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September 18, 2019

**VIA ELECTRONIC FILING**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, Filing Room  
Harrisburg, PA 17120

Re: Wilmer Baker v. Sunoco Pipeline L.P.; Docket No. C-2018-3004294; **SUNOCO PIPELINE L.P.'S REPLY BRIEF**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is Sunoco Pipeline L.P.'s Reply Brief in the above-captioned proceeding.

If you have any questions regarding this filing, please contact the undersigned.

Very truly yours,

Thomas J. Sniscak  
Whitney E. Snyder  
*Counsel for Sunoco Pipeline L.P.*

WES/das  
Enclosure

cc: Hon. Elizabeth H. Barnes, (Electronic [ebarnes@pa.gov](mailto:ebarnes@pa.gov) and first class mail)  
Per Certificate of Service

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the forgoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party). This document has been filed electronically on the Commission's electronic filing system and served on the following:

**VIA PERSONAL HAND DELIVERY ON SEPTEMBER 18, 2019  
AND OVER-NIGHT FEDERAL EXPRESS**

WILMER JAY BAKER  
430 RUN ROAD  
CARLISLE PA 17015



Thomas J. Sniscak, Esquire  
Whitney E. Snyder, Esquire

Dated: September 18, 2019

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

WILMER BAKER

Complainant,

v.

SUNOCO PIPELINE L.P.,

Respondent.

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Docket No. C-2018-3004294

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**RESPONDENT SUNOCO PIPELINE L.P.'S REPLY BRIEF**

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Dated: September 18, 2019

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

Complainant's Brief is nothing more than a list of citations to transcripts and exhibits<sup>1</sup> with a few unsupported and misleading comments interspersed therein that are addressed more specifically in Section II.D. below. SPLP has already addressed in its Main Brief the allegations that Mr. Baker raised in his Complaint and pre-hearing submissions and will refer to its Main Brief for the sake of brevity and conservation of Your Honor, the Commission, and the parties' time where possible. SPLP notes that regardless of Complainant's failure to properly brief this case, the Commonwealth Court has recently confirmed and held that the Commission cannot *sua sponte* raise positions or issues and act as an advocate in adjudicating complaints.<sup>2</sup> The issues and positions in this case are those that the parties have raised. In this Reply Brief, SPLP also addresses the following issues Complainant's Brief raises:

### A. **Complainant seeks mandatory injunctive relief, an extreme remedy with a high burden that he has not met.**

It is well-established law that Complainant must prove SPLP violated a law or regulation to obtain any relief in a complaint proceeding. *West Penn Power Co. v. Pennsylvania Public Utility Comm'n*, 478 A.2d 947, 949 (Pa. Cmwlth. 1984) ("We hold that in order for the PUC to

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<sup>1</sup> Concurrent with this Reply Brief SPLP is submitting a Motion to Strike portions of Complainants' Brief that attempt to introduce and rely upon extra-record materials and materials excluded from the record.

<sup>2</sup> See *Sunoco Pipeline L.P. v. Dinniman and Pub. Util. Comm'n*, \_\_ A.3d \_\_, 2019 WL 4248071, Docket No. 1169 C.D. 2018, Slip Op. at 7-8, 10 (Pa. Cmwlth. Sept. 9, 2019) ("The PUC erred in raising the issue of personal standing *sua sponte* and injecting this theory of standing into the case") (*SPLP v. Dinniman and PUC*).

sustain a complaint brought under this section [66 Pa. C.S. § 1501], the utility must be in violation of its duty under this section. **Without such a violation by the utility, the PUC does not have the authority, when acting on a customer's complaint, to require any action by the utility.**) (emphasis added); *Township of Spring et al. v. Pennsylvania-American Water Co.*, Docket Nos. C-20054919 et al., 2007 WL 2198196 at \*6 (Order entered July 27, 2007) (“If we were to order PAWC to conduct testing of the property in the Stonegate community, we would have to base that order on credible evidence that some act or omission by PAWC in violation of the Code or our Regulations would be remedied by the testing.”) (citing *West Penn*).

