

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of:	)	Docket No. 72-22-ISFSI
	)	
PRIVATE FUEL STORAGE, LLC	)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel	)	
Storage Installation)	)	February 13, 1998

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STATE OF UTAH'S OPPOSITION TO AMENDED PETITION TO  
INTERVENE

In accordance with the Board's order of February 2, 1998, the State responds to Richard Wilson's late-filed Amended Petition to intervene in this licensing proceeding, which was filed on February 2, 1998. As discussed below, the Amended Petition should be rejected at the outset for failure to satisfy, or even address in more than a passing fashion, the Nuclear Regulatory Commission's ("NRC's" or "Commission's") criteria for late-filed intervention petitions. In the event the Board reaches the issue of whether intervention should be granted, neither Richard Wilson nor the organization he purports to represent, Scientist for Secure Waste Storage ("SSWS"), has demonstrated standing to intervene in this proceeding. Moreover, no grounds have been demonstrated for allowing discretionary intervention.

## I. FACTUAL BACKGROUND

On July 31, 1997, the NRC published a notice of opportunity to request a hearing and petition to intervene in this proceeding on or before September 15, 1997. Requests for a hearing and intervention petitions were timely filed by the State of Utah and a number of organizations and individuals.

Additionally, the NRC Staff or the Licensing Board have posted numerous other Federal Register notices regarding the conduct of this proceeding, including a July 7, 1997, notice of intent to establish a local public document room in Utah relating to this proposal; a September 19, 1997, notice of the establishment of Atomic Safety and Licensing Board in this matter; and a December 4, 1997, notice of the establishment of a local public document room at the Marriott Library.

On January 21, 1998 by electronic mail, Richard Wilson submitted a late-filed Petition to intervene, dated January 20, 1998, in the proceeding. Although the Petition purported to be submitted on behalf of a list of 10 individuals, as well as the Atlantic Legal Foundation, only Mr. Wilson signed the Petition. The Petition made no attempt to demonstrate the standing of Mr. Wilson or any other individual to participate in the proceeding, but appeared to request discretionary intervention for the purpose of reviewing and commenting on "any and all scientific and technical issues that are, or will come before the board." *Id.* at 1. Mr. Wilson submitted a slightly modified version of the Petition on January 22, which did not change the substance of the

Petition, but clarified that petitioners "wish to intervene, as a group." *Id.* The modified Petition also stated that the Atlantic Legal Foundation, Inc. "will act as legal advisor to the group" (*id.* at 3), and added two more names of petitioners to the list. *Id.* at 4.

During the prehearing conference in Salt Lake City, on January 27, 1998, the Board stated that it would provide Mr. Wilson with an opportunity to amend his Petition. Tr. at 30. The Board also ordered that the Atlantic Legal Foundation enter its notice of appearance for their counsel on February 2, 1998, along with Wilson's Amended Petition, a request to which Mr. Wilson readily agreed. Tr. at 30.

Pursuant to the Board's order, on February 2, Mr. Wilson submitted an Amended Petition. The Petition now states that the petitioners have formed a "group" called "Scientists for Secure Waste Storage," and that the petitioners seek leave to intervene as a "group." *Id.* at 1. The Amended Petition now identifies the Atlantic Legal Foundation not as a co-petitioner, but as a "legal advisor." *Id.* at 3. No notice of appearance or other filing was made by the Atlantic Legal Foundation on February 2, however.<sup>1</sup>

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<sup>1</sup> Martin S. Kaufman, Esq., a member of the Atlantic Legal Foundation, finally filed a notice of appearance on February 10, 1998, pursuant to the Board's February 3 order, stating that he "is representing" the group "Scientists for Secure Waste Storage" and that he has been "duly authorized by SSWS to act as their legal advisor in the above matter." Because the notice of appearance fails to explicitly state that Mr. Kaufman is authorized to "represent" SSWS in the proceeding, and because Mr. Wilson, rather than Mr. Kaufman, signed the Amended Petition as SSWS's representative, it appears that Mr. Wilson is the organization's representative in the

## II THE AMENDED PETITION FAILS TO SATISFY THE NRC'S LATE-FILING STANDARD.

In considering non-timely filings, NRC regulations require the balancing of the following factors:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

10 CFR § 2.714(a)(1).

The first factor, establishing good cause, is a crucial element in the analysis of whether a late filed petition should be admitted. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986) (hereafter "Braidwood"); South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 886 (1981). The Amended Petition makes little attempt to address the crucial good cause factor, and merely asserts that the petitioners became aware of Private Fuel Storage, LLC's (PFS's) licensing proposal at a "late date," and vaguely contends that it has taken a "little time to collect the information." Amended Petition at 1.

