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USNRC

August 14, 2009 (2:00pm)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

\_\_\_\_\_  
In the Matter of )  
 )  
ENTERGY NUCLEAR OPERATIONS, INC. )  
 )  
(Indian Point Nuclear Generating Units 2 and 3) )  
\_\_\_\_\_ )

Docket Nos. 50-247-LR and  
50-286-LR

August 14, 2009

JOINT MOTION FOR ENTRY OF A PROTECTIVE ORDER

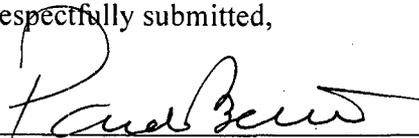
Pursuant to 10 C.F.R. § 2.323(a), Entergy Nuclear Operations, Inc. ("Entergy"), New York State ("NYS"), Riverkeeper, Inc. ("Riverkeeper"), and Hudson River Sloop Clearwater, Inc. ("Clearwater") hereby move that the Atomic Safety and Licensing Board approve an agreed-upon Protective Order. This Protective Order governs the disclosure and use of certain documents that Entergy, its vendors, and other participants in this proceeding claim contain proprietary trade secrets and/or commercial or financial information. The proposed Protective Order, which includes a Nondisclosure Agreement and Acknowledgment, is attached to this Motion.

Entergy, NYS, Riverkeeper, Clearwater, and the NRC Staff have consulted pursuant to 10 C.F.R. § 2.323(b) regarding this Motion and the proposed Protective Order. NYS, Riverkeeper, and Clearwater have indicated that they support this Motion and associated proposed Protective Order. The NRC Staff has indicated that it supports entry of a Protective Order, but opposes certain provisions of the attached Protective Order and will be filing a response to this Motion.

TEMPLATE = SECY - 041

DS 03

Respectfully submitted,



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COUNSEL FOR

ENTERGY NUCLEAR OPERATIONS, INC.

Dated at Washington, DC  
this 14th day of August, 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence G. McDade, Chairman  
Dr. Kaye D. Lathrop  
Dr. Richard E. Wardwell

In the Matter of	)	Docket Nos. 50-247-LR and
	)	50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	)	
	)	ASLBP No. 07-858-03-LR-BD01
(Indian Point Nuclear Generating Units 2 and 3)	)	
	)	, 2009

**PROTECTIVE ORDER**

This Protective Order governs the disclosure and use in this proceeding of certain documents that applicant Entergy Nuclear Operations, Inc. ("Entergy"), or any other Participant in this proceeding, claims contain proprietary trade secrets and/or commercial or financial information.<sup>1</sup> For purposes of this Protective Order, the term "documents" means any audio or video tape recording or written matter of any kind, whether produced, reproduced, or stored on paper, cards, tapes, ribbons, disks, belts, charts, film, computer files, computer disks or diskettes, computer storage devices, or any other medium, and includes, without limitation, books, reports,

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<sup>1</sup> The provisions of this Protective Order do not restrict the use by U.S. Nuclear Regulatory Commission Staff counsel, witnesses, employees, consultants, and others representing the NRC Staff ("NRC Staff") or Nuclear Regulatory Commissioners of documents containing protected material that NRC has received apart from its role as a litigant in this proceeding (e.g., documents containing information required to be submitted to NRC by statute, regulation, or license condition, or information submitted to, or acquired by, NRC in support of a requested licensing action or in fulfillment of its regulatory responsibilities). Instead, NRC Staff use and disclosure of such documents is governed by 10 C.F.R. §§ 2.390, 9.17, and 9.25, and NRC Management Directive 12.6, "NRC Sensitive Unclassified Information Security Program." The provisions of this Protective Order apply to NRC counsel, witnesses, employees, consultants, and others representing the NRC Staff with respect to documents containing protected material that NRC receives solely pursuant to 10 C.F.R. § 2.336 and this Protective Order.

