BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska Public Service Commission, on its own motion, to determine a rate design and address implementation issues with a connections-based contribution, mechanism.	)))))))	**Application No. NUSF-111, PI-211**

COMMENTS BY
CHARTER FIBERLINK – NEBRASKA, LLC AND TIME WARNER CABLE INFORMATION SERVICES (NEBRASKA), LLC

In accordance with the Nebraska Public Service Commission's (the "Commission") *Opinion and Findings* dated December 19, 2018, Charter Fiberlink – Nebraska, LLC and Time Warner Cable Information Services (Nebraska), LLC (collectively, "Charter") take this opportunity to provide comments.

The Commission opened this proceeding to implement its intent, set forth in its Order dated October 31, 2017:

> [T]o study the issue of rate design, utilization of the publicly available Form 477 or TRS data for identifying and capping connections, and the costs associated with implementation of the connections-based mechanism. We will also determine an appropriate timeline for implementation.[1]

As the Commission realizes, and as Charter's discussion below underscores, the Commission will need to engage in further proceedings before a "workable transition" to a connections-based contribution mechanism is practicable.[2] To date, no state has experience implementing a "connections-based" program on a predictable and competitively-neutral basis. Accordingly, the

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[1] *In The Matter of the Nebraska Public Service Commission, On Its Own Motion, To Consider Revisions to the Universal Service Fund Contribution Methodology*, Application No. NUSF-100, PI 193, p. 31.

[2] *Id.*

Commission should proceed cautiously and provide opportunity for meaningful industry input before implementing the connections-based methodology.

The Commission should also continue to keep in mind the administrative burdens and potential costs to contributing carriers (and customers) as the Commission seeks to migrate from a revenues-based method. Because of its long-standing usage, the issues with a revenues-based contribution methodology are well understood, whereas problems associated with a connections-based method are still largely unknown. Moreover, as discussed in Charter's comments and testimony in Application No. NUSF-100, PI 193, nothing in the state or federal statutes or rules compels the Commission to immediately change the Nebraska Universal Service Fund's (the "NUSF") contribution methodology. Indeed, the transition the Commission contemplates appears to conflict with federal law respecting the state's authority to assess VoIP and other Internet-protocol enabled services on anything other than a revenue basis (calculated as the residual percentage less the interstate revenue allocation).[3]

For these reasons and others discussed below, Charter recommends that any transition to a connections-based method be gradual and calculated to gain an understanding of the effects of the transition on service providers and customers. Recognizing that the Commission seeks a better understanding of how a connections-based system could be implemented, Charter has developed its comments in an effort to be constructive, while preserving its previously expressed concerns regarding the approach overall.[4]

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[3] Rather than repeat its previous discussions in detail, Charter incorporates by reference its positions and statements from Application No. NUSF-100, PI 193.

[4] To be clear, no statement herein waives Charter's arguments with respect to its stated opposition, or its positions regarding Application No. NUSF-100, PI 193, or constitutes any admission against interest with respect to the statements therein and in this proceeding.

1. The Commission seeks comment on establishing a rate design that is consistent with the NUSF Act's statutory goals. More specifically, we seek comment on how to structure a connections based rate design that will result in a specific, predictable, sufficient and competitively neutral contribution mechanism.

Response:

a. As an initial matter, the Commission should separate the issue of rate design from the issue of contribution *levels* (*i.e.*, the desired overall size of the NUSF). A connections-based rate design should not be structured to provide revenues greater than the existing system. Rather, the Commission should continue to focus on determining whether and how a "connections-based" contribution methodology maintains current funding levels.

Increasing the size of the NUSF at the same time the Commission initiates a connections-based rate design would increase the potential for confusion, rate shock and market distortions as residential and business customers react to the implementation of what already would be a change in assessment methods – and potentially in the burdens on customers. Failure to separate these issues would make it impossible to measure the effects of the transition on service providers and their consumers, because all other conditions for a "test case" would not remain equal. As discussed in more detail below, it is inappropriate to use a rate design change as a vehicle to change the level of support.

b. The Commission should gain experience with a relatively simple connection-based system for at least two (2) years before making any major changes. As Charter discussed extensively in testimony in Application No. NUSF-100, PI 193, there are unknowns, only some of which can be anticipated, in transitioning to a "connections- based system.

