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VIA RULEFORUM

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Ms. Annette L. Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Attention: Rulemaking and Adjudications Staff
Washington, DC 20555-0001

RE: Comments on Petition for Rulemaking (PRM-54-03)

Dear Ms. Vietti-Cook:

I am submitting the attached comments on behalf of Exelon Nuclear ("Exelon") in response to the petition for rulemaking submitted by Joseph Scarpelli, Mayor of the Township of Brick, in accordance with the Federal Register notice issued by the U.S. Nuclear Regulatory Commission on September 17, 2005 (70 Fed. Reg. 54310).

Exelon urges the Commission to deny the petition for rulemaking in its entirety as unsupported and without a rational basis. The proposed amendments would unnecessarily direct resources from important programs and duplicate existing Commission programs without providing any corresponding benefit in terms of protection of the public health and safety or common defense and security.

..... If you have any questions regarding these comments, please contact Mark Wetterhahn at (202) 282-5703.

Sincerely,

Nicholas S. Reynolds

Template = SECY-067

SECY-02

**EXELON NUCLEAR'S RESPONSE
TO PETITION FOR RULEMAKING SUBMITTED BY JOSEPH
SCARPELLI, MAYOR OF THE TOWNSHIP OF BRICK, NEW JERSEY (PRM-54-03)**

For the reasons discussed herein, Exelon Nuclear ("Exelon") opposes the petition for rulemaking filed with the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") on June 20, 2005, by Joseph Scarpelli, Mayor of the Township of Brick, New Jersey ("Petitioner").¹ Any changes to the existing license renewal regulations would have a significant impact on Exelon as the owner of Oyster Creek Generating Station and the owner and operator of the largest nuclear fleet in the nation – ten stations with seventeen reactors representing approximately twenty percent of the U.S. nuclear industry's power capacity.² The Petitioner, in essence, would require the NRC to conduct a *de novo* review for license renewal using present-day standards for initial licenses. Since the petition fails to demonstrate "sufficient reason" for the proposed amendments under 10 C.F.R. § 2.803, Exelon urges the Commission to deny the Petitioner's request for rulemaking in its entirety as unsupported and without a rational basis.³

The proposal would require the NRC to use substantial resources to re-review the licensability of a facility, in its entirety, at one arbitrary point in its operating life. Petitioner has not demonstrated that such a diversion of resources is needed or that such a shift in resources would increase the overall level of safety at nuclear power plants. The NRC's mission is to assure the adequate protection of the health and safety of the public and to assure the common defense and security over the entire lifetime of the facilities which it regulates. The Commission imposes new or modified requirements as necessary to fulfill that mission. It maintains continuing oversight over plants under its jurisdiction to assure that its requirements are implemented and are adequate. The NRC does not wait to see whether a plant will apply to renew its license before fulfilling its safety and common defense responsibilities. Rather, the dockets of the Commission are rife with examples of the Commission acting to satisfy its legislative mandate to protect the public health and safety and assure the common defense whenever necessary. In this context, the proposed amendments are unnecessary, and, in fact, are counterproductive in that they would divert substantial resources from Commission-determined priorities necessary to protect the public over the lifetime of nuclear power plants.

¹ See 70 Fed. Reg. 54310 (Sept. 14, 2005). Interested persons were invited to submit comments on the petition by November 28, 2005.

² AmerGen Energy, a subsidiary of Exelon and the licensed operator of Oyster Creek Generating Station, filed an application to renew the Oyster Creek's license for an additional twenty years on July 22, 2005.

³ The petition is nearly identical to the petition for rulemaking, PRM-54-02, submitted to the NRC by Andrew Spano, Westchester County Executive, on May 10, 2005. Indeed, the cover letter transmitting the petition specifically requests that it and the Westchester County petitions "be joined together for consideration." In addition, the current petition was submitted during the comment period for the Westchester County petition. For these reasons, and in the interest of conserving Commission resources, Exelon submits that PRM-54-02 and PRM-54-03 should be treated as a single petition. At the very least, any comments submitted for either petition should be considered by both petition review boards.

