

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
PHILADELPHIA ELECTRIC COMPANY) Docket Nos. 50-463
) 50-464
(Fulton Generating Station,)
Units 1 and 2))



NRC STAFF'S RESPONSE TO SAVE SOLANCO ENVIRONMENT
CONSERVATION FUND'S PETITION TO TERMINATE DOCKET AND
EARLY REVIEW OF SITE SUITABILITY*

I. Introduction and Background

On July 3, 1973, Philadelphia Electric Company (PEC or Applicant) filed an application for a permit to construct two 1160 MWe high temperature gas cooled reactors (HTGRs) in Fulton and Drumore Townships, Lancaster County, Pennsylvania. The application was docketed on November 16, 1973 and subsequently a Notice of Hearing on Application for a Construction Permit was published in the Federal Register.^{1/} Pursuant to that notice, a number of persons or groups filed petitions to intervene and were admitted as parties to the proceeding. In addition, the States of Pennsylvania and Maryland were admitted as interested states.

During 1974 and part of 1975, there was extensive discovery among the parties as well as detailed negotiations related to stipulations on contentions. Also during this period, the NRC Staff prepared and issued its Safety Evaluation Report and Supplement and the Draft and Final Environmental Statements

* While the petition addressed herein is captioned as being before the Commission, the petition itself is directed to, and seeks relief from, the "Hearing Board". Accordingly, the Staff's response to the petition is directed to the Licensing Board.

^{1/} 38 F.R. 34484 (December 14, 1973).

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on construction of a facility utilizing the HTGRs proposed in PEC's application.

By letters dated September 17, 1975 and February 19, 1976, the Applicant informed the Licensing Board that its nuclear steam supply system vendor would no longer proceed with work related to the Fulton facility, that the Applicant had suspended design and analysis work on the facility and that it would undertake an evaluation of available options for baseload generating capacity for the mid-to-late 1980's period. The Fulton construction permit proceeding, as well as the NRC Staff review of the Fulton application, assumed a suspended, inactive status at the time of the Applicant's letter to the Licensing Board in the fall of 1975 and remained inactive until the end of 1978.

On December 29, 1978, PEC filed Amendment No. 32 to its construction permit application. Therein, PEC applied for an adjudicatory early site suitability review for the Fulton site pursuant to 10 CFR §2.101(a-1) and Subpart F to 10 CFR Part 2.^{2/} The NRC Staff is currently reviewing PEC's early site review application for acceptability.^{3/} The Staff has not yet determined whether the application is sufficiently complete under 10 CFR §2.603(b)(1) nor issued the notice of acceptability of the application in accordance with 10 CFR §2.603(c).

Against this background, Save Solanco Environment Conservation Fund (SSECF), an admitted intervenor and party to this proceeding, filed a "Petition to

^{2/} These early site review regulations provide for a detailed review of site suitability matters by the NRC Staff, an adjudicatory hearing directed toward the site suitability issues proposed by the applicant, and the issuance by a licensing board of an early partial decision on such site suitability issues.

^{3/} See 10 CFR §2.603(a).

Terminate Docket and to Quash Preapplication and Early Review of Site Suitability" (Petition) on May 14, 1979. In its Petition, SSECF requests that the Licensing Board order the Applicant to show cause why its application, including the application for an early site review, should not be terminated.^{4/}

The bases for this request are SSECF's assertions that:

- (1) The application for an early site review is defective because no specific reactor type has been proposed.
- (2) The accident analysis relied upon for showing site suitability is invalid.
- (3) Objections of local governing bodies show that an early site review is not in the public interest.
- (4) The facility is not needed for a substantial period of time and an early site review now would violate the National Environmental Policy Act (NEPA).

For the reasons set forth below, it is the NRC Staff's position that SSECF's Petition is premature at this time and that a ruling on it should be deferred until completion of the Staff's detailed review of the early site review application. On the other hand, if the Petition is considered on its merits, it should be denied without prejudice to any later motion filed in accordance with 10 CFR §2.605(b) after the Staff has completed its detailed review.

