

July 8, 2013

By Electronic Delivery

Honorable Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: *New York Independent System Operator, Inc., Further Compliance Filing, Docket No. ER12-360-001*

Dear Ms. Bose:

The New York Independent System Operator, Inc. (“NYISO”) respectfully submits this further compliance filing in response to the Commission’s June 6, 2013 *Order Conditionally Accepting Proposed Tariff Revisions* (the “June 2013 Order”).¹ The June 2013 Order accepted, subject to certain conditions, the June 2012 Filing² in which the NYISO proposed market mitigation measures for New Capacity Zones (“NCZs”).³ The June 2012 Filing was submitted in response to the Commission’s September 8, 2011 Order,⁴ and proposed Services Tariff revisions to implement both buyer-side and supplier-side mitigation measures for NCZs.

The NYISO filed its Initial Compliance Filing in this proceeding on June 19, 2013 to address the June 2013 Order’s directives regarding the NYISO’s proposed revised definition of “Locality.”⁵ This further compliance filing addresses the remaining directives of the June 2013 Order. Specifically, this filing:

- Proposes a revised definition for “Commenced Construction” that includes more specific “financial commitment” criteria;⁶

¹ *New York Independent System Operator, Inc.*, 143 FERC ¶ 61,217 (2013).

² *New York Independent System Operator, Inc., Further Compliance Filing*, (filed June 29, 2012) (the “June 2012 Filing”).

³ Capitalized terms that are not defined herein have the meaning specified in the NYISO’s Market Administration and Control Area Services Tariff (“Services Tariff”).

⁴ *New York Independent System Operator, Inc.*, 136 FERC ¶ 61,165 (2011).

⁵ *New York Independent System Operator, Inc., Initial Compliance Filing and Request for Shortened Comment Period and Expedited Action by July 1, 2013* (filed June 19, 2013) (the “Initial Compliance Filing”). The NYISO is not seeking a shortened comment period or expedited action for the compliance tariff revisions proposed in this filing. As described below, the NYISO is requesting that the Commission issue an order within 60 days of this filing.

⁶ June 2013 Order at P 68.

- Proposes a separate new definition of “Indicative Mitigation Net CONE” to provide for informational mitigation exemption determinations for new projects in an NCZ that are made before the Commission’s acceptance of the ICAP Demand Curves for that NCZ;⁷
- Revises section 23.4.5.7.2.2 to accommodate the two potential “effective date scenarios” under the proposed new definition of “Indicative Mitigation Net Cone;”⁸
- Changes the term “Indicative BSM Determination” in section 23.4.5.7.2.2 to “Indicative Buyer-Side Mitigation Exemption Determination;”⁹
- Adds the phrase “unless exempt pursuant to sections 23.4.5.7.6 or 23.3.5.7.7” to the end of section 23.4.5.7.2.1;¹⁰ to address the Commission’s concern that the provision was too broad in scope;¹¹
- Clarifies that section 23.4.5.7.3.2 applies to all Mitigated Capacity Zones;¹²
- Inserts the words “shall be” as appropriate in section 23.4.5.7.3.2;¹³ and
- Addresses two ministerial drafting issues.¹⁴

These proposed compliance tariff modifications, which are discussed in more detail below, are set out in the attachments to this further compliance filing.

I. LIST OF DOCUMENTS SUBMITTED

The NYISO respectfully submits the following documents:

1. This compliance filing letter;
2. A blacklined version of the proposed compliance modifications to the Services Tariff effective September 1, 2012 (“Attachment I”);
3. A clean version of the proposed compliance modifications to the Services Tariff effective September 1, 2012 (“Attachment II”); and
4. Affidavit of Christopher D. Ungate of Sargent & Lundy (the “Ungate Affidavit”) (“Attachment III”).

⁷ *Id.* at P 100.

⁸ *Id.*

⁹ *Id.*

¹⁰ The June 2013 Order at P 100 appears to contain an inadvertent scrivener’s error and to have mistakenly referenced “proposed section 23.4.5.7.1” but to have intended to reference section 23.4.5.7.2.1.

¹¹ June 2013 Order at P 100.

¹² *Id.* at P 112.

