IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

CONTINENTAL OIL COMPANY
AMERADA PETROLEUM CORPORATION
PAN AMERICAN PETROLEUM CORPORATION
SHELL OIL COMPANY
THE ATLANTIC REFINING COMPANY
STANDARD OIL COMPANY OF TEXAS
HUMBLE OIL & REFINING COMPANY,

Petitioners-Appellants
Cross-Appellees

vs. No. 6830

OIL CONSERVATION COMMISSION OF NEW MEXICO, Composed of John Burroughs, Member and Chairman, Murray Morgan, Member, and A. L. Porter, Secretary;
TEXAS PACIFIC COAL & OIL COMPANY,
A Foreign Corporation;
EL PASO NATURAL GAS COMPANY,
A Foreign Corporation;
PERMIAN BASIN PIPELINE COMPANY,
A Foreign Corporation;
SOUTHERN UNION GAS COMPANY,
A Foreign Corporation,

Respondents-Appellees

OIL CONSERVATION COMMISSION OF NEW MEXICO,

Cross-Appellant

ANSWER BRIEF OF CROSS-APPELLEES

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OBJECTIONS TO CROSS-APPELLANT'S STATEMENT OF THE CASE AND STATEMENT OF FACTS

Cross-Appellees have no objection to the Statement of the Case and Statement of the Facts included in Cross-Appellants' Brief-in-Chief, except that reference should have been made to the obvious variance in the recollections of court and counsel as to statements made in the pre-trial conference which preceded the ruling appealed from.

There is a disagreement between Cross-Appellants on the one hand and the court and Cross-Appellees on the other hand as to whether, in the proceedings preceding the trial on the merits, the parties agreed that the sole question before the court was one involving correlative rights and that the question of waste was not involved.

Two pre-trial conferences were held in the case before Honorable John R. Brand at Lovington. The record of the first pre-trial conference held on August 4, 1958 appears at 1 Ct. 50*.

Unfortunately, the argument of counsel was not taken and transcribed (1 Ct. 54). No record was taken of the second pre-trial conference, but the offers of proof on the basis of which it was held are included in the transcript (1 Ct. 65, 80, 86).

It is the recollection of counsel for Cross-Appellees that on more than one occasion it was stated, and concurred in by the counsel for all parties, that the question before the court dealt only with the protection of correlative

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*Note: Cross-Appellees will follow the reference system used in their Brief-in-Chief as Appellants herein. The record before the Oil Conservation Commission will be referred to as "OCC", the record before the District Court as "Ct.". Thus (1 OCC 29) and (II Ct. 50), etc.

rights and that there was no question of waste in the case. The trial judge apparently had the same recollection at the time that he sustained Cross-Appellees' objection to participation by the Oil Conservation Commission as an adversary party in the proceeding:

> "THE COURT: I could be mistaken, but I think I remember a stipulation - at least a tacit understanding that waste was not an issue in this matter." (II Ct. 3).

The objection of counsel for Cross-Appellee evidenced his recollection of what had transpired: ". . . in view of the fact that the sole question in the case, as has been stated and stipulated, is correlative rights * * *" (II Ct. 2).

Counsel for the Commission disagreed with the statement of the Court on the subject:

> "MR. PAYNE: If it please the Court, it has never been stipulated that the only issue in this case is correlative rights. It is our position that waste is also involved in this case." (II Ct. 3).

It is unfortunate that it is impossible to resolve this question from the record; however, it is believed that succeeding portions of this brief will demonstrate that in fact no question of waste was involved in the Commission's order and the proceeding to review it.

ARGUMENT AND AUTHORITIES

ANSWER TO POINT I

THE TRIAL COURT PROPERLY RULED THAT THE OIL CONSERVATION COMMISSION SHOULD NOT PARTICIPATE AS AN ADVERSARY PARTY IN THE PROCEEDING TO REVIEW ITS OWN ORDERS INASMUCH AS NO PUBLIC INTEREST REQUIRING PARTICIPATION OF THE COMMISSION WAS AT STAKE AND THE COMMISSION HAD ACTED AS A QUASI-JUDICIAL AGENCY IN HEARING THE CASE.

