

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE COMMONWEALTH OF KENTUCKY**

In the Matter of:

**THE ELECTRONIC FILING OF BIG RIVERS
ELECTRIC CORPORATION AND KENERGY
CORP. TO REVISE THE LARGE INDUSTRIAL
CUSTOMER STANDBY SERVICE TARIFF.**

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CASE NO. 2023-00312

KIMBERLY-CLARK CORPORATION’S REPLY BRIEF

Pursuant to the Order of the Kentucky Public Service Commission (“Commission”) dated May 3, 2024, Kimberly-Clark Corporation (“Kimberly-Clark”) hereby submits the following brief in reply to the post hearing brief jointly filed by Big Rivers Electric Corporation (“BREC”) and Kenergy Corporation (“Kenergy”) (collectively, “the Applicants”) on May 29, 2024 in the above-captioned matter.

I. INTRODUCTION

The Applicants have failed to establish that the Large Industrial Customer Standby Service Tariff Applicants proposed in the above-captioned matter (“Proposed LICSS Tariff”) is just, reasonable, and non-discriminatory. As explained in Kimberly-Clark’s Post Hearing Brief, the Proposed LICSS Tariff represents the Applicants’ second opportunity to file a just, reasonable, and non-discriminatory LICSS Tariff with the Commission, yet it continues to fail this test, and should not be accepted by the Commission.¹

The Commission’s March 3, 2022 Order allowing the Applicant’s initial LICSS proposal to take effect on a pilot basis (“Pilot LICSS”) was clear about the next steps the Applicants must

¹ See Kimberly-Clark’s Post Hearing Brief, at 4-5 (filed May 29, 2024) (referencing March 3, 2022 Order of the Commission in the matter docketed at 2021-00289 (“March 3 Order”).

take regarding a future, revised LICSS proposal: (1) consultation with affected customers like Kimberly-Clark, and (2) separation of provisions for Backup, Maintenance, and Standby Service. The Applicants honored neither of these requirements.² Instead, the Applicants ignored the Commission’s March 3 Order and continue to unilaterally “conclude” that the Proposed LICSS Tariff is the best approach, despite not being able to cite to any existing similar approach to standby service.³

Yet, despite its disregard for the Commission’s March 3 Order and the fact that during the hearing in this matter held May 1, 2024, none of Applicants’ witnesses who testified were willing to take responsibility for or ownership of the Proposed LICSS Tariff,⁴ the Applicants continue to insist that “the Commission should approve Big Rivers’ and Kenergy’s Revised LICSS Tariff.”⁵

² See 2023-0312 Hearing Video at 11:09:30 a.m. (Commission Chair Chandler noting it was an expectation of the Commission that BREC would have conversations with Kimberly-Clark and Domtar about a new standby rate following the March 3 Order and BREC Witness Terry Wright explaining he “was not aware of” that expectation, nor was he aware of any such discussions having occurred); see also Testimony of Kimberly-Clark witness Timothy Honadle, Hearing Video at 2:13:50 p.m. (noting he was not aware of any contact from either Applicant to Kimberly-Clark to discuss the new standby service tariff between issuance of the March 3 Order and when the Applicants proposed the revised tariff on September 1, 2023).

³ See Order of the Commission, 2021-00289, at 20 (March 3, 2022) (directing that standby service for planned versus unplanned outages “should be offered separately, and the rates should be set such that the appropriate embedded and incremental costs associated with each of the services are recognized and accounted for appropriately.”); see also Proposed LICSS Tariff, Sheet No. 69.01 (defining “Backup Power Service” to include all energy and capacity requirements for both planned and unplanned outages). See Applicants’ Post-Hearing Brief at 5 (“During the process of developing the [Proposed LICSS] Tariff, [BREC] concluded that the structure of the [Proposed LICSS] Tariff properly places the cost and risk of outages associated with a [behind-the-meter-generation] on the Standby Customer”).

⁴ See 2023-0312 Hearing Video at 9:24:35 a.m. (Mr. Wright explaining he reviewed the Proposed LICSS Tariff but that he was not familiar enough with it to be comfortable answering questions about it and that “the only reason [he] sponsored [the Proposed LICSS Tariff] was because the former VP of Energy Services left [BREC] and there was nobody at [BREC] to sponsor it other than [Mr. Wright]”); see also 2023-0312 Hearing Video at 9:39:36 a.m. (explaining he had not read the Commission’s March 3, 2022 Order, that he was “not involved” with the Proposed LICSS Tariff filing).

