

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of UtiliCorp United Inc.'s Missouri)	
Public Service and St. Joseph Light & Power)	
divisions joining the Midwest Independent)	Case No. EO-2002-125
Transmission System Operator, Inc.)	

STAFF RESPONSE TO ORDER RESPECTING COMMISSION JURISDICTION

Comes now the Staff of the Missouri Public Service Commission (Staff) in response to the October 11, 2001 Order Directing Filing of the Missouri Public Service Commission (Commission). In that Order the Commission directed that no later than November 5, 2001 the Staff of the Commission shall file a recommendation regarding whether the Commission has jurisdiction to consider the Application of UtiliCorp United Inc. (UtiliCorp) to transfer operational control over certain designated transmission facilities of its Missouri Public Service (MPS) and St. Joseph Light & Power (SJLP) divisions to the Midwest Independent Transmission System Operator, Inc. (MISO or Midwest ISO).¹ The Staff states that the Commission does have such jurisdiction and in support thereof states as follows:

1. On August 29, 2001 UtiliCorp filed a Request For Finding Of Lack Of Jurisdiction Or, In The Alternative, Application which was assigned Case No. EO-2002-125 by the Commission. In paragraph 3 of its Application, as amended by its First Amendment By Interlineation Of Request For Finding Of Lack Of Jurisdiction Or, In The Alternative, Application filed on September 14, 2001, UtiliCorp states that:

¹ The Staff notes that there are two other cases pending before the Commission involving the Commission's jurisdiction over the transfer of operational and/or functional control of transmission assets of an electrical corporation under the jurisdiction of the Commission to an independent system operator (ISO) or a regional transmission operator (RTO). The two cases are Case No. EO-2001-684 respecting Union Electric Company and Case No. EO-2002-24 respecting The Empire District Electric Company.

UtiliCorp has filed with the Federal Energy Regulatory Commission ("FERC") an application to transfer operational control over certain designated transmission facilities to the Midwest Independent System Operator, Inc. ("MISO"). . . . The FERC application asks the FERC to approve of the transfer of operational control for portions of the MPS and SJLP transmission system in Missouri, and other systems in another state. The FERC in an "Order Authorizing Disposition of Jurisdictional Facilities issued September 13, 2001, approved the transfer subject to certain specified conditions. See 96 FERC para. 62,256.

In paragraph 12 of its Application, ". . . UtiliCorp states that the property involved in the transaction is most of its electric transmission system in Missouri."

2. The Staff contends that the principal basis of the Commission's jurisdiction in this case is Section 393.190.1 RSMo 2000. Thus, in order to approve UtiliCorp's Application in this case, the Commission must find, at a minimum, that UtiliCorp's proposal to become a member of the MISO is not detrimental to the public interest. No standard appears in Section 393.190 for determining whether a public utility's request for authorization to sell, assign, lease, transfer, mortgage or otherwise dispose of the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public should be granted by the Commission. The standard was determined by the Missouri Supreme Court in State ex rel. City of St. Louis v. Public Serv. Comm'n, 73 S.W.2d 393 (Mo.banc 1934), which was the judicial review of a Commission Report And Order granting the application of a foreign corporation, not licensed to do business in Missouri, to acquire and hold more than 10% of the stock of two Missouri utilities. In the underlying Commission case, Re Utilities Power & Light Corp., Case Nos. 6722 and 6723, 18 Mo.P.S.C. 1 (1930), Utilities Power & Light Corporation claimed that the requested transfer of stock to it from an intermediary holding company would simplify its corporate structure, result in tax savings, and have no effect on rates, service, or operations. 18 Mo.P.S.C. 3. The Commission held that the proposed transactions involving the mere transferring from an intermediary holding company to the parent holding company of more than

10% of the total capital stock of two Missouri public utility corporations could have “no detrimental effect upon the public interest.” *Id.* at 4.

To determine the meaning of the applicable section in the Public Service Commission Law, the Court looked to the purpose of the Public Service Commission Act and stated:

... The whole purpose of the act is to protect the public. The public served by the utility is interested in the service rendered by the utility and the price charged therefor; investing public is interested in the value and stability of the securities issued by the utility. [Citation omitted] ...

