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Offshore Wind Webinar

Fresh winds are blowing along The Atlantic Seaboard --
Opportunities and Challenges

Presented by: Peg Hill, Jon Waldron, Mark Haskell and
Moderated by: Joan Bondareff

March 28, 2019

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Recent OSW Developments and Overview

- The U.S. OSW industry is taking off – presenting opportunities and challenges.
- At Blank Rome, we have put together a team of legal and government relations professionals to help you navigate the new field.
- Introduction to speakers:
  - Peg Hill – senior environmental attorney
  - Jon Waldron – senior maritime attorney
  - Mark Haskell – new energy partner with FERC expertise

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Recent OSW Developments and Overview

- 2005 amendments to the OCSLA gave the Secretary of the Interior authority over renewable resources on the OCS.
- DoI Secretary Salazar (Obama) created the "Smart from the Start" program to start leasing areas of the OCS in OSW, and create State-Federal Task Forces.
- Today, 16 WEAs are leased through BOEM auctions raising more than $473M, and more sales are in the pipeline.

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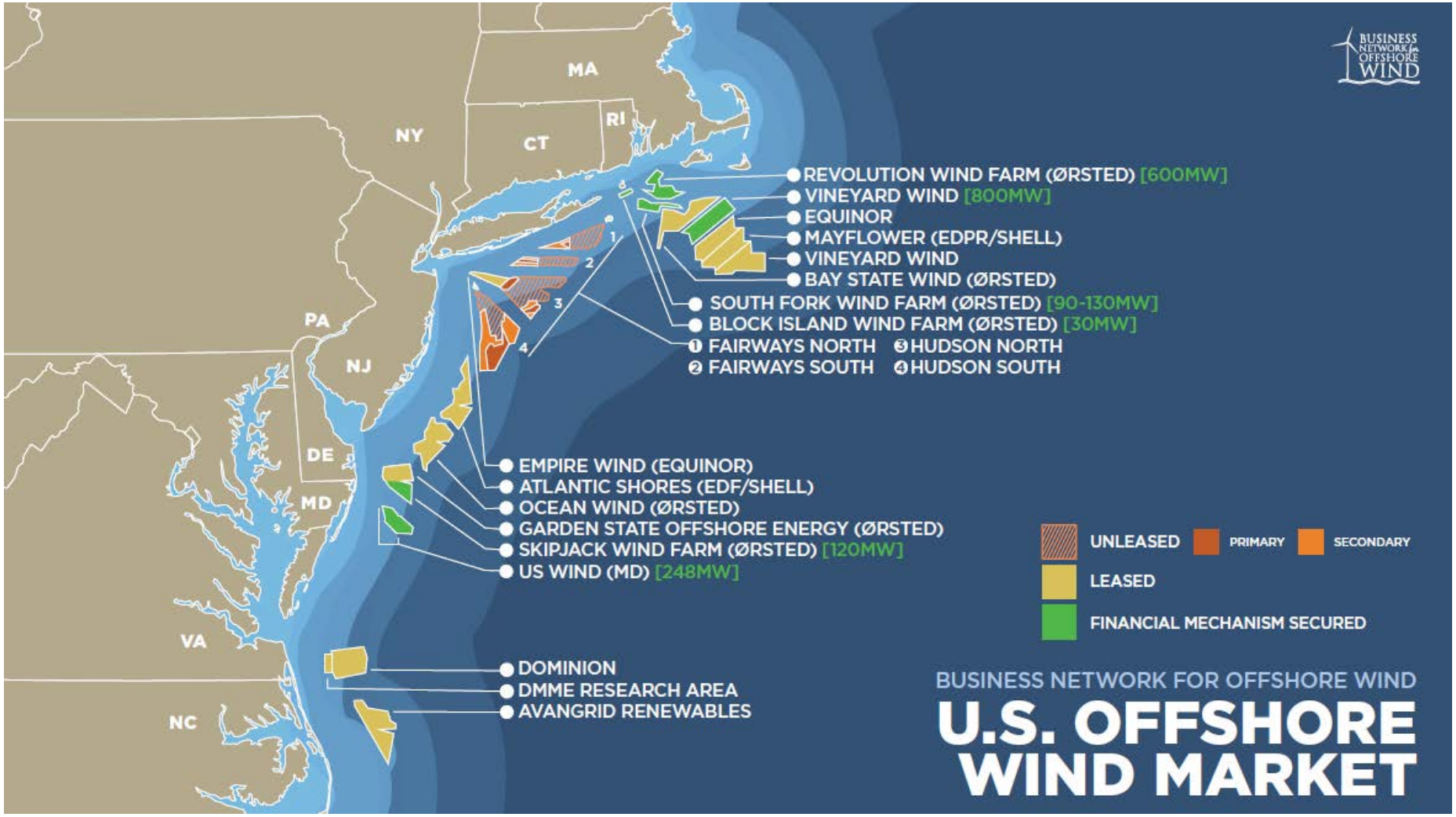
Business Network for Offshore Wind: Maps of the East Coast Projects



