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February 8, 2012

**VIA HAND DELIVERY**

Chairman Kenneth C. Hill
c/o Sharla Dillon
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

Re: ***Tariff Filing by Piedmont Natural Gas Company to Adjust and Correct the Applicable Franchise Fee*, Docket No. 10-00033**

Dear Chairman Hill:

Enclosed please find an original and five (5) copies of Piedmont Natural Gas Company, Inc.'s Franchise Fee Reconsideration Brief.

This material is also being filed today by way of email to the Tennessee Regulatory Authority docket manager, Sharla Dillon. Please file the original and four copies of this material and stamp the additional copy as "filed." Then please return the stamped copy to me by way of our courier.

Should you have any questions concerning this matter, please do not hesitate to contact me at the email address or telephone number listed above.

Sincerely,

David Killion

Enclosures

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**BEFORE THE TENNESSEE REGULATORY AUTHORITY**
**NASHVILLE, TENNESSEE**

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| IN RE: | ) | |
| | ) | |
| TARIFF FILING BY PIEDMONT NATURAL GAS | ) | |
| COMPANY TO ADJUST AND CORRECT THE | ) | DOCKET NO. 10-00033 |
| APPLICABLE FRANCHISE FEE | ) | |

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## FRANCHISE FEE RECONSIDERATION BRIEF

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Piedmont Natural Gas Company, Inc. ("Piedmont"), through counsel, respectfully submits this brief in anticipation of the hearing before the Tennessee Regulatory Authority ("TRA" or "Authority") on Piedmont's request for reconsideration of the Authority's October 28, 2011 *Order Approving, In Part, And Denying, In Part, Piedmont's Tariff Adjusting Franchise Fee* ("Franchise Fee Order") in this docket. The effect of the Franchise Fee Order was to bar Piedmont's recovery of $1,541,565 in franchise fees previously paid to the Metropolitan Government of Nashville and Davidson County ("Metro Government") pursuant to a TRA approved franchise agreement between Piedmont and the Metro Government. Piedmont respectfully submits that the Authority's Franchise Fee Order was rendered on the basis of an incomplete presentation of the facts relating to this matter and is legally problematic under Tennessee statutes establishing Piedmont's right to the collection and recovery of franchise fees. In Piedmont's view, the appropriate resolution of this matter is the adoption of Piedmont's amortization proposal, or some variation thereof, that permits Piedmont to collect the under-recovered balance of monies owed to Piedmont by Metro Government customers in reimbursement for franchise fee payments previously made to that governmental entity.

## PROCEDURAL BACKGROUND

On March 9, 2010 and pursuant to TCA § 65-4-105(e), Piedmont filed a proposed "Twenty-Sixth Revised Sheet No. 1" to its tariffs, to be effective April 1, 2010, reflecting a downward adjustment to the rate used for the collection of the Metro franchise fee from its Nashville and Davidson County customers from 6.11% of customer billings to 6.08%. Piedmont based the adjusted rate on projected franchise fee costs for the succeeding annual period and also included an amortized portion of the then outstanding net under-collected balance in its franchise fee account of $2,911,943. Piedmont's projected total annual franchise fee costs for the next year were $9,563,514. The amortized portion of the under-collected balance in Piedmont's franchise fee account included in the proposed new percentage was $291,194 – or roughly 3% of the total amount to be collected annually. The sole action requested of the Authority by Piedmont's filing was approval of a footnote change in the rates sheet of its tariff adjusting the Metro franchise fee rate from 6.11% to 6.08%.

The Authority suspended the effectiveness of Piedmont's tariff filing for sixty (60) days by action taken at an Authority Conference on March 22, 2010, which was documented in the Authority's April 13, 2010 *Order Suspending Tariff For Sixty Days*. The voting panel considered Piedmont's tariff filing on the merits at the Authority's regularly scheduled Conference on April 20, 2010. Other than announcing in its Final Agenda that the Authority would "consider" Piedmont's filing at the Conference, the Authority provided no notice prior to the hearing that the Authority was considering any adverse action or would propose a disallowance of Piedmont's recovery of any portion of the uncollected balance in its franchise fee account.

