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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Rocky Mountain Power's Application for Alternative Cost Recovery for Major Plant Additions of the Pryor Mountain and TB Flats Wind Projects	Docket No. 21-035-42

REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Pursuant to Utah Rule of Civil Procedure 56 and Utah Admin. Code R746-1-301, the Division of Public Utilities ("DPU"), the Office of Consumer Services ("OCS") and the Utah Association of Energy Users ("UAE") (collectively, "Movants") hereby file this Reply in support of their Motion for Summary Judgment.

ARGUMENT

Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(a). Here, summary judgment is appropriate because there are no genuine issues of material fact and a proper interpretation of Utah Code § 54-7-13.4 ("MPA Statute") does not permit RMP to obtain the relief it seeks in this matter.

I. THERE ARE NO GENUINE ISSUES OF MATERIAL FACT

Once the Movants showed that "there is no genuine issue of material fact that would preclude summary judgment in [their] favor . . . the burden then shifts to [RMP] to show that there is a genuine issue of material fact or a deficiency with the moving party's legal theory that would preclude summary judgment." *Jones & Trevor Mktg., Inc. v. Lowry*, 2012 UT 39, ¶ 29, 284 P.3d 630. RMP does not identify any genuine issue of fact that is material to the Motion. Of the 13 facts that Movants cite in support of the Motion, RMP concedes that ten are undisputed and, with respect to the other three, RMP asserts that they are legal conclusions rather than facts.[1] RMP then identifies several additional facts, none of which is disputed.[2] There are, therefore, no genuine issues of material fact.

The Motion turns on a question of statutory interpretation, which is a question of law appropriate for disposition in summary judgment. As set forth below, the Movants are entitled to judgment as a matter of law because the MPA Statute does not permit RMP to recover costs based on the incremental revenue requirement of the TB Flats and Pryor Mountain wind projects.

[1] RMP Mem. Opp. at 2-6.
[2] *Id*. at 6-7.

II. "MAJOR PLANT ADDITION" MUST HAVE THE SAME MEANING THROUGHOUT THE MPA STATUTE AND RMP MAY NOT RECOVER A PORTION OF THE COST OF TB FLATS AND PRYOR MOUNTAIN

RMP's interpretation of the MPA Statute improperly uses inconsistent definitions for the term "major plant addition" and, when a consistent definition is applied, the MPA Statute does not permit the relief RMP seeks. The rules of statutory interpretation adopted by the Utah courts are well known but worth repeating.

> We look first to the plain language of the statutes to determine their meaning and to discern the intent of the legislature. Courts also examine the purpose of the statute . . . and its relation to other statutes. Provisions within a statute are interpreted in harmony with other provisions in the same statute and with other statutes under the same and related chapters. We do so because a statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole.

Berneau v. Martino, 2009 UT 87, ¶ 12, 223 P.3d 1128 (internal quotation marks and citations omitted).

RMP's interpretation of the MPA Statute ignores these rules of statutory interpretation. In support of its claim that the MPA Statute permits recovery of a portion of the cost of TB Flats and Pryor Mountain, RMP incorrectly argues that Subsection (1)(c) of the MPA Statute must be read in isolation from other parts of the statute. *See Utah Office of Consumer Services v. Public Service Commission*, 2019 UT 26, ¶ 30, 443 P.3d 464 ("We do not, however, read statutory text in isolation. We must read it in context, taking into consideration surrounding terms and associated provisions." (citation omitted)). Utah courts have "specifically rejected a literal reading" of statutorily defined terms when "such a reading conflicted with other provisions" of the statute "and with the overall intent and purpose" of the statutory scheme. *Nixon v. Salt Lake City Corp.*, 898 P.2d 265, 269 (Utah 1995) (finding that "a rigid and isolated reading of the term 'defendant'" would "do[]

significant damage to the scheme" of the Liability Reform Act). As such, the Commission must consider the MPA Statute as a whole along with other ratemaking statutes to determine what relief is permitted by the MPA Statute.