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Recent OSW Developments and Overview

- New state laws and gubernatorial policies in support of RE have helped accelerate the process.

  Examples: **NYS** – Committed to 9,000 MW of OSW by 2035.

  MA – Legislation requires 3,200 MW of OSW by 2035; completed auction for 3 new projects (Vineyard Wind, Equinor, and Mayflower).

  RI – Gov. Raimando called for 1,000 MW of clean energy projects by the end of 2020.

  VA – Legislature declared 3,000 MW of OSW to be "in the public interest."

  MD – Has OREC's and workforce development grants.

  NJ – Committed to 3,500 MW by 2030, also has OREC's.

- States are competing for OSW jobs. Estimates for VA alone are 14,000 new jobs.

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Recent OSW Developments and Overview

- OSW has to be brought onshore by cables and permitted under State Laws before consumers can benefit.
  - Offtake agreements have to be approved by state regulatory commissions.
- Some states have offered ORECs to offset the price of OSW (e.g., MD and NJ).
- But the price of OSW is coming down – making it more competitive with natural gas (e.g., recent Vineyard Wind offtake agreement with MA produced a 7.4 cents per kw hour price tag).
- The future is now. On to our first speaker, Peg Hill, to discuss the environmental challenges.

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Overview of Federal & State Environmental Consideration

- Energy Policy Act of 2005 authorized BOEM – Bureau Of Ocean Energy Management – to issue leases, easements and rows to allow for renewable energy development on OCS.

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Overview of Federal & State Environmental Consideration

- Bureau of Safety and Environmental Enforcement (BSEE)
  - Enforces safety & environmental regulations; responsibilities include permitting and research, inspections, offshore regulatory programs, oil spill response.
- Bureau of Ocean Energy Management (BOEM)
  - Responsible for managing development of the nation's offshore resources in an environmentally and economically responsible way.

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Overview of Federal & State Environmental Consideration

- BOEM'S regulations are codified at 30 CFR Part 585; regulations became effective in 2009
- BOEM'S renewable energy program occurs in four distinct phases:
  (1) planning and analysis,
  (2) lease issuance,
  (3) site assessment, and
  (4) construction and operations.

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Overview of Federal & State Environmental Consideration

- BOEM prepared a final programmatic environmental impact statement (EIS) 2007.
  - BOEM also prepares an Environmental Assessment (EA) to consider reasonably foreseeable impacts of lease issuance.
  - Includes site characterization – surveys of lease area and potential cable routes and subsequent site assessment activities (construction and operation of a meteorological tower or buoys).
  - After lease issuance, lessee submits a Construction & Operations Plan which includes information about lease areas; BOEM conducts a project specific NEPA analysis.

