

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Application for Assignment of License for) MB Docket No. 21-234
KVVU-TV, Henderson, NV)
)
from KVVU Broadcasting Corporation) LMS File No. 0000145518
to Gray Television Licensee, LLC)

INFORMAL OBJECTION; REQUEST FOR CONDITION

Mr. Antenna Las Vegas LLC (“Mr. Antenna”) hereby objects¹ to the grant of the captioned application seeking FCC consent to the assignment of the license for KVVU-TV, Henderson, Nevada from KVVU Broadcasting Corporation to Gray Television Licensee, LLC (“KVVU Application”). The Commission’s consent to the assignment of the KVVU license would be inconsistent with the public interest absent the condition we describe in Section III.

Procedural Context. The KVVU Application is one of numerous long-form assignment applications recently filed in connection with Gray Television, Inc.’s proposed acquisition of the television licenses and related assets of Meredith Corporation (the “Applications”).² The licenses currently are held directly by Meredith or by three indirect, wholly-owned subsidiaries, one of which is KVVU Broadcasting Corporation, the licensee of KVVU.

The Applications were accepted for filing on May 14, 2021. On May 26, the Media Bureau issued a further public notice establishing a special docket,³ thereby signaling that the Gray-Meredith Transaction may present “complex legal, economic or other public interest issues . . . requiring more extensive Commission review”⁴ than is routinely accorded license assignments. To optimize the prospect that the Bureau’s evaluation would take into account all relevant information, the Docket PN

¹ See 47 CFR §73.3587.

² We refer to this as the “Gray-Meredith Transaction,” the “Transaction” or the “Gray Acquisition.”

³ *Media Bureau Establishes Pleading Cycle for Applications Filed for the Assignment of Broadcast Licenses from Meredith Corporation to Gray Television, Inc., and Designates Proceeding As Permit-But-Disclose for Ex Parte Purposes*, DA 21-621, MB Docket No. 21-234, released May 26, 2021 (the “Docket PN”).

⁴ Overview of the FCC’s Review of Significant Transaction, <https://www.fcc.gov/reports-research/guides/review-of-significant-transactions> (last visited August 24, 2021).

announced permit-but-disclose *ex parte* procedures and invited public comments in addition to standing-based objections.⁵ The instant submission is an informal objection to the KVVU Application, including a request that the Commission attach a condition should the application be granted. In addition, because the infirmity we identify is transaction-specific, the condition should be applied to all of the Meredith television licenses that Gray acquires as a result of the Transaction.

I. FACTS

Mr. Antenna is a vendor of outdoor television antennas. From April 2019 until this year, Mr. Antenna advertised its outdoor antenna products and services on KVVU-TV. In late June 2021, however, KVVU notified Mr. Antenna that effective July 1, 2021, KVVU would no longer accept advertising from vendors whose products presented a ‘cord-cutting’ alternative to cable service. Mr. Antenna was told that the decision did not originate locally but came from the senior level at Meredith Corporation and would apply to all of Meredith’s television properties. The reason given for the change in policy was that Meredith’s retransmission consent income is tied to cable subscribership, and that the number of cable households is declining as increasing numbers of people install outdoor antennas as an over-the-air alternative to cable. Therefore, in the eyes of Meredith, such antennas posed a competitive threat. We will refer to Meredith’s position as the “OTA Ads Policy.”

II. ANALYSIS

Under the pattern of facts described below, the OTA Ads Policy conflicts with Meredith’s public interest obligations as the licensee of KVVU, as a licensee of television stations in other markets where the OTA Ads Policy applies; and it will conflict with the public interest *a fortiori* should it be adopted by Gray after the acquisition is consummated. The issue thus has transaction-specific relevance to the Media Bureau’s evaluation. Assuming that the Bureau accepts the Parties’ argument that the Transaction presents substantial public interest benefits, the Bureau should condition its approval on Gray’s commitment to discontinue the OTA Ads Policy at KVVU and elsewhere. The particulars for framing this condition are described in Section III.