The MPA Statute uses the term "major plant addition" numerous times, and each must have the same meaning. *See, e.g.*, *State v. Rassabout*, 2015 UT 72, ¶ 15, 356 P.3d 1258 (noting that "we presume that the Legislature used the term *discharge* consistently throughout the statute," and that it "must mean the same thing" each time it is used). When "major plant addition" is given the same meaning each time it is used in the MPA Statute, it does not support RMP's Application seeking cost recovery for TB Flats and Pryor Mountain, two projects already included in rates.

In Subsection (1)(c), the MPA Statute states that "'Major plant addition' means any single capital investment project of . . . an electrical corporation that in total exceeds 1% of the . . . electrical corporation's rate base, based on the . . . electrical corporation's most recent general rate case." This provision requires a comparison of the cost of a single capital investment project added to utility plant with the utility's rate base. If the cost of a "single capital investment project . . . in total exceeds 1% of . . . rate base," then that cost constitutes a "major plant addition." RMP relies on this definition in Subsection (1)(c) when it asserts that the cost of each of TB Flats and Pryor Mountain constitute a "major plant addition" because RMP's "total investment" in each project "is more than the $75.6 million that represents 1% of RMP's rate base approved in the 2020 GRC."[3] When a definition of "major plant addition" based on the "total investment" in a project is applied to each use of the term "major plant addition" in the MPA Statute, however, it becomes clear that the

[3] RMP Mem. Opp. at 7 (¶¶ 17-18).

Legislature did not permit recovery of a portion of the cost of a project, such as here, where a portion of that cost is already included in customer rates.

Subsection (2) of the MPA Statute permits a utility to file an application seeking "cost recovery of a major plant addition." The term "major plant addition" in Subsection (2) must have the same meaning as in Subsection (1)(c). RMP asserts that TB Flats and Pryor Mountain each qualify as a "major plant addition" because the "total investment" in each project exceeds the $75.6 million that represents 1% of RMP's rate base. If that is correct, then Subsection (2) permits RMP to obtain cost recovery for the "total investment" in a single project that exceeds $75.6 million. RMP does not, however, seek recovery of a "total investment" in any single project, let alone a "total investment" that exceeds $75.6 million. Instead, RMP seeks only a portion of the cost of each of TB Flats and Pryor Mountain. RMP seeks recovery of only the incremental revenue requirement for each project that is observed when the test period for each project is measured on an average-of-2022 basis, rather than on the average-of-2021 basis approved in the 2020 GRC. That incremental number is [redacted] for TB Flats and [redacted] for Pryor Mountain.[4] These incremental amounts do not exceed $75.6 million and, as such, RMP does not seek "cost recovery of a major plant addition" consistent with the plain language of Subsection (2).

Additional provisions of the MPA Statute confirm that the cost recovery sought must—like the definition of "major plant addition" in Subsection (1)(c)—be a "single capital investment project . . . that in total exceeds 1% of . . . rate base." For example, Subsection (4)(b) states that "[i]f the commission approves cost recovery of a major plant

[4] *See* CONFIDENTIAL Direct Testimony of Kevin C. Higgins at lines 195-204; CONFIDENTIAL Direct Testimony of Dr. William Powell at lines 110-112.

addition," it "shall determine the state's share of projected net revenue requirement impacts of the major plant addition." Utah Code § 54-17-13.4(4)(b) (emphasis added). The Commission is not empowered to approve cost recovery of a *portion* of a major plant addition or to approve the revenue requirement impacts of a *portion* of the major plant addition. "The PSC has no inherent regulatory powers and can only assert those which are expressly granted or clearly implied as necessary to the discharge of the duties and responsibilities imposed upon it." *Williams v. Public Service Commission*, 754 P.2d 41, 50 (Utah 1988). "To ensure that the administrative powers of the PSC are not overextended, any reasonable doubt of the existence of any power must be resolved against the exercise thereof." *Id*. (internal quotation marks omitted).

Subsection (5) of the MPA Statute further clarifies that "cost recovery for a major plant addition" is limited to projects that have not already been included in rates. Subsection (5) states that the Commission may either "defer the state's share of the net revenue requirement impacts of the major plant addition" or adjust rates "for the state's share of the net revenue requirement impacts." Utah Code § 54-7-13.4(5) (emphasis added). In the context of this docket, the requirement that the Commission determine and grant recovery based on the state's share of "the net revenue requirement impacts of the major plant addition" means that the Commission must determine and grant recovery based on the net revenue requirement impacts of a "total investment" that exceeds $75.6 million. As noted above, RMP's Application does not seek recovery of a "total investment" that exceeds $75.6 million for either TB Flats or Pryor Mountain. As such, RMP does not seek "cost recovery of a major plant addition" and its Application should be denied.

