

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE JOINT APPLICATION)	
OF AVANGRID, INC., AVANGRID NETWORKS,)	
INC., NM GREEN HOLDINGS, INC.,)	
PUBLIC SERVICE COMPANY OF NEW MEXICO)	
AND PNM RESOURCES, INC. FOR APPROVAL OF THE)	
MERGER OF NM GREEN HOLDINGS, INC.)	
WITH PNM RESOURCES, INC.; APPROVAL OF A)	CASE NO. 20-00222-UT
GENERAL DIVERSIFICATION PLAN; AND ALL)	
OTHER AUTHORIZATIONS AND APPROVALS)	
REQUIRED TO CONSUMMATE AND IMPLEMENT)	
THIS TRANSACTION)	
)	
AVANGRID, INC., AVANGRID NETWORKS, INC.,)	
NM GREEN HOLDINGS, INC.,)	
PUBLIC SERVICE COMPANY OF NEW MEXICO)	
AND PNM RESOURCES, INC.,)	
)	
JOINT APPLICANTS.)	
)	

**NEW ENERGY ECONOMY’S COMBINED RESPONSE TO JOINT APPLICANTS’
OBJECTIONS AND MOTION IN LIMINE AND JOINT APPLICANTS’ MOTION TO
STRIKE CERTAIN PORTIONS OF TESTIMONY AND EXHIBITS OF NEW ENERGY
ECONOMY WITNESS CHRISTOPHER K. SANDBERG**

New Energy Economy (“NEE”), through its counsel, responds to the Joint Applicants’ Motion in Limine and Motion to Strike, and requests that the Hearing Examiner deny both of these motions. In support, NEE states as follows:

I. Introduction

The New Mexico Public Regulation Commission has its own rules of evidence for Commission proceedings, codified at 1.2.2.35 NMAC. Importantly, these rules of evidence differ from the evidentiary rules contained in Rule 11 of the New Mexico Rules Annotated. Specifically, 1.2.2.35 NMAC does not contain a hearsay rule. Where the Commission wants to follow the provisions of the New Mexico Rules Annotated, it explicitly states that it will. *See*

1.2.2.35(A)(3) NMAC (permitting unsworn affirmations in Commission proceedings if they are made “in compliance with rule of civil procedure 1-011(B)NMRA”) However, where it does not explicitly adopt those rules, they do not apply. As our Court of Appeals noted in *State v. Greenwood*, 2012-NMCA-017, ¶ 38, “The Legislature knows how to include language in a statute if it so desires.” (*Citing Chatterjee v. King*, 2011-NMCA-012, ¶ 15). Surely the same principle applies to this Commission in the exercise of its rulemaking authority.

The presiding officer has wide latitude to consider evidence, and is not constrained by the rules of evidence used by the trial courts. As this Hearing Examiner noted in Case No. 13-00390-UT, “the Commission’s rules of evidence emphasize the importance of admitting ‘all relevant evidence.’” 13-00390-UT, *Order Partially Denying Objections and Motions to Strike of New Mexico Industrial Energy Consumers and the New Mexico Attorney General*, December 19, 2014, at 6. This is the “primary purpose” of the Commission’s evidentiary rules, which “are not intended to be restrictive. *Id.* The presiding officer shall consider the rules of evidence in the NMRA, but “shall not be bound by” them. 1.2.2.35(A)(2). The presiding officer “evaluate[s] the admissibility of proffered evidence, based upon its necessity, competence, availability, and trustworthiness.” *Id.* To further the goal of admitting all relevant evidence, the Commission and presiding officer can also order the production of additional evidence. 1.2.2.35(K).

This is a hearing before a Hearing Examiner. It is not a jury trial. Joint Applicants will not suffer any prejudice from having the Examiner hear Mr. Sandberg’s testimony and examine the documents and testimony he relied upon in formulating his expert testimony. Even if Mr. Sandberg’s testimony were inadmissible, there would be no error in its admission, unless the Hearing Examiner or Commission rested a decision on inadmissible evidence. *State v. Hernandez* 1999-NMCA-105, ¶ 22, 987 P.2d 1156 (“We presume that a judge is able to properly

weigh the evidence, and thus the erroneous admission of evidence in a bench trial is harmless unless it appears that the judge must have relied upon the improper evidence in rendering a decision.”) Joint Applicants can address their concerns with this testimony through cross-examination at the hearing.

