



**ORDER**

**OF**

**WEST BENGAL ELECTRICITY REGULATORY COMMISSION**

**IN THE MATTER OF**

**SHREE RENUKA SUGARS LIMITED**

**- VS -**

**WEST BENGAL STATE ELECTRICITY DISTRIBUTION COMPANY LTD**

**CASE NO. OA-251 / 17 – 18**

FINAL ORDER IN RE PETITION FILED BY SHREE RENUKA SUGARS LIMITED UNDER SECTION 86 (1) (A), (B) AND (E) OF THE ELECTRICITY ACT, 2003 (36 OF 2003) SEEKING DIRECTIONS TO WEST BENGAL STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED (WBSEDCL) FOR AMENDMENT OF PPA DATED 8<sup>TH</sup> APRIL, 2009 AS PER WEST BENGAL ELECTRICITY REGULATORY COMMISSION (CO-GENERATION AND GENERATION OF ELECTRICITY FROM RENEWABLE SOURCES OF ENERGY) REGULATIONS, 2013 (IN SHORT 'THE REGULATIONS') AND TO PAY TARIFF FIXED FOR CO-GENERATION BY THE COMMISSION AS PER THE REGULATIONS.

**PRESENT:**

**SRI R. N. SEN, CHAIRPERSON**

**SRI AMITAVA BISWAS, MEMBER**

**SRI DURGADAS GOSWAMI, MEMBER**

**DATE: 05.04.2018**

Final order in Re petition filed by Shree Renuka Sugars Limited under section 86 (1) (a), (b) and (e) of the Electricity Act, 2003 (36 of 2003) seeking directions to West Bengal State Electricity Distribution Company Limited (WBSEDCL) for amendment of PPA dated 8<sup>th</sup> April, 2009 as per West Bengal Electricity Regulatory Commission (Co-Generation and Generation of Electricity from Renewable Sources of Energy) Regulations, 2013 (in short the 'Regulations') and to pay tariff fixed for co-generation by the Commission as per the Regulations

Noting by Office or Advocate	Sl. No.	Date	Office notes, reports orders or proceedings with signature
		05.04.2018	<p style="text-align: center;"><u>ORDER</u></p> <p>1.0 Shree Renuka Sugars Limited, Haldia Unit, City Centre, Post Debhog, Haldia, District Purba Midnapur, Pin 721657 (hereinafter referred to as the "complainant") submitted a petition on 11.05.2017 before the West Bengal Electricity Regulatory Commission (hereinafter referred to as the "Commission") against West Bengal State Electricity Distribution Company Limited (hereinafter referred to as "WBSEDCL") under section 86 (1) (a), (b) and (e) of the Electricity Act, 2003 seeking, inter-alia, the following:</p> <p>a) Declaration that West Bengal Electricity Regulatory Commission (Co-generation and Generation of Electricity from Renewable Sources of Energy) Regulations, 2013 (hereinafter referred to as the 'Regulations') is applicable to the complainant's co-generation plant.</p> <p>b) Direction to WBSEDCL to purchase only surplus power generated in the said co-generation plant and amend the PPA dated 8<sup>th</sup> April, 2009 as per the Regulations.</p> <p>c) To pay tariff fixed for co-generation by the Commission as per the Regulations.</p> <p>d) Direct WBSEDCL to refund Rs. 28.73 crores with interest towards excess payment made by the complainant on account of in-house consumption (import of power) due to denial of accepting surplus power as per the Regulations and levying import charges for in-house consumption.</p>

