

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Evolution Broadband, LLC's Request for Waiver Of Section 76.1204(a)(1) of the Commission's Rules)	CSR-7902-Z
)	
Implementation of Section 304 of the Telecommunications Act of 1996 Commercial Availability of Navigation Devices)	CS Docket No. 97-80
)	

**PETITION FOR RECONSIDERATION OF
PUBLIC KNOWLEDGE,
FREE PRESS, MEDIA ACCESS PROJECT,
NEW AMERICA FOUNDATION, OPEN TECHNOLOGY INSTITUTE,
AND
U.S. PIRG**

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Public Knowledge, Free Press, Media Access Project, New America Foundation, Open Technology Institute, and U.S. PIRG (collectively “PK, *et al.*”) file this *Petition for Reconsideration* of the Memorandum Opinion and Order granting a waiver of 47 C.F.R. § 76.1204(a)(1) to Evolution Broadband, LLC (“Evolution”) (the “*Evolution Order*”) for two set-top box models on the grounds that these boxes met the “low-cost limited capability standard” supposedly set forth in its previous decisions.¹

SUMMARY

PK, *et al.* set forth the following grounds for reconsideration. First, four major manufacturers filed applications for expedited “*Evolution* waivers” even before the conclusion of the period of time for to file *Petitions for Reconsideration*. This rush of applications presents new facts that question the Commission’s prediction that the grant of the waiver will not undermine the deployment of CableCARD. The broad scope of current and potential future “me-too” waivers creates a real possibility of substantial consumer harm through limited consumer choice and, eventually, increased price for set-top boxes. Second, the *Evolution Order* misapplied Commission precedent, erroneously concluding that past orders had adopted a “standard” for “low-cost limited capability” set-top boxes when these orders had merely stated that the Commission would fully consider the matter at the proper time. As a result, the

¹ See *Evolution Broadband, LLC’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules; Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket 97-80, Memorandum Opinion and Order ¶ 11, FCC 09-46 (rel. June 1, 2009) (“*Evolution Order*”) (citing *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial availability of Navigation Devices*, 20 F.C.C.R. 6794, 6814-15 (2005) (“*2005 Order*”).

Commission limited its consideration to whether the boxes described by Evolution met the “standard” that it had not, in fact, adopted, rather than conducting the full inquiry promised in 2005 as to whether grant of such a waiver under any circumstances would serve the public interest.

Under the appropriate analysis, it is clear that the Commission’s unsupported interpretation of the *2005 Order* to permit waiver of 629 for such low-cost boxes would contravene the express command of Congress when it adopted Section 624a (47 U.S.C. §544a) in the *1992 Cable Act*.² Section 624a explicitly prohibited the type of box approved by the Commission here: a box that permits analog viewing.³ The grant of the waiver in the *Evolution Order* has transformed Section 629 from its purpose as an expansion of Section 624a into a way to circumvent Section 624a, repeating exactly the same consumer lock-in Congress found contrary to the public interest over 15 years ago.

Finally, in concluding that the grant of *Evolution Order* waivers would not undermine the development of CableCARD or other “common reliance” technologies, the Commission failed to address the possibility that manufacturers or cable operators might subsequently expand the capabilities of the devices or replicate advanced services – such as DVR – through other means. For example, cable operators might offer to subscribers the ability to insert new chips with enhanced functionality at the time of installation. Such upgrades would allow the waiver granted in the *Evolution Order*, and similar waivers, to permit devices with additional capabilities than those permitted in the *Evolution Order* without inclusion of CableCARD or other similar technologies. This possibility opens the door to wholesale disregard for section 629, resulting in

² *Cable Television Consumer Protection and Competition Act*, Pub. L. 102-385 (1992) (“*1992 Cable Act*”).

³ *Evolution Order* ¶ 16.

fewer choices for consumers, less competition, and clear circumvention of Congressional intent. Furthermore, the ease of technical upgrades to these boxes makes enforcement of the ostensibly narrow terms of the waiver practically impossible. If the Commission does not rescind the waiver, it must impose sufficient protections to ensure that neither cable operators nor manufacturers can enhance the capabilities of *Evolution*-type boxes.

