

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

The Town of Weymouth, Massachusetts,	)	
Petitioner,	)	
	)	
and	)	
	)	
Fore River Residents Against the	)	
Compressor Station, <i>et al.</i> ,	)	
Petitioners,	)	
	)	
v.	)	Nos. 17-1135 & 17-1139
	)	(consolidated)
Federal Energy Regulatory Commission,	)	
Respondent.	)	

**MOTION TO DISMISS FOR LACK OF JURISDICTION**

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Circuit Rule 27, Respondent Federal Energy Regulatory Commission (“FERC” or “Commission”) moves to dismiss the petitions for review for lack of jurisdiction.<sup>1</sup> The challenged agency orders are not final orders. Requests for rehearing of those orders – including requests filed by petitioners here – are pending before the Commission, and the Commission will act on those rehearing requests in a timely manner. That the Commission does not, at this moment, have a quorum of

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<sup>1</sup> This motion is modeled after the Commission’s motion to dismiss currently pending before this Court in *Allegheny Defense Project, et al. v. FERC*, No. 17-1098 (D.C. Cir. filed Mar. 23, 2017). *See* Respondent’s Motion to Dismiss,

Commissioners to transact agency business, and issued “tolling orders” announcing that it will act on the pending rehearing requests at a later time, does not alter this Court’s jurisdictional analysis – the petitions for review are, by the standards of this Court, “incurably premature.”

In the alternative, should this Court not dismiss the petitions, it should hold the petitions in abeyance pending completion of agency proceedings.

## **BACKGROUND**

### **I. Statutory And Regulatory Background**

The petitioners in No. 17-1135, The Town of Weymouth, Massachusetts (“Weymouth”), and in No. 17-1139, Fore River Residents Against the Compressor Station; Food & Water Watch; City of Quincy, Massachusetts; Rebecca Haugh; Sandra Peters; Eastern Connecticut Green Action; Keep Yorktown Safe; West Roxbury Saves Energy; Berkshire Environmental Action Team; Dragonfly Climate Collective; Grassroots Environmental Education; Safe Energy Rights Group; 350Mass South Shore Node; Toxic Action Center; and Stop the Algonquin Pipeline Expansion (collectively, “Coalition”), filed their petitions for review pursuant to Natural Gas Act section 19(b), 15 U.S.C. § 717r(b). *See* Weymouth Petition for Review at 2-3; Coalition Petition for Review at 1-2.

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*Allegheny Defense Project, et al. v. FERC*, No. 17-1098 (filed Apr. 28, 2017), ECF No. 1673156.

Natural Gas Act section 19(a), 15 U.S.C. § 717r(a) provides, in pertinent part, that: an aggrieved party may file a request for rehearing of a Commission order within 30 days after the Commission issues that order; “[n]o proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon;” and “[u]nless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied.”

Under Natural Gas Act section 19(b), 15 U.S.C. § 717r(b), “[a]ny party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States . . . by filing in such court, within sixty days after the order of the Commission upon application for rehearing, a written petition . . . .” The statutory prerequisites of a request for rehearing, an order on rehearing, and a petition for review within 60 days of the rehearing order are mandatory; failure to satisfy any of these prerequisites deprives the reviewing court of jurisdiction. *Process Gas Consumers Grp. v. FERC*, 912 F.2d 511, 514 (D.C. Cir. 1990); *see also Williston Basin Interstate Pipeline Co. v. FERC*, 475 F.3d 330, 336 (D.C. Cir. 2006) (“Statutory jurisdictional requirements, such as the provisions of 15 U.S.C. § 717r, are not mere technicalities that can be brushed aside by a court.”); *Clifton Power Corp. v. FERC*, 294 F.3d 108, 111-12 (D.C. Cir. 2002) (a petition for review filed

before the rehearing order issues is “incurably premature” and “must be dismissed”).

## **II. Factual Background**

On January 25, 2017, the Commission issued the first of the orders challenged here, *Algonquin Gas Transmission, LLC*, 158 FERC ¶ 61,061 (2017) (“Certificate Order”), which conditionally granted Algonquin Gas Transmission, LLC (“Algonquin”) and Maritimes & Northeast Pipeline, L.L.C.’s application, filed under Natural Gas Act section 7(c), 15 U.S.C. § 717f(c), for authorization to construct and operate the Atlantic Bridge pipeline project. Certificate Order, 158 FERC ¶ 61,061 PP 1-2. In accordance with Natural Gas Act section 19, Weymouth and the Coalition filed requests for rehearing of the Certificate Order. *See* The Town of Weymouth Request for Rehearing, Docket No. CP16-9-001 (Feb. 24, 2017); Fore River Residents Against the Compressor Station, *et al.* Request for Rehearing, Docket No. CP16-9-001 (Feb. 24, 2017); Sandra Peters Request for Rehearing, Docket No. CP16-9-001 (Feb. 24, 2017). And as permitted by 18 C.F.R. § 385.212, Weymouth and the Coalition each moved for an agency stay of the certificate’s effectiveness. *See* The Town of Weymouth Motion for Stay, Docket No. CP16-9-000 (Feb. 24, 2017); Fore River Residents Against the Compressor Station, *et al.* Request for Rehearing, Docket No. CP16-9-001, at 43-

