

1 No. 3 2020-00085 (“*Case No. 2020-00085*”), one (1) copy of the Confidential
2 Information highlighted with transparent ink, printed on yellow paper, or otherwise
3 marked “CONFIDENTIAL,” is being filed with this motion by electronic mail. A
4 copy of those pages, with the Confidential Information redacted, is being
5 electronically filed with the Application accompanying this motion.

6 3. A copy of this motion with the Confidential Information redacted has
7 been served on all parties to this proceeding through the use of electronic filing. 807
8 KAR 5:001, Section 13(b).

9 4. If and to the extent the Confidential Information becomes generally
10 available to the public, whether through filings required by other agencies or
11 otherwise, Big Rivers will notify the Commission and have its confidential status
12 removed. 807 KAR 5:001 Section 13(10)(b).

13 5. Under the Kentucky Open Records Act, The Commission is entitled to
14 withhold from public disclosure: “records confidentially disclosed to an agency or
15 required by an agency to be disclosed to it, generally recognized as confidential or
16 proprietary, which if openly disclosed would permit an unfair commercial advantage
17 to competitors of the entity that disclosed the records.” 807 KAR 5:001 Section
18 13(2)(a)(1). Public disclosure of the information marked in the Application and its
19 attached Exhibits and Testimony, would permit such a result as discussed fully
20 below.

21 6. Section I below explains that Big Rivers operates in competitive
22 environments in the wholesale power market and in the credit market. Section II

1 below shows that the Confidential Information is generally recognized as
2 confidential or proprietary. Section III below demonstrates that public disclosure of
3 the Confidential Information would permit an unfair commercial advantage to Big
4 Rivers' competitors, as well as the Solar Developer's competitors.

5 SECTION I

6 Big Rivers Faces Actual Competition

7 7. As a generation and transmission cooperative, Big Rivers competes in
8 the wholesale power market. This includes not only the short-term bilateral energy
9 market, the day-ahead and real time energy and ancillary services markets, and the
10 capacity market to which Big Rivers has access by virtue of its membership in
11 Midcontinent Independent System Operator, Inc. ("*MISO*"), but also forward
12 bilateral long-term agreements and wholesale agreements with utilities and
13 industrial customers. Big Rivers' ability to successfully compete in the market is
14 dependent upon a combination of its ability to: 1) obtain the maximum price for the
15 power it sells, and 2) keep its cost of production or purchase as low as possible.
16 Fundamentally, if Big Rivers' cost of producing or purchasing a unit of power
17 increases, its ability to sell that unit in competition with other utilities is adversely
18 affected. . In fact, the Commission recognizing the competitive market for purchase
19 power agreements when it stated, "[I]n this **era of increasing competition,**

1 utilities should be able to purchase power without prior Commission approval”
2 (emphases added).¹

3 8. Big Rivers also competes for reasonably priced credit in the credit
4 markets, and its ability to compete is directly impacted by its financial results.
5 Lower revenues and any events that adversely affect Big Rivers’ margins will
6 adversely affect its financial results and potentially impact the price it pays for
7 credit. A competitor armed with Big Rivers’ proprietary and confidential
8 information will be able to increase Big Rivers’ costs or decrease Big Rivers’
9 revenues, which could in turn affect Big Rivers’ apparent creditworthiness. A
10 utility the size of Big Rivers that operates generation and transmission facilities
11 will always have periodic cash and borrowing requirements for both anticipated and
12 unanticipated needs. Big Rivers expects to be in the credit markets on a regular
13 basis in the future, and it is imperative that Big Rivers improve and maintain its
14 credit profile.

15 9. Finally, the ability to negotiate the most advantageous power purchase
16 agreements and then offer competitive prices to Big Rivers’ Members, companies
17 interested in expanding in Kentucky, such as Nucor, and potential new Members is
18 fundamental to Big Rivers’ continued success.

¹ See *In the Matter of: The Consideration and Determination of the Appropriateness of Implementing a Ratemaking Standard Pertaining to the Purchase of long-term wholesale Power by Electricity Utilities as Required in Section 712 of the Energy Policy Action of 1992*, P.S.C. Administrative Case No. 350, Order at 8 (October 25, 1993).

1 power and the related RFPs; and to the confidential and proprietary construction
2 and operation plans of the Solar Developers.