ARGUMENT

Petitioners represent cable subscribers and organizations dedicated to encouraging robust competition for cable services. Petitioners' interests are therefore adversely affected by the Commission's decision to grant *Evolution* a waiver.⁴ As set forth below, Petitioners rely on facts that have occurred subsequent to the Commission's grant of the waiver and seek correction of erroneous conclusions of fact and law.⁵ Specifically, (a) the unusually swift and heavy response from STB manufacturers indicates that the Commission erred when it predicted that grant of the waiver would not undermine CableCARD support; (b) the Commission erroneously concluded that it had previously resolved the question of whether grant of any "low-cost, low capability" waivers would serve the public interest and, had the Commission conducted such an analysis, it would have concluded that grant of such a general waiver under any circumstances does not serve the public interest; and (c) the Commission failed to take proper precautions to prevent expansion of capabilities by boxes subject to an *Evolution* waiver.

I. THE FLOOD OF WAIVER APPLICATIONS RAISES CONSIDERABLE DOUBT THAT THE WAIVER WILL NOT UNDERMINE SECTION 629.

The Commission based its grant of the waiver on its conclusion it would not undermine the "common reliance" the Commission sought to foster with the integration ban. Reasoning that the waiver applied "only to the most basic of devices," the Commission concluded that cable

⁴ See 47 C.F.R. §1.106(b)(1).

⁵ See generally 47 C.F.R. §§ 1.106(b)-(d).

operators and manufacturers would prefer to deploy high-end boxes.⁶ In short, the Commission considered the covered boxes a niche market product unlikely to detract from developed of CableCARD enabled devices.

The flood of applications in the short time since the Commission granted the waiver strongly suggests the Commission erred in brushing aside CEA's objections. The Applicants filing in the last two weeks include the major manufacturers Motorola, Cisco, and Thomson.⁷ This does not suggest a niche market unlikely to undermine development of CableCARD and other "common reliance" technology. To the contrary, this strongly suggests that manufacturers perceive cable operators as extremely interested in purchasing such boxes for widespread deployment. This enthusiastic reaction mere days after the Commission granted the waiver shows the Commission significantly underestimated the impact of the *Evolution Waiver Order* on the industry, and its impact on the deployment of CableCARD and the development of other "common reliance" technologies.

Furthermore, the Commission erred in failing to recognize that low-cost STB devices are not a small segment of the market. News articles reported that Comcast was seeking a low-cost STB well over a year ago.⁸ By May of 2008, Comcast had confirmed they were looking to migrate 20 percent of markets by the end of 2008.⁹ Given the size of Comcast's footprint, it was

⁶ *Evolution Order* at ¶ 14.

⁷ *In the Matter of Application of Motorola, Inc.'s Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*, MB Docket No. CSR-8175-Z (released June 16, 2009); *In the Matter of Application of Cisco Systems, Inc.'s Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*, MB Docket No. CSR-8176-Z (released June 16, 2009); *In the Matter of Application of Thomson, Inc.'s Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*, MB Docket No. CSR-8178-Z (released June 18, 2009).

⁸ Jeff Baumgartner, "Comcast Pursuing \$35 Digital Dongle," *Cable Digital News*, Feb. 22, 2008.

⁹ Jeff Baumgartner, "Comcast Confirms Digital Dongle Project," *Cable Digital News*, May 1, 2008.

expected that Comcast would be ordering “about 25 million [STB]s.”¹⁰ A month later the cable operator had selected three vendors – Motorola, Pace Micro, and Thomson – and announced their plans to purchase 6 million STBs in 2008.¹¹ Comcast, whose network passes more than 50 million homes, has since announced plans to have half of their footprint migrated to STBs by the end of 2009.¹² Comcast has deployed the STBs *without* security, transmitting content “in the clear.”¹³ Thus, an entire market has already developed for STBs that fully conform to existing Commission rules. The potential for consumer harm by permitting STBs that do not comply with the integration ban in such a large market – one ably served by conforming STBs – was insufficiently considered in the *Evolution Order*.

