

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

AMEREN ENERGY GENERATING CO.,)
)
Petitioner,)
)
v.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY)
)
Respondent.)

RECEIVED
CLERK'S OFFICE

SEP 16 2009

STATE OF ILLINOIS
Pollution Control Board

PCB No. 09-38
(Thermal Demonstration-Water)

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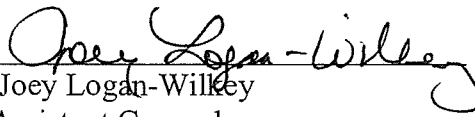
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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board the **POST-HEARING BRIEF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY**, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: 
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Assistant Counsel
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Dated: September 14, 2009
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THIS FILING PRINTED ON RECYCLED PAPER

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**POST-HEARING BRIEF OF THE ILLINOIS
ENVIRONMENTAL PROTECTION AGENCY**

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, by and through Joey Logan-Wilkey, one of its attorneys, and submits its post-hearing brief to the Illinois Pollution Control Board ("Board"). The Agency recommends that the Board **DENY** Ameren's petition because Ameren has failed to meet its burden of proof under 35 Ill. Adm. Code 106.200(a), and 35 Ill. Adm. Code 302.211(j).

I. INTRODUCTION

On December 15, 2008, Ameren filed a petition to modify the site specific thermal limits granted by the Board pursuant to 35 Ill. Adm. Code 302.211(j)(5) on March 19, 1982, which requires that the discharge from the Coffeen Power Station in Montgomery County to its artificial cooling lake known as Coffeen Lake shall not result in a temperature, measured at the outside edge of the mixing zone, that exceeds 105 degrees Fahrenheit as a monthly average from June through September, and 112 degrees Fahrenheit as a maximum for more than three percent of the hours during that same

period; and exceeds 89 degrees Fahrenheit as a monthly average from October through May, and 94 degrees Fahrenheit as a maximum for more than two percent of the hours during that same period. These thermal limits were incorporated into Ameren's NPDES Permit as Special Condition No. 5.

Ameren is proposing to modify the specific thermal standard for its discharge to Coffeen Lake to state that the thermal discharge shall not result in a temperature, measured at the outside edge of the mixing zone, which exceeds 105 degrees Fahrenheit as a monthly average, from June through September, and 112 degrees Fahrenheit as a maximum for more than three percent of the hours during that same period; exceeds 89 degrees Fahrenheit as a monthly average, from November through April, and 94 degrees Fahrenheit as a maximum for more than two percent of the hours during that same period; and exceeds 96 degrees Fahrenheit as a monthly average, in each of the months May and October, and 102 degrees Fahrenheit as a maximum for more than two percent of the hours in each of those same months.

The Illinois EPA filed its recommendation regarding Ameren's petition on April 24, 2009, recommending that the Board deny Ameren's petition to modify the thermal standard for Coffeen Lake. The Agency recommended that the Board deny the petition because Ameren had failed to meet its burden under Section 28.1(c) of the Act, 415 ILCS 28.1 (2008), 35 Ill. Adm. Code 106.200(a), and 35 Ill. Adm. Code 302.211(j). Ameren has failed to demonstrate that the proposed modification is environmentally acceptable and within the intent of the Act, and has failed to demonstrate that the alternatives to the proposed modification to the thermal standard are technically infeasible and

economically unreasonable. The Board conducted the public hearing in this matter on June 23, 2009. Ameren filed its Post-Hearing Brief in this matter on August 13, 2009.

II. ARGUMENT

A. Ameren has failed to meet its burden of proof regarding the ability of Coffeen Lake to continue to be environmentally acceptable and within the intent of the Act under the proposed modification to the thermal limits.

