



Jay Shepherd

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2300 Yonge Street
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BY EMAIL and RESS

December 19, 2014
Our File: EB20140116

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2014-0116 – THESL 2015-2019 – SEC Notice of Motion

We are counsel to the School Energy Coalition (“SEC”). Enclosed, please find a Notice of Motion.

Yours very truly,
Jay Shepherd P.C.

Original signed by

Mark Rubenstein

cc: Wayne McNally, SEC (by email)
Applicant and Intervenors (by email)
Peter Ruby, counsel to the CEA (by email)

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IN THE MATTER OF the *Ontario Energy Board Act 1998*,
Schedule B to the *Energy Competition Act*, 1998, S.O. 1998, c.15;

AND IN THE MATTER OF an Application by Toronto Hydro-System Electric Limited for an Order or Orders approving or fixing just and reasonable rates and other service charges for the distribution of electricity as of May 1, 2015.

AND IN THE MATTER OF Rule 27 of the Board's *Rules of Practice and Procedure*.

**NOTICE OF MOTION
(CEA Benchmarking Documents)**

The School Energy Coalition ("SEC") will make a motion to the Ontario Energy Board ("the Board") at its offices at 2300 Yonge Street, Toronto, on a date and at a time to be fixed by the Board.

PROPOSED METHOD OF HEARING:

SEC has no preference in the method of hearing this motion.

THE MOTION IS FOR:

1. An order requiring Toronto Hydro-System Electric Limited to provide a full and adequate response to interrogatory 1B-SEC-8, specifically to produce benchmarking documents that THESL has participated in through the Canadian Electricity Association.
2. Such further and other relief as the SEC may request and the Board may grant.

THE GROUNDS FOR THE MOTION ARE:

1. The Board issued a Notice of Proceeding on an application by Toronto Hydro-System Electric Limited ("THESL") pursuant to section 78 of the *Ontario Energy Board Act, 1998* for an order or orders approving just and reasonable payment amounts for prescribed generating facilities commencing May 1, 2015.
2. SEC is an intervenor in this proceeding and pursuant to Procedural Order No. 1, delivered written interrogatories to THESL. On November 5th, THESL filed responses to interrogatories. On November 17th and 18th, a Technical Conference was held.

3. Rule 27.03 of the Board's *Rules of Practice and Procedure* ("Rules") provides that a party may bring a motion seeking direction from the Board if it is not satisfied that a party has provided "full and adequate response to an interrogatory."¹ SEC brings this motion because THESL has not provided full and adequate responses to requested information relevant to the issues to be decided in this proceeding.
4. SEC Interrogatory 1B-SEC-8 (Appendix A) requested copies of "all benchmarking studies, analysis, and/or reports in the possession of the Applicant, that it has undertaken, or that it has participated in, since 2011, that has not already been included in the application". In response, THESL provided 13 different documents. THESL further noted that in addition to the documents that it provided, it participated in a number of benchmarking studies through the Canadian Electricity Association ("CEA") but was "unable to provide copies of these materials as the CEA has advised that the information in them is proprietary and it has refused consent in response to Toronto Hydro's request for disclosure and production of those materials".
5. At the Technical Conference, SEC followed-up on THESL's refusal to provide the CEA benchmarking documents.² To date the matter that is subject in this motion has been not been resolved. The CEA has even refused to permit THESL to provide a general description of the nature and scope of each of the studies at issue.³

Information is Relevant

6. Benchmarking information is clearly relevant to THESL's application. THESL itself has not objected on the basis of relevance and has filed significant benchmarking information in this application, both in its prefilled evidence and in response to the interrogatory at issue in this motion (1B-SEC-8). Understanding how THESL preforms against other utilities is an important way that parties can scrutinize the application and to determine if the proposed revenue requirement will lead to "just and reasonable" rates. The Board was clear in its *Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach* that benchmarking will be an increasingly important part of rate regulation of electricity distributors.⁴

Agreement with Third-Party Not a Reason For Non-Production

7. A formal or informal agreement between a utility and a third-party is not a valid reason for non-production of relevant information. The Board has on numerous occasions stated that it is

¹ Ontario Energy Board, *Rules of Practice and Procedure* (as revised on April 24, 2014)

² Technical Conference Transcript, dated November 18th 2014 at p.158-160 (Appendix B)

³ Emails between THESL and SEC (Appendix C)

⁴ *Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach*, dated October 18 2012, at p.56, 59

not bound by agreements between utilities and third-parties that restrict disclosure, such as confidentiality agreements.

