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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 35842

**NEW ENGLAND CENTRAL RAILROAD, INC.
- TRACKAGE RIGHTS ORDER -
PAN AM SOUTHERN LLC**

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**REPLY OF NEW ENGLAND CENTRAL RAILROAD, INC.
TO PAN AM SOUTHERN LLC'S MOTION TO
COMPEL RESPONSES TO FIRST SET OF DISCOVERY**

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Dated: August 24, 2015

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This dispute involves a motion to compel and cross-motions for protective order in this trackage rights compensation proceeding between New England Central Railroad, Inc. ("NECR") and Pan Am Southern LLC ("PAS"). After NECR filed its Opening Statement on June 4, 2015, PAS served NECR with significant and wide-ranging discovery requests. On July 17, 2015, NECR responded to the discovery requests, produced in excess of 4,500 pages of documents and offered to produce more voluminous/not easily transportable or able to be copied documents in its parent company's corporate office in Darien, CT.¹ NECR did object, however, to some of the discovery requests due to their overbroad and unduly burdensome nature and, contemporaneously with its serving its formal responses and objections to PAS's discovery requests, NECR filed a Motion for Preliminary Determination of Appropriate Methodology and for Protective Order ("Methodology Motion"). The Methodology Motion is pending and has not yet been determined on the merits. In addition, contemporaneously with this response, NECR is filing a Motion for Supplemental Protective Order further arguing that the appropriate methodology or methodologies for this proceeding should be determined before forcing NECR

¹ A copy of NECR's Objections and Responses to Pan Am Southern LLC's First Set of Discovery Requests ("NECR Objections and Responses") was attached as Exhibit A to the PAS Motion to Compel, and NECR is not attaching a separate copy to this Reply.

to exchange voluminous and burdensome discovery to its competitor PAS in what is essentially a fishing expedition by PAS to learn the intimate details of NECR's revenues, customer pricing and traffic arrangements.²

On August 3, 2015, PAS filed a Motion to Compel regarding its first set of discovery. PAS's Motion to Compel makes clear that PAS wants free-ranging discovery on all the different methodologies discussed in the SSW Compensation Cases³ so that PAS can then choose which one it wants to use.⁴ For example, PAS has served significant discovery requests seeking details of revenues and profits, but has not explained how or why such information would be necessary for the specific methodologies it is allegedly considering. NECR contends that, instead of the "tail wagging the dog," the Board should limit the discovery to information that would be relevant or potentially relevant only to appropriate methodologies, and protect NECR from the burden of responding to requests seeking detailed highly confidential, proprietary and customer-sensitive traffic, revenue and earnings / profitability information that should be outside the scope

² In the Methodology Motion, NECR argued specifically that the capitalized earning ("CE") methodology was not appropriate in this proceeding and asked for an order that would protect NECR from having to respond to discovery requests seeking traffic, revenue and profitability information and details that would be relevant only to the CE methodology, and that the RCNLD/VIP methodology is the appropriate methodology for this proceeding. In the Motion to Compel, PAS now argues that it is also considering use of the other methodologies including the "comparable line segments" or the "stand-alone approach" ("S-A") methodologies, and that it is entitled to discovery of information to support the use of any and all methodologies. Because NECR believes that has not demonstrated that the disputed revenue-related or traffic information is necessary to apply the RCNLD/VIP methodology, or any other methodology that the Board might accept (making such information not relevant in this proceeding), NECR is filing a Motion for Supplemental Protective Order to supplement the protective order sought in the Methodology Motion.

³ See *St. Louis Southwestern Ry. Co. – Trackage Rights Compensation* ("SSW I"), 1 ICC 2d 766, 1984 ICC LEXIS 347 (1984); *St. Louis Southwestern Ry. Co. – Trackage Rights Compensation* ("SSW II"), 4 ICC 2d 668, 1987 ICC LEXIS 15 (1987) (collectively, "SSW Compensation Cases").

⁴ PAS also filed a response to the Methodology Motion on or about August 5, 2015.

of discovery in this proceeding. As set forth in the Methodology Motion and Motion for Supplemental Protective Order, revenues, earnings, profits and detailed traffic information are not relevant to, and are not necessary for, applying any valuation method that is appropriate for this proceeding.