¹³ *Id.* at n 103.

¹⁴ *Id.* at PP 113-15.

II. PROPOSED COMPLIANCE TARIFF REVISIONS

A. Adding More Specific “Financial Commitment” Criteria to the “Commenced Construction” Test

The June 2012 Filing proposed to “grandfather” projects in New Capacity Zones (“NCZs”) from the NYISO’s NCZ mitigation measures if they had “Commenced Construction” and received Capacity Resources Interconnection Service (“CRIS”) or met specific requirements regarding a CRIS transfer at the same location, as of the date that the NYISO files to establish the NCZ.¹⁵ In order to determine which projects would qualify to be grandfathered, the NYISO proposed to revise section 23.2.1 of its Services Tariff to add the following definition of “Commenced Construction.”

“Commenced Construction” shall mean (a) all of the following site preparation work is completed: ingress and egress routes exist; the site on which the project will be located is cleared and graded; there is power service to the site; footings are prepared; and foundations have been poured consistent with purchased equipment specifications and project design; or (b) as approved by the ISO in accordance with ISO Procedures, a financial commitment comparable to (a) has been made, which includes costs incurred, and costs of cancelling, discontinuing, or suspending the project; and may consist of a combination of actions or commitments. Such actions or commitments may include: major equipment has been purchased; an engineering, procurement, and construction contract for the project has been executed by all parties and is effective; or financing has been completed.

In the June 2013 Order, the Commission stated that it generally supported the use of a “Commenced Construction” test to determine which projects can be grandfathered from the NCZ mitigation provisions. It also accepted the specific “physical commitment prong” language; *i.e.*, that set forth in subsection (a) of the definition above. At the same time, the June 2013 Order directed the NYISO to “revise the language of subsection (b) of the Commenced Construction definition to eliminate the ‘as approved by the ISO in accordance with ISO Procedures’ language and include, instead, specific criteria for its proposed ‘financial commitment.’”¹⁶

Accordingly, the NYISO is proposing the following compliance tariff revisions to its definition of “Commenced Construction”:

“Commenced Construction” shall mean (a) all of the following site preparation work is completed: ingress and egress routes exist; the site on which the project will be located is cleared and graded; there is power service to the site; footings are prepared; and foundations have been poured consistent with purchased equipment specifications and project design; or (b) as approved by

¹⁵ June 2012 Filing at 5.

¹⁶ June 2013 Order at P 68.

the ISO in accordance with ISO Procedures, a financial commitment comparable to (a) has been made, which includes costs incurred, and costs of cancelling, discontinuing, or suspending the project; and may consist of a combination of actions or commitments. Such actions or commitments may include: major equipment has been purchased; an engineering, procurement, and construction contract for the project has been executed by all parties and is effective; or financing has been completed the following financial commitments have been made: (i) (A) an engineering, procurement, and construction contract (“EPC”) has been executed by all parties and is effective; or (B) contracts (collectively, “EPC Equivalents”) for all of the following have been executed by all parties and is effective: (1) project engineering, (2) procurement of all major equipment, and (3) construction of the project, and (ii) the cumulative payments made by the developer under the EPC or EPC Equivalents to the counterparties to those respective agreements is equal to at least thirty (30) percent of the total costs of the EPC or EPC Equivalents without reference to recoverable costs or cancellation fees.

The proposed compliance tariff revisions are consistent with the Commission-accepted rationale of the “Commenced Construction” test, *i.e.*, that projects that are “significantly advanced” at the time that the filing to create the NCZ “should be allowed to participate in capacity markets under the terms that guided their initial investment decision when their locality was in the Rest of State.”¹⁷ The proposed revisions include clear and specific criteria that eliminate the potential “discretion” that the June 2013 Order concluded could be problematic. The revisions establish a “financial commitment threshold” (subsection (b) as a whole, the “Financial Commitment Threshold”) to ensure that a project located in an NCZ will only be “grandfathered” based on its having made a “financial commitment” comparable to what is required to satisfy the accepted physical milestones in subsection (a) of the definition.

