STATE OF CALIFORNIA
California Energy Commission

In the Matter of: The Application for Certification for the CALICO SOLAR PROJECT AMENDMENT	Docket No. 08-AFC-13C

OPENING BRIEF OF CALIFORNIA UNIONS FOR RELIABLE ENERGY REGARDING CALIFORNIA ENERGY COMMISSION JURISDICTION AND BASELINE FOR ENVIRONMENTAL REVIEW FOR CALICO SOLAR PROJECT AMENDMENT

May 23, 2011

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I. INTRODUCTION

Intervenor California Unions for Reliable Energy ("CURE") files this opening brief pursuant to the Committee's May 2, 2011 Scheduling, Briefing and Procedures Order regarding Calico Solar, LLC's petition to modify the Calico Solar Project ("Project Amendment"). In that Order, the Committee invited the parties to brief several specific threshold legal issues.

Specifically, the Committee invited the parties to brief legal issues pertaining to the Commission's jurisdiction to consider approving the Project Amendment, including both the solar thermal and photovoltaic ("PV") parts of the Project, and the Commission's authority and responsibilities in reviewing the Project Amendment, pursuant to the California Environmental Quality Act ("CEQA") (Public Resources Code, § 21000 et seq.). The Committee also invited the parties to address the appropriate environmental baseline for measuring the environmental impacts of the Project Amendment.

As explained below, the Commission now has exclusive jurisdiction to certify the Project Amendment's proposed reduction in solar thermal generating capacity. The Commission does not have jurisdiction to certify the Project Amendment's proposed solar PV component. Irrespective of limitations on Commission site certification jurisdiction, the Commission is required to analyze the whole of the Project Amendment, pursuant to CEQA. In the Commission's analysis, the environmental baseline against which to measure the Project Amendment's potentially significant impacts is the environment that would exist if the original

Project is built, along with any substantial changes in circumstances that have occurred since Project approval.

II. DISCUSSION

A. Energy Commission Jurisdiction

1. The Commission has authority to approve reducing the capacity of the SunCatcher solar thermal technology from 663.5 MW to 100.5 MW

The Warren-Alquist State Energy Resources Conservation and Development Act ("Warren-Alquist Act" or "Act") (Public Resources Code, § 25000 et seq.)[1] provides the Commission with "the exclusive power to certify all sites and related facilities in the state, whether a new site and related facility or a change or addition to an existing facility." (§ 25500; *Department of Water & Power v. Energy Resources Conservation & Development Com.* (1991) 2 Cal.App.4th 206, 214 (*DWP v. CEC*) ["The Energy Commission's certification jurisdiction is set forth in section 25500"].) The Act provides definitions for terms in Section 25500 that clarify the scope of the Commission's jurisdiction. (*Id.* at p. 226 [construing scope of Commission jurisdiction through strict interpretation of definitions provided in the Warren-Alquist Act]; *see also Public Utilities Com. v. Energy Resources Conservation & Dev. Com.* (1984) 150 Cal.App.3d 437, 454 (*PUC v. CEC*) ["the plain language of section 25107 defines the extent of the Energy Commission's jurisdiction over transmission lines"].) "Site" means "any location on which a facility is constructed or is proposed to be constructed." (§ 25119.) "Facility" means "any electric transmission line or thermal powerplant, or both electric transmission line and

[1] All statutory references are to the Public Resources Code, unless otherwise noted.

thermal powerplant, regulated according to the [Act]." (§ 25110.) Thermal powerplant is defined as:

> any stationary or floating electrical generating facility using any source of thermal energy, with a generating capacity of 50 megawatts or more, and any facilities appurtenant thereto...
>
> "Thermal powerplant" does not include any wind, hydroelectric, or solar photovoltaic electrical generating facility.