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Overview of Federal & State Environmental Consideration

- Improving efficiencies of National Environmental Policy Act documentation for offshore wind facilities/case studies report
- BOEM/Office of Renewable Energy Programs/March 2017
  - Reviewed and Compared to EIA Process in Europe

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Overview of Federal & State Environmental Consideration

- BOEM has established Intergovernmental Renewable Energy Task Forces in states that have expressed interest in development of offshore renewable energy.
- 14 BOEM Intergovernmental Task Forces have been established in California, Delaware, Florida, Hawaii, Maine, Maryland, Massachusetts, New Jersey, New York, North Carolina, Oregon, Rhode Island, South Carolina, and Virginia.

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NEPA Consulting Agencies Include:

- National Oceanic and Atmospheric Administration
- National Marine Fisheries Service
- United States Coast Guard
- United States Fish and Wildlife Service
- U.S. Army Corps of Engineers
- U.S. Environmental Protection Agency
- Advisory Council on Historic Preservation
- U.S. Department of Defense
- Federal Aviation Administration
- Various States Agencies

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Applicable Laws:

- Clean Water Act
- Endangered Species Act
- NEPA
- Clean Air Act
- Abandoned Shipwreck Act
- Marine Mammal Protection Act
- Magnuson-Stevens Fishery Conservation and Management Act
- Rivers and Harbors Act
- National Historic Preservation Act
- Coastal Zone Management Act

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Wind Farm Vessel Compliance Issues

Coastwise Trade (Jones Act) Issues

Other vessel-related compliance issues

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What is the Jones Act? How Does it Apply to OSW?

- The Jones Act requires that waterborne transportation of merchandise (and passengers) between two "points" in the U.S. must take place aboard a vessel that is:
  - U.S.-built
  - 75% U.S.-owned
  - U.S.-flagged
  - U.S.-crewed

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CBP Rulings and Interpretations of the Jones Act?

- U.S. Customs and Border Protection ("CBP") has not given a definitive answer whether an OSW farm located on the Outer Continental Shelf ("OCS") is a "coastwise point" in the U.S. for purposes of the Jones Act.
- However, CBP has issued rulings that help clarify the law for now.

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CBP Rulings and Interpretations of the Jones Act?

- These rulings were necessary, in part, to clarify that certain vessels critical to the construction and operation of an OSW farm, such as cable-laying vessels, jack-up barges, and Turbine Installing Vessels ("TIV's") can be used for "installation" purposes.
- Vessels must remain stationary during installation operations.

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CBP Rulings and Interpretations of the Jones Act?

- In summary, the Jones Act does not bar use of non-Jones Act qualified vessels to support OSW operations. Each case has to be reviewed and analyzed on its merits.

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Jones Act Vessel Ownership

- U.S.-Flag Ownership Requirements (Documentation Citizen):
  - The corporation must be incorporated under the laws of the United States, or any state, territory, district, or possession of the United States
  - The corporation's chief executive officer ("CEO"), by whatever title, president, and chairman of the board of directors must be U.S. citizens
  - No more than a minority of a quorum of the board of directors may be non-U.S. citizens

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Jones Act Vessel Ownership

- Ownership Requirements to Operate a Vessel in the Coastwise Trade (Coastwise Citizen):
  - Meet all of the requirements above for a Documentation Citizen
  - At least 75% of the stock interest in the corporation must be owned and controlled by U.S. citizens
  - These requirements must be met at all levels in a corporate chain of ownership

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Jones Act Vessel Ownership

- Application to Limited Liability Companies
  - "Manager-managed" LLC:
    - The members of the LLC have delegated total management authority and control over and responsibility for the LLC to a single manager or a board of directors or managers (or similar management group/committee)
    - Quorum Requirements
    - Key officers/directors must be U.S. citizens
    - At least 75% of each class or series of the membership interests and the voting power in the LLC are owned and controlled by U. S. citizens

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Jones Act Vessel Ownership

- "Member-managed" LLC:
  - Each member of the LLC is a coastwise citizen
  - Key officers must be U.S. citizens
  - at least 75% of each class or series of the membership interests and the voting power in the LLC are owned and controlled by coastwise citizens
- Similar requirements must be met by partnerships and other types of entities involved in the coastwise trade

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Other Vessel Related Regulatory Issues

- Application of Longshore and Harbor Workers' Compensation Act ("LHWCA")
  - The LHWCA establishes a program whereby employers are required to pay compensation and medical care to employees disabled from injuries or illnesses that occur as a result of employment in sectors covered by the LHWCA.
- Application of Occupational Safety and Health Act
  - Act applies to certain conditions related to terminals and ports and cranes and cargo equipment aboard vessels.