This proceeding principally concerns whether the proposed merger is in the public interest. All of the evidence Joint Applicants seek to strike is relevant to that question, and the Hearing Examiner can consider it when making a decision on his recommendation to the Commission. NEE addresses each of Joint Applicant’s arguments below.

II. Seth Berry’s Verified Statement, attached as “Exhibit D” to Mr. Sandberg’s Testimony, is Relevant, Reliable and Trustworthy.

Experts can rely on hearsay information in their expert testimony. *State v. Chambers* 1972-NMSC-069, ¶ 10, 502 P.2d 999. Mr. Berry’s verified statement is admissible; because it is a statement that Mr. Sandberg relied upon in formulating expert testimony. Therefore, Mr. Berry does not have to provide testimony in the manner prescribed by the Commission’s rules. Mr. Berry is not a witness. Instead, Mr. Sandberg is an expert witness, and he can rely on the attachments to his testimony, including Mr. Berry’s verified statement, in giving his expert testimony. These attachments are “facts or data in the case that the expert has been made aware of or personally observed” and because “experts in the particular field he is addressing would reasonably rely on those kinds of facts or data in forming an opinion on the subject”, those facts or data “need not be admissible” for his opinions to be admitted. Rule-11-703 NMRA. *See e.g., Coulter v. Stewart*, 642 P.2d 602 (though hearsay relied on by expert may be inadmissible, experts may rely on hearsay under Rule-11-703).

Representative Berry has an impressive knowledge base relevant to the issues in this case. Mr. Berry is a Representative in the Maine House of Representatives, serving his seventh non-consecutive term. He is the House Chair of the Committee on Energy, Utilities and Technology and the founding Co-Chair of the Broadband Caucus. He has served as a state representative since December 2006, with the exception of 2015 and 2016. Representative Berry has also previously been elected by his House colleagues to serve as Assistant Majority Leader, and also as their Majority Leader. He is also a businessperson and former educator. As a Maine state legislator Representative Berry has focused on utility and energy legal and policy matters for 7 years; 5 of these as House Chair of the committee overseeing all utility matters. For more please see his verified statement attached to NEE's expert Sandberg's testimony. The Hearing Examiner has cited Representative Berry's verified statement in three of his orders: *Order Granting Joint Motion for Joinder of Iberdrola, S.A. for Just Adjudication*, June 8, 2021, at 13-14; *Procedural Order for Proceedings Addressing Contested Stipulation*, May 28, 2021, Attachments 1 (at p.3) and 2; and *Order Addressing New Energy Economy's Objection to Joint Applicants' Notice, Motion to Compel Discovery and Request for Remedy Regarding Spain's Official Investigation Into Avangrid/Iberdrola's Board Chairman Ignacio Galan & Other Executive Committee Members for Spying, Bribery and Fraud*, July 19, 2021, at 13.

As the Hearing Examiner determined in NM PRC Case No. 13-00390-UT "the Commission's rules of evidence emphasize the importance of admitting 'all relevant evidence'" citing 1.2.2.35(A) and 1.2.2.35 K NMAC. These rules "enable[] the Commission to gain access to all relevant evidence[.]" 13-00390-UT, *Order Partially Denying Objections and Motion to Strike of New Mexico Industrial Energy Consumers and the New Mexico Attorney General*, December 19, 2014, p. 6.

Representative Berry's statement was verified by him via an affidavit; his testimony also "satisfies the requirements of competence and trustworthiness. The testimony is admissible as competent evidence for substantive purposes under Rule 11-801 NMRA." *Id.*, at 9.

Joint Applicants' argument that this testimony is hearsay that should not be admitted is also without merit. This Hearing Examiner noted in Case No. 13-00390-UT that: "Hearsay testimony is not inadmissible *per se* under the Commission's rules of procedure" and that hearsay evidence, when admitted, can be given "the proper weight." *See*, 13-00390-UT, *Order Overruling and Denying PNKM's Objections and Motion to Strike Testimony of David an Winkle, Patrick Luckow, Dr. Michael McCally, and Ronald Lehr*, October 9, 2015, at 2-3. In that case, PNM sought to strike expert testimony on hearsay and other grounds. In ruling that the testimony was admissible, this Hearing Examiner also noted that in giving due weight to the challenged testimony, he could also consider PNM's objections and cross-examination. This case is no different.

