

**UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF ENERGY
OFFICE OF ELECTRICITY DELIVERY AND ENERGY RELIABILITY**

**Attn: Docket No. 2007-OE-01 (Draft Mid-Atlantic Area National Corridor)
Docket No. 2007-OE-02 (Draft Southwest Area National Corridor)**

COMMENTS OF THE ORGANIZATION OF MISO STATES

The Organization of MISO States, Inc. (OMS) submits the following comments in response to the U.S. Department of Energy's (Department) May 7, 2007 Federal Register Notice (Notice) requesting comments on the proposed designation of two National Interest Electric Transmission Corridors (NIETCs) in the above-referenced dockets.¹ The OMS appreciates the Department's decision to solicit comments before taking final action on any specific corridor designations. When considering these issues, the OMS requests that the Department take notice of the OMS's prior comments submitted on September 17, 2004, March 6, 2006, and October 12, 2006.

The OMS and its members have a direct interest in the Department's proposed Mid-Atlantic corridor designation because several OMS member states are within the corridor or are identified as having underused generation capacity and/or potential wind generation capability that could serve the Mid-Atlantic critical congestion area.² However, these comments focus on the Department's interpretation of its authority to designate corridors under Section 216 of the Federal Power Act (FPA), including the discretion to designate "conditional congestion areas."³ The Department's interpretation is of particular interest to the

¹ The OMS is filing these comments in both dockets to address the Department's conclusions regarding its authority to designate national corridors. The comments do not take a position on any specific issues related to the proposed Southwest area national corridor, but do address certain issues related to the proposed Mid-Atlantic corridor.

² The proposed Mid-Atlantic corridor includes areas in Ohio and Pennsylvania within the Midwest ISO; although these areas are not part of the "critical congestion area" they are included in the proposed corridor as "source areas." See 72 Fed. Reg. 25904-05, Figures VIII 18 and 19 (2007). Also, several additional OMS member states (Indiana, Michigan, and Kentucky) are shown as having underused generation capacity and/or undeveloped wind generation capability that could serve the Mid-Atlantic critical congestion area absent key transmission constraints. See notice at p. 25897 and Figure VIII.15. As discussed in section III.C of these comments, the Department identifies two such key transmission constraints in Michigan and Indiana. See Figure VIII.16 at p. 25900.

³ U.S. Department of Energy, National Electric Transmission Congestion Study at ix (August 2006).

OMS because four out of the five conditional areas identified in the Department's congestion study are within or partially within the Midwest ISO.⁴

I. Summary

The OMS believes that the Department's interpretation of its authority to designate corridors, particularly as it relates to conditional congestion areas, is inconsistent with the plain reading and legislative intent of the Energy Policy Act of 2005 (EPAAct). In particular, the OMS is concerned with the Department's overly broad interpretation that it has discretion under section 216 of the FPA to designate a corridor if a constraint is hindering the development or delivery of a generation source that is in the public interest, without explicitly showing adverse effects on consumers or demonstrating present or future congestion.^{5 6} The OMS believes that even if the Department proceeds cautiously, the Department's application of this new standard to conditional congestion areas would indirectly and inappropriately encroach on the on going work of regional planners, states, and market participants in the planning and development of the nation's electrical infrastructure. As discussed below, the OMS respectfully requests that the Department reconsider its position or, at a minimum, refrain from making these and similar findings in its final order on the two corridor designations at issue.

The OMS offers additional comments addressing the duration and boundary of corridor designations, rationale for identifying source areas, identification of key transmission constraints, and preferred solutions to congestion problems.

II. Background

On May 7, 2007, the Department published in the Federal Register (Vol. 72, No. 87) a Notice of its intent to designate the Mid-Atlantic and Southern California regions as national corridors; these areas were characterized as containing "critical congestion areas" in the Department's August 2006 congestion study. In the Notice, the Department also summarized and responded to comments on the congestion study that are relevant to national corridor designations, including, but not limited to, the Secretary of Energy's

⁴ These areas are: Montana-Wyoming (coal and wind); Dakotas-Minnesota (wind); Kansas-Oklahoma (wind); Illinois-Indiana and upper Appalachia (coal).

⁵ Notice at 25844.