At the April 20, 2010 Agenda Conference, the Authority ruled that Piedmont would not be permitted to recover $1,541,565 in previously uncollected franchise fee payments made to the Metro Government. The Authority's action was taken on the basis of certain characterizations of underlying "facts" with which Piedmont disagreed and without any opportunity for Piedmont's position on the matter to be heard. At the Conference, the Authority

asked a Piedmont representative a few questions about the filing, but provided no opportunity for Piedmont to be heard on the question of whether Piedmont should be required to forfeit the opportunity to collect roughly $1.5 million in franchise fees previously paid to the Metro Government.

On October 28, 2011, the Authority issued its Franchise Fee Order, restricting Piedmont to the recovery of only its uncollected franchise fee payments from May 31, 2005 through October 31, 2009 in the amount of $1,675,205. In the Franchise Fee Order, the Authority concluded that it would be "inappropriate and unfair to consumers" to allow Piedmont to recover uncollected franchise fee payments which the Authority concluded had accrued prior to May 2005. The Authority based its opinion on the incorrect assumption that rates established in May 2005 accounted for all prior under-collections during the period preceding May 2005 and that the balance in the franchise fee account represented an accumulated aggregate balance over a period of many years when, in fact, the balance in the franchise fee account was a current balance.

On November 14, 2011, pursuant to TCA § 4-5-317(a) and Tenn. Comp. R. & Regs. R. 1220-1-2.20(1), Piedmont filed a *Petition for Reconsideration* of the Franchise Fee Order, which was heard during the regularly scheduled Authority Conference held on November 21, 2011. During the Authority Conference and as later reflected in the Authority's December 29, 2011 *Order Granting Petition for Reconsideration*, the Authority granted Piedmont's request and permitted reconsideration of its Franchise Fee Order. This matter is now before the Authority on reconsideration.

## FACTUAL BACKGROUND

Piedmont uses its Metro Government franchise fee account to track franchise fee payments made to the Metro Government pursuant to a TRA approved franchise agreement and to track the recovery of those payments from its Metro Government customers. Piedmont's rights with respect to the operation of the account are established by TCA § 65-4-105(e) which

provides that "[a]ny franchise payment . . . made by a utility to a municipality . . . shall, insofar as practicable, be billed pro rata to the utility customers receiving local service within the municipality or political subdivision receiving such payments, and shall not otherwise be considered by the authority in fixing the rates and charges of the utility." Piedmont's franchise fee account operates as a tracker mechanism because neither the amount of franchise fees owed to the Metro Government nor the amount of franchise fee reimbursement payments due from customers during any period are known until after that period is over.

The franchise fee obligation in the Metro Government franchise agreement is unique in that it extends to all revenues of the Company except those generated in areas where other franchises are in effect. Under this mechanism, the Metro Government collects franchise fees for revenues generated outside its borders, but Piedmont must collect those fees only from customers within the Metro Government's boundaries. As a result, the correct franchise fee recovery percentage applicable to Metro Government customers is always more than 5% and cannot be determined until after the period for which the fee is due to the Metro Government has been concluded. As such, the franchise fee percentage applicable to customer bills during any period is only an estimate based on a prior balance in the franchise fee account and a projection of the ongoing franchise fee obligation of customers for the current period.

Piedmont's current mechanism for maintaining and adjusting franchise fee accounts was established by a Tennessee Public Service Commission order issued on March 12, 1983, in Docket No. U-82-7190, which according to Piedmont's records provides that:

> Commission Staff recommended that the Company establish a special account to handle fee collections payable and revise the franchise fee rate periodically to adjust for over and under collections payable. The Commission adopts that recommendation.

This order expressly anticipated that Piedmont would seek adjustment of the franchise fee ratio "periodically" for the purpose of collecting under-recoveries of refunding over-recoveries of franchise fees. Historically, Piedmont has calculated and implemented its franchise fee recovery

percentage for Metro Government customers by analyzing its most recent period under-recovery or over-recovery of franchise fees, estimating its future period Metro Government franchise fee obligations, and then calculating a proposed franchise fee recovery percentage on the basis of those two numbers. The percentage is implemented by submitting a proposed revised tariff sheet reflecting the proposed revised franchise fee recovery percentage to the TRA for approval. During the recent past, Piedmont has filed these changes on a more or less annual basis, except for the period following 2005. These changes were typically filed with Authority Staff and then approved by the Authority. To the best of Piedmont's knowledge these changes in franchise fee recovery percentages have never been challenged or modified by either Staff or the Authority until this proceeding.