(§ 25120.) "Electric transmission line" means "any electric powerline carrying electric power from a thermal powerplant located within the state to a point of junction with any interconnected transmission system." (§ 25107.) Thus, the Commission's exclusive permitting authority extends over thermal powerplants that generate at least 50 megawatts ("MW") of electricity, any facilities appurtenant to such power plants and any electric transmission line from a thermal powerplant to a point of interconnection with the transmission system.

Once the Commission certifies a project, the Commission's regulations concerning power plant site certification provide requirements for post certification amendments and changes. (20 Cal. Code. Regs., § 1769.) Pursuant to section 1769(a)(1) of the regulations, a petition is required for any modifications to project design, operation, or performance requirements proposed after the Commission's final decision becomes effective.[2]

In December 2010, the Commission approved the Calico Solar Project ("Project"). On March 22, 2011, Calico Solar, LLC ("Applicant") submitted a petition for the Project Amendment ("Petition"). The Applicant proposes to change, among

[2] Because the Project has not been built and therefore is not an "existing" facility, the 50 MW net capacity increase requirement for Commission jurisdiction over "modifications of an existing facility" under Section 25123 does not apply.

other things, the Project's design by substituting 563 MW of PV panels for 563 MW of solar thermal SunCatcher units. (Petition, pp. 2-1 – 2-4.) The proposed changes would result in a project that generates 100.5 MW of electricity using SunCatchers and 563 MW of electricity using PV panels. The proposed design changes would not reduce the solar thermal generating capacity to below the 50 MW threshold for the Commission's exclusive jurisdiction. Therefore, the Commission has authority to consider approving the proposal to reduce the solar thermal facility's generating capacity to 100.5 MW of electricity.

2. The Commission does not have authority to approve installing PV facilities generating 563 MW of electricity on the Project site

a. PV facilities are ordinarily outside the Commission's certification jurisdiction

The Commission's exclusive jurisdiction over power plants is limited. According to the Warren-Alquist Act, "[i]n the case of any site and related facility or facilities for which the provisions of this division do not apply, the exclusive power given to the commission pursuant to Section 25500 to certify sites and related facilities shall not be in effect." (§ 25542.)

The Warren-Alquist Act excludes solar PV electrical generating facilities from the definition of "thermal powerplant" subject to the Commission's exclusive permitting jurisdiction. (§ 25120.) In 1988, the legislature amended Section 25120 in order to exclude PV projects from the types of facilities over which the Commission has jurisdiction.[3]

[3] See Exhibit 1, Legislative Counsel's Digest for SB 928 (1988).

The Commission's jurisdiction over thermal powerplants extends to facilities that are "related" or "appurtenant" to thermal powerplants. (§§ 25500, 25120.) The Commission's regulations define "related facility" as "a thermal powerplant, electric transmission line, *or any equipment, structure, or accessory dedicated to and essential to the operation of the thermal powerplant* or electric transmission line." (20 Cal. Code Regs. § 1702(n).) The regulations provide examples of related facilities, which include "transmission and fuel lines up to the first point of interconnection, water intake and discharge structures and equipment, access roads, storage sites, switchyards, and waste disposal sites." (*Ibid.*) "Appurtenant" is not defined by the Commission's regulations, but is otherwise defined as "belonging to", "accessory or incident to" or "adjunct, appended, or annexed to."[4]

According to the plain language of these statutory and regulatory provisions, the Commission does not have jurisdiction to certify the PV component of the Project Amendment. The PV component is specifically excluded from the definition of "thermal powerplant" and, thus, does not fall within the scope of projects over which the Commission has jurisdiction pursuant to Section 25500.