"Major plant addition" must have the same meaning each time it is used in the MPA Statute. The Commission should reject RMP's efforts to define "major plant addition" for purposes of Subsection (1)(c) of the MPA Statute as its "total investment" in a project and then, for purposes of Subsections (2), (4)(b), and (6) to define "major plant addition" as a portion of that "total investment." When the same definition is used throughout the statute, it is clear that cost recovery pursuant to the MPA Statute is available only when a utility seeks recovery of a cost "that in total exceeds 1% of . . . rate base." RMP seeks recovery of a cost for each of TB Flats and Pryor Mountain that is far less than 1% of its rate base. As such, the cost for which RMP seeks recovery is not a "major plant addition" and the Application should be denied.

Moreover, the 1% of rate base requirement is a materiality threshold. Recovery of incremental revenues of a project already included in rates would render that threshold meaningless. *See Lund v. Brown*, 2000 UT 75, ¶ 23, 11 P.3d 277 ("[T]he well-established principle of statutory construction requir[es] us to give meaning, where possible, to all provisions of a statute."). Many utility capital additions are in some form components of larger capital investment projects. RMP's proposed interpretation would result in inconsistent treatment of otherwise similar capital investments depending on whether they are attached to a larger total project. A consistent and harmonized interpretation of the MPA Statute makes clear that neither TB Flats nor Pryor Mountain constitute a "major plant addition" for which cost recovery is available. Neither project represents an addition to plant—100% of the cost of each project was included in the rate base measurement in the 2020 GRC. The relief RMP seeks in this docket—recovery of incremental revenue requirement that appears only when the rate base measurement period for these two projects

is changed from the period used in the 2020 GRC—does not exceed 1% of rate base. The changed measurement for each project does not, therefore, represent a major addition to plant required by the Statute. RMP's Application should be dismissed.

III. RMP'S INTERPRETATION OF THE MPA STATUTE RELIES ON INCONSISTENT DEFINITIONS OF THE TERM "MAJOR PLANT ADDITION"

RMP reads Subsection (1)(c) of the MPA Statute in isolation and fails to give consistent meaning to the term "major plant addition" throughout the statute. As noted above, for purposes of Subsection (1)(c) RMP argues that "major plant addition" is defined by the "total investment" in a project. For each other instance in which the MPA Statute uses the term "major plant addition," however, RMP argues that the term "major plant addition" does not mean the "total investment" but, rather, means the incremental cost a utility seeks to recover, whether or not that cost "in total exceeds 1% of . . . rate base." Specifically, RMP takes care to clarify that it "seeks cost recovery for a portion of the costs of two single capital investment projects, not a portion of the projects themselves."[5] The "portion of the costs" for which RMP seeks recovery do not "in total exceed 1% of . . . rate base," yet RMP claims that this "portion of costs" constitutes a "major plant addition" for purposes of Subsections (2), (4)(b), and (6) of the MPA Statute. RMP's interpretation ignores the requirement that statutes are to be "interpreted in harmony with other provisions in the same statute." *Berneau*, 2009 UT 87, ¶ 12. The term "major plant addition" should not be given multiple meanings.

RMP's response to Movants' argument regarding Subsection (6)(b) of the MPA Statute further illustrates RMP's inconsistent use of the term "major plant addition."

[5] RMP Mem. Opp. at 11.

