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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20026

Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services	)	CC Docket No. 92-115
Amendment of Part 22 of the Commission's Rules to Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-common Carrier Services	)	CC Docket No. 94-46 RM 8367
Amendment of Part 22 of the Commission's Rules Pertaining to Power Limits for Paging Stations Operating in the 931 MHz Band in the Public Mobile Service	)	CC Docket No. 93-116

PETITION FOR RECONSIDERATION

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PETITION FOR RECONSIDERATION

BellSouth Corporation and BellSouth Enterprises, Inc. (collectively "BellSouth"), by their attorneys, respectfully submit a petition for reconsideration of the *Report and Order* adopted in this proceeding, *Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services*, CC Docket No. 92-115, *Report and Order*, 59 Fed. Reg. 59502 (1994) ("*Report and Order*").

SUMMARY

BellSouth generally supports the Commission's revision and simplification of Part 22. Nevertheless, certain aspects of the *Report and Order* warrant reconsideration. First, the definition for cellular service should be refined. The definition in the *Report and Order* has the potential to lead to confusion and litigation now that PCS and wide-area SMR systems may provide cellular-like services. BellSouth requests that the

definition specifically refer to the cellular frequencies to eliminate any ambiguity.

Second, BellSouth urges the Commission to reconsider its statement that the concurrent use of the same transmitter by different licensees does not serve the public interest. The Commission has previously found such arrangements to be in the public interest and has provided no rational explanation for its decision to prohibit these arrangements. The Commission gave no notice that this new policy was under consideration, to the extent that this policy is intended to apply to sharing by licensees in the same service.

Third, BellSouth urges the Commission to clarify its rules regarding transfers and assignments in several respects. Specifically, the Commission should reinstate the requirement of a transfer application for all *de facto* and *de jure* changes in ownership or control, including changes resulting from a minority owner acquiring a 50% interest. This change is necessary to ensure that all applicants and licensees are on notice of what constitutes a transfer of control. Next, the Commission should provide for automatic grants, subject to reconsideration, of assignments and transfers that are *pro forma* (*i.e.*, not requiring public notice). BellSouth also urges the Commission to simplify its transfer and assignment procedures by eliminating the need for *pro forma* transfer applications for internal organizational changes not altering either the licensee or the ultimate ownership thereof; in such cases, there is no transfer of control requiring Commission review.

Fourth, BellSouth requests that Section 22.108 of the new rules be amended to make clear that only subsidiaries and affiliates which are Public Land Mobile Services licensees must be identified in Part 22 applications. Finally, BellSouth requests that the

Commission reconsider its decision to subject pending 931 MHz paging applications to the new rules.

I. The Definition of Cellular Service Should be Defined Narrowly

In its *Report and Order*, the Commission has adopted a definition of cellular service which may cause problems with the advent of PCS and wide-area SMR systems. The definition that the Commission has adopted reads: "Radio telecommunications services provided using a cellular system," [1] and the phrase "cellular system," in turn, is defined very broadly.

There are several problems with this definition. First, the definition of "cellular system" is so generic that it includes PCS, ESMR, and other systems using technology similar to cellular systems regulated under Part 22. [2] Because the definition of cellular service relies on the general definition of a cellular system, the term "cellular service" necessarily applies to PCS and ESMR services, as well as to today's cellular licensees,

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1 47 C.F.R. § 22.99 (effective Jan. 1, 1995).

2 A cellular system is broadly defined as:

> An automated high capacity system of one or more multichannel base stations designed to provide radio telecommunication services to mobile stations over a wide area in a spectrally efficient manner. Cellular systems employ techniques such as low transmitting power and automatic hand-off between base stations of communications in progress to enable channels to be reused at relatively short distances. Cellular systems may also employ digital techniques such as voice encoding and decoding, data compression, error correction, and time or code division multiple access in order to increase system capacity.