studies, statements, speeches, notebooks, calendars, working papers, manuals, memoranda, notes, instructions, directions, records, correspondence, diaries, diagrams, drawings, lists, telephone logs, minutes, and photographs, and also includes, without limitation, originals, copies (with or without notes or changes thereon), and drafts. Pursuant to this Protective Order, counsel, witnesses, employees, members, officers, consultants, and others representing a party or interested governmental entity in this proceeding (all of whom are referred to herein, collectively, as "Participants") shall be permitted access to proprietary documents held by another Participant in this proceeding ("Initial Holders") otherwise required to be disclosed in accordance with 10 C.F.R. § 2.336(a) upon the conditions set forth herein. Except as otherwise expressly set forth herein, this Protective Order shall remain in effect until specifically modified or terminated by the Atomic Safety and Licensing Board ("Board") or the U.S. Nuclear Regulatory Commission ("Commission").

Those persons who (1) are qualified pursuant to paragraph F of this Protective Order; and (2) have executed a Nondisclosure Agreement and Acknowledgment in the form included as Attachment A to this Protective Order, the terms of which are hereby incorporated herein, shall be permitted access to proprietary information that is relevant to an admitted contention in this proceeding under the following conditions:

A. If the Initial Holder of proprietary information or its counsel has a good faith belief that a document or portion thereof contains information that qualifies as a trade secret and/or commercial or financial information that is privileged or confidential under 10 C.F.R. §§ 2.390(a)(4) and (b)(4)(i)-(v), then the Initial Holder or its counsel may designate such document as a "proprietary document," and it shall be protected in accordance with the terms and conditions of this Protective Order. Such designation shall take place as follows: the Initial

Holder shall (1) prominently mark with a conspicuous "Contains [insert owner's name] Designated Proprietary Information" label each proprietary document on the first page and on each other page of the document; and (2) on or before the later of (a) thirty (30) days after the date of this Protective Order, or (b) thirty (30) days after the date a Participant requests a copy of the proprietary document, produce a copy of the document with the proprietary information unredacted by providing it to the duly authorized representatives of the Participant requesting the proprietary document (as defined in paragraph F below), provided each such representative has signed a Nondisclosure Agreement and Acknowledgment.

B. Documents that are designated in accordance with paragraph A shall be held in strict confidence pursuant to 10 C.F.R. § 2.390(a)(4) and this Protective Order. This Protective Order, and the good faith representation and designation of documents as proprietary documents by the Initial Holder thereof, serves in lieu of the requirement for an affidavit under 10 C.F.R. § 2.390(b) and allows the NRC Staff to receive proprietary documents and to protect their confidentiality under the Freedom of Information Act. Nothing in this Protective Order shall be interpreted to prevent the NRC from discharging its obligation to release or retain documents in its possession and control in accordance with, and only to the extent required by, federal regulations or statute.

C. Prior to presenting any dispute arising under this Protective Order to the Board, the parties to the dispute shall consult and endeavor to resolve such dispute, including, but not limited to, the use of redaction. The Board shall resolve any disputes arising under this Protective Order not previously resolved, including those relating to the public release of information in a proprietary document otherwise designated as subject to nondisclosure.

D. Any Participant that objects to the designation of a document as proprietary shall provide a notice of objection to the Initial Holder stating the Participant's objection, and specifying the portions of the document that should be disclosed. Any such objections shall be submitted no later than sixty (60) days before the first scheduled day of hearing. However, in no case may an Intervenor submit such an objection with respect to a document that is not relevant to that Intervenor's own admitted or adopted contention(s). Upon such objection, the parties shall have 20 days (the "Consultation Period") to engage in good faith efforts to resolve the matter. The objecting party may file a motion with the Board within ten (10) days of the expiration of the consultation period, or earlier. The Initial Holder shall have the burden of showing that the applicable information in the proprietary document is a trade secret and/or commercial or financial information that is privileged or confidential so that the Board can determine, as applicable, whether, on balance, protection of the document from public disclosure is warranted under 10 C.F.R. § 2.390.