Cross-Appellants have divided their argument and authorities into three segments in support of the single point relied on for reversal. It is believed that the proposition stated above constitutes an answer to all three segments and that there is no occasion to subdivide its presentation.

At the outset, it should be recognized that the issue decided by the Commission, as to which an appeal was taken in this case, had nothing to do with the question of whether production from the Jalmat Pool should be curtailed to prevent waste. That decision had been made by the Commission in another proceeding. On the basis of testimony heard in its monthly hearing to fix allowables for the various prorated pools, the Commission had determined the amount of gas which could be produced from the Jalmat Pool without waste. It had found, as required by the statute (Section 65-3-13, N.M.S.A., 1953), that this allowable production of natural gas from the Jalmat Pool was in an amount less than the wells in the pool could produce if no restrictions were imposed. In performing that function at its regular monthly allowable hearing, the Commission was exercising its jurisdiction to prevent waste of natural gas. The prevention of waste is the basis, and the only basis, on which the Commission is authorized to curtail the natural production of an oil or gas pool. Thus it is provided by Section 65-3-13 (c), N.M.S.A., 1953:

> "Whenever, to prevent waste, the total allowable natural gas production from gas wells producing

> from any pool in this state is fixed by the Commission in an amount less than that which the pool could produce if no restrictions were imposed * * *." (Emphasis supplied.)

Having determined the quantity of production to be allocated to the Jalmat Pool, and having further determined that this allowable production was less than the amount which the wells in the pool could produce if no restrictions were imposed, the statute then makes it the duty of the Commission to "allocate the allowable production among the gas wells in the pool * * * upon a reasonable basis and recognizing correlative rights. * * *" (Section 65-3-13 (c) N.M.S.A., 1953.) (Emphasis supplied.) The standard by which the action of the Commission, in allocating the allowable between wells in the Jalmat Gas Pool, is to be tested is clearly stated by the statute. The validity of the action will be determined by the answer to the questions, "Does it allocate the production on a reasonable basis?", and "Does it recognize correlative rights?" (It is clear that as here used the word "recognize" is synonymous with "protect" since any action which recognized the existence of these rights but failed to protect them obviously would be invalid.) Waste is not involved in this determination.

There is no occasion for the exercise of the Commission's jurisdiction to prevent waste in an appeal to the district court to determine the validity of the Commission's order that fixed a formula for the allocation of the allowable between wells. The court cannot rewrite the Commission's order. Its function is either to find the Commission's order valid and sustain it or to find it invalid and nullify it. Granted, if the court was going to rewrite the order, the presence and participation of the Commission in representing the public and seeing that the new order prevents waste would be appropriate. But in making the single determination - that the order is invalid or valid - there is no opportunity or occasion whatever for the Commission to exercise this jurisdiction.

In this connection it is recognized that Section 65-3-22 (b) N.M.S.A. 1953 purports to authorize the trial court, on appeal from an order of the Commission, to enter "its order either affirming, modifying or vacating the order of the Commission", and further provides, "In the event the court shall modify or vacate the order or decision of the Commission, it shall enter such order in lieu thereof as it may determine to be proper." This provision, however, conflicts with the separation of powers doctrine of the Constitution. The trial court indicated that it did not consider that it had such power (I Ct. 58), and it is not believed that this position would be questioned by any of the parties.

In an effort to establish a right to participate as an adversary in the appeal before the trial court, Cross-Appellant argues (Brief-in-Chief, page 6) that the challenged orders were designed "not only to protect correlative rights but also to achieve a greater ultimate recovery of gas from the Jalmat Pool, thereby preventing the waste of a valuable and vital natural resource". Cross-Appellees in no sense concur in the correctness of that statement, but assuming for the moment that it were correct, the question before the trial court was not whether or not waste would be prevented by the order. As pointed out above, the question is - and it is framed by the statute - does the order allocate production between wells "upon a reasonable basis and recognizing correlative rights"? (Hence, whether or not Cross-Appellant feels, or can show, that the order will have the incidental effect of preventing waste is not an issue in the appeal.) The order, nonetheless, will be invalid if it fails to allocate the allowable between wells on a reasonable basis and to protect the correlative rights of the operators in the field.