I. The Proposed Rulemaking

The Petitioner requests that 10 C.F.R. Part 54, "Requirements for Renewal of Operating Licenses of Nuclear Power Plants," be amended to provide that "a renewed license will be issued only if the plant operator demonstrates that the plant meets all criteria and requirements that would be applicable if the plant were being proposed *de novo* for initial construction." In particular, the petition requests that 10 C.F.R. § 54.29 should be amended to provide that a renewed license may be issued by the Commission only if the Commission finds that, upon a *de novo* review, the plant would be entitled to initial operating licenses as set out in the Commission's regulations. The petition seeks corresponding amendments to sections 54.4, 54.19, 54.21 and 54.23, and also calls for the rescission of section 54.30. Finally, the Petition suggests that the criteria to be examined as part of a renewal application "should include such factors as demographics, siting, emergency evacuation, site security, etc." The petitioner believes that "[t]his analysis should be performed in a manner that focuses the NRC's attention on the critical plant-specific factors and conditions that have the greatest potential to affect public safety."

II. Petitioner's Basis for Proposed Rulemaking

The Petitioner alleges that there have been numerous incidents since Oyster Creek first received its operating license that have raised concerns about using nuclear power to generate energy, particularly in heavily populated areas. The Petitioner generally cites Three Mile Island, Chernobyl, Yucca Mountain, and September 11th as examples of incidents which raise concerns about the safety and security of nuclear power plants. The Petitioner also states that the evacuation of the communities around Oyster Creek is of particular concern since traffic congestion has increased as the result of the failure to improve the infrastructure.

The Petitioner asserts that the process and criteria currently in Part 54 are "seriously flawed" since they are based on the theory that if the plant was licensed originally at the site, it is satisfactory to renew the license, barring any significant issues having to do with passive systems, structures and components. Instead, the Petitioner argues that the regulations should be "broadened and sufficiently comprehensive to cover all facets (including consideration of a worst-case scenario) that were considered for initial construction." As an alternative to expanding the scope of the renewal evaluation, the Petitioner suggests that the license renewal evaluation should "examine all issues related to the plant and its original license, and then concentrate on any issues that are new to that plant or have changed since the original license was issued or that deviate from the original licensing basis."

Lastly, the Petitioner mentions several factors that, it believes, affect nuclear plant licensing. In particular, the Petitioner notes that many of those factors evolve over time as public awareness increases, technology improves, and plant economic values change. As a result, the Petitioner states that roads and infrastructure may not improve as population density increases, inspection methods may not be adopted or may be used inappropriately, and regulations may alter the plant designs after operation has begun. The Petitioner asserts that these factors must be considered and weighed as part of the formal Part 54 relicensing process.

III. The Petition Does Not Demonstrate a Sufficient Reason for Initiation of the Proposed Rulemaking

A. The Commission Has Previously Considered and Rejected the Petitioner's Approach

The Commission has previously considered and rejected the fundamental bases of the rulemaking petition submitted by the Petitioner. In the final rule which established the basis for license renewal in Part 54, the Commission concluded that "[i]t is not necessary for the Commission to review each renewal application against standards and criteria that apply to newer plants or future plants in order to ensure that the operation during the period of extended operation is not inimical to the public health and safety."⁴ The Commission noted that since initial licensing, each operating plant has continually been inspected and reviewed as a result of new information gained from operating experience. In the Commission's view, "[o]ngoing regulatory processes provide reasonable assurance that, as new issues and concerns arise, measures needed to ensure that operation is not inimical to public health and safety common defense and security are 'backfitted' onto the plants."⁵ Finally, the Commission concluded that "(a) its program of oversight is sufficiently broad and rigorous ..., and (b) such a [*de novo*] review is not needed to ensure that continued operation during the period of extended operation is not inimical to the public health and safety."⁶ These conclusions are the bedrock of the current license renewal process and have been demonstrated to be accurate by the actions of the Commission in regulating nuclear power plants since initial licensing.

