impact suppliers competitive positions.

³⁰ 44 U.S.C.S. § 3507 (a)(1)(A) and § 3506 (c) (1).

³¹ 44 U.S.C.S. § 3507 (a)(1)(D).

³² 5 U.S.C.S § 601(6); 15 U.S.C.S. § 632(a).

³³ 66 Fed. Reg. 14565 (2001).

Additionally, compliance with the Paperwork Reduction Act assumes that EIA has the statutory authority in the Federal Energy Administration Act³⁴ and the Department of Energy Organization Act³⁵ to require unregulated energy and energy service providers to submit the information requested. As stated above, EIA is exceeding its statutory authority in the rulemaking and therefore cannot be in compliance with the Paperwork Reduction Act.³⁶ Consequently, the Proposed Surveys should be rescinded and reissued consistent with the data collection methods recommended by NEM in Part IV below.

III.

THIS RULEMAKING WILL HAVE A SIGNIFICANT IMPACT ON ENERGY PRICES, COMPETITION WITHIN THE UNREGULATED ENERGY INDUSTRY AND THE U.S. ECONOMY

A. MICROECONOMIC AND MACROECONOMIC IMPACTS OF THE PROPOSED SURVEYS

The microeconomic and macroeconomic impacts of this proposed rulemaking are significant. The initial costs to design and develop the systems necessary to capture the data requested for each new and revised survey will cost millions of dollars and the on-going production, reporting, record-keeping and compliance costs on the unregulated energy industry will likely exceed \$100 million dollars annually. Additionally, the macroeconomic impacts associated with higher energy prices and reduced and/or delayed competition will increase the impact of this rulemaking.

The microeconomic impacts are so substantial because (a) each utility is a separate marketplace, (b) there are dozens of energy and energy service providers in each marketplace, and (c) the data variables attributable to the information requested in the Proposed Surveys cause the design, development, programming, production, reporting, record-keeping, storage, and compliance costs to multiply exponentially.

³⁴ 15 U.S.C.S. § 761 et. seq.

This rulemaking imposes significant and unnecessary ongoing production, reporting, record-keeping, storage and compliance costs that could easily put many small entities out of business and/or render them unable to effectively compete in a deregulated energy market. Consequently, many small entities will either be forced to delay or abandon plans to compete or be forced to pass along the costs associated with this rulemaking in the form of higher energy prices or higher prices for other bundled products and services. Unlike competitive suppliers, regulated distribution companies can recover the cost of this rulemaking from their captive ratepayers and currently have provisions in existing rates to cover the personnel and systems costs necessary to comply with the Proposed Surveys.

In addition to the macroeconomic impacts of higher energy prices, this proposed rulemaking can have the effect of delaying and/or reducing competition in the unregulated energy market. Inasmuch as utilities and other large companies can afford to cross-subsidize the costs associated with this rulemaking, smaller companies (operating on thin margins) will be forced to pass the costs of design, development, production, storage, and compliance on to their customers in the form of less competitive service offerings. Accordingly, customers of the smaller companies will bear disproportionately higher prices and be less inclined to switch from monopoly service.

The macroeconomic impacts of higher energy prices resulting from cost pass through, or delayed or reduced competition alone can be in the billions of dollars per year. When the multiplier effect of higher energy prices are computed, the macroeconomic impacts of this rulemaking are even more substantial.

B. COSTS OF COMPLIANCE AND COMPLIANCE FAILURES

Another major cost and economic impact of this rulemaking is the on-going costs associated with compliance. The compliance costs borne by unregulated energy and energy service providers include establishment, design, development,

³⁵ 42 U.S.C.S. § 7101 et. seq.

purchase and maintenance of record-keeping and compliance equipment, implementation of compliance procedures and hiring and training new staff, plus the costs and risks associated with compliance failure.

The functions necessary for energy and energy service providers to comply with the Proposed Surveys include compilation, review and retention of data and reports, data storage, and post-filing review internally and with EIA. After data is captured, analyzed, compiled and reviewed, reports are generated, and storage will have to be allocated to the data to protect against the eventuality of subsequent EIA compliance review.