Moreover, even if a violation of law had been shown (it has not) the Complainant is not entitled to any relief commanding the performance of an affirmative act from SPLP – a mandatory injunction. Complainant’s Main Brief requests that Your Honor order an alarm system be installed, that American made pipes be used, and that SPLP should be required to have “open public meetings.”<sup>3</sup> Complainant’s Main Brief also alleges leak detection is possible, implying that this is enough to obtain the relief he requests for a public alarm system. But this relief, which has no basis in the Commission’s regulations, could only take the form of a mandatory injunction, which is inappropriate here under the legal standard for such extreme relief. A “mandatory injunction,” is the rarest form of injunctive relief and is often described as an extreme remedy. *Woodward Twp. v. Zerbe*, 6 A.3d 651 (Pa. Cmwlth. 2010) (citing *Big Bass Lake Community Association v. Warren*, 950 A.2d 1137, 1144 (Pa. Cmwlth. 2008)). The case for a mandatory injunction must be made by a very strong showing, one stronger than that required for a restraining-type injunction. *Id.* at 1145. Complainant here has not met any standard for relief, let alone the extreme relief standard

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<sup>3</sup> Complainant’s Main Brief at 8.

to obtain an order requiring “performance of an affirmative act” under the mandatory injunction standard. There is no avenue for relief here and the Complaint must be dismissed.

**B. Spacing of pipelines is not a violation of law or regulation and there is no evidence relating this issue to safety.**

Complainant now attempts to raise an additional (and meritless) issue that was not raised in the Complaint or his pre-hearing materials – the spacing of SPLP’s Mariner East 2 and 2X (ME2/2X) pipelines. Mr. Zurcher has now testified about this topic twice and made clear that there is no written standard or regulation mandating parallel pipelines be ten feet apart. N.T. 333-334. Complainant presented no evidence showing otherwise and this issue is meritless.

**C. Complainant’s Brief demonstrates he lacks standing.**

Complainant’s Main Brief demonstrates he lacks standing for the issues he raises and thus his entire Complaint lacks standing. Complainant’s Main Brief raises issues for which he does not and cannot show any effect on him, let alone the direct, immediate, and substantial interest required to bring a complaint before the Commission. *SPLP v. Dinniman and PUC*, Slip Op. at 7-10. The court held:

the PUC erred in deciding the Senator has personal standing because the record does not show that he has been aggrieved to the extent required under *William Penn Parking*. We hold that the PUC erred in concluding that Senator Dinniman had personal standing to file a formal complaint against Sunoco simply because its pipelines are located in the Township where he lives. The Complaint alleges neither harm to Senator Dinniman's property nor harm to his person, and the hearing before the ALJ did not yield evidence of either type of harm.

*Id.* at 10. See also *Armstead v. Zoning Board of Adjustment of City of Philadelphia*, 115 A.3d 390, 390 (Pa. Cmwlth. 2015) (objectors lacked standing even though their property was located near, but not adjacent, to a proposed sign). So too here. Complainant has not shown even the possibility

of harm occurring to him or his property as a result of any of the issues he raises here (let alone his failure to prove any of these issues). For this reason, the Complaint should be dismissed.

## II. REPLY ARGUMENT

### A. **Complainant seeks mandatory injunctive relief, an extreme remedy with a high burden that he has not met.**

It is well established law that Complainant must prove SPLP violated a law or regulation to obtain any relief in a complaint proceeding. *West Penn Power Co. v. Pennsylvania Public Utility Comm'n*, 478 A.2d 947, 949 (Pa. Cmwlth. 1984) (“We hold that in order for the PUC to sustain a complaint brought under this section [66 Pa. C.S. § 1501], the utility must be in violation of its duty under this section. **Without such a violation by the utility, the PUC does not have the authority, when acting on a customer's complaint, to require any action by the utility.**”) (emphasis added); *Township of Spring et al. v. Pennsylvania-American Water Co.*, Docket Nos. C-20054919 et al., 2007 WL 2198196 at \*6 (Order entered July 27, 2007) (“If we were to order PAWC to conduct testing of the property in the Stonegate community, we would have to base that order on credible evidence that some act or omission by PAWC in violation of the Code or our Regulations would be remedied by the testing.”) (citing *West Penn*).