8. In EB-2012-0031, the Board ordered production of a benchmarking study, conducted by the CEA, even though the terms of that agreement between Hydro One Networks Inc. and the CEA did not allow for production. The Board went on to say that:

We are somewhat surprised that Hydro One would agree to the confidentiality arrangements described by the company today. Hydro One is well aware of the Board's view of the importance of benchmarking.”⁵

9. In EB-2011-0140, the Board wrote regarding a request to limit disclosure of a document by Hydro One Networks Inc:

As set out in the Board’s *Practice Direction on Confidential Filings* (the “*Practice Direction*”), it is the Board’s general policy that all records should be open for inspection by any person unless disclosure of the record is prohibited by law. This reflects the Board’s view that its proceedings should be open, transparent and accessible. The *Practice Direction* seeks to balance these objectives with the need to protect information properly designated as confidential. In the context of this proceeding, confidentiality concerns should not prevent access by the Board and parties to this proceeding to information in the possession of HONI and GLPT relevant to the development of the East-West Tie line. The fairness of the process is a primary consideration in this case. **Moreover, the Board is not bound by confidentiality agreements entered into by the utilities it regulates, and regulated utilities may be ordered to produce documents that are the subject of such agreements. The *Practice Direction* provides adequate mechanisms for the protection of confidential material.** [emphasis added]⁶

10. The Board also made similar comments in EB-2011-0123:

Utilities, such as Guelph Hydro must be cognizant of this when entering into confidentiality agreements with third parties that extend to the provision of information and documents that the utility knows or ought to know may reasonably be required to be produced as part of the regulatory process.⁷

11. Most recently in EB-2013-0115, the Board it reiterated this view:

Distributors cannot limit or exclude the Board’s jurisdiction by private agreements amongst themselves or with third parties. The Board has often stated that distributors must be cognizant of this when entering into confidentiality agreements with third parties that extend to the provision of information and documents that the utility knows or ought to know may be reasonably required to be produced as part of the regulatory process.⁸

⁵ Motion Hearing Transcript, dated October 23 2012 (EB-2012-0031) at p. 28.

⁶ *Decision on Phase 1 Partial Decision and Order: Production of Documents* (EB-2011-0140), dated June 14 2012, at p.3

⁷ *Decision on Confidentiality* (EB-2011-0123), dated August 19, 2011 at p. 3

⁸ *Procedural Order No. 4* (EB-2013-0115), dated March 19 2014 at p.4

CEA Claim that Information is Proprietary is Not a Reason For THESL’s Non-Production

12. CEA’s claim, as communicated through THESL, that it has some propriety right in the information contained in the benchmarking documents is not a reason for THESL to refuse to produce a relevant document in response to an interrogatory. Rule 26.02(d) of the Board’s *Rules* references interrogatories asking for documents in the possession of the party in which the interrogatives are directed to, not only documents and information in which that party has unrestricted ownership of.⁹ THESL has confirmed that it does have possession of the documents.¹⁰ While the CEA may claim to have proprietary right to some aspect of the information contained in the documents at issue, it is not a reason for THESL’s non-production before the Board in this proceeding.

13. The fact that the THESL may have a formal and/or informal arrangement with the CEA restricting production, or the CEA believes that the information is propriety, are only is only relevant to its potential confidentiality treatment under the Board’s *Rules*.¹¹ THESL has the ability to seek to have any document it is asked to produce treated as confidential pursuant to *the Practice Direction on Confidential Filings*. The appropriate response, in those circumstances, is not a refusal. It is a full and complete response, coupled with a request to the Board for confidentiality treatment.