47 C.F.R. § 22.99 (effective Jan. 1, 1995).

who are currently subject to the cellular rules. Under such a broad interpretation, PCS and ESMR licensees providing "cellular service" would be fully subject to the rules for "cellular service," such as the separate subsidiary rule for the Bell Companies, contrary to Commission intent. As PCS and wide-area SMR providers may provide cellular-like services, but are subject to entirely different rule Parts, the Commission should modify its definition of "cellular service" to make clear that the only cellular-like systems included are those licensed in what is now called the Domestic Public Cellular Radio Telecommunications Service, and that other similar services are not included, even though their technical configurations may be similar.

This amendment and clarification is important because the new definition of cellular service may lead to unnecessary civil litigation. Many settlement, partnership, and other agreements in existence today refer to Part 22's definition of cellular service. BellSouth understands, for example, that many partnership agreements give certain partners exclusive rights to provide cellular service in select areas. If the definition of cellular service is broadened, many otherwise qualified companies will be excluded from the PCS auction process by these partnership agreements. At a minimum, any broadening of the definition will unnecessarily sow the seeds of litigation over the scope of these agreements. This is not what the Commission intended.

To avoid confusion as these new services develop, BellSouth proposes that the definition be amended to read as follows:

> A radio service in which common carriers are authorized to offer and provide commercial mobile radio services and auxiliary common carrier services in the bands 824-849 MHz and 869-894 MHz. This service was formerly titled Domestic Public Cellular Radio Telecommunications Service.

II. Different Licensees Should be Permitted to Share the Same Transmitter

On June 9, 1994, the Commission proposed to delete Section 22.119 of its rules which prohibits the concurrent licensing and use of transmitters for common carrier and non-common carrier purposes. [3] In the course of its discussion of inter-service sharing, the Commission also requested comment on whether different licensees should be permitted to share the same transmitter.[4]

The comments focused principally on the elimination of Section 22.119 and all parties supported the elimination of this section. According to the commenters, elimination of the prohibition would result in "economic efficiencies by reducing the costs of constructing and operating facilities dedicated to both private and common carrier paging when air time is available for both private carrier paging and common carrier paging on the existing common carrier transmitters."[5]

With regard to the shared use of transmitters by different licensees, *every party* commenting on this issue indicated that the public interest would be served by allowing such shared use.[6] Despite the support in the record for shared use, the Commission

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3 *Amendment of Part 22 of the Commission's Rules to Delete Section 22.119*, CC Docket No. 94-46, *Notice of Proposed Rule Making and Order*, 9 FCC Rcd. 2578 (1994) ("*NPRM&O*").

4 *Id.* at 2580.

5 *Report and Order* at ¶ 67.

6 *See* Joint Comments of Airtouch Paging and Arch Communications Group, Inc., CC Docket No. 94-46, filed July 11, 1994, at 5-6; Comments of Paging Partners, Inc., CC Docket No. 94-46, filed July 11, 1994, at 3; Comments of PageMart II, Inc., CC Docket No. 94-46, filed July 11, 1994, at 3; Comments of Paging

(continued...)

indicates that different licensees should be precluded from sharing the same transmitter.

BellSouth urges the Commission to reconsider its statement in the *Report and Order* that such shared use does not serve the public interest. Although the Commission's statement was offered n the course of addressing inter-service sharing, and thus would forbid a Part 22 licensee from sharing a transmitter with an unrelated company licensed under Part 90, [7] the language could be read *out of context* to prohibit sharing of a single transmitter by two licensees in the same service. There is no indication that the Commission intended this result. Moreover, the Commission gave no notice that it was considering adopting such a policy. The *NPRM&O* was limited to inter-service sharing issues, and the comments did not address intra-service sharing issues. Since intra-service sharing was beyond the scope of the *NPRM&O*, the Commission could not lawfully adopt such a rule or policy.