* * *

Any assignment of a broadcast license creates a new state of affairs in commerce – a different structure of legal relations. When these structural changes are multiplied by orders of magnitude, as in large-scale transactions, complex legal, economic and public interest issues nearly always emerge. The Commission’s assessment of significant transactions recognizes that more than a merely formalistic

⁵ Docket PN at 2.

review is needed because complex change often reveals its most important effects below the surface, at the level of motivation and incentive.

While the Commission’s analyses are “predictive judgments,”⁶ they are grounded in “extensive regulatory and enforcement experience”⁷ concerning the behaviors of economic actors who are FCC licensees. As the instant case shows, that hybrid identity can sometimes lead to a sort of schizophrenic behavior, particularly on the part of public company licensees who are under severe short-term pressures to maximize profits. This phenomenon naturally undermines the FCC’s ability to take at face value a licensee’s paper representations and commitments. For that reason, among others, “the Commission’s public interest authority enables [the agency], where appropriate, to impose and enforce transaction-related conditions targeted to ensure that the public interest is served by the transaction.”⁸ We show herein that the FCC’s exercise of such authority is warranted in the Gray-Meredith Transaction.

1. The OTA Ads Policy Fundamentally Implicates the Public Interest

Citing its new OTA Ads Policy, Meredith refused to sell spot advertising to Mr. Antenna, a vendor of outdoor over-the-air antennas. To bring into sharp focus the public interest significance of the OTA Ads Policy, we present below a recent context in which Meredith rehearses the central importance of over-the-air television service as a core value of the Communications Act.

On July 9, 2021, KVVU Broadcasting Corporation (Meredith) filed a petition for rulemaking to amend the digital table of allotments in order for KVVU to change channels. In the table below, we quote (in the left column) the portions of Meredith’s petition stressing its commitment to free over-the-air service – indeed, predicating the grantability of its petition on the enhanced over-the-air service that its channel modification will create. In the right column we reproduce Meredith’s original wording but include (in red font) the OTA Ads Policy. Nothing in the red font is fictitious, inaccurate or speculative. We have supplied the bold type to sharpen the disturbing, Escher-like reality that the *factually-complete* Alternate Version of the petition reveals:

<p align="center">Petition for Rulemaking – As filed pp. 1, 3</p>	<p align="center">Petition for Rulemaking – Alternate Version</p>
<p>. . . As demonstrated herein, the proposed channel substitution for KVVU from VHF Channel 9 to UHF Channel</p>	<p>. . . As demonstrated herein, the proposed channel substitution for KVVU from VHF Channel 9 to UHF Channel</p>

⁶ *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1133 (2001).

⁷ *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd 4238, ¶25 (2011) (*Comcast-NBCU Order*).