Piedmont does not consider the franchise fee recovery percentage applied to Metro Government customer bills to constitute a "rate" subject to the Authority's direct discretionary jurisdiction. Instead, the franchise fee recovery percentage, as is explained more fully later in this Brief, is simply a mechanism to recoup franchise fee payments made to the Metro Government.

## DISCUSSION

Piedmont respectfully submits that based upon the facts described above and the discussion set forth below the Authority should vacate its prior order barring Piedmont from collecting approximately $1.5 million in franchise fees paid to the Metro Government pursuant to an Authority approved franchise agreement and permit Piedmont to implement a revised Metro Government franchise fee to include an amortization of the current under-collected balance in that account.

### I. The Authority's Franchise Fee Order Was Based Upon an Incomplete Identification and Discussion of the Underlying Facts of This Matter.

Piedmont believes that the Authority's prior ruling in this matter was based upon several mistaken factual and accounting assumptions which Piedmont did not have an opportunity to

explain at the time of the April 12, 2010 Authority Conference but is pleased to have the opportunity to explain now. These mistaken assumptions, when identified and corrected, mitigate strongly in favor of allowing Piedmont to recover the full under-collected balance in its Metro Government franchise fee account pursuant to the amortization mechanism proposed by Piedmont in this docket. Piedmont respectfully submits the following discussion of each of these mistaken assumptions for consideration by the Authority:

A. Piedmont's Filing was Consistent with the Established Procedures for Updating Franchise Fee Recovery Percentages.

The only authority Piedmont has been able to locate governing how Piedmont's Metro Government franchise fee account should be managed, other than TCA § 65-4-105(e), is the language from the March 12, 1983 Tennessee Public Service Commission order addressing the operation of this account. That language, as noted above, provides that:

> Commission Staff recommended that the Company establish a special account to handle fee collections payable and revise the franchise fee rate periodically to adjust for over and under collections payable. The Commission adopts that recommendation.

This language anticipates that Piedmont's Metro Government franchise fee account will be operated as a tracker, that end-of-period imbalances will occur, and that changes in the franchise fee percentage applicable to customer bills will be changed periodically to account for such imbalances. This approach to operating the Metro Government franchise fee account makes perfect sense both in 1983 and currently. It is also worth noting what the language of the Tennessee Public Service Commission order does not say. It does not specify any particular period for making adjusting filings in the franchise fee recovery percentage rate, nor does it specify a method for calculating the recovery rate adjustment in individual filings. The discretion as to both these matters appears to be left to Piedmont when it proposes to revise its franchise fee recovery percentage.

In the current docket, Piedmont's filing was made on a periodic basis to adjust for an under-collected balance in the account. Piedmont acknowledges that the period between filings

in the current docket was longer than it had previously utilized but there is nothing in that fact alone that indicates any impropriety on Piedmont's part or a violation of the guidance adopted by the Tennessee Public Service Commission for management of the account. Nor does the account history provided with Piedmont's March 9, 2010 filing indicate that customers suffered any harm from the use of a slightly longer period between filings inasmuch as the cumulative net under-collection reflected in the Metro Government franchise fee account at the end of November 2005 was roughly the same as the under-collection reflected in the current filing – approximately $2.9 million in both cases.

In past filings, all of which were reviewed by Staff and approved by the Authority/Commission, Piedmont utilized the immediate past period performance of the franchise fee account as the basis to adjust for imbalances in the account.[1] Piedmont did this by looking at the immediate past period franchise fee payments and reimbursements. This comparison comprised one part of the calculation of a new franchise fee recovery rate – the other parts being projected future franchise fee payments and projected future customer usage. In its current filing, however, Piedmont proposed a change in the way it calculated the imbalance factor. Instead of relying on the immediate prior period imbalance between payments and reimbursements, Piedmont opted instead to rely on the cumulative account imbalance for that factor in calculating its new franchise fee recovery rate. Piedmont opted for the revised factor based upon its belief that it would provide a better basis upon which to calculate revised franchise fee recovery rates. Piedmont also proposed an amortization of the under-collected imbalance.