The *Evolution Order* appears to justify the waiver in large part because it allows Evolution to provide the industry with a low-cost (\$45-\$55) conversion device. As examination of the *2005 Order* reveals, waivers are no longer necessary to provide low cost devices to consumers. The *Evolution Order* notes that the industry emphasized the importance of in arguing for the *2005 Order*.¹⁴ The NCTA told the Commission in 2004 that a STB of “\$35-\$50” was needed.¹⁵ Whether true in 2004 or not, this need is no longer characteristic of the market. Comcast has stated the STBs already used in their system cost “roughly \$30.”¹⁶ In copying the now-defunct rationale used in the *2005 Order*, the Commission has provided no valid justification for granting this waiver.

¹⁰ *Id.* Comcast has since stated it will be ordering around 30 million. See Thomson Financial, Transcript of Q1 2009 Comcast Corporation Earnings Conference Call, April 30, 2009, p. 5.

¹¹ Todd Spangler, “Comcast Picks DTA Partners,” *Multichannel News*, June 26, 2008.

¹² Todd Spangler, “Comcast: 50% ‘All-Digital’ in 2009,” *Multichannel News*, March 5, 2009; See Comcast First Quarter 2009 Trending Schedule, p. 1.

¹³ Jeff Baumgartner, “Comcast’s DTAs: Security Optional,” *Light Reading*, Sept. 3, 2008.

¹⁴ *Evolution Order* ¶ 12 n.34.

¹⁵ *Id.*

¹⁶ Thomson Financial, Transcript of Q1 2009 Comcast Corporation Earnings Conference Call, April 30, 2009, p. 6.

Accordingly, the Commission should therefore reverse the grant of the waiver or, in the alternative, significantly shorten its term so that the Commission may adequately monitor the market response.

II. THE COMMISSION MISAPPLIED ITS PAST PRECEDENT AND FAILED TO CONDUCT AN APPROPRIATE PUBLIC INTEREST DETERMINATION.

The Commission misapplied its previous precedent in declaring that the *2005 Waiver Order* created a “standard” under which an Applicant would be entitled to waiver on the basis of a particular showing. Rather, the Commission stated that it would “*consider* whether low-cost, limited capability boxes should be subject to the integration ban.”¹⁷ Although the Commission indicated that it was “inclined to believe” that granting such waivers would serve the public interest and would not undermine the goals of Section 629. But the Commission reached no actual conclusion on the matter. Rather, the Commission decided to withhold judgment on this tentative conclusion until presented with an actual device that might qualify – should the Commission decide that grant of such waivers would serve the public interest at all.

A. The Commission Misapplied Its *2005 Order* And Failed To Conduct An Appropriate Public Interest Determination.

In the *Evolution Order*, the Commission treated this tentative language as a foregone conclusion. Rather than making the promised determination on whether or not it would serve the public interest to grant *any* waivers of the integration ban, including waivers for low-cost low capability set-top boxes, the Commission treated the question before it as whether the Evolution STBs met the “standard” announced in 2005. But the *2005 Order* did not announce any standard because the Commission reserved the ultimate question on whether such waivers would serve the public interest at all until confronted with an appropriate low-cost low capability device.

¹⁷ *2005 Order* at 6813 (emphasis added).

Nor did the Commission's 2007 *Order* denying Comcast a waiver resolve the underlying question of whether a general grant of a waiver for low-cost low capability devices served the public interest. The Commission denied Comcast's waiver request because it found the box in question would not be eligible for a waiver of the type described in the 2005 *Order* even if the Commission were disposed to grant such a waiver.¹⁸ Thus, although the *Comcast Order* referred to the "standards" set forth in the 2005 *Order*, it could not have reached the broader question left undecided in 2005 because it had no occasion to do so.

Only here, where an Applicant has met the initial threshold of submitting an Application for a low-cost, low priority box, could the Commission undertake the thorough analysis of determining whether its initial "inclination" that permitting cable operators to offer low-cost, limited capability devices served the public interest and did not endanger the goals of Section 629. The Commission therefore erred when it limited its inquiry to the determination that the Evolution STBs meet the criteria for a low-cost and low capability. The Commission must continue to the next step of the analysis, which it deferred in 2005. It must now determine "whether low-cost, limited capability boxes should be subject to the integration ban or whether cable operators should be permitted to offer such low-cost limited capability boxes on an integrated basis."¹⁹ As discussed in the next section, Congress has previously spoken to this very question, and found that allowing low-cost boxes that permit analog-only viewing do not serve the public interest, and undermine the development of an innovative and competitive market for cable set-top boxes.