3 13. The Confidential Information is not publicly available, is not
4 disseminated within Big Rivers except to those employees and professionals with a
5 legitimate business need to know and act upon the information, and is not
6 disseminated to others without a legitimate need to know and act upon the
7 information. As such, the Confidential Information is generally recognized as
8 confidential and proprietary.

9 14. The Solar Developers face substantial nation-wide competition in the
10 renewable energy development market, as partially reflected in Big Rivers’
11 Request for Proposals fully described by the Application and Testimony in this
12 case. Public disclosure of the highlighted Confidential Information in the Solar
13 Contracts would permit an unfair commercial advantage to competitors of the
14 Solar Developers. Recognizing this need for confidentiality, the three Solar
15 Contracts contain detailed confidentiality provisions.⁴ The Solar Developers and
16 Big Rivers have agreed not to disclose the Confidential Information to any other
17 person without the prior written consent of the other party, with only specifically
18 stated exceptions. Further, the Solar Developers submitted their responses to the
19 RFP based upon the understanding the information would not be publicly
20 disclosed, See Reciprocal Confidentiality and Nondisclosure Agreements attached

⁴ See Section 23 of the contracts.

1 hereto as Exhibit A.⁵ The same need for confidentiality applies to the Solar
2 Developers construction and operation plans, the bids from other companies in
3 response to Big Rivers' RFP, Big Rivers' analysis of those bids, and the confidential
4 terms of other contracts such as the Nucor and OMU contracts.

5 15. Additionally, public disclosure of the Confidential Information would
6 provide insight into the prices at which Big Rivers is willing to buy or sell energy
7 and capacity, and Big Rivers' future needs for energy and capacity. The
8 information is also indicative of the market conditions Big Rivers expects to
9 encounter and its ability to compete with competitors. Information such as this
10 which bears upon a company's detailed inner workings is generally recognized as
11 confidential or proprietary. *See, e.g., Hoy v. Kentucky Indus. Revitalization*
12 *Authority*, 907 S.W.2d 766, 768 (Ky. 1995) ("It does not take a degree in finance to
13 recognize that such information concerning the inner workings of a corporation is
14 'generally recognized as confidential or proprietary'"); *Marina Management Servs.*
15 *v. Cabinet for Tourism, Dep't of Parks*, 906 S.W.2d 318, 319 (Ky. 1995) (unfair
16 commercial advantage arises simply from the ability to ascertain the economic
17 status of the entities without the hurdles systemically associated with the
18 acquisition of such information about privately owned organizations").

19 16. Moreover, the Commission previously granted confidential treatment
20 to this type of information. *See, e.g., In the Matter of Application of the Union*

⁵ See [] May reference to the exhibit to Mark's testimony, if not Exhibit attach here.

1 *Light, Heat and Power Company for Confidential Treatment*, P.S.C. Case No. 2003-
2 00054, Order (August 4, 2003) (finding that bids submitted to a utility were
3 confidential); *In the Matter of: Application of Kentucky Power Company for*
4 *Approval of Renewable Energy Purchase Agreement for Wind Energy Resources*
5 *Between Kentucky Power Company and FPL Illinois Wind, LLC*. Case No. 2009-
6 00545, Order (July 31, 2019). While not controlling precedent, Kentucky Power’s
7 application provided several examples from other states recognizing “similar
8 contract provisions constitute confidential and proprietary information, and their
9 disclosure can cause competitive harm:”