E. If a Participant files a motion for disclosure under paragraph D above, pending a ruling by the Board, the proprietary document in question shall continue to be held in confidence. If the Board rules that a document does not qualify for the asserted protection, or that, on balance, the document should be disclosed without the restrictions of this Protective Order, then the unrestricted use of such documents may begin fifteen (15) days after the Board's decision. If, during such time, the party that asserted protected status of the document files an interlocutory appeal or request that the issue be certified to the Commission, such period of time shall be extended until such time as the Board or the Commission rules on the appeal or request for certification.

F. Only individual counsel, consultants, witnesses, employees, members, officers, and others representing a Participant, listed in Attachment C who have executed the attached Nondisclosure Agreement and Acknowledgment will be afforded access to proprietary information. Participants may have an additional or substitute person(s) necessary for the preparation of materials for this proceeding be authorized to receive proprietary documents. Participants must advise the Initial Holder by electronic mail of the names of any additional or substitute person(s) for whom access to proprietary information is sought. The notification must certify that the individual to be authorized is either: (a) legal counsel to a Participant; (b) an employee, member, officer, or representative of a Participant; or (c) a consultant, witness, or another individual whose review thereof is necessary for the preparation of materials for this proceeding. If the Initial Holder agrees to disclose to the additional or substitute designee, the Initial Holder will so notify the Participant, and the individual must execute and serve the attached Nondisclosure Agreement and Acknowledgment prior to receipt of proprietary information. If the Initial Holder declines to disclose to the applicable designee, then the Participant may seek approval from the Board by filing a motion stating that such agreement was sought and declined, and the basis for its belief that such information should be disclosed to the proposed designee. The Initial Holder may challenge such a motion within ten (10) days of receipt of the Participant's filing and the Board will determine the designation of such additional or substitute recipients by further order. Only after the approval of the requested designation by the Board and the individual's execution and filing of the attached Nondisclosure Agreement and Acknowledgment, may such person(s) be granted access to any proprietary information.

G. Each executed Nondisclosure Agreement and Acknowledgment shall be filed with the Board and served on the other Participants. This service on the Participants shall be accomplished solely through the use of electronic mail.

H. A proprietary document disclosed pursuant to this Protective Order shall only be used as necessary for the conduct of this proceeding and any further Commission or judicial proceedings in this matter, by approved designees. A proprietary document subject to this Protective Order shall not be disclosed in any manner to any person except (1) the Board and its staff; and (2) those persons engaged in the conduct of this proceeding who have executed a Nondisclosure Agreement and Acknowledgment. An individual with access to proprietary documents may make copies of and take notes on the confidential information contained in the documents, but such copies and notes become proprietary documents subject to the terms of this Protective Order.

I. Counsel, consultants, witnesses, employees, members, officers, and others representing a Participant who receive documents subject to the terms of this Protective Order shall maintain the confidentiality of the information contained therein as required in the Nondisclosure Agreement and Acknowledgment. Even if no longer engaged in this proceeding, every person who has executed a Nondisclosure Agreement and Acknowledgment shall continue to be bound by the provisions of this Protective Order and the attached Nondisclosure Agreement and Acknowledgment.

J. Counsel and others representing a Participant shall take all precautions necessary to assure that proprietary documents and proprietary information are not distributed to

unauthorized persons. Counsel and others representing a Participant are responsible for ensuring that persons under their supervision or control comply with this Protective Order.

K. All pleadings, issuances, testimony, exhibits, and correspondence in this proceeding that contain proprietary information shall be treated as confidential, marked in accordance with paragraph A above, and, if served, shall:

1. Be served by electronic mail, with an additional paper copy served by U.S. first class, registered, express, or certified mail, internal NRC mail, messenger-courier, or overnight delivery service in a sealed envelope;
2. Include an attached cover sheet bearing prominent markings indicating the attached document contains "Confidential Proprietary Information Subject to Nondisclosure Agreement," and a cover letter that describes the contents of the pleading or correspondence without reference to such information, and, in the subject line of the electronic filing e-mail, a statement that the electronic filing contains proprietary information; and
3. Be served only on the individual members of this Board and its law clerks, the Office of the Secretary, counsel for the Initial Holder, and representatives of Participants that are authorized to receive such information pursuant to this Protective Order.