The PV component of the Project Amendment also cannot be considered a facility that is "related" or "appurtenant" to the solar thermal facility, for the purpose of extending the Commission's jurisdiction over the PV component. The proposed PV facilities differ from the examples of related facilities provided in the

[4] Black's Law Dictionary, Fifth Edition (1991), p. 103; *see also* Civil Code, § 662 ["[a] thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit"]. The Commission's regulations do not define "appurtenant." However, the definition of "thermal powerplant" explains that "[e]xploratory, development, and production wells, resource transmission lines, and other related facilities used in connection with a geothermal exploratory project or a geothermal field development project are not appurtenant facilities for the purposes of this division."

regulations. Unlike transmission and fuel lines up to the first point of interconnection, water intake and discharge structures and equipment, access roads, storage sites, switchyards, and waste disposal sites dedicated to and essential to a thermal power plant, the PV component of the Project Amendment would not be dedicated to and essential to the thermal component of the Project.

Thus, from the plain language of the Warren-Alquist Act and implementing regulations, as well as the legislative history for Section 25120, the Commission lacks authority to approve installing PV facilities generating 563 MW on the Project site.

3. The Commission must act as lead agency to perform the required CEQA evaluation for the "whole" of the Project Amendment

For purposes of environmental review required pursuant to CEQA, the Commission must act as lead agency for all projects that require certification. (§ 25519(c).) The Warren-Alquist Act and its implementing regulations constitute a regulatory program which has been certified as exempt from the obligation to prepare an environmental impact report under section 21080.5.[5] However, the Commission's exemption from CEQA is not a blanket exemption.

In certifying a powerplant, the Commission must comply not only with the Warren-Alquist Act but also with "those provisions of CEQA from which it has not been specifically exempted by the Legislature." (*See Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1228) Under Public Resources Code section 21080.5,

[5] Letter from Mary D. Nichols, Secretary for Resources, to Mr. William J. Keese, Chairman, California Energy Commission, Subject: Review of the Energy Commission's Certified Program for Siting Power Plants (December 29, 2000).

a certified regulatory program is "exempt from Chapters 3 (commencing with Section 21100), Chapter 4 (commencing with Section 21150), and Section 21167, except as provided in Article 2 (commencing with Section 21157) of Chapter 4.5." (*See Environmental Protection Information Center, Inc. v. Johnson* (1st Dist. 1985) 170 Cal.App.3d 604, 616-618 (*EPIC*)) However, the regulatory program must require that approval of a project be preceded by the preparation of written environmental documentation that:

1) Includes a description of the proposed activity with alternatives to the activity, and mitigation measures to minimize any significant adverse environmental impacts and
2) Is available for a reasonable time to other agencies and the general public for review and comment.

(§ 21080.5(a), (d)(3).)

Furthermore, a regulatory program is ***not*** exempt from any other procedural and substantive requirements of CEQA, if such requirements are found outside of Chapters 3 and 4 of the Act, outside of section 21167 of the Public Resources Code or within section 21080.5 itself. (*EPIC*, *supra*, 170 Cal.App.3d at pp. 616-618.) In fact, section 15250 of the CEQA Guidelines[6] provides that "[a] certified regulatory program [under section 21080.5] remains subject to other provisions of CEQA…." As explained below, the Commission's responsibilities for conducting environmental

[6] The CEQA Guidelines are found in Title 14 of the California Code of Regulations, section 15000, et seq. In interpreting CEQA, courts accord the Guidelines great weight except where they are clearly unauthorized or erroneous. (*Communities For A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319, fn. 4, quoting *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 428, fn. 5.)

review extend to analyzing potentially significant impacts from all aspects of a proposed project, not only those components within its jurisdiction.

Under CEQA, a project is defined as "the whole of the action" that may result in either a direct or reasonably foreseeable indirect physical change to the environment." (CEQA Guidelines, § 15378(a).) This broad definition of "project" is intended to maximize protection of the environment. (*McQueen v. Bd. of Directors of the Midpeninsula Regional Open Space Dist.* (1988) 202 Cal.App.3d 1136, 1143; *Tuolumne County Citizens for Responsible Growth v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1227.) In performing its analysis, a lead agency must not "piecemeal" or "segment" a project by splitting the project into two or more segments. This approach ensures "that environmental considerations do not become submerged by chopping a large project into many little ones, each with a potential impact on the environment, which cumulatively may have disastrous consequences." (*Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 592; *Bozung v. Local Agency Formation Commission* (1975) 13 Cal.3d 263, 283-284.)