In addition to the costs associated with compliance, the costs and risks attendant to compliance failures also have economic impacts on the industry and the U.S. economy. A penalty of \$2,500 per violation³⁷ forces reporting entities to quantify the risks of ensuring EIA compliance. Capital markets will require each reporting entity to review the profit potential of each marketplace given the potential penalty associated with EIA compliance. If an entity operates at a 2% margin, a \$2,500 potential penalty will need to be offset by a minimum of \$125,000 in monthly revenue. Unregulated energy and energy service providers will be forced to make investment and other business decisions including timing and potential for marketplace penetration based on risk of government compliance rather than based solely on providing competitive offerings in the marketplace.

The costs associated with compliance will be included in the proforma financial projections (such as bad debt expense) and will either prevent competition or be passed on in less competitive price offerings to that marketplace. Given the multiplier effect of a direct price pass through, this impact alone on the U.S. economy could be very significant.

³⁶ 44 U.S.C.S. § 3508.

³⁷ 15 U.S.C.S. § 797 (b)(1).

IV. RECOMMENDATIONS

A. REGULATED DISTRIBUTION AND TRANSMISSION ENTITIES ARE THE MOST STATISTICALLY RELIABLE AND VALID SOURCES OF THE DATA SOUGHT.

EIA has the statutory authority to impose reporting requirements on regulated distribution, transmission and generation entities. These entities are and will continue to be the most statistically reliable and valid sources of the information EIA is seeking. In fact, EIA in its own 1999 Electric Sales and Revenue Report admits that data comparison from unregulated entities is hampered by the fact that the states have implemented different requirements in their retail choice programs. NEM recommends that EIA should request the data from the utilities, the entities that are best able to immediately comply with the reporting requirements at the lowest marginal costs to the industry, consumers and the economy. Unless a large percentage of consumers in a given marketplace switch, the local distribution company is still the most statistically reliable source of the data EIA purports to require.

B. UNREGULATED ENERGY AND ENERGY SERVICE PROVIDER REPORTING, IF ANY, SHOULD BE ON A VOLUNTARY BASIS.

As an initial matter, NEM asserts that if Congress amends the requisite statutes to permit the Proposed Surveys to be imposed on unregulated entities, they should only be imposed on a voluntary basis. If the Proposed Surveys are not imposed on a voluntary basis, EIA will clearly have engaged in an improper rulemaking as discussed infra in Section II.

C. NO REPORTING BY UNREGULATED ENTITIES SHOULD BE REQUIRED UNTIL 25% OR MORE OF THE CONSUMERS IN A GIVEN MARKET LEAVE THE LOCAL DISTRIBUTION COMPANY.

Additionally, if the statutes are changed and the reporting requirements of the Proposed Surveys pertaining to electric revenue and sales are imposed on unregulated energy and energy service providers, in order to ensure that EIA is collecting the most statistically reliable and valid data, reporting requirements should only be imposed, if at all, in those states that have achieved at least a 25%

consumer migration. If this threshold of migration has not occurred, statistically reliable data still resides with the utilities, and the utilities will remain the most statistically reliable and valid source of the data.

Alternatively, to minimize their economic impact, NEM recommends that once the laws are changed and 25% migration occurs, the Proposed Surveys should only be imposed on unregulated energy and energy service providers and administered in the same fashion as the random surveys EIA conducts of market participants in the home heating oil industry.

V.

CONCLUSION

NEM urges EIA to rescind and reformulate the Proposed Surveys to require reporting from regulated transmission, distribution and generation entities. It is within the scope of EIA's statutory authority to require reporting from these entities, and they are in the best position to provide the statistically valid and reliable information that EIA is seeking. Lastly, if Congress expands EIA's statutory authority, NEM suggests that any reporting requirements for unregulated energy and energy service providers be imposed on a voluntary basis, in states that have achieved 25% customer switching, and thereafter only on a random basis.

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