II. NRC Staff's Response

A. The Petition is Premature At This Time and a Ruling Should Be Deferred Until Completion of the Staff's Detailed Review of the Early Site Review Application

It is the Staff's position that, apart from the merits, the relief requested by SSECF in its Petition may not be sought until the Staff has completed its

^{4/} Although SSECF, in its request for relief and in several other places in its Petition (see Paras. 16, 17), refers to the site suitability review provisions of Appendix Q to 10 CFR Part 50, those site review procedures are inapplicable here since PEC has applied for an adjudicatory early site review pursuant to 10 CFR §2.101(a-1) and Subpart F rather than a site suitability report from the NRC Staff alone under Appendix Q to Part 50. Accordingly, SSECF's references and arguments with regard to Appendix Q are immaterial and are not addressed herein.

detailed review of the application for an adjudicatory early site review. Although 10 CFR §2.605 provides for termination of an adjudicatory early site review pursuant to a motion of a party, that provision is applicable to the hearing and partial decision stage of the early site review process. There is no similar regulatory provisions applicable to the review conducted by the Staff and that review is not subject to modification or termination, prior to the hearing stage, on the motion of a party. In short, the regulations do not provide to a party any mechanism for controlling the Staff's review before the hearing stage is reached.^{5/} Accordingly, it is the Staff's position that SSECF's Petition is premature at this time and that a ruling on the Petition should be deferred until completion of the Staff's detailed review of the early site review application.

B. On the Merits, the Petition Should Be Denied

If SSECF's Petition is considered on the merits, it is the Staff's position that it should be denied at this time without prejudice to a later motion filed in accordance with 10 CFR §2.605(b) after the Staff has completed its detailed review. The basis for the Staff's position in this regard is set forth below.

^{5/} In the same vein, it is questionable whether, at this stage of the adjudicatory early site review process, a motion to terminate the early site review may even be entertained. For the most part, the NRC actions with regard to the initial stages of the early site review are actions of the NRC Staff in conducting the acceptance review of the application under 10 CFR §2.603 and in conducting the detailed safety and environmental evaluation of the site suitability matters raised in the application. While a Licensing Board has supervisory authority over Staff actions that are a part of the hearing process, it has no such authority with regard to the Staff's review process. Northeast Nuclear Energy Company (Montague Nuclear Power Station, Units 1&2), LBP-75-19, 1 NRC 436 (1975).

1. A Specific Reactor Type Need Not Be Proposed
For Purposes of An Early Site Review

In its Petition (Paras. 10, 11), SSECF asserts that the early site review application is defective since no specific reactor type has been proposed and any analysis of the radiological and environmental effects of accidents would be speculative and conjectural.

It is true that a single specific reactor type has not been proposed by the Applicant for purposes of the early site review. Instead, the Applicant has presented a range of design, construction and operating parameters applicable to three different types of reactors - a pressurized water reactor, a boiling water reactor, and an HTGR. The range of parameters presented is an envelope of parameters intended to allow an evaluation of the suitability of the site for each reactor type. There is no requirement in the adjudicatory early site review regulations in 10 CFR Part 2 that a specific reactor type be proposed and, in point of fact, the approach used by the Applicant here in setting forth enveloping parameters is fully consistent with the guidance provided by the Commission when it promulgated the adjudicatory early site review regulations.^{6/} In view of this, the Applicant's failure to select

^{6/} In the Statement of Consideration accompanying the promulgation of the early site review regulations (42 F.R. 22882, May 5, 1977), the Commission stated that additional guidance to persons seeking early site reviews could be obtained from "Early Site Reviews for Nuclear Power Facilities" (NUREG-0180), a document which describes procedures to be followed by early site review applicants (42 F.R. 22884). NUREG-0180 itself indicates that for early site reviews,

detailed impact analyses would normally be based on "envelope" assumptions regarding plant design and operating characteristics. These assumptions would be necessary since actual plant design would not usually be known. (NUREG-0180, p.I-2).

