UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
HOUSTON LIGHTING & POWER COMPANY et al.	)	Docket Nos. 50-498A 50-499A
	)	
(South Texas Project, Units 1 and 2)	)	
	)	
	)	
TEXAS UTILITIES GENERATING COMPANY, et al.	)	Docket Nos. 50-445A 50-446A
	)	
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	

PETITION OF HOUSTON LIGHTING & POWER COMPANY FOR DIRECTED CERTIFICATION AND REVIEW OF THE LICENSING BOARD'S ORDER DENYING MOTIONS FOR SUMMARY DECISION

This petition arises from the Atomic Safety and Licensing Board's ("ASLB" or "Licensing Board") October 5, 1979*/ "Order Regarding Motions Based Upon Decision of the United States District Court" ("Order") and presents a question of first impression before this Commission which has a significant bearing on the course of this case. This question concerns the continued applicability of the doctrine of collateral estoppel in NRC anti-trust review proceedings.

On March 20, 1979, Petitioner Houston Lighting & Power Company ("Houston") filed a motion for summary decision. Houston

*/ The Order was docketed on October 9, 1979.

moved to collaterally estop the Central & South West Corporation ("C&SW") from relitigating various key factual issues it had recently litigated and lost in a seven week antitrust trial in a United States District Court, West Texas Utilities Co. v. Texas Electric Service Co., 470 F.Supp. 798 (N.D. Tex. 1979), appeal pending. In its Order, the ASLB refused to apply collateral estoppel. Its refusal was not predicated on a difference between the facts at issue in the District Court and the instant case -- indeed, the ASLB recognized that C&SW intends to re-try here the same factual issues and present the very same evidence already decided by the Court.*/ Rather, the ASLB reasoned that NRC antitrust review has special characteristics which preclude the application of collateral estoppel as a matter of law. This holding would effectively eliminate the doctrine of collateral estoppel from NRC antitrust review. Houston petitions now for directed certification and review of this important question and for reversal of the ASLB's decision.**/

*/ As used herein, "C&SW" includes Central & South West Corporation and each of its subsidiaries. All C&SW companies are party-intervenors in Comanche Peak, and one of them, Central Power & Light Company ("CP&L"), is a co-applicant in South Texas. CP&L and a second C&SW subsidiary were plaintiffs in the District Court suit, and it is clear that a controlling corporation and its subsidiaries are in privity for purposes of collateral estoppel. Pan American Match, Inc. v. Sears, Roebuck & Co., 454 F.2d 871 (1st Cir.) cert. denied, 409 U.S. 892 (1972).

**/ A separate part of Houston's motion for summary decision requested that the Licensing Board dismiss Houston from the proceeding altogether, as a matter of discretion, based on past and prospective developments in other forums. That issue is not before the Appeal Board in this petition, which is confined to the legal question of collateral estoppel.

QUESTION PRESENTED

I. Should findings of fact made by a U.S. District Court be accorded defensive collateral estoppel effect against a party to the District Court trial in an NRC antitrust proceeding to preclude such party's relitigation of the same factual issues?

ARGUMENT

I

THE APPEAL BOARD SHOULD EXERCISE ITS POWER OF DIRECTED CERTIFICATION TO REVIEW THE ASLB'S REFUSAL TO GRANT HOUSTON'S MOTION FOR SUMMARY DECISION

A. The ASLB's Order Rests Upon Erroneous Rulings of Law which have Broad Application in Practice Before the NRC

The Licensing Board's refusal to apply collateral estoppel is not predicated on considerations unique to this proceeding. Rather, its holding is based on the characteristics of NRC antitrust review itself and reaches all cases before the Commission.