⁶ The North Dakota Public Service Commission (NDPSC) and the South Dakota Public Utilities Commission (SDPUC) believe that NIETC designation in conditional congestion areas where electric transmission is needed to make use of plentiful and low-cost domestic resources is in the national interest. The NDPSC and the SDPUC support designation of a NIETC within the Dakotas-Minnesota conditional congestion area identified as one of the principle areas of interest in the Department's congestion study.

(Secretary) scope of authority to designate corridors. Having reviewed the Department's conclusions in the Notice, the OMS feels it is necessary to reinforce and expand upon its concerns with the Department's interpretation of section 216 of the FPA.

III. Specific Comments on the Department's May 7, 2007 Notice

A. Section II.A - Scope of Authority

Under section 216(a) of the FPA, the Secretary is required to issue a report, based on the congestion study, which:

. . . may designate any geographic area **experiencing** electric energy transmission capacity **constraints or congestion that adversely affects consumers** as a national interest electric transmission corridor.⁷
(emphasis added)

In the Notice, the Department suggests that it is not attempting to define the complete scope of the term "constraints or congestion that adversely affects consumers" as used in this section. After concluding that the term is ambiguous, the Department distinguishes between its authority to designate corridors based on "congestion that adversely affects consumers" and its authority to designate corridors based on "constraints that adversely affect consumers."

With regard to congestion, the Department finds that it has the discretion to designate a corridor upon a showing of "persistent congestion" without any additional demonstration of adverse effects on consumers.⁸ Although it may be relatively easy to demonstrate that persistent congestion is adversely affecting consumers, the OMS believes that the Department still needs to explicitly demonstrate such adverse effects to designate any national corridor based on congestion. The OMS also finds unacceptable the Department's explanation that the congestion study did not attempt to define when congestion adversely affects consumers.⁹

With respect to "constraints that adversely affect consumers," the Department concludes it has the discretion to designate a corridor:

. . . upon a showing of the existence of a constraint, including the total absence of a transmission line, that is hindering the development or delivery of one or more generation sources that is in the public interest,

⁷ 16 U.S.C. 824p(a).

⁸ Notice at 25844.

⁹ *Id.* at 25843.

regardless of whether there is congestion and without the need for any additional demonstration of adverse effects on consumers.¹⁰

The Department takes no action in the Notice with respect to conditional congestion areas, but concludes that:

. . . were the Secretary to designate a National Corridor for one of those areas, the Secretary would need only to demonstrate the existence of a constraint that was hindering the development or delivery of a generation source that is in the public interest, and would not need to rely on demonstrations of future, or even present, congestion.¹¹

The remaining portion of this section addresses these findings regarding constraints hindering the development or delivery of generation in the public interest and their potential implications if used to designate future corridors in conditional congestion areas or similarly situated areas.

National Corridor Designation Was Not Intended to Solve the So-Called “Chicken and Egg” Problem of Generation and Transmission Development

The Department defined conditional congestion areas in the 2006 congestion study as having “some transmission congestion at present, but significant congestion would result if large amounts of new generation resources were to be developed without simultaneous development of associated transmission capacity.”¹² Before addressing the merits of the Department’s legal interpretation, it is important to point out to the Department that the FERC-approved generation interconnection procedures and RTO planning processes are designed to ensure that the necessary system upgrades are constructed simultaneously with the development of new generation.

With that said, the OMS recognizes that new mechanisms may be needed to address what some call the “chicken and egg” problem of new resource development, in which generation is not constructed until transmission capacity is built and transmission capacity is not expanded until there are generators committed to interconnect. The Department notes that constraints can hinder the development of new power sources, “since project sponsors may not be able to obtain the financing they need if there is uncertainty over the degree to which their electricity could be delivered to consumers.”¹³ The OMS disagrees with the Department that section 216 of the FPA was intended to remedy this multi-

¹⁰ *Id.*

¹¹ *Id.*

¹² Congestion Study at ix.

¹³ Notice at 25844.

faceted problem. The OMS believes it is a targeted federal pre-emption provision aimed at addressing perceived delays in state siting of needed transmission facilities.