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			<p>2.0 While processing admission of the petition, it was revealed that the complainant had filed a writ petition on the aforesaid issues bearing W.P. No. 22948 (W) of 2012 before the Hon'ble High Court at Calcutta on 08.10.2012 where the Commission was also made a respondent. However, the status of the writ petition filed before the Hon'ble Court at Calcutta was not available with the Commission till 14.06.2017. It was also evident from the letter dated 12.10.2017 from the complainant, that the complainant had decided to withdraw the said writ petition and accordingly instructed their advocate to withdraw the said petition. The complainant had submitted a server copy of the withdrawal order dated 28.11.2017 passed by the Hon'ble Judge Sri Debangsu Basak.</p> <p>3.0 Upon receipt of the withdrawal order, the Commission vide its letter no. WBERC/OA-252/17-18/1497 dated 05.01.2018 had directed the complainant to confirm whether any other litigation in the same issue was preferred or was pending before any court of Law / Forum. The complainant had submitted vide letter dated 12.01.2018 confirming that they had neither preferred any other litigation in the same issue nor any litigation of such nature was pending before any court of Law / Forum. The complainant had further requested to expedite adjudication of the petition.</p> <p>4.0 On perusal of the contents of the petition and the reply submitted by the complainant, the Commission had called for a hearing upon service of notice, fixing the date on 20.02.2018 at 15.00 hours at the office of the Commission.</p> <p>5.0 The hearing was held on 20.02.2018 at 15.00 hours at the office of the Commission as scheduled. During the hearing, it was revealed that the copy of the petition, in question, was served upon WBSEDCL only on the date of the hearing i.e., on 20.02.2018, as a result of which WBSEDCL was unable to plead on the case. Upon hearing both the</p>
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			<p>parties, the Commission had passed the following order:</p> <p>Quote:</p> <p style="padding-left: 40px;">The Commission orders that WBSEDCL shall submit their reply through an affidavit to the Commission within 13<sup>th</sup> March, 2018 with a copy to the complainant. The next hearing will be held on 16<sup>th</sup> March, 2018 at 15.00 hours at the office of the Commission.</p> <p style="text-align: right;">Unquote</p> <p>6.0 Accordingly, the hearing was held on 16<sup>th</sup> March, 2018 at 15.00 hours at the office of the Commission. Sri Sunil S Kadam, Sr. General Manager – Legal along with other representatives were present on behalf of the complainant with due authorization. Sri Vishrob Mukherjee, Partner, J Sagar Associates was present in the hearing on behalf of WBSEDCL with due authorization along with officials from WBSEDCL</p> <p>7.0 The complainant, inter-alia, submitted as to whether existing Power Purchase Agreement between the complainant and WBSEDCL – providing that the entire generation of electricity by the complainant will be sold to WBSEDCL and the requirement of the complainant in its sugar refinery has to be purchased from WBSEDCL – is violative of the Electricity Act, 2003 and Regulations made thereunder and is opposed to National Electricity Policy and West Bengal Electricity Regulation Commission (Co-generation and Generation of Electricity from Renewable Sources of Energy) Regulations, 2013 (hereinafter referred to as “Regulations, 2013”) framed by the Commission. It is also submitted that whether WBSEDCL has, in accordance with the National Electricity Policy, a duty coupled with power to purchase only surplus power generated in the co-generation unit i.e., power available after consumption in the sugar refinery of the complainant.</p> <p>The complainant submitted that they are corporate house in sugar</p>
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			<p>industry producing and selling sugar and its bye products in India and abroad. They have established 7 sates-of-art integrated sugar factories in India and abroad and 2 stat-of-art port based sugar refineries in Kandla and Haldia. Sugar refining process requires steam which is being produced with the help of fossil fuel. During the process, electricity is also produced by default, around 10-15 MW, depending on the steam generation. Such generation of power is called co-generation power. Entire power is being sold to WBSEDCL as per Power Purchase Agreement (PPA) dated 08.04.2009 entered into by and between the complainant and WBSEDCL. Out of the entire power, WBSEDCL recovers charges towards the power consumed by the complainant for its captive requirement i.e., around 4-5 MW and balance is being treated as export for which export rate is being paid by WBSEDCL to the complainant as per the applicable tariff rate. Such an arrangement is inconsistent with the National Co-generation Power Policy and the Regulations, 2013.