
**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

REVISION TO ELECTRIC RELIABILITY ORGANIZATION DEFINITION OF BULK ELECTRIC SYSTEM) **Docket No. RM09-18-000**
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)

**COMMENTS OF THE
NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION
IN RESPONSE TO THE NOTICE OF PROPOSED RULEMAKING**

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. NOTICES AND COMMUNICATION	4
III. BACKGROUND	5
IV. DISCUSSION	7
V. CONCLUSION	16

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I. INTRODUCTION

The North American Electric Reliability Corporation (“NERC”)¹ provides these comments in response to the Federal Energy Regulatory Commission’s (“Commission”) Notice of Proposed Rulemaking, issued on March 18, 2010, regarding the Commission’s proposed revision to NERC’s definition of “bulk electric system” (“BES”) to include all transmission facilities with a rating of 100 kV or above.²

The Commission proposed to direct NERC to submit to the Commission, within 90 days of the effective date of a final rule, a revised NERC definition of BES that: (i) provides a 100 kV threshold for facilities that are included in the BES; and

¹ The Federal Energy Regulatory Commission (“Commission”) certified NERC as the electric reliability organization (“ERO”) in its order issued on July 20, 2006 in Docket No. RR06-1-000. *North American Electric Reliability Corporation*, “Order Certifying North American Electric Reliability Corporation as the Electric Reliability Organization and Ordering Compliance Filing,” 116 FERC ¶ 61,062 (July 20, 2006).

² *Revision to Electric Reliability Organization Definition of Bulk Electric System*, “Notice of Proposed Rulemaking,” 130 FERC ¶ 61,204 (2010) (“BES NOPR”).

(ii) eliminates the currently-allowed discretion of a Regional Entity to define BES within its system without NERC or Commission oversight.³ In the NOPR, the Commission proposes that a Regional Entity must seek NERC and Commission approval before it exempts a transmission facility rated at 100 kV or above from compliance with mandatory Reliability Standards. The Commission also proposes that a Regional Entity may develop a transition plan that allows a reasonable period of time for affected entities within that region to achieve compliance with respect to facilities that are subject to mandatory Reliability Standards for the first time.

NERC supports the Commission's objectives of ensuring a common understanding and consistent application of the definition of BES across the regions. NERC also supports the Commission's objective that variations to application of the BES definition should be justified on the basis of reliability. To ensure these objectives are accomplished in a technically and legally appropriate manner, the Commission should rely on the NERC Reliability Standards Development Process to consider, develop and implement new processes that may be needed, or to enhance existing processes. However, NERC objects to the Commission's proposal in the BES NOPR for the Commission to make unilateral decisions with respect to the definition of BES, rather than addressing these issues through the NERC Reliability Standards Development Process.

As discussed in greater detail below, the BES definition is part and parcel of the NERC Reliability Standards, and any changes to that definition must be effectuated through the NERC

³ The Commission did not propose to change the provision of the NERC's definition that radial transmission facilities serving only load with one transmission source are generally not included in this definition. Likewise, Regional Entities may identify "critical" facilities, rated at less than the 100 kV, that are subject to mandatory Reliability Standards, without application to NERC and the Commission.

Reliability Standards Development Process. As the Commission properly recognized in Order No. 693, it is inappropriate for the Commission to expand unilaterally the definition.⁴

With respect to the Commission’s specific BES proposal, NERC has several additional concerns regarding scope and process that are addressed below. First, NERC submits that the potential impact of such a definition change is likely much larger than recognized by the Commission. NERC’s current definition applies to facilities “operated” at 100 kV, whereas the Commission’s proposed definition applies to facilities “rated” at 100 kV. Therefore, the proposed broader definition will result in an expanded scope of facilities, likely beyond the thirty-three entities in the Northeast Power Coordinating Council, Inc. region to be affected as identified by the Commission. Second, a number of Generator Owners and Generator Operators have consistently maintained that their transmission tie lines, generator leads and interconnection facilities are “generator” facilities and not “transmission” facilities. NERC believes that the proposed change could have a significant, national impact with respect to these entities and may result in an unwieldy number of potential exemption requests. Third, even with application of a purported bright line test of 100 kV and above, it is not clear if the Commission intends that the entirety of a facility is subject to a Reliability Standard even where portions or elements of that facility fall below the bright line criteria or if only those portions that meet the criteria are covered. The Commission should allow the Reliability Standard Development Process to determine whether changes are required and to identify which equipment should be subject to Reliability Standard compliance. Fourth, the Commission’s proposal that entities may seek exemption from compliance with Reliability Standards on a facility by facility basis is potentially unworkable, especially in the absence of a clear and unambiguous test that will limit