Moreover, even if a violation of law had been shown (it has not) the Complainant is not entitled to any relief commanding the performance of an affirmative act from SPLP – a mandatory injunction. Complainant’s Main Brief requests that Your Honor order an alarm system be installed, that American made pipes be used, and that SPLP should be required to have “open public

meetings.”<sup>4</sup> Complainant’s Main Brief also alleges leak detection is possible, implying this enough to obtain the relief he requests for a public alarm system. But his relief, which has no basis in the Commission’s regulations, could only take the form of a mandatory injunction, which is inappropriate here under the legal standard for such extreme relief. The Commonwealth Court held that an injunction that commands the performance of an affirmative act, a “mandatory injunction,” is the rarest form of injunctive relief and is often described as an extreme remedy. *Woodward Twp. v. Zerbe*, 6 A.3d 651 (Pa. Cmwlth. 2010) (citing *Big Bass Lake Community Association v. Warren*, 950 A.2d 1137, 1144 (Pa. Cmwlth. 2008)). The case for a mandatory injunction must be made by a very strong showing, one stronger than that required for a restraining-type injunction. *Id.* at 1145.

Injunctive relief must be narrowly tailored to abate the harm complained of. *Pye v. Com. Ins. Dep’t*, 372 A.2d 33, 35 (Pa.Cmwlth. 1977) (“An injunction is an extraordinary remedy to be granted only with extreme caution”); *Woodward Twp. v. Zerbe*, 6 A.3d 651, 658 (Pa.Cmwlth. 2010) (“Even where the essential prerequisites of an injunction are satisfied, the court must narrowly tailor its remedy to abate the injury”); *West Goshen Township v. Sunoco Pipeline L.P.*, Docket No. C-2017-2589346 at 17-18 (Order entered Mar. 15, 2018).

*West Goshen Township v. Sunoco Pipeline L.P.*, Docket No C-2017-2589346, Recommended Decision at 42 (Barnes, J.) (adopted in full by Commission by Order dated Oct. 1, 2018).

Complainant here has not met any standard for relief, let along the extreme relief standard to obtain an order requiring “performance of an affirmative act” under the mandatory injunction standard. There is no avenue for relief here and the Complaint must be dismissed.

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<sup>4</sup> Complainant’s Main Brief at 8.

**B. Spacing of pipelines is not a violation of law or regulation and there is no evidence relating this issue to safety.**

Complainant now attempts to raise an additional (and meritless) issue that was not raised in the Complaint or his pre-hearing materials – the spacing between SPLP’s Mariner East 2 and 2X (ME2/2X) pipelines. Complainant Brief at 7. Mr. Zurcher has now testified about this topic twice and made clear that there is no written standard or regulation mandating parallel pipelines be ten feet apart. N.T. 333-334. Instead, this is a practice the industry often uses, but it is not always achievable or followed and there are many pipelines much closer together than 10 feet throughout the country. N.T. 335:17-25. Complainant has again failed to present any evidence of a violation of law or regulation and his Complaint should be dismissed.

**C. Complainant’s Brief demonstrates he lacks standing.**

Complainant’s Main Brief demonstrates he lacks standing for the issues he raises and thus his entire Complaint. Complainant’s Main Brief raises issues for which he does not and cannot show any effect on him, let alone the direct, immediate, and substantial interest required to bring a complaint before the Commission. *SPLP v. Dinniman and PUC*, Slip Op. at 7-10. The court held:

the PUC erred in deciding the Senator has personal standing because the record does not show that he has been aggrieved to the extent required under *William Penn Parking*. We hold that the PUC erred in concluding that Senator Dinniman had personal standing to file a formal complaint against Sunoco simply because its pipelines are located in the Township where he lives. The Complaint alleges neither harm to Senator Dinniman's property nor harm to his person, and the hearing before the ALJ did not yield evidence of either type of harm.

