Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matters of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	

COMMENTS OF CENTURYLINK

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CenturyLink, Inc.[1] (CenturyLink) submits these comments in the above-referenced matter in response to the Commission's September 8, 2017 *Public Notice* regarding intercarrier compensation (ICC) reform (*Public Notice*).[2]

I. INTRODUCTION AND SUMMARY

The *Public Notice* seeks comment regarding the issues "that were raised in the *2011 ICC Transformation FNPRM* with respect to the network edge, tandem switching and transport, and transit, or developments related to those issues, that should be considered in the context of further ICC reform."[3]

[1] This submission is made by and on behalf of CenturyLink, Inc. and its wholly owned subsidiaries.

[2] "Parties Asked to Refresh the Record on Intercarrier Compensation Reform Related to the Network Edge, Tandem Switching and Transport, and Transit", WC Docket No. 10-90, CC Docket No. 01-92, *Public Notice*, DA 17-863 (rel. Sep. 8, 2017); 82 Fed. Reg. 44754 (Sep. 26, 2017); Public Notice, DA 17-933 (rel. Sep. 26, 2017).

[3] *Public Notice*, p. 3.

In particular, the *Public Notice* asks that parties refresh the record and discuss relevant regulatory and market developments since the *2011 Transformation Order*[4] regarding the questions raised in the *2011 ICC Transformation FNPRM*[5] as to:

- how the Commission should define the network edge (i.e. the point of carrier financial responsibility – for bill and keep, the point to which a carrier is responsible for carrying its traffic, whether directly or indirectly);
- the steps the Commission should take to transition remaining elements associated with tandem switching and transport for access traffic to bill and keep; and
- whether there is a need for the Commission to adopt reform regulation for transit (the term "transit," as used in the *Public Notice*, meaning the non-access traffic functional equivalent to tandem switching and transport for access traffic).[6]

The *Public Notice* also asks that parties address, among other things, how the broader IP network migration affects further ICC reforms relating to these issues.[7]

In addressing these issues, the Commission has an historic opportunity to both resolve still-open critical questions from the *2011 ICC Transformation FNPRM* that are complicating the industry's implementation of the *Transformation Order* transition, and to take significant strides toward placing the treatment of intermediate network services on a solid footing for the IP

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[4] *See, e.g., Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform - Mobility Fund,* WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 FCC Rcd 17663 (2011), *aff'd sub nom., Direct Communs. Cedar Valley, LLC v. FCC and In re: FCC 11-161*, Nos. 11-9900, *et al.*, 753 F.3d 1015 (10th Cir. 2014), *petitions for rehearing en banc denied*, Orders, Aug. 27, 2014, *cert. denied*, 135 S. Ct. 2072, May 4, 2015 (Nos. 14-610, *et al.*) (*Transformation Order* or *2011 ICC Transformation FNPRM*).

[5] *2011 ICC Transformation FNPRM, id*. at 18109-19 ¶¶ 1297-1325.

[6] *Public Notice,* pp. 1-3.

[7] *Public Notice,* p. 3.

migration. In this light, the ideal path forward requires a reversal of the Commission's *de facto* partial reform to-date of only certain categories of tandem switching and transport. This modest step, if combined with a straight-forward completion of the Commission's work on the *2011 ICC Transformation FNPRM* network edge issues in a manner that maximizes the potential for efficient and fair intercarrier network and compensation arrangements, will allow the Commission to seize the opportunity before it.

As has been well detailed in the record of a number of different Commission proceedings,[8] a fundamental asymmetry now exists in the industry whereby terminating access tandem switching and transport in only certain price cap ILEC and CLEC tandem/end office combinations are subject to bill and keep – while other tandem switching and transport services providing equivalent functionality remains compensable. The result of these asymmetric rules is that the Commission has now established a default network edge as the tandem for some terminating traffic and the end office for other traffic. The Commission should correct this asymmetry by adopting rules permitting all tandem owners to be compensated equally for the use of their networks – thereby establishing the end office as the proper default network edge for all providers. Moreover, it should find that bill and keep should not be mandated for any tandem switching and transport services whether those services are provided in connection with traffic bound for the tandem providers' own (or affiliated) end users or to a third party (i.e. wholly unaffiliated) end users.