73 S.W.2d at 399.

The Court stated that “[t]he owners of this stock [sought to be acquired] should have something to say as to whether they can sell it or not; [t]o deny them that right would be to deny them an incident important to ownership of property”; and in such a situation “[a] property owner should be allowed to sell his property unless it would be detrimental to the public.” 73 S.W.2d at 400. The Court noted that the state of Maryland has a statute “identical” to the Missouri statute and that the Maryland Supreme Court had determined “not detrimental to the public” to be the appropriate standard:

The state of Maryland has an identical statute with ours, and the Supreme Court of that state in the case of *Electric Public Utilities Co. v. Public Service Commission*, 154 Md. 445, 140 A. 840, loc. cit. 844, said: “To prevent injury to the public good in the clashing of private interest with the public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be *benefited*, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public *detriment*. ‘In the public interest,’ in such cases, can reasonably mean no more than ‘not detrimental to the public.’”

Id.

3. UtiliCorp states at paragraph 5 of its Application that “[i]t does not appear that the transfer of operational control to MISO in this situation qualifies as an event which would trigger either the letter or the spirit of Section 393.190.” UtiliCorp makes this same basic argument in paragraphs 7 and 8 of its Application. The Staff does not agree. In general, the assertions made by UtiliCorp in paragraphs 5 through 9 of its Application are completely conclusory.

Section 393.190.1 RSMo. 2000 states, in relevant part:

No . . . electrical corporation . . . shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of . . . the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same shall be void. . . . (Emphasis added.).

Black’s Law Dictionary (7th ed. 1999) defines the terms “transfer,” “disposition,” “control” and “consolidation” as follows:

transfer, n. 1. Any mode of disposing of or parting with an asset or an interest in an asset, including the payment of money, release, lease, or creation of a lien or other encumbrance. The term embraces every method – direct or indirect, absolute or conditional, voluntary or involuntary – of disposing of or parting with property, including retention of title as a security interest and foreclosure of the debtor’s equity of redemption. . . .

transfer, vb. 1. To convey or remove from one place or one person to another; to pass or hand over from one to another, esp. to change over the possession or control of. . . .

disposition, n. 1. The act of transferring something to another’s care or possession, esp. by deed or will; the relinquishing of property <a testamentary disposition of all the assets>. . . .

control, n. The direct or indirect power to direct the management and policies of a person or entity whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct or oversee <the principal exercised control over the agent>.

consolidation, n. 1. The act or process of uniting, the state of being united. . . .

Appendix A to UtiliCorp's Application to this Commission includes a copy of UtiliCorp's Application For Approval Of Transfer Of Control Over Transmission Facilities filed with the FERC on August 20, 2001. The Staff notes certain provisions of this document as being particularly relevant to a consideration of UtiliCorp's Application to this Commission.

ARTICLE TWO

X. DURATION AND TERMINATION

B. Transfer Date. The transfer of operational control of the Transmission System from the respective Owners to the Midwest ISO pursuant to this Agreement shall not take place until the Midwest ISO can demonstrate that it is functionally able and ready to take over the provision of transmission service under the Transmission Tariff from the Owners. . . .

Original Sheet No. 58.

ARTICLE THREE

RIGHTS, POWERS, AND OBLIGATIONS OF THE MIDWEST ISO

I. Operation And Planning

A. Functional Control. By this Agreement, each of the Owners authorizes the Midwest ISO to exercise functional control over the operation of the Transmission System as necessary to effectuate transmission transactions administered by the Midwest ISO. . . .

Original Sheet No. 60.

D. Performance of Regulatory Obligations. The Midwest ISO shall comply with existing transmission operation and planning obligations of an Owner, imposed by federal or state laws or regulatory authorities, which can no longer be performed solely by the Owner following transfer of functional control of its transmission facilities to the Midwest ISO, until such time as such obligations are changed or revised.

Original Sheet No. 61.