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Other Vessel Related Regulatory Issues

- Coast Guard Certificate of Compliance (“COC”)
  - The COC describes the vessel's particulars and documents foreign vessel examinations confirming that a vessel meets established safety standards under U.S. law and international conventions.
- Port State Control and navigation issues

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Other Vessel Related Regulatory Issues

- Citizenship Crewing Requirements
  - Outer Continental Shelf Lands Act sets forth specific documentary, registry, and manning requirements for units engaged in OCS activities
- Visa Issues
  - Foreign citizen project manager visas
  - Crew visas

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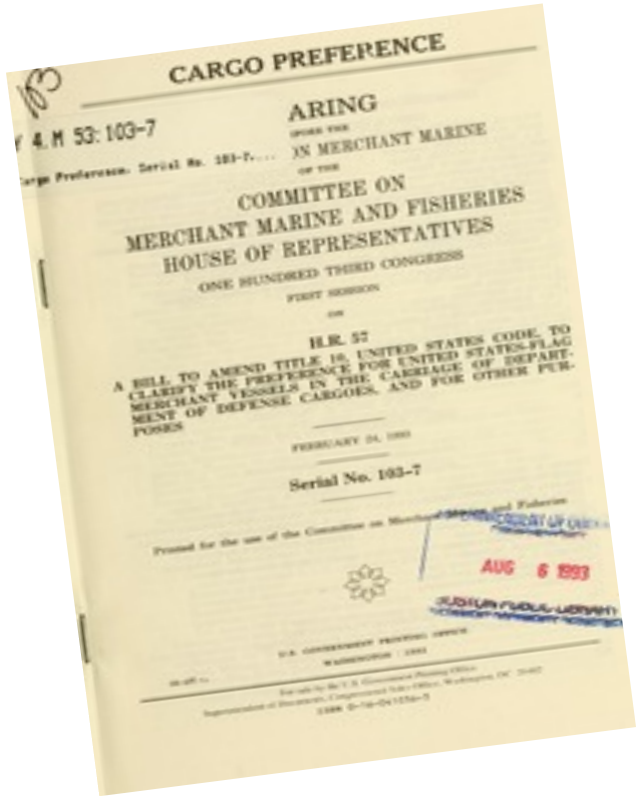
Other Vessel Related Regulatory Issues

- Cargo Preference Act
  - Requirement for transportation of 50% of government financed cargo aboard U.S.-flag vessels based on tonnage
  - Maritime Administration regulates this requirement in its application to other federal agency financial assistance programs



CARGO PREFERENCE

ARING

IN MERCHANT MARINE

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MERCHANT MARINE AND FISHERIES
HOUSE OF REPRESENTATIVES
ONE HUNDRED THIRD CONGRESS

H.R. 57

A BILL TO AMEND TITLE 10, UNITED STATES CODE, TO CLARIFY THE PREFERENCE FOR UNITED STATES-FLAG MERCHANT VESSELS IN THE CARRIAGE OF DEPARTMENT OF DEFENSE CARGOES, AND FOR OTHER PURPOSES

Serial No. 103-7

AUG 6 1993

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Conclusions

- The Jones Act and other coastwise laws exist but are not complete barriers to participation.
- Companies interested in entering into a JV with a U.S. partner should seek assistance in structuring the JV to comply with the Jones Act ownership requirements.
- Companies need to focus on other federal U.S.-related regulatory requirements.

