UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Ownership Information in Market-Based Rate Filings	Docket No. RM16–3–000

COMMENTS OF THE AMERICAN PUBLIC POWER ASSOCIATION AND THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

The American Public Power Association (APPA) and the National Rural Electric Cooperative Association (NRECA) submit these comments on the notice of proposed rulemaking issued in this docket. *See* 80 Fed. Reg. 80,302 (Dec. 24, 2015) (NOPR). The Commission proposes to clarify—and reduce—the ownership information required to be filed by a public utility seeking to obtain or retain authority to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates.

APPA and NRECA support Commission efforts to eliminate unnecessary regulatory burdens, provided that action is consistent with the Commission's long-standing regulatory goal of fostering greater competition in wholesale electricity markets. Clarifying the ownership information required to be filed by these public utilities can potentially reduce these burdens *and* better enable the Commission to accomplish its primary regulatory goal and thus meet its statutory duty of ensuring just and reasonable rates. *See* 16 U.S.C. §§ 825d, 825e.

The instant proposal, however, goes too far in some respects and would frustrate the Commission's primary regulatory goal and its ability to meet its statutory responsibilities. Accordingly, the Commission should either withdraw the proposal or

issue a final rule with different filing requirements. APPA and NRECA propose alternative regulatory language below that will better accomplish the Commission's stated objectives, consistent with the Commission's overall market-based rate regulations and its statutory duties. Specifically:

- If the Commission amends the filing requirements for market-based rate applications and triennial updates, it should require sellers to
    - Identify *all* affiliate owners—not just the two proposed incomplete categories of affiliate owners—and describe the seller's relation to them.
    - Identify all other affiliates of the seller included in the seller's market power analysis and describe the seller's relation to them.
- The Commission should withdraw its proposal regarding passive ownership—or at a minimum clarify that it is not changing its existing policies.
- The Commission should clarify that it is not narrowing the scope of the change-in-status filing requirement.
- If the Commission changes the definition of "affiliate" in its regulations, it should withdraw this proposal altogether.

INTERESTS OF APPA AND NRECA

APPA is the national service organization representing the interests of not-for-profit, state, municipal, and other locally owned electric utilities throughout the United States. More than 2,000 public power systems provide over 15 percent of all kWh sales to ultimate customers, and do business in every state except Hawaii. APPA utility members'

primary goal is providing customers in the communities they serve with reliable electric power and energy at the lowest reasonable cost, consistent with good environmental stewardship. This orientation aligns the interests of APPA-member electric utilities with the long-term interests of the residents and businesses in their communities. Collectively, public power systems serve over 48 million persons.

NRECA is the national service organization for more than 900 not-for-profit rural electric utilities that provide electric energy to approximately 42 million consumers in 47 states, or 13 percent of the nation's population. Kilowatt-hour sales by rural electric cooperatives account for approximately 11 percent of all electric energy sold in the United States. NRECA's members also include approximately 65 generation and transmission (G&T) cooperatives, which supply wholesale power to their distribution cooperative owner-members. Both distribution and G&T cooperatives were formed to provide reliable electric service to their owner-members at the lowest reasonable cost. Similar to APPA, many of NRECA's members operate in RTO/ISO markets.

APPA and NRECA each have many utility members that purchase electric energy, capacity, or ancillary services from public utilities that now have or may seek to obtain market-based rate authority for such sales. In addition, APPA and NRECA each have many utility members that compete with such public utilities in making wholesale sales of energy, capacity, and ancillary services (and as consumer-owned not-for-profit utilities, use the proceeds of such sales to reduce the costs of service to the consumer-owners they are obligated to serve). Accordingly, APPA and NRECA have an interest in ensuring vigorous competition in wholesale electric markets. APPA and NRECA have filed comments in many previous Commission proceedings involving competition issues,

including mergers, affiliate rules, and rules governing public utilities' sales of electric energy at market-based rates.

