

FILE

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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PUCO

In the Matter of the Application of	)	
The Cincinnati Gas & Electric Company	)	
To Modify its Non-Residential Generation	)	
Rates to Provide for Market-Based Standard	)	Case No. 03-93-EL-ATA
Service Offer Pricing and to Establish a Pilot	)	
Alternative Competitively-Bid Service Rate	)	
Option Subsequent to Market Development	)	
Period.	)	
In the Matter of the Application of The	)	
Cincinnati Gas & Electric Company for	)	
Authority to Modify Current Accounting	)	Case No. 03-2079-EL-AAM
Procedures for Certain Costs Associated	)	
with The Midwest Independent Transmission	)	
System Operator.	)	
In the Matter of the Application of The	)	
Cincinnati Gas & Electric Company for	)	
Authority to Modify Current Accounting	)	Case No. 03-2081-EL-AAM
Procedures for Capital Investment in its	)	Case No. 03-2080-EL-ATA
Electric Transmission and Distribution	)	
System And to Establish a Capital	)	
Investment Reliability Rider to be Effective	)	
After the Market Development Period.	)	
In the Matter of the Application of	)	
Duke Energy Ohio, Inc. to Modify Its	)	
Fuel and Economy Purchased	)	Case No. 06-1068-EL-UNC
Power Component of Its Market-Based	)	
Standard Service Offer.	)	
In the Matter of the Application of the	)	
Cincinnati Gas & Electric Company to	)	
Modify Its Fuel and Economy Purchased	)	Case No. 05-725-EL-UNC
Power Component of Its Market-Based	)	
Standard Service Offer.	)	
In the Matter of the Application of	)	
Duke Energy Ohio, Inc. to Adjust and Set its	)	Case No. 06-1069-EL-UNC
System Reliability Tracker.	)	

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In the Matter of the Application of Duke	)	
Energy Ohio, Inc. to Adjust and Set its	)	Case No. 05-724-EL-UNC
System Reliability Tracker Market Price.	)	
 In the Matter of the Application of	 )	
Duke Energy Ohio, Inc.	)	Case No. 06-1085-EL-UNC
To Adjust and Set the Annually Adjusted	)	
Standard Service Offer.	)	

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**APPLICATION FOR REHEARING  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential consumers of Duke Energy Ohio ("Company" or "Duke Energy," including its predecessor The Cincinnati Gas and Electric Company) and pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35(A), applies for rehearing of the Entry ("January Entry") issued by the Public Utilities Commission of Ohio ("PUCO" or "Commission") on January 3, 2007 in the above-captioned cases. The OCC submits that the Commission's Entry is unreasonable and unlawful in the following particulars:

- A. The Commission's January Entry prematurely deals with the admissibility of evidence before such evidence is presented at hearing, and takes such a step in conflict with the dictates of the Ohio Supreme Court in its remand to the Commission and Evid.R. 408.
- B. The Commission's January Entry prematurely deals with the admissibility of evidence before such evidence is presented at hearing, and takes such a step in conflict with the requirement that a quasi-judicial decision-maker is "required to permit a full hearing upon all subjects pertinent to the issues(s), and to base [its] conclusion upon competent evidence." *City of Bucyrus v. State Dept. of Health*, 120 Ohio St. 426, 430.

The reasons for granting this Application for Rehearing are set forth in the attached  
Memorandum in Support.

Respectfully submitted,

Janine Migden-Ostrander  
Consumers' Counsel

A handwritten signature in black ink, appearing to read "Jeffrey L. Small", is written over a horizontal line.

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## MEMORANDUM IN SUPPORT

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### I. HISTORY OF THE CASE

Duke Energy and several other parties filed applications for rehearing on October 29, 2004 in the first four cases in the caption above that were consolidated (*Post-MDP Service Case*). Duke Energy asked the PUCO to either i) approve the Company's first proposal to implement a "competitive market option," ii) approve the stipulation filed on May 19, 2004 (i.e. unaltered by the PUCO); or iii) approve a proposal introduced in the Company's Application for Rehearing ("New Proposal") that contained an array of new charges that had not been subject to an investigation or hearing.<sup>1</sup>

Duke Energy's New Proposal was built on the first four conditions placed by the Commission on the 03-93 Stipulation and introduced new charges and modified previously proposed charges. The New Proposal introduced an "infrastructure maintenance fund" ("IMF") as a new non-bypassable charge based upon percentages of

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<sup>1</sup> Duke Energy Application for Rehearing at 2 (October 29, 2004).