It is submitted that the Board should address the issues raised by the Methodology Motion and the Motion for Supplemental Protective Order (sometimes referred to collectively, "Motions for Protective Order") before deciding whether to compel responses to the discovery requests that would be protected under the requested protective order.

ARGUMENT

I. It Is Appropriate to Limit Discovery to Information Related to a Methodology that the Board Finds Appropriate for the Proceeding..

PAS is correct that NECR does not dispute that the SSW Compensation Cases set forth the general formula for setting compensation in trackage rights cases, and that the SSW Compensation Cases suggest various methodologies for determining the value of the trackage rights line that is the base for calculating the interest rental component of such compensation. NECR does dispute, however, the assumption PAS makes that it is therefore entitled to wide-ranging and burdensome discovery from NECR on any and all possible methodologies. To the contrary, the Board has made clear – and NECR has argued in the Motions for Protective Order – that it is appropriate for the Board to choose the appropriate methodology before wide-ranging discovery ensues. *See Toledo, Peoria & Western Railway Corp. – Trackage Rights Compensation – Peoria and Pekin Union Railway Company*, ICC Finance Docket No. 26476 (Sub-No. 1) (served September 20, 1994) ("*TPW*"), 1994 ICC LEXIS 175 at *8 (experience shows appropriate methodology should be determined early in trackage rights compensation cases to eliminate undue burdens); *Atchison, Topeka & Santa Fe Railway Company – Operating*

Agreement – Southern Pacific Transportation Co., 8 ICC 2d 297 (“*ATSF*”), 1992 ICC LEXIS 43, at *14-15 (determining proper methodology for trackage rights cases before data was submitted to determine the valuation base and interest rental rate).

It does not make sense to allow PAS to impose burdensome discovery of all possible information and data it contends it needs to explore every conceivable methodology of valuing the trackage rights here. In the particular facts of this case, as set forth more fully in the Methodology Motion and the Motion for Supplemental Protective Order, NECR contends that the RCNLD (“replacement cost new less depreciation”) methodology, or the VIP (“value in place”) variation thereof, is the most appropriate methodology to be used here. PAS contends that the CE approach is favored, but also argues that there may be other methodologies PAS would like to use after obtaining all the data they seek from NECR despite the burdensome requests for proprietary information that might require. While PAS summarily states that it needs all of the information requested in order to evaluate which methodology to use, it does not specifically explain how the disputed information would relate to any of the specific methodologies. It would seem unfair, and a waste of both the parties’ resources and the Board’s time not to conduct a proper analysis of what methodology is appropriate under the facts presented in this proceeding, and to limit discovery only to that information necessary to apply the appropriate methodology.⁵ PAS has not cited any legal support for the proposition that the Board should allow unlimited discovery including on methodologies that are likely to be found inappropriate, or that it should allow discovery of information that is not relevant to any appropriate methodology.

⁵ While the Board could conceivably find more than one methodology appropriate, a finding that certain methodologies are inappropriate would still limit the scope of permitted discovery, and the burden of responding thereto. *See* Motion for Supplemental Protective Order.

Nor has PAS cited any legal support for its proposition that NECR must respond to the discovery requests for which it has sought a protective order because the requested protective order has not yet been granted by the Board. The STB discovery rules specifically state that an appropriate response to a motion to compel discovery is a motion for protective order. *See* 49 C.F.R. 1114.21(c) (allowing parties to seek protection from discovery). *See also* Motion for Supplemental Protective Order at 5-6, 11. A finding on the appropriate valuation method at this time would be judicially economical, streamline the proceeding, and save the parties the unnecessary time and expense that would otherwise be spent on gathering the highly sensitive and proprietary documents and information requested, and on the preparation of reports and briefing with respect to inappropriate valuation methods.⁶

II. NECR Has Provided Substantial Responses to PAS's Discovery Requests.

Overall, PAS mischaracterizes NECR's response to its discovery. NECR produced in excess of 4,500 pages of documents (and many more at its parent company's office) in response to the discovery requests, but refused, appropriately, to provide discovery on issues relating to methodologies that NECR believes are inappropriate to the situation presented here. *See* Section I above; NECR Objections and Responses; the Methodology Motion and NECR's Motion for Supplemental Protective Order. In addition, NECR's discovery responses were much more expansive than PAS has characterized in its motion to compel, for example:

- PAS propounded a very dense, wide-ranging set of discovery requests, and NECR responded to its one Interrogatory as well as responded and/or produced documents to 25

⁶ Because the requests for a protective order require a Board determination of the appropriate methodologies for this proceeding, NECR requests that the Board not refer the request for a protective order (or the motion to compel to the extent it relates to discovery covered by the request for a protective order) to an administrative law judge in accordance with its new policy regarding discovery disputes.

of the 35_document requests (to a few of those requests NECR had no responsive documents, but they were answered). *See* NECR responses to Document Requests 2, 4, 6, 8, 9, 12-14, 18-21, 23-35.

- NECR objected to producing documents in response to only 9 of PAS's document requests based on the reasons set forth at length in the Methodology Motion and the Motion for Supplemental Protective Order. *See* NECR responses to Document Requests 3, 5, 7, 10, 11, 15, 16, 17 and 22.
- In a limited number of produced documents, NECR did redact certainly highly confidential, proprietary information that were not responsive to the requests and thus not necessary to produce despite the fact of the existence of a protective order covering confidentiality. Out of the more than 4,500 pages produced, NECR only had redactions on approximately 5% of the production - approximately 200 pages - and those redactions consisted mainly of internal summaries of agreements that were fully produced and/or small redactions on valuation maps that also contained internal, unresponsive notes. Other redactions were of revenue and earnings information that is subject to the requested protective order. These redacted documents were put on a privilege/redaction log and served on opposing counsel separately from the NECR Objections and Responses.
- With regard to the excel spreadsheets that PAS sought to supplement with the native files (in response to Document Requests 14, 19, 24, 31, 32, 33 and 34), NECR has agreed and is producing those native files thus mooted this part of the Motion to Compel.

III. There Is No Justification for Compelling Responses to Discovery Requests that Are Subject to a Pending Request for a Protective Order.

Until such time that the Board rules on NECR's Methodology Motion and Motion for Supplemental Protective Order, NECR is not required to respond to discovery that is in dispute

pursuant to those motions. *See* 49 C.F.R. 1114.22(c)(1),(5) (STB has authority to limit discovery sought by parties). PAS appears to argue, without any legal support whatsoever, that despite NECR's filing of the Motions for Protective Order that NECR should nonetheless produce all discovery that it is seeking to protect from disclosure. The argument is nonsensical and would undermine the STB's provision of a process by which a party may seek a protective order from discovery. There is no legal support for PAS's proposition that "until you get an Order of protection you must produce everything asked." There is a process in the regulations for filing for a protective order that includes providing time for the opposing party to oppose that motion and time for the governing body to decide the motion. So long as the Motions for Protective Order are pending, NECR is well within its rights to withhold responses that might be subject to that Order until such time as the request is denied, and NECR is ordered to produce the information

IV. NECR's general objections are appropriate.

NECR makes a variety of general objections to PAS's discovery requests based on their overbreadth as well as the arguments raised by way of the Methodology Motion and the Motion for Supplemental Protective Order. As a short response to the General Objections that PAS raises issues with in Section I of the Motion to Compel, pages 7-11, NECR responds as follows:

- General Objection 1 and 2 – agreed as restated by PAS in the Motion to Compel;
- General Objections 3, 4 and 5 are grounded in the Methodology Motion and Supplemental Motion for Protective Order and are well-founded. As set forth above, there is no support in the law that until NECR obtains an Order preventing discovery of certain documents NECR must respond to the disputed requests. Unless and until the

Board rules on the Motions for Protective Order, NECR is well within its rights not to produce the information potentially subject to the requested protective order;