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proceeding. However, he has not filed a notice of appearance pursuant to 10 CFR § 2.713(b).

This rationalization is entirely without merit. It is well-established that a petitioner's unawareness of the pendency of a proceeding that has been noticed in the Federal Register does not constitute good cause for failure to meet filing deadlines. Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 389-390 (1976) (claims of unawareness of the construction proceeding are unimpressive where constructive notice by publication in the Federal Register was imparted and extensive publicity occurred in local area affected). Publication in the Federal Register provides constructive notice to nonparties and alerts them to matters requiring their attention. Mobile Exploration and Producing North America, Inc. v. F.E.R.C., 881 F.2d 193, 199 (5<sup>th</sup> Cir. 1989) (publication in the Federal Register provides constructive notice to non-parties and alerts them to matters requiring their attention); *see also*, Jordan v. United States Dept. of Labor, 892 F.2d 482, 487 (6<sup>th</sup> Cir. 1989) ("publication in the Federal Register constitutes constructive notice of the contents of federal regulations . . ."); Rodway v. United States Dept. of Agriculture, 514 F.2d 809, 814 (D.C. Cir. 1975) ("Only publication in the Federal Register meets the APA requirement of constructive notice.").

Here, the NRC has published no less than four Federal Register notices relating to this proceeding. Moreover, the proceeding has been extensively publicized in the State of Utah and elsewhere. In fact, the Amended Petition's assertion of "late" awareness is downright disingenuous, given that at least one person listed on the

Amended Petition, Robert Hoffman, has been aware of the pendency of this proceeding since as long ago as February 1997 when Mr. Hoffman took a public stand on the PFS proposal. See February 8, 1997 Deseret News article "Utah Official Backs N-Waste Dump Site," attached hereto as Exhibit 1. Moreover, as a current member of the Utah Radiation Control Board ("URC Board"), Mr. Hoffman has been present at monthly briefings presented to the Board on the status of the PFS proposal which have been ongoing since February 1997. In addition, as a URC Board member Mr. Hoffmann received copies of the July 31, 1997 Federal Register notice of opportunity for hearing, the State's Petition to Intervene and the State's Contentions A through DD. Also, Mr. Hoffmann was present at URC Board meeting when Scott Northard, PFS and Leon Bear, Skull Valley Band of Goshute gave presentations to the URC Board on the PFS storage proposal. See Affidavit of William J. Sinclair, attached hereto as Exhibit 2. Given this level of information presented to one of the listed members of SSWS, there is absolutely no reason why the Amended Petition should not have been filed on time. Thus, the Amended Petition fails to demonstrate good cause for waiting to file the Petition until over four months after the September 15, 1997 deadline.

Where good cause is not demonstrated, a petitioner must make a "compelling" showing with respect to the remaining four factors. Moreover, even if some of the Amended Petition's statements that are addressed to other regulatory standards are

evaluated against the criteria specified in 10 C.F.R. § 2.714(a)(1)(ii)-(v), they come in short. First, with respect to criterion (ii), there clearly are other means for SSWS to satisfy its interests in this proceeding. SSWS states that it seeks an opportunity to participate in the preparation and "peer review" of the Staff's safety and environmental reports. Amended Petition at 3. There is no bar to SSWS seeking this opportunity by petitioning the NRC Staff.<sup>2</sup> SSWS will also have the same opportunity as the rest of the general public to comment on the Environmental Impact Statement. As the Amended Petition also seems to recognize, the members of SSWS can file limited appearance statements with the Board. In fact, the Amended Petition's expressed desire for an opportunity for broad-based, free-wheeling comment by disinterested parties with a general interest in the "public good" is better suited to these other venues than to the focused adversarial context of the licensing proceeding. With respect to criterion (iii), the Amended Petition's general references to the experience of the petitioners in the nuclear energy field provides no information on the specific nature of the petitioners' expertise, or how that can be expected to assist in developing a sound record regarding the issues that have been raised in the proceeding. Criterion (iv) is not satisfied by the Amended Petition's vague statement that its views may differ from