Admittedly, the Oil Conservation Commission is an agency created in the exercise of the police power of the state to represent and protect the

public interest in the conservation of oil and gas. However, it does not follow that the Commission was thereby granted the right to become an adversary in opposition to the appealing party and to support the successful parties in all cases where appeals are taken from the Commission's decisions. In appeals in which a question of public policy is at issue or in which the prevention of waste is involved, the partisan participation of the agency in the appeal may have been contemplated by the legislature and may be justifiable in principle. But, no such basis exists in a case in which the ultimate question is whether or not a proposed proration formula redistributes the ownership of gas reserves between the operators in the field without giving effect to the correlative rights of the operators. Furthermore, no public interest is served when the Commission becomes an adversary, throwing its weight with one group of operators and against another group in the court hearing such an appeal.

The basic determination of the Commission in Order R-1092-A concerned the formula which should be promulgated for use in allocating the monthly allowable of gas fixed by the Commission between the producing wells in the pool. That determination was of obvious importance to the operators in the pool and of no importance to the public. Since gas is a highly migratory substance and is no respecter of lease lines, the actual measure of the well's value is the allowable assigned to the well rather than the recoverable gas in place under the lease which is the property interest of the owner. This is because if the allowable does not permit production of all recoverable gas in place under a lease, it will be produced by the offset wells through drainage as the gas migrates to the well bore from which the greatest amount of gas is being withdrawn. Through which well bore a particular thousand cubic feet of gas is produced is not of public

concern. For this reason, no doubt, the Legislature of New Mexico affirmatively required the Commission to recognize correlative rights in making an allocation between wells and defined correlative rights as:

> " * * * the opportunity afforded, so far as it is practicable to do so, to the owner of each property in a pool to produce without waste his just and equitable share of the oil or gas, or both, in the pool, being an amount so far as can be practicably determined, and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil or gas, or both, under such property bears to the total recoverable oil or gas, or both, in the pool, * * *" Section 65-3-29 (h) N.M.S.A., 1953.

In making the determination that the formula which had been in effect in the Jalmat pool since the inception of prorationing should be changed to a predominantly deliverability formula, the Oil Conservation Commission actually redistributed the ownership of the gas reserves remaining in the field. The testimony of one expert witness before the Commission was that putting the new formula into effect could be expected to increase the income of certain operators in the Jalmat Pool as much as $25,000 per month and to decrease the income of others in amounts ranging from $15,000 per month down. (Operators' Exhibit 10, 4 OCC 256-7.) The issue therefore was clearly framed. Which of the operators were entitled to, and should be permitted to, produce the gas which would result in this income? The decision of the Commission, in effect, awarded that gas to one group of operators and took it from another. It had no impact upon the public and the legislature recognized this fact when it made the test of the validity of such decision its reasonableness and its recognition of the correlative rights of the parties. Waste was not involved. The order was neither valid if it prevented waste nor invalid if it failed to do so, so long as the statutory standards were complied

If the foregoing analysis of the question for decision by the Commission, and the trial court on appeal, is correct, the premise for Cross-Appellees objection to the participation of Cross-Appellant as an adversary party in the appeal was correct This is true whether or not it had "been stated and stipulated" that the sole question in the case was correlative rights (II Ct. 2, 3). That was in fact the only question

When the legislature provided for an appeal to the district court from a decision of the Commission, it did not expressly provide that the Commission should be a party to the appeal Certain language of the Act indicates that this was not intended The only reference to the Commission in Section 65-3-22 (b) N.M S A., 1953, is the provision.

> "Notice of such appeal shall be served upon the adverse party or parties and the commission in the manner provided for the service of summons in civil proceedings "

There are several reasons for requiring notice to the Commission other than for the purpose of making it an adversary party in the appeal. It is of the utmost importance the Commission be advised immediately when an appeal is taken or decided affecting one of its orders. Its administration of the order might well be affected In addition, it is necessary that the Commission prepare and certify a transcript of the proceeding before it for use in the appeal. The notice served on it affords an opportunity to do so and brings the Commission within the jurisdiction of the court in the event an order need be directed to it as in this case. (I Ct 83.)

