COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF ENERGY RESOURCES

RPS CLASS II REGULATIONS	:	JULY 26, 2019

COMMENTS OF RETAIL ENERGY SUPPLY ASSOCIATION RE CLASS II RPS RULEMAKING

The Retail Energy Supply Association ("RESA")[1] hereby submits its comments in response to the Department of Energy Resources' ("Department" or "DOER") rulemaking to amend 225 C.M.R. 15.00 ("Class II RPS Rulemaking"). RESA appreciates the opportunity to comment on this important matter.

INTRODUCTION

RESA is a non-profit organization and trade association that represents the interests of its members in regulatory proceedings in the Mid-Atlantic, Great Lakes, New York, and New England regions. RESA members are active participants in the retail competitive markets for electricity, including the Massachusetts retail electric market. Several RESA member companies are licensed by the Department of Public Utilities ("DPU") to serve residential, commercial and industrial customers in Massachusetts and are presently providing electricity supply to customers in the Commonwealth. Accordingly, RESA and its members have an interest in ensuring that the

[1] The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

Class II RPS Rulemaking does not have an adverse effect on RESA members, their customers, or the continued success of the retail electric market in Massachusetts.

BACKGROUND

Pursuant to existing regulations, all retail electricity providers selling electricity to end-use customers in the Commonwealth are required to provide specific minimum percentages of their electricity supply from renewable energy generation sources.[2] On April 5, 2019, the Department issued draft regulations to amend portions of these regulations.[3]

On April 11, 2019, the Department issued a Stakeholder Announcement offering interested stakeholders an opportunity to comment on the Department's proposed amendments to the RPS and APS regulations.[4] RESA now hereby submits its comments regarding the Class II RPS Rulemaking.[5]

COMMENTS

According to the Stakeholder Announcement:

> The proposed changes to both RPS Class I and II include those required by Chapter 227 of the Acts of 2018, changes made to improve the regulation, streamline requirements, reduce costs, and eliminate unnecessary or onerous provisions as contemplated by Executive Order 562, and other policy related changes that were identified by DOER during its comprehensive review of the existing regulations.[6]

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[2] *See* 225 C.M.R. 14.00 ("Class I RPS"); 225 C.M.R. 15.00 ("Class II RPS"); 225 C.M.R. 16.00 ("APS").

[3] *See* RPS and APS Stakeholder Announcement (Apr. 11, 2019) (available at: https://www.mass.gov/files/documents/2019/05/15/RPS%20and%20APS%20Stakeholder%20Announcement.pdf) (last visited Jul. 25, 2019) ("Stakeholder Announcement"). The Department's proposed changes to the Class II RPS regulations are available at: https://www.mass.gov/files/documents/2019/04/08/225%20CMR%2015.00%20Draft%20RPS%20Class%20II%20REDLINE%20%28040519%29_0.pdf) (last visited Jul. 25, 2019) ("225 Proposed CMR").

[4] Stakeholder Announcement, at 6. The deadline to submit comments was subsequently extended. *See* RPS Class I & II Rulemaking, Public Comment Period Extended (available at: https://www.mass.gov/service-details/rps-class-i-ii-rulemaking) (last visited Jul. 25, 2019).

[5] RESA is also submitting comments separately regarding the Department's proposed amendments to the Class I RPS regulations.

[6] Stakeholder Announcement, at 2.

Pursuant to Executive Order 562, when adopting regulations, the Department should: (a) only address areas in which there is a clear need for intervention that is best addressed by it; (b) ensure the costs of the regulation do not exceed the benefits; (c) use "less restrictive and intrusive alternatives" when available; and (d) "not unduly and adversely affect Massachusetts citizens and customers of the Commonwealth, or the competitive environment in Massachusetts."[7] However, some of the Department's proposed changes to the Class II RPS regulations would not satisfy these standards. Accordingly, as discussed more fully below, RESA requests that the Department modify those provisions before promulgating amendments to the Class II RPS regulations.