“little g,” created a “system reliability tracker” (“SRT”) for the “purchase [of] power to cover peak and reserve capacity requirements,” changed the bypassability of certain charges, changed the percentage increases associated with the “annually adjusted component” (“AAC”), and introduced a “fuel and economy purchased power” (“FPP”) rate “related to the recovery of fuel, economy purchased power and emission allowances.”<sup>2</sup> CG&E did not provide any numbers to support its New Proposal.

In the First Entry on Rehearing, the PUCO adopted (in principal part) the New Proposal. The Commission provided for certain CG&E filings and verifications before the rate increases provided for in the New Proposal could be placed into effect.<sup>3</sup>

On November 22, 2006, the Ohio Supreme Court remanded the *Post-MDP Service Case*. A principal reason for the remand was the lack of evidentiary support for the PUCO’s decision in the *Post-MDP Service Case*:

The portion of the commission’s first rehearing entry approving CG&E’s alternative proposal is devoid of evidentiary support. There are no citations to the record supporting the commission’s modifications on rehearing. In addition, the commission did not sufficiently set forth its reasoning for the changes on rehearing.<sup>4</sup>

Another principal reason for the remand involves the PUCO’s treatment of the OCC’s efforts to investigate the presence of side deals that should have been considered in the *Post-MDP Service Case*.

If there were special considerations in the form of side agreements among the signatory parties, one or more parties may have gained an unfair advantage in the bargaining process. Therefore, we hold

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<sup>2</sup> Id. at 12-13 and FPP Attachment 3 at 1.

<sup>3</sup> A number of the cases mentioned in the above-stated case caption reflect these filings.

<sup>4</sup> *Ohio Consumers’ Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 at ¶28 (“*Consumers’ Counsel 2006*”).

that the commission erred in denying discovery of this information based on lack of relevancy.<sup>5</sup>

On the subject of privilege, the Ohio Supreme Court “declined to recognize a settlement privilege”<sup>6</sup> and noted in support that “Evid.R. 408 provides that evidence of settlement may be used for *several purposes at trial*, making it clear that discovery of settlement terms and agreements is not always impermissible.”<sup>7</sup>

On December 7, 2006, a complaint for wrongful termination was filed by a former Duke Energy employee (or an employee of an affiliated company), John Deeds (“Deeds Complaint”).<sup>8</sup> The Deeds Complaint alleges that side agreements were used in a discriminatory and predatory manner to win approval of the Company’s plan in the *Post-MDP Service Case*.<sup>9</sup> The Deeds Complaint alleges that an affiliate of Duke Energy makes payments to major commercial and industrial customers based upon charges that these customers pay to Duke Energy.<sup>10</sup> The rebated charges, as outlined in the Deeds

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<sup>5</sup> Id. at ¶86.

<sup>6</sup> Id. at ¶89.

<sup>7</sup> Id. at ¶92 (emphasis added).

<sup>8</sup> *Deeds v. Duke Energy Corporation et al.*, United States District Court, Southern District of Ohio (Western Division), Case No. 1:06CV835, Complaint (December 7, 2006). The Deeds Complaint is attached to a letter docketed in this case by the OCC on December 13, 2006.

<sup>9</sup> Deeds Complaint at ¶7.

<sup>10</sup> Id. The Deeds Complaint alleges that a Duke Energy affiliate made approximately \$20 million in “Option Payments” to Duke Energy customers. Deeds Complaint at ¶9. “Option Payments” are confirmed by information contained in the Commission’s records. See Duke Energy Retail Sales Memorandum Contra OCC Motion to Strike DERS Motion to Quash Subpoena at 9 (“Option Premium Expense during 2005 of \$13,768,812, and during 2006 of \$22,247,000.”) (January 2, 2007), citing *In re DERS Certification*, Case No. 04-1323-EL-CRS, Part 5 of 5, Exhibit C-3 at 34-35 and 55 (August 24, 2006) that shows payments by a Duke Energy affiliate that receives no revenues.