The OMS comments of October 12, 2006, observed that “a NIETC designation can only be in the public interest if it would expedite or facilitate a transmission solution to a national interest congestion problem.” In other words, section 216(a) had a limited purpose of assuring timely state consideration of a transmission proposal. However, the Department seems to read this section as giving it wide-ranging authority to assure that transmission gets built. For instance, the Notice cites “concern about the need to strengthen transmission infrastructure,”¹⁴ although this concern is tempered by statements that a corridor designation does not imply a need for new transmission.¹⁵ The OMS believes the Department should resolve this internal inconsistency in favor of the more limited view of the section 216(a) process.

As further discussed in OMS’s October 2006 comments, designation of a national corridor based on anything other than siting barriers could result in an inefficient application of resources, may fail to resolve the constraint, and would be an inappropriate federal infringement on state siting laws.¹⁶

The Department Disregards Key Terms in the Statute While Creating a New Standard for Corridor Designations

Rather than clarifying and implementing the terms in EPCAct, the Department appears to be downplaying key terms in the statute such as “adversely affects consumers.” The Department even acknowledges that the congestion study did not attempt to define when constraints or congestion adversely affects consumers.¹⁷ At the same time, the Department has created an entirely new standard with new terms not in the statute. Though methodically presented in the Notice, new terms such as “generation source in the public interest” are not defined or supported by the statute.

Section 216(a)(4) identifies several factors that the Secretary may consider when determining whether to designate a corridor. Although some of these considerations relate to the development or diversification of energy supplies, the statute notably does not mention “hindrances” to the “development or delivery of a generation source that is in the public interest.” Moreover, EPCAct uses the phrase “public interest” in numerous instances, including a reference in

¹⁴ *Id.*

¹⁵ See, e.g., Notice at 25839 and 25845.

¹⁶ Comments of the Organization of MISO States at 4 (October 12, 2006).

¹⁷ Notice at 25843.

section 216 pertaining to FERC's finding that transmission facilities are in the public interest; the term is not, however, used in the context of national corridor designations.

The Department explains “that it is unnecessary in this notice to reach the question of the type of information that would be required to demonstrate that a constraint is hindering the development or delivery of a generation source that is in the public interest.”¹⁸ The Department suggests, however, that the considerations in section 216(a)(4) provide “some examples of generation sources the development of which would be in the public interest.”¹⁹ The Department appears to be using the considerations in section 216(a)(4) to help define an entirely new standard, rather than applying the plain language of the statute.

Constraints Cannot be “Experienced” Absent Generation to Constrain the System

Section 216 of FPA provides that the Secretary may designate as a national corridor any geographic area “experiencing” constraints that adversely affect consumers. But how can a constraint that adversely affects consumers be “experienced” if there is not yet generation that constrains the system? Is coal in the ground in Appalachia a “generation source”? It appears to be based on the Department’s identification of conditional congestion areas, and yet there are numerous factors—far beyond the siting of transmission—that will determine *whether* and *where* generation facilities will actually be constructed to burn that coal. The Department appears to gloss over this reality when it states:

With regard to the source area, where the decision to designate a National Corridor is based on the existence of a constraint that is hindering the development or delivery of a particular generation source that is in the public interest, the identification of the appropriate source area would be relatively straightforward: the source area would be the geographic area within which that particular source of supply is, or is likely to be, located.

Under the Department’s interpretation of section 216, it appears that the Department could designate a corridor if a potential generation source that is in the public interest—however that is defined—needs transmission to deliver the resulting electrical power to some end market. This could be done even in the absence of actual, concrete proposals to construct generation or transmission facilities. Based on the generation sources identified in the conditional congestion areas, this interpretation could essentially result in the entire contiguous United States being covered by a national corridor designation. This cannot be what Congress intended as part of this pre-emption provision.

¹⁸ *Id.*, Footnote 15.

¹⁹ *Id.*

If the Department implements this new standard to support designation of conditional congestion areas, it will necessarily expand its role into system planning in a manner that could supplant or otherwise duplicate the traditional roles of states and other entities. Again, the OMS recognizes that transmission construction can be a significant barrier to the development of wind generation and other location-constrained generation sources. But there are more efficient and effective ways to ensure that transmission is properly planned, financed, and constructed to promote renewable energy goals than the Department designating conditional areas as national corridors.

