

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

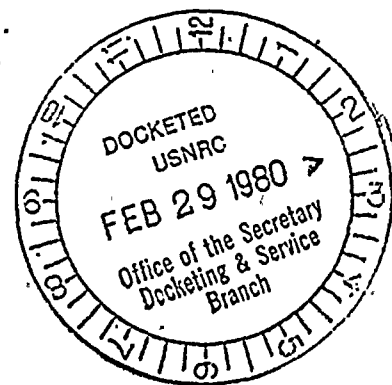
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

PENNSYLVANIA POWER AND LIGHT CO.  
ALLEGHENY ELECTRIC COOPERATIVE, INC.

(Susquehanna Steam Electric Station,  
Units 1 and 2)

Docket Nos. 50-387  
50-388



NRC STAFF'S ANSWER TO APPLICANTS'  
MOTION TO PROHIBIT ENVIRONMENTAL COALITION ON NUCLEAR  
POWER FROM PARTICIPATING IN LITIGATION OF CERTAIN CONTENTIONS

By a filing<sup>1/</sup> dated February 4, 1980, the Applicants moved the Licensing Board to prohibit Environmental Coalition on Nuclear Power (ECNP) from participating in any way (including presentation of direct testimony and conducting cross-examination) in the litigation of Contentions 1, 2 and 3.<sup>2/</sup> As grounds for their request, Applicants state that ECNP has "failed properly to respond" to interrogatories addressed to Contentions 1, 2 and 3. For the reasons set forth below, the Staff supports that part of the Applicants' motion which seeks to prohibit direct testimony but opposes that portion which seeks to prohibit cross-examination by ECNP.

Prohibiting Direct Testimony

In its Memorandum and Order on Discovery Motions (II) (Discovery Order II) dated October 30, 1979 (at 10), the Board stated that ECNP's prior response to discovery

<sup>1/</sup> Applicants' Motion to Prohibit Environmental Coalition on Nuclear Power from Participating in Litigation of Certain Contentions and Motion to Compel dated February 4, 1980.

<sup>2/</sup> Applicants also moved the Board for an order compelling adequate answers to certain of their interrogatories. The Staff takes no position on that motion.

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requests of the Staff and the Applicants were deficient and that dismissal of ECNP (and other intervenors) and all of its contentions from this proceeding could potentially be granted on that basis. However, it granted ECNP (and other intervenors) an extension of time in which to respond. In addition the Board emphasized that:

If any intervenor fails properly to respond in a timely fashion . . . it will not be permitted to present any direct testimony on that contention. [emphasis in original] (No further order of this Board to this effect will be required.) Id. at 19.

In its Order Denying Requests of ECNP dated December 6, 1979 (at 9), the Board extended to January 18, 1980, the time within which discovery requests on wholly environmental contentions (those numbered 1, 2, 3, 4, 14, 16, 17 and 18) must be answered. No further extensions of time have been granted. ECNP filed a document entitled ECNP's Responses to Board's Memorandum and Order on Discovery Motions (II) on January 18, 1980. At page 2 of that document ECNP stated that it "has nothing to add to its earlier responses to Staff interrogatories." Therefore, ECNP's responses to the majority of the Staff's discovery requests continue to be deficient. Because of its failure to properly respond in a timely fashion to the Staff's discovery requests, and regardless of the quality of its responses to Applicants' discovery requests, by the terms of the Board's Order ECNP is automatically prohibited from presenting direct testimony on Contentions 1, 2 and 3.<sup>3/</sup> For that reason alone, if for no other, the Staff believes that part of the Applicants' motion which seeks to prohibit direct testimony by ECNP on Contentions 1, 2 and 3, although it may be unnecessary, should be granted.

<sup>3/</sup> By the terms of the Board's Order ECNP is also automatically prohibited from presenting direct testimony on Contention 18.