The Ungate Affidavit supports the NYISO’s proposed Financial Commitment Threshold. The Financial Commitment Threshold requires significant contractual commitments. Not all projects have an EPC; therefore, the proposed tariff revisions provides for “EPC Equivalents.” The Ungate Affidavit describes that EPC Equivalents (collectively) are kinds of contracts that a project developer without an EPC would enter into.¹⁸

The Ungate Affidavit also explains that the proposed thirty percent cumulative payment requirement in subsection (b)(ii) was based on Sargent & Lundy’s review, at Mr. Ungate’s direction, of the construction cash flows of typical natural gas fired simple cycle and combined cycle generating plants and transmission projects.¹⁹ The projects considered were representative

¹⁷ June 2013 Order at P 64.

¹⁸ *Id.* at P 13.

¹⁹ *Id.* Mr. Ungate explains that the EPC spending threshold consistent with the milestones in subsection (a) occurred at 22% for typical simple cycle plants; 30% for typical combined cycle plants; and between 28% and 44% for the transmission projects. *Id.*

of the area included in the proposed NCZ that is currently pending before the Commission in Docket No. ER13-1380, *i.e.*, Load Zones G, H, I, and J,²⁰ although Mr. Ungate is clear that he also believes that the proposed cumulative payment requirement would be reasonable to apply to other potential future NCZs.²¹ Based on the Sargent & Lundy review, Mr. Ungate concluded that the proposed thirty percent cumulative payment level would require a commitment consistent with what is required to achieve the Commission-accepted physical milestones in subsection (a). The proposed level is also objective and practically verifiable.²² The EPC or EPC equivalents, coupled with the proposed cumulative payment level is therefore reasonable and satisfies the requirements of the June 2013 Order.

The Ungate Affidavit explains and supports the proposed language requiring that the cumulative payment level be calculated without consideration of recoverable costs and cancellation fees. Although some portion of the cumulative payments may be recoverable if the project is, or is in jeopardy of being, abandoned, the recoverable amount would depend on facts specific to the project.²³ This variability would make verification of costs more difficult and could make implementation less objective, and the thirty percent payment level demonstrates a significant commitment to the project even with a possible recovery of some costs possible or actual abandonment. It is therefore reasonable to not consider recoverable costs and cancellation fees under the Financial Commitment Threshold.

Third, the Ungate Affidavit describes the kinds of contracts that are reasonably deemed to be “EPC Equivalents” because they are the kinds of contracts that a project developer that has made a substantial financial commitment, but does not have an EPC, would be expected to have entered into.²⁴

Finally, on July 1, 2013, the NYISO issued a draft of the proposed tariff compliance revision and a notice of conference call for June 3 to its Installed Capacity Working Group, to obtain stakeholder input regarding its proposed revisions to the definition of “Commenced Construction.” In addition, the NYISO consulted with its independent Market Monitoring Unit (“MMU”), Potomac Economics, Ltd., when formulating the proposed compliance revisions to the definition.

B. Introducing a Separate Definition of “Indicative Mitigation Net CONE” and Clarifying References to “Indicative Buyer Side Mitigation Determinations”

The June 2012 Filing proposed a revision to the definition of “Mitigation Net CONE,” which is currently pending before the Commission in Docket No. ER10-2371,²⁵ so that it would

²⁰ *Id.* at P 14.

²¹ *Id.* at P 11.

²² *Id.* at 15.

²³ *Id.* at P 15.

²⁴ *Id.* at P 13.

²⁵ New York Independent System Operator, Inc., *Resubmittal of August 12, 2010 Filing*, Docket No. ER10-2371-000 (filed Aug. 24, 2010). The Commission indicated that acceptance of any revisions in this docket will be subject to the outcome of Docket No. ER10-2371-000. *See* June 2013 Order at n 89.