⁴ *Mandatory Reliability Standards for the Bulk-Power System*, FERC Stats. & Regs. ¶ 31,242 at P 75, 1893 (2007) (Order No. 693), *reh’g denied*, 120 FERC ¶ 61,053 (2007) (Order No. 693-A).

non-meritorious requests for exemption. Such a test should be developed in the first instance through the Reliability Standard Development Process. While beyond the scope of the BES NOPR, NERC believes a test also should be developed with respect to facilities that do not meet the criteria but should be included. Fifth, the proposed ninety day time frame is too short for meaningful consideration and determination of applicable facilities and exemption tests.

NERC requests that the Commission invoke its authority under section 215(d)(5) to direct NERC to address the specific matter of the appropriate definition of “bulk electric system,” in light of the concerns the Commission has raised. NERC would then address that specific matter through its Reliability Standards Development Process.

II. NOTICES AND COMMUNICATIONS

Notices and communications with respect to this filing may be addressed to:

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III. BACKGROUND

A. Regulatory Framework

Through its enactment of the Energy Policy Act of 2005 (“the Act”), Congress entrusted the ERO, duly certified by the Commission, with the duties of promulgating and enforcing mandatory Reliability Standards, subject to Commission approval to ensure the reliability of the Nation’s bulk power system.⁵ Section 215 of the Federal Power Act provides that all users, owners and operators of the bulk power system in the United States will be subject to Commission approved Reliability Standards. On July 20, 2006, the Commission certified NERC as the ERO.⁶

B. Definition of Bulk Electric System

In the Energy Policy Act of 2005, Congress granted the NERC jurisdiction over users, owners and operators of the bulk power system, as set forth in Section 215 of the Federal Power Act. Specifically, NERC was vested with authority to develop Reliability Standards and to impose a penalty on a user, owner or operator of the bulk power system for a violation of a Commission-approved Reliability Standard subject to Commission oversight.

As the Commission recognized in Order No. 693, Section 215(a) of the FPA defines bulk-power system as:

(A) facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof) and (B) electric energy from generating facilities needed to maintain transmission system

⁵ 16 U.S.C. § 824o.

⁶ *Rules Concerning Certification of the Electric Reliability Organization: Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204 (2006), *order on reh’g*, Order No. 672-A(2006), FERC Stats. & Regs. ¶ 31,212 (2006). (“Order No. 672”).

reliability. The term does not include facilities used in the local distribution of electric energy.⁷

The term “bulk electric system” is narrower than the statutory term “bulk power system,” yet it is read and applied consistent with the statutory term. In Order No. 693, the Commission approved the following NERC definition of “bulk electric system,” which is an integral part of the NERC Reliability Standards and is included in the NERC Glossary of Terms Used in Reliability Standards (“NERC Glossary”):

As defined by the [Regional Entity], the electrical generation resources, transmission lines, interconnections with neighboring systems, and associated equipment, generally operated at voltages of 100 kV or higher. Radial transmission facilities serving only load with one transmission source are generally not included in this definition.⁸

In Order Nos. 693 and 693-A, the Commission stated that it will continue to rely on NERC’s definition of BES, with the appropriate regional differences, and the registration process until the Commission determines in future proceedings the extent of the bulk-power system.⁹

Notwithstanding this background, the BES NOPR states that no action is being taken with respect to the bulk-power system definition, and the Commission proposes to modify the definition of BES unilaterally:

While the Commission indicated in Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 77, that the Commission may reconsider the scope of the statutory term Bulk Power System in a future proceeding, *in this proceeding we are addressing only the ERO’s definition of the term bulk electric system.*¹⁰

⁷ Order No. 693 at P 50 (quoting 16 U.S.C. 824o(a) (2006)).