I. THE DEPARTMENT SHOULD NOT INCREASE THE CLASS II RPS WASTE-TO-ENERGY ("WTE") MINIMUM STANDARD OR ALTERNATIVE COMPLIANCE PAYMENT RATE

The Department is proposing to increase the WTE Minimum Standard and the WTE alternative compliance payment ("ACP") rate for 2019 through 2025.[8] However, there is not a clear need for the Department to intervene by making these proposed changes. Moreover, the Department's proposed changes to the WTE Minimum Standard and WTE ACP rate will unnecessarily increase costs to ratepayers; thereby, adversely affecting those customers, especially those with fixed incomes or subject to budgets. Moreover, there are less intrusive means by which the same goals can be achieved. Accordingly, for the reasons set forth more fully below, the Department should not increase either the WTE Minimum Standard or the WTE ACP rate.

[7] Executive Order No. 562 To Reduce Unnecessary Regulatory Burden (Mar. 31, 2015) ("EO 562"), §§ 3, 5.

[8] *See* 225 Proposed CMR 15.07(2); 225 Proposed CMR 15.08(4)(a)(2).

A. There Is No Clear Need For The Department To Increase the WTE Minimum Standard Or The WTE ACP Rate

The Department is proposing "to increase the RPS Class II Waste-to-Energy Minimum Standard from 3.5% to 3.7% for 2019 through 2025 to align supply and demand with current retail load figures and address issues related to persistent oversupply."[9] However, there is no demonstrated need to "align supply and demand." In fact, there are currently only two major sellers of WTE renewable energy credits ("RECs") in the Commonwealth. As a consequence, these WTE providers have the ability to exert significant market power over the number of available WTE RECs and the cost for such RECs. Moreover, there are no prospects for the addition of facilities to produce WTE RECs.[10] Thus, increasing the Minimum Standard will simply result in existing WTE sellers gaining more market power.

The Department is also proposing to increase the WTE ACP rate for 2019 through 2025 to equal that of the ACP rate for Class II RPS Renewable Energy ("Class II ACP Rate") in order to "help improve revenues for Waste-to-Energy facilities for the period of 2019 through 2025."[11] However, noting that WTE facilities would receive higher revenues is not the same as demonstrating that they ***need*** to receive higher revenues. Indeed, any generator that produces RECs would like the ability to sell those RECs for higher prices and garner higher revenues. This does not mean, however, that ratepayers should have to bear the higher cost burden necessary to produce those higher revenues. A for-profit, private company's desire for higher revenues simply

[9] Stakeholder Announcement, at 4; *see also* 225 Proposed CMR 15.07(2).

[10] *See* Mass. Gen. Laws Ch. 25A, § 11F(d) (specifying that "a Class II renewable energy generating source is one that began commercial operation ***before December 31, 1997***") (emphasis added).

[11] Stakeholder Announcement, at 4-5; *see also* 225 Proposed CMR 15.08(4)(a)(2).

does not warrant governmental intervention. Thus, the proposed increases in the WTE Minimum Standard and the WTE ACP rate contravene the principles of Executive Order 562.[12]

B. The Cost Of The Proposed Increases To The WTE Minimum Standard And WTE ACP Rate Will Exceed The Benefits

The proposed increases to the WTE Minimum Standard and WTE ACP rate are significant and will have a substantial impact on customer prices. For compliance year 2018, the WTE ACP rate is $11.32 per Megawatt-hour ("MWh"), while the Class II ACP Rate is $28.30 per MWh – ***One Hundred Fifty Percent (150%)*** more than the WTE ACP Rate.[13] Even if the 2019 Class II ACP Rate did not increase over the 2018 rate,[14] the 2019 WTE ACP rate would increase by ***two and one half times*** over the current rate.

Furthermore, because the Department's proposed changes to the WTE Minimum Standard are designed to increase demand for and reduce oversupply of WTE RECs,[15] there will be little (if any) excess supply to drive down the cost of acquiring such RECs. In fact, there is little possibility that there will be an increase in supply in the near term to drive down the price of WTE RECs. Currently, there are only two sellers generating the majority of the WTE RECs, and those sellers historically have priced those RECs at or near the applicable WTE ACP rate. Moreover, there are no prospects for the development of new WTE facilities to produce additional WTE RECs.[16] As a consequence, WTE RECs will continue to trade at or near the

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[12] EO 562, § 3, 5 (requiring that, when adopting a regulation, an agency demonstrate that "there is a clearly identified need for governmental intervention that is best addressed by the Agency and not another Agency or governmental body.").