⁵ Applicants’ Post Hearing Brief at 12.

II. REPLY ARGUMENT

A. In The Absence Of Commission Direction On The Design Of A Just And Reasonable Standby Rate Design, A Special Contract Does Not Afford Standby Customers Meaningful Relief.

In the Applicants' Post Hearing Brief, BREC claims that "Standby Customers are still able to enter agreements regarding maintenance power rates through special contracts."⁶ Applicants' lack of desire to work with Standby Customers to develop a reasonable LICSS tariff directly undercuts any notion that Standby Customers would have any reasonable opportunity to negotiate a special contract that would ameliorate Standby Customers' concerns. Applicants' position does nothing to allay Kimberly-Clark's serious concern that it is being asked to pay much more than its fair share of the cost to BREC or Kenergy of providing Standby Service to Kimberly-Clark. The Applicants' inflation of the costs associated with their providing Standby Service to Kimberly-Clark unfairly shifts costs to Kimberly-Clark and jeopardizes the Owensboro Mill's competitive position.

Applicants' suggestion that a special contract could be the safety valve for any issues with its proposal is no suggestion at all and does not transform this unfair proposal into something palatable. If the Proposed LICSS tariff is approved as requested, it tilts the scale so far in Applicants' favor that neither BREC nor Kenergy will have any incentive to enter into such special contracts that better approximate the actual costs of Applicants providing such service to Kimberly-Clark. Applicants did not comply with the Commission's directive to enter into good faith negotiations prior to filing the Proposed LICSS Tariff.⁷ Accordingly, and given Applicants' extreme positions in this proceeding, Kimberly-Clark cannot rely on the Applicants' willingness

⁶ Applicants' Post Hearing Brief at 11.

⁷ See n.2, *supra*.

to negotiate in good faith, while Kimberly-Clark considers long-term business decisions regarding the Owensboro Mill, which is a significant employer within the Applicants' service territories.

The Proposed LICSS Tariff should be rejected, and a reasonable standby service tariff should be approved for BREC's and Kenergy's customers consistent with Kimberly-Clark's recommendations.

B. Applicants' "Cross-Subsidization" Claims Are Unfounded; If Anything, The Record Demonstrates That The LICSS Tariff As Proposed Would Result in Cross-Subsidization Of Other Customers By Standby Customers.

The Applicants argue that "arbitrary rate discounts used in more conventional tariffs," such as those ordered by the Commission pursuant to its March 3 Order, "risk subsidization of Standby Customers . . . by non-Standby Customers."⁸ Not only do Applicants fail to provide any quantifiable data to justify this claim, this position also fails to recognize that the central role of a cost-causation analysis is to align the responsibility for costs with the *actual* costs that a customer imposes on the system.⁹ These actual costs arise based on *actual reliance* of a standby customer on the system. This is a critical flaw in the Proposed LICSS Tariff.

A key element of the Applicants' proposal is charging Standby Customers based on an inflated view of Standby Customers' load requirements, which is beyond that required by the Midcontinent Independent System Operator, Inc. ("MISO"), and beyond what BREC proposes to recognize in its integrated resource plan currently under review at the Commission. Contrary to the Applicants' claims, a direct consequence of the Applicants' proposed approach of grossing up Standby Customers' load is shifting costs to Standby Customers well beyond the Applicants'

⁸ Applicants' Post-Hearing Brief at 5-6.

⁹ See *In the Matter of: The Application of Kentucky Power Co. d/b/a Am. Elec. Power for Approval of an Amended Compliance Plan for Purposes of Recovering the Costs of New & Additional Pollution Control Facilities & to Amend Its Env't Cost Recovery Surcharge Tariff*, No. 2002-00169, 2003 WL 26453635, *23 (Mar. 31, 2003) (explaining a "bedrock principle" of rate making is "basing rates on cost causation").

actual cost to serve these customers. As explained in Kimberly-Clark’s Post Hearing Brief, this approach would result in undue discrimination against Standby Customers.¹⁰ Over-allocating costs to Standby Customers and then calibrating rates based on that over-allocation would necessarily result in Standby Customers cross-subsidizing other customers, not vice versa.

