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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
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In the Matter of	:	
	:	Docket Nos. 50-424-OLA-3
GEORGIA POWER COMPANY, <u>et al.</u>	:	50-425-OLA-3
	:	
	:	Re: License Amendment
(Vogtle Electric Generating Plant,	:	(Transfer to
Units 1 and 2)	:	Southern Nuclear)
	:	
	:	ASLBP NO. 93-671-OLA-3

GEORGIA POWER COMPANY'S RESPONSE TO INTERVENOR'S
MOTION TO ADMIT CERTAIN ADMISSIONS OF GEORGIA POWER

I. Introduction.

Georgia Power Company ("Georgia Power") opposes Intervenor's Motion to Admit Certain Admissions of Georgia Power (October 6, 1995) ("Intervenor's Motion" or "the Motion"). For a variety of reasons, Intervenor's Motion does not establish good cause for the admission of Georgia Power's denials, and refusals to admit or deny, with respect to the OI Evidentiary Findings in question, as required by the Board's September 6 ruling (Tr. 13154-55).

First, the Motion is deficient because the boilerplate arguments that Intervenor repeats for virtually every item are vague, inconsistent, and thus fail to demonstrate what evidence Intervenor intends to rely upon so that all parties have notice of the issues. Second, the Motion fails to demonstrate that the introduction of the materials sought by Intervenor would

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establish a pattern of false statements, and, therefore, does not show that the evidence it seeks is within the scope of this proceeding. Third, because Intervenor elected to move in the evidence he seeks by a less than straightforward method (i.e., other than through direct questioning of the witnesses who have personal knowledge of the facts discussed in the OI Evidentiary Findings in question), granting Intervenor's Motion will lead to the introduction of evidence which could be highly prejudicial without any means to assure its reliability or probativeness.

Last, but by no means least, Intervenor's Motion is untimely. Having previously elected not to file a reply brief on the topic of whether denials of requests for admissions are admissible evidence, Intervenor waited a full 30 days, after all the witnesses had finished testifying and any meaningful opportunity for reaction to new issues had passed, before responding to the Board's September 6, 1995 ruling. If Intervenor's Motion is granted, Georgia Power will need to consider submitting additional evidence to clarify the record. Intervenor's delay, beyond the end of the hearing, effectively prevents Georgia Power from doing so without creating substantial risk of delay in the completion of this proceeding. For all of these reasons, Intervenor's Motion should be denied.

II. Background.

Intervenor's First Request for Admissions (May 17, 1994) sought admissions from Georgia Power concerning each and every statement in the 100-plus pages of the OI Report. The

request further required Georgia Power to state the precise grounds justifying any denial of the accuracy of the OI Report statements. Following discussions among the Board and the parties at the May 26, 1994 status conference, it was agreed that Georgia Power would respond only to the 657 numbered Evidentiary Findings in the OI Report.¹ Georgia Power provided its response to the request for admissions on July 7.

Intervenor's initial list of exhibits did not identify Georgia Power's July 7, 1994 Response to Intervenor's First Request for Admissions. It was not even marked for identification until July 13, 1995 when Intervenor questioned Mr. Hairston about a few of the responses. At that time, Intervenor marked it as Intervenor Exhibit II-168, and moved its admission into evidence only to the extent that the document was referred to in the questioning of a witness at the hearing. Tr. 9300. Thereafter, with the exception of Mr. Mark Ajluni who testified on August 10, 1995, Intervenor did not question any other Georgia Power witness concerning Intervenor Exhibit II-168.

During Intervenor's cross-examination of Mr. Ajluni on August 10, 1995, Judge Bloch suggested to Intervenor that, in lieu of questioning Mr. Ajluni about numerous responses contained in Intervenor Exhibit II-168, he could file a list of the admissions which he planned to refer to and then state them for the record. The end result would be that the listed admissions

¹ Georgia Power later requested and received an extension of time to respond to July 7, 1994.

could then be used in the parties' findings without having had to refer to them in questioning a witness, in this case Mr. Ajluni.