The Board's Order makes this clear; it refused to apply collateral estoppel against C&SW for the following legal reasons:

(1) the ultimate legal issues involved in the District Court trial (under the Sherman Act) are not perfectly congruent with t[illegible]e involved in a Section 105c proceeding (Order at 11); and

(2) the "very nature of NRC antitrust review . . . evoke[s] special public interest factors which preclude the application of collateral estoppel or res judicata." (Order at 17).*/

*/ The ASLB additionally found that the District Court's specific legal findings as to the §5 of the FTC Act and §105c of the Atomic Energy Act were not essential to its judgment and could not be binding on the NRC. But as pointed out infra at 15-16, Houston has never sought to impose any estoppel based on those conclusions of law. The only other reason provided by the Board, that collateral estoppel can be ignored because it might have only a "procedural effect" (Order at 12-13), is plainly erroneous and is non-legal in nature. It is dealt with infra at 13-15.

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In short, the Licensing Board held that collateral estoppel cannot be applied defensively in an NRC antitrust proceeding. Such a ruling is not supported by any prior NRC or Appeal Board decisions. Indeed, the Appeal Board has stated:

> [A]s a general matter, a judicial decision is entitled to precisely the same collateral estoppel effect in a later administrative proceeding as it would be accorded in a subsequent judicial proceeding.

Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-378, 5 NRC 557, 561 (1977). The ASLB's Order effectively holds just the opposite.

Directed certification is particularly appropriate where, as is emphatically the case here, a question presents a significant and precedential issue of law. United States Energy Research and Development Administration (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 76 (1976). See also, Offshore Power Systems (Floating Nuclear Power Plants), ALAB-517, 9 NRC 8, 12 (1979); Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-514, 8 NRC 697 (1978), appeal dismissed for mootness, CLI-79-1, 9 NRC 1 (1979).

B. If Appellate Review is Deferred, It cannot be Fully Effective and would be Hindered by Difficult Questions of Administration

The fundamental purpose of collateral estoppel is to protect parties from having to relitigate issues which have already been tried and resolved. Parklane Hosiery Co. v. Shore, ___ U.S. ___, 99 S.Ct. 645, 649 (1979). But, post-trial appellate review in Houston's favor would obviously be ineffective to accomplish this,

for the case would already have been retried. Such an inability to obtain fully effective appellate review is yet another factor calling for directed certification. Offshore Power Systems (Floating Nuclear Power Plants), ALAB-517, 9 NRC 8, 11 (1979), quoting Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977); See also United States Energy Research and Development Administration (Clinch River Breeder Reactor Plant) CLI-76-13, 4 NRC 67, 76 (1976).

If Houston's position as to collateral estoppel is sustained upon post-trial review, it will be extremely difficult for this Appeal Board to separate those portions of the decision tainted by the collateral estoppel ruling from those which could be preserved. This problem, and those that would arise before the ASLB upon remand, make deferred appellate review inappropriate. The interests of efficient judicial administration call for resolution of this question now.

II

THE APPEAL BOARD SHOULD REVERSE THE ASLB AND ESTOP C&SW FROM RELITIGATING THE FACTUAL ISSUES IT TRIED BEFORE THE DISTRICT COURT

If collateral estoppel is ever to apply in an NRC antitrust proceeding, then it must apply in this case. C&SW, a plaintiff in District Court antitrust litigation, here seeks to relitigate the very same factual issues the District Court tried and resolved. The identity of the factual issues is so complete that C&SW intends to present as its "proof" to this Commission the very same evidence it presented in the court litigation.*/ C&SW cannot prevail on any antitrust legal theories it might assert here unless the Commission were to reach findings contrary to those determined on the same evidence by the District Court. The doctrine of collateral estoppel can never apply more squarely.

Given these circumstances, the ASLB had only two choices. If it ruled collateral estoppel applicable in NRC antitrust proceedings, it would have to apply here. The only way it could fail to apply collateral estoppel here was to hold that the doctrine of collateral estoppel is not applicable in any NRC antitrust proceeding -- an unprecedented step. Yet this is the step the ASLB took.

The ASLB's Order offers four reasons for holding collateral estoppel inapplicable. We deal with each of these reasons in turn below and show that they are without merit and that the ASLB's Order should be reversed.