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<sup>2</sup> It is also clearly beyond Licensing Board's authority to tell staff what to do. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45, 48-49 (1983) *citing*, New England Power Co., (NEP Units 1 and 2), LBP-78-9, 7 NRC 271 (1948). *See Offshore Power Systems* (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 206-07 (1978).

those of the Applicant and the Skull Valley Band of Goshutes, because it makes no effort to identify any expected or potential differences. Finally, there is no basis for the Amended Petition's claim that the petitioners do not expect to delay the proceeding. 10 C.F.R. § 2.714(a)(1)(v). If the Board grants the Amended Petition's request for a broad opportunity to participate on all issues in the case, SSWS may file motions and testimony on any issue, thus requiring the intervenors to respond to an additional party in the case. Fairness would dictate that the intervenors be granted sufficient additional time to respond to whatever legal or factual material SSWS submits in addition to the submissions of the Applicant and Staff. Braidwood, 23 NRC at 244. Contrary to this requirement, the Amended Petition does not explicitly address, nor does it satisfy, all of the other four late-filing factors. Accordingly, the Amended Petition completely fails to demonstrate that a balancing of the five late-filing criteria favors admission of the petitioners. In fact, they weigh heavily against admission of SSWS as a party.



### III THE AMENDED PETITION DOES NOT DEMONSTRATE STANDING TO INTERVENE BY ANY ORGANIZATION OR INDIVIDUAL.

#### A. Requirements for Establishing Standing as of Right

Persons requesting leave to intervene in NRC proceedings must show that they have standing to intervene pursuant to 42 USC § 2239(a).<sup>3</sup> NRC regulations addressing intervention require a petitioner to intervene to show:

- (i) The nature of the petitioner's right under the Act to be made a party to the proceeding.
- (ii) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
- (iii) The possible effect of any order that may be entered in the proceeding on the petitioner's interest.

10 CFR § 2.714(d)(1). In addition, the petition must set forth with particularity the petitioner's interest in the proceeding and the aspects of the proceeding in which the petitioner wishes to intervene. 10 CFR § 2.714(a)(2); *see also*, Private Fuel Storage, Limited Liability Company; Notice of Consideration of Issuance of a Materials License for the Storage of Spent Fuel and Notice of Opportunity for a Hearing, 62 Fed. Reg. 41099 (July 31, 1997).

The Commission looks to judicial concepts of standing in determining whether a petitioner's interest may be affected by a licensing proceeding. Thus, a petitioner

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<sup>3</sup> "In any proceeding under this Act [the Atomic Energy Act of 1954], for the granting . . . of any license . . . , the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." 42 USC § 2239(a).

must show that a proposed action will cause injury-in-fact to the petitioner's interest; that injury must arguably fall within the zone of interests sought to be protected by the Atomic Energy Act (AEA) and the National Environmental Policy Act (NEPA). Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993); Public Service Co. of Indiana (Marble Hill Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 439 (1980); Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-614 (1976)). Additionally, the injury must be fairly traceable to the proposed action, and the injury must be redressable by the Commission. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (hereinafter "Lujan").

The petitioner must demonstrate that the harm suffered is or will be "distinct and palpable" (Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996)) by showing that it is "concrete and particularized," and "actual and imminent, not 'conjectural or hypothetical.'" Lujan, 504 U.S. at 560. "[A] mere academic interest in a matter, without any real impact on the person asserting it, will not confer standing." Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613 (1976); Puget Sound Power and Light Co. (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981, 984 (1982) (hereinafter "Skagit/Hanford").

Organizations as well as individuals may petition to intervene in NRC proceedings, and they must identify any organizational interest or interests of identified members that are harmed or threatened with injury by the license application at issue. Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995), *referring to* Warth v. Seldin, 422 US 490, 511 (1975); Northeast Nuclear Energy Co. (Millstone Nuclear Power Plant, Unit No. 1), LBP-9601, 43 NRC 19, 21-23 (1996).