</p> <p>Electricity Act, 2003 (hereinafter referred to as the 'Act') defines 'co-generation' as 'a process which simultaneously produces two or more forms of useful energy (including electricity)'. In the case of complainant, two forms of useful energy are steam and electricity. The complainant's co-generation power plant is not stand alone power plant, but mix of two forms of useful energy. The difference between stand alone power plant and the complainant's co-generation power plant is that stand alone power plant consumes entire steam for power production, whereas in this co-generation plant, portion of steam goes for process and power is being produced by default with the help of steam. As per process steam requirement, complainant's electricity generation capacity varies from 10 to 15 MW.</p> <p>As per the PPA, the entire generation of power was being supplied to WBSEDCL at the rate agreed thereto. During the first year of supply, WBSEDCL granted average export rate of 541.00 paise per unit, which</p>
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			<p>was subsequently reduced to 214 paise per unit and continuing till date.</p> <p>Contrary to National Co-generation Policy and the Regulations, 2013 captive consumption was charged at 541 paise per unit which was subsequently increased to 900.00 paise unit. Since concept of co-generation was not recognized then, the entire co-generation supply was treated as export and the consumption of the plant as import.</p> <p>The complainant further submitted that contrary to the National Electricity Policy, WBSEDCL interpreted complainant's co-generation plant as Independent Power Plant (in short "IPP") and accordingly continued to levy charges on captive consumption of the complainant. This is inconsistent with the co-generation power policy adopted by the other States and national power policy. The complainant submitted that they have brought this inconsistency to the notice of WBSEDCL on several occasions and requested WBSEDCL to amend the PPA in line with the Regulations, 2013, which clearly states under clause 6.8 that <i>'The price of energy purchased by distribution licensee from any Co-generation and / or renewable sources shall be determined as per these regulations for entire purchase of power of such sources if it is a generator and in case of captive generation such purchase shall be for entire surplus after the captive consumption'</i>. But, WBSEDCL with his own assumption and interpretation continued to contravene National Co-generation Policy, Act and Regulations, 2013. The complainant submitted that as per Rule 3 of the Electricity Rules, 2005 a power plant shall qualify as a 'captive power plant' (in short "CPP") when not less than fifty one percent (51%) of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use. But the complainant's generating plant is neither CPP nor IPP. They are co-generation plant.</p> <p>The complainant submitted that the Government of India announced promotion of co-generation power plants on 6<sup>th</sup> November, 1996, wherein the meaning of cogeneration has been clearly defined. In the</p>
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			<p>said promotion policy two basic cogeneration cycles have been identified viz. topping cycle and bottoming cycle amongst which, the complainant squarely falls under the topping cycle according to clause 5.1(i) of the said promotion policy. The complainant also submitted that section 2(8) of the Act defines 'Captive Generating Plant' as a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any cooperative society or association of persons for generating electricity primarily for use of members of such cooperative society or association while section 2(12) of the Act defines "Co-generation" as a process which simultaneously produces two or more forms of useful energy (including electricity). Therefore, the complainant's power generation squarely falls under the category "Co-generation" and not "Captive Generation Plant" as is claimed by WBSEDCL.</p> <p>The complainant further submitted that they had filed a writ petition vide no. 22948(W) of 2012 before the Hon'ble High Court at Calcutta with a prayer for declaration on certain issues compatible with the interest of the complainant. During the pendency of the said writ petition, the Commission published West Bengal Electricity Regulatory Commission (Co-generation and Generation of Electricity from Renewable Sources of Energy) Regulations, 2013 in supersession of West Bengal Electricity Regulatory Commission (Co-generation and Generation of Electricity from Renewable Sources of Energy) Regulations, 2010. The complainant wrote a letter to WBSEDCL on 11.06.2013 requesting them to enter into a fresh PPA in line with Regulations, 2013. In reply, WBSEDCL vide its letter dated 18.06.2013 called for a joint meeting of the concerns to discuss and decide course of action on entering into fresh PPA, subject to fulfilment of certain requirement to enable to prepare necessary PPA and arrive at the tariff rate. After exchange of series of correspondence between the complainant and WBSEDCL, a draft PPA was prepared by WBSEDCL and sent to the complainant on</p>