These conclusions were not reached lightly. The Commission made these decisions after extended analyses which included issuing an Advanced Notice of Proposed Rulemaking, conducting workshops, and issuing proposed regulations. The Commission also responded to comments submitted by interested members of the public. Ultimately, the Commission concluded that a *de novo* review of the entire licensing basis was not necessary as part of the license renewal process. Thus, the Petitioner's requests have been posed before and were discarded by the Commission in favor of the current renewal process.

B. Petitioner Has Failed to Demonstrate an Adequate Justification for the Changing the Current Process

By merely rehashing issues already thoroughly considered and rejected by the Commission, the Petitioner fails to establish any basis upon which the Commission might conclude that its policy determinations underlying the current license renewal regulations are unsound. This lack of any "new information" poses an obstacle to the proposed amendments suggested by the Petitioner. In order to rescind a prior rule, the Administrative Procedure Act (APA) requires federal agencies like the NRC to explain the reasons for a proposed regulatory

⁴ "Nuclear Power Plant License Renewal: Final Rule", 56 Fed. Reg. 64943, 64945 (Dec. 13, 1991).

⁵ *Id.*

⁶ *Id.*

change. An agency can reexamine and change existing rules, but a proposal to rescind a rule bears a higher burden of justification. Since revocation constitutes a reversal of the NRC's former views as to the proper course, the agency may not act precipitously or in an irrational manner in revising its rules. *Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n*, 391 F.3d 338, 352 (1st Cir. 2004). A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." *Atchison, T. & S. F. R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808 (1973). In that situation, an agency must "supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first place." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 41 (1983). Petitioner fails to provide an adequate basis for the drastic reversal of more than a decade of Commission regulatory policy.

The petition does not address any of the Commission's earlier conclusions "head-on," or even obliquely. Instead, the request flows from a misapprehension of the Commission's regulatory structure, which, if correctly understood, would logically negate the bases of the Petition. The petition baldly asserts that the proposed amendments are necessary while ignoring the structure of ongoing regulatory requirements which obligate a plant to meet new or modified requirements applicable to such a facility.⁷ Licensees also take actions over time to improve operation safety and security at their facilities. The record of the current regulatory status of a facility is its "licensing basis" which in 10 C.F.R. § 54.3 is "the set of NRC requirements applicable to a specific plant and a licensee's written commitments for ensuring compliance with and operation within applicable NRC requirements and the plant specific design basis (including all modifications and additions to such commitments over the life of the license) that are docketed and in effect." The licensing basis reflects changes and adjustments from time to time in light of new information that develops.⁸

When specific actions are identified as necessary, the Commission can take actions to resolve the concerns which result in a change to the licensing basis at the operating plants at any time. Through this mechanism, the Commission is able to ensure that nuclear power plant

⁷ For example, 10 C.F.R. § 50.54(h) states that: "[t]he licensee shall be subject to the provisions of the [Atomic Energy] Act now or hereafter in effect and to all rules, regulations and orders of the Commission. The terms and conditions of the license shall be subject to amendment, revision, or modification, by reason of amendments of the Act or by reason of rules, regulations and orders issued in accordance with the terms of the Act."

⁸ To address an example raised by Petitioner, following the events at Three Mile Island, the Commission mandated a number of actions regulating the design, operations and emergency plans, which when implemented became part of the facility's design basis. Moreover, after the events of September 11, 2001, the Commission took a number of steps to improve the security at nuclear power plants. The Commission issued an order on February 25, 2002 that required compliance with specified interim security and safeguards requirements. In addition, the NRC issued orders on access authorization on January 7, 2003, and on fatigue, guard training and qualification, and the revised design basis threat on April 29, 2003. All of these measures are now part of all plants' current licensing basis.

operation is not inimical to the health and safety of the public at any point during the operating life of the plant. There is no magical transformation that occurs when a facility contemplates license renewal. Instead, a key license renewal principle already requires that the plant-specific licensing basis be maintained during the renewal term in the same manner and to the same extent as during the original licensing term.⁹ If compliance with the current licensing basis reflects the Commission's judgment that its operation is not inimical to the public health and safety during the initial license period, then continued compliance with the current licensing basis (as it may be modified to reflect the limited scope of review for license renewal) during the renewed period of operation should result in the same Commission determination. This existing regulatory structure has served the Commission well. In light of the NRC's considerable experience as well as the flexibility and success of the current approach, extension of the principles of current licensing bases to the license renewal term has been a logical and proven application of Commission resources.