[8] *See* Petition for Limited Stay of Transformation Order Years 6 and 7 ICC Transition – As It Impacts a Subset of Tandem Switching and Transport Charges, WC Docket No. 10-90, CC Docket No. 01-92, *et al*. (filed Apr. 11, 2017); Reply Comments of CenturyLink in Support of Petition for Limited Stay of Transformation Order Years 6 and 7, WC Docket No. 10-90, CC Docket No. 01-92, *et al*. (filed May 11, 2017); Petition of CenturyLink Communications, LLC to Reject and to Suspend and Investigate AT&T Tariff Filings, Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal No. 1859, *et al*., June 7, 2017 Access Charge Tariff Filings (filed June 14, 2017).

In addition to ensuring that all carriers have the right to be compensated equally for tandem switching and transport services, the Commission should also clarify that all carriers also have the right to determine the most economical manner in which to deliver the traffic to the edge, including the right to directly connect with terminating providers for access traffic to avoid usage-based tandem switching and transport charges. Having established the end office as the default network edge, this clarification will ensure that the carrier with the financial obligation to deliver traffic to that edge also has the ability to make the economic decision regarding how the traffic routes. And, it will also ensure that providers of tandem switching and transport services are incentivized to charge competitive rates for their services.

With these rock-solid principles in place (equal and fair compensation to all types of carriers for equivalent tandem switching and transport services, establishing the end office as the default network edge, and a right to establish direct connections to that end office to avoid those services where the economics warrant), the Commission should then simply complete its work on the remaining *2011 ICC Transformation FNPRM* network edge issues for terminating traffic by establishing rational edge/interconnection rules that support these concepts and that are symmetrical for all types of carriers. To do so, the Commission should specify, as its central network edge principle, that the switch that serves the end user (the called party on the terminating side) is the default financial edge – i.e. the point at which an IXC carrier ceases responsibility for carrying traffic. This will provide the industry with rational interconnection principles that apply to all providers as opposed to the patchwork of asymmetric rules that harm the industry today.

While the focus of the *Public Notice* appears to be on terminating access traffic scenarios, where the *Transformation Order* transition has already moved certain access elements to bill and

keep, these same concepts should also carry-over to originating traffic. Although, as discussed more fully below, some originating-specific aspects may need to be attended-to – among other things, due to the fact that originating access is subject to positive compensation and not bill and keep.

Transit services, since they are the non-access traffic functional equivalent of tandem switching and transport for access traffic, and non-access traffic more generally should also be subject to these same concepts. It also follows that, for these reasons and the reasons discussed more fully below, transit services need not otherwise be the subject of further ICC reform at this time.

The above principles are not only the best way to address the status of the services at issue from an economics and policy perspective, but they are consistent with the applicable legal standards in this area.

It is increasingly critical that the Commission address all of these issues expeditiously. These are all limited and reasonable steps that the Commission can take immediately that will go a long way toward addressing current ICC problems plaguing the industry while also allowing LECs to have the opportunity to recover their costs.

II. DISCUSSION

A. The Commission Must Ensure That All Carriers Have the Right To Be Compensated Equally for Their Tandem Switching and Transport Services – and Must Reverse the Current Asymmetry in That Regard.

Tandem switching and transport services constitute the middle or intermediate component of legacy TDM network connectivity. But, unlike more downstream end office functionality, this functionality does not solely serve a carrier's own end users. And, not all carriers have invested in constructing these intermediate facilities. These services are costly to build and maintain – particularly when they consist of legacy TDM switches and other

technology that are gradually becoming obsolete. Over time, the technology and architecture which enables these legacy TDM network services will evolve with the IP migration. But, intermediate network services will continue to be essential – even in the all-IP world. Therefore, continued robust investment in these facilities will be needed and this will only occur if carriers are assured of their ability to obtain fair compensation for their services. It is self-evident that a result where no carriers can obtain compensation for these services would be inappropriate. And, a result where only some carriers are able to obtain fair compensation while others cannot when they provide equivalent functionality similarly constrains investment, reduces competitive choices and encourages arbitrage. It was a fundamental goal of the *Transformation Order* reforms to eliminate this type of ICC and interconnection disparity.