Ameren argues that it is not required to make a showing of no environmental impact, and that the existence of a fishery is not required. Section 302.211(j)(3) of the Board regulations provides the standard of review for artificial cooling lake demonstrations: “At an adjudicative hearing the discharger shall satisfactorily demonstrate to the Board that the artificial cooling lake receiving the heated effluent will be environmentally acceptable, and within the intent of the Act, including, but not limited to: (A) provision of conditions capable of supporting shellfish, fish and wildlife, and recreational uses consistent with good management practices, and (B) control of the thermal component of the discharger’s effluent by a technologically feasible and economically reasonable method.” 35 Ill. Adm. Code 302.211(j)(3).

Ameren concedes that artificial cooling lakes must be capable of supporting a fishery, citing to the Board opinion In the Matter of: Water Quality and Effluent Standards Amendments, Cooling Lakes, R75-2 slip op. at 25 (Sept. 29, 1975). In that opinion, the Board stated: “Generally formed by damming an existing watercourse which is itself a protected water of the state, such artificial cooling lakes remain subject to the Board’s water quality and effluent standards.” Cooling Lakes, R75-2, slip op. at 4 (Sept. 29, 1975).

Dr. James McLaren, in his hearing testimony on behalf of Ameren, states that SIU has reported the entrapment of fish in coves near the mixing zone, resulting in fish kills. Dr. McLaren stated that SIUC, regarding the fish that have become entrapped and died, is “citing specifically within the discharge arm where they have taken refuge, but with a prolonged temperature increase, have for one reason or another, not vacated that water for temperatures in the lake better suited for their preference, their tolerance. So on one occasion, some limited numbers of fish have been killed.” Hearing transcript, p. 131, lines 4-11. When asked if SIUC “concluded that the cause of these entrapments was sudden temperature rise” Dr. McLaren stated “Yes, sudden and prolonged temperature rise.” Hearing transcript, p. 133, lines 2-6. Dr. McLaren also testified that he would agree that “at least some of the angling related fish mortalities were caused by – were in part caused by thermal stress.” Hearing transcript, p. 134, lines 5-10. When asked whether he was aware if any states have used the concept of degree days in setting water quality standards, Dr. McLaren responded that he “would venture to say that that would be a misapplication of degree days.” Hearing transcript, p. 135, lines 2-3. Dr. McLaren relied on the concept of degree days in the ASA report, the technical supporting document for the proposed standards, which would in effect be water quality standards for the Lake if adopted by the Board.

With regard to the Upper Incipient Lethal Temperature (“UILT”) for fish, Dr. McLaren acknowledged that for largemouth bass the UILT is 97.3 degrees Fahrenheit, while the preferred temperature for that species is 79.7 to 89.6 degrees Fahrenheit. Hearing Transcript pp. 153-154. Dr. McLaren acknowledged, in his hearing testimony, that the lethal end points “would likely be exceeded with the three species that we’re

looking at by the maximum temperatures for May and October.” Hearing Transcript p. 155, lines 4-8. Ameren’s primary witness regarding impacts of the proposed temperatures on the fish stated that the lethal end points for largemouth bass, bluegill, and channel catfish would be exceeded by the proposed thermal standard for May and October. Temperatures that exceed lethal end points for three of the Lake’s RIS are not indicative of conditions that support fish, shellfish, and wildlife. Moreover, Dr. McLaren acknowledged that the three RIS studied are heat tolerant species. Hearing Transcript at p. 154. So what does that mean for the other species of fish that exist in Coffeen Lake? Those species would likely show even greater negative impact from the proposed standards if studied. For example, Dr. McLaren stated that white crappie, another species that lives in the Lake, is less heat tolerant than the RIS. Hearing Transcript, p. 154.

When questioned about the three RIS cited in IDNR’s Lake Management Status Report for 2007 (“Report”), Dr. McLaren acknowledged that the Report states that relative weight for bluegill was only 82-89, while the Lake Management Goal was 90-110, and that the relative weight for catfish was only 89. Hearing Transcript, p. 172-177. When asked what IDNR meant by stating in the Report that the channel catfish “population continues in anguish” Dr. McLaren stated “I have no idea.” Hearing transcript, p. 177. If the RIS in the Lake are “in anguish” under the current thermal regime, what effect will the proposed temperature increase have on those populations?