A. The Factual Issues upon which Collateral Estoppel is sought are Identical between the Two Proceedings

Houston seeks collateral estoppel on seven key issues of fact

/ See infra at 9 n..

resolved by the District Court. These precise issues are raised again here by C&SW as matters it intends to relitigate. The identity of the factual issues in the two cases is shown strikingly in the table below.

The District Court found that:	C&SW has asked this Board to find that:
(i) HL&P and TESCO did not engage in concerted action to confine their operations to intrastate commerce, and did not engage in any conspiracy to restrain trade or concerted refusal to deal. (470 F.Supp. at 817-19.)	(1) HL&P combined with TU (the parent company of TESCO) to refuse to deal with CP&L. (CP&L's Petition at 8.)
(ii) There is no direct competition between CP&L and either HL&P or TESCO. (470 F.Supp. at 820, 837-38.)	(2) CP&L and HL&P are in direct competition. (CP&L's Petition at 11.)
(iii) There is no relevant market in which plaintiffs and defendants compete. (470 F.Supp. at 822-24, 838.)	(3) HL&P has a dominant position which it uses to monopolize or attempt to monopolize CP&L's and HL&P's service areas. (CP&L's Petition at 8-9.)
(iv) With respect to plaintiffs' theory of indirect competition, defendants' alleged refusal to cooperate in the "coordinated services market" had no adverse effect on competition in any "down-stream markets" -- inter-fuel markets, self-gereration markets, wholesale markets, or retail markets, including competition for new industrial customers. (470 F.Supp. at 822-24, 838.)	(4) HL&P's and TU's refusal to deal in interstate commerce had a detrimental impact on CP&L by preventing possible savings from interstate operation. (CP&L's Petition at 12-13.)
(v) Defendants were not motivated by any anticompetitive intent in their decision to disconnect from CP&L and WTU on May 4, 1976. (470 F.Supp. 824, 838.)	(5) HL&P's action in disconnecting from CP&L on May 4, 1976, was an unfair method of competing with CP&L. [See also (ii) in opposite column] (CP&L's Petition at 10.)
(vi) HL&P and TESCO acted reasonably in opposing interstate operation. (470 F.Supp. at 831-32, 839.)	
(vii) CP&L and WTU suffered no economic loss or threatened harm as a result of defendants' disconnection on May 4, 1976. (470 F.Supp. at 824, 829, 838.)	

Source:

West Texas Utilities Co. v. Texas Electric Service Co., 470 F.Supp. 798 (N.D. Tex. 1979).	CP&L's Petition for Leave to Intervene and Request for Hearing Out of Time at 8-13. (June 4, 1976).

The factual issues between the two proceedings could not be more identical. Indeed, even the evidence C&SW intends to present is exactly the same as that presented to the District Court.*/

The ASLB, in denying collateral estoppel effect against C&SW on these identical factual issues, stated:

> Where, as here, the legal standards of two statutes are significantly different, the decision of issues under one statute does not give rise to collateral estoppel in the litigation of similar issues under a different statute.

(Order at 11) (footnote omitted). In other words, the Board found that because §105c is broader than the Sherman Act, collateral estoppel is not available in §105c proceedings. The inevitable result of the Board's ruling is to eliminate the doctrine of collateral estoppel in antitrust cases before this Commission as a matter of law. The totally unprecedented nature of such a result is, itself, suggestive of serious infirmities in the Board's reasoning. Analysis of the Board's Order confirms that it is, in fact, infirm.

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*/ MR. MILLER [attorney for C&SW]: "That's right. But I, having participated in the trial in Dallas, I can tell you that the proof is essentially identical. There are a series of agreements, written agreements, to which these companies are signatory. There are a series of oral agreements established through deposition testimony and other testimony of witnesses, and it is going to be the same evidentiary presentation, at least as far as we're concerned."

In the Matter of Texas Utilities Generating Co., et al. and Houston Lighting & Power Co., et al., Docket Nos. 50-445A, 50-446A, 50-498A, 50-599A, Prehearing Conference of December 5, 1978.(Tr. at 55) (Emphasis added).