THE FOLLOWING DOCUMENTARY MATERIAL AND EVIDENCE WILL BE RELIED UPON AT THE HEARING OF THE MOTION:

1. The Record in EB-2014-0116.
2. Such further and other material as counsel may advise and the Board may permit.

December 19, 2014

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Mark Rubenstein
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Fax: 416-483-3305

Counsel to the School Energy Coalition

⁹ Ontario Energy Board, *Rules of Practice and Procedure* (as revised on April 24, 2014). 26.02 “Interrogatories shall: (d) contain specific requests for clarification of a party's evidence, **documents or other information in the possession of the party** and relevant to the proceeding;” [emphasis added]

¹⁰ Technical Conference Transcript, dated November 18th 2014 at p.159

¹¹ Ontario Energy Board, *Rules of Practice and Procedure* (as revised on April 24, 2014), Rule 10

TO: Ontario Energy Board
2300 Yonge Street, Suite 2701
Toronto, ON M4P 1E4

Tel: 416-481-1967
Fax: 416-440-7656

AND TO: Toronto Hydro-Electric System Limited
14 Carlton Street
Toronto, ON M5B 1K5

Daliana Coban
Tel: 416-542-2627
Fax: 416-542-3024

AND TO: Torys LLP
79 Wellington St. W, 30th Floor
Box 270, TD South Tower
Toronto, ON M5K 1N2

Charles Keizer and Crawford Smith
Tel: 416-865-7512
Fax: 416-865-7380

Counsel to Toronto Hydro-Electric System Limited

AND TO: Intervenors

AND TO: Goodmans LLP
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Peter Ruby
Tel: 416-597-4184
Fax: 416-979-1234

Counsel to the Canadian Electricity Association

A

RESPONSES TO SCHOOL ENERGY COALITION INTERROGATORIES

1 **INTERROGATORY 8:**

2 **Reference(s):** **Exhibit 1B**

3

4

5 Please provide a copy of all benchmarking studies, analysis and/or reports in the
6 possession of the Applicant, that it has undertaken, or that it has participated in, since
7 2011, that has not already been included in the application.

8

9

10 **RESPONSE:**

11 Attached are copies of all the significant benchmarking studies, analyses or reports that
12 Toronto Hydro has undertaken, or participated in, since 2011.

- 13 • Appendix A – Productivity Benchmarking Study, prepared by UMS Group
14 (March, 2013)
- 15 • Appendix B – IVR Assessment 2014 for Toronto Hydro, prepared by E-Source
16 (October, 2014)
- 17 • Appendix C – Residential Website Assessment 2013 for Toronto Hydro, prepared
18 by E-Source (December 2013)
- 19 • Appendix D– Website Assessment 2011 for Toronto Hydro, prepared by E-
20 Source (October 2011)
- 21 • Appendix E – Customer Communication of Capital Projects, prepared by Toronto
22 Hydro (2014)
- 23 • Appendix F – 2014 Electric Utility Residential Customer Satisfaction Study,
24 prepared by J.D Power and Associates (October, 2014)

RESPONSES TO SCHOOL ENERGY COALITION INTERROGATORIES

- 1 • Appendix G – 2014 Electric Utility Business Customer Satisfaction Study,
2 prepared by J.D Power and Associates (February 2014)
- 3 • Appendix H – 15th Annual Electric Utility Customer Satisfaction Survey,
4 prepared by Simul Corporation / Utility PULSE Division (2013)
- 5 • Appendix I – Utility Safety Benchmarking Study, prepared by UMS Group
6 (Febbruary 2014)
- 7 • Appendix J – Reliability Benchmarking Analysis: Comparative Evaluation of
8 Toronto Hydro to United States Power Distributors, prepared by Power System
9 Engineering (January 2013)
- 10 • Appendix K – Cost Benchmark Analysis: Comparative Evaluation of Toronto
11 Hydro to North American Electric Distributors, prepared by Power System
12 Engineering (February 2013)
- 13 • Appendix L – Review of the Reliability of Supply to Toronto Hydro, prepared by
14 KEMA, Inc. and UMS Group (October 2014)
- 15 • Appendix M – Strategic Facility Review, prepared by Bennet, Cresa and All Steel
16 (May 2014)

17

18 At the request of J.D. Power and Associates, Toronto Hydro has redacted identifiable
19 information about other utilities that participated in the studies filed at Appendices G and
20 H. However, to assist the OEB and intervenors in understanding who the comparators
21 were, Toronto Hydro has attached a list of the participants in each study.