- General Objection 6 - PAS has generally agreed that period of time (January 1, 2013 to May 31, 2015) that NECR has suggested is reasonable. However, has not justified the longer time periods it says it needs for three specific requests, seven years for two (Nos. 34 and 35) that relate NECR costs for track materials, and for installing and replacing crossings, and 25 years for one (No. 9) that relates to loan, grant and other agreements with government or quasi-government agencies.⁷ Setting aside the small likelihood that NECR would have responsive documents going back that far,⁸ it is also not clear what relevance any such information would have. The entity that provided the financing for improvements comprising the trackage rights line segments is not relevant for determining trackage rights compensation. *Arkansas and Missouri Railroad Company v. Missouri Pacific Railroad Company*, 7 ICC 2d 164 (1990), 1990 ICC LEXIS at *17-18 (the owning railroad is entitled to earn a return on property donated by government that is used or useful in the railroad business provided by the owning railroad). Thus, whether NECR received loans or grants from governmental or quasi-governmental agencies, or from banks or from any other sources, is not relevant to the issues present in this proceeding. Accordingly, there is no justification for making NECR search for records

⁷ NECR does not know how 2008 was selected or what relevance that year has. NECR understands that 1990 is when PAS's predecessor was required to sell the middle segment of the trackage rights line to Central Vermont Railway.

⁸ NECR acquired from its lines, including the trackage rights line segments, from Central Vermont Railway at the end of 1994 as a member of the RailTex corporate family. RailTex (including control of NECR) was acquired by RailAmerica in early 2000, and RailAmerica (including control of NECR) was acquired by Genesee & Wyoming Inc. at the end of 2012. The time period proposed by NECR is the time period during which it has been under control of its current parent company, the time period over which current management has had control of NECR's records and recordkeeping.

going back for the periods suggested by PAS, or for any period beyond what has been agreed upon will govern all of the other requests.

- General Objections 7, 11, and 14 are well founded as there is no basis for PAS, a competitor, to discover highly confidential and proprietary information that is not responsive and not relevant to this proceeding – and the existence of a protective order on confidentiality does not cure these objections. That existing protective order governs and protects the confidentiality of discoverable, responsive information but it does not require the production of non-relevant or non-responsive information;
- General Objection 8 is also well-founded. NECR does not agree that there is any “long standing practice” of establishing a document repository in Washington, DC for proceedings before the Board. There are only two parties involved in this action, and requiring the production of documents in a document repository in Washington would be an unnecessary and unduly burdensome obligation on NECR. The “practice” is not required by the Board’s regulations, and when used has generally been the subject of an order of the Board in large, multiparty proceedings such as mergers, or by agreement of the parties. The parties here have not agreed to produce their documents into a repository, nor has the Board ordered it, and it is unnecessary in these circumstances. NECR has already agreed to make the specific oversized and/or voluminous documents⁹ available to PAS in its parent’s Darien, CT corporate offices, instead of the less convenient location of St. Albans, VT where the documents are maintained in the usual course of business. If PAS wants to pay for the copying and shipment of the documents in containers and boxes without first reviewing the documents, then NECR will obtain an

⁹ There are over 30 rolls of dispatch papers measuring 25 inches by 4 inches in depth, three 121 quart plastic containers filled with 4-inch binders, and 1 banker’s box filled with documents.

estimate for doing so, and upon payment by PAS will arrange for the copying and shipping. NECR will also, as requested by PAS, discuss the contents of the document rolls, although the information is not available in another format. PAS is creating a dispute where there really is none to be had.

- General Objection 12 is appropriate as it is an objection to producing documents that are not relevant and not reasonably calculated to lead to the discovery of admissible evidence in this matter. NECR's General Objection 12 is also related to General Objections 3, 4 and 5 discussed above. PAS does not have an "all access" pass to obtain all of NECR's documents that it requests if such requests cannot be shown to be relevant to the proceeding at hand.

V. NECR Should Not Be Compelled to Respond to Document Requests to which It Has Asserted Objections Based on the Methodology Motion and the Motion for Supplemental Protective Order.

As set forth above, NECR objected to produce documents in response to Document Requests 3, 5, 7, 10, 11, 15, 16, 17 and 22 based on the reasons set forth in its Methodology Motion and Motion for Supplemental Protective Order. It is not within the parties' best interests or the Board's interest to allow discovery on every possible valuation methodology available, and the methodology/methodologies should be determined before it is determined if NECR is required to produce any further information in response to these discovery requests. NECR incorporates by reference herein its Methodology Motion and the Motion for Supplemental Protective Order.