Complaint, are the rate increases that were requested by Duke Energy and approved by the PUCO in 2004.<sup>11</sup>

On November 29, 2006, the Attorney Examiner issued an Entry, stating “that a hearing should be held in the remanded RSP case, in order to obtain the record evidence required by the court.”<sup>12</sup> DE-Ohio submitted a pleading on December 13, 2006, under the guise of a “Motion for Clarification,” in which it argued that the words used in the entry issued on November 29, 2006 – “*hearing . . . in order to obtain the record evidence*” must have been intended to be limited to “briefs and/or oral argument.”<sup>13</sup> The OCC argued that the plain language of the Entry clearly contemplated an evidentiary hearing<sup>14</sup> and that Duke Energy’s pleading should not have been considered because the pleading should have been filed as an interlocutory appeal pursuant to Ohio Adm. Code 4901-1-15.<sup>15</sup>

In the January Entry (dated January 3, 2007), the Commission addressed Duke Energy’s Motion for Clarification despite the absence of any certification to the PUCO pursuant to Ohio Adm. Code 4901-1-15. The Commission stated:

[I]n light of the Supreme Court’s opinion, it is appropriate to hold a hearing in these consolidated proceedings. We will not, as requested by DE-Ohio, grant a motion to “clarify” that the hearing should be limited to the filing of briefs and/or oral argument citing evidence already of record. That ruling was correct.<sup>16</sup>

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<sup>11</sup> Id. at ¶7.

<sup>12</sup> Entry at 2 (November 29, 2006).

<sup>13</sup> Duke Energy Motion for Clarification at 3 (December 13, 2006).

<sup>14</sup> OCC Memorandum Contra Duke Energy Motion for Clarification at 6 (December 20, 2006).

<sup>15</sup> Id. at 6.

<sup>16</sup> Entry at 2 (January 3, 2007).

However, the PUCO seemed inclined to restrict any OCC use of side agreements at the hearing before seeing any of the evidence that the OCC may seek to introduce. The PUCO stated:

The Court required the Commission to compel disclosure of the information requested by OCC in its discovery and pointed out that side agreements might be relevant to the Commission's determination of "whether there exists sufficient evidence that the stipulation was the product of serious bargaining." Therefore, *we find that the hearing in these proceedings may also consider evidence relating to relevant side agreements and how such side agreements may have impacted the seriousness of the bargaining that led to the stipulation adopted in the opinion and order.*<sup>17</sup>

The OCC is engaged in the discovery phase in these cases, and cannot be certain about the full extent of its use of side agreements at hearing. At this stage in these proceedings, the Commission should remain open to how the side agreements may be used at the hearing.

## II. ARGUMENT

- A. The Commission's January Entry prematurely deals with the admissibility of evidence before such evidence is presented at hearing, and takes such a step in conflict with the dictates of the Ohio Supreme Court in its remand to the Commission, Evid.R. 408, and R.C. 4903.09.

The Ohio Supreme Court's decision in *Consumers' Counsel 2006* and the Commission's subsequent decision to hold a hearing at which the PUCO may consider evidence concerning side agreements should provide the Commission with important insights into whether parties to the *Post MDP Services Case* "gained an unfair advantage

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<sup>17</sup> Entry at 3 (January 3, 2007) (emphasis added).

in the bargaining process.”<sup>18</sup> Such an unfair advantage is a major theme in the Deeds Complaint. An examination of the process by which parties supported the Company’s final proposal in the *Post-MDP Service Case* may also be important regarding whether Duke Energy should be provided a waiver under Ohio Adm. Code 4901:1-35-02(C). That provision permits a post-MDP service plan that does not satisfy the substantive provisions contained in Ohio Adm. Code Chapter 4901:1-35 “where there is substantial support from a number of interested stakeholders. Again, a lack of integrity and openness in the process by which Duke Energy gained support for its post-MDP service plan could be important to the Commission’s determination under its rules regarding standard service offers.

The Ohio Supreme Court’s opinion regarding the use to which information regarding side agreements could be put was necessarily subject to the fact that the Court was unable to review information that the OCC could not obtain in the *Post-MDP Service Case* according to the broad discovery rights provided for by R.C. 4903.082 and Ohio Adm. Code 4901-1-16. However, *Consumers’ Counsel 2006* contains indicative language that could signal the Ohio Supreme Court’s approach if the admissibility of the side agreements and related documentation ever reaches the Court again. The Court “decline[d] to recognize a settlement privilege applicable to Ohio discovery practice,” even as to documentation of settlement discussions.<sup>19</sup> The Court further stated: “Evid.R. 408 provides that evidence of settlement may be used for *several purposes at trial*, making it clear that discovery of settlement terms and agreements is not always

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<sup>18</sup> *Consumers’ Counsel 2006* at ¶186.

<sup>19</sup> *Consumers’ Counsel 2006* at ¶92.

impermissible.”<sup>20</sup> Had the OCC obtained the side agreements in the *Post-MDP Service Case*, the OCC may have used the information for a broader spectrum of purposes. The Commission should recognize this situation in its approach to the upcoming hearing on remand from the Ohio Supreme Court. The Court identified an appropriate use of the side agreements and was not defining every other possible use of the side agreements.