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			<p>29<sup>th</sup> October, 2013 for its acceptance. On 28<sup>th</sup> November, 2013, the complainant submitted certain comments on the draft PPA to WBSEDCL, since the same was prepared on IPP mode. The complainant also requested WBSEDCL to make new tariff with effect from 22<sup>nd</sup> March, 2013 in consonance with the Regulations, 2013. WBSEDCL vide its letter dated 6<sup>th</sup> March, 2014 explained the complainant as to why the complainant's plant cannot be accepted as co-generation plant or CPP under excess power mode. The complainant submitted that they have requested WBSEDCL to recognize their plant as co-generation and to allow to sell the surplus power. WBSEDCL, in reply, informed that the complainant's plant would be recognized as CPP and not co-generation. Finally, WBSEDCL vide its letter dated 24<sup>th</sup> May, 2016 informed that they are not in a position to go for new agreement and the power purchase from the complainant's plant will continue as per existing PPA executed on 08.04.2009. It is submitted by the complainant that they have suffered a loss of Rs. 2873.00 lakh during the period from July, 2013 to March, 2017, i.e., the period after publication of the Regulations, 2013.</p> <p>The complainant submitted that the impugned action and / or inaction on the part of WBSEDCL is arbitrary, unreasonable, contrary to National Electricity Policy, Electricity Act, 2003 and the Regulations, 2013 of the Commission and unreasonably offend the complainant's right to carry on business, suffer from unreasonableness, procedural, impropriety and illegality and is violative of Article 14 of the Constitution of India as also destructive of Article 19(1)(g) and negate Article 21 of the Constitution of India by denying a procedure which is just, fair and reasonable.</p> <p>The complainant also submitted that since the dispute is regarding modification of existing PPA and extending co-generation tariff rate for surplus power being sold by the complainant's co-generation plant in line with Regulations, 2013, the Commission is empowered under</p>
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			<p>section 60 of the Act to decide and issue direction as it considers appropriate to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which causes or likely to cause an adverse effect on competition in electricity industry. Accordingly, the complainant had filed a petition before the Commission on 18<sup>th</sup> February, 2011 stating that arrangement between the complainant and WBSEDCL became financially and economically unviable and prayed for amendment of the PPA allowing the complainant to consume power from bus for its captive requirement first and then the balance / surplus power be exported to WBSEDCL. The said petition was returned by the Commission for non-compliance of the provisions specified in the West Bengal Electricity Regulatory Commission (Conduct of Business) Regulations, 2007.</p> <p>The complainant submitted that section 62(6) of the Act specified that if any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee. Hence, the petition, in question, made by the complainant is bonafide and made in the interest of justice. The complainant also submitted that save and except as disclosed above, the complainant has not filed any other application before the Commission or any other court, on the selfsame cause of action.</p> <p>In view of what has been stated hereinabove, the complainant prayed before the Commission to pass orders on the issues as have been specified in paragraphs 1(a) to 1(d) above.</p> <p>8.0 WBSEDCL has submitted that the present petition is barred by limitation. The purported cause of action arose on 06.03.2014 when WBSEDCL rejected the Petitioner's request for amendment of the PPA dated 08.04.2009. The present Petition has been filed after a delay of</p>