The alternative tariff proposed by Kimberly-Clark’s expert witness Larry Blank (“Kimberly-Clark’s Proposal”) ensures that the burdens that customers with behind-the-meter-generation (“BTMG”) place on the BREC system are measured by their actual reliance on Backup, Maintenance, or Standby Power.¹¹ The performance of Kimberly-Clark’s onsite generation, referred to as “generation capacity factor” in Kimberly-Clark’s Proposal, has been very high, and has continued to improve over time.¹² Kimberly-Clark’s Proposal is the only proposal before the Commission that captures a customer’s actual reliance on standby service by incorporating the frequency and duration of a customer’s actual historical outages—i.e., the real *probability* of an outage—into the determination of a Standby Customer’s cost of backup, maintenance, and standby power.¹³ In this important respect, Kimberly-Clark’s proposal supports aligning costs borne by a customer with costs actually caused by that customer, consistent with cost-causation principles.

¹⁰ See Kimberly-Clark’s Post Hearing Brief, Sections III.b. and e.

¹¹ See Exhibit LB-1 to Direct Testimony of Kimberly-Clark Expert Witness Larry Blank (filed December 4, 2023); see also Kimberly-Clark’s Post Hearing Brief, Section IV.a

¹² See Honadle Direct Testimony with Revision, page 10 (refiled May 7, 2024) (explaining that “unplanned outages of the Cogen Unit have been decreasing due to experience since the initial start up”).

¹³ Domtar’s witness Stephen J. Baron also explains that a “customer’s own generation reliability factor is a critical component in the determination of the cost of providing backup service,” noting that “Big Rivers’ tariff does not even consider this factor.” Direct Testimony and Exhibits of Stephen J. Baron, on behalf of Domtar Paper Company, page 12 (filed December 4, 2023).

The Applicants posit that the proper metric for measuring costs should be the mere *possibility* that an outage occurs, no matter how small.¹⁴ Going down a path of *possible* reliance raises a whole host of critical policy questions that would involve an impossible exercise of looking behind each retail customer’s meter to determine that customer’s *possible* reliance on the Applicants’ services. This “possibility” approach, rather than a probability approach, would result in a significant overbuild of the BREC system. As such, the Applicants’ approach risks increasing costs for all customers if Applicants’ artificial inflation of its load requirements triggers a phantom need for additional capacity to be developed by BREC.

BREC’s “possibility” approach also departs sharply from electric utility planning, which is invariably based on *probabilistic* analysis (*i.e.*, what is likely to occur, rather than what could possibly occur). The incorporation of a forced outage rate, a *probabilistic* approach, as in Kimberly-Clark’s Proposal, has been successfully adopted by other utilities, including Minnesota Power and DTE Energy in MISO.¹⁵

Relatedly, the structure of the energy charges creates cross-subsidization of BREC’s members by Standby Customers because BREC would necessarily be collecting more than needed to cover its costs of providing energy to Standby Customers. As explained in Kimberly-Clark’s Post Hearing Brief, not only do the Applicants propose to impose a *demand* charge based on the mistaken assumption that the customer’s on-site generation is never available, the Proposed LICSS Tariff is also unjust and unreasonable in part because it proposes coupling a demand charge with the “higher of” BREC’s energy cost or market energy prices for “first through the meter” energy

¹⁴ See Applicants’ Post Hearing Brief at 11 (arguing “the possibility rather than the probability, of forced outage is the relevant consideration when examining demand costs”).

¹⁵ See Surrebuttal Testimony of Kimberly-Clark Expert Witness Jamie Scripps, page 11, lines 7 through 13.

charges.¹⁶ In this respect, the Proposed LICSS Tariff is also “unduly punitive.”¹⁷ In either case, under the Proposed LICSS Tariff, Kimberly-Clark would face an energy cost that is likely higher than the Applicants’ cost of providing energy to Kimberly-Clark during any outage of Kimberly-Clark’s onsite generation.