The text of Evid.R. 408 regarding settlement discussions and settlements is instructive:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to *prove liability for or invalidity of the claim* or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. *This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the courts of compromise negotiations.* This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

It is unlikely, in the context of a case before the Commission dealing with rate setting, that a party would seek to introduce into evidence either information regarding settlement discussions or settlements to “prove liability for or invalidity of [a] claim.”<sup>21</sup> The rule itself provides a non-exhaustive list of other valid evidentiary purposes to which information regarding settlement discussions or settlements could be put. Therefore, the OCC should be able, as deemed necessary under the circumstances of the upcoming hearing, to use the existence of side agreements and negotiations regarding those side

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<sup>20</sup> Id. (emphasis added).

<sup>21</sup> Evid.R. 408.

agreements to “prov[e] bias or prejudice of a witness.”<sup>22</sup> The January Entry does not appear to recognize this valid use of settlements discussions and settlements.

As stated above, the list of valid evidentiary uses for settlement discussions and settlements that is provided by Evid.R. 408 is non-exhaustive, as it must be as a general rule that applies to a broad spectrum of cases. In the context of a plan presented for post-MDP service, the Commission has stated that it evaluates alternatives to the requirements provided for under Ohio Adm. Code 4901:1-35 (“EDU Standard Service Offer”) based upon rate certainty for customers, the financial stability for the applicant utility, and encouragement for the competitive market.<sup>23</sup> The presence of side deals that provide rate discounts for only large customers may be important to, *inter alia*, the Commission’s determination regarding elevated rates for small customers (including all residential customers), the Commission’s judgment regarding Duke Energy’s over-compensation for its standard service offer service, and discriminatory as well as predatory pricing that is destructive to the competitive market for generation service. The January Entry should be revisited or clarified to state that information regarding settlements discussions and settlements may be considered by the attorney examiners as possible evidence for their importance to the Commission’s test of post-MDP service proposals, including the effect on the competitive market that exists as a central theme to the Commission’s consideration of post-MDP pricing plans.

The Deeds Complaint supports arguments that side agreements may have been used in a discriminatory and predatory manner toward winning approval of the

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<sup>22</sup> Id. See, e.g., *Maynard v. Owens-Illinois*, Ohio App. LEXIS 5841 at 2 (1993).

<sup>23</sup> See, e.g., Entry on Rehearing at 13 (November 23, 2004).

Company's proposals, in violation of R.C. 4905.32, 4905.33 and 4905.35.<sup>24</sup> The discriminatory and predatory scheme could have included violation of R.C. 4928.37, 4928.39, and 4928.40 that require that regulatory transition charges be collected on a non-bypassable basis from all "wires" customers.<sup>25</sup> It may also have included impermissible collaboration under 4928.02 ("anticompetitive subsidies") by an electric utility and its marketing affiliate to achieve anti-competitive objectives.<sup>26</sup> While these matters should be considered at the time of the hearing, statistics regarding shopping rates for customers of Duke Energy are suggestive. At the time of the hearing in the *Post-MDP Service Case*, switching rates for sales to Duke Energy's commercial and industrial customers were 22.04 percent and 19.7 percent, respectively.<sup>27</sup> As of September 2006, the switching rates for commercial and industrial customers had dropped to 8.23 percent and 0.35 percent, respectively.<sup>28</sup> The competitive options for residential customers are unlikely to develop under circumstances where alternative providers of generation service are in full retreat.<sup>29</sup> With the revelations contained in the Deeds Complaint, the Commission should certainly admit into evidence information regarding harm to the

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<sup>24</sup> Deeds Complaint at ¶7.

<sup>25</sup> *Id.*

<sup>26</sup> The marketing affiliate identified and described in the Deeds Complaint is Cinergy Retail Sales, LLC, the predecessor to Duke Energy Retail Sales, LLC. Deeds Complaint at ¶¶5-10.

<sup>27</sup> Tr. Vol. II at 133 (Stevie) (May 20, 2004).

<sup>28</sup> <http://www.puco.gov/cmplibrary/files/util/mktmonitoringelecucustswitchrates> (last visited January 22, 2006).

<sup>29</sup> The switching rate was 4.91 percent of sales at the time of the hearing. Tr. Vol. II at 133 (Stevie) (May 20, 2004). The figure from the Commission's web site for September 2006 was 1.75 percent.

competitive market that may have resulted from Duke Energy's predatory use of side agreements.