The Board established the burden of proof for artificial cooling lakes, that they must be environmentally acceptable and within the intent of the Act. Ameren claims this burden is very easy to meet. They claim that the Board’s opinion in R75-2 supports their view that the fishery need not be optimal. In R75-2, the Board considered whether there

was “any degradation of water quality” in the artificial cooling lake that could be attributable to the power plant’s thermal effluent, including lake levels of phosphorus, mercury, and dissolved oxygen. Slip op. at 16. The Board used Lake Sangchris as an example of an artificial cooling lake that did not exhibit a degradation of water quality, specifically stating that the lake had low levels of phosphorus, and mercury levels were “rarely at the detectable limit.” Id. The Agency has presented evidence that Coffeen Lake is currently out of compliance with mercury and phosphorus water quality standards and that increased thermal loading may exacerbate those violations.

Coffeen Lake is currently on the Agency’s 303(d) list of impaired waters for its phosphorus levels. Ameren’s witness, Dr. Ann Shortelle, testified at hearing that the proposed modification may cause an increase in the Lake’s phosphorus level. When asked whether the proposed increased thermal standards for May and October would result in an increase in the phosphorus in the Lake, Dr. Shortelle stated: “The blue bar graph, but the specific numbers using those two flux rates was an additional - - in round numbers, 48 kilograms of phosphorus per year to 96 kilograms of phosphorus per year.” Hearing Transcript p. 225, lines 19-23. Dr. Shortelle also testified that the use of different flux rates account for the differing calculations of the internal loading of phosphorus in the Lake. The evidence presented at hearing showing that phosphorus will increase under the proposed temperatures demonstrates that the proposed thermal standard is not environmentally acceptable and within the intent of the Act. Dr. Shortelle also testified that increasing lake temperature may also increase the methylation of mercury in the Lake. This is further evidence that the proposed modification to the thermal standard is not environmentally acceptable and within the intent of the Act.

The Board in 75-2 also discussed dissolved oxygen in artificial cooling lakes when assessing the impact of thermal effluent on water quality. The proposed modification to the Lake's thermal standard may also result in violations of the Dissolved Oxygen water quality standards of 35 Ill. Adm. Code 302.206. The evidence presented at hearing shows that an increase in temperature in May and October will increase the number of anoxic days. Dr. Shortelle testified that the increased temperatures in May and October would increase the number of anoxic days from 18 to 23 days in segment 1 and 17 to 25 days in segment 2 in May, and an increase in segment 1 from 1 to 13 days and in segment 2 from 1 to 11 days in October. Hearing Transcript p. 228 lines 19-25, p. 229 lines 1-5.

During the hearing, Mr. James Williams, manager of the Coffeen Power Station, testified that Ameren does not monitor the temperature of the discharge from the Lake to the stream. The regulations require that any discharge from the Lake to the stream must meet the thermal standards. The Board regulations at 35 Ill. Adm. Code 302.211(j)(1) state that "All discharges from the artificial cooling lake to other waters of the State comply with the applicable provisions of subsections (b) through (e)" of 35 Ill. Adm. Code 302.211. In addition to the numeric limits in subsection (e), overflows from Coffeen Lake must also comply with the following requirements of the Board regulations: there shall be no abnormal temperature changes that may adversely affect aquatic life unless caused by natural conditions, 35 Ill. Adm. Code 302.211(b); the normal daily and seasonal temperature fluctuations which existed before the addition of heat due to other than natural causes shall be maintained, 35 Ill. Adm. Code 302.211(c); and the maximum temperature rise above natural temperatures shall not exceed 2.8°C (5° F), 35 Ill. Adm. Code 302.211(d).