The sentence of Section 65-3-22 (b) following the one quoted above provides that the transcript of proceedings before the Commission shall be received in evidence "upon offer by either party." This would seem to contemplate only two adversary parties to an appeal. In a matter begun on the Commissions own motion or in which the Commission was in effect the

adversary in the proceeding (such as an order to show cause why a well should not be shut in for failure to comply with regulations of the Commission) the Commission clearly would be one of the two parties to the appeal But where, as in the case at bar, there are two opposing groups of parties and the issue is as to the correlative rights between them, there is nothing in the statute which requires, or even indicates that the Commission should be an adversary party.

In the case of Plummer v. Johnson, 61 N.M. 423, 301 P.2d 529, (1956), relied upon by Cross-Appellants, this Court was considering an appeal from a decision of the State Engineer. The statute involved in that case also is silent as to the status of the Engineer in an appeal. The Court there recognized and applied the general rule that the agency "is usually considered a necessary, or at least a proper party." This is in no sense determinative of the question here presented. Cross-Appellees did not object to the presence of the Commission as "a necessary, or at least a proper party " It was to the Commission as an adversary party, presenting evidence, arguing law and importuning the court to uphold the validity of its own order that the objection was made and sustained.

This distinction was recognized and applied by the Supreme Court of Alabama in an appeal from the decision of the Public Service Commission in a rate case. Thus in Birmingham Electric Company v. Alabama Public Service Commission, 254 Ala. 119, 47 S. 2d 449 (1950) the court said, at page 452:

> "Nor do we find any authority in the statute authorizing the Public Service Commission to become a party in such proceedings as an adversary of the utility seeking a revision of its rates. The Commission, in contemplation of law, is without interest in the controversy and sits as an impartial tribunal with statutory powers legislative in character, to regulate rates of public utilities."

Likewise in Kirchoff v. Board of Commissioners of McLeod County, 189 Minn. 226, 248 N.W. 817 (1933) in an appeal from a decision of the Board the court said, at page 817:

> "The board is the tribunal designated by statute to hear the petition and pass upon it in the first instance. The litigants are the petitioner and the school districts affected. A court or tribunal before whom a controversy is litigated has, as such, no appealable interest in the matter.

The Ohio Supreme Court considered the status of the Board of Zoning Appeals in an appeal in which the same "public interest representation" argument was advanced as urged by Cross-Appellant. In A. Di Cillo & Sons v. Chester Zoning Board of Appeals, 158 Ohio St. 302, 109 N.E. 2d 8 (1952), the Ohio court disposed of this argument saying, at page 10:

> "There is no statutory language which expressly confers upon * * * (the Board of Zoning Appeals) any right to appeal from a judgment of a court or even to participate as a party in an appeal to a court from one of its decisions. * * * The legislative provisions for such a board are entirely inconsistent with any idea that the board or its members as such should be considered as persons 'aggrieved' or 'affected by any decision of the administrative officer' from which an appeal is taken, as parties interested in what decision should be rendered by them on the appeal, or as parties who might be 'adversely affected' by any decision that might be rendered. * * * That legislation apparently contemplates that the board should be disinterested in deciding matters brought before it as a court should be.
>
> "It has been argued that the function of the Board is to represent the interest of the public; and that, therefore, it must, if those interests are to be protected, be allowed to have an interest adverse to the appellee in the instant case.
>
> "Admittedly, the Board does represent the interest that the public has in having appeals correctly heard and decided and in having proper authorizations on such appeals for variances from the terms of the zoning resolution. However, it does not follow that the board or any of its members as such may become

> partisans when one of its decisions is questioned on an appeal to a court. * * * If no one appeals to the board from a decision of an administrative officer, the decision of the administrative officer stands. If a proper party does appeal, then a party so appealing is in a position which should enable satisfactory representation of interests of the public which may be adversely affected by the decision made by the administrative officer."

On this same question, the Missouri court said in State v. Donnelly, 285 S.W. 2d 669 (Mo. 1956), at page 677:

> "* * * (There is no) provision in the applicable statutes giving to the commissioner of finance any rights as a party after the board of appeals has obtained jurisdiction. * * * An administrative agency is not a party to a litigation as that term is customarily used, and should not be so considered unless the legislature has so provided. * * * We hold that under applicable law the commissioner has no right to invoke a judicial review of the decision of the board of appeals. This holding is in accord with the weight of authority with respect to the right of a public officer or board to appeal in the absence of a statutory provision.
>
> "The commissioner in the first instance and then the board of bank appeals represented the general public interest in the exercise of police power. The proposed incorporators were the persons whose private rights might be affected by action of the commissioner or the board of appeals."