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			<p>more than 3 years and thus ought to be dismissed on account of delay and laches. It is also submitted that the Hon'ble Supreme Court has in the case of A.P. Power Coordination Committee &amp; Ors. v. Lanco Kondapalli Power Ltd. &amp; Ors., reported as (2016) 3 SCC 468 held that claims coming for adjudication before any Commission cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation. Thus, the period of limitation for claims before Electricity Regulatory Commission is the same as that of civil suits i.e. 3 years. Since the present petition has been filed with a delay of more than 3 years, it is barred by limitation. It is further submitted that The Hon'ble Supreme Court has in Major (Retd) Inder Singh Rekhi v. Delhi Development Authority, reported as (1988)2 SCC 338 held that a dispute was said to arise when there was a claim and the same was denied/repudiated by the other party and that a party cannot postpone the cause of action by sending reminders. Thus, subsequent correspondence exchanged between the complainant and WBSEDCL whereby the complainant requested WBSEDCL for consideration of its request for amendment of the PPA will not postpone the cause of action.</p> <p>WBSEDCL submitted that in terms of section 2(8) read with section 9 of the Act, Rule 3 of the Electricity Rules, 2005, it is clear that for qualifying as a Captive Generating Plant, 26% of the ownership has to be held by the captive user(s) and not less than 51% of the aggregate electricity generated in such plant, determined on an annual basis has to be consumed for the active use. The legislature has not left any ambiguity as to how a captive user is to be determined. It is pertinent to note that no carve out has been made for cogeneration plants as far as captive generating plants are concerned. In this regard, the paragraphs 23 and 24 of the order dated 18.10.2012 and paragraph 9 of the order dated 08.01.2013 of the Hon'ble CERC are relevant. The complainant is</p>
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			<p>not a captive generating plant since it does not consume 51% of the aggregate electricity generated in the plant. The same has been admitted by the complainant in paragraphs 10 and 49 of the present Petition. WBSEDCL, in this regard, has provided a chart reflecting the consumption of power by the complainant for the past three years.</p> <p>The complainant's contention that consumption of steam energy generated by the project be considered as consumption of electrical energy for arriving at 51% of the aggregate electrical consumption is contrary to the statutory mandate. It is submitted that in terms of Section 2(12) of the Act cogeneration has been defined as a process which simultaneously produces two or more forms of energy (including electricity). Therefore, the two forms of energy namely, steam and electrical energy are considered separate and distinct. The interpretation sought to be given by the complainant militates against the definition of co-generation and the statutory mandate. Since the complainant does not fulfil the condition for captive generating plant set out in Rule 3 of the Electricity Rules, 2005, it is not entitled to sale of balance energy after deduction of captive consumption. It is submitted that the complainant is incorrect in relying upon the letter dated 04.09.2014. The said letter reiterates the position taken by WBSEDCL that the complainant will be entitled to sell surplus energy only if it is meeting the conditions for captive generation plant in terms of Rule 3 of the Electricity Rules. WBSEDCL submitted that the complainant's reliance on Regulation 6.8 of the Regulations, 2013 to contend that only surplus power after auxiliary power consumption ought to be sold to WBSEDCL, is erroneous. It is also submitted that the stipulation for sale of surplus energy after captive consumption only applicable for captive generating plant.</p> <p>It is submitted by WBSEDCL that the terms of the PPA dated 08.04.2009 were mutually agreed between the parties. In fact the tariff scheme stipulated in the PPA was on the insistence of the complainant</p>
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			<p>itself. Merely because the provision under article 11 of the PPA dated 08.04.2009 is no longer beneficial to the complainant, the same cannot be a ground for reopening the terms of the PPA by this Commission. The complainant would not be discharged of its obligations under the PPA. It bears mention that the term of the PPA was 25 years. The aforesaid position has been confirmed by the Hon'ble Supreme Court in the case of Energy Watchdog v. CERC &amp; Ors., reported as (2017) 14 SCC 80.</p> <p>WBSEDCL submitted that regulation 6.6 of the Regulations, 2013 provide that for an existing co-generation plant under an existing PPA executed under repealed regulations, a new price of electricity based on the two part tariff set by the said Regulations may be agreed between the buyer and the seller by entering into a new PPA. However, the Regulations, 2013 do not mandate the seller and the buyer to enter into a new PPA. In fact, in terms of Regulation 5.2 of the Regulations, 2013, any PPA entered into between the seller and the purchaser based on earlier Regulations would remain valid. It is submitted that the complainant was aware of the legal regime including co-generation policy, the Electricity Act, 2003 and the applicable Regulations at the time of execution of the PPA. Thus, the commercial arrangement between the complainant and WBSEDCL was entered into knowingly by both the parties. Given the above, no Court can direct execution of an agreement in a particular manner and format. The existing PPA is in accordance with the applicable Regulations and does not warrant any interference.