APPENDIX E

FRAMEWORK FOR OPERATIONAL RESPONSIBILITIES

I. General Description Of Midwest ISO's Operational Responsibilities

A. Midwest ISO Responsibilities. The Midwest ISO shall be responsible for the following operational functions:

1. The Midwest ISO shall have functional control of the Transmission System as set forth in Section II of this Appendix E and as defined in Article One, Section I, Paragraph L of the ISO Agreement.

Original Sheet No. 149.

The turning over of operational and/or functional control of its transmission assets (*i.e.*, the "authority to manage, direct or oversee") to the MISO clearly constitutes the "transferring of something to another's care." In other words, UtiliCorp is proposing to "otherwise dispose" of its transmission assets by transferring them to the MISO.

The word "dispose" appears both in Missouri statutory Section 393.190.1 RSMo 2000 and in Section 203 of the Federal Power Act ("FPA"). The FERC, in discussing in Order No. 2000 its jurisdiction under FPA Section 203, makes specific reference to the word "disposition," stating in Order No. 2000, under the subheading "FPA Section 203," that the FERC has the authority and responsibility under Section 203 to "review mergers and other transactions involving public utilities, including dispositions of jurisdictional facilities by public utilities." FERC Order No. 2000, Statutes And Regulations, para. 31,089 at 31,039, 31,045 (1999). It seems clear that the FERC regards transactions such as the one here at issue as "dispositions."

Of considerable interest is the use of the phrase "disposition of facilities" to characterize the transfer of functional control of transmission facilities to an RTO. As previously

noted, the words “dispose of” appear in Section 393.190.1 relating to events respecting any part of a electrical corporation’s works or system, necessary or useful in the performance of duties to the public, that require Commission authorization.

In fact, in a subsection in FERC Order No. 2000, Statutes And Regulations, para. 31,089 at 31,213 (1999) entitled “7. States’ Roles with Regard to RTOs,” the FERC acknowledges that the states are not preempted respecting authority for state commission approval of a utility joining an RTO:

We continue to believe that states have important roles to play in RTO matters. For example, most states must approve a utility joining an RTO, and several states have required their utilities to turn over their transmission facilities to an independent transmission operator. . . .(Emphasis added.).

In the subsection “3. Operational Authority (Characteristic 3)” of Order No. 2000, the FERC relates that “an RTO must have operational authority for all transmission facilities under its control and also must be the security coordinator for its region.” The FERC further states that “[o]ne necessary aspect of operational authority as used here refers to the authority to control transmission facilities.” FERC Order No. 2000, Statutes And Regulations, para. 31,089 at 31,090 (1999). The FERC “conclude[s] that those designing the RTO should have flexibility to decide how it would exercise its operational control authority” and announces that it will leave to the discretion of the region the decision on the combination of direct and functional control that works best for its circumstances, but “the RTO must have clear authority to direct all actions that affect the facilities under its control. . . .” *Id.* at 31,091.

Section 393.190.1 also confers jurisdiction on the Commission by virtue of the fact that UtiliCorp’s proposal constitutes a type of consolidation of the Company’s transmission system with those of other utilities. The Company’s proposal calls for the consolidation into the

MISO, of functional control of the transmission assets of UtiliCorp, and the various other member entities.

4. UtiliCorp notes at paragraph 6 of its Application that MPS has been a member of the Southwest Power Pool (SPP) electric regional reliability council for many years and "UtiliCorp has no recollection of ever filing an application with the Commission requesting permission to initially join SPP or submit to control over certain aspects of UtiliCorp's operations." Respecting another electric regional reliability council, UtiliCorp notes at paragraph 6 of its Application that "UtiliCorp is a transmission-owning member of Mid-Continent Area Power Pool ('MAPP'), and transmission service across UtiliCorp's transmission system is provided under the rates, terms and conditions of the MAPP tariff approved by FERC."

First, Missouri administrative agencies are not bound by *stare decisis*:

An administrative agency is not bound by *stare decisis*. *State ex rel. Churchill Truck Lines, Inc. v. Public Serv. Comm'n*, 734 S.W.2d 586 (Mo.App. 1987). "Courts are not concerned with alleged inconsistency between current and prior decisions of an administrative agency so long as the action taken is not otherwise arbitrary or unreasonable." *Columbia v. Missouri State Bd. of Mediation*, 605 S.W.2d 192, 195 (Mo.App. 1980). . . .