To obtain standing, an organization must demonstrate immediate or threatened injury to its organizational interests or derive representational standing from an individual member who has standing to participate and that member has authorized the organization to represent his or her interests. Millstone, 43 NRC at 21-22. One member cannot simply claim that other members have given some "concrete indication" that a representation of their interest is authorized. An organization must specifically identify individual members by name and address, identify how that member may be affected and show that the organization is authorized to request a hearing on behalf of the member." Millstone, 43 NRC at 25.

Further, "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA." Sierra Club v. Morton, 405 US 727, 739 (1972); *see*

also, Puget Sound Power and Light Co., (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-26, 15 NRC 742, 743 (1982); General Public Utilities Nuclear Corporation (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 159 (1996) (hereinafter "Oyster Creek").

**B. The Amended Petition Fails to Show Organizational Standing.**

The Amended Petition appears to be intended to demonstrate organizational standing by SSWS. However, it is fatally deficient to meet the NRC's requirements for demonstrating organizational standing. First, it is not accompanied by any affidavit of a member of SSWS that demonstrates that any member of the organization authorizes SSWS to represent it in this proceeding.<sup>4</sup> Moreover, the Amended Petition provides no evidence supporting Mr. Wilson's claim that he is "spokesman" for SSWS.

Allied-General Nuclear Services, et al. (Barnwell Fuel Receiving and Storage Station),

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<sup>4</sup> On February 10, 1998 the State received an e-mail message from attorney Martin Kaufman attaching a "Declaration of Interest and Appointment of Representative" of Robert Hoffman. The Declaration should be ignored because it is untimely and it has not been properly filed. Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2) LB-82-72, 16 NRC 968, 970 (untimely filings may only be made after requesting and obtaining leave from the Board); Public Service Company of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 265 (1991) (all participants, including lay litigants, are expected to adhere to deadlines to ensure the orderly administration of the adjudicatory process). In addition, it was not served on the parties by first-class or other mail, in violation of the Board's order of February 3, 1998, and 10 CFR § 2.712.

The State also notes that the Board has already graciously given Mr. Wilson an opportunity to re-submit his January 20 intervention Petition, and that he has had legal counsel since at least the time of the prehearing conference. The Board also set explicit deadlines for the re-filing, to which Mr. Wilson agreed. Thus, there is no reason to indulge this inexcusably late filing.

LBP-75-60, 2 NRC 687, 690 (1975). In fact, William Kanes, a person provisionally listed on the first two Petitions filed by Mr. Wilson, wrote to Wilson that he had not authorized his name to be used in the Petition. See Letter from William H. Kanes to Professor Robert Wilson dated January 27, 1998, attached hereto as Exhibit 3.

The Amended Petition is also devoid of any demonstration of injury-in-fact to a cognizable interest. Most notably, it is not accompanied by a single member affidavit setting forth the member's name, address, his proclaimed proximity to the proposed site, nor described any facet of the member's personal interest in the proceeding whatsoever. Northeast Nuclear Energy Co. (Millstone Nuclear Power Plant, Unit No. 1), LBP-96-1, 43 NRC 19, 22-23 (1996). In the absence of such an affidavit, the Amended Petition's vague reference to "[o]ne of the petitioners [who] lives and works in the State of Utah, not far from the proposed site," and "his personal interest in the hearing" (Amended Petition at 2) is completely inadequate to demonstrate standing.<sup>5</sup>

Moreover, even assuming for purposes of argument that the Amended Petition could suffice in the absence of affidavits, by its own terms, it demonstrates that the petitioners lack standing. The Amended Petition concedes that the petitioners have no "personal financial or property interests in the proceeding," and that the petitioners' interest is "solely" in "the public good." Such a mere "academic interest" is

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<sup>5</sup> This same statement appears in all three of Wilson's Petitions, yet in the first two Petitions William Kanes is the only person resident in Utah; in the third Petition Robert Hoffman is the only Utah resident.

insufficient to confer standing. See, Skagit/Hanford, 16 NRC at 984; Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit No. 1), LBP-82-52, 16 NRC 183, 185 (1982); Sierra Club v. Morton, 405 U.S. at 739. The Amended Petition's references to a "broad public interest" and a desire to "help ensure that the scientific and technical record is correct" are similarly unavailing.