The following day, Intervenor served on the Board and the parties Intervenor's Motion to Admit Certain Admissions and Sections of the OI Report into Evidence (August 11, 1995). Intervenor's August 11 Motion covered Georgia Power responses which not only constituted admissions (with and without clarifications), but also those which constituted denials and refusals to either admit or deny. Georgia Power objected to the August 11 Motion except as it applied to pure admissions or admissions with clarifications² on the ground that, under federal practice and procedure, such responses simply are not "admissions" and, therefore, they are not admissible. Georgia Power's Response at 1. Georgia Power's Response also objected to introducing a number of Georgia Power responses which admitted (and, in one case, neither admitted nor denied) that the OI Report accurately paraphrased statements from tapes 57 and 58, the stipulated transcripts of which have already been admitted into evidence, on the ground that such responses were cumulative, non-probative, and not the best evidence. Georgia Power's Response further stated it was not appropriate to admit, as the sole basis for Georgia Power's denials or refusals to admit or

² Georgia Power Company's Response to Intervenor's Motion to Admit Certain Admissions and Sections of the OI Report into Evidence (August 22, 1995) ("Georgia Power's Response") at 2 argued that, for each admission, the related OI Evidentiary Finding and any supporting referenced documentation should also be admitted at the same time.

deny, the Response's general identification of conflicting information which precluded an admission or, in the case of a refusal to admit or deny, an admission or denial. "Other or more specific bases for denial may exist, but given the excessive number of requests for admission -- one for each OI Evidentiary Finding -- Georgia Power's ultimate position on a particular Finding is not necessarily reflected in these responses."

Georgia Power's Response at 2.

On August 25, 1995, the Licensing Board stated:

The Licensing Board has on its plate the motion concerning OI conclusions and the admissions motion, which we had some discussion of. We authorized [sic] a reply by Intervenor if it chooses to do so on the question of the effect of denials in admissions motions. Staff expressed a strong opinion orally that denials are not evidence.

Tr. 12914. Intervenor elected not to file a reply brief.

On September 6, 1995, the Board engaged the parties on the record concerning this issue. Tr. 13078-92. Georgia Power and NRC Staff both expressed their opposition to Intervenor's August 11 Motion with respect to the admission of denials and refusals to admit or deny. Thereafter, the Board ruled that those Georgia Power responses included in Intervenor's August 11 Motion which constituted admissions and admissions with clarification, and which were acceptable to Georgia Power, were admitted into evidence along with the clarifying materials that Georgia Power asked to have admitted in its August 22 Response. Tr. 13154. With respect to the Georgia Power responses which constituted denials or refusals to admit or deny, the Board ruled that:

we understand the difficulty that Georgia Power has about knowing how to counteract the case which isn't presented in greater detail than it's being presented with.

We do think it's within the scope of the admitted contention to show that the way in which denials were made could be part of a pattern of misrepresentation. But we don't have the foggiest notion of what the pattern is that Intervenor sees.

And as a prerequisite to our granting any motions about the documents that have to do with denials or refusals to admit, we think it's necessary that there be further showing of good cause demonstrating what the evidence is that Intervenor intends to really [sic] on, so that everyone will know what's in contest about those denials. And there will be an opportunity to rebut that if necessary by Georgia Power.

Tr. 13154-55 (September 6, 1995). Intervenor filed nothing in response to this Board ruling until a full 30 days later, after the completion of testimony, when he filed his October 6 Motion.

IV. Argument.

- A. INTERVENOR'S OCTOBER 6 MOTION SHOULD BE DENIED BECAUSE IT FAILS TO ADEQUATELY DEMONSTRATE THE EVIDENCE UPON WHICH INTERVENOR INTENDS TO RELY AND IS OTHERWISE FATALY FLAWED.

Intervenor's Motion asserts that Intervenor "takes the opportunity to show good cause and to demonstrate the evidence upon which Intervenor intends to rely." Motion at 1. As discussed in detail below, the Motion completely fails to show any good cause for admission of those Georgia Power's denials and refusals to admit or deny identified in Intervenor's Motion. Moreover, the Motion is so flawed with internal inconsistencies,

inaccuracies, misleading statements, and vague and conclusory statements that it fails to demonstrate what evidence it is upon which Intervenor intends to rely.