46 (Feb. 24, 2017); Sandra Peters Request for Rehearing, Docket No. CP16-9-001, at 1 (Feb. 24, 2017).

On March 27, 2017, pursuant to authority delegated by the Commission in 1995,<sup>2</sup> the Secretary of the Commission (“Secretary”) issued a procedural order tolling the time for the Commission to issue its order addressing the matters raised in the requests for rehearing of the Certificate Order. *Algonquin Gas Transmission, LLC*, Docket No. CP16-9-001 (Mar. 27, 2017) (“First Certificate Tolling Order”). That order stated:

Rehearings have been timely requested of the Commission order issued on January 25, 2017, in this proceeding. *Algonquin Gas Transmission, LLC*, 158 FERC ¶ 61,061 (2017). In the absence of Commission action within 30 days from the date the rehearing requests were filed, the request for rehearing (and any timely requests for rehearing filed subsequently)<sup>3</sup> would be deemed denied. 18 C.F.R. § 385.713 (2016).

In order to afford additional time for consideration of the matters raised or to be raised, rehearing of the Commission’s order is hereby granted for the limited purpose of further consideration, and timely-filed rehearing requests will not be deemed denied by operation of

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<sup>2</sup> See *Delegation of Authority to the Secretary, the Director of the Office of Electric Power Regulation and the General Counsel*, 60 Fed. Reg. 62,326 (Dec. 6, 1995), FERC Stats. & Regs., Reg. Preambles Jan. 1991-June 1996 ¶ 31,030 (1995) (“1995 Delegation Order”) (codified in 18 C.F.R. § 375.302(v)).

<sup>3</sup> See *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 95 FERC ¶ 61,173 (2001) (clarifying that a single tolling order applies to all rehearing requests that were timely filed).

law. Rehearing requests of the above-cited order filed in this proceeding will be addressed in a future order.

On the same day, Commission staff separately issued a letter order, pursuant to delegated authority codified in 18 C.F.R. 375.308(x), authorizing Algonquin to proceed with construction of certain facilities in Connecticut. *See* FERC Letter Authorizing Construction of Connecticut Facilities at 1-2 (Mar. 27, 2017) (“March Authorization Letter”) (explaining that Algonquin had provided the “information necessary to meet the construction conditions of the [Certificate Order] for the activities approved herein” and obtained “all federal authorizations relevant to the approved activities”).

On April 13, 2017, Commission staff issued another letter order authorizing Algonquin to proceed with construction of certain other facilities in Connecticut. *See* FERC Letter Order Authorizing Construction of Connecticut Facilities at 1-2 (Apr. 13, 2017) (“April Authorization Letter”) (making same determinations as in the March Authorization Letter).

Weymouth sought rehearing of the First Certificate Tolling Order. *See* The Town of Weymouth Request for Rehearing, Docket No. CP16-9-004 (Apr. 26, 2017). The Coalition sought rehearing of the March Authorization Letter. *See* Fore River Residents Against the Compressor Station, *et al.* Request for

Rehearing, Docket No. CP16-9-003 (Apr. 7, 2017).<sup>4</sup> Neither Weymouth nor the Coalition sought rehearing of the April Authorization Letter.

On May 8, 2017, the Secretary issued a procedural order tolling the time for the Commission to respond to the issues raised in the requests for rehearing of the March Authorization Letter. *Algonquin Gas Transmission, LLC*, Docket No. CP16-9-003 (May 8, 2017) (“March Authorization Tolling Order”). On May 24, 2017, the Secretary issued yet another procedural order tolling the time for the Commission to respond to the issues raised in the request for rehearing of the First Certificate Tolling Order. *Algonquin Gas Transmission, LLC*, Docket No. CP16-9-004 (May 24, 2017) (“Second Certificate Tolling Order”).

