



## APPENDIX J

### CORRIDOR LAND MANAGEMENT OPTIONS

November 1, 2012

#### **Introduction:**

During the development of the Illiana Corridor Tier 1 Environmental Impact Statement, interest has developed in preserving a “green” corridor concept along the proposed transportation corridor. Different stakeholders have approached this issue from several different viewpoints. For instance, the US Environmental Protection Agency’s August 28, 2012 DEIS comment letter included a request to consider a wide transportation corridor that could contain multiple modes of transportation, flanked by planned natural buffers on each side of the transportation corridor to provide ecological connectivity. Kankakee County expressed interest in providing utility connectivity (i.e. electric transmission lines and pipelines) additional corridor space to accommodate existing and future needs. The Will County Farm Bureau weighed in on the concept, stating that a multi-purpose corridor might offer their members benefits if it concentrated transportation and utility impacts in one place while alleviating them in others. Additionally, members of the Illiana Corridor Planning Group (CPG) and Technical Task Force (TTF) stated similar ideas during discussions at CPG/TTF meetings, in comments received as part of Public Meeting #1 and during one-on-one stakeholder discussions. While it is clear that the foremost priority of the majority of stakeholders is for the Illiana Corridor to provide transportation benefits in the Study Area, the concept of a multi-purpose corridor has been a consistent topic of conversation supported by stakeholders from the very beginning of the study process.

The Illiana Corridor Tiered EIS study recognizes the need to identify project elements that are directly related to the project’s Purpose and Need, and in Tier One identified three “build” corridors of approximately 2,000 feet in width that would serve as planning corridors for locating the transportation improvement that will be refined in Tier Two studies. The “working alignment” identified nominal 400 foot alignments within the 2,000 foot corridors that represented a transportation facility in place, with enlarged areas near potential highway interchange locations. The Tier One study also

recognized that the Tier Two footprint is likely to vary in actual width from the nominal 400 feet, being wider or narrower as needed to accommodate the transportation facility, drainage or mitigation features, access roads, and the like. Protecting lands directly adjacent to the initial Illiana Corridor footprint for future uses is not directly related to the project purpose and need; however, tools to protect these areas are available and their use is outside of the NEPA process.

This paper discusses some of the tools that are available to units of state and local government to promote the development of a multi-purpose, open-space, and efficient transportation corridor. It is worth noting, however, that achieving these objectives constrains the goal of promoting economic development within the corridor, and vice-versa. Moreover, the fragmented jurisdictional nature of the corridor (which includes two States and multiple local government planning areas) may, when combined with the general political desirability and competitive nature of economic development, make it difficult to preserve open areas. To the extent that these issues predominate land use planning discussions in the corridor, the affected communities may see a benefit to adopting a cooperative corridor planning effort to ensure that a balancing of these outcomes is affected, and that an equitable distribution of benefits occurs.

Following are some of the various techniques that could be considered by the various jurisdictions to accomplish such a goal in the states of Illinois and Indiana where the Illiana Corridor is located.

#### **Outright Acquisition by State DOT's:**

This strategy would consist simply of identifying the amount of space over and above that which is needed for the initial roadway to accommodate additional multi-purpose needs. The advantage of this strategy would be that the state agency would have complete control over the land use within the wide corridor, thus pre-empting conflicting development and preserving the corridor for whatever future uses it might entail.

This strategy has several negative implications. The use of eminent domain (to allow acquisition from unwilling sellers) may be justifiable under state and federal laws requiring acquired property to be for a "public use"; however, many jurisdictions have taken a harder look at acquiring public property for potential private use (such as by a P3 developer or utility company) after the US Supreme Court's *Kelo* decision in 2005; also, plaintiffs in an eminent domain action might successfully convince a court that a future need, especially one that has not been proven to exist, cannot be used to justify an immediate taking. Other disadvantages to this methodology are that the state needs to expend the funds upfront to protect the property, and that acquisition removes private property from the local tax rolls potentially decades before it is needed for a public purpose. Every increment of 100 feet of corridor expansion would likely cost in excess of \$7 million<sup>1</sup> for acquiring parcels along the length of the corridors under consideration.

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<sup>1</sup> 50 mile corridor length and \$12,000/acre average value of land and buildings assumed.