There is no justification for any limitation on the sharing of transmitters in the same or different services. With respect to paging companies, the Commission has recognized that the paging industry is highly competitive and private and common carrier paging operations are essentially indistinguishable. Each paging licensee competes with

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[6] (...continued)
Network, Inc., CC Docket No. 94-46, filed July 11, 1994, at 10-11.

[7] BellSouth assumes that a transmitter could be shared by two stations licensed to the same entity, even though those stations hold different call signs, because the Commission found it in the public interest to eliminate the ban on concurrent use in different services. In many cases, however, the Part 90 and Part 22 operations of a single communications entity may be licensed to different subsidiaries. There is no indication the Commission intended to ban sharing between two separate, but related, entities.

a number of other carriers.[8] Given the number of competing paging providers, the shared use of a transmitter between carriers will not harm competition. Generally, paging carriers do not serve the identical geographic area because licenses are not awarded for defined geographic areas as in cellular and PCS. Accordingly, carriers which share a transmitter must still compete with one another in geographic coverage, as well as price and service offerings, and must compete with other carriers not sharing the transmitter in question. Nevertheless, sharing a transmitter may be the most cost-effective way to provide coverage from key locations, such as mountaintop or skyscraper sites, where there may be high costs involved in installing separate transmitters (if even permitted by space constraints).

Additionally, the Commission has long recognized that Part 22 licensees share transmitters. With regard to paging, the Commission has granted licenses to parties proposing to "share a single transmitting antenna system"[9] and virtually every paging licensee has shared a transmitter with another licensee. In cellular, the Commission "expressly codif[ied]" the proposition that a single cellular facility may be used by two different carriers to serve multiple markets.[10]

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8 The Commission acknowledged that paging licensees compete with between 5 and 19 other carriers in a given market. *Report and Order* at ¶ 69.

9 *Beep Communication Systems, Inc.*, 88 FCC 2d 1303, 1306 (1982); *see also Radio Page Stamford, Inc.*, 3 FCC Rcd. 5784 (1988); *ICS Communications*, Mimeo 6728, released Sept. 5, 1986; *Paging Network of San Francisco, Inc.*, Mimeo 6041, released Aug. 16, 1984.

10 *Amendment of the Commission's Rules Regarding Unserved Areas*, CC Docket No. 90-6, *First Report and Order*, 6 FCC Rcd. 6185, 6231 (1991) (subsequent history omitted) ("*Unserved Area Order*"); *see also* 47 C.F.R. § 22.903(e); *Amendment of the Commission's Rules Regarding Unserved Areas*, CC Docket

(continued...)

The Commission has failed to justify a deviation from its prior practice of allowing joint use of facilities and there is no support in the record for doing so.[11] The Commission's only rationale for its determination that shared use of transmitters will no longer serve the public interest is that such use may result in "questions regarding the control and responsibility for the transmitter" and may create "broader service disruptions."[12] BellSouth notes, however, that no reason has been provided for the Commission's present concern in these areas. Paging licensees have shared transmitters for years and BellSouth is unaware of any control issues being raised in recent years as a result of these arrangements. Further, control issues did not hinder the Commission from expressly authorizing the multiple licensing of cellular facilities in 1992. Nothing in the record indicates that control issues have been raised regarding the concurrent use of cellular or paging facilities.[13]

BellSouth also disagrees with the Commission's statement that shared transmitters would cause broader service disruptions. First, the Commission has previously

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10 (...continued)
No. 90-6, *Third Report and Order*, 7 FCC Rcd. 7183, 7190 (1992) (subsequent history omitted) ("Licensees in more than one market can include service from a single cell as part of their CGSAs so long as the cell is *licensed to each licensee* . . . This dual licensing has always been our intent.").

11 *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1979), *cert. denied*, 403 U.S. 923 (1981) ("an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.").

12 *Report and Order* at ¶ 71.