⁸ *Ibid.*

<p>24 would allow the Station to significantly improve over-the-air service to viewers in the Las Vegas, Nevada market which is important because the Las Vegas market has a high percentage of over-the-air viewers . . .</p> <p>Here, the proposed move to Channel 24 would serve the public interest by providing Las Vegas-area residents with greater access to KVVU’s free over-the-air signal . . .</p> <p>Indeed, reliable over-the-air coverage is particularly critical as more U.S. households continue to cut the cord on traditional cable and satellite services.</p>	<p>24 would allow the Station to significantly improve over-the-air service to viewers in the Las Vegas, Nevada market which is important because the Las Vegas market has a high percentage of over-the-air viewers . . .</p> <p>Here, the proposed move to Channel 24 would serve the public interest by providing Las Vegas-area residents with greater access to KVVU’s free over-the-air signal . . .</p> <p>Indeed, reliable over-the-air coverage is particularly critical as more U.S. households continue to cut the cord on traditional cable and satellite services.</p> <p>Notwithstanding this trend, Meredith’s retransmission consent revenues are tied to cable subscribership. Therefore, Meredith may reject advertising from vendors of out-door antennas in order to protect that stream.</p>
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<p>Petition for Rulemaking – As filed pp. 4-5</p>	<p>Petition for Rulemaking – Alternate Version</p>
<p>. . . Many households are relying on free local broadcast signals, often in combination with online streaming services. This is especially true in the Las Vegas market where on average, more than 25 percent of viewers receive television broadcast signals over-the-air. The COVID-19 pandemic has helped to produce a significant increase in local and national broadcast television newscasts viewership, which further demonstrates that free, over-the-air broadcast TV coverage plays an essential role in providing critical information accessible to viewers. And in a market like Las Vegas, having a strong over-the-air signal becomes even more important during local emergencies such as flash floods, wind storms, earthquakes or wildfires when satellite and cable service, as well as electricity, may be interrupted, because television broadcasters can still reach the many local viewers who have generators in their homes. During local emergencies, television broadcasters provide their local communities with the lifesaving information they need. These ongoing trends underscore the importance of the proposed channel change and the benefits it will provide to the Las Vegas market.</p>	<p>. . . Many households are relying on free local broadcast signals, often in combination with online streaming services. This is especially true in the Las Vegas market where on average, more than 25 percent of viewers receive television broadcast signals over-the-air. The COVID-19 pandemic has helped to produce a significant increase in local and national broadcast television newscasts viewership, which further demonstrates that free, over-the-air broadcast TV coverage plays an essential role in providing critical information accessible to viewers. And in a market like Las Vegas, having a strong over-the-air signal becomes even more important during local emergencies such as flash floods, wind storms, earthquakes or wildfires when satellite and cable service, as well as electricity, may be interrupted, because television broadcasters can still reach the many local viewers who have generators in their homes. During local emergencies, television broadcasters provide their local communities with the lifesaving information they need. These ongoing trends underscore the importance of the proposed channel change and the benefits it will provide to the Las Vegas market.</p> <p>While a strong over-the-air signal in Las Vegas is important, especially during emergencies, Meredith’s retransmission consent revenue is more important. Additionally, it would be contrary to Meredith’s corporate interest if the number of households relying on over-the-air reception increases. In order to curb the rise of over-the-air viewing, Meredith refuses to sell advertising to outdoor antenna companies.</p>

We present the Alternate Version of the petition in order to demonstrate that the OTA Ads Policy conflicts with core public interest values – namely: free, over-the-air broadcasting, robust competition, and public safety.

A. Free, over-the-air broadcasting. Meredith's statement that it has received numerous complaints from viewers living in the Las Vegas DMA who are unable to receive the KVVU signal cannot be squared with the company's decision to refuse advertising from vendors of outdoor television antennas in order to protect Meredith's retransmission consent revenues. The two operational orientations reflected in the Alternate Version are wholly at odds with each other. A licensee cannot execute the OTA Ads Policy and at the same time be operationally committed to the mission of over-the-air television.

It is not that the trustee model is meant to hold licensees to a standard they are incapable of living.⁹ The model is not intended to work at cross-purposes with natural business vectors. It permits the practice of free preference-ordering that traditional economic theory posits. It does not prevent a broadcast firm's revenue ambitions from influencing other aspects of its worldview as an FCC licensee, within bounds.

What the trustee model *does not countenance*, however, is this: A licensee may not utilize, as an overt, intentional strategy, the denigration of a core public interest value *as an instrument for* protecting and enlarging revenues. The corporate objective of maximizing revenue may not rely for its realization on a device, like the OTA Ads Policy, *explicitly designed to diminish* a key goal of the Communications Act *in return for* greater revenue. The Alternate Version of Meredith's channel change proposal is repugnant, *not* because it reveals Meredith's determination to maximize retransmission income, but because the use of the OTA Ads Policy as *an instrument to limit over-the-air viewing for the sake of retransmission income sacrifices a public interest value on the altar of Meredith's private interest*. The marginalization of a core public interest value that results from the OTA Ads Policy is not an accidental effect of the policy. It is the *very purpose* of the policy.

B. Robust competition. Another key objective of the Communications Act is to promote competition in the communications marketplace. Robust competition is the value that most effectively positions consumers to exercise their preferences over an optimal range of high quality services and actionable pricing. The level of competition in a market is largely a function of the ability and desire of consumers to substitute one product for another, depending on price. When cord-cutting is a viable consumer option and is occurring, this is a sign of the market's competitive health: Consumers are substituting over-the-air television for cable or satellite service in response to price, as over-the-air television is free. The phenomenon is a classic, indisputably compelling demonstration of the market

⁹ The Commission's trustee model is hardly a naïve anachronism. Indeed, the recent prominence of 'ESG' frameworks (environment, social and corporate governance) in contemporary corporate culture, the increasingly influential role of social and environmental financial accounting, Wall Street's New Corporate Value Metrics, and other corporate gestalt shifts are strong evidence that the Commission's stewardship paradigm has never been more relevant than it is today.

principle that the FCC constantly champions in its public interest analyses. But the OTA Ads Policy is manifestly at odds with that principle. Meredith's *intention* in adopting the policy is to *stifle the phenomenon* of cord-cutting because it poses a competitive threat to cable and thereby threatens Meredith's retransmissions consent revenues.