If relief is granted to Ameren, the Board order must specify the requirements applicable to Ameren and how compliance with these conditions will be met. In the current relief, simply requiring compliance with applicable provisions of 35 Ill. Adm. Code 302.211(b) through (e) has not been sufficient to assure compliance because Ameren is not required to monitor discharges from Coffeen Lake. Under Section 302.211(j)(2) of the Board regulations, 35 Ill. Adm. Code 302.211(j)(2), Ameren must demonstrate that thermal relief will not result in violations of other water quality standards in Subtitle C of the Board's regulations. Failure to do so requires denial of the artificial cooling lake demonstration.

B. Ameren has failed to demonstrate that there are no technically Feasible and economically reasonable alternative treatment technologies.

Section 302.211(j)(3)(B) of the Board regulations, 35 Ill. Adm. Code 302.211(j)(3)(B), states "At an adjudicative hearing the discharger shall satisfactorily demonstrate to the Board that the artificial cooling lake receiving the heated effluent will be environmentally acceptable, and within the intent of the Act, including, but not limited to ... (B) control of the thermal component of the discharger's effluent by a technologically feasible and economically reasonable method." There is no dispute about the alternative technically feasible methods of control in this case. Derating and cooling towers are both currently utilized and could be expanded.

During the hearing, Ameren presented evidence that the alternative treatment technologies are not economically reasonable, and continues to make that argument in its Brief. Ameren is arguing that investments in supplemental cooling must pay for themselves over the lifetime of the equipment in order to be considered economically reasonable. Ameren's definition of economic reasonableness in this context is whether or

not a thermal technology will allow Ameren to generate enough additional power so as to see an actual profit on the investment in the supplemental cooling capacity. Acceptance of Ameren's economic reasonableness argument in this case would jeopardize the basis of most regulatory decisions that require a consideration of economic reasonableness. It will be a very rare case where environmental controls result in a profit to the regulated entity.

Petitioner states "Ameren has already made substantial investments in cooling technologies to control the Station's thermal effluent to Coffeen Lake. Ameren has spent \$26 million on the construction of a 70-acre cooling basin and a 48-cell, 200,000 gallon per minute (gpm) cooling tower system." Petitioner's Brief at 2. Contrary to these statements, testimony at the hearing and a review of the Record makes clear that these investments were undertaken to increase profits at the Coffeen Station, not to improve environmental conditions in Coffeen Lake or to increase compliance with thermal limits. These improvements were undertaken after Ameren came to this Board requesting regulatory relief in PCB 97-131, making the following argument: "CIPS evaluated the thermal performance of Coffeen Lake and various alternatives that would allow for higher generation levels. (Am. Pet. at 8.) Four cooling tower options were reviewed after the evaluation. (Am. Pet. at 8.) However, due to high initial capital costs and ongoing operating and maintenance expenses, all of the alternatives were rejected. (Am. Pet. at 8.) CIPS believes that these costs were not practical considering the infrequent and unpredictable nature of when they would be needed. (Am. Pet. at 9.)" PCB 97-131 (June 5, 1997) at 3. After arguing that the installation of supplemental cooling would cause economical hardship and being granted relief from the Board based on that hardship,

Ameren chose to install supplemental cooling technologies to allow for increased energy production.

As Mr. Williams testified for Ameren in the hearing in this proceeding on June 23, 2009:

“And initially when we did the EVA [Economic Value Added], it did show 11 ½ year payback, which meant I can invest the 18 million, and in 11 ½ years, it would pay back on a capital – a piece of equipment that would typically have a 15-year capital life.

Since then, as I mentioned, we are in a deregulated environment. And we annually review all of our capital projects. And in this EVA model, it does show our forward price curves, as well as any additional environmental projects we may have. And when we reran the analysis, it does come back that it is a negative \$2.7 million. So it is not economically viable.”

Hearing Transcript at Page 16 at lines 7-19.

When both the Board and the Agency attempted to clarify this point, Mr. Williams gave the same explanation:

“Q (Ms. Liu) “But to put it into context, you threw out the number negative 2.7 million. That means it’s not economically viable. At zero, does it become economically viable, or does it have to be a positive number?”