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The only difference between these two antitrust proceedings cited by the Board is that in the District Court, C&SW litigated the facts under a Section 1, Sherman Act theory, and now C&SW wishes to relitigate the same underlying factual matters under both a Sherman Act theory and a §105c theory. A fact issue determined in one suit does not lose its validity in a subsequent proceeding simply because that fact determination is proffered to support a different legal theory:

> That different legal conclusions may flow from a single fact finding, however, does not alter the existence of that fact finding. The distinguishing feature of the doctrine of collateral estoppel is that it precludes in a second or subsequent suit the relitigation of fact issues actually determined in a prior suit regardless of whether the prior determination was based on the same cause of action in the second suit.

James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 459 (5th Cir.) (emphasis in original), cert. denied, 404 U.S. 940 (1971). Accord, Azalea Drive-in Theatre, Inc. v. Hanft, 540 F.2d 713 (4th Cir. 1976). See Singer v. Hollander & Sons, 202 F.2d 55, 57-58 (3d Cir. 1953). If the presence of a different legal theory or statute were sufficient to defeat the application of collateral estoppel, the doctrine could not exist.

The principle relied on by the Board -- that "significantly different" legal standards of two statutes can defeat collateral estoppel[*/] -- is a very narrow exception that has been applied only in a handful of cases. In each case, the initial litigation was decided under statutes bearing essentially no relation

*/ Order at 11 & n.11.

to those in the second lawsuit.*/ Never has this exception been invoked in a manner calculated to preclude the application of collateral estoppel in a particular agency or forum altogether. The only Appeal Board case cited by the ASLB, Toledo Edison Company, supra, 10 NRC ___ (September 6, 1979) involved a prior FPC decision as to interconnections under §202(b) of the Federal Power Act, which the Appeal Board pointed out was not governed by antitrust considerations.**/ There is nothing in the Appeal Board's decision which remotely suggests that collateral estoppel should not be applied where, as here, it flows from factual issues resolved in a District Court antitrust suit. The decision in Pacific Seafarers Inc. v. Pacific Far East Line Inc., 404 F.2d 804, 809-10 (D.C. Cir. 1968), cert. denied 393 U.S. 1093 (1969), undermines rather than supports the Board's decision. The question there was whether a Federal Maritime Commission ("FMC") decision holding a transaction not to be in foreign commerce under the Shipping Act of 1916 determined as a conclusion of law that the transaction was not in foreign commerce under the Sherman Act. The Court found the earlier decision bore no relation to the

*/ Moreover, cases cited by the ASLB all involved attempts to invoke collateral estoppel as to conclusions of law, not factual issues. United Shoe Machinery Corp. v. United States, 258 U.S. 451 (1922). (conclusion of law that leases were valid under the patent statutes could not resolve the legal question of validity under the antitrust laws); Tipler v. E. I. duPont deNemours, 443 F.2d 125 (6th Cir. 1971) (conclusion of law under the National Labor Relations Act that plaintiff was not fired because of union activities does not resolve whether he was a victim of racial discrimination under the Civil Rights Act of 1964); In re Yarn Processing Patent Validity Litigation, 498 F.2d 271 (5th Cir. 1974) (both factual and legal issues critically different between Canadian and United States patent law decision).

**/ Slip op., 209-10.

Sherman Act, did not involve any antitrust principles and hence, its conclusions of law were not applicable. But the Court did point out that the facts determined by the FMC would be fully binding in the later antitrust litigation. 404 F.2d at 809.*/

If the ASLB's reasoning were correct, then collateral estoppel would rarely, if ever, apply in cases before administrative agencies, since each has its own statute to administer. But as the Appeal Board has recognized: "as a general matter, a judicial decision is entitled to precisely the same collateral estoppel effect in a later administrative proceeding as it would be accorded in a subsequent judicial proceeding." The Toledo Edison Company, supra, 5 NRC at 561. Accord, 2 K. Davis, Administrative Law Treatise §18.11 (1958). The ASLB's decision simply reaches too far.