¹⁸ *Comcast Corp. Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, 22 F.C.C.R. 17113, 17123-27 (2007).

¹⁹ 2005 *Order* at 6813

B. Grant of the Waiver Replicates The Type of Boxes Prohibited By Congress In the 1992 Cable Act.

In 1992, as part of the *Cable Television Consumer Protection and Competition Act* (the 1992 Cable Act) Congress created Section 624a of the *Communications Act* (codified at 47 U.S.C. §544a). Congress made explicit findings that allowing cable operators to use security features or other mechanisms to disable or inhibit consumer electronic devices from attaching to the cable network threatened to reduce innovation and competition.²⁰ Congress therefore required the Commission to conduct a rulemaking to require a common interface that would permit development of televisions and other devices capable of working on any cable system, and to periodically review these regulations to ensure that changes in technology did not eliminate this compatibility.²¹ The wisdom of this Congressional mandate became clear almost as soon as the Commission completed the required rulemaking. Consumers quickly found themselves with a choice of “cable ready” television sets and other electronic devices, eliminating the need to rent set-top boxes and remote controls from cable operators at non-competitive prices. Indeed, Section 624a proved so successful that in 1996 Congress expanded the concept to include new two-way services and to explicitly cover all MVPDs.²²

1. The Evolution Order Effectively Eliminates Section 624a.

By creating an expedited process to grant “*Evolution* waivers” to other STB manufacturers, the Commission has had the unintended effect of eliminating application of Section 624a.²³ The Commission has now determined that **any** STB that offers only those

²⁰ See Section 624a(a).

²¹ Section 624a(c)-(d).

²² See Section 629(a).

²³ The Media Bureau’s refusal to consider comments that might address this issue make it impossible, absent reconsideration here, to address the relationship between the proposed waiver and Section 624a. See, e.g., Public Notice, Media Bureau Seeks Public Comment on Cisco’s Low-Cost Limited Capability Set-Top Box Certification, MB Docket No. CSR-8176-Z (released

capabilities necessary to view analog only programming may receive a waiver, regardless of the impact on Section 624a. For the first time since the Commission implemented Section 624a in 1993, a cable operator may legally require that a consumer subscribing to a tier of service providing only one-way SD service lease a set-top box and remote from the cable operator as a requirement of service.

Nothing in the language or legislative history suggests that Congress intended Section 629 to supersede Section 624a. To the contrary, Congress clearly intended Section 629 to expand on the success of Section 624a. But by creating a waiver of Section 629 for the express purpose of permitting cable operators to offer “one-way, non-HD, non-DVR devices” under a proprietary arrangement, the Commission has created a situation in which a waiver of Section 629 obligations eliminates any obligation to comply with Section 624a as well.

2. The Congressional Findings in Section 624a and Subsequent Market History Demonstrates that The Commission erred In Concluding That Grant of the Evolution Waiver Serves the Public Interest.

In the *2005 Order*, the Commission voiced concern that consumers have access to low-cost boxes to facilitate the DTV transition by ensuring subscribers could continue to use analog television sets “before and after the transition.”²⁴ Absent any evidence or substantial experience at the time with CableCARD, the Commission cautiously stated that it was “inclined to believe” that waivers for low-cost boxes “will not endanger the development of the competitive marketplace envisioned in Section 629.”²⁵ On review of the Evolution Application, however, the

June 16, 2009) at n.6 (the Bureau “does not seek comment on the policy issues resolved in the *Evolution Order*”).

²⁴ *2005 Order* at 6813.

²⁵ *Id.*

Commission treated this tentative conclusion as a finding of fact already subject to evaluation on the record.²⁶

This tentative conclusion in 2005, which the Commission should have analyzed thoroughly in the instant case, runs contrary to the Congressional findings in Section 624a and the history of 624a's implementation. Congress explicitly found that allowing cable operators to limit the availability of cable boxes did, in fact, frustrate the development of precisely the sort of competitive market "envisioned in Section 629."²⁷ Furthermore, the adoption of a standard interface for set-top boxes and other consumer devices resulted in the widespread availability of cheap "cable ready" televisions and other devices as a result of the economies of scale. The Commission's concern that a refusal to grant a waiver would result in an increase in prices runs directly contrary to Congress' previous findings and the Commission's own experience.