10 For example, the Indiana Utility Regulatory Commission issued
11 an Order in the *Verified Petition of Indiana Michigan Power*
12 *Company, An Indiana Corporation, For Approval Pursuant To*
13 *Ind. Code 8-1-2-42(a), 8-1-8.8-11 And To the Extent Necessary 8-1-*
14 *2.5-6 Of A Renewable Energy Purchase Agreement With Fowler*
15 *Ridge II Wind Farm, LLC, Including Time Cost Recovery* Case No.
16 43750 (Ind. P.U.C. September 1, 2009). The West Virginia
17 Commission has repeatedly ordered confidential protection of
18 similar terms and conditions (*Joint Petition for consent and*
19 *approval of wind power purchase agreements between Appalachian*
20 *Power Company and Wheeling Power Company, dba American*
21 *Electric Power and Grand Ridge Energy II LLC and Grand Ridge*
22 *Energy 111 LLC*. Case No. 09-0305-E-PC (PSC of West Virginia,
23 April 29, 2009); *Joint petition for consent and approval of a wind*
24 *power purchase agreement between Appalachian Power Company*
25 *and Wheeling Power Company, dha American Electric Power and*
26 *Beech Ridge Energy LLC and a joint motion for non-disclosure and*
27 *protective order of certain exhibits with the filing*, Case No. 08-
28 1600-E-PC (PSC of West Virginia, December 11, 2008) and
29 *Petition for consent and approval of the purchase of power*
30 *produced by a renewable wind energy resource and for an*
31 *Assurance of Rate Recovery*, Case No. 07- 173 1 -E-PC (PSC of
32 West Virginia, December 4, 2007.). In Virginia, the State
33 Corporation Commission also afforded confidential treatment to
34 the terms and conditions of a similar Wind purchase power
35 agreement (*For Approval Pursuant To Section 56-585.2 Of The*

1 gas suppliers. *Id.* Likewise, in P.S.C. Case No. 2018-00056, the Commission
2 granted confidential treatment to the pricing terms of a contract, recognizing “that
3 the specific cost information may be used to the financial detriment of Cumberland Valley
4 and its ratepayers by allowing potential future vendors to bid just under the cost of its
5 current vendor, which, in turn, would place Cumberland Valley at a competitive
6 disadvantage.” *In the Matter of: Application of Cumberland Valley Electric, Inc. for*
7 *Commission Approval for a Certificate of Public Convenience and Necessity to Install an*
8 *Advanced Metering Infrastructure (AMI) System Pursuant to KRS 807 KAR 5:001 and KRS*
9 *278.020*, P.S.C. Case No. 2018-00056, Order (May 9, 2018). Similarly, potential power
10 suppliers or buyers manipulating Big Rivers’ bidding process would lead to higher
11 costs or lower revenues to Big Rivers and would place it at an unfair competitive
12 disadvantage in the wholesale power market and credit markets.

13 19. Further, if confidential treatment of the negotiated terms of the Solar
14 Contracts, the Solar Developers’ proprietary construction and operation plans, the
15 confidential terms of the OMU and Nucor Contracts, or the bids provided in
16 response to Big Rivers’ RFP is denied, then other companies interested in buying or
17 selling power in Kentucky would know that the confidential terms of their future
18 contracts, plans, or bids may also be publicly disclosed.

19 20. Many companies would be reluctant to have such confidential and
20 proprietary information disclosed because public disclosure would, for example,
21 allow their competitors to know how they offer and price their projects. This would
22 create precisely the kind of competitive harm KRS 61.878(1)c(1) intends to prevent.

1 21. Because companies would not want their confidential and proprietary
2 information disclosed to their competitors, public disclosure of the Confidential
3 Information in this case would likely reduce the pool of companies willing to
4 negotiate with Big Rivers, reducing Big Rivers’ and other utilities’ ability to secure
5 the best terms in power purchase agreements. Big Rivers’ competition for future
6 renewable purchase contracts is not limited to its traditional regulated competitors.
7 Large industrial consumers, municipals, cities, and communities are reaching out to
8 solar developers as well.

9 22. The Commission has also recognized this real danger to utilities in
10 Kentucky. In P.S.C. Case No. 2003-00054, the Commission granted confidential
11 protection for bids submitted to ULH&P. ULH&P argued, and the Commission
12 implicitly accepted, that the bidding contractors would not want their bid
13 information publicly disclosed, and that disclosure would reduce the contractor pool
14 available to ULH&P, which would drive up ULH&P’s costs, hurting its ability to
15 compete with other gas suppliers. *In the Matter of: Application of the Union Light,*
16 *Heat and Power Company for Confidential Treatment*, P.S.C. Case No. 2003-00054,
17 *Order* (August 4, 2003). Similarly, in *Hoy v. Kentucky Indus. Revitalization*
18 *Authority*, the Kentucky Supreme Court found that without protection for
19 confidential information provided to a public agency, “companies would be reluctant
20 to apply for investment tax credits for fear the confidentiality of financial
21 information would be compromised.” *Hoy v. Kentucky Indus. Revitalization*
22 *Authority*, 907 S.W.2d 766, 769 (Ky. 1995).