13 Control of shared facilities would continue to be governed by existing standards. *See Intermountain Microwave*, 24 Rad. Reg. (P&F) 983 (1963). To encourage compliance with these standards, the Commission may wish to suggest that parties reduce their sharing arrangements to writing.

found concurrent licensing of cellular facilities to serve the public interest.[14] Sharing facilities creates economic efficiencies that allow the carriers sharing a facility to direct more money toward additional transmitters, thus, delivering improved service to the public quicker than if each facility could only be licensed to a single carrier. Further, shared transmitters are subject to agreements which contain maintenance requirements. The chance of service disruptions is minimized under such arrangements because two parties are monitoring the facility and, therefore, there are greater resources available to be directed at problems. The contractual nature of these agreements also focuses the parties more closely on the status of the shared facility.

Licensees should be able to share transmitters for the same reason that the Commission eliminated the prohibition of using transmitters for both private and common carrier services: licensees will be able to achieve substantial economies of scale without diminishing the quality of service.[15] Prohibiting the use of shared transmitters is not in the public interest because it will result in higher costs to consumers. The Commission has previously recognized that the concurrent use of facilities creates economies of scale and promotes efficient use of the spectrum.[16] Accordingly, BellSouth respectfully requests that the Commission (1) acknowledge that nothing in the revised rules precludes the shared use of transmitters by different licensees, and (2) reconsider its statement that such shared use does not serve the public interest.

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14 *See* 47 C.F.R. § 22.903(e); *see also Unserved Area Order*, 6 FCC Rcd. at 6231.

15 *See Report and Order* at ¶¶ 67-70.

16 *Unserved Area Order*, 6 FCC Rcd. at 6231.

III. Transfer and Assignment Notifications

BellSouth requests that the Commission reconsider the rules regarding transfers and assignments. As described below, BellSouth requests that the Commission (1) adopt a definition of a transfer of control, (2) eliminate the need for approval of purely internal changes in corporate or organizational structure, (3) deem *pro forma* transfers and assignments granted upon filing with the Commission, and (4) eliminate the requirement that copies of all authorizations and notifications pertaining to the licensee be included in a transfer or assignment application.

A. Definition of a Transfer of Control

Under the current Part 22 rules, any ownership or control change that alters *de jure* or *de facto* control of a licensee is a transfer of control requiring prior approval, including any change in ownership from less than 50 percent ownership to 50 percent or more ownership.[17] The new rules do not contain this definition; the only definition found in the new rules regarding a transfer of control reads: "A transfer of the controlling interest in a Public Mobile Services licensee from one party to another."[18]

Despite BellSouth's previous request that the current definition be retained, the Commission failed to include the definition in the newly adopted rules.[19] The new rule would appear to eliminate the reporting requirement for changes in *de facto* and *de jure* control achieved by transferring less than a controlling interest. The current "50% rule"

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[17] *See* 47 C.F.R. § 22.39(a)(1) which provides that "A change from less than 50% ownership or more ownership shall always be considered a transfer of control.".

[18] 47 C.F.R. § 22.99 (effective Jan. 1, 1995).

[19] *See* Comments of BellSouth, CC Docket No. 92-115, filed Oct. 5, 1992, at 10-22.

serves the public interest by ensuring that any acquisition of a majority interest will be reviewed. It also assists in keeping track of major ownership interests in licensees by giving the agency the opportunity to review whether there are changes in the *de facto* or *de jure* control of licensees. [20] This rule revision cannot be sustained, however, because no adequate explanation was given for this significant departure from prior policy.[21]

Under Section 310(d) of the Communications Act, 47 U.S.C. § 310(d), an entity cannot acquire control of a licensee without prior FCC approval, even if control is acquired by indirect means. Thus, the new rule's failure to specify that changes in *de facto* and *de jure* control, including the acquisition of a 50% ownership interest, requires prior approval may induce some parties to engage in transactions that the rule appears to exempt, but nevertheless involve a *de facto* transfer of control. Challenges to such unlawful transfers will result in needless litigation. Accordingly, BellSouth requests that the Commission amend new Section 22.137 to specify that any change in *de facto* or *de jure* ownership or control, including the acquisition of a 50% interest, will constitute a transfer of control requiring the filing of an application and Commission consent.