On the same day that the Second Certificate Tolling Order issued, without waiting for the Commission to issue a rehearing order addressing the matters raised in the various requests for rehearing, Weymouth filed the petition for review in No. 17-1135 seeking review of the Certificate Order. The next day, May 25, 2017, the Coalition filed the petition for review in No. 17-1139 seeking review of the Certificate Order, First Certificate Tolling Order, April Authorization Letter, and

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<sup>4</sup> Sandra Peters, who joined the Coalition’s petition for review, filed a separate request for rehearing of the Certificate Order, *see* Sandra Peters Request for Rehearing, Docket No. CP16-9-001 (Feb. 24, 2017), but she did not join the rest of the members of the Coalition in seeking rehearing of the March Authorization Letter, *see* Fore River Residents Against the Compressor Station, *et al.* Request for Rehearing, Docket No. CP16-9-003 (Apr. 7, 2017).

March Authorization Tolling Order. The following table illustrates Weymouth’s and the Coalition’s relationships to the relevant orders:

<b>FERC Order</b>	<b>Rehearing Status</b>	<b>Petitioner(s) Who Requested Rehearing</b>	<b>Petition for Review</b>
Certificate Order	Pending	- Weymouth - Coalition	- 17-1135 (Weymouth) - 17-1139 (Coalition)
First Certificate Tolling Order	Pending	- Weymouth	- 17-1139 (Coalition)
March Authorization Letter	Pending	- Coalition (except Sandra Peters)	—
April Authorization Letter	Pending	—	- 17-1139 (Coalition)
March Authorization Tolling Order	No Rehearing Sought	—	- 17-1139 (Coalition)
Second Certificate Tolling Order	No Rehearing Sought	—	—

## **ARGUMENT**

### **I. The Petitions For Review Should Be Dismissed For Lack Of Jurisdiction**

#### **A. The Challenged Orders Are Not Final, Reviewable Orders**

This Court has “long held that [it] ha[s] jurisdiction to review only final orders of the Commission.” *Transwestern Pipeline Co. v. FERC*, 59 F.3d 222, 226 (D.C. Cir. 1995) (discussing Natural Gas Act section 19(b)) (citing, *e.g.*, *Pub. Utils. Comm’n of Cal. v. FERC*, 894 F.2d 1372, 1376-77 (D.C. Cir. 1990) (discussing both Natural Gas Act section 19(b) and its parallel provision in Federal

Power Act section 313(b), 16 U.S.C. § 825l(b)). Moreover, the “presumption that Congress intends judicial review of administrative action applies . . . *only* to final agency action.” *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1171 (D.C. Cir. 2016) (internal quotation and citation omitted). “Final agency action is that which ‘mark[s] the consummation of the agency’s decisionmaking process.’” *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (alteration by Court)).

The challenged orders are not final agency action. The various requests for rehearing – including Weymouth’s and the Coalition’s – that are pending before the Commission rendered the challenged orders non-final. *Clifton Power*, 294 F.3d at 110; *see also Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 238-39 & n.11 (D.C. Cir. 1980) (explaining that a party must file for Commission rehearing before it may file a petition for review, and that the order denying the requests for rehearing is the final, reviewable agency order). “There is good reason to prohibit any litigant from pressing its cause concurrently upon both the judicial and administrative fronts: a favorable decision from the agency might yet obviate the need for review by the court,” or the agency might act to alter the issues ultimately presented for review, “mak[ing] the case moot and [the court’s] efforts supererogatory.” *Clifton Power*, 294 F.3d at 111-12. Thus, the petitions for review of the non-final orders at issue here are “incurably premature” and should be dismissed. *Id.* at 110-11.

**B. The Tolling Orders Extended The Time For The Commission To Consider The Rehearing Requests**

Weymouth’s petition asserts that its request for rehearing of the Certificate Order was “constructively denied by operation of law” because the Commission “did not validly act” on that request within 30 days. Weymouth Petition for Review at 2. Similarly, the Coalition’s petition asserts that the Coalition’s requests for rehearing of the Certificate Order and subsequent authorization letter<sup>5</sup> “must be deemed denied by operation of law pursuant to 15 U.S.C. § 717r(a)” because the Commission’s tolling orders are “invalid.” Coalition Petition for Review at 4. Weymouth and the Coalition are mistaken.