*Id.* at 10. “Stated simply, standing requires the complainant to be ‘negatively impacted in some real and direct fashion.’” *Id.* at 7 (citing *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016) (quoting

*Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655,660 (Pa. 2005))). Mere proximity is not enough of an interest for standing. *See also Armstead v. Zoning Board of Adjustment of City of Philadelphia*, 115 A.3d 390, 390 (Pa. Cmwlth. 2015) (objectors lacked standing even though their property was located near, but not adjacent, to a proposed sign).

Here, Complainant has not shown even the possibility of harm occurring to him or his property as a result of any of the issues he raises here (let alone his failure to prove any of these issues). Non-expert allegations clearly do not meet this hurdle. Complainant has not shown that anything he complains of will result in something bad happening and likewise has not shown that even if something bad happened it would impact him. He clearly does not have and has not shown standing to bring this Complain and it should be dismissed.

**D. Responses to additional portions of Complainant's Brief**

**1. Issues in Chester and Delaware County**

Complainant cites to various portions of documents concerning Chester and Delaware County. Complainant Brief at 1, 6 (citing Complainant Cross Exhibit 1 and discussion of a Delaware County resolution at N.T.261-268). Ms. Kerslake's Amicus Brief also references these materials.

First, Complainant has no standing to raise these issues, as the analysis in the section above demonstrates. Complainant lives in Cumberland County, not Delaware or Chester County. There is no showing and that these issues have any effect on Complainant. Ms. Kerslake is not a party and cannot introduce these issues.

Second, the material Complainant cites<sup>5</sup> in Complainant Cross Exhibit 1 and references on page 1 of his Brief should not have been admitted into the record and cannot be relied upon to make a finding of fact - they are pure and simple uncorroborated hearsay. SPLP already briefed this issue at length concerning Complainant Cross Exhibit 1. SPLP Main Brief at Section II.A.2, pp. 23-27. In sum, Complainant Cross Exhibit 1 is a transcript of a legislative committee hearing. While there is a hearsay exception for prior testimony statements, that exception requires the witness to testify in the current proceeding be subject to cross-examination about the prior statement.

The following statements are not excluded by the rule against hearsay if the declarant testifies and is subject to cross-examination about the prior statement:

(1) *Prior Inconsistent Statement of Declarant-Witness.* A prior statement by a declarant-witness that is inconsistent with the declarant-witness's testimony and:

(A) was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition;

(B) is a writing signed and adopted by the declarant; or

(C) is a verbatim contemporaneous electronic recording of an oral statement.

Pa.R.E. 803.1. None of the people that testified in Cross Exhibit 1 testified in this proceeding and none were available for cross-examination here. Accordingly, the Complainant Cross Exhibit 1 Transcript is pure hearsay, SPLP repeatedly objected to its admission, and it cannot form the basis of a finding of fact.

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<sup>5</sup> Complainant also refers to a Delaware County resolution that was not admitted into the record and is part of the materials SPLP seeks to strike in its Motion.

whether simple hearsay may support a finding of an agency depends on whether the evidence meets the criteria of the *Walker/Chapman* rule. The *Walker/Chapman* rule provides that simple hearsay evidence may support an agency's finding of fact so long as the hearsay is admitted into the record without objection and is corroborated by competent evidence in the record. See *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366, 370 (Pa. Cmwlth. 1976) (*Walker*) (citations omitted); see also *Chapman v. Unemployment Compensation Board of Review*, 20 A.3d 603, 610, n.8 (Pa. Cmwlth. 2011) (*Chapman*).

*Evangeline Hoffman-Lorah v. PPL Electric Utilities Corporation*, Docket No. C-2018-2644957, Initial Decision at 16-18 (Nov. 14, 2018) (ALJ Barnes).