It is also noted that INDOT currently follows a policy of obtaining land from “willing sellers only” for purposes of establishing mitigation sites, although the agency reserves the right of condemnation as with other acquisitions. Therefore, if land were to be acquired for the purpose of providing additional “green space” under the context of mitigation for the Illiana Corridor in Indiana, the acquisitions would be from willing sellers.

### **Conservation Easements:**

Conservation Easements have primarily been used by both private organizations and public jurisdictions to protect lands from commercial, industrial or residential development.

Kane County, IL has a formal program of protecting agricultural lands from premature development, using a mixture of state and federal funds. The federal aspect of the program is referred to as FRPP, or Farm and Ranch Lands Protection Program, administered by USDA with matching local funds. The county has elected to preserve some farmland with easements with 100% county money, in addition to the easements acquired with joint county/federal funds. The county’s source of money is a dedicated fund derived from county proceeds from the two operating casinos in Aurora and Elgin in Kane County. According to the information provided by Openlands, Kane County has used 100% of Illinois’ USDA allotment over the past several years as no other county or local entity is participating in this program yet.

So far, Kane County has entered into easements for over 5,000 acres of land since its inception in 2001. To put this in perspective, 5,000 acres of easements translates to a strip about 800’ wide through the length of the Illiana Corridor. Typically, this is done parcel by parcel (placing an easement on an entire property) instead of acquiring “strip” development rights as might be done in a transportation corridor. The easements allow existing uses and limited development relating to farm outbuildings, additional residence for family members, etc. but the intent is to prevent non-agricultural commercial, industrial or subdivision-scale residential use on the property, in perpetuity. The county does have the right to terminate the easement if it wished to re-zone the property at some time in the future; however, any federal funds used from USDA would then have to be reimbursed back to the federal government by the county.

There is a discussion in the Openlands’ report about the use of eminent domain (ED) to forcibly put a conservation easement on lands desired for protection. The opinion is that ED is applicable to this use if a county wished to use it; however, Kane County expressly forbids use of ED in its conservation easement program. There is also discussion about a transportation corridor pre-empting a conservation easement such as those protected by the FRPP program. Under IL law, if public projects, such as highway expansions, take property subject to a conservation easement, that agency must provide compensation for both the value of the property and the agricultural conservation easement to avoid an unjust taking.

Indiana does not have any substantial participation in FRPP. No applications have been received from potential participating state or local agencies since the program's inception, and there are no pending applications. USDA currently maintains the FRPP program through its National Resources Conservation Service (NRCS) Easement Program in Indiana.

It is noteworthy that some not-for-profit foundations, including the Nature Conservancy and the Conservation Fund, provide for voluntary fee-simple acquisition and/or easement adoption through contributions by property owners, which can then be written off on that owner's income taxes as a charitable contribution.

*References:*

<http://openlands.org/farmland-protection/your-community/kane-county-illinois.html>

Includes Openlands report entitled *Authority, Structure, and Operation of Purchase of Agricultural Conservation Easements*.

<http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/farmranch>

Interview with Janice Hill of Kane County (IL) Development and Community Services Department, August 24, 2012

Interview with Brianne Lowe, state manager of FRPP program, USDA NRCS Indianapolis, IN office, October 31, 2012

**Corridor Protection:**

Both Indiana and Illinois have corridor protection statutes that allow the states to protect transportation corridors independent of the NEPA process, and long in advance of major project development or construction. Illinois' process was enacted in 1967 and has been amended over the years, while Indiana's process was formally adopted into law in 2008. Illinois' law was challenged and went all the way to the U.S. Supreme Court, which refused to hear the case, upholding the state Supreme Court's unanimous ruling that the state law was constitutional. Indiana's corridor protection law is modeled after Illinois' law, with two notable exceptions:

- The Indiana law contains a section on compensation for property damages incurred while establishing a corridor protection, while the Illinois law is silent on this subject.
- The Illinois law contains a 10-year "sunset" provision where each corridor protection must be reviewed for validity on each 10-year anniversary of the protection, including a public hearing requirement. The IDOT retains the decision making power to keep the corridor in place or to remove it, but must consider the need and public input in making its decision. Indiana law does not have this requirement.