</p> <p>It is further submitted that the existing PPA is not contrary to co-Generation Policy or WBERC Regulations. The complainant is incorrect in stating that WBSEDCL'S treating of the Co-generation plant as IPP instead of a Captive Generating Plant is contrary to the Co-Generation policy and WBERC Regulations. Insofar as the Regulations, 2013 are concerned, the condition of purchase of surplus after self-consumption</p>
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			<p>is limited to captive power plants. Since the complainant's project does not qualify as a captive Generating Plant, it is not entitled to captive consumption of power or sale of only surplus. Insofar as the 1996 Policy on promotion of co-generation is concerned, the policy only stipulates that co-generation plants would be treated similar to captive generating plants for the purpose of CEA clearance. Therefore, there are no conditions which require treatment of co-generation projects as captive generating plants. In any event, the Policy would be subservient to the Electricity Rules, 2005 which prescribe the conditions for grant of captive generating plant status. The complainant's allegation that the PPA dated 08.04.2009 is violative of the Act and the extant Regulations dealing with cogeneration of power, is erroneous. The allegation that the PPA dated 08.04.2009 is violative of Article 14, 19 and 21 of the Constitution are bald allegations and are denied. The complainant has not substantiated how the aforesaid Articles have been violated in the present case. It is further submitted that the complainant is incorrect in stating that WBSEDCL has indulged in abuse of its dominant position. The complainant has not produced anything on record to show that WBSEDCL has abused its position. It is pertinent to note that the approval granted by this Commission for procurement of power from the complainant took into account the fact that the entire capacity was to be supplied to WBSEDCL. This was the fundamental understanding on the basis of which procurement of power was approved. The Order dated 14.12.2009 in Case No. WBERC/OA-66/09-10 is relevant and referred to in this case.</p> <p>It is reiterated that the PPA dated 08.04.2009 is valid and in accordance with the Electricity Act, 2003 and the extant Regulations. Accordingly, the complainant is bound by the terms of the PPA. It is settled law that courts cannot rewrite the terms of a contract.</p> <p>In the light of the aforesaid submission, WBSEDCL prayed before the Commission to dismiss the present petition of the complainant and to</p>
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			<p>pass any other order(s) as the Commission may deem fit.</p> <p>9.0 Upon hearing both the parties, the Commission asked the complainant as to whether they can produce any relevant provision(s) of the Statute, i.e., Act, Rules and Regulations by which it can be established that they can consume part of the electricity generated in co-generation plant and sell the surplus power without satisfying the conditions of captive generation power plant in Rule – 3 of the Electricity Rules, 2005. But the complainant could not do so, rather reiterated the same contentions as have been narrated hereinabove. However, the Commission is of the opinion that as per the statute it has no scope to intervene into the commercial terms and conditions of PPA and the matter should be settled between the complainant and WBSEDCL mutually.</p> <p>10.0 In view of the above, the Commission decides that the petition of Shree Renuka Sugars Limited is not maintainable. However, the Commission likes to direct that both the complainant and WBSEDCL shall sit together to resolve the issue mutually. Once any new PPA with mutually agreed terms and conditions as per provisions of the Act, Rules and Regulations thereunder is evolved, they can submit it to the Commission for approval. However, both the parties shall submit a report on the same to the Commission within 16<sup>th</sup> April, 2018.</p> <p>11.0 With the above decision, the case is disposed of.</p> <p>12.0 Let a copy of the order be served upon the complainant and WBSEDCL.</p> <p style="text-align: center;">Sd/- (DURGADAS GOSWAMI) MEMBER</p> <p style="text-align: center;">Sd/- (AMITAVA BISWAS) MEMBER</p> <p style="text-align: center;">Sd/- (R. N. SEN) CHAIRPERSON</p> <p>Dated : 05.04.2018</p>
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