Yet, fundamental asymmetry is what now exists in the industry. As a result of guidance given during the implementation of the Year 6/2017 stage of the *Transformation Order* transition, a *de facto* approach has been followed where terminating access tandem switching and transport in only certain price cap ILEC and CLEC tandem/end office combinations have been subjected to bill and keep – while all other tandem switching and transport services providing equivalent functionality remains compensable. For traffic falling into the first category, no compensation will be owed for the tandem services as of July 2018 (rates for these services were moved to $.0007 in July 2017) and, in this circumstance, the tandem becomes the network edge and the price cap LEC's end user effectively assumes the cost of the services. In contrast, for traffic falling into the other category, the IXC must pay for the tandem services. This effectively establishes the network edge for this traffic closer to the terminating end office and increases the IXC's financial obligation for transporting the traffic for this category of traffic.

The Commission can correct this asymmetry and set a path by which investment in these important network facilities will be sustained for the IP migration by simply adopting rules specifying that all tandem owners should be compensated equally for the use of their networks – thereby adopting the sound interconnection principle that no network should be utilized unilaterally for free. This principal is equally appropriate as an economic policy matter whether these intermediate network services are provided in connection with traffic bound for a third party (i.e. wholly unaffiliated) end users or in connection with traffic bound for the tandem providers' own (or affiliated) end users.

Clearly ICC compensation must be ensured in the former category since, in such circumstances, the tandem provider has no end user involved in the call flow.

But, there are also problems with a bill and keep approach to tandem switching and transport services for traffic bound to a tandem provider's own (or affiliated) end users as well. To begin with, since the edge will necessarily be the end office for some traffic (i.e. the traffic discussed immediately above – traffic bound for a third party that is wholly unaffiliated from the tandem owner), the Commission must establish that same edge for all carriers. If not, it will simply create another type of asymmetry that will skew the marketplace (since some end users would incur the cost of tandem services for traffic delivered to them – but others would not) and inevitably lead to arbitrage. Fundamentally, it also makes no policy sense to impose mandatory bill and keep on a critical portion of switched access infrastructure where only some carriers have invested to construct such facilities. To do so, would only penalize those carriers and disincentivize further investment in intermediate network services.

In contrast, an approach whereby all providers are compensated for their tandem services equally will best facilitate the Commission's work to address the broader ICC reform issues that

remain pending in the *2011 ICC Transformation FNPRM* and, as part of that, the IP transition. There will continue to be a need for robust investment in intermediate network services in IP networks. The first essential ingredient to ensuring such investment is allowing all tandem providers (and providers of functionally equivalent intermediate IP network services) to exist and to compete equally. It should not matter that those intermediate carrier services are provided by a price cap ILEC, an affiliated entity or an independent provider.[9] Each provides the same value and the presence of each fosters competition. Arbitrary line-drawing that precludes some such providers, but not others, from charging for the same functionality has the result of defining network edge rules and tandem cost recovery in a harmful and inefficient way that could be precedent-setting as the industry transitions away from TDM to IP networks. The Commission should allow all tandem owners to be compensated as opposed to picking certain call flows over others to receive continued ICC recovery.

B. The Commission Should Also Clarify That Terminating Carriers Have the Obligation To Offer Direct Termination If Requested.