Intervenor's Motion is the antithesis of a thoughtful and careful pleading. Intervenor arbitrarily incorporated the same boilerplate language again and again in his replies to Georgia Power's responses. For example, Intervenor included the following conclusory statement in his replies to all of Georgia Power's denials and virtually all of Georgia Power's refusals to admit or deny:

Additionally, this information is relevant to establish a pattern of false statements and misrepresentations to the NRC....

As discussed in more detail below, Intervenor simply inserted this statement without any supporting discussion, as if it was a last minute afterthought. As a result, the Motion is fatally vague in this respect. In fact, Intervenor even included this assertion in his reply concerning OI paragraph 16 of Allegation No. 2, in which Intervenor admits that Georgia Power's response is not false.

Intervenor's boilerplate is also highly misleading. In a large number of his responses, Intervenor asserts "[i]t is important to note that Licensee admits that the OI paragraph is accurate." Georgia Power's denials, and refusals to admit or deny, do not admit that the OI paragraphs are accurate. If they did, they would be "admissions." What they do state is that the OI investigator accurately quoted or summarized what was already

contained in an OI interview transcript. This does not mean that Georgia Power agrees that the statement made in such transcript is an accurate statement of fact. Furthermore, Intervenor inaccurately applied this boilerplate to Georgia Power's denials of OI Evidentiary Findings 1, 2 and 4 of Allegation No. 7 (Intervenor's Motion at 31-32). In none of those responses did Georgia Power admit that the OI paragraphs in question were accurate or even that the investigator had accurately quoted or summarized anything.

Finally, with respect to demonstrating the evidence upon which Intervenor intends to rely, Intervenor's Motion is internally inconsistent. On the one hand, Intervenor states "[i]t is the factual information, gathered and verified by Mr. Ajluni, contained in the responses as well as the information contained in the OI Report paragraphs of which Intervenor is seeking admission" and not the arguments of the parties (presumably, the denials and refusals to admit or deny). Motion at 2. On the other hand, Intervenor's Motion, Section II.B, pp. 3-32, indicates that Intervenor intends to argue in his findings that Georgia Power's denials and refusals to admit or deny are a continuing pattern of false statements.

- B. INTERVENOR'S OCTOBER 6 MOTION SHOULD BE DENIED BECAUSE IT FAILS TO SHOW THAT INTRODUCTION OF THE MATERIAL SOUGHT BY INTERVENOR WOULD ESTABLISH A PATTERN OF FALSE STATEMENTS BY GEORGIA POWER OR THAT IT IS OTHERWISE NECESSARY FOR AN ADEQUATE RECORD.

The Licensing Board's September 6 ruling, discussed above, required Intervenor to make a further showing of good cause. The Board explained that Intervenor had not adequately demonstrated that what he sought to prove was within the scope of the proceeding. The Board ruled that a pattern of misrepresentations would be within the scope of the contention, but that it could not see a pattern as Intervenor had alleged. Tr. 13154-55 (September 6, 1995). Intervenor's Motion utterly fails to show how a pattern of false statements could be reasonably inferred from the information Intervenor seeks to admit into evidence. Therefore, Intervenor has failed to show that the information which he seeks to be admitted is within the scope of the proceeding. Because Intervenor made no other showing that the information which he seeks is necessary for an adequate record, his Motion should fail.

First, there are a number of OI paragraphs in Intervenor's Motion which Intervenor does not even allege are relevant to establish a pattern of false statements and misrepresentations. Those are OI paragraphs 9, 10, 12, 13, 14, 21, 24, 32, and 33, discussed in Intervenor's Motion at 14-17, all of which pertain to Allegation No. 3. As discussed in Georgia Power's August 22, 1995 Response, these OI paragraphs merely summarize statements on Tapes 57 and 58, the stipulated

transcripts of which are Georgia Power Exhibits II-1 and II-2, respectively, the entirety of which have been admitted into evidence. Because the stipulated transcripts are the better evidence of what was said, by whom, and when, the OI paragraphs summarizing statements made on those transcripts are not probative and are cumulative. Intervenor's conclusory assertion that Georgia Power's responses concerning these OI paragraphs are necessary for an adequate record is absurd.