Movants noted that if the Commission were to grant the Application and enter an order to "defer the state's share of the net revenue requirement impacts of the major plant addition," that deferral would terminate immediately because, as required by Subsection (6)(b), deferral "shall terminate upon a final commission order that provides for recovery in rates of all or any part of the net revenue requirement impacts of the major plant addition."[6] When "major plant addition" is measured by the utility's "total investment" in a project, then the Commission's 2020 GRC Order provided for recovery in rates of "all or any part of the net revenue requirement impacts" of both TB Flats and Pryor Mountain. RMP responds by arguing that terminating deferral upon an order providing recovery in rates of "any part" of the major plant addition supports its position that the MPA Statute supports recovery of a portion of the costs of a major plant addition. RMP's response ignores the fact that the Commission can only grant deferral of "the net revenue requirement impacts of the major plant addition." Utah Code § 54-7-13.4(5)(a) (emphasis added). The term "the major plant addition" in Subsection (5)(a) must have the same meaning as it does in Subsection (1)(c)—"total investment." The Commission can grant deferral or rate adjustment only for the net revenue requirement impacts of the "total investment" that comprises the "major plant addition."

Finally, RMP fails to explain why Subsection (4)(c) of the MPA Statute requires the Commission to presume the prudence of the capital costs of a major plant addition only if it has previously approved the major plant addition pursuant to Utah Code §§ 54-17-302 and -402, but not when the major plant addition has been approved in a general rate case.[7] The only logical explanation is that the Utah Legislature did not intend to permit cost

[6] Motion at 9 (quoting Utah Code § 54-7-13.4(6)(b)).
[7] RMP Mem. Opp. at 11-12.

recovery of a major plant addition when the project has already been included in rates. RMP's assertion that Subsection (4)(c) does not change the statutory definition of "major plant addition" further illustrates the point that reading Subsection (1)(c) in isolation and ignoring the remainder of the MPA Statute, as RMP does, fails to properly harmonize the statute.

Defined terms must be uniformly applied throughout a statute. RMP improperly interprets the MPA Statute when it defines "major plant addition" as "total investment" for purposes of Subsection (1)(c) and as "a portion of the costs of that total investment" for purposes of all remaining parts of the statute. Such an interpretation violates the rules of statutory interpretation and should be rejected.

III. RMP'S POLICY ARGUMENTS DO NOT JUSTIFY AN INTERPRETATION OF THE MPA STATUTE THAT USES INCONSISTENT DEFINITIONS OF THE TERM "MAJOR PLANT ADDITION"

RMP offers several policy arguments in response to the Motion, none of which alters a proper interpretation of the MPA Statute that gives the same meaning to the term "major plant addition" throughout the statute.

First, RMP's argument that the MPA Statute was intended to avoid consecutive rate cases ignores the statute's strict requirements for that outcome. In support of its position that the MPA Statute was intended to avoid full rate review following a recent rate case, RMP cites the direct testimony of OCS witness Michele Beck.[8] RMP's reliance on Ms. Beck for support is misguided. In her direct testimony, Ms. Beck clearly states that RMP's Application in this docket "seeks to misuse the major plant addition statute" and that its effort to recover incremental revenue requirement for projects already included in rates "subverts the test year policy."[9] The MPA

[8] RMP Mem. Opp. at 13-14.
[9] Direct Testimony of Michele Beck (OCS) at lines 29-30 & 38-41.

Statute provides a narrow exception to the prohibition on single-issue ratemaking, but ***only*** when the specific elements of the statute are met.[10] As set forth in Section II, above, the elements permitting this exception are not present here.[11] The 1% threshold represents a minimum materiality threshold to justify the exception. The MPA Statute was *not* intended to allow a utility to include incremental recovery for less than the threshold minimum capital addition or to recover 100% of the costs of a project in rate base in a general rate case and then to request additional revenue for that project based on an alternative measurement of rate base.

Second, in response to the Movants' assertion that the MPA Statute bars a utility from obtaining cost recovery of a single project both through a general rate case and through the MPA Statute, RMP incorrectly states that this assertion contains a "logical flaw" because it would "produce the same result that the Company seeks here"[12] Movants' position does *not* yield the same result that RMP seeks here. In the 2020 GRC, the Commission approved customer rates that include 100% of the costs of TB Flats and Pryor Mountain in the average-of-2021 rate base calculation that was based on the in-service dates estimated for various portions of those projects.[13] Those rates went into effect on January 1, 2021. As a result, RMP has been recovering from ratepayers for the cost of TB Flats and Pryor Mountain for nearly a year, despite the fact that TB Flats and Pryor Mountain have been in service for only a few months. If RMP had removed the

[10] *In the Matter of the Investigation of the Costs & Benefits of PacifiCorp's Net Metering Program*, Docket No. 14-035-114, Consolidated Order Denying Dispositive Motions at 7, 2017 (Feb. 23, 2017) ("Under circumstances where the legislature has not directed otherwise, a utility may not seek to adjust rates based on isolated issues without considering all relevant costs and revenues.").