Perhaps the status of the Oil Conservation Commission in an appeal of the kind here involved can be clarified if its right to appeal from a decision of the trial court is examined under the statute. Clearly the Commission has no right to appeal from its own decision. Only a party dissatisfied with the disposition of the case by the Commission has that right and then it is limited to questions presented in an application for rehearing which the Commission itself could not have filed. But what if the Commission participated in the trial on appeal and its order was annulled? Does it have the right to appeal to the Supreme Court? If it has the right to participate as an adversary

party it would appear that it should have the right to appeal an adverse decision. Yet the statute is absolutely silent in this regard.

The prevailing rule is that in the absence of express statutory provision an administrative body has no right to appeal from a decision invalidating one of its orders. The Colorado court so held in Board of Adjustment v. Kuehn, 290 P. 2d 1114 (Colo. 1955), saying, at page 1116:

> "Does the Board of Adjustment of the City and County of Denver, or the individual members thereof, have the power to prosecute a writ of error from the Supreme Court to review the judgment of the district court which reversed a decision of said Board?"
>
> "This question is answered in the negative. Generally, we think it is well established that a judicial or quasi-judicial tribunal cannot appeal or prosecute a writ of error from the determination of a reviewing court, unless express authorization by charter provision or legislative enactment directs to the contrary. The weight of authority seems to apply this general rule to cases which deal with zoning boards of adjustment. * * *"

The following cases have applied the same rule, usually premised on the proposition that the administrative body has no interest in the subject matter of the litigation and will not be adversely affected by the decision. Miles v. McKinney, 174 Md. 551, 199 A. 540, 117 A.L.R. 207 (1938); Rox v. Doherty, 284 N.Y. 550, 32 N.E. 2d 549 (1949); State v. Zoning Board of Appeal and Adjustment, 198 La. 758, 4 So. 2d 820 (1941); Appeal of Board of Adjustment, Lansdowne Borough, 313 Pa. 523, 170 Atl. 867 (1934); Gilliam v. Etheridge, 67 Ga. App. 731, 21 S.E. 2d 556 (1942); Department of Labor and Industries v. Cook, 44 Wash. 2d 671, 269 P.2d 962 (1954); In re Applications Nos. 2354 and 2374 of Central Nebraska Public Power and Irrigation District, 132 Neb. 547, 272 N.W. 560, (1937).

We submit that the rule so applied is sound and should be applied in this case. Regardless of what may be the case when waste of natural

resources is the issue and the Commission is acting in a purely legislative capacity, in this case there is no precedent and no authority for the Commission to become an adversary supporting the claim of one group against another. This is particularly true because the controversy here was basically between two groups of operators each of whom asserts the right to produce certain gas and to receive the proceeds therefrom.

Finally, it is submitted that the action of the Commission in hearing this controversy and promulgating Orders R-1092-A and R-1092-C was the performance of a quasi-judicial function. Cross-Appellants assert that the trial court acted on that premise and that it is erroneous (Brief-in-Chief, page 10). In so doing they ignore the distinction between judicial and quasi-judicial functions.

It is the established law of New Mexico that quasi-judicial functions can be delegated to legislative agencies without coming into conflict with the separation of powers required by the Constitution. Thus this Court said in State ex rel Hovey, et al v. Mechem, 63 N.M. 250, 316 P. 2d 1069 (1957), at page 252:

> "This is not to say that the legislature, in the exercise of its police powers, may not confer 'quasi-judicial' power on administrative boards for the protection of the rights and interest of the public in general whose orders are not to be overruled if supported by substantial evidence."

See also State v. Kelly, 27 N.M. 412, 202 P. 524, 21 A.L.R. 156 (1921); City of Socorro v. Cook, 24 N.M. 202, 173 P. 682 (1918).