The most salient point for the Authority to consider from Piedmont's management of its franchise fee account both prior to and concurrent with its March 9, 2010 filing, is that Piedmont's management of that account was completely consistent with the guidance

[1] This is discussed in more detail in Section I.C., *Infra*.

established with respect to the operation of that account by the Tennessee Public Service Commission in 1983. Piedmont operated its account as a tracking mechanism, it recorded franchise fees paid to the Metro Government and reimbursements of franchise fees recovered from Metro Government customers into the account, and periodically made filings with the Authority/Commission to adjust its franchise fee recovery percentage to adjust for over or under collections. This is all the Tennessee Public Service Commission's prior order requires and Piedmont's actions were in conformity with that order. Piedmont did not have an opportunity to explain these facts before the Authority ruled on Piedmont's revised franchise fee recovery rate proposal on April 12, 2010. Piedmont believes that these facts are critical to an appropriate evaluation of Piedmont's current franchise fee proposal and further believes they support approval of Piedmont's proposal and do not support the roughly $1.5 million in forfeitures previously ordered by the Authority in this docket.

B. The Under-Collected Balance in Piedmont's Franchise Fee Account is a Current Balance and is not Prejudicial to Customers.

One of the premises for the Authority's forfeiture order in this case appears to have been the notion that the under-collected balance in Piedmont's franchise fee account was a stale or old balance dating back some 15 years or more. As explained by Piedmont witness Carpenter, however, that notion is contrary to the operation of the franchise account and to similar types of tracker accounts such as Piedmont's gas cost deferred account or even simple deposit accounts. In each case, for any accounting period selected, these accounts have a beginning balance, activity in the account during the period consisting of debits and credits, and an ending balance. At the end of any period, the ending balance in the account becomes the beginning balance for the subsequent period. As a result of these basic accounting facts, and as explained by Witness Carpenter, the balance in the franchise fee account at any given time is always both (1) the cumulative result of every transaction in the account since its inception, and (2) a current balance in the account. The current balance in the account is obviously influenced

by prior transactions in the account but that does not change the fact that it is a current balance. Inasmuch as the balance is current, there is no unfairness or potential difficulty involved with asking current customers to recompense Piedmont for that balance as anticipated by TCA.§ 65-4-105(e). To the contrary, that is precisely how the procedures adopted by the Tennessee Public Service Commission anticipate franchise fee costs will be recovered from customers.

There are also other factors inherent in the operation of the account that support the conclusion that Piedmont's management of the account was not unreasonable. First, it is important to recognize that the impact of running an under-collected balance in this account is a benefit to customers and a detriment to Piedmont because the account does not bear interest. Second, the annual transactions in the account have resulted in significantly varying ending balances over time and it is not possible to exactly "balance" the account during any actual period in which it operates. Third, as a result of the first two factors, it is better for customers that Piedmont run an under-collected balance in the account because maintaining a positive balance would mean that Piedmont was over-collecting its franchise fee costs and artificially inflating the total cost of providing service to its customers. Finally, the actual amount of under-collected franchise fees that Piedmont seeks to recover from its customers is nominal in nature compared to the overall annual cost of service paid by its customers.

C. Piedmont's 2005 Franchise Fee Filing Was Based on Immediate Past Period Under-Collections and Not the Cumulative Under-Recovered Balance in the Account.

In disallowing Piedmont's recovery of under-collections attributable to periods prior to 2005 in its Franchise Fee Order, the Authority relied upon its conclusion that "the rates established in the May 2005 filing were set on a going forward basis and accounted for all prior under-collections that were attributable to projected versus actual revenues during the period preceding May of 2005." The Authority then reasoned that it would be unfair to allow Piedmont to recover under-collected fees attributable to periods prior to 2005 in its current filing after Piedmont had implemented a recovery percentage in 2005 which the Authority believed was