B. Elimination of Prior Commission Approval for Purely Internal Changes in Corporation Organizational Structure

BellSouth strongly urges the Commission to adopt a streamlined approach for handling the many changes in organizational structure that frequently occur in modern businesses that have no effect on the identity of the licensee or the ultimate ownership or

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20 *See Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 42 (D.C. Cir. 1994); *Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 655 (D.C. Cir. 1994).

21 *See Greater Boston*, 444 F.2d at 852.

control of the licensee. Many businesses are organized with multiple tiers of corporate subsidiaries under a holding company. Radio licenses in such businesses are commonly held by a lower-level subsidiary, which is owned by an intermediate subsidiary, which in turn is owned by the parent holding company. Business strategies may make it necessary to shift the assets of one intermediate subsidiary to another or to merge certain low-level subsidiaries into others.

As BellSouth has previously stated, there is no statutory requirement that these transactions require prior authorization.[22] Section 310(d) of the Communications Act only provides that:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, except upon application to the Commission and upon a finding by the Commission that the public interest, convenience and necessity will be served thereby.

47 U.S.C. § 310(d).[23] The principal purpose of this statute is to ensure that the Commission can review the qualifications of those who will own or control a radio station prior to their assuming that position, rather than afterward.[24] In *pro forma* transactions, however, the ultimate controlling entity remains unchanged and thus, there is no need for prior

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22 Comments of BellSouth, CC Docket No. 92-115, filed Oct. 5, 1992, at 12-13.

23 *See* 47 U.S.C. § 309(c)(2)(B) which exempts from the public notice requirements any application for "consent to an involuntary assignment or transfer under Section 310(d) or to an assignment or transfer thereunder which does not involve a substantial change in ownership or control."

24 *See* S.Sewell, *Assignments and Transfers of Control of FCC Authorizations Under § 310(d) of the Communications Act of 1934*, 43 Fed. Comm. L.J. 277, 282-83.

approval because the Commission has already passed on the qualifications of the controlling entity.

Revising this rule as suggested would substantially reduce the burden and expense involved in effecting corporate organizational changes and would not impinge in any way on the Commission's oversight of licensee activities or qualifications. It would also eliminate the need for Commission processing of hundreds or thousands of *pro forma* transfer and assignment applications each year that are occasioned by purely internal, organizational changes.

C. Deem *Pro Forma* Assignment and Transfer Applications Granted Upon Filing with the Commission

BellSouth urges the Commission to adopt rules that would eliminate a waiting period for grant of applications for *pro forma* assignments and transfers. Specifically, *pro forma* assignment and transfer applications should be deemed granted upon filing with the Commission, subject to reconsideration by the Commission within thirty days from the filing date. BellSouth is unaware of a single instance where a *pro forma* assignment or transfer application has been denied or designated for hearing. Such applications do not involve substantial changes in beneficial ownership or control. There is no substantial public interest issue raised by such applications. Accordingly, the Commission is entitled to engage in a presumption that a properly filed *pro forma* transfer or assignment application will be granted consistent with the public interest. [25]

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[25] The Commission has previously instituted similar application procedures for other services. *See, e.g., Amendment of Parts 1, 2, and 90 of the Commission's Rules*, PR Docket No. 79-338, 45 Fed. Reg. 59880 (1980), *aff'd mem. sub. nom*

(continued...)

Pro forma changes in ownership and control are frequently necessary on short notice due to changing business relationships, corporate alignments, or tax considerations. Deeming the applications granted upon filing would permit licensees to engage in relatively insubstantial reorganizations, partnership changes, and similar activities without waiting for the staff to perform the ministerial task of processing and granting such applications.