The second critical ingredient for an ideal regulatory approach to the issues raised regarding tandem switching and transport services is for the Commission to clarify that terminating carriers have the obligation to offer direct termination if requested. Competitive intermediate network services can only be accomplished now and with IP networks in the future if IXCs have the ability to avoid these metered tandem charges when traffic volumes warrant such direct connections. Combined, this ingredient and the first ingredient discussed above (assuring that all providers of tandem services have the ability to obtain compensation for the

[9] This approach also reflects the fact that, even if a broad interpretation of affiliate is used when transitioning tandem and end office arrangements by affiliated entities to zero, the Commission would still eliminate the incentive for investment in intermediate network services in just some types of configurations (i.e. based on an affiliate relationship), which will lead to arbitrage and inefficiencies.

same functionality) represent limited and balanced steps that, once taken, will enable the market to do the rest and ensure that rates and practices remain reasonable and competitive. Certainly there are other important ICC concerns to be attended-to – for example, other open issues regarding the network edge (discussed above and below) and POIs more broadly, the role of agreements and tariffs in the post-*Transformation Order* world, and ensuring that LECs have adequate flexibility when it comes to end-user charges.[10] But, by assuring these two critical ingredients, the Commission can go a long way toward addressing current ICC problems currently plaguing the industry and maximizing the prospect of efficient network interconnection as the IP migration continues.

C. The Commission Should Establish Rational Edge/Interconnection Rules.

The Commission should also establish rational edge/interconnection rules that support the two concepts described above and that are symmetrical for all types of carriers. It follows from these concepts that, as a general matter, the switch that serves the end user (i.e. the end office or its equivalent) should be the default financial edge (i.e. point at which an IXC ceases responsibility for carrying traffic). It is possible that the IP migration will eventually bring about circumstances in which a different, but still appropriately localized, component of carrier networks will be the appropriate demarc for financial responsibility. But, as it stands today, the local switch remains the best dividing point between the categories of network services where it is appropriate to impose bill and keep, and thereby impose related costs on the carrier's own end users, and those where such treatment is not appropriate.

Accordingly, the Commission should reject calls to dictate, as the network edge, a '"competitively neutral'" location '"where interconnecting carriers have competitive

[10] *2011 ICC Transformation FNPRM*, 26 FCC Rcd at 18116-19 ¶¶ 1316-24.

alternatives—other than services or facilities provided by the terminating carrier to transport traffic to the terminating carrier's network.'"[11] Competition in the provision of intermediate tandem services has increased considerably in recent years. But, while the absence of a competitor could indicate the potential for concerns about whether carrier rates will be adequately regulated by the market, that concern is something that will be adequately addressed by the caps that already apply to such rates. It should not disqualify carriers from their ability to obtain *any* compensation whatsoever.

Similarly, the Commission should reject the proposal that a single point in each Local Access and Transport Area (LATA) determined by a terminating carrier for Mutually Efficient Traffic Exchange.[12] If the Commission adopts the two principles discussed above – market forces will determine the most mutually efficient traffic exchange point.

D. These Same Concepts Should Also Carry-Over to Originating Access Traffic.

As noted, the focus of the *Public Notice* appears to be on terminating access traffic scenarios, where the *Transformation Order* transition has already moved certain access elements to bill and keep. But, these same concepts discussed above can and should also carry-over to originating access traffic. Although, CenturyLink recognizes that some originating-specific aspects may need to be attended-to. This is due to, among other things, the fact that originating access is subject to positive compensation and not bill and keep. By way of example, the Commission would need to attend-to the specifics of how edge compensation would work in the context where direct connection is sought for 8YY originating traffic – particularly in a scenario where the originating carrier doesn't have the technical capability to do so.

[11] *Public Notice*, p. 2 (citation omitted).

[12] *Public Notice*, p. 2.

E. The Commission Should Not Impose New Regulation on Transit Services.

The Commission, in the *Public Notice*, describes "transit" as the term historically used for non-access traffic to describe the functional equivalent of tandem switching and transport for access traffic.[13] It follows that transit services and non-access traffic more generally should similarly be subject to the concepts above.