Corridor Protection works by mapping out a corridor protection area which is attached to the deeds of property in all parcels underlying the corridor. It then requires all potential developers seeking improvements on their property to first notify the states of their intent, allowing the states the first right of refusal in preemptively acquiring the property so that development can be prohibited. Typically, small improvements such as building a shed or home addition have not been preempted by Illinois in its application, but rather large scale developments such as residential subdivisions or commercial buildings have triggered a state protective response.

The Corridor Protection laws enjoy several advantages as a method to protect against unwanted development. They do not require state expenditure until a parcel comes into “play” due to potential development. The protection puts property owners on notice and may discourage potential development merely from its potential for application. Corridor Protection does not require review under NEPA or other state or federal laws and policies, and is designed to protect land from development for a need far into the future. Illinois’ law has been tested by the US Supreme Court and found to be valid, at least in a transportation usage. Disadvantages to Corridor Protection are that it has not been used to protect uses other than transportation (and both states’ legislation may need to be amended for those purposes), and requires the states to be ready to expend funds if a need for protecting a parcel arises.

References for Indiana and Illinois Corridor Protection legislation:

<http://www.in.gov/legislative/bills/2008/SE/SE0031.1.html>

<http://www.ilga.gov/legislation/ilcs/fulltext.asp?DocName=060500050K4-510>

### **County and Municipal Zoning and other protection:**

Local public agencies in both Illinois and Indiana have a number of tools at their disposal to preserve open space and encourage the development of alternative transportation facilities. The pertinent jurisdiction for the application of such tools varies, and is subject to interpretation and refinement. For example, Indiana Code allows for cities and towns, within certain limits and with the permission of their host counties, to adopt planning jurisdictions that extend beyond their municipal boundaries, as well as lays out remedies should these jurisdictions overlap.

Since the proposed Illiana corridor crosses multiple planning jurisdictions, a high degree of coordination will be required between units of local government to ensure that any local plans and implementing tools relevant to the corridor are consistent in their scope and effect. For this reason, one potential option is that comprehensive land use plans for affected jurisdictions consider including growth management and the preservation of open space as community goals, if they are not already included. In addition to ensuring consistency in application both within and across communities, in both Illinois and Indiana comprehensive plans are the policy foundation for any tools that are adopted, and without their amendment the legality of adopting implementation tools (particularly regulatory mechanisms) may be put at risk.

As an example of a prior effort, Will County (IL) was a member of a consortium that in 2009 developed an “I-355 Area Trails Master Plan” that coordinated alternative transportation facilities across multiple jurisdictions, including the Village of Homer Glen, the Village of Lemont, the City of Lockport, and the Village of New Lenox) (<http://willcountylanduse.com/sites/default/files/documents/I-355%20Area%20Trails%20Master%20Plan%20-%20FINAL%20-%20May%202009%20Secured.pdf>). This plan ensured connectivity and consistency of design for trails within its study area.

Additionally, in 2005 Will County and the Villages of Beecher, Crete, Monee, Peotone and University Park worked cooperatively to develop and introduce legislation that would have allowed them to create a new agency that would be responsible for overseeing and implementing a multi-jurisdictional land use plan, enforced by municipal and county zoning ordinances. The desire behind this multi-jurisdictional planning and zoning was for the communities to effectively deal with the development and land use changes associated with growth projections and the development of the South Suburban Airport (SSA) and to work together to avoid competition over developments. During 2005, this legislation passed the Illinois Senate, but did not pass the House due to unresolved issues regarding planning and governance of the SSA. Since 2005, the county and municipalities have sought funding through several state, federal and MPO-based grant sources to complete a multi-jurisdictional land use plan and zoning ordinance.

Significant groundwork has already been laid for the preservation of open space and the provision of alternative transportation facilities in both States. For example, Will County (IL) has developed an “Open Space Element” ([http://willcountylanduse.com/sites/default/files/documents/03\\_Open%20Space%20Element.pdf](http://willcountylanduse.com/sites/default/files/documents/03_Open%20Space%20Element.pdf)) that provides significant policy justification for open space preservation. Lake County (IN) has designated most of the area affected by the Illiana corridor with agricultural zoning, containing a sufficiently restrictive minimum lot size (20 acres) for as-of-right residential development to simplify future preservation efforts (<http://www.lakecountyin.org/cms-host/planning-commission/ordinances/Lake%20County%20Zoning%20Ordinance.pdf>).