Natural Gas Act section 19(a), 15 U.S.C. § 717r(a), does state that, “[u]nless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied.” This and other Courts have uniformly determined, however, that this does not require the Commission to act on the merits of a rehearing request within 30 days; rather, the Commission appropriately “acts upon the application for rehearing” by providing notice within the 30-day period that it intends to further consider a rehearing

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<sup>5</sup> The Coalition’s petition for review of the April Authorization Letter should be dismissed for the additional reason that the Coalition did not seek agency rehearing of that letter – it instead sought rehearing of the March Authorization Letter. *See Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 397 (D.C. Cir. 2017) (declining

request, as it did here. *See Cal. Co. v. FPC*, 411 F.2d 720, 721 (D.C. Cir. 1969) (“the Commission has power to act on applications for rehearing beyond the 30-day period so long as it gives notice of this intent”); *see also Kokajko v. FERC*, 837 F.2d 524, 525 (1st Cir. 1988) (“The statutory language, . . . although requiring FERC to ‘act’ upon the application for rehearing within thirty days after filing, lest the application is deemed denied, does not state . . . that FERC must ‘act on the merits’ within that time lest the application is deemed denied.”); *Gen. Am. Oil Co. v. FPC*, 409 F.2d 597, 599 (5th Cir. 1969) (Commission “acted” for purposes of Natural Gas Act section 19 by providing notice that it intends to further consider rehearing requests). These and other relevant court authorities are listed in a recent district court decision denying interlocutory relief while another pipeline proceeding (PennEast) was underway before the Commission, in *Del. Riverkeeper Network v. FERC*, No. 16-cv-416, slip op. at 4 (D.D.C. Mar. 22, 2017), *on appeal*, No. 17-5084 (D.C. Cir. filed Apr. 24, 2017).

As this Court has found in granting Commission motions to dismiss other petitions for review filed upon FERC issuance of tolling orders, “tolling orders do not resolve the rehearing requests but simply extend the time to consider them.” *City of Glendale v. FERC*, No. 03-1261, 2004 WL 180270, at \*1 (D.C. Cir. Jan.

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to review challenge to staff letter orders authorizing pipeline activity because petitioner failed to seek agency rehearing of those letter orders).

22, 2004) (citing *Kokajko*, 837 F.2d at 525); *see also Cal. Mun. Utils. Ass'n v. FERC*, No. 01-1156, 2001 WL 936359, at \*1 (D.C. Cir. July 31, 2001) (“In light of the agency’s tolling order and subsequent clarification order, it is clear petitioners’ rehearing requests are still under consideration by the Commission. The petitions for review are, therefore, incurably premature.” (internal citation omitted)); *Moreau v. FERC*, 982 F.2d 556, 564 (D.C. Cir. 1993) (“[W]e hold that section 717r(a) denies us jurisdiction to review matters . . . raised in rehearing petitions before FERC until FERC denies the petition or until FERC rules on the merits of a granted petition for rehearing.”).

**C. The Commission’s Delegation Of Authority To The Secretary To Issue Tolling Orders Continues When The Commission Lacks A Quorum**

As already discussed, the Commission’s 1995 Delegation Order delegated authority to the Secretary to issue tolling orders. Shortly before the Commission lost its quorum in early 2017, it explicitly preserved that delegation in an order delegating additional authority to its staff. *See Agency Operations in the Absence of a Quorum*, 158 FERC ¶ 61,135 n.5 (2017) (“2017 Delegation Order”) (“All pre-existing delegations of authority by the Commission to its staff continue to be effective. 18 C.F.R. §§ 375.301-.315 (2016). This includes the authority of the Secretary to toll the time for action on requests for rehearing. 18 C.F.R.

§§ 375.302(v) (2016).”); *see also id.* n.10 (“authority to issue tolling orders already rests with the Secretary”).

The Coalition’s petition asserts that the Secretary did not have delegated authority to issue the First Certificate Tolling Order or the March Authorization Tolling Order because the Commission lacked a quorum when those orders issued. Coalition Petition for Review at 4. But the absence of a quorum does not justify departure from the normal rule of final agency action. *See Pub. Citizen*, 839 F.3d at 1171 n.4 (“practical and prudential considerations, however compelling, cannot provide the basis for our jurisdiction absent demonstrated final agency action”); *Clifton Power*, 294 F.3d at 112 (rejecting argument that “the requirement of finality is merely a prudential consideration, with which we may dispense, rather than a jurisdictional prerequisite”).

Moreover, a staff member to whom authority is delegated while an agency has a quorum retains that authority during periods when the agency lacks a quorum. *See UC Health v. NLRB*, 803 F.3d 669, 670, 672, 675-81 (D.C. Cir. 2015) (finding that an agency staff member maintained his previously delegated authority to conduct a union election and certify its results when the agency lacked a quorum); *SSC Mystic Operating Co., LLC v. NLRB*, 801 F.3d 302, 308-09 (D.C. Cir. 2015) (same); *see also New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 684

n.4 (2010) (that the agency lacked a quorum did “not cast doubt on the prior delegations of authority to [staff]”).