Prohibiting Cross-Examination

As the Applicants noted in their motion, since many intervenors seek to make their case through cross-examination rather than by introducing direct evidence, preventing the introduction of direct evidence may be no sanction at all. Motion at 4. However, we do not believe that a prohibition of cross-examination is appropriate at this time.<sup>4/</sup> The ends of discovery are to prevent surprise in the course of the proceeding. Discovery Order II at 5-6, 10-11. At this stage of the proceeding when the scope of cross-examination is not known, it cannot be told if ECNP should be prohibited from asking any question because it is based upon a matter that it should have revealed in discovery to prevent surprise. Thus, any efforts to bar some or all of the Intervenor's cross-examination should await the hearing, and should be made only upon a showing that the ECNP's cross-examination is grounded upon information which should have been provided in response to the Staff's or Applicants' discovery requests.

Testing of evidence through cross-examination is the hallmark of the adjudicatory process. In Northern States Power Co.,<sup>5/</sup> the Commission emphasized the importance of cross-examination by affirming that intervenors can cross-examine on contentions they had not raised. In this proceeding all parties need respond

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<sup>4/</sup> As the time to respond to discovery requests on safety issues has been postponed, it appears that dismissal from the proceeding may also be too severe a sanction now. See Discovery Order II, at 6 and 10.


<sup>5/</sup> Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2) CLI-75-1, 1 NRC 1 (1975).

to discovery only on contentions they raised, and other procedures are provided to deal with surprise at hearing. Discovery Order II, at 15-19. It would be anomalous to say that one who had not raised a contention on which it had to respond to discovery could cross-examine on that contention, but one who did raise the contention may not cross-examine even if no element of surprise were present.<sup>6/</sup> Sanctions should be tailored with the ends of the discovery rules and the purposes of cross-examination in mind. Cross-examination, generally, should not be prohibited on a failure to meet discovery requests.<sup>7/</sup>

### Conclusion

For the reasons discussed above, the Staff believes that part of the Applicants' motion which seeks to prohibit direct testimony by ECNP on Contentions 1, 2 and 3 should be granted and that part which seeks to prohibit cross-examination by ECNP on Contentions 1, 2 and 3 should be denied.

Respectfully submitted,

  
James M. Cutchin, IV  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 25th day of February, 1980

<sup>6/</sup> Cross-examination, as indicated in Northern States Power Co., *supra*, is primarily for the benefit of the trier of fact, not the examiner. See also Discovery Order II, at 19.

<sup>7/</sup> Hearing time need not be wasted on contentions without foundation, for one could move for summary judgment, with supporting affidavit, to dismiss those contentions from the proceeding. See Discovery Order II, at 13 and 20. See also Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 752-754 (1977).

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

PENNSYLVANIA POWER AND LIGHT CO.  
ALLEGHENY ELECTRIC COOPERATIVE, INC.

(Susquehanna Steam Electric Station,  
Units 1 and 2)

Docket Nos. 50-387  
50-388

NRC STAFF'S ANSWER TO APPLICANTS' MOTION TO PROHIBIT SUSQUEHANNA  
ENVIRONMENTAL ADVOCATES FROM PARTICIPATING IN THE LITIGATION OF CONTENTION 1

By a filing<sup>1/</sup> dated February 4, 1980 the Applicants moved the Licensing Board to prohibit Susquehanna Environmental Advocates (SEA) from participating in the litigation (including presentation of direct testimony and conducting cross-examination) of Contention 1. As grounds for their request, the Applicants cite the fact that SEA filed another inadequately supported motion for a protective order rather than stating that it had no information to provide in response to the Applicants' interrogatories on Contention 1. For the reasons set forth below the Staff supports that part of the motion which seeks to prohibit direct testimony and opposes that part of the motion which seeks to prohibit cross-examination.

Prohibiting Direct Testimony

In its Memorandum and Order on Discovery Motions II (Discovery Order II) dated October 30, 1979 (at 19) the Board emphasized that:

1/ Applicants' Motion to Prohibit Susquehanna Environmental Advocates from Participating in the Litigation of Contention 1, dated February 4, 1980.