As mentioned in the preceding section of this response, Intervenor's conclusion with respect to OI paragraph 16 (Allegation No. 2), Intervenor's Motion at 13, demonstrates that Intervenor simply incorporated his "pattern of false statements" accusation arbitrarily to each of Georgia Power's responses to the remaining OI paragraphs discussed in Intervenor's Motion. In the case OI paragraph 16 (Allegation No. 2), Intervenor applied the accusation to a Georgia Power response which Intervenor also said was not in conflict with his understanding of the facts. It is outrageous that Intervenor admits that Georgia Power's denial is not false and, in the same breath, asserts it is "relevant to establish a pattern of false statements and misrepresentations."

In every other one of Intervenor's replies to the specific OI Evidentiary Findings discussed in his Motion, Intervenor makes the same bald assertion that Georgia Power's response is relevant to establish a pattern of false statements and misrepresentations. No support for such assertions is provided and no indication is given that Georgia Power's

responses are unreasonable. Below, Georgia Power discusses a number of the replies in Intervenor's Motion.

With respect to OI paragraphs 25, 27, 28, 44 and 61, discussed in Intervenor's Motion at 3-6 and 8-11, Intervenor correctly observes that Georgia Power's response of "neither admit nor deny" was based on the differing recollections of Messrs. Bockhold and Burr, or Messrs. Cash and Burr, concerning Mr. Burr's involvement in the preparation of the April 9, 1990 Diesel Testing transparency. Then Intervenor concludes, on the strength of this alone, that this is relevant to establish a pattern of false statements and misrepresentations. However, Intervenor's conclusion of false statements does not follow from the fact that Messrs. Bockhold and Burr, or Messrs. Cash and Burr, remembered the 1990 events differently. Intervenor provides no information as to why the Board should even conclude that these Georgia Power responses are unreasonable.

With respect to OI paragraph 31, Georgia Power denied that Mr. Burr saw the Diesel Testing transparency for the first time on April 9, 1990 because Georgia Power believes Mr. Burr assisted Mr. Bockhold in preparing the transparency. Intervenor's Motion at 6 correctly asserts that Georgia Power's Response shows that Messrs. Bockhold and Burr had differing recollections and that Georgia Power chose to believe Mr. Bockhold in this instance. However, Intervenor's further assertion that this information is "relevant to establish a pattern of false statements and misrepresentations" is illogical

and unreasonable. Intervenor provides no explanation of the basis for this conclusion. Indeed, the reasonableness of the Response is borne out by Intervenor's deposition of Mr. Burr, in which Mr. Burr stated that he and Mr. Stokes and/or Mr. Kochery worked on a sequence of testing that was presented to the NRC. Burr May 24, 1994 deposition at 154.

Similarly, in every one of Intervenor's replies provided in his Motion he included the boilerplate "[t]his evidence is necessary for an adequate record." In every case, it is the last sentence of his reply to the specific Georgia Power responses and no support for that conclusion is given.

C. INTERVENOR'S OCTOBER 6 MOTION SHOULD BE DENIED BECAUSE IT WILL LEAD TO THE ADMISSION OF EVIDENCE WHICH IS NOT RELIABLE OR PROBATIVE OR NECESSARY FOR AN ADEQUATE RECORD.

NRC's Rules of Practice provide that "[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted." 10 C.F.R. § 2.743(c). Not surprisingly, Intervenor's Motion, at 2-3, fails to cite a single case in support of his assertion that denials in response to requests for admission are admissible. The general evidentiary rule of practice is that responses to discovery requests are not admissible into evidence. See, e.g., Walton v. United Consumers Club, Inc., 786 F.2d 303, 313 (7th Cir. 1986); Power Application & Mfg Co. v. Moscow Agri-Industries, No. 86-1656-PFK, 1992 U.S. Dist. LEXIS 18928 (D. Kan. 1992). However, admissions to

requests for admissions may be offered in evidence in order to "expedite trial by eliminating the necessity of proving undisputed and peripheral issues." Kosta v. Connolly, 709 F. Supp. 592, 594 (E.D. Pa. 1989). The Kosta court warned, however, that "[w]e should not employ the rule to establish facts which are obviously in dispute" Id. The NRC's Rules of Practice also only provide that "[a]dmissions obtained pursuant to [requests for admissions] may be used in evidence to the same extent and subject to the same objections as other admissions." 10 C.F.R. § 2.742(c) (1994) (emphasis added). This rule does not provide for the admission into evidence of any discovery response other than an admission. Thus, although a party may be relieved of his burden of proving matters admitted in response to a request for admission, he still must affirmatively prove all other elements of his case.³