[13] *See* Alternative Compliance Payments (ACP) Rates and Information (available at: https://www.mass.gov/service-details/alternative-compliance-payments-acp-rates-and-information) (last visited Jul. 25, 2019).

[14] The 2019 Class II ACP is likely to be higher than the 2018 Class II ACP due to Consumer-Price-Index-adjustments used in setting the annual Class II ACP Rate. *See* 225 C.M.R. 15.08(3)(a)(2).

[15] *See* Stakeholder Announcement, at 4 ("DOER proposes to increase the RPS Class II Waste-to-Energy Minimum Standard from 3.5% to 3.7% for 2019 through 2025 to align supply and demand with current retail load figures and address issues related to persistent oversupply.").

[16] *See* Mass. Gen. Laws Ch. 25A, § 11F(d) (specifying that "a Class II renewable energy generating source is one that began commercial operation ***before December 31, 1997***") (emphasis added).

WTE ACP rate; thereby, significantly increasing the cost of Class II RPS compliance, which will ultimately be passed on to ratepayers through higher Basic Service rates and supplier prices. Thus, despite paying more for WTE RECs, it is unlikely there will be an increase in the available supply of those RECs in the near term. WTE RECs will just cost more. As a consequence, ratepayers are unlikely to receive any emissions-reduction benefit. Thus, the costs of the regulation will exceed the benefits and unduly and adversely burden customers in direct contravention of Executive Order 562[17] and the Department's goal to "reduce ratepayer exposure to higher future program costs."[18]

C. There Are Less Intrusive Alternatives Available

The costs associated with an increase in the WTE Minimum Standard and WTE ACP rate would be borne by ratepayers throughout the Commonwealth. Alternatively, WTE facilities can increase their revenues through increased tipping fees. This option would be less intrusive because it would only impact those using the WTE facilities and not place the burden on all electric ratepayers in the Commonwealth. Moreover, basic ratemaking principles dictate that costs should be borne by those who cause them.[19] WTE facilities serve the waste disposal needs of local communities.[20] Thus, if a WTE facility needs increased revenues to support its operations, the local community it serves, not electric ratepayers throughout the Commonwealth,

[17] EO 562, § 3, 5 (requiring that, when adopting a regulation, an agency demonstrate that "the costs of the regulation do not exceed the benefits that would result from the regulation"); *id.* (requiring that, when adopting a regulation, an agency demonstrate that "the regulation does not unduly and adversely affect . . . customers of the Commonwealth . . .").

[18] Stakeholder Announcement, at 5.

[19] *See, e.g.*, D.T.E. 03-121 (Jul. 23, 2004), at 46 ("The [Department of Telecommunications and Energy's] ratemaking policy requires cost responsibility to follow cost incurrence."). At the time of this decision, the DPU was known as the Department of Telecommunications and Energy.

[20] *See* 225 C.M.R. 15.02 (s.v. Waste Energy) (defining "waste energy" as "[e]lectrical energy generated from the combustion of ***municipal*** solid waste.") (emphasis added).

should bear those costs.[21] Indeed, if the local community served by the WTE facility bears these costs, that community (and the individuals and businesses that comprise it) will have an economic incentive to reduce the amount of solid waste that they generate; thereby, furthering the policies of the state.[22]

D. Any Proposed Changes Should Reduce Ratepayer Exposure To Higher Future Program Costs As Much As Possible

If, despite the foregoing, the Department still intends to increase the WTE Minimum Standard and/or WTE ACP rate, it should make several modifications in order to "reduce ratepayer exposure to higher future program costs."[23] First, the proposed increases should be reduced to the absolutely lowest level necessary to meet the demonstrated need. To do this, the Department should, as it has done when adopting other regulatory changes, require an independent analysis of supply, demand and revenue requirements and alternative ways to achieve those requirements.[24] Moreover, this analysis should take place within the broader context of careful consideration of the Commonwealth's solid waste master plan.[25] In this way, the Department can ensure that customers are not unduly subsidizing WTE generators and that WTE generators do not receive an unjustified windfall. Instead, WTE generators would be

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[21] *Cf.* EO 562, § 3, 5 (requiring that, when adopting a regulation, an agency demonstrate that "less restrictive and intrusive alternatives have been considered and found less desirable based on a sound evaluation of the alternatives").