The Implications of the Corridor Designation Should Not be Downplayed

The OMS acknowledges and appreciates the Department's intention to proceed carefully in the exercise of its discretion to designate corridors. This intention does not, however, alleviate the OMS's concern that the Department has interpreted section 216 in a manner that is not consistent with the plain reading and spirit of EPCRA. The OMS also disagrees that section 216's limitations on FERC's ability to exercise siting authority provides rationale for the Department to broadly interpret its authority to designate national corridors. If anything, these limitations on FERC's authority serve as an indication that Congress did not intend section 216 to represent a sweeping change in the federal government's role in siting transmission.

The Department appears to attempt to downplay states' interest and concern with respect to the corridor designation process. For example, the Department states that, "a National Corridor designation itself does not preempt state authority or any state actions."²⁰ However, the Department must acknowledge that its designation of a corridor will trigger events that can result in the pre-emption of states. The Department appears to be saying that the first step in a journey of a thousand steps is not part of the journey. However, if the first step in the journey is not taken, none of the subsequent steps will follow. If the Department does not designate a corridor, the Federal Energy Regulatory Commission does not acquire a pre-emptive role in transmission siting. So, despite the Department's narrative that attempts to downplay and minimize state commission concerns with the Department's corridor designation policy and process, the state commissions have legitimate concerns.

For these reasons, the OMS asks the Department to reconsider its interpretation of its authority to designate corridors in conditional congestion areas or other areas where constraints may "hinder the development or delivery of generation sources in the public interest." In the alternative, the OMS requests that the Department reserve these legal findings for a future date after it

²⁰ Notice at 25839.

has gained experience with national corridor designations in areas with existing persistent congestion that is already adversely affecting consumers.

B. Section VI - Duration of Corridor Designation

With regard to the duration of the corridor designation, the Notice states that “. . . DOE intends to adopt a default approach, under which an initial designation would be for a period of 12 years unless it finds reason in a particular case to set some other initial term.”²¹

The OMS does not believe that the Department has adequately supported its position to establish a default approach. Establishing a fixed time frame may lead to circumstances in which the congestion or constraint that led to the designation of the corridor is eliminated, but the corridor designation nevertheless remains in effect for years.

The Department notes that it will stipulate in any corridor designation order that the designation may be modified, rescinded, or renewed for cause at any time, after a period of public notice and comment.²² However, the OMS recommends a more defined process for modifying the term after the initial designation to address changes in system conditions within the corridor. As stated previously, the OMS is particularly concerned that the corridor designation be removed as soon as the stated goal of the designation has been accomplished.

C. Section III and VIII.D.1 - Definition of Source Area and Identification of Key Transmission Constraints

With regard to the proposed Mid-Atlantic corridor, the Notice states that “DOE selected as source areas locations of substantial amounts of existing, under-used economic generation capacity, as well as locations with the potential for substantial development of wind generation capacity.”²³ The OMS does not believe the Department has adequately explained why it selected this definition of source area and the specific criteria for identifying these areas. In the general discussion of source areas in Section III of the Notice, the Department recognizes that when the national corridor is based on the existence of persistent congestion, the selection of source areas “will necessarily involve discretion and is not suited to a formulaic approach.”²⁴ The Department goes on to state that the considerations identified in FPA section 216(a)(4) provide guidance on some

²¹ *Id.* at 25851.

²² *Id.*

²³ *Id.* at 25897.

²⁴ *Id.* at 25848.

of the possible bases for selecting source areas. However, the Department did not fully explain whether and how it applied such considerations or other factors when selecting the sources areas for the proposed Mid-Atlantic corridor.

Another area of the Notice that warrants additional clarification is Figure VIII.16, which identifies “key transmission constraints preventing electricity transfers from available lower cost generation sources to Mid-Atlantic critical congestion area.”²⁵ Two of these “key transmission constraints” are located in Michigan and Indiana but the Notice provides no explanation or details. Moreover, Figure VIII.16 is not sufficiently clear to determine the exact location of the constraints and how they may correspond with the results of the combined system study conducted by the PJM and Midwest ISO that, among other things, examined the deliverability of resources across the combined RTO footprints.²⁶ The constraints shown in Indiana and the southwestern corner of Michigan in the Department’s Figure VIII.16 do not seem to correspond with the binding constraints identified in the joint PJM-Midwest ISO study, although there is binding constraint in the joint PJM-Midwest ISO study (Dunes Acres – Michigan City) that is near the one shown in Figure VIII.16.²⁷ The OMS recommends that the Department provide additional details related to Figure VIII.16 and similar figures to avoid ambiguity and provide adequate justification for its findings.