22

23 In addition to the studies noted above, Toronto Hydro also participated in a number of
24 benchmarking studies through the Canadian Electricity Association (“CEA”). However,
25 Toronto Hydro is unable to provide copies of these materials as the CEA has advised that

RESPONSES TO SCHOOL ENERGY COALITION INTERROGATORIES

1 the information contained in them is proprietary and it has refused consent in response to
 2 Toronto Hydro’s request for disclosure and production of those materials.

3

4 The following tables outlines Toronto Hydro’s progress with respect to the
 5 recommendations of the UMS Productivity Benchmarking Report’s attached at Appendix
 6 A to this response:

UMS Recommendation	Toronto Hydro’s Implementation Progress
UMS - OI-1 Develop a plan to reduce THESL fully-loaded unit rates to levels commensurate to outside contractors.	Toronto Hydro developed a construction efficiency methodology for internal vs. contractor costs to continually assess the reasonableness of the costs of the capital construction projects completed by the utility’s internal construction crews (Exh. 2B, Section C3.4). Toronto Hydro is working towards lowering overhead costs and improving practices in operational areas in order to converge closer to the external contractor cost results. Examples of such efforts and initiatives take by Toronto Hydro to reduce construction overheads are noted in Exh. 1B, Tab 2, Sch. 5; Exh. 2B, Section E.8.3; Exh. A, Tab 2, Sch. 12.
UMS - OI-10 Expand Out-Sourcing of Vehicle Maintenance	Toronto Hydro has made a significant progress in further improving Fleet Management function, including expansion of outsourcing activities. For details, see Exh. 4A, Tab 2, Sch. 10
UMS - OI-11 Reduce Material Requisition Lead Time from 45 days to 30 days and explore opportunities to improve Design	Strong progress has been made on this objective over the last two years. Inventory turns increased from 1.38 at the end of 2012 to 2.05 in September 2014. This has been achieved primarily by driving improvements in material planning processes. In addition, a key measure for planning accuracy (measuring materials used monthly against original plan) was introduced in 2012 and this metric improved from 33% in 2012 to 71% in 2014. Toronto Hydro thoroughly investigated an option to reduce requisition lead time from 45 to 30 days in 2014, but has not yet implemented it. The primary reason is that many parts currently have supplier lead times between 30 and 45 days. To enable the proposed change would require that Toronto Hydro increase inventory of all such parts. Since the primary

B

THE ONTARIO ENERGY BOARD

IN THE MATTER OF the Ontario Energy Board Act,
1998, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF an application by Toronto
Hydro-Electric System Limited for an order
approving just and reasonable rates and other
charges for electricity distribution to be
effective May 1, 2015 and for each following
year effective January 1 through to December 31,
2019.

Hearing held at 2300 Yonge Street,
25th Floor, Toronto, Ontario,
on Tuesday, November 18th, 2014,
commencing at 8:58 a.m.

TECHNICAL CONFERENCE

1 correct? So Innovative Research was the one who did the
2 research; you provided some of the information for that
3 material?

4 MS. KLEIN: What we have provided in this IR response
5 is correct.

6 MR. RUBENSTEIN: With respect to meeting your major
7 customers and getting feedback from major customers, am I
8 correct Toronto Hydro did attend those meetings?

9 MS. KLEIN: Our engagement activities with respect to
10 our very large customers can be found at Exhibit 1B, tab 2,
11 schedule 7, page 8.

12 MR. RUBENSTEIN: Is the answer yes?

13 Now, with respect to the meetings referred to, are you
14 able to provide the name of the customers, the dates of
15 those meetings, the list of attendees, and all the material
16 that you provided to them and any minutes that were taken?