Likewise, the Blume testimony Ms. Kerslake cites is pure and simple hearsay that cannot be relied upon. Kerslake Amicus Brief at 2 (citing N.T. 140). Complainant nor any of his witnesses presented any credible or competent evidence regarding Cumberland County or its Township's emergency preparedness and response.

Third, even if these materials were competent evidence (they are not), they have shown nothing relevant to Complainant or Cumberland County, are generic and not specific to SPLP's pipelines, and do not show a violation of law or regulation. See generally Complainant Cross Exhibit 1. Moreover, the discussion Complainant cites on page 6 of his Brief (N.T.) 261-269 rely solely on Complainant's questions posed on cross-examination – not the witnesses answers. Complainant was attempting to ask Mr. Noll questions outside the scope of his direct testimony regarding a Delaware County resolution. There is no relevant evidence supporting any contention Complainant is trying to make against SPLP. Complainant's statements cross-examining a witness are not evidence separate and apart from the witness' answers.<sup>6</sup>

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<sup>6</sup> Cf. *In re Monroe Cty. Tax Claim Bureau*, 91 A.3d 265, 273 (Pa.Cmwlth.2014) (an attorney's statements or questions at trial are not evidence) (citing *Commonwealth v. La Cava*, 666

**2. *Imported Pipe, Pipeline Design Standards, Pipeline Exposure, and Welding Requirements***

On page 2 (line three through entirety), page 3 (entirety), page 6 (references to exhibits C-4, C-4), page 7 (references to exhibits C-15, C-16, C-17, C-18, C-19), and page 8 (reference to exhibit C-24), Complainant cites various portions of the transcript and exhibits that all deal with the issues of Imported Pipe, Pipeline Design Standards, Pipeline Exposure, and Welding Requirements. SPLP fully briefed these issues in its Main Brief at Sections I., III.A., C-F., including evidentiary issues, and hereby incorporates those sections herein as if set forth in full. Complainant's Brief presents no argument on these issues (wholly failing to meet his burden of proof) and SPLP has already shown in its Main Brief that there is no violation of law, regulation, or safety concern regarding these issues.

**3. *Public Awareness and Emergency Response***

At the bottom of page 1 through the top of page 2, page 4 (entirety) through page 5 at (reference to "10 feet apart"), pages (references to C-1 and C-2). SPLP previously briefed these issues in full in its Main Brief at Sections I., III.A.-B. and incorporates those materials herein as if set forth in full.

SPLP presents the following additional replies to Complainant's Brief:

- The cites to the transcript at the bottom of page 1 through the top of page 2 of Complainant's Brief (citing N.T. 26) reference the ALJ's opening summary of the case and framing party allegations or positions – that is not evidence. Moreover, that SPLP sent

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A.2d 221, 231 (Pa.1995)); *see also Anderson v. Dep't of Transp., Bureau of Driver Licensing*, 744 A.2d 825 (Pa.Cmwlth.2000).

Complainant its public awareness brochure is not a showing of a violation of law or regulation or otherwise a safety issue.

- Complainant's baseless and self-serving speculative allegations of "inflated numbers" of attendance at trainings are false and misleading, particularly where he alleges Mr. Noll was "lying." Complainant Brief at pages 4-5. Complainant is referring to the number of people that attended CORE and SPLP's MERO trainings and falsely alleging that SPLP is trying to present an inflated number of attendees because SPLP personnel also attended these trainings. This is nonsense – SPLP presented as evidence the sign-in sheets that show which attendees were SPLP personnel. If SPLP were trying to "inflate" its numbers of attendees why would it present that evidence? More disturbing is Complainant misconstruing Mr. Noll's testimony and accusing him of lying when that clearly was not the case. Complainant is referring to the following cross-examination:

Q. Sir, out of all the meetings, could you tell me how many people were Sunoco representatives to your MERO?

A. I do not know the answer to that in total, but I can tell you that at all the sessions that I was involved in, that the maximum number of Sunoco folks who may have been attending the program never exceeded three to five.