The Commission may not limit its analysis to only those impacts that would result from the solar thermal component of the modified Project, as such a constrained approach to environmental review would constitute impermissible piecemealing. Rather, the Commission is required to analyze the impacts of constructing and operating the whole of the Project, including the PV component and related ground disturbance and infrastructure. (*See*, *e.g.*, *PUC v. CEC*, *supra*, 150 Cal.App.3d at p. 451 ["if certification of a new transmission line or thermal

powerplant will require construction of transmission lines that will not fall within the commission's certification jurisdiction, the additional lines must be considered part of the 'project' for purposes of [CEQA] [Citation] when the commission prepares an environmental impact report on the facility [Citation]"].)

B. Baseline for Environmental Review

1. The CEC may restrict its review to the incremental effects associated with the modification, compared against the anticipated effects of the previously approved project together with any substantial changes in surrounding circumstances

The extent to which the lead agency can rely upon the previous environmental review document for establishing baseline conditions and evaluating project impacts varies with the circumstances. After the lead agency certifies an EIR equivalent document and approves a project, CEQA requires the lead agency to conduct subsequent or supplemental environmental review when (1) the applicant proposes substantial project changes which will require major revisions in the previous environmental review document, (2) there are substantially changed circumstances which will require major revisions in the previous environmental review document or (3) significant new information, which was not known and could not have been known at the time the previous environmental review document was certified, arises. (§ 21166; CEQA Guidelines, §§ 15162, 15163; *see also*, *e.g.*, *Laurel Heights Improvement Association v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1129-1130 (*Laurel Heights II*).)

> In a case in which an initial EIR has been certified, section 21166 comes into play precisely because in-depth review of the project has already occurred, the time for challenging the sufficiency of the original CEQA document has long since expired and the question

> before the agency is whether circumstances have changed enough to justify repeating a substantial portion of the process.

(*Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467, 1479-80.)

CEQA Guidelines section 15162(a)(1)-(2) specifies the nature of "substantial changes" in the project or the circumstances that trigger preparation of a subsequent or supplemental environmental review as those involving "new significant environmental effects or a substantial increase in the severity of previously identified significant effects." CEQA Guidelines Section 15162(a)(3) specifies the nature of "new information" as information showing:

> (A) The project will have one or more significant effects not discussed in the previous environmental review document;
>
> (B) Significant effects previously examined will be substantially more severe than shown in the previous environmental review document;
>
> (C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
>
> (D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.

(CEQA Guidelines 15162(a).)

"When a lead agency is considering whether to prepare [the equivalent of a supplemental or subsequent environmental review document], it is specifically authorized to limit its consideration of the later project to effects not considered in connection with the earlier project. [Citation.]" (*Temecula*

Band of Luiseño Mission Indians v. Rancho Cal. Water Dist. (1996) 43 Cal.App.4th 425, 437 (*Temecula Band*); *see also Benton*, *supra*, 226 Cal.App.3d at p. 1477; *Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538, 1544.) As the leading CEQA treatise explains "if the project under review merely constitutes a modification of a previously approved project, previously subjected to environmental review, the agency may restrict its review to the incremental effects associated with the modification, compared against the anticipated effects of the previously approved project." (Remy, et al., *Guide to CEQA* (11th ed. 2007), p. 198; *see also Temecula Band*, *supra*, 43 Cal.App.4th at p. 439 (*Temecula Band*) [since water district had issued a negative declaration for a pipeline project and treated the pipeline relocation as a modification of an approved project, district's review of the pipeline realignment project's potential environmental effects is limited to incremental effects of relocating the pipeline]; *see also Benton*, *supra*, 226 Cal.App.3d at pp. 1477 & fn. 10, 1483-1484 [where county treated permit application to change the location of a previously approved winery that had undergone CEQA review as a modification to the previous permit, county properly considered only the incremental effects between the original approved project and the proposed relocation project]; *compare Communities For A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 322 [air district erred in using maximum permitted operational levels as a baseline where no previous environmental review occurred].)