Finally, the Commission failed to consider here that the passage of time and changes in the law significantly reduced the need for low-cost limited capability boxes as a means of facilitating the digital transition. When the Commission issued the *2005 Waiver Order* in March of 2005, the digital transition remained in limbo. To complete the transition and end analog transmission required that a significant percentage of the public be capable of receiving digital television signals, including as subscribers to cable or other MVPDs.²⁸ This placed an extremely high value on encouraging consumers to migrate to MVPD to free up spectrum through the digital transition and the end of analog broadcasting.²⁹ Subsequent to the *2005 Order*, Congress passed the *Digital Television Transition And Public Safety Act of 2005* ("DTV Transition Act")

²⁶ *Evolution Order* at ¶ 12.

²⁷ See Section 624a (a)(2) (ability of cable operators to use encryption and other means to disable or inhibit devices will make "consumers less likely to purchase, and electronics manufacturers less likely to develop, manufacture or offer for sale" competing devices).

²⁸ See 47 U.S.C. §309(j)(14).

²⁹ *2005 Order* at 6813.

as part of the Deficit Reduction Act of 2005.³⁰ This set a hard date for the end of analog broadcasting, significantly reducing the need to provide a low-cost device for viewing digitally broadcast signals on analog televisions.

The positive benefits of the waiver that the Commission tentatively identified in the *2005 Order* are further reduced by other changes between March 2005 when the Commission released the *2005 Order* and today. For example, the coupon program created by Congress in the *DTV Transition Act* and fully funded in the most recent federal budget has provided an even lower cost solution for viewers wishing to see digital television signals with their analog receivers. Full power analog broadcasting has ended, and consumers still using analog receivers have already chosen among possible alternatives and services to maintain the level of service they desire – from exclusive reliance on free over-the-air signals to subscription to existing MVPDs *without* the need for a low-cost, limited capability set-top box offering.

In other words, there is no evidence that any of the benefits the Commission tentatively identified in March 2005 remain compelling in June 2009. This is why the Commission declined to make a determination until presented with an Application for a genuinely low-cost limited capability set-top box. Had the Commission conducted the appropriate analysis instead of erroneously applying its tentative conclusions from 2005 as immutable findings, the Commission would have concluded that the possible benefits of granting such a waiver had dwindled considerably past the point where they would outweigh the concerns Congress had successfully addressed more than 15 years ago in Section 624a.

³⁰ See *Deficit Reduction Act of 2005*, Title III, §§ 3001-03.

III. THE POSSIBILITY OF DEVICE UPGRADES UNDERMINES THE ORDER AND IS NOT SUFFICIENTLY LIMITED.

A. Waivers Require Devices to be Limited in Capability.

Even under the Commission’s erroneous interpretation of the *2005 Order*, waivers of the integration ban are premised on the “low-cost, limited capability” nature of the devices at issue.³¹ The *Evolution Order* acknowledges this, stating clearly that “[a]ny device with advanced functionality (including the ability to engage in two-way communication over the cable system) is ineligible for waiver....”³² To allow more powerful devices – or devices which could later be given additional flexibility through cable operator hardware or software upgrades – to be sold without supporting CableCARD technology would undermine Congressional intent to create a competitive marketplace in devices, ultimately limiting consumer choice and raising consumer prices.

The ability to upgrade devices therefore poses a substantial risk of harm to consumers. If devices are capable of substantial upgrades by cable operators prior to or after deployment, then substantial potential exists for those cable operators to sell powerful devices not subject to the integration ban, which would undermine the *Evolution Order* and other past Commission actions as well as the clear intent of Congress. It would essentially eliminate Section 629 if manufactures can receive waivers for “limited capability” boxes that a cable operator can transform into higher capacity boxes either before or after deployment to the subscriber’s home.