The competitive harm that the OTA Ads Policy renders is starkly obvious in the current environment. One tragic effect of the Pandemic has been widespread loss of employment. The Las Vegas market has been one of the regions where employment has been most severely affected because the local economy relies very heavily on tourism. With loss of employment comes loss of household income. When families lose income, they often are no longer able to pay monthly cable or satellite subscriptions fees. Free, over-the-air broadcast service allows them to continue to enjoy television.¹⁰ The OTA Ads Policy, however, is designed to curtail this behavior.

C. Public safety. Meredith's deploying the OTA Ads Policy abuses another core public interest value – namely, public safety. As Meredith's rulemaking petition articulates well, the public's access to information via over-the-air reception has been essential in the Pandemic Era. The OTA Ads Policy, however, undercuts KVVU's *ability* to make the welfare of its viewers a priority; it literally renders Meredith *less able* to achieve the goal of over-the-air signal abundance for the sake of public safety. KVVU's viewers *cannot receive over-the-air signals except by using an antenna*. Optimal OTA reception in most cases requires an outdoor antenna, and outdoor antenna ads enlarge audience awareness of the utility of OTA service.

These harms are not speculative. There is a real-world, causal relationship between outdoor antenna advertising, OTA adoption, and viewer access to free, over-the-air television content. No one can deny that increased OTA adoption shrinks the cable subscribership levels that Meredith's retransmission income depends on. If this were not so, or if Meredith did not believe it to be so, the OTA Ads Policy would not exist.

The OTA Ads Policy crosses a line. It harms the public interest in multiple ways.

2. *The OTA Ads Policy is Relevant to the FCC's Evaluation of the Gray-Meredith Transaction*

We do not have direct knowledge of Gray's position with respect to the OTA Ads Policy. It is curious, however, that Meredith's announcement of the OTA Ads Policy occurred on July 1 – a point in

¹⁰ See Aaron Pressman, "Cord cutting is breaking records during the pandemic," *Fortune*, <https://fortune.com/2020/09/21/cord-cutting-record-covid-19-pandemic/> (Sept. 21, 2020); "US Pay TV Suffers Historic Cord-Cutting," *eMarketer*, <https://www.emarketer.com/content/pay-tvsuffers-historic-cord-cutting> (Sept. 21, 2020).

the Transaction's pendency when the Applicants were anticipating Meredith's imminent sale of its stations. This timing suggests that the OTA Ads Policy may have been urged by Gray to enact – 'the sooner, the better' – a practice that Gray already has implemented or plans to implement throughout its television station universe. Given these circumstances, we urge the Media Bureau to inquire of Gray as to its intentions on this score.

Questioning Gray about its plans *vis a vis* the OTA Ads Policy is warranted for a separate reason. On July 7, 2021, the Commission issued a Notice of Apparent Liability for Forfeiture based on Gray Television's violation of 47 CFR 73.3555(b)(1) – the Local Television Ownership Rule or Top-Four Prohibition.¹¹ Under this Rule, a broadcaster may not own two full-power television stations in the same DMA if both stations have a top-four rating. Historically, the Top-Four Prohibition could be evaded by means of a sale or swap of a network affiliation because non-license asset transactions do not require FCC approval. In 2016, the Commission closed this loophole by adding Note 11 to the Rule. Note 11 disallows network affiliation sales or swaps if the change would result in an entity's having an attributable interest in two of the top-four rated stations in the market unless prior FCC approval via a rule waiver is obtained.