L. At any hearing or conference in this proceeding in which a statement is made by a representative of a Participant, or a witness is questioned, concerning a proprietary document or information contained therein, the statement or testimony shall be given in camera or under other suitable conditions as the Board may establish, and the record of that portion of the hearing and any transcript thereof, shall be withheld from distribution to the public and may only be distributed to individual members of this Board and its law clerks, the Office of the Secretary, counsel for the Initial Holder, and representatives of Participants that are authorized to receive such information pursuant to this Protective Order. It shall be the duty of the presenting Participant to notify the Board and the Initial Holder that such testimony or statement will contain proprietary information, prior to the testimony or statement being made.

M. Proprietary documents shall remain available for the purposes of this proceeding until the date that an order terminating this proceeding is no longer subject to judicial review (the "Proceeding Termination Date"). The Participants shall, within forty-five (45) days of the Proceeding Termination Date, return all proprietary documents in their possession, or in the possession of their counsel, consultants, employees, members, officers, and agents, to the Initial Holder's counsel or shall destroy that material, except that copies of filings, issuances, transcripts, and exhibits in this proceeding that contain such information and notes taken by persons reviewing proprietary material, may be retained if they are maintained in a secure place such that no distribution of the information to unauthorized individuals will occur. Within such time period, each Participant receiving proprietary documents under this Protective Order shall submit to the Initial Holder's counsel an affidavit stating that, to the best of his/her knowledge, all proprietary documents have been returned or destroyed, or, in the case of filings, issuances, transcripts, exhibits, or notes in this proceeding, that such documents will be maintained in a secure place such that no distribution of the information to unauthorized individuals will occur. To the extent that such filings, issuances, transcripts, exhibits, and notes are not returned or destroyed, they shall remain subject to the provisions of this Protective Order.

N. Counsel, consultants, employees, members, officers, or any other individuals representing a Participant who have reason to believe that proprietary documents may have been lost or misplaced or may have otherwise become available to unauthorized persons during the pendency or following the completion of this proceeding shall notify the Board and the Initial Holder's counsel promptly of such belief and the reasons for it.

O. Any violation of the terms of this Protective Order or a Nondisclosure Agreement and Acknowledgment executed in furtherance of this Protective Order may result in the

imposition of such sanctions as the Board may deem appropriate including, but not limited to, referral of the violation to appropriate bar associations and/or other disciplinary authorities.

P. Nothing in this Protective Order precludes any Participant(s) in this proceeding from seeking changes in this Protective Order from the Board, the Commission, or a court as future circumstances warrant.

Q. Nothing in this Protective Order shall be deemed to preclude any Participant from independently seeking, through discovery in any other administrative or judicial proceeding, any proprietary document or information produced in this proceeding under this Protective Order. In addition, if information identified in this proceeding as proprietary comes into the possession of, or is known by any Participant independently of a proprietary document produced in this proceeding, and such knowledge was acquired without violation of law or other requirement applicable to such Participant directing the Participant to keep such information confidential, use of that document or information in this proceeding, without compliance with the terms of this Protective Order, shall not be a violation of the terms of this Protective Order. The Participant asserting independent knowledge of the contents of a proprietary document or independent access to such a document shall have the burden of proving that such information was independently obtained if the Initial Holder asserts that disclosure of such information or document was a violation of this Protective Order.

R. In addition, if a document designated as a proprietary document is ruled in another proceeding not to be proprietary or confidential, or if the Initial Holder discloses a document designated as a proprietary document in another action without such a designation, then any Participant objecting to the continued designation of such document as a proprietary document in

this proceeding shall consult with the Initial Holder in accordance with paragraphs C and D of this Protective Order regarding whether such document should continue to be subject to the terms of this Protective Order. If counsel or others representing a Participant in this proceeding becomes aware that a document designated as a proprietary document in this proceeding is ruled by another Board, the Commission, or a court in another proceeding not to be proprietary or confidential, then that Participant shall inform all parties of that ruling.