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Respectfully submitted,

/s/ Tyson Kamuf

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RECIPROCAL CONFIDENTIALITY AND NONDISCLOSURE AGREEMENT

THIS RECIPROCAL CONFIDENTIALITY AND NONDISCLOSURE AGREEMENT (the "Agreement") is entered into this ____ day of June, 2019, by and between National Renewables Cooperative Organization, Inc. ("NRCO"), Big Rivers Electric Corporation ("BREC"), and _____ ("_____"), each individually a "Party" or collectively the "Parties." The Party providing Confidential Information (as hereinafter defined) or Trade Secret (as hereinafter defined) to the other Party or Parties shall hereinafter be referred to as the "Disclosing Party," and any Party receiving such Confidential Information or Trade Secret shall hereinafter be referred to as a "Receiving Party."

WHEREAS, the Disclosing Party may provide certain proprietary, confidential and trade secret information to the Receiving Party in connection with consideration of the projects or proposed transactions as further identified on the last page hereof (the "Purpose"), and each Disclosing Party desires that all such information will be kept confidential by the Receiving Party and used by the Receiving Party only for the Purpose.

NOW, THEREFORE, the Parties agree to the following:

1. **Confidential Information, Trade Secret Definitions.** As used in this Agreement, the term "Confidential Information" means non-public information relating in any way to the Disclosing Party's business that is not a Trade Secret and that is provided to Receiving Party by Disclosing Party in connection with the Purpose. The term "Confidential Information" also includes, without limitation, the existence of discussions between the Parties concerning the Purpose. As used in this Agreement, "Trade Secret" has the meaning ascribed to that term in the Uniform Trade Secrets Act, as amended from time to time.

2. **Exclusions from Confidential Information Definition.** Notwithstanding anything in this Agreement to the contrary, the following shall be deemed not to be Confidential Information:

- a. Information already known or at any time learned by Receiving Party, without breach of this Agreement, from a third party that has no duty of confidentiality to Disclosing Party with respect to such information;
- b. Information that already is in or at any time enters the public domain through no wrongful act of Receiving Party; and
- c. Information that has been or is independently developed by the Receiving Party without reference to the Confidential Information if such independent development can be demonstrably supported.

3. **Nondisclosure and Confidentiality.**

- A. The Receiving Party shall not use the Confidential Information or Trade Secrets disclosed to such Party for any purpose other than the Purpose.

- B. The Receiving Party shall not reveal the Confidential Information or Trade Secrets to any person or entity, except such Receiving Party's employees, agents and consultants (or those of its parent companies, members, subsidiaries or affiliates) who reasonably have a need to know such information for the purpose of furthering the Purpose and who shall be notified of and obligated to maintain the confidentiality of such Confidential Information at least to the extent contemplated hereunder. In addition, the Receiving Party shall use best efforts to prevent disclosure of the Confidential Information received by such Party to any person or entity not specifically permitted hereunder to receive such Confidential Information.
- C. Notwithstanding any other provision of this Agreement, the Receiving Party may disclose Confidential Information in connection with (i) any filings to or proceedings before the Kentucky Public Service Commission, and (ii) any communications with auditors, creditors, or ratings agencies; provided that the Receiving Party seeks for the Confidential Information be afforded confidential treatment with respect to any such disclosures.

4. **Standard of Protection; Prevention of Commingling.** The Receiving Party shall protect Confidential Information and any Trade Secret disclosed by the Disclosing Party with at least the same degree of care as Receiving Party normally exercises to protect its own proprietary information of a similar nature. The Receiving Party shall segregate the Confidential Information and any Trade Secret the Receiving Party receives from other materials in order to prevent commingling.

5. **Notification of Compulsory Process, Subpoena.** In the event Receiving Party receives a subpoena or other validly issued administrative or judicial process requesting Confidential Information and/or Trade Secrets, Receiving Party shall provide prompt actual notice to the Disclosing Party of such receipt, providing the Disclosing Party with a reasonable opportunity to intervene in the proceeding before the time that Receiving Party is required to comply with such subpoena or other process.