The NALF explains that Gray ignored the Top-Four Prohibition:

We find that Gray Television, Inc., the indirect parent of Gray Television Licensee, LLC, the licensee of Stations KYES-TV . . . and KTUU-TV, Anchorage, Alaska apparently willfully and repeatedly violated the Commission's prohibition against owning two top-four televisions stations in the same DMA. Based upon our review of the facts and circumstances before us, we conclude that the Licensee is apparently liable for a monetary forfeiture in the amount of . . . \$518,283, **the statutory maximum for a single violation by a broadcaster. . . Gray neither contacted Commission staff about the permissibility of the transaction with the licensee of KTVA(TV) nor filed a request for waiver of section 73.3555 prior to consummation . . .**

[T]he violation resulted in the **substantial economic gain that comes from affiliation with a top-four network**, particularly given that the timing of the acquisition enabled Gray to take advantage of the record-setting political advertising expenditures in the months leading up to the 2020 election.¹²

Top-four network affiliations have enormous value. There are several reasons for this, but one important reason is that Top-four network affiliates have significantly greater leverage and can command significantly higher prices in retransmission consent negotiations than stations affiliated with other networks or independent stations. Indeed, in the NALF the Commission drew attention to Gray's 2020

¹¹ *Gray Television, Inc.*, Notice of Apparent Liability for Forfeiture, FCC 21-81, released July 7, 2021 (NALF).

¹² NALF, ¶¶ 1, 7, 10, 13 (emphasis added).

Annual Report, which stated that transactions activity on the year, including the Anchorage transaction, “are expected to . . . provide us, among other things, with the ability to negotiate more favorable terms in our agreements with third parties.”).¹³

The NALF should inform the Media Bureau’s evaluation of the Transaction because the NALF reflects the same unlawful dynamic, driven by the same corporate philosophy, that is at work in the OTA Ads Policy. That is, Gray adopts a strategy whose logic is: ‘Enlarge revenue by denigrating a core public interest value.’ In this case, the NALF actually identifies two values. One is competition. As the Commission pointed out in the NALF, the very purpose of the Local Television Ownership Rule is to “promote competition and a diversity of viewpoints in local markets.”¹⁴ The other value is respect for Commission regulations. Gray’s behavior appears to have been the product of a premediated strategy to violate Section 73.3555(b)(1)¹⁵ where the risk of getting caught was thought to be low and the reward was huge.¹⁶ The Commission wrote:

The forfeiture amounts for the acquisition of an affiliation that violates our Top-Four Prohibition is worthy of that of an unauthorized transfer of control **because of the similar damage they both do to competition, localism, and the Commission’s ability to monitor and regulate those policies.** As noted above, the Commission has found that such transactions “serve as the functional equivalent of a transfer of control or assignment of license” with respect to the Commission’s Top-Four Prohibition.¹⁷

Gray’s behavior as it is described in the NALF is important information. The Anchorage episode did not happen by accident. Forethought, planning, and cunning brought it about. Indeed, the only ‘accident’ was that the FCC happened to learn about it.¹⁸ The information is relevant to the Media Bureau’s evaluation because it relates to Gray’s corporate philosophy – an orientation that is generated at the C-level where the pressure to maximize revenue is felt most intensely. That dispositional characteristic

¹³ NALF, n. 33 (emphasis added).

¹⁴ NALF, ¶ 2.

¹⁵ NALF, ¶10 (“Gray’s acquisition of the affiliation of another Top 4 station in the market was “conscious and deliberate,” and thus willful, as evidenced by the fact that it consummated an agreement to do so without prior Commission approval”).

¹⁶ NALF, ¶ 5 (“Gray neither contacted Commission staff about the permissibility of the transaction with the licensee of KTVA(TV) nor filed a request for waiver of section 73.3555 prior to consummation”); n. 16 (expedience of a network affiliation swap “can be used to evade the top-four prohibition”).

¹⁷ NALF, n. 28.