[22] *See* Massachusetts 2010-2020 Solid Waste Master Plan (April 2013) (available at: https://www.mass.gov/files/documents/2016/08/nw/swmp13f.pdf), at iv (focusing on, among other things, increasing "producer responsibility to reduce waste that needs to be recycled or disposed of by municipalities and eliminate products containing toxic chemicals from disposal.") (last visited Jul. 25, 2019).

[23] Stakeholder Announcement, at 5.

[24] *See, e.g.*, Historical Development of the Solar Massachusetts Renewable Target (SMART) Program (available at: https://www.mass.gov/info-details/historical-development-of-the-solar-massachusetts-renewable-target-smart-program) ("In February 2016, DOER selected Sustainable Energy Advantage, LLC to complete both an analysis of revenue requirements for solar projects and a comparative evaluation of various types of incentive programs.") (last visited Jul. 25, 2019).

[25] *Accord* Stakeholder Announcement, at 4 (noting that, beginning in 2025, the WTE Minimum Standard will be reviewed every five years and "could be modified following consultation with MassDEP over its consistency with the Commonwealth's solid waste management plan.").

considered in their proper role as one means, among several, for addressing solid waste issues in the Commonwealth.[26]

Further, the duration of any increase in the WTE Minimum Standard and/or WTE ACP Rate should be shortened to account for increased revenues already being received or contracted to be received. The proposed increases in the WTE Minimum Standard and WTE ACP Rate appear to be designed to provide WTE facilities with a level of increased revenues for a seven-year period (i.e., compliance years 2019-2025).[27] However, WTE facilities are already receiving increased revenues. Soon after the Department issued its proposed changes to the Class II RPS regulations, the price for WTE RECs jumped significantly. In fact, WTE REC prices have risen to the level of the proposed WTE ACP Rate. As a consequence, WTE facilities are already selling WTE RECs at these higher prices and are, thus, already receiving increased revenues and have entered into multi-year contractual commitments that will provide for those increased revenues to continue into the future. Accordingly, the period of time that the increased WTE Minimum Standard and increased WTE ACP are in effect should be reduced to account for the increased revenues the WTE generators are already receiving and are guaranteed to receive through contractual commitments that extend into the future. By doing so, the Department can "reduce ratepayer exposure to higher future program costs"[28] and avoid providing a windfall to WTE generators.

[26] The Department of Environmental Protection might be better suited to lead a solid waste master plan review. *See* EO 562, § 3, 5 (requiring that, when adopting a regulation, an agency demonstrate that "there is a clearly identified need for governmental intervention that is best addressed by the Agency and not another Agency or governmental body").

[27] *See* 225 Proposed CMR 15.07(2) (proposing to increase the WTE Minimum Standard for 2019-2025); 225 Proposed CMR 15.08(4)(a)(2) (proposing to increase the WTE ACP Rate for 2019-2025).

[28] Stakeholder Announcement, at 5.

II. THE DEPARTMENT SHOULD PROTECT EXISTING RATEPAYER EXPECTATIONS

If the proposed regulations are adopted, the increased WTE Minimum Standard and WTE ACP Rate will go into effect beginning this year.[29] As the Department most certainly appreciates, while the Department's proposed regulatory changes are being considered, the competitive electricity market in the Commonwealth continues to advance and suppliers continue to enter into contractual obligations with customers, often with multi-year terms of service.[30] When entering into these arrangements, suppliers do not take market positions or enter into agreement terms with customers based on the release of proposed regulatory revisions. Rather, since proposed regulatory revisions are subject to change based on legislative considerations as well as the regulatory input process, suppliers take market positions and enter into agreements based only on currently effective regulatory requirements officially promulgated by the governing regulatory authority. In this way, customers are not exposed to undesirable contracting arrangements, unnecessary price increases, and/or pricing volatility as a result of speculative regulatory changes that may never be adopted or that may be significantly modified through the regulatory process before such changes ultimately become effective. Thus, only once the Department officially adopts changes to the Class II RPS regulations will suppliers modify their market positions and/or the terms of their agreements with customers to account for those changes.