The controversy between Appellants and Appellees heard by the Oil Conservation Commission in Case No. 1327 turned on the question of whether the proposed deliverability proration formula would better protect the correlative rights of operators in the Jalmat Pool than the existing

acreage formula. The issue was clear. The effect of the decision, as has been shown heretofore was actually to redistribute the ownership of the Jalmat Pool because when the amount of gas which an operator can produce from the pool is changed, his percentage of ownership is changed. The impact of the decision was felt by the operators and owners in the pool, all of whom were parties to the proceeding. The public interest was in no wise affected by this decision which redistributed the right to take gas from the pool.

This Court said in State v. Kelly, supra, at page 428:

> "The rights and liabilities of a private individual are fixed by law and are to be determined by judicial inquiry. * * *"

Mr. Justice Holmes in Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 226, 29 S. Ct. 67, 69, 53 L. Ed. 150, said:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power."

This statement, relied upon by Cross-Appellants (Brief-in-Chief, page 11), has been criticized as having produced many unsatisfactory practical results. 1 Davis, Administrative Law Treatise 35.01, page 286. Nonetheless, if it be accepted as a correct statement, it is apparent that the unique effect of the promulgation of a gas proration order partakes to a marked degree of the judicial function. An operator owns in a gas pool only the gas which he is permitted to produce from it. Thus an order which fixes that quantity for the future equally adjudicates his present ownership in the pool. The effect of Order R-1092-A upon an operator whose income was reduced

$15,000 per month by it, was to adjudicate him to own a proportionately smaller part of the gas pool. It is not suggested that the order is thereby converted into a judicial act. It is suggested, however, that its character as a quasi-judicial act thereby becomes fully apparent.

The courts have been much more inclined to approve participation of administrative bodies in appeals from their orders where the act was purely legislative in character and the representation of the public interest was direct. In appeals from quasi-judicial determination, however, where the agency was sitting as an adjudicator between the conflicting positions of opposing parties the rule has developed otherwise. The case at bar is clearly in the latter category. In such a case, the Wisconsin court analyzed and applied the rule for which we contend with a very cogent statement of its reasons. The case was Muench v. Public Service Commission, 261 Wis. 492, 53 N.W. 2d 514 (1952). The court said, at page 523:

> "The Public Service Commission in conducting hearings upon that application made under Ch. 31, Stats., for the erection of a dam in a navigable stream, and making its findings on the issues presented, is acting in a judicial capacity. In such a proceeding where the dam is one to produce electric power, as in the instant case, there are usually conflicting interests represented. On the one side is the applicant, together with those persons and interests who will benefit from the power to be generated as a result of the construction of the dam, and who therefore favor granting the application; while, on the other side are those citizens and organizations which are interested from the standpoint of the public use of the stream for recreational purposes and oppose the application for permit on the ground that such public rights will be endangered or destroyed if the dam is constructed. To hold that the Public Service Commission should not only decide between these conflicting interests in its judicial capacity, but also should represent the state in protecting public rights, would make the commission both judge and advocate at the same time. Such a concept violates our sense of fair play and due process which we believe administrative agencies acting in a quasi-judicial capacity should ever observe."

CONCLUSION

We respectfully submit that the ruling of the trial court prohibiting participation by the Commission in the appeal on an adversary basis was correct and should be affirmed. There is no statutory authorization for such participation and in fact the wording of the statute seems not to contemplate it.

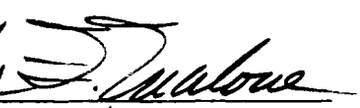
In the case at bar, the controversy related only to the effect of the proposed order on the property rights of the parties and no public interest was involved.

Finally, because of the unique application and effect of a gas proration formula upon an operator in a gas pool, the function performed by the Commission in this case was quasi-judicial and the public interest was not affected by it. The statute itself provides that reasonableness and recognition of correlative rights shall be the standard for such determination. Neither relates to the public interest in such a situation. To permit the Commission to participate as an adversary party in an appeal such as the case at bar offends the American concept of fair play and is contrary to the rationale of the majority of the cases that have been confronted with this problem.

We respectfully submit that the ruling of the trial court from which the Cross Appeal was taken should be affirmed.

Respectfully submitted,

ATWOOD & MALONE

By 

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