The need to proceed cautiously in any transition from a revenues-based contribution method appears to be understood by other state commissions. The New Mexico Public Regulation Commission, pursuant to recent legislation, adopted rules late last year to allow a transition from revenues-based contributions to "connections-based" contributions, but has not initiated a proceeding to implement such a transition.[5] The Maine Public Utilities Commission, on its own motion, scheduled but then postponed comments on transitioning to a "connections-based" contribution method.[6] The Maine commission just issued a further procedural order, listing fifteen issues, several of which are the subject of Charter's comments in this proceeding, which need to be addressed.[7] In contrast, in Utah, where the changes to the contribution mechanism became effective at the end of 2017,[8] providers continue to object to the rule changes on grounds that they are not competitively neutral and nondiscriminatory as between prepaid and postpaid wireless providers, or because of the need for consistency in and between the application of state and federal law. Significantly, the charge in Utah is only $0.36/line, nearly two-thirds less than the level suggested by the data here.[9]

c. The Commission should consider whether its decision to adopt a connections-based methodology for VoIP conflicts with the FCC's revenue contribution methodology. As discussed in Application No. 100, PI 193, the FCC ruled in 2010 that it has only authorized states to assess *intrastate* revenues:

> We further conclude that state universal service contribution requirements do not conflict with federal rules to the extent that states calculate the amount of their universal service assessments in a manner that is consistent with the rules adopted in the *Interim Contribution Methodology Order*.

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[5] *See In the Matter of Potential Amendments To State Rural Universal Service Fund Rule 17.11.10 NMAC, Pursuant To Recent Amendments To New Mexico Rural Telecommunications Ac*t, Final Order Adopting Rule, Case No. 17-00077-UT (Dec. 7, 2017).

[6] *Inquiry into Chapter 288 - Maine Universal Service Fund*, Notice of Inquiry, Docket No. 2017-00305 (Nov. 29, 2017), Procedural Order, Docket No. 2017-00305 (Jan. 5, 2018).

[7] *Inquiry into Chapter 288 - Maine Universal Service Fund*, Notice of Inquiry, supra, Procedural Order (Jan. 24, 2018).

[8] *See Utah Administrative Code R746-360 Universal Public Telecommunications Service Support Fund,* Notice that Proposed Rules Have Been Made Effective and Order of Clarification, Docket No. 17-R360-01, Notice, Ut. P.S.C. (Dec. 22, 2017).

[9] Our preliminary review of available data suggests a per-subscription charge of approximately $1.00 per month. This analysis is presented in d. below.

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> "[T]o avoid a conflict with the Commission's rules, a state imposing universal service contribution obligations on interconnected VoIP providers must allow those providers to treat as intrastate for state universal service purposes the same revenues that they treat as intrastate under the Commission's universal service contribution rules."[10]

A connections-based mechanism, which by its nature is unrelated to intrastate revenue, on its face appears incompatible with the FCC's directive. Moreover, a key premise for the FCC *not* preempting state commissions in assessing VoIP service has been the *consistency* of such assessments with the FCC's federal universal service mechanism.[11] Although the FCC has allowed states to impose state universal service contribution requirements on the revenues generated by interconnected VoIP service – which by definition uses a broadband connection – the FCC has not yet made a similar determination with respect to a "connections-based" method.[12]

Implementing an entirely new contribution system will entail costs and administrative changes. The risk of imposing additional transitional costs is increased by the uncertainties of the Commission's authority to assess "connections."

d. Charter suggests that the connections-based system be initialized using Form 477 data[13] as of December 2017. While Charter harbors reservations concerning the stability of the

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[10] *Declaratory Ruling, In the Matter of Universal Service Contribution Methodology, Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, WC Docket No. 06-122, rel. November 5, 2010, at ¶ 17. (Emphasis added.)

[11] *Universal Service Contribution Methodology, Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, WC Docket No. 06-0122, FCC 10-185, Declaratory Order (Nov. 5, 2010), para. 11.