BREC claims the “bill credits to its members, including Standby Customers” created by surplus revenue would appropriately account for the additional costs to Standby Customers under the LICSS Tariff.¹⁸ However, the cost shift to Standby Customers that would result from the Proposed Tariff cannot be cured via a credit back to all customers, which would dilute any offsetting value to Kimberly-Clark. Further, if, for any reason at all, BREC does not exceed its TIER level and there is minimal or no surplus, Kimberly-Clark would receive mere pennies—or no pennies at all—for each dollar that BREC over-collects from Kimberly-Clark. Stated differently, Kimberly-Clark’s over-payment for Standby Service could still result in no or minimal MSRM credit to Kimberly-Clark.

Without citing any support, the Applicants relatedly argue that their not-for-profit status means that “profits are no motivation,” and, therefore, they should somehow get the benefit of the doubt when it comes to tariff design.¹⁹ They further argue that, even if the tariff does result in overpayment to BREC, such “excess revenue” would generate “bill credits to its members, including Standby Customers, through [BRECs’] MSRM Program.”²⁰ This argument must fail

¹⁶ See Kimberly-Clark’s Post Hearing Brief, Section III.c.

¹⁷ See Baron Direct Testimony, page 12 lines 18-21; see also generally, Mr. Wright Testimony, 2023-00312 Hearing Video at 9:50:00 to 9:57 (discussing volatility of real time market as compared to advanced planning for energy purchases).

¹⁸ Applicants’ Post Hearing Brief at 9.

¹⁹ *Id.*

²⁰ *Id.*

because returning *some* money collected pursuant to unjust, unreasonable, and discriminatory rates does not cure the underlying unjust, unreasonable, and discriminatory nature of those rates. Indeed, Applicants’ argument in this regard is effectively an admission that BREC will likely over-recover costs from Standby Customers—and subsidize other customers on the system—in violation of cost causation principles.

Moreover, despite valuing good working relationships with its utility partners, Kimberly-Clark must respectfully point out that even not-for-profits have self-interests, as reflected by the Commonwealth’s decision to regulate cooperative utilities to ensure that their rates are just and reasonable and do not result in undue discrimination. In this case, the Proposed LICSS Tariff would result in Kimberly-Clark paying charges not linked to cost-causation, thereby forcing Kimberly-Clark to subsidize other customers of Applicants.

C. Applicants’ Reliability Claims Are Unfounded.

In Applicants’ Post-Hearing Brief, they explain that BREC “has concluded that a conventional LICSS approach will not adequately address the concerns that the Revised Tariff was designed to resolve” because, according to BREC, a “more favorable rate for scheduled maintenance outages” is not justified by the advantages advanced scheduling would provide given BREC’s “seasonal capacity requirements and the increasing frequency of extreme weather events and outages during shoulder seasons”²¹ Applicants’ position that they must assume that every Standby Customer will need backup service at all times in order to maintain system reliability is an unwarranted oversimplification of the ratemaking process, and fails to acknowledge the various, nuanced techniques that have developed and been refined over time to address these issues. Instead

²¹ Applicants’ Post-Hearing Brief at 10.

of recognizing and applying these approaches, BREC takes a distorted approach by assuming the worst and then transitioning to using grossed-up loads when estimating its costs.

In sharp contrast, MISO's load forecasting rules *do not require* the use of grossed-up loads.²² Using gross-up loads is inconsistent with BREC's own practice for estimating its own loads, where it submits *net* load amounts to MISO.²³ BREC's cost allocation studies use *actual metered load* amounts and allocate transmission costs on a 12-month, coincident peak basis (which is, again, a net load approach).²⁴

BREC's concerns regarding reliability are also misplaced because even when an unplanned outage occurs, Standby Customers are actually relying on energy being produced *generally* on the MISO system, and not upon BREC generation specifically. In fact, BREC's current generators are not equipped to react quickly to a Standby Customer's unplanned outage.²⁵ This is particularly true of potential unplanned outages of Kimberly-Clark's Cogeneration Unit ("Cogen Unit") at its Owensboro Facility. As described by Kimberly-Clark witness Timothy Honadle, the unplanned outages of Kimberly-Clark's Cogen Unit occur with little or no notice and, if and when they do occur, Kimberly-Clark only requires standby service for a short period of time.²⁶ More specifically, Kimberly-Clark's Owensboro Facility requires about just 14 MW for roughly 15 minutes in the event of an unplanned outage, providing enough time for Kimberly-Clark to safely

²² See Kimberly-Clark's Post Hearing Brief, Section III.b.