A (Mr. Williams) “I’d have to review that, but you’d want it to be a payback period before you’d make an investment and lose \$2.7 million through the life of a cooling tower is what that analysis would show. Before the life of that cooling tower, I’d have to – I’d lose money there, and plus the cooling tower would be at the end of its life. You’d make – that’s what the analysis would take into account, the full life expectancy of the cooling towers. So, yes, that’s correct.”

Hearing Transcript at Page 74, Lines 5-20.

“Q (Ms. Williams) Just to follow up on the Board’s question. Do you believe that’s the economic reasonableness test that the Board should consider whether or not Ameren can make a profit off the installation of the treatment technology?

A (Mr. Williams) No, I don’t believe the profit. It needs to be a payback to be economically viable.

Q So it needs to be zero before it’s considered economically reasonable by the Board?

A Yes, and it would be considered, correct.”

Page 74 Line 22 through Page 75, Line 7.

The installation of additional cooling systems and de-rating are technically feasible and economically reasonable alternatives treatments available to Ameren.

Ameren has failed to demonstrate a lack of alternative treatments that are technically feasible and economically reasonable.

C. Ameren has failed to make a 316(a) demonstration that is consistent with Federal Law.

1. State Law

Section 302.211(j) of the Board regulations, 35 Ill. Adm. Code 302.211(j), sets forth the requirements for an artificial cooling lake demonstration, allowing exceptions from the temperature water quality standards when all of the conditions provided have been met. Failure to comply with any of these will require the Board to deny the relief requested. Section 302.211(j)(4) states that the “required showing in subsection (j)(3) may take the form of an acceptable final environmental impact statement or pertinent provisions of environmental assessments used in the preparation of the final environmental impact statement, or may take the form of showing pursuant to Section 316(a) of the Clean Water Act (CWA) (33 U.S.C. 1251 et seq.), which addresses the requirements of (j)(3).” 35 Ill. Adm. Code 302.211(j)(4).

Ameren argues that the list of formats for the artificial cooling lake demonstration are illustrative only and not mandatory and cites to the Board Opinion in R75-2. The Board likely did intend to provide some flexibility and did not intend to require the submittal of a 316(a) demonstration by the Petitioner in all cases. The Board still must address whether Ameren has included all of the information that is needed to make its decision.

The relief requested must take the form of a water quality standard change that requires federal approval under Section 303(c) of the Clean Water Act. Ameren correctly points out the uniqueness of the Clean Water Act’s treatment of heat as a pollutant. This

is true under State law as well. Not only must Ameren comply with the requirements of State law, but the Board should ensure consistency of the interpretation of State law and the Clean Water Act.

2. Federal Law

Section 316(a) of the Clean Water Act states: “With respect to any point source otherwise subject to the provisions of section 1311 of this title or section 1316 of this title, whenever the owner or operator of any such source, after opportunity for public hearing, can demonstrate to the satisfaction of the Administrator (or, if appropriate, the State) that any effluent limitation proposed for the control of the thermal component of any discharge from such source will require effluent limitations more stringent than necessary to assure the projection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge is to be made, the Administrator (or, if appropriate, the State) may impose an effluent limitation under such sections for such plant, with respect to the thermal component of such discharge (taking into account the interaction of such thermal component with other pollutants), that will assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on that body of water.” 33 U.S.C. §1326.

Section 303(c) of the Clean Water Act states as follows: “Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses...” 33 U.S.C. §1313(c)(2)(A).

In addition to a site specific thermal limit, federal law would also permit a water quality standard change to take the form of a change in use designation through a use attainability analysis.