Furthermore, when a new obligation is imposed, it impacts existing contracts that were not priced to include such obligations and may have a term of service that extends over multiple

[29] *See* 225 Proposed CMR 15.07(2) (proposing to increase the WTE Minimum Standard for 2019-2025); 225 Proposed CMR 15.08(4)(a)(2) (proposing to increase the WTE ACP Rate for 2019-2025).

[30] *See, e.g.*, Energy Switch Massachusetts website (available at: http://www.energyswitchma.gov) (displaying numerous fixed price offers that extend 12-36 months into the future) (last visited Jul. 25, 2019).

years.[31] While suppliers may have contractual and legal means to address change of law circumstances, these mechanisms will have a direct and immediate financial impact on customers who have contracted for a fixed-price and will now be subject to new and unanticipated charges that are not within their budgets. These unanticipated charges place customers in an untenable position as they may be required to pay these new and unanticipated costs per the terms of their contractual agreements. Moreover, they undermine the customers' underlying confidence that the competitive electricity market can provide and deliver the type of pricing products they desire (which often include fixed-price products) and have contracted to meet their energy needs. The other alternative is for suppliers to enter into agreements in which they pass through the cost of Class II RPS compliance to customers. However, this type of contracting arrangement is not desirable to many customers, who prefer fixed price contracts in which the risk of price fluctuations is placed on the suppliers, because it does not provide budget certainty.

Accordingly, consistent with its prior practice,[32] RESA requests that the Department create an exemption (subject to suppliers providing appropriate documentation) from the increased WTE Minimum Standard and WTE ACP rate until the expiration of any contracts existing as of the effective date of the regulations instituting those changes. In this way, the Department can protect existing ratepayer expectations.

[31] *Cf.* Energy Switch Massachusetts website (available at: http://www.energyswitchma.gov) (displaying numerous fixed price offers that extend 12-36 months into the future) (last visited Jul. 25, 2019).

[32] *See, e.g.*, 225 C.M.R. 14.07(2)(a), (3)(a); 225 C.M.R. 14.09(g).

III. THE DEPARTMENT IS NOT AUTHORIZED TO REQUIRE FINANCIAL SECURITY OR TO GRANT ITSELF BROAD ENFORCEMENT AUTHORITY

The Department's proposed changes to the Class II RPS regulations would require competitive suppliers to post financial security that could be used to enforce those regulations.[33] In the proposed changes to the Class II RPS regulations, the Department also "reserves all rights to take any and all appropriate actions to ensure the collection of all Alternative Compliance Payments owed to ensure annual compliance obligations are fully discharged by a Retail Electricity Supplier . . . ."[34] However, the Department is not empowered to require that suppliers provide financial security, to use that financial security to enforce the Class II RPS regulations, or to otherwise grant itself broad enforcement authority.

As a creature of statute,[35] the Department can act only within the parameters provided by the legislature.[36] The legislature has not authorized the Department to require financial security to ensure a supplier discharges its Class II RPS obligations.[37] Nor has the legislature authorized the Department to grant itself broad enforcement authority over suppliers who fail to meet those obligations.[38] If the legislature had intended to do so, it could have.[39] Thus, the Department does not have the power to require that competitive suppliers post financial security, to use that

[33] *See* 225 Proposed CMR 15.12.

[34] 225 Proposed CMR 15.12(7).

[35] *See* Mass. Gen. Laws Ch. 25A, § 1 (creating the Department).

[36] *See, e.g.*, *Mass. Comm'n Against Discrimination v. Liberty Mutual Ins. Co.*, 371 Mass. 186, 189 (1976) ("It is well settled that the commission, as a board created by statute has . . . only those powers, duties and obligations conferred upon it by statute . . . .") (citations omitted).

[37] *See, generally,* Mass. Gen. Laws Ch. 25A, § 11F.