⁸ Order No. 693 at P 51.

⁹ Order No. 693 at P 75, 77-78. Order No. 693-A at P 19.

¹⁰ BES NOPR at P 15 n.24 (*emphasis added*). NERC acknowledges that the statutory term bulk power system defines the jurisdiction of the Commission and that the Commission has made clear that it has chosen to defer in Order No. 693 and the BES NOPR determining the extent of Commission’s jurisdiction pursuant to that statutory term. NERC also understands that in Order No. 693-A that the Commission made clear it “cannot and will not” delegate the Commission’s jurisdiction pursuant to that term to NERC. Order No. 693-A at P 19. However, NERC notes that the Commission must still define its jurisdiction through a rulemaking proceeding.

As discussed below, the Commission's proposal would improperly expand the definition of BES in contravention of the Commission's own recognition and pronouncements that it should not unilaterally modify the definition of BES that was previously developed through the Reliability Standard Development Process.¹¹

IV. DISCUSSION

As an initial matter, NERC supports the Commission's objectives of ensuring a common understanding and consistent application of the definition of BES across the regions. NERC also supports the Commission's objective that variations to application of the BES definition should be justified on the basis of reliability. However, NERC objects to the BES NOPR approach which provides for unilateral decisions to be made by the Commission regarding the BES definition in the instant rulemaking proceeding.

To ensure the Commission's objectives are accomplished in a technically and legally appropriate manner, NERC believes it is appropriate for the NERC Reliability Standards Development Process to consider, develop and implement new processes that may be needed, or to enhance existing processes with respect to the BES definition. The Commission's Final Rule should make clear that it is exercising its authority under section 215(d)(5) and is only seeking to provide guidance to NERC on a specific matter that must be addressed and is not seeking to dictate the specific content of the definition or to bypass NERC's Reliability Standard Development Process. The Commission should further make clear that it will entertain alternative proposals that are as effective and efficient as the Commission's proposal.

¹¹ Order No. 693 at PP 75, 1893-94 and 1898.

A. THE COMMISSION MAY NOT UNILATERALLY CHANGE THE DEFINITION OF BES; RATHER, CHANGES, IF WARRANTED, SHOULD BE DEVELOPED THROUGH THE RELIABILITY STANDARD DEVELOPMENT PROCESS.

Section 215 requires the ERO to develop Reliability Standards under rules that ensure “reasonable notice and opportunity for public comment, due process, openness, and balance of interests.” Section 215(d)(2) also requires the Commission to give due weight to the technical expertise of the ERO with respect to the content of a standard. Section 215(d)(5) provides that the Commission may order the ERO to submit a proposed Reliability Standard or a modification to a Reliability Standard that addresses a specific matter, if the Commission considers such a new or modified Reliability Standard appropriate to carry out Section 215. In the BES NOPR, the Commission recognizes that:

As with Reliability Standards, the Commission reviews and approves revisions to the NERC [G]lossary pursuant to Section 215(d)(2). Further, the Commission may direct a modification to address a specific matter identified by the Commission pursuant to Section 215(d)(5).¹²

There are limits on the Commission’s authority, however, which the Commission seems to have ignored in the BES NOPR. The Commission does not have authority to dictate the content of a Reliability Standard or a term used in the Reliability Standard that is set forth in the NERC Glossary, such as the BES definition. Rather, it may either approve a Reliability Standard or NERC Glossary defined term (or modifications thereto) or remand it to the Standards Development Process to consider and address any potential issues. While the Commission has authority to approve, reject or remand Reliability Standards, interpretations or terms in the NERC Glossary, the Commission is precluded from effectuating changes unilaterally, as proposed here.

¹² BES NOPR at P 15 n.23. *See* Order No. 693 at PP 1893-1898.