“be applicable to NCZ Examined Projects in a Mitigated Capacity Zone.”²⁶ The June 2013 Order did not reject the concept of there being separate rules in the Services Tariff “to permit ‘indicative,’ *i.e.*, informational, new capacity zone offer floor and exemption determinations.”²⁷ It found, however, that the NYISO needed to be clearer that the new language submitted in the June 2012 Filing provided “for only indicative, *i.e.*, informational, mitigation exemption determinations for new projects in new capacity zones prior to the effectiveness of Demand Curves for the new capacity zone.”²⁸ The June 2013 Order therefore held that that the NYISO should file a “revised definition to provide a new term “Indicative Mitigation Net CONE” containing its proposed revisions to make clear that the new revisions are only to provide for an indicative, *i.e.*, informational only, Mitigation Net CONE calculation for purposes of indicative, informational only, buyer-side mitigation exemption determinations made prior to the effectiveness of a new capacity zone’s Demand Curves.”²⁹

In compliance with this directive, the NYISO proposes to add the new defined term to section 23.2.1 of Attachment H. Solely for ease of reference, the following definition treats June 2012 Filing’s proposal to add language to the Mitigation Net CONE definition as base language and underscores changes to create a separate definition of “Indicative Mitigation Net Cone”³⁰

For purposes of Section 23.4.5 of this Attachment H, **“Indicative Mitigation Net CONE” shall mean the capacity price calculated by the NYISO for informational purposes only** if there is not an effective ICAP Demand Curve and the Commission (i) has accepted an ICAP Demand Curve for the Mitigated Capacity Zone that will become effective when the Mitigated Capacity Zone is first effective, **in which case, the Indicative Mitigation Net CONE shall mean be** the capacity price on such ICAP Demand Curve for the Mitigated Capacity Zone corresponding to the average amount of excess capacity above the Indicative NCZ Locational Minimum Installed Capacity Requirement, as applicable, expressed as a percentage of that requirement that formed the basis for the ICAP Demand Curve accepted by the Commission; or, (ii) has not accepted an ICAP Demand Curve for the Mitigated Capacity Zone, but the ISO has filed an ICAP Demand Curve for the Mitigated Capacity Zone pursuant to Services Tariff Section 5.14.1.2.11, **in which case the Indicative Mitigation Net CONE shall mean be** the capacity price on such ICAP Demand Curve corresponding to the average amount of excess capacity above the Indicative NCZ Locational Minimum Installed Capacity Requirement, expressed as a percentage of that requirement, that formed the basis for such ICAP Demand Curve.

²⁶ June 2012 Filing at 10.

²⁷ June 2013 Order at P 91.

²⁸ *Id.* at P 100.

²⁹ *Id.*

³⁰ Attachments I and II to this filing show the language on the eTariff sheet in blackline and clean, respectively.

In addition, the June 2013 Filing found that section 23.4.5.7.2.2, which provides for an “Indicative BSM Determination,” should be “revised to accommodate the two effective date scenarios reflected in the foregoing proposed revisions to the definition of Mitigation Net CONE.”³¹ The Commission also ordered the NYISO to change the term “Indicative BSM Determination” in that section to “Indicative Buyer-Side Mitigation Exemption Determination,” as the term “BSM” is undefined and the Commission found it to add an unnecessary acronym.³² The proposed changes to section 23.4.5.7.2.2 to implement these directives are set out below.

The ISO shall make an “Indicative **BSM Buyer-Side Mitigation Exemption** Determination” for any NCZ Examined Project **if that (i) the Commission has accepted an ICAP Demand Curve for the Mitigated Capacity Zone that will become effective when the Mitigated Capacity Zone is first effective, is in a Class Year that has not been completed prior to or (ii) if the Commission has not** ~~accepted~~ acceptance of the first ICAP Demand Curve to apply specifically to the Mitigated Capacity Zone in which the NCZ Examined Project is located, provided the ISO has filed an ICAP Demand Curve pursuant to Services Tariff Section 5.14.1.2.11. The Indicative **BSM Buyer-Side Mitigation Exemption** Determination shall be computed using such ICAP Demand Curve for the Mitigated Capacity Zone concurrent with the determinations the ISO makes for Examined Facilities pursuant to Sections 23.4.5.7.3.2 and 23.4.5.7.3.3. The ISO shall recompute the Indicative **BSM Buyer-Side Mitigation Exemption** Determination promptly after Commission acceptance of the first ICAP Demand Curve for the applicable Locality provided that such NCZ Examined Project (i) received CRIS if the Class Year completed at the time the Commission accepts the Demand Curve, or (ii) has not been removed from the Class Year Deliverability Study if the Class Year is not completed. The Indicative **BSM Buyer-Side Mitigation Exemption** Determination is for informational purposes only. The exemption or Offer Floor for an NCZ Examined Project to which this Section applies shall be determined for such projects receiving CRIS using the Commission-accepted Locality Demand Curve.