And, with respect to the *Public Notice*'s specific request for comment as to whether greater regulation is needed, the historic treatment for transit services has been that providers of such services are generally compensated by the financially responsible carrier on the originating side (for non-access traffic, typically the originating LEC). And, the assurance of direct connection rights on origination and termination will drive similar efficiencies for non-access traffic. It also follows that, for these reasons and the reasons discussed more fully below, transit services need not otherwise be the subject of further ICC reform at this time. And, it follows that, notwithstanding the recent court decision cited in the *Public Notice*,[14] transit services should *not* be deemed Section 251 services subject to the provision's pricing and other requirements of Section 252 (which would effectively mandate that they be sold at TELRIC). As the Commission acknowledged, it has not previously ruled that transit services must be provided

[13] *Id.*, p. 3.

[14] *Id.* (citing *Petition of Sprint Spectrum L.P. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish Interconnection Agreements with Michigan Bell Tel. Co., d/b/a AT&T Michigan; The Joint Submission of Sprint Spectrum L.P. and Michigan Bell Tel. Co., d/b/a AT&T Michigan, for Approval of an Interconnection Agreement,* Case Nos. U-17349, U-17569, Michigan Public Service Commission, Order, 2014 WL 1285874 (Mar. 18, 2014), *aff'd in part and rev'd in part and remanded by Michigan Bell Tel. Co. v. Michigan Pub. Serv. Comm'rs*, No. 1:14-cv-416, 2017 WL 2927485 (W.D. Mich., July 10, 2017)). This holding is contrary to the prior holdings of the Commission and numerous courts and no doubt will be appealed.

pursuant to Section 251[15] and it should not do so now. Rather, transit rates should continue to be negotiated/market-based rates.

F. These Principles Are Also Consistent With Applicable Legal Standards.

The Commission has authority to adopt these sensible proposals by exercising its rulemaking authority under Section 201, including its authority thereunder to adopt rules to implement Section 251(a).

To begin with, the questions teed-up in both the *Public Notice* and the *2011 ICC Transformation FNPRM* regarding the future of tandem switching and transport services effectively ask whether bill and keep or zero rate treatment should apply to certain categories of tandem switching and transport. Answering these questions and related questions regarding the network edge requires application of the "just and reasonable rates" standards imposed by Sections 201 and 332[16] as well as the "mutual and reciprocal recovery of costs" standard of Section 252(d)(2)[17] and requires that the Commission navigate the usual prescriptions that its conduct not contravene requirements that agencies avoid arbitrary and capricious rulings.[18]

And, while the Commission's authority to impose bill and keep on certain aspects of access and non-access ICC components has been sustained,[19] transition of new components such

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[15] *Transformation Order*, 26 FCC Rcd at 18114 ¶ 1311.

[16] 47 U.S.C. §§ 201, 332.

[17] 47 U.S.C. § 252(d)(2)(A)(requiring that compensation terms and conditions "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier[]").

[18] *See Transformation Order*, 26 FCC Rcd at 17914-25 ¶¶ 760-781. As with the issues resolved in the *Transformation Order* transition, the issues teed-up in the *Public Notice* and the proposals herein are subject to these various standards because they implicate all types of carriers – e.g. ILECs, CLECs, and CMRS providers.

[19] *E.g., Direct Communs. Cedar Valley, LLC v. FCC*, note 4, *supra*, 753 F.3d at 1109.

as the tandem and transport functionality at issue here can not satisfy those standards. The Commission's rationale for the *Transformation Order* transition to-date is encapsulated in the following language from Paragraph 757 of the Order:

> Although a bill-and-keep approach will not provide for the recovery of certain costs via *intercarrier* compensation, it will still allow for cost recovery via end-user compensation and, where necessary, explicit universal service support….We find that although the statute provides that each carrier will have the opportunity to recover its costs, it does not entitle each carrier to recover those costs from another carrier, so long as it can recover those costs from its own end users and explicit universal service support where necessary.[20]