A summary discussion of applicable government tools follows:

- *Planning tools.* As noted above, comprehensive and corridor plans provide policy justification for the implementation of other tools. However, by providing clear direction to a number of affected parties, such as developers, school districts, property owners, and the like, plans also have a significant influence on development in their own right. For example, the Will County open space element encourages farmers to designate their land with the State as Agricultural Preservation Areas under 505 ILCS 5. Illinois’ “Open Space Act” also allows a person to have their property taxes reduced by maintaining their land as open space.

- *Capital tools.* By giving careful consideration to the location, timing, and capacity of extensions of infrastructure and associated operating services, units of local governments have significant influence in the built environment. Generally, any land uses that are more intensive than low-density residential require water and sanitary sewer infrastructure and roads in order to develop. Local governments can also plan for the extension of alternative transportation facilities to the Illiana corridor, ensuring that any facilities that are incorporated into the corridor have multiple branching options for travelers who frequent them.
- *Urban zoning overlays (UZOs).* UZOs are special zoning districts that address special situations or accomplish special goals, and are allowed under both Illinois and Indiana State Law. The name derives from its placement “over” the base zoning for an area to alter underlying regulations, and they are frequently implemented in a transportation corridor context. Typically, UZOs modify the performance and/or massing standards of underlying zoning; for example, building setbacks and spacing requirements can be modified, supplemental treatments (such as trails and sidewalks) can be required, impervious surfaces on the site can be minimized, etc.
- *Zoning and Subdivision Ordinances, and other regulatory tools.* These land use tools serve multiple community-wide objectives, and modifications to them should not be over-relied upon to service Illiana corridor-specific objectives. However, to the extent that the Illiana corridor’s land use objectives overlap with broader community goals, there is merit to exploring amendments to community-wide ordinances. A good example is the minimum lot size for residential development in agricultural zones, noted above; while not applicable across the entire area of the corridor, there is sufficient agricultural zoning encompassing the Illiana to provide sufficient assistance in minimizing development impacts, and Lake County had previously seen the merit to establishing the zone type independently of the Illiana. Another example would be the incorporation of a “complete streets” requirement into local thoroughfare plans and design standards; such a requirement is unlikely to directly impact the Illiana facility itself, but would ensure that multimodal and open space connections to the Illiana are preserved. “Right-to-farm” laws, by limiting nuisance claims against farmers by adjacent landowners, help to maintain the commercial viability of agriculture as a land use activity.

“Incentive zoning” involves the purchase and transfer of development rights within or between special districts, and is intended to mitigate the “harsh”, all-or-nothing approach taken by traditional zoning. The right (allowed under current planning and zoning ordinances) to develop property within the Illiana corridor to certain intensities may be “traded off” for higher densities outside of the corridor. A sustained and strong planning and zoning framework at the local municipal level is needed to make such a proposal work. Illinois allows such proposals to be developed under 65 ILCS 5/11-48.2; Indiana has tried to establish a comparable legal framework, so far without success (*cf* SB 125 [2000]).

## **Existing local government plans and policies pertinent to open space acquisition and alternative transportation modes:**

Lake County (IN) has interest in two north-south green or multimodal corridors that intersect the project area. The first, a designated bicycle route along Morse Street, would have little impact on the project, except insofar as the street remain open following construction. The second is an open space corridor that was part of an abandoned State effort to designate a natural resource corridor along West Creek, west of US 41. Following the State's withdrawal from the project, the County has consistently placed the corridor in its long-term parks and recreation plans, but there has of yet been no opportunity to assign resources to the project. The County has identified several potential sites within the West Creek corridor, including several that are within or are near to the Illiana B3 alignment (interview with Robert Nickovich, Superintendent of the Lake County Parks and Recreation Department, September 7, 2012).

The Forest Preserve District of Will County (IL) has multiple landholdings that are proximate to the B3 alignment. While the District has not yet specifically identified the Illiana as an asset, the District has previously implemented regional trails connecting its landholdings using roadway projects as the catalyst. Since the District itself only has access to voluntary acquisition for assembling its landholdings, roadways provide an opportunity to provide connections that might otherwise not be possible. The District is eager to assess the opportunities the implementation of the B3 alignment would afford, and has offered to assemble teams of interested stakeholders, if so desired (interview with Marcela DeMaura, Executive Director of the Forest Preserve District, September 10, 2012).