Although it was not mentioned in the June 2013 Order, Section 23.4.5.7.2.5 of the Services Tariff also included a reference to an “Indicative BSM Determination.” For the sake of consistency and correctness the NYISO is therefore including a conforming change to that provision in this compliance filing:

When evaluating NCZ Examined Projects pursuant to Sections 23.4.5.7.2.1 or 23.4.5.7.2.2, the ISO shall seek comment from the Market Monitoring Unit on matters relating to the determination of price projections and cost calculations. The ISO shall inform the NCZ Examined Project of the Offer Floor or Offer Floor exemption determination or Indicative **BSM Buyer-Side Mitigation Exemption** Determination promptly. The responsibilities of the Market Monitoring Unit that

³¹ *Id.*

³² *Id.*

are addressed in this Section 23.4.5.7.2.5 are also addressed in Section 30.4.6.2.11 of Attachment O.

Finally, the Commission found that the proposed section 23.4.5.7.[2].1 is too broad as it requires NYISO to perform buyer-side mitigation exemption and offer floor determinations for any NCZ Examined Project that is in a completed Class Year and has received CRIS, without regard to whether the project is exempt from mitigation.³³ Accordingly, the Commission ordered NYISO to add to the end of section 23.4.5.7.[2].1 the phrase “unless exempt pursuant to section 23.4.5.7.6 or 23.4.5.7.7.”³⁴

Promptly after Commission acceptance of the first ICAP Demand Curve to apply to a Mitigated Capacity Zone, the ISO shall make an exemption and Offer Floor determination for any NCZ Examined Project that is in a completed Class Year and has received CRIS, **unless exempt pursuant to section 23.4.5.7.6 or 23.4.5.7.7.**

C. Clarifications and Corrections to Section 23.4.5.7.3.2

The June 2013 Order, found that it was not clear if section 23.4.5.7.3.2, which discusses the treatment of Expected Retirements in forecasting ICAP Spot Market Auction prices, was applicable only to New York City. It therefore ordered the NYISO to “file revised tariff language to clarify that provision.”³⁵

Accordingly, the NYISO is proposing to clarify that section 23.4.5.7.3.2 is applicable to both NCZs and the existing New York City Locality, by adding a reference to the defined term “Mitigated Capacity Zone”:

23.4.5.7.3.2 The ISO shall compute the reasonably anticipated ICAP Spot Market Auction forecast price **for any Mitigated Capacity Zone** based on Expected Retirements (as defined in this subsection 23.4.5.7.3.2), plus each Examined Facility in 23.4.5.7.3 (I), (II), and (III).

In addition, the NYISO is proposing to make two ministerial edits to the definition of “Expected Retirements” in section 23.4.5.7.3.2, as set out below in bold and underscored.³⁶

Expected Retirements **shall be** determined based on any Generator that provided written notice to the New York State Public Service Commission that it intends to retire, plus any UDR facility or Generator 2 MW or less that provided written notice to the ISO that it intends to retire.

³³ *Id.* As indicated in n. 10 above, the Commission identified proposed section 23.4.5.7.1. The NYISO understands that reference to be a typographical error as that section does not discuss Buyer-Side Mitigation exemptions specifically. Section 23.4.5.7.2.1, however, does refer to such determinations, and accordingly has made the compliance correction to this section.

³⁴ *Id.* at P 100.

³⁵ *Id.* at P 112.

³⁶ *Id.* at n 103.

The load forecast and Special Case Resources **shall be** as set forth in the mostrecently published Load and Capacity Data (Gold Book).