[11] *See also* Direct Testimony of Michele Beck (OCS) at line 57 ("RMP's application does not meet the statutory requirements.").

[12] RMP Mem. Opp. at 12-13.

[13] As noted below, the *actual* in-service dates for portions of TB Flats and Pryor Mountain are different than the estimated in-service dates that affected rates in the 2020 GRC.

projects from the 2020 GRC, the rate base associated with these projects would not have been included in the test period and RMP could not have collected any amount from ratepayers for these projects until after the conclusion of a docket filed pursuant to the MPA Statute. The MPA Statute bars cost recovery for a "major plant addition" until the later of a Commission order approving such recovery or the in-service date.[14] RMP could have chosen to wait to begin recovering the cost of TB Flats and Pryor Mountain until the in-service dates of those projects. Instead, it chose to recover those costs starting January 1, 2021. These results are not the same. RMP simply seeks to have its cake and eat it, too, by including 100% of the cost of each project in the 2020 GRC so that it can recover immediately and then requesting to recover incremental revenue requirement by changing the rate base measurement for these projects to an average-of-2022 period. There is a sharp difference between RMP's effort to move the rate base measurement goal posts for these projects and the Movants' position about the proper scope of the MPA Statute.

Third, RMP makes the troubling assertion throughout its testimony and in its response to the Motion that it seeks recovery for a portion of the cost of TB Flats and Pryor Mountain that it claims is "not already included in rates."[15] This Commission determined the prudently-incurred costs of these projects in the 2020 GRC, and RMP's assertion that a portion of those costs is "not included in rates" suggests that RMP believes it has been prejudiced by the use of an average-of-2021 rate base calculation. RMP has not directly attacked the use of average of period rate base determinations, but the natural implication of its argument is that they result in the denial of the recovery of prudently-incurred costs and/or that they do not yield just and reasonable rates. The

[14] *See* Utah Code § 54-7-13.4(6)(a).
[15] *See, e.g.*, Rebuttal Testimony of Steven R. McDougal at lines 23-24 ("[T]he Company is requesting a rate change effective January 1, 2022 associated with the portions of the Pryor Mountain and TB Flats wind projects not included in rates."); RMP Mem. Opp. at 11 (asserting that RMP is "seeking recovery of the portion of the costs associated with the single capital investment project not already included in rates").

Movants strongly reject this assertion and urge the Commission to do the same. This Commission has utilized average-of-period rate base calculations in electric utility rate cases for decades.[16] The Commission has previously ruled that the use of "an average-of-year rate base provides an appropriate basis for matching the annual flows of revenues and expenses to the average annual stock of plant and equipment employed by the utility and to the manner in which the utility has been operated."[17] RMP undermines long-established Commission ratemaking practice when it asserts that prudently-incurred costs are "not included in rates" when average rate base measurement is used and when plant is placed in service during (rather than before) a test period.

Finally, RMP's assertion that it would somehow be unfair for the MPA Statute to be interpreted as Movants suggest simply ignores that ratemaking mechanisms are designed to balance utility and ratepayer interests to allow a utility a fair opportunity to receive a reasonable return on its investment.[18] Ratemaking is not intended to be a precise cost recovery mechanism. "[A] utility is not entitled to earn a profit on expenses. . . . A utility is entitled only to the opportunity to earn a reasonable return on its investment; the law does not insure that it will in fact earn the particular rate of return authorized by the commission, or indeed that it will earn any net (return)."[19] The 2020 GRC set rates based on a fully-projected test period using an average rate base calculation. The rates currently paid by RMP customers are based in part on a projection of plant in-service dates that are different than the actual in-service dates. TB Flats and Pryor