D. Section VIII.D.1 - Boundaries of the Draft Mid-Atlantic Area National Corridor

The proposed Mid-Atlantic national corridor includes part of PJM and part of New York. The Notice explains:

. . . the draft National Corridor for the Mid-Atlantic Critical Congestion Area is a single Corridor—the draft Mid-Atlantic Area National Corridor—covering part of the PJM footprint and part of New York, partly because some of the transmission planning that is needed should involve both PJM and NYISO, and also because transmission projects may be proposed that would cross their common boundary.²⁸

The Department did not adequately explain why it decided to specify a single corridor, especially considering that the identified source areas for the

²⁵ *Id.* at 25900.

²⁶ 2006 Midwest ISO-PJM Coordinated System Plan. Available at <http://www.pjm.com/committees/stakeholders/inter-regional-planning-adv/downloads/20061207-2011-csp-report-final.pdf>.

²⁷ *Id.* at 18-20. The joint study identifies proposed solutions for this constraint.

²⁸ Notice at 25902-25903.

critical congestion in PJM and the critical congestion in New York are mostly different.

The NIETCs proposed by the Department are geographically expansive. For example, Figure VIII-19 shows that just the so-called PJM portion of the proposed Mid-Atlantic corridor (which includes portions of the Midwest ISO territory) encompasses eastern Ohio all the way to the Atlantic Ocean and ranges from the northern border of Pennsylvania well into the heart of Virginia and West Virginia.

In its October 12, 2006 Comments, the OMS recommended as follows:

Just because a proposed transmission project is located within the geographic area encompassed by the NIETC, it should not automatically be assumed that the project will address the circumstances for which the NIETC was designated. Accordingly, it is critical that the Department clearly define the goal of the NIETC so that only projects intended to address that stated goal would be eligible for the FERC backstop siting treatment specified in Section 216(b) of the amended FPA. OMS Comments at 6.

In its Notice, the Department acknowledged the concerns of the OMS in this regard, but declined to act on these concerns, arguing that Section 216(b) of the Act specifies the scope of FERC jurisdiction over projects to be built in NIETCs.²⁹ The Department specifically referred to Section 216(b)(4) which requires FERC to find that “the proposed construction or modification will significantly reduce transmission congestion in interstate commerce and protects or benefits consumers” prior to issuing permits for the construction or modification of electric transmission facilities.

However, the Section 216(b)(4) does not resolve the OMS’s concern about possible misuse of the NIETCs. It is the OMS’s position that only transmission projects intended to address the particular reason(s) for which the corridor was designated by the Department should be eligible for the FERC backstop siting treatment.

If the Department shares that view, it could make that position clear in its final notice designating corridors. It serves no purpose for the Department to leave this matter ambiguous. Doing so would just open the door for future contentiousness and wasteful litigation. It is the Department’s decision to propose geographically expansive corridors, rather than simply specifying sources and sinks as recommended by the OMS in previous comments, that has made the OMS’s concern manifest. See, e.g., OMS October 12, 2006 Comments at 5-6. Furthermore, it is the Department’s Notice that specifies the

²⁹ Notice at 25849.

reasons for the proposed corridor designations. Therefore, the Department should take the responsibility to make its position clear on this issue raised by the OMS, rather than deferring the issue to potential future litigation in FERC proceedings.

E. The Department is Inconsistent on Whether or Not its Proposed Corridor Designation is Identifying Transmission as the Optimal Remedy

The Notice states:

The Department acknowledges that transmission expansion is but one possible solution to a congestion or constraint problem; increased demand response, improved energy efficiency, and conservation, as well as siting of additional generation close to load centers are also potential solutions. However, given the effect of a National Corridor designation and the existing obligations of State and Federal siting authorities as discussed in Section I.A above, there is no need for the Department to undertake an analysis of transmission solutions and nontransmission solutions or to speculate about any theoretical indirect effects a National Corridor designation would have on the market. Indeed, the Department believes that expanding its role to include making findings on the optimal remedy for congestion could supplant or otherwise duplicate the traditional roles of States and other entities.³⁰

However, later in the Notice when discussing the Mid-Atlantic corridor, the Department states:

The data detailed above indicate that consumers in the Mid-Atlantic Critical Congestion Area now pay high electricity prices because their electricity suppliers are unable to access low-cost supplies due to insufficient transmission capacity.³¹

Similarly, the Department states:

Further, while efforts are being made to increase the participation of demand-side resources in the PJM wholesale electricity markets, it does not appear that such efforts are capable of producing near-term results on the scale needed to forestall the need for additional transmission.³²

³⁰ Notice at 25845.