C. The Proposed Amendments Would Eviscerate the Proven Existing License Renewal Process Without Compensating Benefit

The amendments suggested by the Petitioner would eviscerate the existing regulatory process and induce regulatory paralysis. While Exelon agrees that safety-related considerations may trump concerns regarding the stability of the regulatory process, it is clear that the proposed amendments, if implemented, would result in diversion of substantial Commission resources from other regulatory priorities and create unneeded regulatory disarray. One fundamental purpose of the license renewal rule was to provide a "predictable and stable" regulatory process that clearly sets forth standards that must be met for license renewal. In crafting a license renewal program, the Commission has allocated its Staff and its resources in a manner that allows it to perform its license renewal responsibilities as well as its other ongoing regulatory duties. The proposed amendments would shift considerable resources away from the Commission's continuing responsibilities by duplicating ongoing oversight in the license renewal context. This makes little sense. Petitioner has demonstrated no benefit to the public health and safety or the common defense and security as a result of such a shift. As it stands, Commission oversight is appropriately not dependent on whether a licensee seeks renewal, but rather is properly part of its day-to-day oversight responsibility.

In addition to diverting resources from the Commission's priorities, the proposed amendments would have a considerable impact on the regulated industry. The current license renewal rule was designed to allow licensees to make decisions about whether to seek license renewal "without being influenced by a regulatory process that is perceived to be uncertain, unstable, or not clearly defined."¹⁰ To date, nineteen plants totaling thirty-five units have received a renewed license. Applications for another fourteen units are currently being reviewed by the NRC Staff and another twenty-five plants have filed letters of intent to submit license renewal applications. These plants and their owners have invested considerable resources in

⁹ "Nuclear Power Plant License Renewal; Revisions: Final Rule", 60 Fed. Reg. 22461, 22464 (May 8, 1995).

¹⁰ 60 Fed. Reg. at 22462.

evaluating whether to seek an additional twenty years of operation. For most licensees, the technical requirements for license renewal must be established before an owner can reasonably determine whether license renewal is economically justified. A change in the process at this late date would cause large disruptions in the planning for many, if not most, plants. Some owners have intentionally staggered their submission for license extensions to accommodate their specific resource needs as well as the NRC Staff's available resources. Other plants have queued up their license renewal programs to take advantage of the "timely renewal" principle such that changing the requirements at this late date could have tremendous financial and regulatory impacts on those plants. In the absence of a convincing motivation for reconfiguring the license renewal program, a disruption of settled expectations at this late date is entirely gratuitous.

Lastly, the license renewal process itself has evolved as the Staff and industry have incorporated the lessons learned from early license renewal reviews into its current regulatory process.¹¹ To discard all of that effort and expense after so many have invested so much in the existing license renewal process – without any compelling reasons for doing – would create an unnecessary barrier to further license renewal applications. Further, such a dramatic turn of events would obliterate the Commission's successful-to-date efforts to promote a clear and stable regulatory program for license renewal.

D. The Key Renewal Issues Raised by Petitioner Are Already Addressed By Existing Regulatory Processes

In support of its petition, the Petitioner identifies several "key renewal issues" or questions that it believes require an answer before a renewed license should be issued. These questions focus specifically on the pending license renewal application for Oyster Creek and are not a basis for any changes to the rules generally. Four of these questions are related to the consideration of the current licensing basis, emergency planning, and security issues as part of the license renewal process. In summary, the following questions are posed by Petitioner:

- Could a new plant, designed and built to current standards, be licensed on the same site today?
- The design of Oyster Creek has been prohibited for nearly four decades. Does that reactor conform to today's standards?
- In light of the terrorist attacks of 9/11, would Oyster Creek's storage system, which is located close to Route 9, be acceptable today?
- Is the evacuation plan realistic in today's Ocean County? Would the tremendous growth over the past four decades inhibit Oyster Creek's likelihood of receiving an operating license?