Other resources for corridor preservation:

[http://www.ncdot.gov/doh/preconstruct/tpb/SHC/pdf/US64-NC49\\_Corridor\\_Preservation\\_Report.pdf](http://www.ncdot.gov/doh/preconstruct/tpb/SHC/pdf/US64-NC49_Corridor_Preservation_Report.pdf)

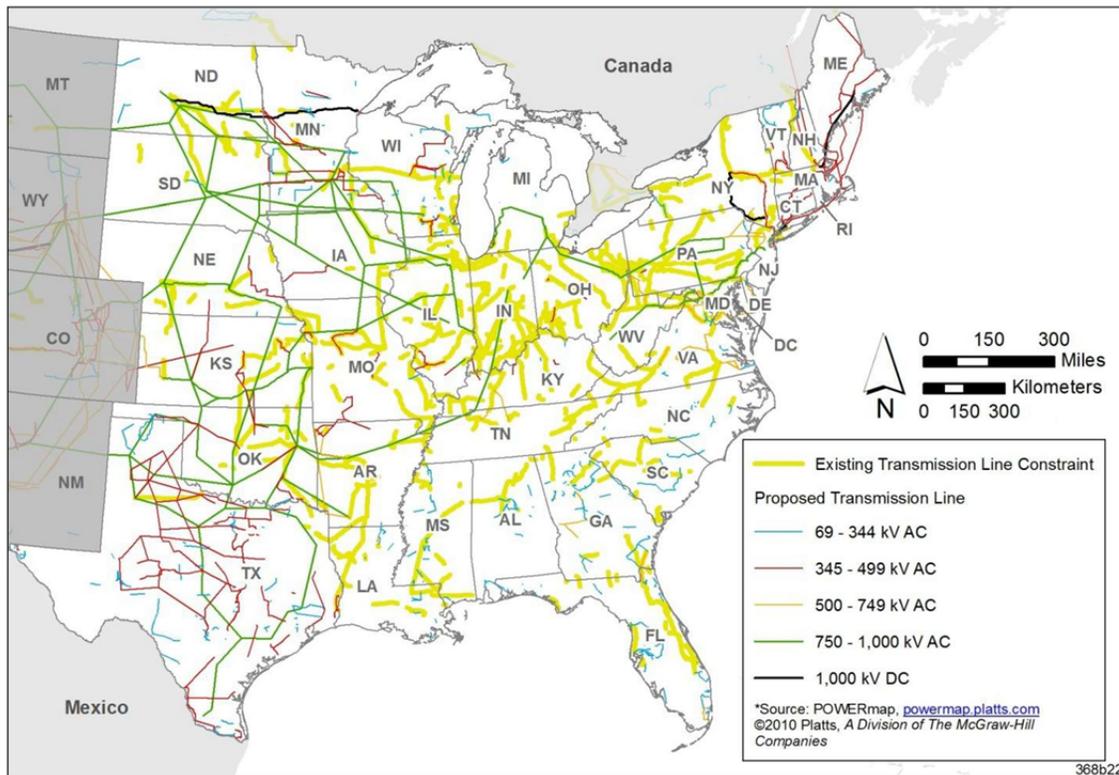
## **Energy Corridor Uses**

As indicated in this document's introduction, stakeholder interest has been expressed in co-locating utility transmission facilities within or adjacent to the Illiana Corridor. In the *Energy Transport Corridors* study performed by the U.S. Department of Energy (DOE) in 2011, 1,396 new miles of electric transmission facilities are planned by 2018 in the Reliability First Corporation's<sup>2</sup> service area which includes northeast Illinois and northwest Indiana as well as portions of several other Midwestern states. The exhibit below shows constraint locations where congestion relief is needed as identified by industry and grid operators, and also shows planned facilities through the year 2018. An electric transmission constraint is shown south of Lake Michigan in the general

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<sup>2</sup> Reliability First is a member of North American Electric Reliability Council (NERC), an organization that works to promote reliability of the electric power grid over the interconnected facilities of its electric provider company members in the U.S and Canada.

vicinity of the Illiana Corridor; the exhibit also indicates no transmission lines proposed in the Illiana Corridor area. It should be noted that planning for electric transmission facilities is a very interdependent and complex undertaking, and that new lines or upgrades are not always desirable or feasible where constraints are present; upgrading the grid sometimes requires bypassing the constraint in a new location as well as addressing it at or near its current location. The DOE has a leadership role in coordinating use of federal lands for new transmission facilities, as well as coordinating industry efforts in modernizing and upgrading the grid (including research and implementation of so-called “smart grid” improvements).