³¹ *Id.* at 25894-25895.

³² *Id.* at 25895.

These last two statements, which identify transmission as the solution, seem to contradict the first quoted statement above assuring that, in making corridor designations, the Department is not “making findings on the optimal remedy for congestion.” The OMS recommends that the Department refrain from making even indirect judgments on the optimal remedy and available options. As the Department seems to acknowledge in at least some portions of the Notice, this is important to ensure that the Department is not duplicating or encroaching on the traditional planning roles of state authorities, local and regional planners, and other entities.

Also, in the first statement above, the Department indicated that there is no need to speculate about any “theoretical indirect effects” a national corridor designation would have on the market. The OMS believes that the Department should be fully cognizant of the potential effects of any corridor designation because these effects are central to understanding the need for and scope of particular designations. With regard to conditional congestion areas, “theoretical indirect effects,” such as the siting of potential generation and transmission facilities and the expected benefits to consumers, would be the primary reasons to support such a designation. The OMS suggests that as part of any designation, the Department should not overlook the potential effects on the market and how the designation may shape the development of the nation’s electric infrastructure and potentially favor—albeit indirectly—certain locations, generation sources, consumers, or technologies. The Department should also be clear on whether its overarching purpose is to “strengthen the transmission system” or whether its purpose is more of an administrative one of designating corridors upon finding a constraint or congestion and then letting the solutions develop as they may.

IV. Conclusion and Recommendation

The OMS believes that the Department is overstepping the statutory authority granted to it under section 216 of the FPA. At a minimum, the Department should reserve the issue regarding its authority to designate conditional areas for a future time, after it has gained experience with designations in areas with actual, persistent congestion that already adversely affects consumers. There are more direct and constructive ways to ensure that a lack of transmission is not a barrier to cost-effective development of renewables and other generation sources than the Department designating conditional congestion areas as national corridors.

The OMS also recommends that the Department:

- Explicitly demonstrate adverse effects on consumers even in cases of persistent congestion prior to designating a NIETC.
- Clearly define the goal of the NIETC designation so that only projects intended to address that stated goal would be eligible for the FERC backstop siting treatment.

- Establish an explicit process to modify the default term of a corridor, particularly after the stated goal of the designation has been achieved.
- Further explain the selection of source areas and key transmission constraints related to the proposed Mid-Atlantic corridor.
- Further explain its decision to designate portions of New York and PJM as a single national corridor.
- Refrain from making judgments on the optimal remedy to congestion or constraint problems and identifying transmission as the needed solution.
- Fully consider the potential impacts—even the “theoretical”—that national corridor designation may have on particular markets, customers, and the configuration of the electric system.

The OMS submits these comments because a majority of the members have agreed to support them. Individual OMS members reserve the right to file clarifying comments or minority reports on their own regarding the issues discussed in these comments. The following members generally support these comments:

Illinois Commerce Commission
 Indiana Utility Regulatory Commission
 Iowa Utilities Board
 Kentucky Public Service Commission
 Michigan Public Service Commission
 Minnesota Public Utilities Commission
 Missouri Public Service Commission
 Montana Public Service Commission
 Nebraska Power Review Board
 North Dakota Public Service Commission
 Pennsylvania Public Utility Commission
 South Dakota Public Utilities Commission
 Wisconsin Public Service Commission

The Manitoba Public Utilities Board did not participate in this pleading. The Public Utilities Commission of Ohio abstained from support of these comments.

The Minnesota Department of Commerce, the Iowa Office of Consumer Advocate, and the Indiana Office of Utility Consumer Counselor, as associate members of the OMS, support these comments.

Respectfully Submitted,
William H. Smith, Jr.
 William H. Smith, Jr., Executive Director
 Organization of MISO States
 100 Court Avenue, Suite 218
 Des Moines, Iowa 50309
 Tel: 515-243-0742

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