The Commission already addressed these concerns as part of the rulemaking for the license renewal process. *See, supra*, Section III.A. These statements also ignore the fact that the

¹¹ For example, the Commission has updated the Standard Review Plan for License Renewal with interim staff guidance (ISG) as new insights or issues emerge and also updated its Generic Aging Lessons Learned (GALL) report and Generic Environmental Impact Statement (GEIS) for License Renewal.

licensing basis for Oyster Creek Generating Station, and indeed all nuclear power plants, has evolved considerably since initial licensing in response to Commission initiatives and ongoing safety and security issues. This ongoing process ensures that operation of the plant is not inimical to the health and safety of the public or the common defense and security during both the entire initial period of operation and during any renewed period of operation. Certainly, the current licensing bases vary among the different plants, but, at bottom, continuing Commission regulation and oversight of each facility assures that operation is not inimical to the health and safety of the public and only continues so long as the licensee satisfies its licensing basis.

The Commission also determined, both in the original rulemaking for and as part of the amendments to 10 C.F.R. Part 54, that the license renewal process need not include determinations regarding emergency planning, and the Petition provides no basis upon which the Commission could conclude that those earlier determinations were incorrect or inappropriate. Commission regulations require that licensees perform regular evaluations and updates to programmatic elements that might be affected by changing population demographics. Sections 50.47, 50.54(q), 50.54(s) through (u), and Appendix E to Part 50 contain requirements and performance objectives to protect public health and safety by ensuring the existence, implementation, revision and maintenance of emergency preparedness programs for power plants. These sections require periodic exercises and drills to ensure the effectiveness of the emergency plan. Such evaluations are used to ensure that emergency planning considerations such as evacuation time estimates, meteorological criteria, and prompt alert mechanisms are regularly updated and adequate.

Indeed, in the final rule, the Commission specifically addressed comments alleging that evacuation time estimate and exercises were inadequate to keep pace with changing demographics, land use, and transportation patterns.¹² The Commission concluded that these issues do not involve matters related to license renewal. Instead, through its standards, drills, and exercises, the Commission “ensures that existing plans are adequate throughout the life of any plant even in the face of changing demographics” and, as a result, “[t]here is no need for a licensing review of emergency planning issues in the context of license renewal.”¹³ More recently, the Commission rejected a request to consider emergency planning issues as part of renewal licensing and reiterated its view that “emergency planning is, by its very nature, neither germane to age-related degradation nor unique to the period covered by the [pending] license renewal application.”¹⁴ The Commission saw no need to spend “valuable resources litigating allegations of *current* deficiencies” when license renewal is “directed to *future-oriented* issues of

¹² 56 Fed. Reg. at 64967.

¹³ 56 Fed. Reg. at 64966-67. In addition, section 50.71(e) requires licensees to provide regular updates to their final safety analysis report (FSAR) to assure that information in the report contains the latest information developed.

¹⁴ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power State, Units 2 and 3), CLI-05-24, slip op. at 9 (October 26, 2005); see also *id.* at n. 38 (providing additional support for conclusion that emergency planning issues fall outside of license renewal).

aging.”¹⁵ Thus, the emergency planning issues raised by Petitioner are already addressed by existing programs regarding the safety and security of operating reactors.

Similarly, the Commission previously determined that plant protection and physical security do not warrant separate or individualized consideration during the license renewal process. Noting that 10 C.F.R. Part 73 continues to apply, the Commission stated that “[t]he level of protection will be maintained during the renewal term in the same manner as during the original license term.”¹⁶ Security and physical protection requirements also apply to any independent spent fuel storage installations (ISFSI) which is separately licensed.¹⁷ Indeed, as discussed above, with respect to 9/11, the Commission continually evaluates its requirements regulating security and, when necessary, issues orders revising security requirements or engages in other actions, such as rulemaking, which affect nuclear power plants or ISFSIs.¹⁸ The Commission has also addressed this particular issue in a license renewal proceeding emphasizing that “security issues at nuclear power reactors, while vital, are simply not among the aging-related questions at stake in a license renewal proceeding.”¹⁹ The relicensing process in no way affects the NRC’s existing security or emergency preparedness requirements. Thus, the Commission will continue to ensure compliance with security and physical protection of all licensees, whether operating under a renewed license or the original license, through ongoing inspections and reviews, and will continue to revise such requirements as necessary.