If any intervenor fails properly to respond in a timely fashion . . . it will not be permitted to present any direct testimony on that contention [emphasis in original] (No further order of this Board to this effect will be required).

In its Order Denying Requests of ECNP dated December 6, 1979 (at 9) the Board extended to January 18, 1980 the time within which discovery requests on wholly environmental contentions (those numbered 1, 2, 3, 4, 14, 16, 17 and 18) must be answered. No further extensions of time have been granted.

On January 29, 1980 the Staff received a filing entitled "Answers to NRC Staff's First Round Discovery Requests and Motion for Protective Order of Intervenor Susquehanna Environmental Advocates (SEA)." As the Staff pointed out in its answer to the SEA motion for a protective order, the filing was not dated, the accompanying certificate of service was dated merely January 1980 and the envelope in which the filing was received was postmarked January 24, 1980.<sup>2/</sup> Thus by the terms of the Licensing Board's Order SEA's responses to the Staff's discovery requests were not timely filed and SEA is automatically prohibited from presenting direct testimony on the wholly environmental contentions that it sponsored (Contentions 1, 3 and 4). For that reason alone, if for no other, the Staff believes that part of the Applicants' motion which seeks to prohibit the introduction of direct testimony by SEA, although it may be unnecessary, should be granted.

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<sup>2/</sup> NRC Staff's Answer in Opposition to SEA Motion for Protective Order dated February 12, 1980 at n. 1.

Prohibiting Cross-Examination

As the Applicants noted in their motion, since many intervenors seek to make their case through cross-examination rather than by introducing direct evidence, preventing the introduction of direct evidence may be no sanction at all. Motion at 3. However, we do not believe that a prohibition of cross-examination is appropriate at this time.<sup>3/</sup> The ends of discovery are to prevent surprise in the course of the proceeding. Discovery Order II at 5-6, 10-11. At this stage of the proceeding when the scope of cross-examination is not known, it cannot be told if SEA should be prohibited from asking any question because it is based upon a matter that it should have revealed in discovery to prevent surprise. Thus, any efforts to bar some or all of the Intervenor's cross-examination should await the hearing, and should be made only upon a showing that the SEA's cross-examination is grounded upon information which should have been provided in response to the Staff's or Applicants' discovery requests.

Testing of evidence through cross-examination is the hallmark of the adjudicatory process. In Northern States Power Co.,<sup>4/</sup> the Commission emphasized the importance of cross-examination by affirming that intervenors can cross-examine on contentions they had not raised. In this proceeding all parties need respond to discovery only on contentions they raised, and other procedures are provided

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<sup>3/</sup> As the time to respond to discovery requests on safety issues has been postponed, it appears that dismissal from the proceeding may also be too severe a sanction now. See Discovery Order II, at 6 and 10.

<sup>4/</sup> Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2) CLI-75-1, 1 NRC 1 (1975).

to prevent surprise at hearing. Discovery Order II, at 15-19. It would be anomalous to say that one who had not raised a contention on which it had to respond to discovery could cross-examine on that contention, but one who did raise the contention may not cross-examine even if no element of surprise were present.<sup>5/</sup> Sanctions should be tailored with the ends of the discovery rules and the purposes of cross-examination in mind. Cross-examination generally should not be prohibited on a failure to meet discovery requests.<sup>6/</sup>

Moreover, no basis exists to prohibit cross-examination on Contention 1 by SEA. In answer to discovery requests, SEA said it did not have the resources to collect the information sought by the interrogatories. This makes it apparent that SEA does not presently possess the information sought. Thus without even considering whether the Board has the power to or should take action to prohibit cross-examination on a contention where an intervenor is in default in responding to discovery on that contention, the Staff does not believe there is at this time a factual basis for such a sanction here.