III. The Reliable, Timely and Independent Management Audit by the Maine Public Utilities Commission of CMP and Avangrid is Central to the Determination of Whether Iberdrola/Avangrid is Fit to Serve PNM Ratepayers

The Liberty Report is relevant and necessary to the central question of this proceeding – whether the proposed merger is in the public interest – and should be admitted. In fact, the Commission and this Hearing Examiner have both been concerned with management audits during this proceeding, and the Examiner found that Joint Applicants have been "less than forthcoming on these issues." *Order Regarding Avangrid Service Quality Issues and Management Audits and Suspension of the Filing Date for Statements in Opposition to the May 7, 2021 Stipulation, May 11, 2021*, at 3. The Commission's April 29, 2021 Bench Request to

Avangrid requested information surrounding Avangrid's corporate structure, customer satisfaction, customer complaints, and associated reports. Additionally, the Hearing Examiner's May 11, 2021 *Order Regarding Avangrid Service Quality Issues and Management Audits and Suspension of the Filing Date for Statements in Opposition to the May 7, 2021 Stipulation* required the Joint Applicants to propose "a process to incorporate the results of the management audits from Connecticut and Maine into the record of this proceeding." *Id.* at 5.

Additionally, the Liberty Report is competent and trustworthy. The Maine Public Utilities Commission ("MPUC") commissioned this report and made it publicly available on July 12, 2021. Joint Applicants admit these facts in their July 13, 2021 *Notice of Filing of Management Audit in Maine and Other Regulatory Proceeding*. Additionally, because the MPUC commissioned this report, it is an "official rule, report, order, record, or other document prepared and issued by any government authority" and can be admitted into evidence under 1.2.2.35(F) NMAC.

Avangrid/Iberdrola's recent history of electric service unreliability and customer service failings in a utility of similar size could not be more relevant to this proceeding and the question of its fitness to serve New Mexico's ratepayers. PNM/Avangrid/Iberdrola seeks the exclusion of Representative Berry's verified statement and the July 12, 2021 management audit of CMP and Avangrid not because these issues are not central to the Commission's decision but because the testimony reflects poorly on Avangrid/Iberdrola's priorities, service quality, effectiveness, and cost of services, management focus and stability, expertise, planning, governance, and internal structure. For the reasons outlined above the Hearing Examiner should reject Joint Applicants' arguments that Mr. Berry's verified statement and the Liberty Consulting Group Report be excluded from record evidence in the case.

IV. The Hearing Examiner and Commission must Consider Evidence and Testimony regarding the Spanish Investigation into Iberdrola's Corporate Spying, Fraud and Bribery.

Like the Liberty Report, but for different reasons, all evidence and testimony regarding the Spanish Investigation is relevant and necessary to the central question of whether Avangrid/Iberdrola are competent, professional, and trustworthy, and whether the companies will adhere to the laws of the State of New Mexico and the regulatory policy, practices and procedures of this Commission; this is of great importance to the determination about whether the merger is in the public interest. The Hearing Examiner in this proceeding has already acknowledged that "If the Chairman and Chief Executive Officer of a company seeking an approval before the Commission is involved in a criminal investigation, the Commission deserves to know about it. And the Commission deserves to know what the criminal investigation is about." *Order Addressing New Energy Economy's Objection to Joint Applicants' Notice, Motion to Compel Discovery and Request for Remedy Regarding Spain's Official Investigation Into Avangrid/Iberdrola's Board Chairman Ignacio Galan & Other Executive Committee Members for Spying, Bribery and Fraud*, July 19, 2021, at 10.