See also NUREG-0180, pp.II-1, IV-1 (reliance may have to be placed on envelope assumptions instead of on detailed design information and
(FOOTNOTE CONTINUED ON NEXT PAGE)

a single specific reactor type for early site suitability review provides no basis for terminating the early site review and SSECF's assertions to the contrary are without merit.

2. There Is No Basis for Concluding That an Adequate Accident Analysis Will Not Be Performed With Regard to the Early Site Review

SSECF contends that much of the accident analysis in PEC's original construction permit application was based on the allegedly discredited Reactor Safety Study (WASH-1400) and that this, in combination with the accident at Three Mile Island, affects the underlying bases of the NRC's policy with regard to accidents, siting and safety regulations (Petition, Paras. 11, 14, 15). In essence, SSECF appears to assert then that an early site review as requested by the Applicant should not be undertaken because an adequate accident analysis will not be performed.

First, it should be noted that PEC's original construction permit application was filed in July 1973, more than two years before WASH-1400 was issued in October 1975. The Staff's Safety Evaluation Report and Supplement were issued in March and June of 1975 respectively and the Final Environmental Statement

^{6/} (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

operating characteristics), p.A-IV-1 (use of conservative design envelopes for meteorology review), p.A-V-1 (use of an envelope of radiation source terms for accident analyses), pp.A-VI-1, 2 (use of conservative design envelopes for radiological effluent assessment and for evaluation of radiological impacts from routine operation).

While NUREG-0180 does not, of course, have the force of a regulation, it may be used to ascertain the intent of the regulations. See, e.g. Portland General Electric Co. et al. (Trojan Nuclear Plant), ALAB-531, Slip Op. pp. 18-20 (March 21, 1979) for an analogous situation in which the Appeal Board relied on a Staff guidance document cited in the Commission's Statement of Consideration accompanying the promulgation of certain regulations to determine the intent of those regulations.

for Fulton was issued in April 1975.^{7/} These Staff documents which, among other things, included detailed accident analyses for the Fulton site, were thus prepared and issued long before WASH-1400 was published. There was no reliance by the Staff upon WASH-1400 and SSECF has cited no instance in which that document was relied upon with regard to Fulton. SSECF's conclusory allegations in this vein are unsupported and unsupportable and have no bearing on whether an adequate accident analysis can and will be performed with regard to the Fulton early site suitability review.

Second, SSECF's assertions with regard to the implications of the Three Mile Island accident amount, in essence, to a challenge to the existing safety-related regulations of the Commission. Except in special circumstances not shown to exist here, such a challenge to existing regulations, whether it arises through argument of a party or by other means, is prohibited in adjudicatory proceedings. 10 CFR §2.758; Philadelphia Electric Company (Limerick Generating Station, Units 1&2), ALAB-262, 1 NRC 163, 204 (1975); Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1&2), ALAB-218. AEC 79, 88-89 (1974). Consequently, SSECF's arguments in this regard cannot form the basis for denying the Applicant's request for an early site suitability review. Moreover, there is currently underway an intensive review and evaluation of the implications of the Three Mile Island accident. It is conceivable that this review might result in additional regulatory requirements and safety standards. In any event, the accident and safety analyses required to determine the suitability of the Fulton site in

^{7/} See Safety Evaluation of the Fulton Generating Station, Units 1 and 2, NUREG-75/015, March 1975; Supplement No. 1 to Safety Evaluation, June 1975; Final Environmental Statement Related to the Proposed Fulton Generating Station, Units 1 and 2, NUREG-75/033, April 1975.

accordance with PEC's application for an adjudicatory early site review will, of necessity, be based upon the latest regulatory requirements and standards, including any applicable additional standards and requirements which are derived from the Three Mile Island accident and which are in place before the Fulton early site review is completed.^{8/} Insofar as the Staff's early site review findings on site suitability may be based on accident analyses and evaluations, such findings will certainly be subject to challenge and close scrutiny at the early site review hearing. Accordingly, the Three Mile Island accident provides no basis for concluding that an adequate accident analysis will not be performed in relation to PEC's early site review application or that PEC's request for an adjudicatory early site review should be denied now before any detailed site suitability review has been undertaken by the Staff.