17 MR. SMITH: No, we're not prepared to do that.

18 MR. RUBENSTEIN: If I can ask you to turn to 1B-SEC-7,
19 specifically page 2 -- sorry, 1B-SEC-8. I apologize.

20 So in this interrogatory, we had asked you to provide
21 all benchmarking studies, analysis and reports, and you
22 provided a number of them. But then on line 23 it says:

23 "In addition to the studies noted above, Toronto
24 Hydro also participated in a number of
25 benchmarking studies through the Canadian
26 Electricity Association ('CEA'). However,
27 Toronto Hydro was unable to provide copies of
28 these materials as the CEA has advised that the

1 information contained in them is proprietary and
2 it has refused consent in response to Toronto
3 Hydro's request for disclosure and production..."

4 Does Toronto Hydro have these reports? Does it have
5 in its possession these reports and studies?

6 MS. KLEIN: Toronto Hydro does have in its possession
7 certain CEA studies.

8 MR. RUBENSTEIN: Now, I understand that you've refused
9 to provide them based on the explanation in this
10 interrogatory. Are you able to provide us with the year of
11 each report and an understanding of the topic that they're
12 covering? Is it a -- an example is, are we talking about a
13 reliability study or a cost benchmarking analysis? Are you
14 allowed to provide that information?

15 MS. KLEIN: So I think it's fair to say that the CEA
16 refused our request to produce this information, so any
17 requests about the nature of the information itself would
18 be something that we would go back to them and determine
19 whether or not their claim of proprietary nature of the
20 information covers what you're asking.

21 MR. SMITH: Mr. Rubenstein, I understand that you've
22 been in communications with counsel for the CEA, Mr. Ruby,
23 of the Goodmans law firm, and it may be appropriate for us
24 to have an offline discussion to see if this issue can be
25 moved forward in some sort of meaningful way.

26 MR. RUBENSTEIN: Just the last question on this topic.
27 Understanding what Mr. Smith said, is the basis of the
28 CEA's refusal -- is it a contractual term in the agreement

1 that you have with the CEA? Or is it just you're seeking
2 their -- you want to provide it to them -- you want -- you
3 know, in good faith you're seeking to have their permission
4 to provide it?

5 MR. SMITH: Well, as you'll know, I understand this
6 has been an ongoing, two-year dialogue between you and Mr.
7 Ruby, so it may be that you have better understanding of
8 the CEA's position than we do, but certainly the CEA has
9 consistently and repeatedly objected to the production of
10 that information by Toronto Hydro on a variety of reasons;
11 contractual breach of certain proprietary, intellectual
12 property rights, et cetera.

13 MR. RUBENSTEIN: If I can ask you to turn to 1B-SEC-8,
14 appendix A. This is the UMS group productivity and
15 programming benchmark study. Can I just ask if you can
16 describe the background of the study? What were the
17 parameters given to the consultant? What's the history
18 behind this specific report?

19 MR. SEAL: Mr. Rubenstein, the subject-matter experts
20 with this particular report are not part of this panel to
21 maybe answer detailed questions about it, so perhaps it's
22 something could be answered through undertaking.

23 MR. RUBENSTEIN: That's fine with me.

24 MR. SMITH: So what you're really looking for is the
25 background and genesis of the report?

26 MR. RUBENSTEIN: Yeah. And what were the parameters
27 provided, specifically what were the parameters provided to
28 the consultant.

C

Mark Rubenstein

From: Smith, Crawford <csmith@torys.com>
Sent: December-19-14 9:16 AM
To: 'Mark Rubenstein'; 'Amanda Klein'; Maureen.Helt@ontarioenergyboard.ca; 'Daliana Coban'; Ruby, Peter (pruby@goodmans.ca)
Cc: Smith, Crawford
Subject: RE: CEA Materials

Mark,

We similarly understand that the CEA does not consent to disclosure in relation to either of your two items below. Should you elect to bring a motion, please serve counsel for CEA (cc'd on this note).