In its Petition, Ameren cites to Section 28.1 of the Environmental Protection Act as a basis of its Petition but does not mention the Adjusted Standard provisions from that Section of the Environmental Protection Act in its post-hearing brief. Instead, Ameren simply cites to the Board's thermal regulations for artificial cooling lake demonstrations in 35 Ill. Adm. Code 302.211(j) and the procedural requirements in 35 Ill. Adm. Code 106.200 et al [sic]. Petitioner's Post-Hearing Brief also states that Ameren "requests a modification to the thermal limits granted by the Board in 1982 for the cooling water discharge from Coffeen Power Station ('Station') to Coffeen Lake." Brief at 1. In 1997, when Ameren last came to the Board for relief from the May and October thermal limits, it utilized a Variance proceeding for temporary relief. See PCB 97-131. However, Ameren stated that it would Petition the Board for a site-specific rulemaking after three years. PCB 97-131, slip op. at page 3.

Ameren is vague in identifying the provision in the Environmental Protection Act that would serve as the basis for the requested relief. While the initial Board regulation in R75-2 required Artificial Cooling Lake demonstrations to be made in a regulatory proceeding, this was later changed to an adjudicatory proceeding but was addressed independently in the procedural rules from other types of adjudicatory proceedings.

The Board cannot generally grant an alternative effluent limit where that effluent limit will result in the water quality standard being violated without creating inconsistencies with federal law. Alternative effluent limits including those that grant

relief from the prohibition against causing a violation of water quality standards (i.e., 35 Ill. Adm. Code 304.105) must also be treated as a water quality standard change in order to be consistent with the Clean Water Act. See, In the Matter of: Site Specific Rule for City of Effingham Treatment Plant Fluoride Discharge, 35 Ill. Adm. Code 304.233, R03-11, First Notice Opinion (July 24, 2003).

The Board regulation requiring that the showing take the form of a 316(a) demonstration is designed to make the Artificial Cooling Lake demonstration approvable as a 316(a) demonstration by U.S. EPA, permitting it be to included in the NPDES permit. Consistent with Section 303(c) of the Clean Water Act, an Artificial Cooling Lake demonstration is a regulatory relief mechanism (like an adjusted standard or site-specific rulemaking) that results in a water quality standard change that must be submitted to U.S. EPA for approval.

Absent a change in the use designation, Ameren must show that the site-specific water quality standard requested will be protective of aquatic life as designated by the General Use standard. Ameren has not suggested that this is a change in use designation. Ameren must show aquatic life that live in Coffeen Lake will be protected by the relief. Testimony on thermal impacts and impacts of the thermal effluent on other parameters shows this is not the case.

Because the Agency believes Ameren has not made a sufficient showing to gain federal approval of the relief requested as a water quality standard change, the documentation submitted with this Petition is not sufficient.

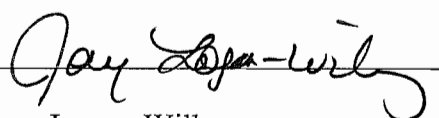
III. CONCLUSION

Pursuant to 35 Ill. Adm. Code 106.200(a), and 35 Ill. Adm. Code 302.211(j), the Illinois EPA recommends that the Board **DENY** Ameren's request to modify the thermal standard for Coffeen Lake. Ameren has failed to meet its burden under the Act and Board regulations. Ameren has failed to prove that the proposed standards will be environmentally acceptable and within the intent of the Act. Further, Ameren has failed to show that the available treatment alternatives are not economically reasonable and technically feasible. The installation of additional cooling technologies and de-rating are available treatment alternatives that are technically feasible and economically reasonable.

WHEREFORE, for the reasons stated herein, the Illinois EPA recommends that the Board **DENY** Ameren's Petition.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: 

Joey Logan-Wilkey
Assistant Counsel
Division of Legal Counsel

Dated: September 14, 2009

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CERTIFICATE OF SERVICE

I, Joey Logan-Wilkey, certify that I have served the attached **POST-HEARING BRIEF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY**, by first class mail, upon the following persons:

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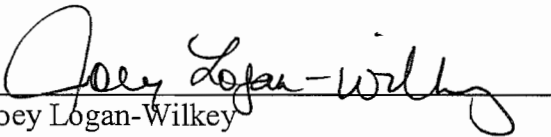
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Dated: September 14, 2009


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