Pursuant to (*inter alia*) R.C. 4903.09, the Supreme Court of Ohio has charged this Commission with reaching a decision based on evidence in the record and conclusions of law regarding various charges that Duke Energy proposed as part of the Post-MDP Service Case.<sup>30</sup> Given the potential magnitude of the payments to large customers as part of the side deals, as alleged in the Deeds Complaint, residential customers may have been asked to pay for this windfall to large customers or residential customers may have suffered harm in other ways under law and rule as a result of the side deals. It is imperative that the OCC be able to make an evidentiary record regarding the remuneration associated with the side deals in order to properly and comprehensively examine the level of the charges that residential customers have been asked to bear. Thus, the side deals are very relevant to determining the appropriateness of the charges Duke Energy seeks to impose on customers.

- B.** The Commission's January Entry prematurely deals with the admissibility of evidence before such evidence is presented at hearing, and takes such a step in conflict with the requirement that a quasi-judicial decision-maker is "required to permit a full hearing upon all subjects pertinent to the issues(s), and to base [its] conclusion upon competent evidence." *City of Bucyrus v. State Dept. of Health*, 120 Ohio St. 426, 430.

The Commission should remain open to the presentation of evidence regarding the pillars upon which the PUCO has based its post-MDP decisions. The OCC's above-stated list of the uses to which side deals and negotiations over the side might be put must, by necessity, remain tentative while the OCC continues its discovery efforts and otherwise develops its case. During

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<sup>30</sup> See, e.g., *Consumers' Counsel 2006* at ¶95.

this period prior to the hearing, the Commission should also keep an open mind towards the presentation of evidence.

In the context of a review of an administrative decision, the Ohio Supreme Court stated:

While the technical rules of a hearing by a court are not required to be strictly observed in hearings before administrative bodies, it is the duty of such bodies to permit a full hearing upon all subjects pertinent to the issue, and to base their conclusion upon competent evidence; and such result can better be accomplished by a substantial adherence to the rules observed in hearings in court.<sup>31</sup>

The January Entry does not comply with the requirement that an administrative body must provide a “full hearing upon all subjects pertinent to the issue” to the extent that it limits the OCC’s presentation of settlement discussions and side deals to only the impact upon the possible advantage gained by some parties during bargaining regarding post-MDP pricing. The issue before the Commission upon remand is the support for, or lack thereof, the post-MDP pricing plan proposal presented by Duke Energy after the hearing concluded in the *Post-MDP Service Case*. The Commission should proceed in substantial adherence to the rules of evidence that -- as commented upon by the Ohio Supreme Court in *Consumers’ Counsel 2006* -- permit the presentation of information regarding settlements for several purposes at trial.

### III. CONCLUSION

The Commission, especially in light of the Supreme Court of Ohio’s rulings that give rise to this remand, should maintain neutrality and an open mind when considering the admissibility of side agreements and related negotiations. Thought provoking allegations -- in the form of the Deeds Complaint -- were raised just days after the Ohio Supreme Court’s remand of the *Post-MDP Service Case*. A voice that formerly came

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<sup>31</sup> *City of Bucyrus v. State Dept. of Health*, 120 Ohio St. 426, 430.



from within the Duke affiliated companies alleges that these companies have acted to destroy competition in Duke Energy's service territory. These agreements, if presented at a hearing in this case by the OCC or some other party, may cast shadows on more than the seriousness of the bargaining that took place in the *Post-MDP Service Case*. The agreements may show that Duke Energy has acted to undermine the statutory framework that was enacted to protect Ohioans from discriminatory and predatory practices that undermine the competitive market for the provision of generation service. In a remand that exists because the Court concluded the Commission failed to have the lawful record for its decision-making, the Commission's new opportunity for an evidentiary hearing should provide for the full hearing on these matters as required by law.

The OCC's Application for Rehearing should be granted. The Commission should find or clarify that its January Entry provided grounds upon which evidence of side deals could be presented but that the PUCO did not determine (prematurely) that it has limited the grounds upon which settlement discussions and settlements may be introduced into evidence.

Respectfully submitted,

Janine L. Migden-Ostrander  
Consumers' Counsel

A handwritten signature in black ink, appearing to read "Jeffrey L. Small", is written over a horizontal line.

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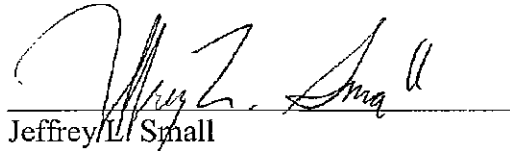
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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing  
*Application for Rehearing* has been served according to the e-mail distribution list  
(provided by the Attorney Examiner) this 1st day of February 2007.



Jeffrey L. Small  
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