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The Role of FERC in Offshore Wind Farms

- To date, the Federal Energy Regulatory Commission ("FERC") has addressed two fundamental issues relating to offshore wind projects:
  - Review of proposals to develop transmission projects to facilitate the integration of offshore wind energy into the transmission grid; and
  - Review of proposals to permit offshore wind resources to access wholesale markets subject to the jurisdiction of FERC.

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FERC Review of Offshore Wind Transmission Projects: *Atlantic Grid*

- In *Atlantic Grid Operations A LLC, et al.*, Docket No. EL11-13-000 (2011), FERC addressed incentive rate treatment for the proposed Atlantic Wind Connection Project.
- The Atlantic Wind Connection Project, originally estimated to cost approximately $5 billion, was designed to include 320 kV direct current cables running parallel to the Mid-Atlantic coast, 20 miles offshore for 250 miles, interconnecting with existing land-based transmission systems in New Jersey, Delaware, Maryland, and Virginia.
- FERC found that the project would be eligible for incentive rate treatment (that is, an increase in the allowed return on equity to approximately 12.59% based on then applicable capital market conditions) if the project ultimately were approved for inclusion in the PJM regional transmission expansion plan.
- The Atlantic Wind Connection Project as originally conceived appears to have been dropped in 2014, according to Bureau of Ocean Energy Management data.

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FERC Review of Offshore Wind Transmission Projects: Anbaric Development Partners

- On February 12, 2018, FERC issued an order granting to Anbaric Development Partners, LLC authorization to charge market-based rates for transmission rights for a new offshore transmission system that would connect Massachusetts offshore wind generation to the ISO-New England transmission system in Massachusetts.
- FERC did, however, reserve the right to review Anbaric's open season and capacity allocation process following the close of its open season process.
- *Anbaric* reflects a fundamentally different approach to offshore wind transmission development than that originally adopted in *Atlantic Grid.*

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FERC's Role in Integrating Offshore Wind into Wholesale Markets: Vineyard Wind

- ISO-New England market rules permit some renewable technology resources to participate in capacity auctions without being subject to a minimum offer price rule.
- In connection with its forward capacity auction for 2022-23, ISO-New England took the position that its market rules did not allow renewable resources (such as offshore wind) to participate in the auction unless they were located within the physical boundaries of a New England state.
- Vineyard Wind, located in the OCS, sought a waiver of this requirement, which FERC did not timely grant before the ISO-New England auction was completed.
- ISO New England filed to prospectively change the relevant market rule.

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FERC Policy Issues Affecting Further Development of Offshore Wind

- Four pending policy issues may affect FERC policy toward offshore wind:
  - A dispute regarding who (state commissions or FERC) determines the appropriate mix of resources within ISO or RTO service territories.
    - A petition for certiorari is currently pending filed by the Electric Power Supply Association seeking Supreme Court review of lower federal court decisions affirming zero emission credits for certain nuclear resources. The petition contends that the applicable state programs intrude on federal jurisdiction.
  - Disputes regarding modification of long-term renewable energy contracts in the context of public utility purchaser bankruptcies.
    - The Sixth and Ninth Circuits ultimately will have to address a dispute regarding whether FERC or the Bankruptcy Courts (or both) possesses the power to invalidate long-term renewable energy contracts under the Mobile-Sierra doctrine.

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FERC Policy Issues Affecting Offshore Wind

- A new initiative to review FERC's electric transmission incentives policy.
- A new review of FERC's policy regarding allowed return on equity for energy infrastructure, covering electric transmission, oil pipelines and natural gas pipelines.

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Conclusions / Summary

- OSW industry is taking off in the U.S., especially in the Atlantic.
- Jurisdiction over OSW is shared between the Federal government and states.
  - There is no 1-stop shopping permit.
- The Trump Administration supports renewable energy as long as it's not subsidized.
- The "Green New Deal" may accelerate OSW development.
- We have a team of lawyers available to assist you navigate state and federal waters and stay off the shoals.

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