State ex rel. GTE North, Inc. v. Public Serv. Comm'n, 835 S.W.2d 356, 371 (Mo.App. 1992). In *State ex rel. General Telephone Co. v. Public Serv. Comm'n*, 537 S.W.2d 655, 661-62 (Mo.App. 1976) case, the Western District Court of Appeals held that the Commission's decision in a prior General Telephone case had no binding effect in a subsequent General Telephone case:

Insofar as the conclusion in the 1962 case is concerned, it has no binding effect in a future rate case. A concise statement of the applicable rule is found in 2 Davis, *Administrative Treatise* Section 18.09, 605, 610, (1958), as follows:

"* * * For an equity court to hold a case so as to take such further action as evolving facts may require is familiar judicial practice, and administrative agencies necessarily are empowered to do likewise. When the purpose is one of regulatory action, as distinguished from merely applying law or applying law or policy to past facts, an agency must at all times be free to

take such steps as may be proper in the circumstances, irrespective of its past decisions. * * * Even when conditions remain the same, the administrative understanding of those conditions may change, and the agency must be free to act * * *." (Footnotes omitted.)

Clearly the commission in this case was not bound by the action in the 1962 case.

537 S.W.2d at 661-62. If in the past the Staff has been remiss in not asserting that the Commission has jurisdiction under Section 393.190.1 over matters that have been transferred to regional reliability councils, that does not mean that the Commission never had jurisdiction or has lost jurisdiction. The activities of and matters addressed by regional reliability councils and ISOs and RTOs may in part be similar, but they are not the same, for if they were, then there would be no need for ISOs or RTOs.

Although the Staff contends that the language of Section 393.190.1 encompasses Commission jurisdiction over transactions such as that which is the subject of this case, the Staff notes *State ex rel. Laclede Gas Co. v. Public Serv. Comm'n*, 535 S.W.2d 561 (Mo. App.1976), wherein Jackson County argued that the Commission had no power to grant interim rate relief. Jackson County argued that "the Commission has only those powers specifically or necessarily by implication conferred upon it by statute, that there is no statute in this state granting the Commission power to grant interim rate increases, and that in the absence of such a statutory grant there can be no such authority." *Id.* at 565. Jackson County asserted that the fact that at the then current session of the Missouri Legislature, a bill had been introduced for the purpose of empowering the Commission to "prescribe temporary schedules, rates, tolls, charges, or joint rates to be charged and collected" by a public utility pending the hearing and final determination of a permanent increase, showed that the Commission previously had not been granted that power. *Id.* at 567.

The Western District Court of Appeals held that “[w]hile the amendment to a statute must be deemed to have been intended to accomplish some purpose, that purpose can be clarification rather than a change of existing law. *Hogan v. Kansas City*, 516 S.W.2d 805, l.c. 811 (Mo.App.1974)” and that “the Commission has power in a proper case to grant interim rate increases within the broad discretion implied from the Missouri file and suspend statutes and from the practical requirements of utility regulation.” 535 S.W.2d at 567. The Court in a footnote also commented that “[a] somewhat analogous question is whether the Commission has authority to grant interim test or experimental rates. The Missouri Supreme Court has long held that the Commission does have this power as a matter of necessary implication from practical necessity.” *Id.* at 567. Section 386.040 RSMo 2000, among other things, confers on this Commission “...all powers necessary and proper to enable it to carry out fully and effectually all the purposes of this chapter.” Section 386.250(7) extends the Commission’s jurisdiction “[t]o such other and further extent, and to all such other and additional matters and things, and in such further respects as may herein appear, either expressly or impliedly.”