P. 416.865.8209 | F. 416.865.7380 | 1.800.505.8679

From: Mark Rubenstein [mailto:mark.rubenstein@canadianenergylawyers.com]
Sent: December-11-14 6:19 PM
To: Smith, Crawford; 'Amanda Klein'; Maureen.Helt@ontarioenergyboard.ca; 'Daliana Coban'
Subject: RE: CEA Materials

Crawford,

He contacted me in response to what I believe was THESL's inquiries to the CEA regarding my questions. He had not seen the specific questions himself. I filled him in on the contents generally of my email to THESL and his response was the CEA was not willing to provide any information about the scope of the studies (question 1), or the actual studies in any redacted or other form (question 2).

The issue I have is that my request was to THESL, not the CEA, as it is not a party to this proceeding.

I haven't cc'd Peter Ruby (pruby@goodmans.ca) on this email since I don't know if you wanted that, but feel free to forward him this chain of emails if you would like.

Mark

Mark Rubenstein
Jay Shepherd Professional Corporation
Tel: 416-483-3300
mark.rubenstein@canadianenergylawyers.com

From: Smith, Crawford [mailto:csmith@torys.com]
Sent: December-11-14 2:08 PM
To: 'Mark Rubenstein'; 'Amanda Klein'; Maureen.Helt@ontarioenergyboard.ca; 'Daliana Coban'
Subject: RE: CEA Materials

Mark,

When you say that you have spoken to Peter Ruby, can you please advise more specifically as to the nature of the discussions and the CEA's position?

P. 416.865.8209 | F. 416.865.7380 | 1.800.505.8679
79 Wellington St. W., 30th Floor, Box 270, TD South Tower
Toronto, Ontario M5K 1N2 Canada | www.torys.com

From: Mark Rubenstein [<mailto:mark.rubenstein@canadianenergylawyers.com>]
Sent: December-11-14 1:53 PM
To: 'Amanda Klein'; Maureen.Helt@ontarioenergyboard.ca; 'Daliana Coban'; Smith, Crawford
Subject: RE: CEA Materials

While I have spoken to Peter Ruby (CEA counsel) about the issues generally, can THESL please provide a formal response to my email?

Thanks
Mark

Mark Rubenstein
Jay Shepherd Professional Corporation
Tel: 416-483-3300
mark.rubenstein@canadianenergylawyers.com

From: Amanda Klein [<mailto:aklein@torontohydro.com>]
Sent: November-20-14 2:33 PM
To: 'Maureen.Helt@ontarioenergyboard.ca'; 'mark.rubenstein@canadianenergylawyers.com'; Daliana Coban; 'csmith@torys.com'
Subject: Re: CEA Materials

Thanks, Mark. I have reached out to CEA and passed on your requests.

Best,
Amanda

Amanda Klein
Director, Rates and Regulatory Affairs
Toronto Hydro-Electric System Limited

Office | 416.542.2729
Cell | 416.903.1423

14 Carlton Street | Toronto, Ontario | M5B 1K5

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From: Maureen Helt [<mailto:Maureen.Helt@ontarioenergyboard.ca>]
Sent: Wednesday, November 19, 2014 05:34 PM
To: 'Mark Rubenstein' <mark.rubenstein@canadianenergylawyers.com>; Amanda Klein; Daliana Coban; csmith@torys.com <csmith@torys.com>
Subject: RE: CEA Materials

Mark
Thank you for copying me on this email. Please keep me in the loop

From: Mark Rubenstein [<mailto:mark.rubenstein@canadianenergylawyers.com>]
Sent: November-19-14 4:52 PM
To: csmith@torys.com; aklein@torontohydro.com; dcoban@torontohydro.com
Cc: Maureen Helt
Subject: CEA Materials

Crawford et al.

I wanted to follow-up on the issue raised during the Technical Conference regarding CEA benchmarking materials that THESL has in its possession, but refused to produce in response to 1B-SEC-8, based on the CEA's refusal to consent to their production.

I have two questions:

1. Will the CEA consent to you providing for each benchmarking report/study, the year of the study, and a description of the nature and scope of the benchmarking study (i.e. what was measured, how many utilities etc.)?
2. From past proceedings, I understand the CEA position that they oppose production of these types of full copies of the materials, even on a confidential basis. But is the CEA willing to allow production of the information contained in the materials in anyway, such as a redacted version where other participants information cannot be identified?

Mark

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Associate
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