Intervenor's tactic of addressing the OI Evidentiary Findings through Georgia Power's denials and refusals to admit or deny such Findings will not lead to the admission of reliable or probative evidence. When Georgia Power responded to Intervenor's First Request for Admissions, Georgia Power made a number of General Objections given the burden of responding to 657 OI Evidentiary Findings. As one objection, Georgia Power objected

³ Additionally, "[o]therwise admissible evidence can be excluded altogether if it lacks any significant probative value." Southern California Edison Co. (San Onofre Nuclear Generating Station), LBP-82-3, 15 N.R.C. 61, 76 (1982). Because the denials Intervenor seeks to have admitted into the record are without probative value in regard to the issues raised in this proceeding, they should be excluded.

to identifying, or producing, every document which supported Georgia Power's responses to the requests for admission. Instead, Georgia Power endeavored to identify and produce any documents which it reasonably believed were not among the documents previously produced to Intervenor; Georgia Power found no such documents. Therefore, as pointed out in its August 22, 1995 Response, Georgia Power does not believe that its responses to Intervenor's First Request for Admissions identify all supporting materials for Georgia Power's denials and refusals to admit or deny.

Allowing Intervenor to admit such responses to somehow impeach Georgia Power's credibility or case-in-chief would also be inappropriate because the underlying information is second or third-hand hearsay that is not sufficiently reliable or probative to be admitted by itself. To illustrate, the responses relate to statements made by an OI investigator who has not been questioned about them. The investigator's summaries in turn refer to statements allegedly made by other individuals who also have not been questioned about them. Where, as here, no witness has been questioned about a single one of those statements, their impeachment value is non-existent.

Furthermore, Intervenor totally failed to make any showing of why he did not, or could not, establish the facts he seeks through the direct questioning of the various Georgia Power witnesses who appeared in this proceeding and who are the subjects of the OI Evidentiary Findings in question. The only

occasion on which Georgia Power believes that Intervenor questioned Georgia Power witnesses about either the OI Evidentiary Findings or Georgia Power's responses to the request for admissions is on July 13, during questioning of Mr. Hairston, and on August 10, during questioning of Mr. Ajluni. While Mr. Ajluni is the individual who verified Georgia Power's denials and refusals to admit or deny, that does not cure the evidentiary problem presented with their admissibility. Mr. Ajluni does not have personal knowledge of the underlying events. He simply evaluated the underlying factual information and made a judgment regarding whether Georgia Power could agree with the OI Evidentiary Findings.

Intervenor should not now be permitted to establish these facts through Georgia Power's denials and refusals to admit or deny, which, as described above, are not reliable or probative evidence. Intervenor's game is a familiar one; he wants to contrast the OI Evidentiary Findings with Georgia Power's case-in-chief in order to show inconsistencies. Were this tactic permitted, Intervenor would avoid confronting Georgia Power witnesses directly about the facts he wishes to establish. This is another slant on Intervenor's tactic throughout this proceeding of establishing facts concerning one Georgia Power witness through the questioning of other witnesses. This tactic is particularly unfair when the author of the OI Report did not stand cross-examination concerning those OI Evidentiary Findings. Because the Georgia Power denials and refusals to admit or deny

are not reliable or probative evidence, it follows that they are not necessary for an adequate record.

Finally, in two instances, OI paragraph 57 of Allegation No. 3 and OI paragraph 4 of Allegation No. 4 (Intervenor's Motion at 17-18 and 24-25), the OI investigator summarized the July 1990 OI interview transcript of Allen Mosbaugh. There is no good reason why, if Intervenor deemed it necessary for an adequate record, that Intervenor did not include this information in the prefiled testimony of Mr. Mosbaugh. It is ludicrous for Intervenor to now move his own prior statements into evidence and thereby avoid cross examination on those statements.