COMMUNICATIONS

Service should be made on, and communications directed to, these persons:

Delia D. Patterson
General Counsel
American Public Power Association
2451 Crystal Drive, Suite 1000
Arlington, VA 22202
202-467-2993
dpatterson@publicpower.org

Randolph Elliott
Senior Regulatory Counsel
American Public Power Association
2451 Crystal Drive, Suite 1000
Arlington, VA 22202
202-467-2952
relliott@publicpower.org

Paul M. Breakman
FERC Counsel
National Rural Electric Cooperative Association
4301 Wilson Boulevard
Arlington, VA 22203
703-907-5844
paul.breakman@nreca.coop

Paul McCurley
Chief Engineer and Acting Executive Director of Energy & Power
National Rural Electric Cooperative Association
4301 Wilson Boulevard
Arlington, VA 22203
703-907-5867
paul.mccurley@nreca.coop

COMMENTS ON DETAILED PROPOSALS

I. The proposed amendments to 18 C.F.R. § 35.37(a)(2) should be withdrawn or modified.

A. The Commission should require a Seller to identify all affiliated owners and all affiliates included in its market-power analysis and to describe their connection to the Seller.

The Commission's established policy under Order No. 697 allows public utility sellers to charge market-based rates for wholesale sales of electric energy, capacity and ancillary services only if the sellers can demonstrate that they and their affiliates lack or

have adequately mitigated horizontal and vertical market power.[1] The Commission does not propose any changes in this docket to this long-standing requirement.

The Commission's stated concern is that the filing requirements to obtain market-based rate authority under this policy are ambiguous and may impose an unwarranted regulatory burden. NOPR, P 8. The problem is not with the filing requirements set forth in the Commission's current regulations at 18 C.F.R. § 35.37 (2015), which the Commission recently revised in Order No. 816.[2] Instead, the Commission focuses on the language in footnote 258 of Order No. 697-A:

> A seller seeking market-based rate authority must provide information regarding its affiliates and its corporate structure or upstream ownership. To the extent that a seller's owners are themselves owned by others, the seller seeking to obtain or retain market-based rate authority must identify those upstream owners. Sellers must trace upstream ownership until all upstream owners are identified. Sellers must also identify all affiliates. Finally, an entity seeking market-based rate authority must describe the business activities of its owners, stating whether they are in any way involved in the energy industry.[3]

The Commission states that sellers have complained that identifying and describing "individual shareholders, particularly those with less than ten percent voting interests," is sometimes difficult. NOPR, P 7. The Commission also states that "information about

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1 18 C.F.R. § 35.37 (2015). *See* Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252 (2007), *clarified*, 72 Fed. Reg. 72,239 (Dec. 20, 2007), 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268 (2008), *clarified*, 124 FERC ¶ 61,055 (2008), *order on reh'g*, Order No. 697-B, 73 Fed. Reg. 79,610 (Dec. 30, 2008), FERC Stats. & Regs. ¶ 31,285 (2008),*order on reh'g*, Order No. 697-C, 74 Fed. Reg. 30,924 (June 29, 2009), FERC Stats. & Regs. ¶ 31,291 (2009), *corrected*, 128 FERC ¶ 61,014 (2009), *clarified*, Order No. 697-D, 75 Fed. Reg. 14,342 (Mar. 25, 2010), FERC Stats. & Regs. ¶ 31,305, clarified, 131 FERC ¶ 61,021 (2010), *reh'g denied*, 134 FERC ¶ 61,046 (2011), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011).

2 Refinement of Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 816, 80 Fed. Reg. 67,056 (Oct. 30, 2015) (final rule), *modified*, 153 FERC ¶ 61,337 (2015) (order partially extending compliance effective date), *reh'g pending.*

3 Order No. 697-A, P 181 n.258, 73 Fed. Reg. at 25,860 n.258.

owners that are not considered affiliates under 18 C.F.R. § 35.36(a)(9) is not necessary to evaluate horizontal and/or vertical market power (and is not required to be identified in the asset appendix or the corporate organization chart) …." NOPR, P 8. Thus, the Commission states that requiring public utilities to file information on "unaffiliated owners" may create an unnecessary regulatory burden. *Id.*

If that premise is accepted, however, then the filing requirements in 18 C.F.R. § 35.37(a)(2) could be amended simply to clarify that an applicant Seller only needs to identify and describe its upstream owners that are affiliates of the Seller. Requiring an applicant Seller to identify all affiliate owners would be a reasonable regulatory obligation and would be consistent with the inquiry required by the Commission's market-based rate program.