[12] It should also be noted that the FCC cited the Eighth Circuit's finding that "the FCC has made clear it, and not state commissions, has the responsibility to decide whether intrastate VoIP services should be subject to universal service assessments" (*Ibid* para 14), suggesting that only the FCC has the authority to modify the contribution methodology that applies to VoIP services.

[13] Charter presumes, based on the Commission's statement, that the Commission intends to obtain and use *public* (aggregated) connections or subscribership information. To the extent that the Commission contemplates using FCC

voice-subscription data in the future should the Commission proceed in this manner, the Form 477 voice-subscription data is probably the best available data at this time. Based on Form 477 data for June **2016**, such a system would produce the following distribution among industry participants:

Nebraska Voice Subscriptions (thousands)

Mobile	1,919	72%
ILEC	366	14%
Non-ILEC	381	14%
	2,666	

Although the Commission has only posted NUSF remittance data for the first 3 quarters, assuming that the monthly decline in the fourth quarter is the same as the average decline in the prior nine (9) months, the Commission will collect approximately $ 32 million in 2017.[14] If recovered equally from all 2.67 million voice subscriptions (2016),[15] the resulting NUSF fee would be no greater than $1.00 per voice-subscription per month. In other words, the "steady state" connections-based NUSF fee should average no more than $1.00 per month – any amount above this represents not a change in rate *design*, but an *increase* in the fee on Nebraska's consumers and businesses.

e. Although 477 provides a simplified starting point, the Commission would still need to address (at a minimum):

i. How to best use data that is only produced biannually.

confidential Form 477 data, the Commission should obtain it directly from the FCC, and subject to the FCC's limitations on disclosure, for the reasons discussed by Charter in Application No. NUSF 100, PI 193.

[14] Source: Quarterly Remittance and Fund Balance Report, available at: http://www.psc.nebraska.gov/ntips/ntips_nusf.html.

[15] Source: State-Level Subscriptions available at: https://www.fcc.gov/voice-telephone-services-report.

ii. A connection-based system would remove contributions from intrastate special access services.

iii. Although $1.00 is a relatively small percentage of most phone bills (even when applied to all voice subscriptions), the charge may still present potential problems for large businesses and institutions served, for example, by conventional line-based technologies (PRI and other TDM services).[16]

iv. How to collect a contribution payment from wireless resellers that do not report voice subscriptions on Form 477.

2. Further, the Commission seeks comment on a proposed rate design that will reasonably balance the burden of the surcharge with the requirement that the NUSF provide reasonably comparable access to telecommunications and advanced communications services in rural high-cost areas.

Response:

Assuming the Commission adopts a per-voice subscription charge, Charter believes the Commission should not use a change in rate design to increase the NUSF burden on Nebraska's consumers and businesses. As discussed above, Charter estimates that a steady-state (2017) voice subscription charge would be no higher than $1.00 per month. Any proposal with an average charge above this level represents an increase in the NUSF fee and not a change in rate design.

3. We solicit comments on how to design a contribution mechanism in light of the estimated costs to deploy broadband service to the remaining areas in Nebraska and the ongoing costs to maintain areas that have already built out. On the one hand, the Commission currently uses the Benchmark Cost Proxy Model (BCPM) which was a cost model we recommended to the FCC for universal service in Docket No. C-1633. More recently, we made the State Broadband Cost Model (SBCM) available to interested parties through a licensing agreement. The SBCM estimates broadband deployment costs

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[16] Moreover, the charge is likely to be a large percentage charge on IP-based business services that establish temporary voice-channels over internet pipes. The "incremental price per-voice channel" of such services is low compared to TDM products (for instance, $5 month).

Charter also has previously expressed the concern that the Form 477 instructions addressing the "maximum number of interconnected VoIP calls" as that term is used to report the number of business voice subscriptions may become a point of contention in future filings.

throughout the state. Are there other broadband deployment costs the Commission should consider? How should these costs be considered when determining a connections-based surcharge?