In other words, it was founded on the premise that carriers can and should recover the costs for certain services from their own end users. But, as explained above, that rationale simply does not extend to access and non-access tandem switching and transport provided in connection with traffic bound for (or coming from) another party's end users. Given the fact that the tandem provider, in this circumstance, does not have a customer relationship with an end user for the long distance service at issue here, these requirements are more demanding and, in fact, cannot be met. Indeed, CenturyLink maintains that the above discussion also demonstrates that, in the current environment, a bill and keep approach to tandem switching and transport services for traffic bound to or from a tandem provider's own (or affiliated) end users also does not ultimately satisfy either the "just and reasonable rates" standard imposed by Sections 201 and 332 or Section 252(d)(2)'s "mutual and reciprocal recovery of costs" standard and would be arbitrary and capricious. Since only some carriers have invested to construct such facilities, the result of such a rule would be that, for some types of traffic, calling or called party end users will incur the costs of these services, while, for others, IXCs (and ultimately their end users) will incur the costs of these services.

[20] *Transformation Order*, 26 FCC Rcd at 17913-14 ¶ 757 (emphasis in original; citation omitted).

Similarly, a rule clarifying that all carriers have the right to determine the most economical manner in which to deliver the traffic to the edge, including the right to directly connect with originating and/or terminating providers, is consistent with Section 251(a) and Commission decisions implementing its requirements as well as other Commission rules and precedents. Regarding Section 251(a), the Commission established in the *Local Competition Order*[21] that an incumbent LEC at the time of the 1996 Act could not *force* a competitive provider into direct interconnection. Similarly, it follows that an originating or terminating carrier today cannot force indirect interconnection with a competitive IXC that requests direct interconnection with it. In the *Local Competition Orde*r, the Commission was focused on the distinct question of whether non-ILECs (primarily CMRS providers) should *be required* to enter into direct interconnection with an ILEC subject to the requirements of Section 251(c).[22] In finding that they could not be so required, the Commission stated that "indirect connection . . . satisfies a telecommunications carrier's duty to interconnect pursuant to section 251(a)[]" and that "direct interconnection . . . is not required under section 251(a)" for non-ILECs.[23] But, the Commission also made clear in the same discussion that the driving concern was that competitive carriers be permitted to set up interconnection arrangements, particularly those with ILECs, "based upon their most efficient technical and economic choices."[24] In other words, just as CMRS providers in the late 1990's contended that they should be free to choose the most

[21] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 15988-92 ¶¶ 992-998 (1996) (*Local Competition Order*) (subsequent regulatory history omitted).

[22] *Id.*

[23] *Id.*, 11 FCC Rcd at 15991 ¶ 997.

[24] *Id.*

efficient manner of interconnection with ILECs, so too IXCs should be free to do so when seeking interconnection arrangements with CMRS providers or other types of carriers today.

It is important to note that it is impossible to interpret the statutory language of Section 251 (stating that [e]ach telecommunications carrier has the duty…to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers[]"[25]) in a meaningful way without imposing the determinative right of choice on one of the parties in an interconnection relationship. Otherwise, one party's exercise of its purported right to insist on one form of interconnection or another would necessarily result in a trumping of the other party's purported right to insist on another type. Thus, the only way to give Section 251(a) meaning is to give one party the determinative choice and, that being the case, it would only be reasonable to give that right to the financially responsible party.

Of course, a "financially responsible party's right to direct interconnection rule" such as that described above would only be mandatory as a default rule. The rule would permit the parties to, under appropriate circumstances, negotiate an appropriate alternative to direct connection.

Finally, it is noteworthy that, since a direct interconnection obligation would apply equally to all types of carriers (all types of ILEC, as well as CLECs and CMRS providers), it must also comply with Section 251(f) (exempting qualifying rural ILECs from 251(c)).[26] But, Section 251(f) does not present a hurdle to this result. This is because Section 251(f) only relieves qualifying rural ILECs from the special Section 251(c) interconnection obligations otherwise applicable to ILECs – leaving them subject to the more generic interconnection obligations of Section 251(a) applicable to all carriers.

[25] 47 U.S.C. § 251(a).

[26] 47 U.S.C. § 251(f).

III. CONCLUSION

For the reasons stated above, the Commission should take the action described herein.

Respectfully submitted,

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