The Commission's proposal, however, goes further in narrowing the required ownership-structure information. The Commission proposes to modify § 35.37(a)(2) so that a Seller would have to identify only two categories of affiliate owners: (1) "all ultimate affiliate owner(s)" and (2) "all affiliate owners that have a franchised service area or market-based rate authority, or that directly own or control: generation; transmission; intrastate natural gas transportation, storage or distribution facilities; physical coal supply sources or ownership of or control over who may access transportation of coal supplies." NOPR, P 9. This proposal would exclude all other affiliate owners, as the last sentence of paragraph 9 states: "To the extent that an affiliate owner does not fall into either of the two categories described above, the seller will not need to identify it when describing its ownership structure."

The problem is that these two categories of affiliate owners exclude other, intermediate affiliate owners that are clearly relevant to understanding the market power analysis the Commission requires of a Seller. For example, these other intermediate affiliate owners, while excluded from the two categories in the Commission's proposal, nonetheless may own (directly or indirectly, partially or wholly) another entity that itself is an affiliate of the Seller and must be included in the Seller's market power analysis, *e.g.*, because the affiliate has a franchised service area, has market-based rate authority, or owns or controls generation or other facilities. Such "lateral" affiliates of the Seller must be identified in the asset appendix and the corporate organization chart, and if they own or control generation facilities this generation capacity must be included in the horizontal market-power screens. Yet the Commission's proposal would allow a Seller to exclude from its description of its ownership structure its affiliate owners that also own or control other affiliated entities included in the market-power analysis required of the Seller.

Or consider an intermediate affiliate owner in the ownership structure that exerts operational control over and dictates policy for a group of sellers with market-based rates, while the ultimate affiliate owners are financial entities whose control is far less immediate and important. The Commission's proposal would completely miss the key affiliate owner.

The Commission notes that the ownership structures of public utility sellers with market-based rates are becoming ever more complex. *See* NOPR, P 6. Yet the proposed required ownership-structure information would be facially incomplete and even useless to the Commission staff in evaluating initial applications and triennial updates.

The Commission recognizes part of this problem but ignores it in the proposed regulation. Paragraph 10 of the proposal states: "The seller should also describe each ultimate affiliate owner's connection to the seller, and this description should be sufficient to allow the Commission to understand the relation between the seller and the ultimate affiliate owner(s), and could include references to the required corporate organization chart." The proposed regulatory text for § 35.37(a)(2), however, contains no such requirement. But even if that problem were fixed by adding that requirement to the proposed regulatory text, that still would not address the larger problem of letting the Seller exclude some of its affiliate owners altogether.

These multiple deficiencies in the Commission's proposal can be remedied by a straightforward editing of the proposed regulatory text of 18 C.F.R. § 35.37(a)(2) as follows:

> When submitting a market power analysis, whether as part of an initial application or an update, a Seller must include a description of its ownership structure that identifies all affiliate owners. The Seller must also describe each affiliate owner's connection to the Seller, and this description should be sufficient to allow the Commission to understand the relation between the Seller and all affiliate owners. A Seller must also identify all other affiliates of the Seller included in the Seller's market power analysis and describe such affiliates' connection to the Seller, and this description should be sufficient to allow the Commission to understand the relation between the Seller and all such affiliates. ~~all ultimate affiliate owner(s), *i.e.*, the furthest upstream affiliate(s) in the ownership chain. A Seller must also identify all affiliate owners that have a franchised service area or market-based rate authority, and all affiliate owners that directly own or control: Generation; transmission; intrastate natural gas transportation, storage or distribution facilities; physical coal supply sources or ownership of or control over who may access transportation of coal supplies.~~ The term "affiliate owner" means any owner of the Seller that is an affiliate of the Seller as defined in § 35.36(a)(9) of this subchapter. The Seller must also provide an appendix of assets in the form provided in Appendix B of this subpart and an organization chart. The organization chart must depict the Seller's current corporate structure indicating all affiliates.