6. **Intellectual Property; No Representations.** No license or other intellectual property right is either granted or implied by the conveying of information to the Receiving Party by the Disclosing Party pursuant to this Agreement. None of the information that is disclosed by the Disclosing Party pursuant to this Agreement shall constitute any representation, warranty, assurance, guarantee or inducement to the Receiving Party of any kind. For greater certainty, the Disclosing Party makes no representations or warranties of any nature with regard to its Confidential Information and Trade Secrets, including, without limitation, the completeness or accuracy of such information and no Party shall have any liability to the other Parties from the use of Confidential Information and/or Trade Secrets supplied under this Agreement.

7. **Ownership; Return of Confidential Information, Trade Secrets.** All Confidential Information and Trade Secrets shall remain the property of the Disclosing Party and, to the extent still in Receiving Party's possession, shall be returned to Disclosing Party promptly, along with all copies of the same, upon written request from Disclosing Party to Receiving Party. Notwithstanding the foregoing, the Receiving Party shall be entitled to retain electronically stored data and copies of the Confidential Information and Trade Secrets to the extent such retention is necessary in order to comply with applicable law, regulation, internal retention policies, or the rules of any professional or regulatory body. Further, the Receiving Party shall not be required to return and shall be entitled to maintain any Confidential Information and Trade Secrets contained in the Receiving Party's board minutes or board papers; in pleadings, communications, or other documents in, with, or relating to regulatory proceedings, creditors, ratings agencies, auditors, or members; and in any of Receiving Party's documents containing or seeking advice from advisers or containing legally privileged information. However, all such Confidential Information and Trade Secrets that is permitted to be retained or maintained by this Section shall remain subject to the terms of this Agreement.

8. **Notification of Disclosure.** The Receiving Party shall promptly notify the Disclosing Party upon discovery of any unauthorized or improper use or disclosure of the Confidential Information and/or Trade Secrets, or any other material breach of this Agreement, by the Receiving Party and shall use reasonable efforts and offer reasonable cooperation to regain possession or to prevent further unauthorized use or disclosure of such Confidential Information and/or Trade Secrets.

9. **Export Control Compliance.** The Receiving Party specifically acknowledges that use or disclosure of Confidential Information may be subject to export control laws or regulations and warrants that the Receiving Party shall make no use or disclosure of the Confidential Information contrary to such laws or other applicable laws. The Receiving Party shall not transmit or otherwise forward, directly or indirectly, the Confidential Information received hereunder or any portion thereof to any location outside of the United States unless it receives the prior written consent of the Disclosing Party and is in strict compliance with all applicable laws and regulations.

10. **Termination.** This Agreement shall terminate on the fifth (5th) anniversary of the date of this Agreement, whether or not the Parties ultimately pursue the Purpose further.

11. **Survival.** Liability for any and all breach of this Agreement occurring prior to termination of this Agreement shall survive such termination. All Trade Secret information shall be safeguarded by the Receiving Party as required by this Agreement in perpetuity or for so long as such information remains a Trade Secret under applicable law, whichever occurs first.

12. **Integration.** This Agreement constitutes the entire understanding between the Parties as to the subject matter hereof and supersedes all prior agreements and discussions, whether written or oral, between the Parties as to such subject matter.

13. **Effect of Agreement.** It is expressly understood that this Agreement is not and

shall not be construed as any obligation or form of a letter of intent or agreement to enter into the Purpose. Neither Party may rely on this Agreement or the negotiations or exchange of Confidential Information, Trade Secrets, or other documentation between the Parties as a commitment to enter into binding definitive agreements.

14. **No Waiver Unless in Writing.** None of the provisions of this Agreement shall be deemed to have been waived by any act of acquiescence of a Party, and the provisions of this Agreement shall be waivable only by an instrument in writing signed by the duly authorized officer or representative of the waiving Party or signed by the waiving Party in the case of a waiving Party that is a natural person.

15. **Choice of Law.** This Agreement shall be governed by and interpreted in accordance with the laws in effect in the State of Indiana, including torts, without regard to its choice of law rules and excluding any rule of law that would result in another choice of law.

16. **Remedies for Breach.** The Parties acknowledge and agree that:

- a. The covenants in this Agreement are reasonable under the circumstances and are necessary to protect the Parties and the property of such Parties; and
- b. The breach by one Party of any of the provisions of this Agreement would cause serious and irreparable harm to the other Party that could not be adequately remedied by monetary damages alone.