[38] *See, generally, id.*

[39] *See, e.g.*, Mass. Gen. Laws Ch. 25A, § 11I(*l*) (requiring the provision of financial security for energy management service contracts); Mass. Gen. Laws Ch. 25A, § 11A (giving the Department the power to enforce the Massachusetts commercial and apartment conservation service program).

financial security to enforce the Class II RPS regulations, or to otherwise grant itself broad enforcement authority.[40]

IV. THE PROPOSED FINANCIAL SECURITY REQUIREMENT IS INCONSISTENT WITH EXECUTIVE ORDER 562

The Department's proposed financial security requirement runs afoul of the principles of Executive Order 562 because: (a) there is not a clear need for intervention ***by the Department;*** (b) there are "less restrictive and intrusive alternatives" available; and (c) Massachusetts ratepayers would be unduly and adversely affected by the requirement. Accordingly, the Department should not require competitive suppliers to post financial security.

Each licensed competitive supplier is already required to provide annual documentation to the DPU of its financial capability.[41] Similarly, each licensed competitive supplier must provide annual documentation to the DPU that it is a New England Power Pool ("NEPOOL") participant (or has a contractual relationship with a NEPOOL participant),[42] which requires demonstration of financial capability.[43] Because these other financial capability requirements already exist, there is not a clear need for intervention into this area by the Department.

Moreover, the Department regulations already provide appropriate mechanisms for enforcement of the Class II RPS regulations, including referral of non-compliant suppliers to the DPU for licensure action.[44] In addition, the DPU has broad enforcement authority over

[40] *Cf. Mass. Comm'n Against Discrimination*, 371 Mass. at 189 ("It is well settled that the commission, as a board created by statute has . . . ***only*** those powers, duties and obligations conferred upon it by statute . . . .") (emphasis added).

[41] *See* 220 C.M.R. 11.05(2)(b)(13) (requiring documentation of financial capability in licensing applications and annual license renewal applications).

[42] *See* 220 C.M.R. 11.05(2)(b)(14) (requiring documentation that the Competitive Supplier is a NEPOOL participant or will meet its transaction requirements through a contractual arrangement with a NEPOOL participant).

[43] *See, generally*, Federal Energy Regulatory Commission Docket # ER 19-444-000, ISO New England Financial Assurance Policy (Effective Date: Jan. 29, 2019).

[44] *See* 225 C.M.R. 15.12.

competitive suppliers[45] and has exercised that authority in connection with a supplier's failure to satisfy its RPS obligations.[46] Because these enforcement mechanisms already exist, there is not a clear need for further intervention by the Department into this area.

These other enforcement mechanisms also present less intrusive alternatives to the Department's proposed financial security requirement because they address any discrete non-compliance issues with the particular competitive suppliers involved. Conversely, a financial security requirement would impose a burden on ***all*** suppliers even those complying with their obligations. Further, the costs associated with maintaining the financial security would ultimately been borne by ratepayers through higher supplier prices. As a consequence, Massachusetts ratepayers would be unduly and adversely affected by this requirement in contravention of Executive Order 562.[47]

CONCLUSION

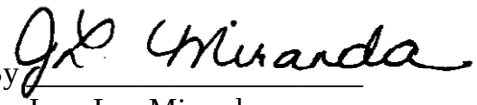
For all of the foregoing reasons, the Department should modify its proposed changes to the Class II RPS regulations before adopting them as final.

[45] *See* 220 C.M.R. 11.07.

[46] *See* Docket D.P.U. 19-18, *Notice of Probable Violation upon Union Atlantic Electricity, LLC, pursuant to G.L. c. 30A, 220 CMR 11.07, 14.06(5), 25.00, and Order Establishing Final Interim Guidelines for Competitive Supply Investigations and Proceedings, D.P.U. 16-156-A (2017)*, Notice of Probable Violation (Feb. 4, 2019).

[47] EO 562, § 3, 5 (requiring that, when adopting a regulation, an agency demonstrate that "the costs of the regulation do not exceed the benefits that would result from the regulation"); *id.* (requiring that, when adopting a regulation, an agency demonstrate that "the regulation does not unduly and adversely affect . . . customers of the Commonwealth . . .").

Respectfully submitted,
RETAIL ENERGY SUPPLY ASSOCIATION

By 

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