3. The Objections of Certain Local Government Agencies
Do Not Preclude Initiation of an Early Site Review
at This Time

SSECF states that various local governmental agencies have objected to an early review of site suitability issues for Fulton as not being in the public interest. Petitioner apparently asserts that, in view of this local governmental opposition, the NRC should decline to initiate an early site review.

^{8/} Since an adjudicatory early site review decision does not result in the authorization of construction (10 CFR §2.606(a)) and the findings therein are subject to reconsideration based on significant new information that substantially affects the conclusions on site suitability from the early site review (10 CFR §2.606(b)(2)), there is clearly a mechanism to assure that any significant additional regulatory requirements or standards resulting from the Three Mile Island accident will properly be accounted for before any final decision authorizing the use of the Fulton site is issued by the NRC.

10 CFR §2.605(b) provides, among other things, that on motion of a party to the proceeding filed at least 60 days before the commencement of the hearing on site suitability issues, the Commission

may decline to initiate an early hearing or render an early partial decision on any issue or issues of site suitability ... (2) In cases where it appears that an early partial decision on any issue or issues of site suitability would not be in the public interest considering (1) the degree of likelihood that any early findings on those issues would retain their validity in later reviews, (2) the objections, if any, of cognizant state or local government agencies to the conduct of an early review on those issues, and (3) the possible effect on the public interest and the parties of having an early, if not necessarily conclusive, resolution of those issues. (Emphasis added).

Thus, under the adjudicatory early site review regulations, local governmental opposition is one factor to be considered in determining whether an early site suitability hearing should be held and a partial decision issued. At the same time, that regulation is expressly directed toward commencement of hearing and issuance of a partial decision pursuant to the hearing. There is no provision in the regulations for rejecting out of hand an adjudicatory early site review application before the acceptance review under 10 CFR §2.603 has been completed or before the NRC Staff has performed its detailed review of the application and of the site suitability issues raised therein. At present, the acceptance review for PEC's application has not been completed and the Staff's detailed review has not even begun. In this setting, SSECF's petition is, at best, very premature if it is entertainable at all.^{9/}

Moreover, the opposition of local government agencies to an adjudicatory early site review constitutes only one factor bearing on whether an early

^{9/} See Section II.A supra.

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hearing and partial decision on site suitability matters would not be in the public interest. As to the other factors, there is no indication that early findings on the site suitability issues raised by the Applicant would not retain their validity in later reviews.^{10/} Similarly, indications of adverse effects on the public interest and the parties in having an early resolution of site suitability issues for Fulton are singularly lacking. On the contrary, full pursuit of the adjudicatory early site review procedures would appear to be in the public interest since, as stated by the Commission in its Statement of Consideration accompanying the promulgation of these regulations (42 F.R. 22882), it should "provide a measure of certainty" as to site suitability, and "increase the effectiveness of the licensing process in resolving legitimate public concerns and ... enhance the effectiveness of the nuclear facility planning process." There is a decided public interest in the prompt airing and resolution, to the extent possible, of questions pertaining to the acceptability of a site proposed for a nuclear facility. Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1&2), ALAB-277, 1 NRC 539, 552 (1975). It is the Staff's view that, on balance, the public interest does not favor a termination of the early site review for Fulton (which at this point has barely begun), even if a request for termination is cognizable at this time, and that SSECF has not shown otherwise.

^{10/} In particular, such matters as the physical contours of the site, and site seismology, meteorology, geology and hydrology should not change significantly over a period of several years. Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1&2), ALAB-277, 1 NRC 539, 548 (1978). In turn, site suitability findings with regard to such matters should retain their validity for the period of time during which an early partial decision on site suitability would remain effective.