VI. NECR's Specific Objections to Document Requests Are Well-Founded.

Many of PAS's arguments in this section are repetitive of the arguments it makes earlier in its Motion to Compel and to which NECR has responded above, and NECR incorporates those

responses as if set forth below. Without also repeating many of the arguments made above and in the Motions for Protective Order, NECR will try to limit its responses to any new arguments raised by PAS with regard to NECR's specific objections to individual document requests.

Document Request No. 1

NECR objected to producing the work papers used/relied upon by the "expert" submissions attached to NECR's Opening Statement. Contrary to PAS's argument that it is "astonished" by NECR's refusal to produce what is information that is clearly protected by the attorney-client and/or work product privilege, PAS cites to no case that states that work product consisting of work papers of a supporting witness must be produced. To the contrary, PAS just cites to several Board opinions that speak to the submission of spreadsheets to the Board and the need for those spreadsheets to be fully searchable/workable electronic versions. As stated above, NECR has agreed to provide native, electronic versions of the previously produced Excel spreadsheets to the extent that they contain information relevant to these proceedings. Additionally, NECR will also produce electronic, fully functioning Excel spreadsheets of the appendices included in the Verified Statements of Charles Banks and John Ireland of R.L. Banks and Associates, Inc. (the "RLBA Verified Statement") submitted in support of NECR's Opening Statement, which were previously not produced.

NECR objects to producing the underlying work product/work papers of its witnesses and contends that those internal working papers/calculations are not subject to proper discovery. To the extent the documents or information requested were collected or prepared in anticipation of litigation, they should be protected by the work product privilege and found not to be discoverable. Further, the Board's discovery regulations are silent on the issue of expert work papers, but the Federal Rules of Civil Procedure can be instructive when the Board's discovery

rules are silent. The Federal Rules extends attorney-client privilege to documents provided to an “expert” by the attorney. *See* Fed. R. Civ. P. 26(B)(4). In addition, Rule 26(b)(4) requires only the disclosure of a summary of the grounds for the opinion of an expert witness. *See, e.g., Advanced Medical, Inc. v. Arden Medical Systems, Inc.*, 1992 U.S. Dist. LEXIS 17523, at *5 (E.D.Pa. 1992) (plaintiff only required to supply a summary of the grounds for expert opinion and not a detailed narrative of all the thought processes in which plaintiff’s experts engaged in ultimately arriving at their results). Thus, the production of work papers that would reveal the thought processes of the witness should be required to be produced. The statements provided in support of NECR’s Opening Statement by outside professionals are similar in nature to expert reports. The spreadsheets provided in electronic format do provide support for the calculations in NECR’s Opening Statement along with the other information that was produced by NECR in response to PAS’s document requests. Production of internal work papers collected or prepared in anticipation of litigation would be a violation of the attorney-client privilege and work product doctrine and is not supported by any case law offered by PAS in its motion.

Document Requests Nos. 3, 7 10, 11, 15, 16 and 22

PAS spends a good deal of time claiming that these various document requests are relevant to the various methodologies it would like to explore, but does not identify specifically which methodologies require the information. As set forth above and in the Motions for Protective Order, these document requests all seek information that is only potentially relevant to methodologies that are not appropriate for valuing the trackage rights line segments in this particular case. As NECR has demonstrated, the information requested in these various document requests is not relevant to the RCNLD/VIP methodology that the Board should find is

the most appropriate in this proceeding.¹⁰ PAS can, and has, raised these arguments in response to NECR's Methodology Motion and Motion for Supplemental Protective Order.

Moreover, PAS's document requests go well beyond merely seeking information regarding NECR's total earnings (total revenues less total costs), and line-specific earnings (line-specific earnings less line-specific costs). Instead, PAS seeks information on "profitability" of specific traffic, as well as detailed traffic information regarding the specific commodities, weights, type of rail cars, junction points, origins and destinations, dates and time of handling, projections of future traffic by traffic group, and more – none of which are essential to the relevant calculations of total and line-specific earnings, or any element of any methodology, appropriate or not. For example, Document Request No. 15 has 37 different sub-parts which is quite overbroad and unduly burdensome under any methodology scenario and clearly aimed at attempting to drown NECR in discovery. As such, even if the Board were to allow some discovery related to revenues or earnings, NECR objects that the requests are overbroad and burdensome, irrelevant and not likely to lead to the production of relevant evidence.