The Hearing Examiner ordered Joint Applicants to produce documents related to the Spanish investigation in his order and explained why:

A criminal investigation involving issues such as bribery and falsification of documents is particularly concerning. The criminal investigation at issue here involves Ignacio Galan, who is the Chairman and CEO of Iberdrola, S.A. (which was recently joined as a party in this case). Mr. Galan is also the Chairman of the Board of Directors of Avangrid, Inc., which is a Joint Applicant. Moreover, the criminal investigation involves three other current and former Iberdrola executives.¹ ... Joint Applicants [] fail[ed] to provide the

¹ *Order Addressing New Energy Economy's Objection to Joint Applicants' Notice, Motion to Compel Discovery and Request for Remedy Regarding Spain's Official Investigation Into*

detail required to understand fully the seriousness of the matter and its relevance to this proceeding. The Notice raises questions that require further information.² ... Iberdrola's apparent investigations into its opponents in Europe are relevant to the potentially similar investigations that Iberdrola's American affiliates may be conducting of their American opponents.³ ... The Hearing Examiner, accordingly, finds that the Joint Applicants, including Iberdrola, should file supplemental testimony, pursuant to 1.2.2.35.K NMAC, about the facts underlying the investigations described in the June 24 Notice. The issues relate to the public interest. They relate to the Joint Applicants' claims about the high ethical standards of the Iberdrola/Avangrid group of companies and the contrary potential that they may conduct similar investigatory activities against their opponents here in New Mexico. The questions to be answered are identified in Attachment 1.⁴

"[S]everal of the news reports were issued by Reuters, which is not an unreliable news source." *Id.*, at 11. Mr. Sandberg included many documents attached as exhibits to his testimony about the investigation of Iberdrola/Avangrid's top management for corporate spying, fraud, bribery and falsification of documents, some of which were reported in Reuters, and others were from Spanish and UK dailies. It was not only appropriate that Mr. Sandberg included this in his testimony it is, again, relevant evidence that must be taken into account when making a determination about the fitness of these companies to serve and goes to their credibility and trustworthiness. Mr. Sandberg is an expert witness who can rely on the attachments to his testimony in giving his expert testimony. These attachments are "facts or data in the case that the expert has been made aware of or personally observed." Rule-11-703 NMRA. Furthermore, since the Commission's evidentiary rules do not exclude hearsay, and instead seek to admit all relevant evidence, the attachments should not be stricken from the record.

V. The Hearing Examiner can Consider Mr. Sandberg's Testimony and Exhibits regarding Attorney Marcus Rael.

Avangrid/Iberdrola's Board Chairman Ignacio Galan & Other Executive Committee Members for Spying, Bribery and Fraud, July 19, 2021, at 10.

² *Id.*, at 11.

³ *Id.*, at 13.

⁴ *Id.*, 13-14.

Again, Mr. Sandberg can rely on “facts or data in the case that the expert has been made aware of or personally observed” to formulate expert testimony. Rule 11-703 NMRA. Whether the facts or data relied upon constitute hearsay is not relevant to the question of admitting the expert testimony. Here Joint Applicants ask the Hearing Examiner to strike Mr. Sandberg’s rebuttal testimony that discusses the relationship between Attorney Marcus Rael and the Attorney General, and the alleged conflicts of interest that that relationship poses. The New Mexico Supreme Court highlighted the importance of alleged conflicts of interest stating:

We take this opportunity to stress the absolute importance of the conflict of interest portions of the Rules of Professional Conduct. It is essential that a tribunal determine whether an attorney or a law firm is disqualified from a case immediately upon being alerted to a potential conflict of interest. Until that determination is made, no further proceedings may take place. Conflicts of interest, left unchecked, could taint an entire case and call into question the integrity of the attorney-client relationship. A potentially conflicted attorney has a duty to step down from the case immediately upon discovering the conflict of interest. If the attorney flouts his or her professional duty to do so, the tribunal has a duty to immediately stay the proceedings to determine whether a conflict exists. Failing to stay the proceedings was error that seriously affected the fairness, integrity, or public reputation of the proceedings.

Living Cross Ambulance Serv., Inc. v. N.M. Pub. Regulation Comm’n 2014-NMSC-036, ¶ 22.