4. NEPA Does Not Preclude an Early Site Review and Provides No Justification for Terminating PEC's Application

SSECF makes numerous claims to the effect that an early site suitability review for the Fulton site would violate NEPA. Specifically, it is asserted that the early site review process itself violates NEPA because it allows establishment of a site for a nuclear facility without the systematic interdisciplinary environmental evaluation required by NEPA.^{11/} (Petition, Para. 17). It is also argued that an early site review of this specific application would violate NEPA since, because of the general nature of the application and the lack of a specific and detailed facility design, the NRC cannot conduct a full evaluation of the environmental impacts of, alternatives to, or economic and environmental costs and benefits of, the proposed facility as required by NEPA. (Petition, Paras. 18, 19, 20).

SSECF totally misapprehends the nature and import of the adjudicatory early site suitability review process. The adjudicatory early site review does not result in the authorization of anything by the NRC. Although an evidentiary hearing on site suitability matters proposed by the applicant will be held and a Partial Decision on such matters will be issued, the adjudicatory early site review regulations explicitly provide that:

[n]o limited work authorization may be issued pursuant to §50.10 (e) of Part 50 of this chapter and no construction permit may be issued without completion of the full review required by section 102(2) of the National Environmental Policy Act of 1969, as amended, and Part 51 of this chapter. 10 CFR §2.606(a) (emphasis added).

^{11/} On its face, this assertion appears to be an impermissible attack on the early site review regulations. As previously indicated, the Commission's regulations are not subject to challenge in adjudicatory proceedings absent the showing of special circumstances. 10 CFR §2.758. No special circumstances have been shown to exist here.

Thus, the adjudicatory early site review process is not a federal action that will result in environmental impacts of any sort.

The early site review process, quite simply, amounts to nothing more than an evaluation of certain site-related matters to determine the suitability of the site, from an environmental and safety standpoint, as it is affected by those site-related matters. The early site review process does not pretend to constitute a full NEPA review and it has long been recognized that an early consideration of certain site-related matters is only a part of the total review and evaluation that is mandated by NEPA.^{12/} At the same time, there is neither a statutory nor regulatory prohibition against considering site-related matters early and prior to completion of the full environmental review required by NEPA.^{13/} That full NEPA review, including a balancing of costs and benefits, will, of necessity, be performed if and when PEC prosecutes its application for a construction permit. At that time, any findings on site-suitability made pursuant to the early site review, insofar as such findings retain their validity, will be factored into the full NEPA evaluation.^{14/} In the meantime, an adjudicatory early site review for the Fulton site is fully consistent with NEPA and SSECF's assertions to the contrary are simply wrong.

^{12/} See Douglas Point supra, ALAB-277, 1 NRC 539 at 546-47.

^{13/} In ruling that an early consideration of site-related matters prior to a full NEPA review is wholly appropriate and not proscribed by statute or regulation, the Appeal Board has noted that

[b]oth the Atomic Energy Act and NEPA are singularly free of provisions purporting to fix the precise times at which evidence is to be gathered and findings made. Just as clearly, the Commission's regulations do not attempt to dictate such matters. (footnote omitted).

Douglas Point supra at 1 NRC 544.

^{14/} See 10 CFR §2.606(b)(2) and footnote 3 to that regulation.

SSECF also claims that the original projections of the Applicant and the Staff as to the date when the generating capacity of a facility at the Fulton site would be needed were "grossly in error" and, in view of the currently projected period of need, any consideration of alternate energy sources in an early site review would violate NEPA (Petition, Paras. 3, 4, 5, 12, 13). Once again, SSECF misapprehends the nature of the early site review process and the findings that will result therefrom.