Document Request No. 19

The Highly Confidential version of NECR's Opening Statement (in the RLBA Verified Statement) contains information relating to maintenance of way costs responsive to Document Request No. 19. To the extent the request seeks documents relating to existing maintenance-of-way plans, costs and specific staffing that are not necessary and production of which would be burdensome.

¹⁰ Nor would they be relevant to any other methodology that the Board might find potentially appropriate.

Document Request No. 27

NECR did not object to the request on the grounds that it was duplicative. It simply referred PAS to the documents listed in response to Document Request No. 26 as the same documents were responsive to both requests. To the extent there is information that PAS seeks in response to Document Request No. 27 that is not supplied by the documents already produced in No. 26 it should make that known. Moreover, as is clear from the documents produced by NECR, NECR acquired an easement (with the option to purchase for a nominal amount) for its entire lines, including the trackage rights segments, and any donations of property underlying the lines would have pre-dated NECR's ownership interests. It would be burdensome and inequitable to require NECR to do a title search of the trackage rights segments to identify donated parcels, if any. This is especially true since the question of whether any parcels were donated is not relevant to whether NECR is entitled to earn a return on the property if it is being used for railroad purposes. *See*, the discussion of General Objection 6 at p. 9 above. Property records are public documents, and PAS can do its own title search if it deems the information necessary.

VII. The Redaction of Certain Documents Is Acceptable as the Redactions Were Either Irrelevant or Nonresponsive, or Subject to the Motions for Protective Order.

As set forth above, less than 5% of the produced documents were redacted and the reasons for the redactions were provided in a privilege/redaction log produced to PAS's counsel on July 23, 2015. Most of the redactions were of highly confidential information that was not responsive to the document requests, including revenue and earnings information that is the subject of the requested protective order as discussed above. Accordingly, NECR does not believe such documents are required to be produced even under the protections of the existing protective order as PAS is a direct competitor, and NECR has a significant interest in not sharing

information that is not relevant or responsive to the issues presented here. *See CSX Corp. and CSX Transp. Inc., Norfolk Southern Corp and Norfolk Southern Railway Co. and Operating Leases/Agreements - Conrail Inc. and Consolidated Rail Corp.*, STB Finance Docket 33388, Decision No. 34 (September 18, 1997), 1997 STB LEXIS 236 at *3-5 (even with a protective order in place, parties are not required to produce sensitive, proprietary information that is not responsive or not relevant to the proceeding; if the entire document is not responsive/relevant it need not be produced and if the document is partially responsive the non-responsive, non-relevant part of the document may be redacted).

With regard to the spreadsheets, as discussed above, NECR has agreed to produce electronic files of all spreadsheets so that they are fully functional. To the extent that redactions were previously made they will also be made on the electronic version of the native worksheets as well; however, the redactions will not affect their functionality. Redactions on spreadsheets were primarily of revenue-related information which NECR contends is not relevant to any appropriate methodology, or of information not responsive to the requests.

CONCLUSION

In sum, NECR produced over 4,500 pages of documents, has agreed to provide native, electronic spreadsheets and has also agreed to produce thousands of pages of more documents at its parent company's Darien, CT office at a mutually convenient time and/or copy those documents at PAS's expense. To date, PAS has not looked at any of the documents that NECR has agreed to make available in Connecticut or requested that copies be made. Most of the objections and refusal to produce documents are based solely on the well-reasoned arguments in NECR's Methodology Motion and Motion for Supplemental Protective Order in which NECR urges the Board to decide on the proper methodology first so that discovery may go forward in a more efficient, less burdensome manner for all involved. For all these reasons, NECR requests that the Motion to Compel be denied.

Respectfully submitted,



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Dated: August 24, 2015

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CERTIFICATE OF SERVICE

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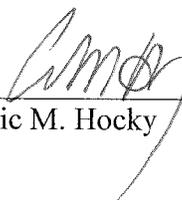
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Dated: August 24, 2015