#### Conclusion

For the reasons discussed above, the Staff believes that part of the Applicants' motion which seeks to prohibit SEA from presenting direct testimony on Contention 1

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<sup>5/</sup> Cross-examination, as indicated in Northern States Power Co., supra, is primarily for the benefit of the trier of fact, not the examiner. See also Discovery Order II, at 19.

<sup>6/</sup> Hearing time need not be wasted on contentions without foundation, for one could move for summary judgment, with supporting affidavit, to dismiss those contentions from the proceeding. See Discovery Order II, at 13 and 20. See also Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 752-754 (1977).



should be granted and that part which seeks to prohibit cross-examination by SEA on Contention 1 should be denied.

Respectfully submitted,



James M. Cutchin, IV  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 25th day of February, 1980

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )

PENNSYLVANIA POWER AND LIGHT CO. )  
ALLEGHENY ELECTRIC COOPERATIVE, INC. )

(Susquehanna Steam Electric Station, )  
Units 1 and 2) )

Docket Nos. 50-387  
50-388

NRC STAFF'S ANSWER IN SUPPORT OF APPLICANTS' MOTION  
TO DISMISS CITIZENS AGAINST NUCLEAR DANGERS FROM THIS PROCEEDING

By a filing<sup>1/</sup> dated February 4, 1980 the Applicants moved the Licensing Board for an order dismissing intervenor Citizens Against Nuclear Dangers (CAND) as a party for its continued failure to comply with the discovery orders of the Board.

For the reasons set forth below and in the NRC Staff's motion of September 25, 1979, the NRC Staff believes that the Applicants' motion should be granted.

CAND was admitted as an Intervenor in this proceeding by the Board's Special Prehearing Conference Order dated March 6, 1979. (LBP-79-6, 9 NRC 291). In that Order the Board also ruled on contentions and established a schedule for discovery. The Board designated May 25, 1979, as the last day for submission of first-round discovery requests and specified that responses to first-round discovery requests must be filed by June 29, 1979. 9 NRC at 327.

<sup>1/</sup> Applicants' Motion to Dismiss Citizens Against Nuclear Dangers from this Proceeding dated February 4, 1980.

The Staff's first round discovery requests of CAND were timely served by mail on May 21, 1979. They related to specific contentions which were admitted by the Board as suitable for litigation in this proceeding. The Staff requested information concerning the factual bases for CAND's contentions and the identities and addresses of persons to be called by CAND as expert witnesses. CAND also was asked to identify and produce documents to be used by it in examining and cross-examining witnesses. The Applicants also served interrogatories on CAND.

Following receipt on June 20, 1979 of a CAND document<sup>2/</sup> which the Staff considered to be totally unresponsive to its legitimate discovery requests, the Staff on June 28, 1978 filed a motion<sup>3/</sup> for an order compelling CAND to fully and properly respond to the Staff's discovery requests. Applicants had filed a similar motion on June 27, 1979.

In its Memorandum and Order on Scheduling and Discovery Motions I (Discovery Order I) dated August 24, 1979 the Board found (1) that CAND had failed to respond to discovery requests filed in accordance with the Commission's Rules of Practice and this Board's Order of March 6, 1979, (2) that CAND had failed to seek a protective order with regard to the discovery requests (or alternatively, if the June 16, 1979 "replies" be considered as seeking a protective order, that no valid basis for such an order had been demonstrated), and (3) that the

<sup>2/</sup> Citizens Against Nuclear Dangers' Replies to the Interrogatories of the NRC Staff and the Applicants and Other Matters filed June 16, 1979.

<sup>3/</sup> NRC Staff's Motion for an Order Compelling Citizens Against Nuclear Dangers to Respond to the Staff's Discovery Requests dated June 28, 1978.