Site suitability, not "need for power" or the viability of alternate energy sources, is the subject of an early site review. Because of the lack of specific cost data and the uncertainty in long range forecasts of need for power, a full review of the need for power as required for a construction permit is not feasible in an early site review. Accordingly, the early site review process does not contemplate a full need for power analysis or a detailed evaluation of alternate energy sources.^{15/} Rather, such full-scale detailed evaluations in this vein as are required by NEPA must and will be performed as part of the full NEPA review at the construction permit stage. Consideration of need in the early site review is limited to an evaluation of whether there is a reasonable likelihood of a nuclear facility of a given size being needed and cost justified relative to alternative types of generating capacity at some, not necessarily well specified, time in the future with a reasonable outer limit of time of need being 15 to 20 years.^{16/} PEC's approach, in its early site review application, with regard to need for power and alternate energy sources is fully consistent with the need for power evaluation that is intended in the early site review process. In view of

^{15/} Early Site Reviews for Nuclear Power Facilities, NUREG-0180, May 1977, p. A-VIII-1.

^{16/} Id.

this and of the fact that the full need for power analysis required by NEPA will be performed prior to any NRC action that might authorize construction, the early site suitability review requested by PEC would not violate NEPA and SSECF's arguments to the contrary are without merit.

In summary, NEPA neither precludes the adjudicatory early site review sought by PEC nor justifies, at this time, the termination of the early site review as requested by SSECF in its Petition.

III. Request for Certification to the Commission

In its request for relief, SSECF asks that the Licensing Board "certify such issues as this Board may deem necessary to the full Commission for review." (Petition, p.7). The request is apparently made pursuant to 10 CFR §2.718(i) which empowers the presiding officer, in his discretion, to certify questions to the Commission or pursuant to 10 CFR §2.730(f) which authorizes the presiding officer to refer rulings to the Commission.

A party seeking certification under section 2.718(i) must, at a minimum, establish that a referral under 10 CFR §2.730(f) would be proper - i.e. that a failure to resolve the issue in question will cause the public interest to suffer or will result in unusual expense or delay. Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-361, 4 NRC 625 (1976); Toledo Edison Company (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 759 (1975); Public Service Co. of New Hampshire (Seabrook Station, Units 1&2), ALAB-271, 1 NRC 478, 483 (1975). In addition, section V(f)(4) of Appendix A to 10 CFR Part 2 states that:

[a] question may be certified to the Commission or to the Appeal Board, as appropriate, for determination when a major or novel question of policy, law or procedure is involved which cannot be

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resolved except by the Commission or the Appeal Board and when the prompt and final decision of the question is important for the protection of the public interest or to avoid undue delay or serious prejudice to the interest of a party

This guidance from Appendix A serves to illustrate the Commission's general policy that a Licensing Board's power to certify a question to the Commission is to be exercised sparingly.

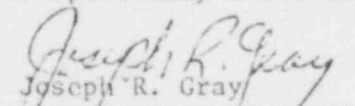
Against this background, it is clear that SSECF has wholly failed to demonstrate that certification or referral to the Commission is warranted. There is no showing of any kind that certification is necessary to protect the public interest or prevent unusual expense or delay. Indeed, there is not even an allegation to this effect. Consequently, it is the Staff's view that, with the current absence of any demonstrated need for certification or referral to the Commission, SSECF's request for certification cannot be granted.

IV. Conclusion

For the reasons set forth above

- (1) A ruling on SSECF's Petition to terminate PEC's application for an early site review should be deferred until completion of the Staff's detailed review or, in the event that the Petition is considered on its merits, it should be denied without prejudice to any later motion filed pursuant to 10 CFR §2.605(b) after the Staff's detailed review is completed.
- (2) SSECF's request that the matter be certified, in whole or in part, to the Commission should be denied.

Respectfully submitted,


Joseph R. Gray
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 4th day of June, 1979

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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PHILADELPHIA ELECTRIC COMPANY) Docket Nos. 50-463
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO SAVE SOLANCO ENVIRONMENT CONSERVATION FUND'S PETITION TO TERMINATE DOCKET AND EARLY REVIEW OF SITE SUITABILITY" 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 4th day of June, 1979:

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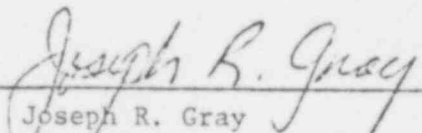
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