²³ *Id.*; see also Testimony of BREC Expert Witness John Wolfrom, 2023-00312 Hearing Video at 1:28 p.m. (explaining he used 12-month coincident peaks to calculate costs); see also *id.* at 1:39 p.m. (explaining, subject to check, calculations were net of the behind-the-meter-generation); see also *id.* at 1:41 p.m. (explaining "utility would be focused on what amounts of capacity they have to supply to the customer—so net of any customer self-supply").

²⁴ *Id.*

²⁵ See Wright Testimony, 2023-00312 Hearing Video at 11:50:00 (explaining that the fastest BREC's generation could respond to provide energy is "almost 40 minutes").

²⁶ See Honadle Direct Testimony, page 8, line 16 through page 10, line 3.

reduce its load.²⁷ Kimberly-Clark's planned outages are coordinated well in advance with BREC, and they can and do occur during times when capacity is in surplus.²⁸

Even if unplanned outages were sufficiently lengthy such that BREC generation could or would respond, BREC's obligation in this regard is sharply undercut by the language in its Proposed LICSS Tariff that enables BREC to terminate service to the Standby Customer in case of an emergency. Specifically, that provision reads as follows: "During system emergencies, Big Rivers may discontinue sales to the Standby Customer."²⁹ As such, the Proposed Tariff charges a demand charge to the Standby Customer as if the Standby Customer's on-site generation does not exist but then, remarkably enough, the Proposed Tariff does not require BREC to provide Standby Service during emergency conditions. This is patently unjust and unreasonable and should be reformed, consistent with the Kimberly-Clark Proposal, such that the demand charge appropriately reflects the actual costs that the Standby Customer is placing on the Applicants' systems.

D. The Commission, Not A Utility, Determines What Is Just, Reasonable, And Non-Discriminatory.

Kentucky's voters, via their elected officials in the legislature, have seen fit to empower this Commission to oversee the regulation of rates and services of utilities in the Commonwealth.³⁰ Despite the clear direction from the Commission in its March 3 Order to separate Backup Power and Maintenance Power, the Applicants remarkably maintain a position that directly conflicts with the Commission's express directives, appearing to suggest that they know better. The record in this proceeding demonstrates otherwise.

²⁷ *Id.*

²⁸ See Honadle Direct Testimony, page 7, lines 1-2.

²⁹ Proposed LICSS Standby Tariff, at Sheet No. 69.05.

³⁰ KRS 278.040(2).

Applicants claim the Proposed LICSS Tariff “achieves the same goal as a bifurcation of maintenance and backup power rates by leveraging market realities to incentivize outage scheduling”³¹ In fact, the reality is the Applicants’ proposed approach of combining Maintenance and Backup Power *does not* achieve the same goal. The Proposed Tariff affords no incentive for Standby Customers to provide advanced notice to BREC of a planned outage because there is no difference in the rates for maintenance service versus backup service.³²

The Applicants shrug off the novel, unorthodox nature of their proposal. The Applicants claim they “could have simply mirrored existing rate structures of other utilities,” but the Proposed LICSS Tariff “was an attempt to evaluate how to effectively develop a[n] LICSS tariff for the MISO marketplace”³³ Yet, Applicants could cite to no other utility *anywhere*, let alone in MISO, that uses an approach like the one in the Proposed LICSS Tariff.³⁴ In contrast, Kimberly-Clark as well as Intervenor Domtar have offered alternatives that align with approved methodologies consistent with industry best practices, including within the MISO footprint.³⁵

Applicants’ approach of combining Maintenance and Backup Power is also directly contradictory to the Public Utilities Regulatory Policies Act (“PURPA”) and its implementing

³¹ Applicants’ Post Hearing Brief at 5.

³² See Kimberly-Clark’s Post Hearing Brief, Section III.a. (citing March 3, 2022 Order which explained combining Maintenance and Backup Power provides “the wrong price signals to standby customers[,]” and “no incentive beyond maintaining good corporate relations” for a customer to inform BREC about a planned outage or reduce the length of those outages, where the outage could “effectively provide standby customers a means to avoid relatively higher fuel prices for its own generation”); *see also* 2023-00312 Hearing Video at 10:08:17 (discussing lack of credit for notifying utility ahead of time for outages).