Section 105c creates no new antitrust principles or violations. While Section 105c permits the NRC to act upon facts which establish an "inconsistency" with the antitrust laws or their underlying policies**/, the factual issues dealt with in the District Court's decision go to the heart of any conceivable theory of violation of §105c which could be offered in this case. The ASLB did not suggest, nor is it possible to devise a plausible theory of inconsistency with the antitrust laws or policies applied under §105c, that skirts these factual issues. They must be reached. It is simply impossible

*/ The Court concluded that the facts, in any event, were not seriously in dispute. Id. at 809.

**/ Joint Committee on Atomic Energy, Amending the Atomic Energy Act of 1954 to Eliminate the Requirement for a Finding of Practical Value, to Provide for Prelicensing Antitrust Review of Production and Utilization Facilities, and to Effectuate Certain Other Purposes Pertaining to Nuclear Facilities, S.Rep. No. 91-1247 and H.R. Rep. No. 91-1470, 91st Cong., 2d Sess. 14-15 (1970).

for C&SW to show that Houston's actions are "inconsistent" with any antitrust law without necessarily relitigating the facts and evidence already fully contested and decisively lost. Collateral estoppel could not be more appropriate.

B. The Presence of Other Parties in the NRC Proceeding does not Preclude Collateral Estoppel against C&SW which has already had Its Day in Court

As the Licensing Board correctly noted (Order at 12 & n.13), collateral estoppel can preclude only a party or a privy to the first judgment. Because of this, Houston carefully limited its motion for collateral estoppel to apply exclusively against C&SW, and the Board so noted. (Id. at 12 & n.14) However, the Board then reasoned that

> selective invocation of collateral estoppel to apply to CP&L and CSW would have only a procedural effect in this proceeding. . . .

(Order at 13.) Thus, the Board assumed that, since other parties could present the same case as C&SW, there would be "no advantage" to precluding C&SW from relitigating the issues it lost in the District Court. The Board then applied this analysis in declining to apply collateral estoppel.

The Board's analysis is triply flawed. First, it is clear that the presence of additional parties in the second proceeding cannot preclude the application of collateral estoppel. As the Appeal Board held with respect to collateral estoppel on the

issue of disqualification in a prior NRC antitrust proceeding:

> [I]t is irrelevant that the NRC staff and the Department of Justice are parties to our antitrust proceeding but not to the district court proceeding.

Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-378, 5 NRC 557, 563 (1977), citing Dreyfuss v. First National Bank of Chicago, 424 F.2d 1171, 1175 (7th Cir.), cert. denied, 400 U.S. 832 (1970); Hummel v. Equitable Life Assur. Soc., 151 F.2d 994, 996 (7th Cir. 1945). Because the NRC Staff participates only in NRC proceedings, if the Licensing Board were correct, collateral estoppel could never be applied in any NRC proceeding. This result is clearly contrary to well-established NRC practice.

Second, the Licensing Board's analysis of the "advantages" of applying (or not applying) collateral estoppel in an NRC proceeding implies the existence of discretionary power which does not exist. When the elements of collateral estoppel are present, as they are here and they were in Davis-Besse (ALAB-378), the NRC must apply collateral estoppel just as any other administrative agency or court. See, e.g., Lentin v. Commissioner of Internal Revenue, 226 F.2d 695 (7th Cir. 1955); Westgate-Sun Harbor Co. v. Watson, 206 F.2d 458 (D.C. Cir. 1953); George H. Lee Co. v. FTC, 113 F.2d 583 (8th Cir. 1940); See generally, 2 K. Davis, Administrative Law Treatise, §18.11 (1958).

Third, the Licensing Board's reasoning that application of collateral estoppel would have only a procedural effect is without support. At the June 1 Prehearing Conference during

oral argument on Houston's Motion, both the NRC Staff*/ and the Department of Justice**/ indicated that they would not present the same evidence as C&SW did in the District Court.

In any event, the Licensing Board's inference as to the effect -- procedural or otherwise -- of applying collateral estoppel against C&SW is wholly speculative. Houston believes that a favorable ruling on collateral estoppel would simplify and shorten the proceeding, which is the reason for its motion and this appeal. The parties opposing the motion obviously agree that this effect would result or they would not bother to oppose Houston on this matter. Where, as here, the elements of collateral estoppel are so undisputedly present, application of the doctrine of collateral estoppel is mandated, and speculation as to the resulting effects is irrelevant.