Because the inserted language is more inclusive, and requires a full description of the ownership structure and all affiliates in the market-power analysis, it renders the stricken language redundant. Requiring the Seller to identify all affiliate owners and all affiliates included in its market power analysis is a reasonable regulatory burden and will assist the Commission in processing market-based rate applications and triennial updates. If the Commission adopts a final rule in this docket, it should adopt this alternative language (or something similar) rather than the narrower language the Commission has proposed.

B. The proposal conflicts with the organization-chart requirement of Commission Order No. 816.

In Order No. 816, the Commission recently amended its policies and procedures for market-based rates for sales by public utilities, including the filing requirements in 18 C.F.R. § 35.37.[4] In the instant proceeding, the Commission states that it is proposing the new ownership-structure description requirements "[i]n conjunction with the new organization chart requirement in Order No. 816 …." NOPR, P 5. In a footnote, the Commission states that the "proposed regulatory text changes in this NOPR are keyed off of the new regulatory text as promulgated in Order No. 816." NOPR, P 16 n. 23. To the contrary, the Commission's proposal conflicts with the organization-chart requirement adopted in Order No. 816.[5]

The text added to 18 C.F.R. § 35.37(a)(2) by Order No. 816 is in the last two sentences of the proposed regulatory text quoted above, which the Commission proposes to retain without substantive change: "The Seller must also provide an appendix of assets in the form provided in Appendix B of this subpart and an organization chart. The

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[4] *See supra* n.2.

[5] *See* Order No. 816, PP 332–335, 80 Fed. Reg. at 67,100.

organization chart must depict the Seller's current corporate structure indicating all affiliates." As the discussion in the previous section makes clear, however, the Commission's instant proposal would require a narrative description of the Seller's ownership structure that is less complete than the information that is required to be depicted in the organization chart—"the Seller's current corporate structure indicating all affiliates."

The Commission's departure from Order No. 816 is plain to see in the instant proposal. Paragraph 12 of the proposal has an example of a seller (Company A) with affiliate owner Companies B, C, D, and E, with these latter four companies wholly owned by affiliate owner Company F. In the last sentence of P 12, the Commission explains, "Under our proposed new framework, sellers must identify Company F only if Company F" is in the proposed two categories of affiliate owners. The very same example appears in Paragraph 334 of Order No. 816, which states that the organization chart would have to show Companies B, C, D, E, and F as affiliates of the Seller. The Commission's instant proposal does not acknowledge the departure from the Order No. 816, much less explain why the two reporting requirements should be so different. The instant proposal would result in further regulatory ambiguity and confusion.

Some parties have filed requests for rehearing of this part of Order No. 816, arguing that the organization chart should only contain affiliates that an applicant deems "relevant" to the MBR analysis.[6] Even if the organization-chart requirement were to be so limited, however, the Commission's instant proposal would still be inconsistent and unjustified: the Commission's proposal would allow an applicant Seller to exclude from

[6] *See* Request for Rehearing and Motion for Stay of the Edison Electric Institute, Docket No. RM14-14-001 (filed Nov. 16, 2015); Request for Rehearing or, in the Alternative, Clarification and Motion for Stay of the Electric Power Supply Association, Docket No. RM14-14-001 (filed Nov. 16, 2015).

its description of its ownership structure many intermediate affiliate owners, including its affiliate owners that directly or indirectly own or control affiliates of the Seller that would have to be included in the market-power analysis and the organization chart. The required description of the ownership structure and the required organization chart would be different, and there would be no requirement to explain the difference, leaving the public and the Commission staff to ferret out the information.