Order No. 693 is clear that the NERC Glossary “governs Reliability Standards.”¹³ The terms contained in the NERC Glossary are used in the Reliability Standards and are an integral part of the particular standards in which the terms are used. The NERC Glossary is therefore not considered a separate document apart from the standard; rather, it is a convenient means to list defined terms that are used in one or more Reliability Standards without having the need to include the full definition in each of those affected standards.¹⁴ In approving the NERC Glossary, the Commission properly recognized that changes to terms defined in the NERC Glossary should be addressed through the established NERC Reliability Standards Development Process:

The Commission approves the glossary. The terms defined in the glossary have an important role in establishing consistent understanding of the Reliability Standards Requirements and implementation. The approval of the glossary will provide continuity in application of the glossary definitions industry-wide, and will eliminate multiple interpretations of the same term or function, which may otherwise create miscommunication and jeopardize Bulk-Power System reliability. *The glossary should be updated through the Reliability Standards development process whenever a new or revised Reliability Standard that includes a new defined term is approved, or as needed to clarify compliance activities. For example, the ERO will need to update the glossary to reflect modifications required by the Commission in this Final Rule.*¹⁵

In the proceeding leading up to the issuance of Order No. 693, the Commission summarized comments raised by NERC and others which are particularly relevant here:

Reliability Standards under consideration were developed and approved through NERC’s Reliability Standards development process with the intention that they would apply based on the industry’s historical conception of the bulk electric system and that the outcome might have been different using the Commission’s proposed definition. NERC therefore argues that it would be inappropriate to assume that the requirements of the existing Reliability Standards would be relevant to an expanded set of entities or an expanded of facilities under a broader

¹³ Order No. 693 at P 1897.

¹⁴ The applicability defines the scope of the affected entities subject to the standard and any facility limitations or expansion beyond the current definition of BES are handled through explicit identification at the standard level. *See. e.g.*, FAC-003 and PRC-023.

¹⁵ Order No. 693 at P 1893 (*emphasis added*).

definition of the Bulk-Power System. NERC also asserts that there is no reasonable justification for subjecting “thousands of small entities” to the costs of compliance with the Reliability Standards when there is no reasonable justification to do so in terms of incremental benefit to the reliability of the Bulk-Power System.¹⁶

NERC argued that changes should be made through its Reliability Standard Development Process:

NERC should be directed to develop, through its Reliability Standards development process, a single process to identify the specific elements of the Bulk-Power System that must comply with Reliability Standards under section 215. According to NERC, the Commission, the states, and all other stakeholders would benefit tremendously from a deliberate dialogue on these matters. NERC asks that the Commission not directly define the outer limits of its jurisdiction under section 215, but requests that the Commission direct NERC to undertake certain activities to reconcile the definitions of bulk electric system and Bulk-Power System and report the results back to the Commission.¹⁷

Others similarly argued that:

the Commission should require NERC to revisit it using the ANSI process to give “due weight” to NERC’s technical expertise. . . .¹⁸

and, according to Ontario IESO, that if:

the Commission believes that NERC’s definition of bulk electric system excludes facilities that should be subject to Reliability Standards for reasons other than preventing cascading outages, the Commission could submit a detailed request through the ERO Reliability Standards development process.¹⁹

Importantly, the Commission agreed:

we agree with commenters that unilaterally modifying the definition of the term bulk electric system is not an effective means to achieve our goal.²⁰

Yet, the Commission proposed to modify the definition of BES in a unilateral manner that is directly counter to Order No. 693 and would effectively modify the Reliability Standard

¹⁶ *Id.* at P 62.

¹⁷ *Id.* at P 67.

¹⁸ *Id.* at P 68.

¹⁹ *Id.* at P 66.

²⁰ *Id.* at P 75.

itself without the benefit of the Reliability Standards Development Process. As a result, by substituting its own definition, the Commission would improperly affect the application of the Reliability Standards. Such action fails to recognize the international reach of NERC and effectively precludes NERC's technical expertise, which includes the valuable input of industry experts across North America that have operational and planning experience spanning many years, on the issues from being considered. In addition, the Commission's proposed approach will prevent NERC from considering the Commission's guidance and developing an equally effective and perhaps superior alternative. Thus, the Commission's NOPR would accomplish indirectly that which it is prohibited from doing directly, in contravention of well-established judicial precedent.²¹

NERC's view of the matter would be different if the Commission were proposing to define the term "bulk power system." That term is contained in Section 215 itself, and demarcates the Commission's jurisdiction over reliability matters. It would be entirely appropriate for the Commission to define a statutory term in aid of clarifying the reach of its jurisdiction.