³³ Applicants’ Post Hearing Brief at 7.

³⁴ See Joint Response of Applicants to Domtar Paper Company, LLC’s First Request for Information, Response to Request No. 1-5 (filed October 27, 2023) (stating “[BREC] is not aware of other utilities that have standby schedules similar to the proposed LICSS”).

³⁵ See note 15, *supra*.

regulations.³⁶ As evident from its regulations, the Federal Energy Regulatory Commission continues to recognize the distinction between these two services, and while other PURPA rules have been modified in recent years,³⁷ the rules relating to standby service have remained the same. Also, other utilities that continue to differentiate the various levels of standby service in the MISO footprint have recognized that MISO's move to a seasonal capacity construct does not change the costs to serve the various levels of standby service. BREC's method, therefore, stands out as flawed and not aligning with costs to serve the various legally defined categories of standby service (*i.e.*, backup, maintenance, and standby service).

Applicants also attempt to argue that because "MISO's own approach to regulating [behind the meter generation] remains in flux," Applicants were justified in "conclud[ing] that a market pricing approach that allocated capacity credits, administrative costs, and energy costs based on economic realities would be a flexible way to accurately allocate the costs and credits of providing Backup Power" ³⁸

First, Kimberly-Clark does not agree that Applicants have demonstrated that MISO's approach to behind-the-meter-generation is necessarily in flux. Second, even if MISO's approach were in flux, that would only provide further reason to avoid tying a capacity credit under the Proposed LICSS Tariff to the MISO market prices. And, during his hearing testimony, BREC witness Terry Wright admitted that BREC does not buy capacity from the market because BREC

³⁶ See Kimberly-Clark's Post Hearing Brief at 7; *see also* 18 C.F.R. § 292.305(c).

³⁷ *See, e.g.*, FERC Order 892, 173 FERC ¶ 61,158 (clarifying final rule adopting revisions to regulations implementing section 201 and 210 of PURPA).

³⁸ Applicants' Post Hearing Brief at 7.

is actually a net seller of capacity.³⁹ Thus, the market price is irrelevant to the cost of supplying reserve capacity for backup service given BREC's excess capacity.

Further, with regard to MISO, there is no requirement to have Standby Customers obtain accreditation from MISO nor to be qualified as a Load Modifying Resource.⁴⁰ In fact, the Applicants have not offered any evidence of the process by which MISO would accredit a retail customer's BTMG when the customer has no plans to participate in the MISO market. This lack of clarity could add significant delays, if not serve as an outright bar, to Kimberly-Clark being qualified to receive standby service from the Applicants, which is Kimberly-Clark's right as a Qualifying Facility under PURPA.⁴¹ As such, the Commission should disregard the Applicants' unfounded claims around the need for MISO accreditation and LMR qualification of standby customers' BTMG as further discussed in Kimberly-Clark's Post-Hearing Brief.

III. CONCLUSION

For the reasons discussed herein as well as in Kimberly-Clark's Post Hearing Brief, the Applicants' Proposed LICSS should be found to be unjust, unfair, unreasonable, and discriminatory. Kimberly-Clark respectfully requests that the Commission (a) reject the Pilot Tariff and the Proposed LICSS Tariff, and (b) adopt an LICSS tariff with rates and provisions consistent with Kimberly-Clark's Proposal.

Dated June 7, 2024.

³⁹ Wright Testimony, 2023-00312 Hearing Video at 9:38:55 a.m. (explaining that BREC "ended up selling capacity into" the most recent auction and that, as a result, the capacity auction results would be of no consequence to BREC's costs of providing capacity service).

⁴⁰ See Kimberly-Clark's Post Hearing Brief at 10, 14.

⁴¹ See 18 C.F.R. § 292.305(b).

Respectfully Submitted,

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Certification

I hereby certify that a copy of this Reply Brief has been served electronically on all parties of record through the use of the Commission's electronic filing system, and there are currently no parties that the Commission has excused from participation by electronic means. Pursuant to the Commission's July 22, 2021 Order in Case No. 2020-00085, a paper copy of this filing has not been transmitted to the Commission.

/s/ Daniel E. Danford

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