<u>Response</u>:

a. Charter opposes determining broadband support payments based on the SBCM or any other cost model that looks only at what an incumbent *might* invest to provide broadband. To begin, it has become clear that the underlying data used by such models does not accurately reflect the number of locations in rural areas that are today unserved by broadband. This so-called "location gap" has been the topic of recent filings by USTelecom and ITTA before the FCC.[17] Although the topic of these filings concerns areas subject to the upcoming Connect America Fund ("CAF") Phase II auction (discussed in more detail below), the problem is not limited to these areas. In simple terms, the CAF model (and thus its progeny) assumes there are significantly more locations in rural areas than actually exist. As a result, the model will construct facilities – and thus include costs – to serve phantom locations. This bias fundamentally overstates the cost of broadband coverage by including network end-points that are not needed.

In addition, Charter has previously explained that other data indicates that (1) the SBCM and its predecessor Cost Model likely overstate costs, and (2) the better structure to determine support is to move towards an auction process that incorporates information from the FCC's auction.

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[17] *See, e.g.*, Ex Parte Letter from Jonathan Banks (USTelecom) to Marlene Dortch, CAF Phase II Auction (WC Docket No. 10-90; Auction 903), January 19, 2018 stating that its "...due diligence effort revealed approximately 18% fewer locations" exist than claimed by the Connect America Model. *See also*, Ex Parte Communication, WC Docket Nos. 10-90, 14-58, 14-259, and AU Docket No. 17-182, ITTA, January 22, 2018 citing a study that "found an overestimation of model-identified locations in 85 percent of 144 exchanges, with an average discrepancy of approximately 22 percent between model-identified locations and "real-world" locations."

i. There are two data sets that suggest that the CAF Model, which is the basis for the SBCM, overstates the cost of broadband deployment. The first data-set is drawn from the FCC's Rural Broadband Experiments ("RBE"), and the second data-set concerns the very high acceptance rates for the "statewide offers" of support that the FCC made to the price cap ILECs. Although many details of the RBE are proprietary, it is known that *each* of the rural experiments proposed to offer service requesting support at or below model-calculated levels, with high-performance network bidders (*i.e.*, bidders that offered to build networks with 100/25 Mbps download/upload speeds) collectively requesting $69 million in annual support for census blocks that would have received $149 million in model-based support. Second, the ILECs accepted 94% of the offers representing over 95% of the available support. Acceptance rates in this range indicate that the offers were overly generous.

ii. Charter recommends that the Commission move from a cost model approach to a reverse auction approach that does not duplicate federal universal fund (CAF, A-CAM or legacy) subsidies. It is important to appreciate that the FCC's reliance on the cost-model approach was intended to only jump-start the broadband process, but that its long-term vision – finally being implemented now – has been to rely on market-auctions to fund the best broadband proposals. It makes no sense for the Commission to stay wedded to a "first generation" approach when the FCC is making those models obsolete with its auction system. Indeed, the FCC has on its January 30th agenda an item that indicates that the first-round auction – which will award $1.98 billion over the next ten (10) years – will begin July 24, 2018.[18]

The far better path than relying on cost models is for the Commission to await the results of the CAF Phase II auction in July and determine from that auction the proposals to serve areas in Nebraska and their relative cost. To the extent such proposals produce the most efficient outcome, the Commission could direct the NUSF to those proposals in Nebraska that fail to achieve federal funding. Even more importantly the auction will provide a market-test of the cost estimates of the federal model as the CAM establishes the reserve price. The Commission should place greater faith in the cost profiles observed from the auction than in simply accepting the results from a hypothetical cost model.

iii. The use of a reverse auction process is not only current federal policy, it is also part of a current Nebraska legislative proposal as well. For example, newly introduced LB 994 would authorize the Commission to conduct a reverse auction to award broadband grants for Internet infrastructure deployment projects in unserved or underserved areas of the state. The bill (whatever its other merits may or may not be) directs the Commission to withhold universal service funds from companies that have not served, to the Commission's satisfaction, areas with service that meets the criteria for "successful investment of Nebraska Telecommunications Universal Service Funds[,] and instead use such funds to implement and operate a reverse auction program." To summarize, there is no valid reason to rely on cost-model data when market proposals are on the *immediate*

[18] *See* Public Notice, Connect America Fund Phase II Auction Scheduled For July 24, 2018, Notice And Filing Requirements And Other Procedures For Auction 903, AU Docket No. 17-182 WC Docket No. 10-90. (On Agenda for Adoption January 30, 2018).

horizon and which will greatly inform the Commission on the reasonableness of the cost model's estimates.