The Commission should clarify in the Final Rule that any modifications to the definition of BES must be accomplished through the NERC Reliability Standards Development Process. This approach properly respects the international nature of NERC and will allow all interested entities an opportunity to provide input in final determinations.

²¹ As the Commission is well aware, the Courts have consistently held that the Commission cannot do indirectly that which it cannot do directly. *National Fuel Gas Supply Corp. v. FERC*, 909 F.2d 1519, 1522 (D.C. Cir. 1990); *Richmond Power & Light v. FERC*, 574 F.2d 610, 620 (D.C. Cir. 1978).

B. IN THE FINAL RULE, A NUMBER OF ISSUES RELATED TO SCOPE AND PROCESS ALSO MUST BE ADDRESSED.

1. The Proposed Definitional Change Would Have a Much Broader Impact than Acknowledged by the Commission.

In support of its proposed BES definition, in part, the Commission states that the proposed BES definition is expected only to affect thirty-three entities in the Northeast Power Coordinating Council, Inc. region. However, NERC believes the potential impact of the Commission's proposed BES definition is likely much larger than recognized by the Commission. First, the current BES definition applies to facilities "operated" at 100 kV, whereas the Commission's proposed definition applies to facilities "rated" at 100 kV. The proposed broader definition will necessarily result in an expanded scope of facilities, beyond the thirty-three entities in the Northeast Power Coordinating Council, Inc. region. For example, an entity may have built its existing transmission facilities taking into account future load growth or business needs. While it may *operate* at 40 kV, the facilities may be *rated* at 138 kV. Under the existing NERC definition of BES, those facilities would be excluded from compliance with NERC Reliability Standards, but they would be included under the proposed BES definition. Thus, the scope of facilities subject to compliance with Reliability Standards would be expanded under a broader definition of BES. Using the NERC Standards Development Process would provide a forum where all stakeholders could appropriately explore those issues.

Second, as the Commission is well aware, a number of Generator Owners and Generator Operators have consistently maintained that their transmission tie lines, generator leads and generator interconnection facilities are "generator" facilities and not "transmission" facilities. In the wake of the NERC and Commission registration decisions in *New Harquahala Generating Company*, initiatives were launched to determine if limitations to Reliability Standards are

warranted with respect to Generator Owners and Generator Operators that own and/or operate transmission facilities a.k.a. generator interconnection facilities, rather than being registered as Transmission Owners and/or Transmission Operators. In the fall of 2008, NERC undertook a survey to identify the specific concerns and to solicit ideas on possible solutions. There were over 100 respondents. As a result, in February 2009, NERC announced the formation of an Ad Hoc Group for Generator Requirements at the Transmission Interface, which was comprised of a cross-section of participants across different geographic regions and industry segments, specifically linked with various NERC technical groups and representatives of both the operating and planning perspective. On November 16, 2009, the Final Report from the Ad Hoc Group for Generator Requirements at the Transmission Interface was issued, with proposed recommendations, in part, that generator interconnection facilities should only be subject to compliance with a subset of the current Transmission Owner and Transmission Operator Reliability Standards. A Standards Authorization Request (“SAR”) has been submitted to NERC to implement the proposed recommendations. The SAR remains pending at NERC and efforts related thereto are subject to prioritization with other competing projects.