June 16, 1979 "replies" constituted a failure to answer or respond under 10 CFR 2.740(f). Id. at 11. The Board granted the Staff's motion to compel discovery. Id. at 8. Moreover, the Board explained the forms and purposes of discovery in an NRC proceeding and noted that discovery always entails some burden and expense--a party must determine what information it possesses and disclose it. Commission proceedings are not to become the setting for "trial by surprise." Id. at 6. The Board also explained that extensions of time for responding can be obtained for "good cause" shown and that relief from harrassing, irrelevant, unduly burdensome or embarrassing discovery is available. Id. at 6. Finally the Board warned of the serious consequences--including dismissal of a contention or of a party from the proceeding--that can result from failure to properly respond to discovery requests. Id. at 7.

In spite of having had benefit of the Board's explanation of the purpose of the discovery process and the duty of an intervenor to disclose the bases for its contention, an extension of time in which to reply and fair warning of the possible consequences of a failure to adequately respond, CAND filed a paper<sup>4/</sup> dated September 10, 1979 that, although it was timely filed, neither adequately responded to the Board's directive nor the Staff's discovery requests.

The Board had directed CAND to respond fully and properly (or, as appropriate, to file particularized, specific objections) to the Staff's discovery requests

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<sup>4/</sup> Citizens Against Nuclear Dangers Response to the Licensing Board Directive, Contained within Additional Briefs to the Appeal Board.

of May 21, 1979, by no later than fourteen (14) days from the service of its Order. Discovery Order I at 11.

CAND did not answer the Staff's interrogatories separately or fully. It did not submit its answer under oath or affirmation. Nor did CAND, in lieu of answering them, file particularized and specific objections to any of the interrogatories. CAND did not deal with the merits of the Staff's interrogatories. It merely labeled the interrogatories "outlandish," said it presently has no answers and made equivocal statements about its plans to obtain expert witnesses to answer them and about its plans for participating in the hearing sessions. As the Board clearly pointed out, such general "evasive" objections to discovery are not acceptable. Id. at 9.

In view of CAND's continued failure to respond to the discovery requests, notwithstanding the Board's order to do so in Discovery Order I, the Staff moved on September 25, 1979 for the dismissal of CAND and the contentions solely sponsored by it from the proceeding. On October 10, 1979, Applicants filed an answer in support of the Staff's motion.

On October 30, 1979, the Board issued its Memorandum and Order on Discovery Motions (II), LBP-79-31, 10 NRC \_\_\_\_ ("Discovery Order II"). There the Board observed that the responses filed by CAND and the other intervenors since Discovery Order I were "the same type of generalized objections which, in Discovery [Order] I, we indicated were inadequate." Discovery Order II, slip op. at 6. The Board warned that, given the deficiencies in the responses



of the intervenors (including CAND) to the discovery requests served by Staff and Applicants, "the relief now being sought by the Applicants and Staff - dismissal of CAND, ECNP and SEA (and all their contentions) from this proceeding - could potentially be granted..." Id. at 10.

The Board, however, was of the view that "dismissal of any of the intervenors or their contentions at this time would not be warranted." Id. at 11, emphasis added. Nevertheless, while granting the intervenors one more opportunity to comply with its previous Orders, the Board underscored that "it is absolutely necessary that the intervenors respond in a timely fashion to the discovery obligations which still remain." Id., emphasis in original. The Board suspended all discovery obligations with respect to health and safety contentions, granted an extension of time until December 14, 1979 (later extended further to January 18, 1980), for responses to outstanding discovery requests on environmental contentions, and once again directed all parties "to respond by December 14, 1979 to the discovery requests on the environmental contentions." Id. at 18-19. The Board ruled that "[i]f any intervenor fails properly to respond in a timely fashion to the discovery as outlined in paragraphs 2 and 3, it will not be permitted to present any direct testimony on that contention. (No further order of this Board to this effect will be required)." Id. at 19. Finally, the Board cautioned that "[f]ailure to respond properly, in addition to precluding an intervenor from presenting direct testimony, may be grounds for dismissing that intervenor (as distinguished from its contentions) from the proceeding (emphasis in original). Id. at 20.