D. The Commission Should Eliminate the Need for Filing Copies of Authorizations With Transfer and Assignment Applications

BellSouth requests that the Commission reconsider its requirement that each transfer and assignment application include as an exhibit copies of the current authorizations and notifications relating to the call signs involved in transactions. The requirement should be eliminated for two principal reasons.

First, requiring the submission of authorizations and notifications merely duplicates information already on file with the Commission. This duplicative information is frequently greater in volume than the rest of the application and associated exhibits. Because of this requirement, many transfer and assignment applications require thousands of pages of authorizations. These filings are totally unnecessary and contravene the Paperwork Reduction Act, 44 U.S.C. § 3507(a)(1)(A)-(B).

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[25] (...continued)
Telocator Network of America v. FCC, Docket No. 80-2182 (D.C. Cir. Aug. 14, 1981); *Amendment of Parts 1, 81, and 83*, 70 FCC 2d. 863 (1979); *Personal (Citizens Band) Radio Service*, 41 Fed. Reg. 15849 (1976); *see also FCC v. Pottsville Broadcasting Co.*, 309 U.S. 138 (1940).

Second, in all cases except partial assignments, an assignment or transfer affects all of a licensed station's facilities. These stations are identified by call sign. As the transactions are not facility specific but station specific, identification of the call sign for each station involved in the transaction should be sufficient.

IV. Applicants Should not be Required to List All Affiliates and Subsidiaries In All Part 22 Applications

Under the revised regulations, BellSouth believes that the Commission has inadvertently broadened the scope of the real party-in-interest disclosure that must be made in Part 22 applications. Specifically, under the new Section 22.108, each application for an authorization, or assignment or transfer of an authorization, must include a list of *all* an applicant's affiliates and subsidiaries. Pursuant to current Section 22.13(a)(1), however, an applicant must fully disclose the real party-in-interest to the application, including a list of affiliates and subsidiaries "*engaged in the Public Land Mobile Services*" only. [26] Requiring large corporate entities now to report *every* affiliate and subsidiary would flood the Commission with volumes of needless information. Because the Commission gave no notice that it was considering broadening the reporting requirement, BellSouth believes that the language limiting the reporting requirement was inadvertently omitted from the new rule or, perhaps, was removed in the interest of simplification. The change does not simplify the rules, however. Instead, it substantially

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[26] *See* 47 C.F.R. § 22.13(a)(1); *see also Real Party in Interest Disclosure Requirements in the Public Mobile Radio Service*, Public Notice, Mimeo 1060, 52 Rad. Reg.2d (P&F) 1053 (released Nov. 26, 1982); *Catherine L. Waddill*, 8 FCC Rcd. 2169, 2170 (1993); *Eldon L. Huber*, 6 FCC Rcd. 736, 738 (Mob. Serv. Div. 1991).

increases applicants' paperwork burden without any corresponding public interest benefit. Accordingly, BellSouth requests that the Commission amend new Section 22.108 to make clear that applicants must only list affiliates and subsidiaries engaged in commercial mobile radio services.

V. Pending 931 MHz Applications Should Be Processed Under Existing Rules

BellSouth urges the Commission to reconsider applying the new rules to 931 MHz applications pending at the time the *Report and Order* was released. One of the reasons for adopting rules is to provide certainty to applicants regarding what obligations they must fulfill and what requirements they must meet before an authorization may be obtained for frequency use. Based on these rules, applicants invest considerable time and money developing business plans for providing paging service over these frequencies. Applicants with pending applications have relied on good faith on the Commission's rules. Subjecting these applications to new processing rules is patently unfair and needlessly delays service to the public by impeding grant of these applications. BellSouth concurs with those commenters who urged the Commission to refrain from retroactively applying the new rules to pending applications and respectfully requests that the Commission reconsider its decision.

CONCLUSION

For the foregoing reasons, BellSouth respectfully requests that the Commission reconsider select aspects of the revised Part 22.

Respectfully submitted,

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