N.T. 242:9-14. Mr. Noll was very specific that he was only testifying regarding specific attendance at the MERO training that he presented. *Id.* That MERO training was the October 2017 MERO training, N.T. 224:21-225:1, and the attendance sign-in sheet for that session reflects exactly what Mr. Noll testified to – three SPLP/Energy Transfer personnel attended that session. SPLP Exhibit 13. Importantly as Mr. Noll explained, SPLP personnel attend because part of the trainings is fostering a relationship between the pipeline industry and local first responders.

Q. Is it important, as part of the MERO process, to develop relationships among the pipeline operator and the local emergency response community?

A. Yes. Relationships are everything in terms of working in the emergency services community, because they provide a foundation for when you have that emergency, you already have the credibility of the individuals, of the players; they know each other. Even if they don't know each other personally, they recognize them or they have that affiliation that they can go back to a training or meeting, and it helps provide an effective foundation for the response, as well as the plan.

N.T. 232:13-25. SPLP's trainings achieved the fostering of this relationship. N.T. 233:1-7. Moreover, SPLP makes sure that first responders and others are invited but cannot require first responders to attend these trainings. N.T. 225:9-226:6.

- Complainant cites exhibit C-1 for the proposition that his Township did not have a copy of the public awareness brochure that Complainant was sent. This makes unfounded assumptions from a hearsay statement in a letter and ignores Mr. Perez's competent, credible evidence that SPLP sent out a mailer to townships. The portion of C-1 (a letter from a secretary/assistant of the Township Supervisors to Mr. Baker) Complainant references states: "I have asked them [SPLP] to bring copies of the 'Important Safety Message' flyers." This statement cannot be read to mean SPLP has not mailed its public awareness materials to this Township or even that the Township did not have those materials. This unfounded assumption based on hearsay cannot support a finding of fact. Complainant presented no credible evidence of what the Township received. Moreover, as Mr. Perez explained, SPLP mailed public outreach brochures in September 2018 to the affected public (all residents, businesses, farms, schools, and other places of congregation within 1,000 feet of each side of the pipeline), excavators, public officials, and emergency response organizations. SPLP Exhibit No. 2 at N.T. 590. These brochures were sent to:

- 40,046 members of the affected public;
- 16,338 excavators;
- 4,384 public officials; and
- 3,301 emergency response organizations.

SPLP Exhibit No. 2 at N.T. 593. SPLP completes this mailing every two years consistent with PHMSA regulations, which includes American Petroleum Institute (API) Recommended Practice (RP) 1162 (incorporated by reference, 49 C.F.R. Part 195.3(b)(8). SPLP Exhibit No. 2 at N.T. 591; 49 C.F.R. Part 195.440.

### III. CONCLUSION

WHEREFORE, SPLP respectfully requests that Your Honor conclude Complainant has not met his burden of proof to show Respondent violated the law or regulation and dismiss the Complaint with prejudice. Your Honor and the Commission do not have authority to order any relief where Respondent has not violated the law or regulations. *West Penn Power Co. v. Pennsylvania Public Utility Comm'n*, 478 A.2d 947, 949 (Pa. Cmwlth. 1984) (“We hold that in order for the PUC to sustain a complaint brought under this section [66 Pa. C.S. § 1501], the utility must be in violation of its duty under this section. **Without such a violation by the utility, the PUC does not have the authority, when acting on a customer's complaint, to require any action by the utility.**”) (emphasis added); *Township of Spring et al. v. Pennsylvania-American Water Co.*, Docket Nos. C-20054919 et al., 2007 WL 2198196 at \*6 (Order entered July 27, 2007) (“ If we were to order PAWC to conduct testing of the property in the Stonegate community, we would have to base that order on credible evidence that some act or omission by PAWC in violation of the Code or our Regulations would be remedied by the testing.”) (citing *West Penn*).

Respectfully submitted,

*Thomas J. Sniscak*

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