The Petitioner also introduces some topics with no demonstrated connection to license renewal. As paraphrased, the petition identifies the following issues:

- In recent weeks, two studies have raised serious concerns about the nuclear plant security and the health effects of low level radiation upon people who reside near nuclear plants. Should these be taken into account during license renewal?
- Would a license be permitted in light of the public opposition to the plant?

The NRC’s review of a license renewal application focuses on the technical and regulatory requirements necessary to ensure protection of the public health, safety and the environment during an additional twenty years of operation. Any issues that are not specific to license renewal (such as the effect of radiological effluent) are already being addressed by the Commission separately. “Public opposition” *per se* is simply not a component of any

¹⁵ *Id.* (emphasis in original).

¹⁶ 56 Fed. Reg. at 64967.

¹⁷ See Petition, at 3 (referring to storage system near Route 9). The requirements that apply to ISFSIs are also revised as needed. See, e.g., EA-02-104 (Order Modifying Licenses) (requiring implementation of interim compensatory measures at ISFSIs to address the current threat environment).

¹⁸ See n. 8, *supra*.

¹⁹ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power State, Units 2 and 3), CLI-04-36, 60 NRC 631, 638 (2004).

radiological health and safety or common defense and security criteria used to evaluate whether an initial operating license, much less a renewed operating license, should be issued. Indeed, an agency rule would be arbitrary and capricious if the agency relied on factors which Congress has not intended it to consider. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). To the extent the Petitioner or any other member of the public has concerns about a plant-specific license renewal application or operation of a facility, the current regulatory process already provides various mechanisms for raising concerns, including opportunities for public comment and input.²⁰ In any event, even assuming that “public opposition” could be evaluated in a meaningful way, it lacks any relevance to issues associated with extended operation.

IV. Conclusion

The Petitioner’s bases for revising Part 54 to incorporate a requirement for *de novo* review are utterly lacking in substance. They are nothing more than an unsupported attempt to revisit issues conclusively decided by the Commission over a decade ago. The issues that the Petitioner seeks to raise are different than the technical bases for extended operation of a facility. In fact, the Petitioner seeks to question the wisdom of ongoing operation of a particular facility. As such, the issues, concerns, and questions raised by Petitioner are more than adequately addressed by existing regulatory, licensing, inspection, and oversight programs. The proposed amendments would impose redundant regulation on licensees and sap valuable Commission resources from other regulatory priorities. The Petitioner would have the Commission throw a monkey-wrench into the stable, predictable, and functioning process for license renewal developed over the past decade and impose an arbitrary divide in the scope of review for license renewal between those which have been granted renewal and those yet to have their review completed. Further, the proposed amendments fail to offer any benefits to the public health, safety, or the environment as they merely duplicate existing regulatory oversight. In short, the proposed amendments would impose unnecessary costs on licensees and distract the Commission from other missions with little to no corresponding benefit for the public – a “lose-lose-lose” situation.

Accordingly, there is no technical or policy basis for adoption of any of the Petitioner’s proposals and Exelon urges the Commission to deny the petition for rulemaking, PRM-54-02, submitted by the Petitioner, in its entirety.

DC:437990.3

²⁰ For example, the NRC held a public meeting near Oyster Creek on August 24, 2005, to give the public information about the license renewal process. The NRC will hold additional public meetings during the review of the license renewal application.

From: Carol Gallagher
To: Evangeline Ngbea
Date: Fri, Nov 25, 2005 9:43 AM
Subject: Comment letter on PRM-54-03

Attached for docketing is a comment letter on the above noted petition for rulemaking from Nicholas S. Reynolds, Winston & Strawn, that I received via the Rulemaking website on 11/23/05.

Carol

Mail Envelope Properties (43872319.218 : 3 : 886)

Subject: Comment letter on PRM-54-03
Creation Date: 11/25/05 9:43AM
From: Carol Gallagher

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