D. INTERVENOR'S OCTOBER 6 MOTION SHOULD BE DENIED BECAUSE IT IS UNTIMELY.

Intervenor's delay in filing his October 6 Motion is intolerable. Intervenor's Motion was filed on the day that the hearing record was closed. On September 20, 1995, the parties discussed remaining items to be addressed before the record could be closed. At that time, Intervenor did not identify any filing it intended to make on the topic of Georgia Power's responses to Intervenor's First Request for Admissions; Intervenor further stated that he was unaware of any motions he intended to file other than the ones he had identified.

Intervenor has been extremely dilatory in pursuing this motion. The Board offered Intervenor an opportunity to submit a

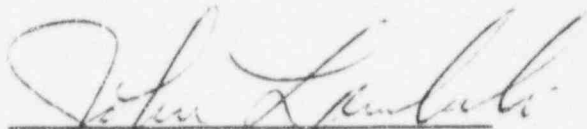
Intervenor did nothing. The Board offered Intervenor another opportunity to submit justification for admitting denials on September 6, but instead of acting promptly, Intervenor waited until the completion of the hearing.

Intervenor's delay in filing his October 6 Motion is prejudicial to Georgia Power. The purpose of the Board's September 6 ruling was to determine if there were any essential issues that needed to be considered, and if so, make sure all the parties were on notice so they could react and have an opportunity to provide rebuttal if necessary. The Board specifically contemplated an opportunity for rebuttal. Tr. 13155. By waiting until after all witnesses had completed testifying, Intervenor has effectively denied both Georgia Power and NRC Staff any reasonable opportunity to present additional evidence or explanation. The granting of Intervenor's late motion would now place Georgia Power in the position of having to choose between the lesser of two evils: (1) accepting Intervenor's unreasonable demands to admit the Georgia Power denials without further rebuttal, or (2) risk further delay of this already lengthy proceeding in order to supplement the record. Either choice would be unreasonable.

IV. CONCLUSION.

For all of the foregoing reasons, Intervenor's Motion to Admit Certain Admissions of Georgia Power, dated October 6, 1995, should be denied..

Respectfully submitted



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Dated: October 12, 1995

UNITED STATES OF AMERICA

DOCKETED
USNRC

NUCLEAR REGULATORY COMMISSION

'95 OCT 13 A11:38

Before the Atomic Safety and Licensing Board

OFFICE OF SECRETARY
DOCKETING & SERVICE

In the Matter of)

) Docket Nos. 50-424-OLA-3

GEORGIA POWER COMPANY,
et al.)

) 50-425-OLA-3

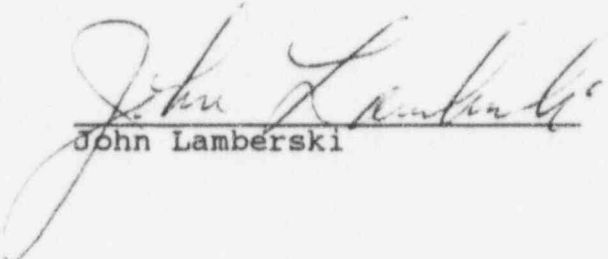
(Vogtle Electric Generating
Plant, Units 1 and 2))

) Re: License Amendment
) (Transfer to Southern
) Nuclear)

) ASLBP No. 93-671-01-OLA-3

CERTIFICATE OF SERVICE

I hereby certify that copies of Georgia Power Company's Response to Intervenor's Motion to Admit Certain Admissions of Georgia Power, dated October 12, 1995, were served by express mail upon the persons listed on the attached service list this 12th day of October, 1995.


John Lamberski

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of
GEORGIA POWER COMPANY,
et al.

(Vogtle Electric Generating Plant,
Units 1 and 2)

Docket Nos. 50-424-OLA-3
50-425-OLA-3

Re: License Amendment
(Transfer to Southern Nuclear)

ASLBP No. 93-671-01-OLA-3

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