A quick review of the NERC Compliance Registry, without regard to whether they own or operate interconnection facilities, reveals that there are a number of Generator Owners and Generator Operators that are currently not registered as Transmission Owners and Transmission Operators. While there a number of those that are registered in both generator and transmission categories, the Commission’s proposed changes to BES could arguably, by definition, capture those interconnection facilities that the Regional Entities may have excluded on a case by case basis. Such expansion could have a significant, national impact with respect to these entities and may not lead to any significant increases in the BES reliability. Given the work of the Ad Hoc

Group, NERC expects that the proposed BES definition will result in an unwieldy number of potential exemption requests in the absence of clear and unambiguous criteria that would reduce non-meritorious exemption requests. Therefore, FERC should allow NERC to consider the suggested changes to the BES in concert with SAR currently pending before NERC that resulted from the Generator Owner/Transmission Owner efforts.

2. The Proposed Bright Line Test Does Not Eliminate Ambiguity Over Application to Specific System Configurations or Facilities.

Conceptually, a bright line test should clarify those facilities that are subject to compliance and those that are not. However, due to regional and system configurations, there is intermingling of 100 kV rated facilities with transmission components and elements that are not rated at 100 kV. It is not clear from the face of the BES NOPR if the Commission intends that the entirety of a facility is subject to a Reliability Standard even where portions or elements of that facility fall below the bright line criteria or if only those portions that meet the criteria are covered. The Commission should allow the Reliability Standard Development Process to determine whether changes are required and to identify which equipment should be subject to Reliability Standard compliance.

3. The Exemption Process is Unworkable in the Absence of Specific Tests that Should be Developed Through the Reliability Standards Development Process.

As the Commission is well aware, entities are registered by function not facilities. NERC believes that this continues to be the correct approach. There are over 1,900 registered entities, a number of which may own and/or operate “transmission” facilities that fall within the proposed BES definition. The Commission’s proposal that entities may seek exemption from compliance with Reliability Standards on a facility by facility basis is potentially unworkable, especially in the absence of a clear and unambiguous test for such exemptions. It is imperative that a specific

test be developed to address situations where an entity's facility meets the criteria yet it seeks exemption from compliance for legitimate reasons, but it is equally imperative that the test be robust enough to screen out requests for exemption where there is no technical basis for such exemption or where the exemption would impede reliability.

While not at issue in the BES NOPR, it also would be appropriate to develop a specific test with respect to a situation where an entity's facility does not technically meet the stated criteria for inclusion in the BES yet a determination is made by the Regional Entity and/or NERC that it should be subject to compliance. Such tests must apply objective rather than subjective criteria. Corresponding changes also likely will be necessary in the NERC Rules of Procedure and the NERC *Statement of Compliance Registry Criteria* once such tests are developed. While the Commission may wish to suggest some criteria considerations, the tests should be developed in the first instance through the Reliability Standard Development Process.

Additionally, the application of objective test criteria herein is not dissimilar to the efforts to define criteria for "critical" facilities directed in other Commission orders (e.g. Transmission Relay Loadability Reliability Standard, Order No. 733). Whereas the BES NOPR proposal addresses facilities to be subjected to the application of all NERC Reliability Standards below 100 kV, Order No. 733, for example, addresses facilities to be subject to PRC-023-1 below 200 kV as they are explicitly excluded from standards application. NERC contends that the development of these criteria should be consistent for these two efforts and for the application of any standard for which specific facility application is defined. Therefore, the Commission should consider having NERC establish through the Reliability Standards Development Process criteria that could be applied to all Reliability Standards for which facility-specific application is defined.

4. The Proposed Ninety Day Time Frame is too Short for Meaningful Consideration and Determination of Applicable Facilities and Exemption Tests.

In the Final Rule, the Commission should eliminate the requirement that the definition be changed within ninety days. This does not provide sufficient time for consideration of all of the issues with respect to applicable facilities and specific tests to be developed through the Reliability Standards Development Process. This process will facilitate the necessary dialogue and consideration of all relevant issues and will lead to an informed decision. NERC agrees, however, that once these issues are resolved, a transition period is appropriate and necessary.

The issues are complex and it is important to devote the requisite time to develop appropriate solutions and not cause unintended consequences.

V. CONCLUSION

NERC respectfully requests that the Commission issue a Final Rule consistent with the comments set forth herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document upon all parties listed on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 10th day of May, 2010.

/s/ Rebecca J. Michael

Rebecca J. Michael

*Attorney for North American Electric
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