Each Party, therefore, consents that, in the event of a breach or threatened breach of confidentiality under this Agreement, the other Party is entitled to seek an order specifically enforcing the provisions of this Agreement or an order being issued against such other Party enjoining or restraining it from any breach of the provisions of this Agreement, and agrees that such orders may be issued against such other Party without the necessity of an undertaking as to damages or posting of bond by the other Party seeking any such orders. The provisions of this Section shall not derogate from any other remedy that one Party may have in the event of a breach hereunder by the other Party.

17. **Severability.** If a court of competent jurisdiction would otherwise adjudge, declare or decree all or any portion of the provisions set forth in this Agreement void or unenforceable under the circumstances, the portions hereof that would otherwise be held void or unenforceable shall, automatically and without further act on the part of the Parties or by such court, but only as pertains to those matters or parties before such court, be reduced in scope, territory or duration of time to such an extent that such court would hold the same to be enforceable under the circumstances before such court.

18. **Successors and Assigns.** This Agreement shall inure to the benefit of and be binding upon the Parties and their (i) respective successors, including but not limited to any successors by reason of amalgamation or statutory arrangement, and (ii) permitted assigns. This

Agreement shall not be assigned by the Receiving Party without the prior written consent of the Disclosing Party. Each attempted assignment hereof, if any, not in compliance with this Section shall be null and void.

19. **Parties' Intent.** The language used in this Agreement shall be deemed to be the language chosen by the Parties to express their mutual intent. In the event that an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the Parties, and no presumption or burden of proof shall arise favoring or disfavoring any person or entity by virtue of the authorship of any of the provisions of this Agreement.

20. **Choice of Forum.** Exclusive venue and jurisdiction with respect to each lawsuit or court action, if any, under this Agreement must be brought and exclusively maintained in the _____ Courts of the State of Indiana, it being understood, however, that judgments, orders or decrees resulting from such lawsuits or court actions may be appealed to or enforced in any competent court.

21. **Reasonable Attorneys' Fees.** Notwithstanding anything in this Agreement to the contrary, in the event of commencement of suit by either Party with respect to any of the provisions of this Agreement, the prevailing Party in such suit shall be entitled to receive attorneys' fees and costs that the court in which such suit is adjudicated may determine reasonable in addition to all other relief granted.

22. **Notices.** All notices required or permitted under this Agreement be in writing. Notices must be given by (i) personal delivery, (ii) a nationally-recognized, next-day courier service, (iii) first-class registered or certified mail, postage prepaid, or (iv) electronic mail, to the Party's address specified in this Agreement, or to the address that a Party has notified to be that Party's address for the purposes of this section. A notice given in accordance with this agreement will be effective upon receipt by the party to which it is given or, if mailed, upon the earlier of receipt and the fifth Business Day following mailing.

To NRCO: Attn: Amadou Fall
Address: 4140 West 99th Street, Carmel, IN 46032-7731
Email Address: amadou.fall@nrco.coop

To BREC: Attn: Mark Eacret
Address: 201 3rd Street Henderson, KY 42420
Email Address: mark.eacret@bigrivers.com

To _____: Attn:
Address:
Email Address:

23. **Counterparts.** This Agreement may be executed in multiple counterparts, each of which shall be deemed an original and all of which together shall be deemed one and the same

instrument.

24. **Amendments.** This Agreement shall not be modified, supplemented or altered in any manner other than in a writing signed by each Party.

[Signature Page(s) to Follow]

IN WITNESS WHEREOF, the Parties have duly executed this Agreement as of the date first above written.

**NATIONAL RENEWABLES
COOPERATIVE ORGANIZATION, INC.**

**BIG RIVERS ELECTRIC
CORPORATION**

By: _____

By: _____

Print Name: _____

Print Name: _____

Title: _____

Title: _____

Date: _____

Date: _____

[BIDDER]

By: _____

Print Name: _____

Title: _____

Date: _____

Purpose:

Big Rivers Electric Corporation's evaluation, development, design, and acquisition of or contracting for solar electric generation.

[Signature Page to Reciprocal Confidentiality and Nondisclosure Agreement]

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