4. It was suggested by some commenters in NUSF-100/PI-193 that a per-line connection assessment could result in a significant impact on enterprise business customers. In the workshop held in that proceeding, some participants discussed the potential use of a cap similar to that used in the Telecommunications Relay Service (TRS) program, which is capped at the first one hundred telephone numbers or functional equivalents per subscriber. Should the Commission likewise adopt a rate design which uses a cap for business lines for NUSF remittance purposes? If so, please provide comments or recommendations related to the method by which the Commission could calculate the cap. What source data should the Commission use to determine a cap? We ask interested parties that have an interest in a surcharge cap to assess the impact such a cap would have on the overall annual remittances either by an individual carrier or as a whole relevant to the total remittance base and provide the Commission with that information for its consideration.

Response:

a. The cap approach may be viable, but only in combination with a reasonable rate (such as the $1.00 per connection suggested here).

b. The cap does *not* address the fact that businesses are moving towards services that establish *temporary* voice paths within broadband pipes that are dramatically less expensive than legacy TDM services. The Form 477 instructions indicate providers should report the maximum number of such paths (alternatively, the PBX equivalent), even though such temporary paths are not economically equivalent to permanent paths of legacy technology.[19]

c. The best way to minimize the distortions of a connections-based regime is to *not* use the change in rate design as an excuse to raise the aggregate subsidy level. The funding level of the state high cost program currently appears to be about $28 million of the $38 million total

[19] Charter previously explained its concern that the Form 477 instructions are not likely to produce uniform outcomes across multiple firms. *See* also Charter response to question 6 *infra*.

NUSF budget.[20] The rate design discussion would benefit by the Commission focusing on a steady-state rate level so that the size of the fund debate does not distort issues involving rate design. That said, Charter has always stated the view that a smaller fund produces smaller problems, particularly as the Commission seeks to implement a new rate design.

d. Some commenters in Application No. NUSF-100, PI 193, proposed to analogize the TRS program with the high cost NUSF program, but there are significant differences between these programs. The TRS statute, mandates a charge, not exceed twenty cents per month on each telephone number or functional equivalent in Nebraska (with a cap of 100 numbers). The TRS program has a minimal annual budget for the TRS program (approximately $600,000).[21] This reflects the declining use of traditional TRS and Captel, and the resulting minimal ($.01 per telephone number) fee. [22]

5. In order for the Commission to assess the comparative contribution differences among categories of service moving from a revenues basis to a connections basis, we ask commenters to provide the following aggregate data:

a. The average monthly NUSF contribution per consumer-grade service customer under the current revenues-based contribution mechanism as well as a calculation of that current contribution on a per connection basis for both circuit-switched and interconnected VoIP customers.

Response:

i. The "average monthly NUSF contribution" data sought by the Commission to assist in developing rate design lacks a specific definition and, given the diversity of products and customer bases, will largely be meaningless. Moreover, it is unclear how the

[20] 2017 Annual Report to the Legislature on the Status of the Nebraska Telecommunications Industry, Nebraska Public Service Commission, September 30, 2017, p. 17; Year 14 NUSF 26 Distribution Model Public spreadsheet, available at http://www.psc.nebraska.gov/ntips/ntips_nusf.html.

[21] State of Nebraska Executive Budget, 2017-2019 Biennium, pp. 198-99.

[22] Nebraska TRS Advisory Committee Meeting minutes, January 20, 2017.