As noted, substantially changed circumstances alone can trigger the requirement to conduct subsequent environmental review. (§ 21166(b); *see also* 14 Cal. Code Regs., § 15162(a)(2); *see also Mira Monte Homeowners Assn' v. County of Ventura* (1985) 165 Cal.App.3d 357, 362-365 [discovery that development project would encroach upon previously undisclosed wetlands was a substantial change in circumstances requiring the subsequent environmental review].) Accordingly, the lead agency must also consider any substantially changed circumstances when establishing the baseline for analyzing the potentially significant impacts that would be caused by proposed project modifications.

Thus, if the Project Amendment triggers subsequent environmental review under CEQA and the Commission treats the Project Amendment as a modification to the previous certification, the Commission may consider the approved project along with any substantially changed circumstances in the baseline against which to assess the environmental impacts of the Project Amendment.

III. CONCLUSION

The Commission is authorized to consider approving the Project Amendment's proposed reduction in solar thermal generating capacity. The Commission does not have jurisdiction to certify the Project Amendment's proposed PV component.

Despite limitations to the Commission's jurisdiction, CEQA requires the Commission to analyze the whole of the Project Amendment, including both the solar thermal and PV components of the Project. If the Commission determines

that the Project Amendment requires subsequent or supplemental environmental review, and if the Commission determines that the Project Amendment is a modification of the previously approved Project, the baseline for analyzing the Project Amendment's potentially significant effects is the environment that would exist if the original Project were built, along with any substantial changes in circumstances that have occurred since Project approval.

Dated: May 23, 2011

Respectfully submitted,

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EXHIBIT 1

1988 Cal. Legis. Serv. 965 (West)

CALIFORNIA LEGISLATIVE SERVICE 1987-88
REGULAR SESSION (1988 Laws)
0666

Additions are indicated by <<+ UPPERCASE +>>
Deletions by <<- * * * ->>
Changes in tabular material are not indicated

CHAPTER 965
S.B.No. 928
ENERGY RESOURCES—THERMAL POWERPLANTS—DEFINITION AND CERTIFICATION

AN ACT to amend Sections 25120 and 25540.6 of, and to add Section 25140 to, the Public Resources Code, relating to energy resources, and declaring the urgency thereof, to take effect immediately.

[Approved September 16, 1988]

[Filed September 19, 1988]

LEGISLATIVE COUNSEL'S DIGEST

SB 928, Rogers. Energy resources: thermal powerplants.

(1) The existing State Energy Resources Conservation and Development Act defines a thermal powerplant for purposes of that act.

This bill would specify that a wind, hydroelectric, or solar photovoltaic electric generating facility is not a thermal powerplant for purposes of the act.

(2) The act eliminates the requirement for a notice of intention, and requires the State Energy Resources Conservation and Development Commission to issue its final decision within 12 months on an application for certification of specified types of thermal powerplants, or modification thereof.

This bill would include within these provisions an application for certification of a solar thermal powerplant, as defined.

(3) The bill would declare that it is to take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

CA PUB RES § 25120

SECTION 1. Section 25120 of the Public Resources Code is amended to read:

25120. "Thermal powerplant" means any stationary or floating electrical generating facility using any source of thermal energy, with a generating capacity of 50 megawatts or more, and any facilities appurtenant thereto. Exploratory, development, and production wells, resource transmission lines, and other related facilities used in connection with a geothermal exploratory project or a geothermal field development project are not appurtenant facilities for the purposes of this division.
<<+"THERMAL POWERPLANT" DOES NOT INCLUDE ANY WIND, HYDROELECTRIC, OR SOLAR PHOTOVOLTAIC ELECTRICAL GENERATING FACILITY.+>>

CA PUB RES § 25140

SEC. 2. Section 25140 is added to the Public Resources Code, to read:
25140. "Solar thermal powerplant" means a thermal powerplant in which 75 percent or more of the total energy output is from solar energy and the use of backup fuels, such as oil, natural gas, and coal, does not, in the aggregate, exceed 25 percent of the total energy input of the facility during any calendar year period.