D. Ministerial Drafting Issues in Section 23.4.5.7.7

The June 2013 Order directed the NYISO to address two ministerial drafting issues that were originally identified by the NYTOs³⁷ and which the NYISO indicated it had no objection to adopting.³⁸ First, the June 2013 Order instructed the NYISO to revise section 23.4.5.7.7(I)(b)(ii) to read “submitted to the ISO an Interconnection Request” instead of “submitted to the ISO a request for an Interconnection Agreement.”³⁹ Second, the NYISO was required to modify section 23.4.5.7.7(II), which provides that generators and UDR projects that are not subject to deliverability requirements shall be exempt from an Offer Floor if certain criteria are met. The NYTOs had suggested that requiring the project to have “an effective interconnection agreement,” instead of “an effective Small Generator Interconnection Agreement pursuant to Attachment Z,” would be more appropriate.

Accordingly, this compliance filing proposes to revise section 23.4.5.7.7(I)(b)(ii) as follows:

and (ii) either (1) received the MW of CRIS in a Class Year that was completed or (2) submitted to the ISO a request for an Interconnection Agreement **an Interconnection Request** that specifically states ...

Similarly, this compliance filing proposes to revise section 23.4.5.7.7(II) to state:

(II) An existing or proposed Generator or UDR project that is not subject to a deliverability requirement (and therefore, is not in a Class Year and does not receive CRIS MW) shall be exempt from an Offer Floor if it meets the following requirements prior to the ISO’s March 31 Filing in an ICAP Demand Curve Reset Filing Year in which a Mitigated Capacity Zone is first applied to such location:
(a) has Commenced Construction, (b) has an effective Small Generator Interconnection Agreement pursuant to OATT Attachment Z **interconnection agreement**,

III. REQUESTED ACCEPTANCE AND EFFECTIVE DATE

The NYISO respectfully requests that the compliance tariff revisions proposed in this filing be made effective as of September 1, 2012, *i.e.*, the effective date that the June 2013 Order the stated as the date “the Commission accepts NYISO’s June 29, 2012 filing, to be

³⁷ *Id.* at P 115 (“the NYTO’s consist of Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Power Authority, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.”).

³⁸ *Id.*

³⁹ June 2013 Order at P 113.

effective September 1, 2012, subject to conditions.”⁴⁰ The NYISO also requests that the Commission issue an order accepting this compliance filing within the sixty day period normally applicable to filings under section 205 of the Federal Power Act. Action within that timeframe will permit the NYISO to proceed in an orderly fashion to make the buyer-side mitigation determinations for projects in, which is important to the implementation of, the NCZ that the NYISO proposed in Docket No. ER13-1380, and in time for the May 1, 2014 start of the 2014/2015 Capability Year.

IV. SERVICE

This filing will be posted on the NYISO’s website at www.nyiso.com. In addition, the NYISO will e-mail an electronic link to this filing to the official representative of each party to this proceeding, to each of its customers, to each participant on its stakeholder committees, to the New York Public Service Commission, and to the New Jersey Board of Public Utilities.

V. COMMUNICATIONS

Copies of correspondence concerning this filing should be served on:

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⁴⁰ See June 2013 Order at P 1. The NYISO notes that Ordering Clause A of the June 2013 Order identified September 12, 2012 as the effective date. The NYISO understands the reference to September 12, 2012 rather than September 1, 2012 to be a typographical error. Neither the NYISO nor any other party requested September 12, 2012. The eTariff sheets submitted with the June 2012 Filing, and submitted as Attachments I and II with this filing, identify September 1, 2012.

⁴¹ Waiver of the Commission’s regulations (18 C.F.R. § 385.203(b)(3) (2012)) is requested to the extent necessary to permit service on counsel for the NYISO in both Miami, FL and Washington, DC.

VI. CONCLUSION

For the reasons specified above, the New York Independent System Operator, Inc. respectfully requests that the Commission accept this further compliance filing.

Respectfully submitted,

/s/ Gloria Kavanah

Gloria Kavanah

Senior Attorney

New York Independent System Operator, Inc.

Dated: July 8, 2013

cc: Travis Allen
Michael A. Bardee
Gregory Berson
Anna Cochrane
Jignasa Gadani
Morris Margolis
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Michael McLaughlin
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. §385.2010. Dated at Rensselaer, NY this 8th day of July, 2013.

/s/ Joy A. Zimmerlin

Joy A. Zimmerlin

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