C. The Issues upon which Collateral Estoppel is sought were Necessary to the District Court's Judgment

The District Court held that Houston's policies with respect to intrastate operation were not an unlawful group boycott or otherwise violative of Section 1 of the Sherman Act, 15 USC §1. The seven findings of fact from that judgment upon which Houston sought collateral estoppel are set out above, and each relates specifically to an issue in the case and was necessary to the District Court's judgment.

The Licensing Board, in fact, never found that the seven factual issues upon which Houston sought collateral estoppel

*/ Tr. 288-89.

**/ Tr. 300, 303.

were unnecessary to the District Court judgment. Instead, reflecting confusion about the difference between estoppel on factual issues and estoppel on conclusions of law, the Board ruled that the District Court's findings with respect to Section 5 of the Federal Trade Commission Act (District Court Conclusion of Law #20) and Section 105(c) of the Atomic Energy Act (District Court Conclusion of Law #22) "were unnecessary and immaterial to the determination of the Section 1, Sherman Act cause of action." (Order at 14.) But Houston has never sought and does not now seek collateral estoppel on those conclusions of law. They were not the basis of and were not even mentioned in Houston's motion to the ASLB. Rather, Houston seeks estoppel only as to the seven factual findings outlined above. These were demonstrably essential to the District Court's judgment, and collateral estoppel on these facts is warranted.

D. The Nature of NRC Antitrust Review does not Preclude the Application of Collateral Estoppel to the District Court's Findings of Fact

The Licensing Board states that "the very nature of NRC antitrust review and the significant responsibilities borne by the Department and the Staff, evoke special public interest factors which preclude the application of collateral estoppel or res judicata."*/ The Board's decision assumes there is a "unique NRC role in a Section 105c proceeding," that supersedes the public policies underlying the doctrine of collateral estoppel.**/

The Licensing Board's assertion that the NRC possesses unique antitrust review authority is simply erroneous. As the

*/ Order at 17.

**/ Order at 17.

Commission has already stated in this case, the NRC merely applies the same antitrust principles as are applied in other forums:

> There are strong policy reasons why this Commission has expansive health and safety jurisdiction, which continues through the lives of outstanding licenses. Nuclear power is an area of considerable technical complexity. Its governance should be entrusted to an agency which embodies that particular expertise. But in the field of antitrust, our expertise is not unique. We merely apply principles, developed by the Antitrust Division, the Federal Trade Commission, and the Federal courts, to a particular industry.

Houston Lighting & Power Company (South Texas Project, Unit Nos. 1 and 2), CLI-77-13, 5 NRC 1303, 1316 (1977) (emphasis added).

Section 105c creates no special antitrust public interest factors or expertise which justify permitting a party to relitigate fact issues which it has litigated and lost in a District Court. The ASLB's ruling is nothing more than a decision that collateral estoppel does not apply in NRC antitrust proceedings. As such, it is clearly contrary to law.

CONCLUSION

For all the foregoing reasons, Houston respectfully petitions the Appeal Board to order the following:

(1) that this Petition for Directed Certification be granted; and,

(2) that C&SW be collaterally estopped from relitigating or attempting to relitigate any of the fact issues decided against it by the United States District Court in West Texas Utilities Co. v. Texas Electric Service Co., 470 F.Supp. 798 (N.D. Tex. 1979).

Respectfully submitted,

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DATED: November 9, 1979.

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(Comanche Peak Steam Electric Station, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing

PETITION OF HOUSTON LIGHTING & POWER COMPANY FOR DIRECTED CERTIFICATION AND REVIEW OF THE LICENSING BOARD'S ORDER DENYING MOTIONS FOR SUMMARY DECISION

were served upon the following persons, by hand *, or by deposit in the United States Mail, first class postage prepaid, this 9th day of November, 1979.

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