¹⁸ See NALF, ¶¶ 6-8.

bears in a fundamental way on the *projectability* of the post-transaction world, which is the essence of the FCC’s review responsibility. The NALF is problematic because it suggests that the FCC cannot simply count on Gray to act in good faith. In such instances, the FCC’s imposition of conditions can be a way forward. Where conditions are called for, a ‘reference case’ ensures that the conditions are properly tethered to reality. Here is a reference case:

Like Meredith, Gray recently filed a petition for rulemaking to modify the channel of one of its television stations (WAGM-TV, Presque Isle, Maine). In its petition, Gray states:

The grant of this Petition will create a preferential arrangement of allotments by **expanding the availability of free over the-air television service** in this market . . . This channel substitution **serves the public interest because it will resolve significant over-the-air (“OTA”) reception problems** in WAGM’s existing service area. **With viewers increasingly reliant on OTA signals to receive the most valued video content, providing a strong broadcast signal is more important than it has been in decades.**¹⁹

Perhaps Gray values its recognition that “viewers [are] increasingly reliant on OTA signals to receive the most valued video content, [and that] providing a strong broadcast signal is more important than it has been in decades” higher than the loss of retransmission consent revenues stemming from increased OTA viewership levels. If so, we should expect that Gray will discountenance the OTA Ads Policy that Meredith inaugurated July 1 once Gray has acquired KVVU and the other Meredith stations – but Gray’s plans in this regard are not known yet. It is within the authority of the Media Bureau to ask Gray what its intentions are on this score. We urge the Bureau to do so. Further, in light of the NALF, it would be appropriate for the Bureau to condition its approval of the Transaction as described below.

III. PROPOSED CONDITION

It is important to be clear about our position. We are not concerned here with the issue of when television stations have the right *vel non* to reject advertising.²⁰ Rather, our position is this: In the context of the Gray-Meredith Transaction, it is contrary to the public interest for Meredith or Gray to refuse to sell spot advertising to a vendor of outdoor television antennas when (1) the motivation for this policy is to protect retransmission consent revenues, and (2) the logic of the policy is that outdoor antenna advertising is causally related to OTA adoption, viewer access to free, over-the-air television content, and the cable subscribership levels that retransmission income depends on.

¹⁹ Gray Petition at 2 (emphasis added).

²⁰ There are limited contexts in which stations do *not* have the right to decline advertising – for example, with respect to political broadcasting; and there are limited contexts where stations do have the right or duty to decline advertising – for example, when the ad would involve obscene or indecent speech or advocate illegal conduct. The present discussion does not implicate this set of questions.

In order for the foregoing concept to be converted into a tractable condition applied to the Stations, we suggest that there can be no plausible reason for a television broadcast licensee to refuse airtime to a vendor of OTA antennas other than to discourage cord-cutting and thereby preserve its retransmission consent revenue stream. Therefore, the Commission should impose a condition requiring that Gray and related entities forbear from denying reasonable requests for airtime from vendors of television antennas. The imposition of such a condition would reflect a recognition that the OTA Ads Policy is contrary to the public interest. In addition, this option would have the advantage of simplicity.

Alternatively, the Commission could allow Gray to adopt a policy to refuse to sell spot ads to vendors of outdoor television antennas, but requiring that if it does so, it must upload to the Stations' online public files a statement to this effect, including a certification that the policy's adoption is unrelated to Gray's corporate interest in preserving or maximizing retransmission consent revenues.

Fashioning the condition in the form of the alternative option would put the burden on Gray to lodge its statement in good faith. It may happen, of course, that Gray would adopt the policy with illicit motivation but would make the certification nonetheless. In that event, there may be little that the FCC could do absent revelation of facts that a third party might bring to light. The primary force of the public file approach is that it would require Gray *to make a statement – create a public record* – with respect to the matter. This would add a *gravitas* that should make a false statement less likely.

* * *

The parties may suspend the OTA Ads Policy while the spotlight is on them in connection with the Transaction. However, without adoption of one of the above conditions, the Commission cannot be certain but what the OTA Ads Policy will be revived once the Transaction is consummated and there is no longer a public focus on this issue.

Respectfully submitted,

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August 26, 2021

CERTIFICATION OF KARLO MAALOUF

I, Karlo Maalouf, hereby certify under penalty of perjury that the facts set forth in the foregoing Informal Objection are true and correct to the best of my personal knowledge.

/Karlo Maalouf
Karlo Maalouf

August 26, 2021

CERTIFICATE OF SERVICE

I, Ronald D. Maines, hereby certify that on this 26th day of August, 2021, I caused a copy of the foregoing Informal Objection; Request for Condition to be served on the following by email and (as to the private parties) by US mail:

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