CA PUB RES § 25540.6

SEC. 3. Section 25540.6 of the Public Resources Code is amended to read:
25540.6. Notwithstanding any other <<+PROVISION+>> of law, <<-* * *->> no notice of intention <<+IS+>> required, and the commission shall issue its final decision on the application, as specified in Section 25523, within 12 months after the filing of the application for certification of <<+THE+>> powerplant and related facility or facilities, or at <<+ANY+>> later time as is mutually agreed by the commission and the applicant<<+, FOR ANY OF THE FOLLOWING+>>:
(a) A thermal powerplant which will employ cogeneration technology<<+, OR A SOLAR THERMAL POWERPLANT+>>. Such <<+A+>> facility may not exceed 300 megawatts unless the commission, by regulation, authorizes a greater capacity.
(b) A modification of an existing facility.
(c) A thermal powerplant which it is only technologically or economically feasible to site at or near the energy source.
(d) A thermal powerplant with a generating capacity of up to 100 megawatts.
(e) A thermal powerplant designed to develop or demonstrate technologies which have not previously been built or operated on a commercial scale. Such <<+ A+>> research, development, or commercial demonstration project may include, but <<+IS+>> not <<-* * *->>limited to, <<+THE+>> use of renewable or alternative fuels, improvements in energy conversion efficiency, or <<+ THE+>> use of advanced pollution control systems. Such <<+A+>> facility may not exceed 300 megawatts unless the commission, by regulation, authorizes a greater capacity. <<-* * *->>Section 25524 <<+DOES+>> not apply to <<-* * *->>such <<+A+>> powerplant and related facility or facilities.

SEC. 4. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to ensure and expedite the development of solar energy facilities, which are nonpolluting, environmentally safe forms of renewable energy resources, to reduce the state's dependence on depletable fuel supplies, and to reduce the economic impact of future oil shortages and price increases, it is necessary that his act take effect immediately.
CA LEGIS (1988) 965

Calico Solar – 08-AFC-13C
DECLARATION OF SERVICE

I, Valerie Stevenson, declare that on May 23, 2011, I served and filed copies of the attached **OPENING BRIEF OF CALIFORNIA UNIONS FOR RELIABLE ENERGY REGARDING CALIFORNIA ENERGY COMMISSION JURISDICTION AND BASELINE FOR ENVIRONMENTAL REVIEW FOR CALICO SOLAR PROJECT AMENDMENT**, dated May 23, 2011. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at www.energy.ca.gov/sitingcases/calicosolar/CalicoSolar_POS.pdf. The document has been sent to both the other parties in this proceeding as shown on the Proof of Service list and to the Commission's Docket Unit electronically to all email addresses on the Proof of Service list; and by depositing in the U.S. mail at South San Francisco, CA, with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list to those addresses NOT marked "email preferred."

AND

By sending an original paper copy and one electronic copy, mailed and emailed respectively to:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 08-AFC-13C
1516 Ninth Street, MS 4
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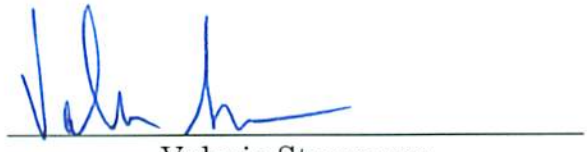
I declare under penalty of perjury that the foregoing is true and correct. Executed at South San Francisco, CA, on May 23, 2011.



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FOR THE CALICO SOLAR PROJECT AMENDMENT

Docket No. 08-AFC-13C
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(Revised 5/18/2011)

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