As in *UC Health* and *SSC Mystic*, the Commission had a quorum when it delegated authority to the Secretary to issue tolling orders. Furthermore, as in those cases, the Commission determined that this delegated authority would continue during the period in which the Commission did not have a quorum. *See* 2017 Delegation Order n.5 (determining that the Commission’s 1995 delegation to the Secretary to toll the time for action on requests for rehearing (as well as its other prior delegations) would continue to be effective in the absence of a quorum).<sup>6</sup>

The fact that a pipeline project may proceed while rehearing requests and motions for stay are pending before the Commission – regardless of whether a quorum exists – does not undermine the validity of the Commission’s delegations of authority. Nor does it render otherwise non-final agency action final. Indeed, Congress designed the Natural Gas Act to produce that default outcome if the

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<sup>6</sup> The Coalition also cannot fairly rely upon the lack of a quorum for relief because several of its members – Berkshire Environmental Action Team; Food & Water Watch; Grassroots Environmental Education; Safe Energy Rights Group, Inc.; and Stop the Algonquin Pipeline Expansion – signed a March 1, 2017 letter urging Members of Congress to “oppose restoration of a quorum of FERC Commissioners.” *See* Letter at p. 6 of the following link: <http://www.delawareriverkeeper.org/sites/default/files/PR%20FERC%20Quorum%20Should%20Be%20Opposed%203.1.17%20w%20attach.pdf>.

Commission does not, or cannot, act. *See* 15 U.S.C. § 717r(c) (“The filing of an application for rehearing under [15 U.S.C. § 717r(a)] shall not, unless specifically ordered by the Commission, operate as a stay of the Commission’s order.”); *Pub. Citizen*, 839 F.3d at 1174 (explaining in the context of the Federal Power Act that, where judicial review is limited due to an operation of law, “[a]ny unfairness associated with this outcome inheres in the very text of the [statute]. Accordingly, it lies with Congress, not this Court, to provide the remedy”).

If Weymouth or the Coalition truly believes there are exceptional circumstances justifying extraordinary relief from this Court to preserve future jurisdiction, either can try to justify extraordinary relief under the All Writs Act, 28 U.S.C. § 1651. *But see In re: American Rivers*, 372 F.3d 413, 419 (D.C. Cir. 2004) (writ of mandamus for agency delay typically justified only when delay measures in years, not months or weeks).<sup>7</sup>

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<sup>7</sup> Many parties in recent years, seeking interlocutory judicial relief from FERC certificate approvals (of natural gas infrastructure projects), have filed motions for stay or petitions for mandamus, prior to merits briefing on final orders; all have failed. *See Sierra Club v. FERC*, D.C. Cir. No. 16-1329 (Nov. 17, 2016), and 14 earlier denials in: D.C. Cir. Nos. 16-1081 (2016), 15-1127 (2015), 15-1052 (2015), 12-1481 (2013), 13-1016 (2013), 13-1015 (2013), 12-1390 (2012), 10-1389 (2011), and 10-1407 (2011); 2nd Cir. Nos. 16-345 (2016), 15-926 (2015) and 12-566 (2012); 3rd Cir. No. 15-2940 (2015); and D. Mass. No. 1:15-cv-12352 (2015).

## **II. Alternatively, The Petitions For Review Should Be Held In Abeyance**

If the Court determines not to dismiss the petitions for review, they should be held in abeyance pending issuance of an order on the pending requests for rehearing. As this Court has noted, it “often . . . issue[s] . . . orders [to hold a petition for review in abeyance] in light of other pending proceedings that may affect the outcome of the case before [it].” *Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008)); *see also Alaska v. FERC*, 980 F.2d 761, 764 (D.C. Cir. 1992) (it is “usually preferable to require the parties to wait for appellate review until the [proceeding] is ultimately resolved – to insist on the standard of one case, one appeal.”).

### **CONCLUSION**

Accordingly, the Commission requests that the Court dismiss Weymouth’s and the Coalition’s petitions for review because they seek review of non-final Commission orders. Alternatively, the Commission requests that the Court hold the petitions for review in abeyance pending the issuance of a final order in the underlying FERC proceeding.

Respectfully submitted,

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June 30, 2017

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) and Circuit Rule 27(d)(2)(A) because this motion contains 4,083 words.

I further certify that this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

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June 30, 2017

**CERTIFICATE OF SERVICE**

In accordance with Fed. R. App. P. 25(d) and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 30th day of June 2017, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system, as indicated below:

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