December 11, 1979, CAND filed a document entitled Citizens Against Nuclear  
angers Petition for a Government Inquiry; Replies to Discovery Order; Motions  
Interrogatories Before the Atomic Safety and Licensing Board (CAND Petition),  
which CAND purportedly responded to the directives of Discovery Order II.  
CAND again provided no responses to the outstanding interrogatories, and this  
time proposed that in lieu of its replying to the discovery requests, "the Board  
utilize its extraordinary power of subpoena and pose every applicable specific  
discovery question formulated by the NRC Staff and the Applicants to be answered  
by the appropriate qualified government official at the state and federal level  
who have first-hand expert knowledge of these matters in the course of their  
government service." CAND Petition at 5. CAND offered to "accept these expert  
actual responses in lieu of their own replies and as the basis for their testi-  
mony and accompanying background information." Id.

On January 4, 1980, the Board issued a Memorandum and Order Denying CAND Petition  
and Motions in which it found the relief requested by CAND "to be unwarranted"  
and denied it "in its entirety." Id. at 1. The Board noted that CAND's  
December 11, 1979 filing "alternatively must be considered as another deliberate  
attempt to avoid the obligations of discovery." Id. at 1-2, footnote omitted.  
The Board rejected CAND's request that government officials be subpoenaed and  
ruled that, even if such officials were to be called to testify by the Board,  
that eventuality would still not relieve CAND of its obligation to inform the  
parties of the bases for its own contentions." Id. at 3, footnote omitted.




CAND's next filing, dated January 11, 1980, was a Motion for Reconsideration of Motions before the Licensing Board. In that filing, CAND still provided no answers to the outstanding interrogatories.

On January 16, 1980, the Board issued another Order (accompanied by a telegram to CAND containing essentially the same information) in which it denied CAND's motion, and reminded CAND of its discovery obligations and possible sanctions against CAND for its continued refusal to meet those obligations.

Under the procedures of this Commission it is proper to dismiss a party for failure to comply with discovery requests.<sup>5/</sup> The foregoing chronology alone provides sufficient grounds for dismissing CAND from this proceeding. In view of CAND's total disregard of its responsibilities in this proceeding, any lesser sanction would be insufficient. CAND has disregarded no less than five explicit Discovery Orders of the Board without offering any valid justification. To allow a party to so ignore the Board's authority without sanction is unfair to the other parties and makes a mockery of the Commission's discovery and hearing process. CAND should be dismissed as a party to this proceeding. Thus the Staff believes that the motion to dismiss CAND should be granted.

Respectfully submitted,



James M. Cutchin, IV  
Counsel for NRC Staff

Dated at Bethesda, Maryland,  
this 25th day of February, 1980.

<sup>5/</sup> See: 10 C.F.R. 2.707; Northern States Power Co. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298 (1977); Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813 (1975); Public Service Electric and Gas Co. (Atlantic Nuclear Generating Station, Units 1 and 2), LBP-75-62, 2 NRC 702, 705 (1975).

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(Susquehanna Steam Electric Station,  
Units 1 and 2)

Docket Nos. 50-387  
50-388

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO APPLICANTS' MOTION TO PROHIBIT ENVIRONMENTAL COALITION ON NUCLEAR POWER FROM PARTICIPATING IN LITIGATION OF CERTAIN CONTENTIONS", "NRC STAFF'S ANSWER TO APPLICANTS' MOTION TO PROHIBIT SUSQUEHANNA ENVIRONMENTAL ADVOCATES FROM PARTICIPATING IN THE LITIGATION OF CONTENTION 1", and "NRC STAFF'S ANSWER IN SUPPORT OF APPLICANTS' MOTION TO DISMISS CITIZENS AGAINST NUCLEAR DANGERS FROM THIS PROCEEDING" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 25th day of February, 1980:

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James M. Cutchin, IV  
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