Commission would (or could) use a limited sample of data from only certain carriers or industry segments that may not even be comparable.[23] It would seem more useful to a rate-design analysis that all parties have access to the same (and most current) data, aggregated to the maximum extent practical to protect carrier confidentiality.

ii. Most Charter customers subscribe to a bundled service product. It is important to appreciate that Charter uses "all in one" pricing, to which Charter does not add a surcharge for NUSF. In effect, Charter pays the NUSF surcharge for its customers, which reduces the revenues that Charter has to invest in its own broadband facilities. This produces the counter-intuitive consequence that Charter – one of the largest investors in broadband facilities in the state – must use its revenues to build its own broadband network as well as pay to build facilities in other parts of the state. While Charter does not categorically oppose programs to extend broadband to areas unserved by any carrier today, it believes that the only fair way to open such a system to all providers, and all technologies, is to consider ways to coordinate the NUSF with the federal auction system.

b. The average monthly NUSF contribution per business and government grade service customer under the current revenue based contribution mechanism as well as a calculation of that current contribution on a per connection basis for both circuit-switched and interconnected VoIP customers.

Response:

See response to 5(a) above.

c. The average monthly NUSF contribution per mobile telephony service customer under the current revenues-based contribution mechanism as well as a calculation of that current contribution on a per connection basis.

Response:

[23] For instance, it is Charter's understanding that the largest contributors to the NUSF are likely to be wireless carriers that are not direct participants in this proceeding.

Charter does not provide mobile telephony in Nebraska and has no such information to report. Charter observes, however, that because wireless carriers have most of the voice subscriptions in the state (over 70%), the Commission would have to obtain data from the wireless industry, including, in some instances, from wholesale providers (because resellers themselves do not have reportable Form 477 data) in order to meaningfully engage in rate design.

6. In providing responses to the questions posed in questions 1-5 above, the Commission requests that the commenters explain how connections data reported to the FCC on Form 477 was used, if applicable, and if so, how the instructions for Form 477 were relied upon for definitional or other determinations.

Response: Because Charter's network separates voice from its other services, it is relatively simple for Charter to report voice subscriptions on Form 477. Charter's concern, however, is that "over the top" voice providers, and integrated voice/broadband cloud providers, utilize different network architectures and may not report voice subscriptions in a consistent manner, even though such firms compete with Charter for residential and business customers. To date, most of the discussion in this proceeding has been from legacy providers that use TDM technologies that are premised on voice connections (*i.e.*, 64kbps channels), wireless providers that equate voice connections to handsets, and cable companies that typically segregate voice from other services. The companies that enjoy the greatest flexibility in how Form 477 is completed – Over-the-top and Cloud-based Integrated Providers – have never participated in these proceedings. The absence of these providers in the hearing room does not mean, however, that they are not in the market. Indeed, both CenturyLink (with Level 3) and Windstream (Earthlink and Broadview Networks) are increasingly turning to IP-based services through acquisition. Charter remains concerned that relying on Form 477 data for these types of providers will prove unworkable.

7. If a commenter believes that a state-wide data source other than the FCC Form 477 data is appropriate, please explain how that data source meets the objectives of the Commission regarding the need for data to implement the connections-based mechanism. As part of this explanation, please explain why such a data source should be used and how compliance with Commission objectives would be achieved through its use.

Response:

See (6) above.

8. We seek comment on how a connections-based system should be implemented. What are the associated costs and benefits of moving to a connections-based system? How would the costs differ from any other flat rate charge currently established by the Commission such as the E911 or the TRS surcharge?

Response:

As noted, Charter does not impose a NUSF fee on its subscribers.

9. We ask interested parties to provide the Commission with an estimation of cost of a billing system conversion as well as the time required to complete such a conversion to implement a connections-based NUSF contributions mechanism. Please include any supporting data.

Response:

See (8) above.

10. Please identify and quantify other costs which may be associated with implementation of a connections-based mechanism, including necessary supporting data as well as a timeline for implementation.

Response:

a. It is unclear how a connections-based system would be audited. Moreover, Charter anticipates that there will be unexpected (and, therefore, unknown) consequences from moving to a new assessment system. Consequently, we reaffirm our view that the Commission should provide a 2-year window of actual experience for the new system to stabilize before judging whether it has met its objectives.

Respectfully submitted this 30th day of January, 2018.

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