Actions and inactions taken by Iberdrola/Avangrid in this proceeding are relevant to whether this merger is in the public interest. “They relate to the Joint Applicants’ claims about the high ethical standards of the Iberdrola/Avangrid group of companies and the contrary potential that they may conduct similar investigatory activities against their opponents here in New Mexico.”⁵ Especially, in light of the more than one million dollars spent by Joint Applicants on advertisements on tv, in the newspapers, on radio, and on the web, the testimonies of Kump and Azagra Blazquez touting how ethical Iberdrola/Avangrid is and how beneficial the

⁵ *Order Addressing New Energy Economy’s Objection to Joint Applicants’ Notice, Motion to Compel Discovery and Request for Remedy Regarding Spain’s Official Investigation Into Avangrid/Iberdrola’s Board Chairman Ignacio Galan & Other Executive Committee Members for Spying, Bribery and Fraud*, July 19, 2021, at 14. (footnote omitted.)

merger will be, and Joint Applicants' efforts to conceal (past and/or current) wrongdoing herein, the information about the Rael/Balderas relationship and potential undue influence regarding settlement is certainly relevant.

A pattern and practice has emerged; the Rael/Balderas conflict of interest and undue influence (and potential fraud) laid out in the articles attached to Mr. Sandberg's testimony in conjunction with the underhanded and extra-legal misconduct in Spain and Maine evidences a disturbing *modus operandi* by the Iberdrola/Avangrid group. *See* Rule 11-404 NMRA. (Crimes, wrongs, or other acts are admissible: "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.") *See also, State v. Smith*, 1997-NMSC-017, 123 N.M. 52, 933 P.2d 851. (Where character is an element of the crime, claim or defense, there is no question as to its relevancy and its admission is governed by Rule 11-402 NMRA.) *State v. Abril*, 2003-NMCA-111, 134 N.M. 326, 76 P.3d 644, cert. denied, 134 N.M. 320, 76 P.3d 638. (Character evidence is admissible in a civil case where character is in issue, but the trait of character, desired to be proved by testimony in the form of opinion or evidence of reputation, must be directly in issue. In their testimony in this case, Mr. Kump and Mr. Azagra Blazquez, put traits of "transparency" and "world's most ethical companies" directly in issue. *See* Kump Dir., at 4 and Azagra Blazquez Dir., at 6

Mr. Sandberg does not offer testimony on this issue "to prove the truth of the matter asserted." Rule 11-801(C)(2) NMRA. In fact, he states in his testimony that he does not know whether a conflict of interest or undue influence exists or not, but it made an impression on him worth advising the Commission about. *See* Rule 11-803(1) NMRA. (Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.) The articles the Joint Applicants seek to exclude were included as a

classic exception to the hearsay rule and that can be seen in the way Mr. Sandberg referenced it – the present impression of the Balderas/Rael debacle jogged his memory about the existence of a conflict that tainted the nature of negotiations and impugned the integrity of a past regulatory matter, which he provided as reference, as well. *See* Rebuttal Testimony and Exhibits in Opposition to Proposed Transaction and Second Amended Stipulation of Christopher K. Sandberg on Behalf of New Energy Economy July 29, 2021 at 17-19 (discussing the importance of conflict of interest issues without opining on the truth of any allegations of conflict of interest in this proceeding).

Further, on July 27, 2021 the Hearing Examiner ordered several parties to file verified pleadings indicating their positions on whether a conflict of interests exists. *Order Requiring Positions of Joint Applicants, Attorney General, and Bernalillo County on Alleged Conflict of Interest* at 2. Today, the Hearing Examiner issued an order *Notice of Ex Parte Communications and Order Providing Opportunity to Respond*, indicating, once again, the lack of respect for and adherence to Commission’s rules and practice, and improper attempts at extra-legal influence in this proceeding. Lastly, the Joint Applicants have the opportunity to cross-examine Mr. Sandberg on these matters, to the extent he has information about it, argue it in briefs, and the Hearing Examiner is equipped to give this evidence the weight it deserves.