5. As indicated above, UtiliCorp amended its Application on September 14, 2001 by adding a sentence to paragraph 3 of its Application. The sentence states that “[t]he FERC in an “Order [sic] Authorizing Disposition of Jurisdictional Facilities issued September 13, 2001, approved the transfer subject to certain specified conditions. See 96 FERC para. 62,256.” A review of that FERC Order Authorizing Disposition of Jurisdictional Facilities reveals the following sentence regarding UtiliCorp’s application at the FERC to transfer operational control of certain of UtiliCorp’s jurisdictional transmission facilities to the MISO: “In addition, UtiliCorp states that the Missouri and Kansas commissions will have the opportunity to review and must approve the proposed transfer.” 96 FERC para. 62,256 at 64,516.

6. Although the Staff is not prescient, and thus is not aware of what UtiliCorp may argue in its response to this pleading, it should be noted that UtiliCorp has not argued that the Commission is preempted by the Federal Power Act (FPA) and the FERC. Appendix A to UtiliCorp's Application to this Commission includes a copy of UtiliCorp's Application For Approval Of Transfer Of Control Over Transmission Facilities filed with the FERC on August 20, 2001. Part of Appendix A is a copy of the November 20, 2000 Agreement Of Transmission Facilities Owners To Organize The Midwest Independent Transmission System Operator, Inc., A Delaware Non-Stock Corporation. Language in "Article Seven - Regulatory, Tax And Other Authorities - A. Regulatory And Other Authorities," "Original Sheet No. 79" and "Original Sheet No. 80" makes clear that this Commission is not preempted by the FPA and the FERC in deciding whether to authorize UtiliCorp on behalf of its MPS and SJLP divisions to be members of the MISO:

ARTICLE SEVEN

REGULATORY, TAX, AND OTHER AUTHORITIES

A. Regulatory And Other Authorities. This agreement and the participation of the signatories to this Agreement is subject to acceptance or approval by the FERC and may be subject to actions of respective state regulatory authorities to which respective signatories may be subject and to the actions of any other governmental body which may affect the ability of any signatory to participate in this Agreement. This paragraph describes the signatories' rights and obligations in the event required regulatory and other approvals or acceptances are not obtained.

1. In the event the FERC disapproves or refuses in whole or in part to accept this Agreement or the Transmission Tariff . . .

2. In the event the FERC by order imposes conditions on approval of the Agreement or the Transmission Tariff

3. In the event any state regulatory authority refuses to permit participation by a signatory or imposes conditions on such participation which adversely affect a signatory in the sole judgement of that signatory, such

signatory or any other signatory that is, in its sole judgement, adversely affected by such regulatory action (whether or not the signatory is subject to that regulatory authority's jurisdiction) may, no later than thirty (30) days after the date of such action, **or after any such signatory concludes reasonably that the state regulatory authority has refused to act**, and upon notice to all signatories, withdraw from this Agreement. In such event, the signatories shall, negotiate in good faith to determine whether changes should be made to this Agreement or the Transmission Tariff to address the reasons for such signatory's withdrawal.

4. In the event any other governmental body takes an action (or fails to take a necessary action)

(Emphasis added.).

7. Again, the Staff is not prescient, and thus is not aware of what UtiliCorp may argue in its response to this pleading, but it should be noted that UtiliCorp has not argued that the Commission is equitably estopped from denying, not approving or rejecting UtiliCorp's Application because the Commission has intervened in various FERC proceedings and has never indicated opposition to UtiliCorp or some other Commission regulated electrical corporation joining the MISO.

There are two relatively recent appellate court decisions involving the Commission and charges by utilities regulated by the Commission that the Commission was equitably estopped from taking certain ratemaking actions: *Missouri Gas Energy v. Public Service Comm'n*, 978 S.W.2d 434 (Mo.App. 1998) and *State ex rel. Capital City Water Co. v. Public Serv. Comm'n*, 850 S.W.2d 903, 910 (Mo.App. 1993). *Missouri Gas Energy* involves appellate review of a decision of the Commission in a 1996 Missouri Gas Energy (MGE (a division of Southern Union Company)) rate increase case, Case No. GR-96-285, wherein the Commission determined, according to the Western District Court of Appeals, that the carrying cost rates for an accounting authority order (AAO) granted in 1994 in *Re Missouri Gas Energy, Accounting Authority Order*, Case No. GO-94-234, 3 Mo.P.S.C.3d 201 (1994) should be for