### Electric Transmission Constraints and Planned Additions, Platts 2010

There are also some constraints in the natural gas supply pipeline network in the Midwestern U.S. that will be accentuated with natural gas' replacement of other fossil fuels for energy generation and other uses, along with the large-scale production of natural gas from shale in states such as Pennsylvania and Ohio in the coming years; the DOE report did not offer specific information on how this may affect the Illiana Corridor area. Oil and petroleum product pipelines in this area are anticipated to have lesser expansion needs than natural gas and electricity, due to the relatively flat usage of oil projected in the U.S. through the year 2035.

Utilities generally acquire land or easement rights on private lands or open federal lands not associated with a transportation corridor. In general, utilities other than

communications avoid locating large transmission facilities within transportation corridors. This is due primarily to two factors:

- When utilities locate on state rights of way, they are subject to the conditional permitting of this use. For instance, the utilities are liable for any relocation costs incurred if the transportation facility is altered or expanded, and requiring movement of utility facilities. This can result in very expensive relocations of facilities at the utility company's expense. In the case of a limited access facility such as an interstate highway, access for facility maintenance and repair may be very difficult as compared to access from a company-owned corridor or easement.
- Large scale transmission facilities were historically discouraged from locating on state DOT by policy, except at crossing locations, on the interstate system. The Federal Highway Administration relaxed this discouragement somewhat in 1988, allowing more latitude for each state to set policies on accommodating utilities. So far, telecommunications (fiber optic broadband transmission lines, etc.) have been the primary beneficiaries of the policy relaxation. There is new federal guidance for placement of utilities, including new technologies and generation facilities such as solar panels and wind turbines, within interstate highway rights-of-way (see Guidance on Utilization of Highway Right of Way (FHWA) for additional information).

Where large transmission facilities do exist along a transportation corridor, they are generally placed on a strip of adjacent private land. Co-location of utility facilities alongside the Illiana Corridor would likely be done by private initiative, but could be encouraged by further coordination with energy companies, the DOE, and potentially as part of an overall public-private partnership if the Illiana Corridor is developed in that manner.

It is also noted that neither Illinois nor Indiana currently acquires land for the purpose of providing new corridors for private utilities. Decisions on where to place new utility lines, and the process of acquiring parcels or easements for their use, are the expertise of the respective utility companies and the states are not involved except from a regulatory perspective. The state DOTs are allowed to reimburse utilities to move existing lines, and to reimburse utilities for the acquisition of property or easements for the right of way for such locations, in limited circumstances where the utilities are impacted by a transportation project.

*References:*

East-wide Energy Corridor Programmatic EIS (DOE)

<http://www.eastcorridoreis.anl.gov/>

Utilities Program (FHWA)

<http://www.fhwa.dot.gov/programadmin/utility.cfm>

Guidance on Utilization of Highway Right of Way (FHWA)

[http://www.fhwa.dot.gov/realestate/guidutil\\_a.htm](http://www.fhwa.dot.gov/realestate/guidutil_a.htm)

Conversation with Brian Hill, US Department of Energy, October 23, 2012

### **Grant Funding Sources:**

While many funding sources pertaining to transportation projects focus solely on planning for a transportation facility specifically, there are some sources that support planning for land uses around a facility, as well. Due to the Illiana Corridors status as a priority bi-state project being done in conjunction with the Federal Highway Administration, pursuit of federal, state and MPO-based grants such as the Illinois corridor planning program, federal Unified Work Program (UWP), Local Technical Assistance program (LTA), and others are logical. Grant funds could be applied for by a qualified single state or local entity, or by a group of qualified entities as part of a larger, more comprehensive effort to organize, build support and complete a corridor protection plan that could be implemented and adhered to on a local jurisdictional level.

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