VI. Mr. Sandberg’s References to and Testimony Based Upon Judge Hempling’s Testimony Is Admissible.

In addition to the overarching principles discussed above that stress the importance of admitting all relevant evidence, Judge Hempling’s testimony is relevant, available, competent and trustworthy. Judge Hempling’s testimony is relevant, because it consists of his expert opinion on whether the proposed merger is in the public interest. It is available because the

Attorney General filed Judge Hempling’s testimony in this case on April 2, 2021. It is competent and trustworthy, because Judge Hempling filed his testimony under oath, has extensive experience in regulatory matters as evidenced by his recent appointment to the FERC, among other qualifications included in his resume attached to his April 2, 2021 testimony, and because his testimony is an admission of a party opponent under Rule 11-801(D)(2) NMRA.

Additionally, Judge Hempling has made no mention that having his direct testimony entered into the record presents a “conflict with official Government duties and responsibilities”, and no party has presented evidence that it does. 5 C.F.R. § 2635.101(b)(10). Joint Applicants have failed to provide any verified evidence that Judge Hempling is unavailable or that his appearance at hearing or his testimony will result in a conflict. To the extent that his testimony in this case may present a future conflict, that hypothetical conflict can be addressed in the proceeding in which it arises, if it ever does. This is a purely hypothetical concern that the Commission need not consider. *See State v. Barnett* 1973-NMCA-098 ¶9, 512 P.2d 977 (“Should defendant’s hypothetical situation become reality, we will deal with it at that time.”). *See also Santa Fe Southern Ry. v. Baucis Ltd. Liab. Co.* 1998-NMCA-002, ¶ 25, 952 P.2d 31, (considering hypothetical situations “which may or may not arise” wastes judicial resources.) (Citing *New Mexico Indus. Energy Consumers v. New Mexico Pub. Serv. Comm’n.* 1991-NMSC-018, ¶ 25, 808 P.2d 592. *See also State v. Carillo* No. 35,503 N.M. Ct. App. Sept. 13, 2016 ¶ 4 (non-precedential) (“We will not address hypothetical issues that could have no effect on the resolution of a case.”))

VI. Conclusion

None of Joint Applicants' arguments are sufficient to justify their two motions that seek to limit the testimony and other evidence in this proceeding. This is especially true in light of the Commission's "interest in receiving all relevant evidence", and it is consistent with the Commission's duty to protect the public interest. *See Order Partially Denying Objections and Motions to Strike of New Mexico Industrial Energy Consumers and the New Mexico Attorney General* at 10. (Citing *Mountain States Tel. & Tel. Co. v. New Mexico State Corp.* Comm. 1977-NMSC-032, ¶ 19, 563 P.2d 588)⁶ All of the evidence the Joint Applicants seek to strike will aid the Commission in making a decision about whether the proposed merger is in the public interest and the evidence is consistent with Commission rule 1.2.2.35 NMAC. New Energy Economy respectfully requests that the Hearing Examiner deny *Joint Applicants' Motion in Limine* and *Joint Applicants' Motion to Strike Certain Portions of Testimony and Exhibits of New Energy Economy Witness Christopher K. Sandberg* in their entirety.

Respectfully submitted this 4th day of August, 2021.

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BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

⁶ The Commission has a "duty to be a prime mover in the procedure to see that the public interest is protected" and "[c]onsidering this broad mandate it could hardly be envisioned that the Commissioners would sit as spectators, like Roman Emperors in the coliseum, and simply exhibit a 'thumbs-up or thumbs-down judgment after the dust of battle settles in the arena.'"

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 GREEN HOLDINGS, INC., PUBLIC SERVICE COMPANY)
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 APPROVAL OF THE MERGER OF NM GREEN)
 HOLDINGS, INC. WITH PNM RESOURCES, INC.;)
 APPROVAL OF A GENERAL DIVERSIFICATION PLAN;)
 AND ALL OTHER AUTHORIZATIONS AND APPROVALS)
 REQUIRED TO CONSUMMATE AND IMPLEMENT THIS)
 TRANSACTION)

Case No. 20-00222-UT

CERTIFICATE OF SERVICE

I CERTIFY that on this date I sent via email to the parties and individuals listed below a true and correct copy of:

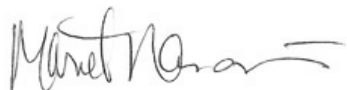
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Respectfully submitted this 4th day of August, 2021.

New Energy Economy,



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