S. The Board may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding.

T. The additional provisions set forth in Appendix B apply to Participants receiving proprietary documents designated as containing "Vendor Proprietary Information" (i.e., documents containing information proprietary to vendors and contractors such as Westinghouse Electric Company LLC and Enercon Services, Inc.) from any other Participant in this proceeding or its vendors or contractors.

It is so ORDERED.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD

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Lawrence G. McDade, Chairman  
ADMINISTRATIVE JUDGE

ATTACHMENT A

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence G. McDade, Chairman  
Dr. Kaye D. Lathrop  
Dr. Richard E. Wardwell

In the Matter of	)	Docket Nos. 50-247-LR and
	)	50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	)	
	)	ASLBP No. 07-858-03-LR-BD01
(Indian Point Nuclear Generating Units 2 and 3)	)	
	)	

**NONDISCLOSURE AGREEMENT AND ACKNOWLEDGMENT**

Under penalty of perjury, I hereby agree and acknowledge that (i) access to “proprietary documents,” as that term is defined in the Atomic Safety and Licensing Board’s Protective Order dated \_\_\_\_\_, 2009 issued in Docket Nos. 50-247-LR and 50-286-LR (“Protective Order”), may be provided to me pursuant to the terms and restrictions of the Protective Order; (ii) I have been given a copy and have read the Protective Order; and (iii) I agree to be bound by the terms of the Protective Order. I understand and agree that proprietary documents, their contents, or any notes or other memoranda summarizing or otherwise describing their contents, or any form of information that derives from the proprietary documents and copies or discloses the contents of the proprietary documents, shall be held in strict confidence and shall not be disclosed to anyone except in accordance with that Protective Order, and shall be used only for purposes of this proceeding. I acknowledge that a violation of this Nondisclosure Agreement and Acknowledgment or the Protective Order, which incorporates the terms of this Nondisclosure

Agreement and Acknowledgment, constitutes a violation of an order of the U.S. Nuclear Regulatory Commission and may result in the imposition of such sanctions as the Atomic Safety and Licensing Board or the U.S. Nuclear Regulatory Commission may deem to be appropriate. I also acknowledge that a violation of this Nondisclosure Agreement and Acknowledgment or the Protective Order shall entitle the Initial Holder or owner of the proprietary document(s) or proprietary information contained therein to seek immediate injunctive relief prohibiting such violation.

WHEREFORE, I do solemnly agree to protect such proprietary documents, and their contents, as may be disclosed to me in this proceeding, in accordance with the terms of the attached Protective Order and this Nondisclosure Agreement and Acknowledgment.

[Note: For NRC representatives executing this Nondisclosure Agreement, an executed agreement will be modified to contain the following additional sentence: "My agreement and acknowledgment, however, are not binding on the U.S. Nuclear Regulatory Commission's fulfillment of its obligations under the Freedom of Information Act."]