The only hint in the Amended Petition to any injury is the stated concern that "officials of the State of Utah" have made "inaccurate (and not publicly retracted) statements on the science and technology of nuclear physics and its application to waste storage" which "misrepresent and demean science and the scientific community." Amended Petition at 2. The Amended Petition fails entirely to identify the purportedly damaging statements, or demonstrate how they constitute injury-in-fact to the petitioners. Thus, the Amended Petition alleges no injury that is "distinct or palpable," "concrete and particularized," or "actual and imminent." Yankee, 43 NRC at 6; Lujan, 504 U.S. at 560.

Accordingly, the Amended Petition utterly fails to show that SSWS has standing to intervene.<sup>6</sup>

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<sup>6</sup> Even if Mr. Wilson had asked to intervene as an individual, on his own behalf (which he has not), the Amended Petition does not show that he has standing. Mr. Wilson has not demonstrated any personal interest in the outcome of this proceeding, nor has he demonstrated any particularized injury to his interest.

#### IV NO SHOWING HAS BEEN MADE THAT A GRANT OF DISCRETIONARY INTERVENTION IS WARRANTED.

Where petitioners are not entitled to intervention as a matter of right, adjudicatory boards may exercise their discretion based on an assessment of all the facts and circumstances of the case in determining whether to grant discretionary intervention Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976). According to the Commission, the following are some of the factors that should be considered in determining whether to grant discretionary intervention:

1. Weighing in favor:
  - (a) the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record;
  - (b) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and
  - (c) the possible effect of any order which may be entered in the proceeding in the petitioner's interest.
2. Weighing against:
  - (a) the availability of other means whereby petitioner's interest will be protected;
  - (b) the extent to which the petitioner's interest will be represented by existing parties; and
  - (c) the extent to which petitioner's participation will inappropriately broaden or delay the proceeding.

*Id.* In Pebble Springs, the Commission derived its list of factors from its own regulations governing late-filed petitions and those governing intervention generally, that is, 10 CFR § 2.714(a)(1) and (d)(1), and emphasized that these are not the only factors which might be considered. *Id.* at 617.

The primary consideration is the first factor: assistance in developing a sound record. Pebble Springs, 4 NRC at 617; Oyster Creek, 44 NRC at 160. The Commission recognized that permission to intervene should be more readily available "where petitioners show significant ability to contribute on substantial issues of law or fact which will not otherwise be properly raised or presented, set forth these matters with suitable specificity to allow evaluation, and demonstrate their importance and immediacy, justifying the time necessary to consider them." Pebble Springs, 4 NRC at 617.

The Commission further determined that to avoid the possibility of "adventitiousness or delay," adjudicatory boards may demand specificity from prospective intervenors and may limit their participation in discretionary cases to the issues they have specified as of particular concern to them. *Id.* at 617. This requirement satisfies the concept of general fairness to those petitioners who have met judicial standing tests for intervention as of right, because the same level of rights extended to such petitioners would generally not be available for petitioners who do not meet traditional standing tests.

The Amended Petition fails entirely to meet the standard for discretionary intervention. First, the Amended Petition provides no evidence of how the expertise and ability of Mr Wilson or the other listed petitioners may reasonably be expected to assist in developing a sound record. The Amended Petition, at 2, states, "[m]ost of the



petitioners have worked much of their lives in research on the science and technology of nuclear energy and in planning and regulating nuclear energy," and can offer the "collective knowledge and experience of the petitioners . . . to the board." This statement is too vague to show how petitioners could make a contribution on the specific issues of law or fact that have been raised in the case, beyond the contributions of other parties.

Second, the Amended Petition admits, at 2, that "none of the petitioners have personal[,] financial or property interests in the proceeding." The Petitioners' only interest appears to be an academic interest in the science and technology of the project. *Id.* at 1.

Third, the Amended Petition shows no effect on the petitioners' interest of any order that might be issued, other than disappointment in a decision they might disagree with.


Finally, as discussed above, other factors considered under the second part of the Pebble Springs case weigh heavily against intervention.

## V. CONCLUSION

The Board should reject the Amended Petition because it is unjustifiably late and fails to meet the NRC's criteria for either standing as of right or discretionary standing.

DATED this 13th day of February, 1998.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Denise Chancellor", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that copies of STATE OF UTAH'S OPPOSITION TO AMENDED PETITION TO INTERVENE, were served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 13 day of February, 1998:

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