C. The Commission's proposed connected-entity data rule does not support the instant proposal.

In footnote 16 of the instant proposal, the Commission notes that it recently issued a notice of proposed rulemaking in Docket No. RM15-23-000 to require regional transmission organizations and independent system operators to collect and provide to the Commission information on their market participants' "connected entities."[7] APPA and NRECA have generally supported the connected-entity proposal, albeit with some recommended changes to make it more effective and less burdensome.[8]

The Commission does not assert that the proposed connected-entity data rule, if adopted, would provide a basis for the instant proposal. In fact, the two proposals are quite distinct, and nothing in the connected-entity proposal justifies the instant proposal.

The instant proposal amends the Commission's regulations that concern the *ex ante* examination of public utility sellers' market power that, together with *ex post* monitoring of their sales, provides the legal basis for the Commission's market-based rate

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[7] *See* Collection of Connected Entity Data from Regional Transmission Organizations and Independent System Operators, Docket No. RM15-23-000, 80 Fed. Reg. 58,382 (Sept. 29, 2015) (notice of proposed rulemaking) ("Connected Entity Data NOPR").

[8] *See* Comments of American Public Power Association and National Rural Electric Cooperative Association on Notice of Proposed Rulemaking, Docket No. RM15-23-000 (filed Jan. 22, 2016).

program.[9] By contrast, the proposed connected-entity data rule would be a new regulation that the Commission asserts would assist it in policing market manipulation, including the behavior of sellers with market-based rate authority.[10] As the Commission noted in proposing the connected-entity data rule, "[u]nderstanding the relationship between connected entities can be an important aspect of the Commission's *ex post* analysis, which is a critical element of the market-based rate program" under *Lockyer*.[11] Because the instant proposal involves the *ex ante* analysis, it must stand on its own merits, even if the Commission adopts the proposed connected-entity data rule.

In any event, the Commission proposes that the connected-entity data rule would only apply in regions with a regional transmission organization and independent system operator.[12] Thus, the proposed connected-entity data rule could not justify a change in market-power mitigation regulations that, like those at issue here, apply to public utility sellers in all regions regulation in all regions.

D. The Commission should withdraw its proposal regarding the reporting of passive ownership—or at a minimum, clarify that it is not changing its existing regulatory policy.

In paragraph 13 of the instant proposal, the Commission states: "With respect to owners that a seller represents to be passive, we propose to require that the seller affirm

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9 *See Cal. ex. rel Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004). *See also Blumenthal v. FERC*, 552 F.3d 875, 882 (D.C. Cir. 2009) ("In other words, what matters is whether an individual seller is able to exercise anticompetitive market power, not whether the market as a whole is structurally competitive.").

10 *See* Connected Entity Data NOPR, PP 3–11, 18–19, 80 Fed. Reg. at 58,382–85.

11 *Id.*, P 19, 80 Fed. Reg. at 58,385.

12 APPA and NRECA support that limitation. *See* Comments of APPA and NRECA, Docket No. RM15-23-000 at 4.

that its passive owners own a separate class of securities, do not exercise day-to-day control over the company, and cannot remove the manager without cause."

The Commission should withdraw, or at a minimum, clarify, this proposal. The Commission provides no context for this proposal, no explanation, and no regulatory text. In particular, the Commission does not explain whether the proposal is intended to be a continuation of current policy or a change in current policy.

In footnote 21, the Commission cites *AES Creative Resources, L.P.*, 129 FERC ¶ 61,239 (2009), where the Commission distinguished between passive and controlling interests, and a 2010 staff deficiency letter requiring a seller to demonstrate that certain interests were passive. The *AES* order, the 2010 staff deficiency letter, and a Commission order issued just days after the instant proposal, *Starwood Energy Group Global, LLC*, 153 FERC ¶ 61,332 (2015), all confirm that the Commission's policy requires a seller to *demonstrate*—not just "affirm"—that an investment relationship is passive. In Order No. 816, the Commission explained this requirement and made clear that it was not being eliminated.[13] The Commission should not weaken that requirement here.