Name (printed): \_\_\_\_\_

Title: \_\_\_\_\_

Employed by or Representing: \_\_\_\_\_

Signature: \_\_\_\_\_

Executed on (date): \_\_\_\_\_

## ATTACHMENT B

### **Additional Provisions Applicable to Vendor Proprietary Information**

- A. The following additional provisions apply to Participants receiving proprietary documents designated as containing "Vendor Proprietary Information":
1. The direct or indirect receipt and use of Vendor Proprietary Information by a Participant, as defined in the attached Protective Order, shall not be for the purpose of producing a product or service either by a Participant, its parent corporation, subsidiaries, officers, directors, contractors, consultants, counsel, witnesses, employees, or any other person, for transfer to third parties.
  2. Vendors make no warranty or representation whatsoever to Participants as to the sufficiency or accuracy of the Vendor Proprietary Information provided pursuant to this Protective Order.
  3. Vendors and their suppliers and subcontractors of any tier shall not be liable to Participants with respect to or resulting from the use (or the results of such use) or misuse by Participants or others of any Vendor Proprietary Information furnished pursuant to this Protective Order.
  4. Participants shall not, at any time, without the prior written approval of the appropriate vendor, file, cause or authorize the filing of any patent application in any country in respect of any invention derived from the Vendor Proprietary Information supplied pursuant to this Protective Order.
  5. Participants shall not disclose any Vendor Proprietary Information received in this proceeding, or any product of such Vendor Proprietary Information, directly or indirectly, without the prior written permission of the appropriate vendor, to any of the countries designated in the United States Government regulations as issued from time to time relating to the exportation of technical data, including any computer programs. Participants shall fully comply with all regulations with regard to the Vendor Proprietary Information transmitted pursuant to this Protective Order.

## ATTACHMENT C

### **Individuals Approved to Receive Proprietary Documents Upon Execution of Nondisclosure Agreement and Acknowledgment**

#### Entergy

Kathryn M. Sutton (Morgan, Lewis & Bockius LLP – Counsel for Entergy)  
Paul M. Bessette (Morgan, Lewis & Bockius LLP – Counsel for Entergy)  
Martin J. O'Neill (Morgan, Lewis & Bockius LLP – Counsel for Entergy)  
Jonathan M. Rund (Morgan, Lewis & Bockius LLP – Counsel for Entergy)  
Esther Park (Morgan, Lewis & Bockius LLP – Counsel for Entergy)  
William C. Dennis (Entergy Nuclear Operations, Inc. – Counsel for Entergy)  
Edwin P. Villarico (Morgan, Lewis & Bockius LLP – Paralegal)

#### New York State

Mylan Denerstein (Executive Deputy Attorney General – Counsel for New York State)  
Katherine Kennedy (Special Deputy Attorney General – Counsel for New York State)  
John Sipos (Special Deputy Attorney General – Counsel for New York State)  
Janice Dean (Assistant Attorney General – Counsel for New York State)  
Lisa Feiner (Assistant Attorney General – Counsel for New York State)  
Anthony Roisman (Assistant Attorney General – Counsel for New York State)  
Paul Blanch (Expert witness for New York State)  
Bruce Egan (Expert witness for New York State)  
Richard Lahey (Expert witness for New York State)  
David Schlissel (Expert witness for New York State)  
Rudy Hausler (Expert witness for New York State)

#### Riverkeeper

Phillip Musegaas (Hudson River Program Director, Riverkeeper, Inc. – Counsel for Riverkeeper)  
Deborah Brancato (Staff Attorney, Riverkeeper, Inc. – Counsel for Riverkeeper)  
Dr. Joram Hopenfeld (Expert witness for Riverkeeper)

#### Clearwater

Manna Jo Greene (Clearwater Environmental Director – Representative for Clearwater)  
Ross Gould (Clearwater Member – Representative for Clearwater)  
Stephen Filler (Clearwater Director and Member – Representative for Clearwater)

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of ) ENTERGY NUCLEAR OPERATIONS, INC. ) (Indian Point Nuclear Generating Units 2 and 3) )	) Docket Nos. 50-247-LR and ) 50-286-LR ) ) ) August 14, 2009
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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the "Joint Motion for Entry of a Protective Order," dated August 14, 2009, were served this 14th day of August, 2009 upon the persons listed below, by first class mail and by e-mail as shown below.

Office of the Secretary \*\*  
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Washington, D.C. 20555-0001  
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Administrative Judge  
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Atomic Safety and Licensing Board Panel  
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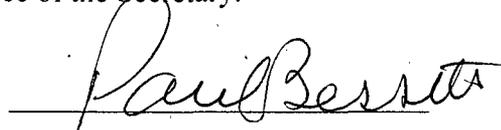
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