[16] *See, e.g.*, *In re Utah Power & Light Co.*, Docket No. 82-035-13, 1983 WL 913521 (May 23, 1983) (using average rate base determination for test period ending August 31, 1983).
[17] *In re Mt. Fuel Supply Co.*, Docket No. 89-057-15, 1990 WL 509865 (Nov. 21, 1990) (approving average-of-year rate base determination and rejecting end-of-year rate base measurement because "[a]n end-of-year rate base is a mere snapshot, a potentially misleading picture of rate base at one point in time [that] requires that substantial, difficult adjustments, fraught with policy implications, be made to revenues and expenses.").
[18] *See, e.g.*, *Stewart v. Utah Public Service Commission*, 885 P.2d 759, 776 (Utah 1994) ("[T]he role of the Commission is to protect the interests of both the ratepayers and the shareholders and to accommodate both those interests to the overall public interest.").
[19] *Utah Dept. of Bus. Reg., Div. of Public Utilities v. Public Service Commission*, 614 P.2d 1242, 1249 n.14 (internal quotation marks omitted).

Mountain are good examples. RMP's current rates are based on a projection that 309 MW of TB Flats would be in service prior to the start of the 2021 test year, and that 109 MW would be placed into service in June of 2021.[20] RMP's current rates also assume that 160 MW of Pryor Mountain would be in service prior to the 2021 test year and that the remaining 80 MW would be delayed until July 2021.[21] We now know that only 204.3 MW of TB Flats was in service by the start of the 2021 test year and that the remaining approximately 303 MW was placed into service on July 26, 2021.[22] We also know that only 20 MW of Pryor Mountain was in service prior to the 2021 test year and that the remaining 220 MW was placed in service as of April 1, 2021.[23] We also know that the projected costs of the projects as used in the 2020 GRC exceed the current projections for the costs of the projects.[24] As such, current rates based on projections assume a test period rate base that is higher for those two projects than would be justified based on current actual information.

Movants do not contend that these facts mean that current rates are unfair or that current rates are not just and reasonable. These facts simply demonstrate that ratemaking is based on the best information available at the time that rates are set, that it is sometimes imprecise, and that ratemaking is not intended to ensure a dollar-for-dollar matching of utility costs to customer rates at precisely the time the costs are incurred. The Commission ruled in the 2020 GRC that allowing RMP to recover the cost of TB Flats and Pryor Mountain "on an average-of-period basis over the Test Year," and that this treatment of the cost of each project was "just and reasonable."[25]

[20] Docket No. 20-035-04, Order (Dec. 30, 2021) at 44.
[21] *Id*.
[22] RMP Errata to Application for Alternative Cost Recovery at 2.
[23] *Id*.
[24] *See, e.g.*, Confidential Rebuttal Testimony of Steven R. McDougal at lines 103-113.
[25] 2020 GRC Order at 46.

CONCLUSION

The MPA Statute defines a "major plant investment" as a "single capital investment project . . . that in total exceeds 1% of . . . rate base." Utah Code § 54-7-13.4(1)(c). That defined term must be used consistently throughout the MPA Statute whenever the term "major plant addition" appears. When that defined term is used consistently, it is clear that the MPA Statute authorizes the Commission to grant cost recovery for a "total investment" that exceeds 1% of rate base, but does not authorize the Commission to grant additional relief to a utility that is already recovering the cost of a project in rates.

RMP does not seek cost recovery of a "total investment" that exceeds 1% of rate base. Instead, RMP seeks to recover portions of costs of TB Flats and Pryor Mountain that it claims were not included in the revenue requirement in the 2020 GRC. The MPA Statute does not authorize the Commission to grant recovery of the portions of costs of a project when that project is already included in rates. As such, when Subsection (2) permits a utility to seek "cost recovery of a major capital investment," it means that recovery is authorized for a cost that exceeds 1% of rate base. As such, the MPA Statute does not authorize RMP to receive the relief it seeks in this docket and its Application must be denied as a matter of law.

DATED this 22nd day of November 2021.

Respectfully submitted

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Electronically signed with permission of counsel

CERTIFICATE OF SERVICE

I certify that on November 22, 2021, I caused a true and correct copy of the foregoing to be filed with the Public Service Commission and served by the Utah Division of Public Utilities to the following in Utah Docket 21-035-42 as indicated below:

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