Thus, the Commission should withdraw the proposal in paragraph 13 or clarify that no change in policy is being made. That is, the Commission should make clear that a seller cannot simply affirm that a relationship is passive; instead a seller must cite to the Commission order finding that the seller has made the required demonstration, or it must make the required demonstration in its application or update filing.

[13] Order No. 816, P 284.

II. The Commission should clarify that it is not narrowing the scope of the change-in-status filing requirement.

The Commission's regulations at 18 C.F.R. § 35.42(a) provide a non-exclusive list of factual situations that reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority to a public utility seller and therefore must be reported as a "change in status." *See* 18 C.F.R. § 35.42(a) ("A change in status includes, but is not limited to, the following: …").

The only amendment to the change-in-status reporting requirement that the Commission proposes is "to specify the following scenario as an additional departure from the characteristics the Commission relied upon in granting market-based rate authority and which should be reported to the Commission: when the seller acquires a new ultimate affiliate owner(s)." NOPR, P 17. Specifically, the Commission would amend § 35.42(a)(2) to provide that an "[a]ffiliation with any entity not disclosed in the application for market-based rate authority" that must be reported as a change in status include an affiliation that "(v) Is an ultimate affiliate owner, defined as the furthest upstream affiliate(s) in the ownership chain."

Because this amendment merely adds another factual scenario to a non-exclusive list of scenarios that constitute a reportable change in status, it does not, strictly as a matter of logic, narrow the scope of reportable scenarios. Indeed, because each scenario listed in § 35.42(a)(2) is an "affiliation," a reportable change in status already includes an affiliation with an affiliate owner other than an ultimate affiliate owner. Therefore, an additional clarification of the regulatory text is unnecessary. With that understanding, the proposed change in the text of the regulation is unobjectionable. The Commission should

make clear that its intent is to clarify and not narrow the scope of affiliations that constitute a change in status that must be reported.

III. The Commission should withdraw this proposal if it decides to change the regulatory definition of affiliate.

The above comments assume that the Commission is leaving in place the existing definition of "affiliate" in 18 C.F.R. § 35.36(a)(9). The Commission proposed to amend the definition of affiliate in a 2010 notice of proposed rulemaking in Docket No. RM09-16-000.[14] It has taken no action in that docket. APPA and NRECA opposed that proposal as unworkable and insufficient to protect consumers, because it would replace the bright-line 10% ownership test in the existing definition with an ambiguous "control" test.[15] APPA and NRECA continue to believe the proposal in Docket No. RM09-16-000 should be withdrawn (or in the minimum, substantially modified as described in our comments in that docket).

If the Commission were to adopt the proposal in Docket No. RM09-16-000, however, or otherwise were to substantially change its existing affiliate definition, then the instant proposal would have to be completely re-examined, because it relies on the existing affiliate definition as a central element. In that case, the Commission should withdraw the instant proposal and reconsider what proposed amendments, if any, of the ownership-structure filing requirements would be warranted.

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[14] Control and Affiliation for Purposes of Market-Based Rate Requirements under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act, 75 Fed. Reg. 4,498 (Jan. 28, 2010) (notice of proposed rulemaking).

[15] *See* Comments of American Public Power Association and National Rural Electric Cooperative Association, Docket No. RM09-16-000 (filed Mar. 29, 2010).

CONCLUSION

The Commission should withdraw or modify the proposed rulemaking as argued above.

Respectfully submitted,

s/ Randolph Elliott
Delia D. Patterson
General Counsel
Randolph Elliott
Senior Regulatory Counsel
American Public Power Association
2451 Crystal Drive, Suite 1000
Arlington, VA 22202
202-467-2900
dpatterson@publicpower.org
relliott@publicpower.org

s/ Paul M. Breakman
Paul M. Breakman
FERC Counsel
Paul McCurley
Chief Engineer and Acting Executive Director of Energy & Power
National Rural Electric Cooperative Association
4301 Wilson Boulevard
Arlington, VA 22203
703-907-5844
paul.breakman@nreca.coop
paul.mccurley@nreca.coop

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