ratemaking purposes the weighted average short-term debt interest rate for allowance for funds used during construction (AFUDC) of 4% for 1994 and 6% for 1995 and 1996, instead of the 10.54% rate which was requested by MGE in its Application for an AAO in Case No. GO-94-234 and authorized by the Commission in the AAO it issued in 1994. This 1994 AAO was preceded by several other AAOs, all for the same purpose of capitalizing and deferring recognition of certain costs respecting the utility's investment in new service lines and mains. This construction was occurring for the utility to comply with the Commission's gas line safety rules promulgated in 1989 in response to federal legislation. These two earlier AAOs had been granted in 1989 and 1992, in Case No. GO-90-51 and Case No. GO-92-185, respectively. 978 S.W.2d at 436-37.

MGE, among other things, made an equitable estoppel argument for continuation of the 10.54% carrying cost, asserting that the 1993 settlement and the 1994 AAO caused the equitable estoppel doctrine to be dispositive. The Western District Court of Appeals, noting that equitable estoppel is not ordinarily applicable to the government, identified the elements of equitable estoppel as follows, as it applies to a government entity:

- (1) a statement or act by the government entity inconsistent with the subsequent government act;
- (2) the citizen relied on the act;
- (3) injury to the citizen;
- (4) the governmental conduct complained of must amount to affirmative misconduct;
- (5) there must be exceptional circumstances and a manifest injustice will result;
- (6) equitable estoppel will not be invoked if it will interfere with the proper discharge of governmental duties, curtail the exercise of the State's police power or thwart public policy; and


- (7) equitable estoppel is limited to situations where public rights must yield because private parties have greater equitable rights.

978 S.W.2d at 439; *See State ex rel. Capital City Water Co. v. Public Serv. Comm'n*, 850 S.W.2d 903, 910 (Mo.App. 1993).² "The party claiming equitable estoppel has the burden of proof and every fact creating the estoppel must be established by clear and satisfactory evidence. *Van Kampen*, 685 S.W.2d at 625." 850 S.W.2d at 910. UtiliCorp, which has not raised an equitable estoppel claim, meets none of the criteria for the imposition of equitable estoppel.

Wherefore the Staff maintains that the Commission has jurisdiction to consider the Application of UtiliCorp United Inc. (UtiliCorp) to transfer operational control over certain designated transmission facilities of its Missouri Public Service (MPS) and St. Joseph Light & Power (SJLP) divisions to the Midwest Independent Transmission System Operator, Inc. (MISO or Midwest ISO).

Respectfully submitted,

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² "Equitable estoppel is normally not applicable against a governmental entity. *Farmers' & Laborers' v. Dir. of Revenue*, 742 S.W.2d 141, 143 (Mo. banc 1987). The application of equitable estoppel against governmental entities or public officers is limited to exceptional circumstances where right or justice or the prevention of manifest injustice requires its application. *Murrell v. Wolff*, 408 S.W.2d 842, 851 (Mo.1966); *State ex rel. Letz v. Riley*, 559 S.W.2d 631, 634 (Mo.App.1977). Honesty and fair dealing must require that equitable estoppel be applied in order to prevent manifest injustice. *Murrell*, 408 S.W.2d at 851. The doctrine is not favored by law and is not to be casually invoked. *State, Etc. v. City of Woodson Terrace*, 599 S.W.2d 529, 531 (Mo.App.1980). Equitable estoppel cannot be applied if it will prejudicially affect the sovereignty of the state. P.H. Vartanian, Annotation, *Applicability of Doctrine of Estoppel Against Government and its Governmental Agencies*, 1 A.L.R.2d 338, 340-41 (1948). As a result, equitable estoppel is not applicable if it will interfere with the proper discharge of governmental duties, curtail the exercise of the state's police power or thwart public policy. *Id.* at 341. The underlying principle behind its limited application to governmental entities and public officials is that public rights should yield only if private parties possess greater equitable rights. *Riley*, 559 S.W.2d at 634." 850 S.W.2d at 910.

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 5th day of November 2001.



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