designed to collect those amounts. This analysis, however, is based on the false premise that the franchise fee recovery rate implemented in 2005 was calculated on the cumulative under-collection in the franchise fee account at that time. This is not the case and a review of the 2005 filing, supported by Mr. Carpenter's testimony, indicates that the 2005 filing was instead based upon the performance of that account only with respect to the period just ended. Mr. Carpenter explains this in his testimony and it is apparent from examining both the cover letter provided with the 2005 filing which indicates that it is based on under-collections from the "Previous Months" experience and from the schedules making up the filing which show only data from the immediately preceding franchise period. In short, the 2005 filing was not calculated on the basis of the cumulative under-collection in the franchise fee account as was presumed by the Authority in its Franchise Fee Order but, instead, was calculated on the imbalance resulting from credits and debits to the account during the immediately preceding franchise fee period without regard to the cumulative imbalance.

Based on the further explanation of Piedmont as to the nature and basis of the calculation underlying its 2005 franchise fee filing, the rationale underlying the Authority's Franchise Fee Order would no longer appear to be sustainable. Piedmont respectfully requests that the Authority reconsider its ruling in that order in light of this fact and vacate its ordered forfeiture of roughly $1.5 million in uncollected franchise fees.

D. Forfeiture of $1.5 million in Unrecovered Franchise Fees is an Inappropriate Remedy in this Instance.

Based on the foregoing discussion, Piedmont believes that it has reasonably established the following facts regarding its Metro Government franchise fee account: (a) Piedmont's management of the franchise fee account was consistent with TCA § 65-4-105(e) and the guidance established for the account by the Tennessee Public Service Commission Order No. U-82-7190 issued in 1983, (b) the balance in the franchise fee account subject to Piedmont's current franchise fee adjustment request is the current balance in the account, (c) Piedmont did

not represent to the Authority in conjunction with its 2005 franchise fee adjustment filing that the proposed revised rates were intended to collect the cumulative imbalance in the account, and (d) no customer was prejudiced by Piedmont's management of the account. As such, Piedmont does not believe that a forfeiture of Piedmont's ability to collect from its customers $1,541,565 in franchise fees previously paid to the Metro Government is appropriate in this instance.

At worst, Piedmont can be reasonably criticized for using a less than optimal methodology in one part of its formula for calculating updated and revised franchise fee recovery rates by using the immediate prior period account imbalance rather than the cumulative account imbalance. It should be noted, however, that Piedmont's less than optimal methodology was nonetheless consistent with existing guidance on the operation of the account and indirectly approved many times by both the Authority and Staff over many years of operation of the account. Because Piedmont's franchise fee account does not bear interest and because Piedmont has run a consistent under-recovery in that account, the net impact from Piedmont's management of the account has been beneficial to customers. Ironically, it was Piedmont's effort to change and improve this methodology, and thereby more accurately establish appropriate franchise fees going forward, that caused the Authority to issue its forfeiture order.

Piedmont is certain that at the time the Authority rendered its decision in this matter on April 12, 2010 (as later reflected in the Franchise Fee Order) the Authority was acting in good faith in the pursuit of what it perceived to be the public interest. At that time, however, it was operating without the benefit of all of the facts described above and without Piedmont's perspective on those facts. Piedmont respectfully submits that having now heard the rest of the story, it is appropriate for the Authority to reconsider its prior action and to find that neither the facts nor the equities of the situation support a forfeiture of Piedmont's right to collect from its customers the franchise fee payments previously made to the Metro Government.

## II. The Authority's Franchise Fee Order Appears to be Inconsistent with the Statutory Structure Governing Recovery of Franchise Fees.

One of the principal concerns Piedmont has with the Authority's Franchise Fee Order is that it appears to be inconsistent and in conflict with the statutory provisions governing the recovery of franchise fees. TCA § 65-4-105, titled "Extent of regulatory power of authority," provides:

> Any franchise payment . . . made by a utility to a municipality . . . ***shall***, insofar as practicable, ***be billed pro rata to the utility customers*** receiving local service within the municipality or political subdivision receiving such payments, and ***shall not otherwise be considered by the authority in fixing the rates*** and charges of the utility.