The Media Bureau already has before it applications with unspecified downloadable capabilities.³³ Nor has the Commission taken steps to prevent cable operators from offering to upgrade capacity by adding new hardware or software to the box. Cable operator could perform

³¹ *Evolution Order* ¶¶ 11-12.

³² *Id.* ¶ 13.

³³ *See, e.g., Application of Motorola.*

such installations as a routine part of deploying boxes with waivers, leaving the new capabilities inactive until some future date.

Furthermore, substantial incentive exists for such behavior as well – if cable operators can offer “low cost” devices to their consumers that can handle a broad range of cable features, they can discourage the growth of non-integrated devices and other competing means of using cable service, ultimately limiting consumer choice and allowing them to raise prices and increase lock-in. The Commission’s failure to even address this potential for harm is unsupportable and should be resolved through a reconsideration of the waiver and an additional process of information and analysis concerning upgradeability.

B. The *Evolution Order* Did Not Demonstrate Impossibility of Upgrades.

The conclusions of the *Evolution Order* are undercut by its failure to consider device upgrades. The scope of the waiver and the insufficiency of Commission review create a substantial possibility of device upgrades that undermine the intent of the Commission and Congress. The *Evolution Order* conferred a blanket waiver upon an entire class of devices, rather than on a single cable operator’s implementation of the device in a cable system. Because of the scope of such a waiver, the Commission should have placed a heavy burden of proof on *Evolution* to demonstrate not only that the device is incapable of advanced functionality, but also that cable operators cannot readily upgrade the device prior to deployment or after deployment through downloadable upgrades. Instead, a minimal presentation of technical capabilities of the device was held to be sufficient, and the Commission’s subsequent waiver was applied in advance to all cable operators who wish to deploy the device, without any opportunity for Commission supervision of deployment in practice.

The Commission takes such precautions elsewhere. For example, the Commission requires any equipment manufacturer seeking certification for unlicensed devices under Part 15

to take steps to ensure that users cannot subsequently modify the device to exceed permissible power and frequency limits.³⁴ In addition, the Commission explicitly prohibits third parties from selling amplifiers or other means of exceeding the power limits for which the device received certification.³⁵

In the *Evolution Order*, a single sentence sufficed to establish that the devices were low-cost: “We have reviewed the specifications of the Subject Boxes, and we conclude that they do not include two-way functionality or any other capabilities that would preclude waiver under the low-cost, limited-capability standard.”³⁶ The Commission did nothing to prevent future upgrades that would render the certification of “limited capability” meaningless.

C. Device Upgrades Would Undermine the Commission’s Waiver and Congressional Intent.

The Commission should reconsider the *Evolution Order* because it failed to address explicitly and cabin the possibility of upgrades to the Evolution devices. As an initial matter, the Commission should consider whether it is possible to sufficiently limit the possibility of hardware and software upgrades to permit deployment of the devices. The Commission has no ability to monitor devices in the field to ensure that they do not come either with open slots for installation of new hardware or with the ability to download new software which would expand the capacity of the device. Nor can the Commission determine to what extent even a modest upgrade to “limited capability” devices would frustrate the development of the CableCARD market or other forms of common reliance technology. Allowing widespread deployment of

³⁴ See 47 C.F.R. §15.15(b).

³⁵ See 47 C.F.R. §15.204.

³⁶ *Id.* ¶ 13. PK has understood this to mean that the device as certified is not capable of supporting upgrades. See *Opposition of Public Knowledge to Application of Motorola*, MB Docket No. CSR-8175-Z (filed June 26, 2009). Even under this reading, the Commission’s Order does not address the issue of upgrades by cable operators.

potentially upgradable boxes may simply constitute too great a risk to the developing advanced set-top box market.

Alternatively, the Commission could require manufacturers seeking limited functionality waivers to demonstrate that the device is incapable of being upgraded. The Commission should similarly prohibit MVPDs from upgrading “limited capability” STBs or seeking to circumvent the functional limitations on the devices through other means. Only through direct restrictions on upgrades can the Commission prevent circumvention of the integration ban and protect the emerging market in Section 629 devices.

CONCLUSION

WHEREFORE, for the reasons given above, the Commission should grant this *Petition for Reconsideration*.

Respectfully submitted,

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