TCA § 65-4-105(e)(emphasis added). The caption of this provision makes it clear that it prescribes and limits the scope of the Authority's jurisdiction over the collection of franchise fees by utilities. Further, by unqualifiedly providing that such payments "shall" be billed to customers and "shall not" be considered by the Authority with respect to establishing rates and charges for the utility, the statute appears to be directive in nature with no discretion reserved to the Authority. It appears the statute intended to create a simple pass-through mechanism for the collection of franchise fees. Further, the clear distinction made between the "rates and charges" of the utility and franchise fee recoupment payments, in conjunction with the plain intent that the two operate independently, calls into serious question whether the Authority has been provided with the statutory jurisdiction upon which to deny recovery of properly paid franchise fees. Piedmont respectfully submits that this is not the case and that the Authority's action in this docket in denying Piedmont the ability to recover properly paid franchise fee payments from its customers was beyond the power granted to the Authority under Tennessee law.

Under the natural and ordinary meaning of this statute Piedmont is entitled to recover franchise fee payments from its customers. The statute contains no restriction on the timing of such recovery and any interpretation imposing such a time limit would be contrary to the plain language of the statute. Further, the varying year-to-year collections and payments under the

Metro Government franchise fee mechanism, and the various positive and negative net balances it produces, support utility flexibility in the recovery or distribution of net balances in the franchise fee account. This utility flexibility is also supported by the language of the Tennessee Public Service Commission's Order in Docket No. U-82-7190 cited above.

The franchise fee statute also evidences an intent that the Authority not obstruct a utility's ability to recover (and therefore be made whole through the recovery of) franchise fees by expressly stating that such franchise fees "shall not otherwise be considered by the authority in fixing the rates and charges of the utility." This language establishes that the Authority's ratemaking jurisdiction does not extend to franchise fee payments. In this case, the Authority treated Piedmont's franchise fee recovery mechanism as if it were a rate when it precluded Piedmont from making itself whole for previous franchise fee payments to the Metro Government. This action effectively extended the Authority's jurisdiction over franchise fee payments beyond that established by statute and treated Piedmont's franchise fee recovery mechanism as a rate subject to the Commission's approval. That treatment is inconsistent with and contradictory to the express exclusion of franchise fee payments from the Authority's ratemaking power.

The language of TCA § 65-4-105(e) proscribing the Authority's power over franchise fee collections and distinguishing between franchise fee payments and "rates and charges" is in stark contrast to the Authority's almost plenary jurisdiction over rates. Under TCA § 65-5-101, the Authority has much greater jurisdiction over rates charged or proposed to be charged by utilities. That statute states:

> The Tennessee regulatory authority has the power after hearing upon notice, by order in writing, to fix just and reasonable individual rates, joint rates, tolls, fares, charges or schedules thereof, as well as commutation, mileage, and other special rates which shall be imposed, observed, and followed thereafter by any public utility as defined in § 65-4-101, whenever the authority shall determine any existing individual rate . . . to be unjust, unreasonable, excessive, insufficient, or unjustly discriminatory or preferential, howsoever the same may have heretofore been fixed or established. In fixing such rates, joint rates, tolls, fares, charges or schedules, or commutation, mileage or other special rates, the authority shall

take into account the safety, adequacy and efficiency or lack thereof of the service or services furnished by the public utility.

This statute provides the Authority with substantial discretionary power over rates and charges. This sort of discretionary power is notably absent from TCA § 65-4-105(e).

Pursuant to TCA § 65-4-105(e), Piedmont has the right to recoup its franchise fee payments from its customers. Such payments are, by express statutory directive, precluded from being treated as rates or charges. As such, it does not appear to Piedmont that the Authority's prior action in this case – denying Piedmont recovery of more than $1.5 million in franchise fee payments – is authorized by statute or otherwise legally sustainable. Accordingly, the Authority's limitation on Piedmont's recovery of and treatment of franchise fee payments as the functional equivalent of a rate in the Franchise Fee Order was inconsistent and in conflict with the express requirements of TCA § 65-4-105(e).

## CONCLUSION

WHEREFORE, Piedmont Natural Gas Company, Inc., respectfully requests that the Authority vacate its April 12, 2010 ruling, as reflected in the Franchise Fee Order, and order Piedmont to recover the current balance of its uncollected franchise fees through an amortization of the under-collected balance in that account.

Respectfully submitted this __th day of February, 2012.

**Piedmont Natural Gas Company, Inc.**

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