

**SOAH DOCKET NO. 582-09-2005
TCEQ DOCKET NO. 2009-0033-AIR**

APPLICATION OF LAS BRISAS	§	BEFORE THE STATE OFFICE
ENERGY CENTER, LLC	§	
FOR STATE AIR QUALITY PERMIT;	§	OF
NOS. 85013, HAP48, PAL41,	§	
AND PSD-TX-1138.	§	ADMINISTRATIVE HEARINGS

**APPLICANT LAS BRISAS ENERGY CENTER LLC'S
CONSOLIDATED REPLY TO EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGES' PROPOSAL FOR DECISION ON REMAND**

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TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW Applicant Las Brisas Energy Center, LLC (“*Applicant*” or “*Las Brisas*”) and, pursuant to 30 Tex. Admin. Code § 80.257(a), files this consolidated reply to exceptions to the Administrative Law Judges’ (“*ALJs*”) Proposal for Decision On Remand (“*PFD*”) filed by Protestants Environmental Defense Fund (“*EDF*”), Sierra Club, Clean Economy Coalition (“*CEC*”), and Wilson Wakefield in the above-captioned matter. Protestants have, in their exceptions to the ALJs’ PFD, engaged in lengthy discussions as to the proper procedure to be followed by the Texas Commission on Environmental Quality (“*TCEQ*” or “*Commission*”) from this point forward. Specifically, Protestants devote substantial discussion to the propriety of yet another remand proceeding. Protestants, by ignoring the evidence in the record, incorrectly presume that the permit application is defective.¹ As recognized by the ALJs in the PFD, there is

¹ For example, Protestants EDF and Sierra Club complain that Applicant’s air dispersion modeling submitted with the application is deficient and the application must be amended to resolve those alleged deficiencies. See EDF’s Exceptions at 5; Sierra Club’s Exceptions at 3. However, as the record evidence proves, the air dispersion modeling submitted with the application was approved by the TCEQ Air Dispersion Modeling Team on December 16, 2008, and that position has not changed. See Ex. ED-18. The additional modeling submitted through the contested case hearing process does not amend the application, but only provides additional information to the ALJs and Commission for their consideration, similar to any other evidence introduced by the parties. EDF also complains that Applicant’s failure to commit to a specific off-site material handling plan can only be resolved by amending the application.

ample evidence in the record proving by a preponderance of the evidence that the Las Brisas Energy Center (“**LBEC**”) will “meet applicable air quality standards” when operated as proposed by Applicant.² For the reasons discussed in more detail below, Applicant has met its burden of proof and the administrative and evidentiary record clearly justifies granting Las Brisas’s permit application to construct the LBEC.

I. ARGUMENT

Protestants’ exceptions to the PFD generally restate positions that have previously been briefed extensively by the parties, carefully reviewed and rejected by the ALJs, and addressed in detail in the PFD and Proposed Order. Protestants have, however, attempted a few new approaches in their exceptions, relying primarily on attempts to revise Applicant’s burden of proof and misapply the Texas Rules of Evidence. Because Applicant has not previously addressed Protestants’ latest efforts to obfuscate the record in this proceeding, it does so here.

A. OFF-SITE MATERIAL HANDLING

1. Off-Site Material Handling Facilities Are Not Part Of The LBEC Stationary Source

In their exceptions, Protestants complain that Las Brisas’s failure to commit to a specific off-site material handling plan equates to a failure to prove that Las Brisas will not control those off-site material handling facilities.³ This argument, however, elevates Applicant’s burden of

See EDF’s Exceptions at 5. However, as explained in more detail below in Section I.A.2 of this reply brief, because the off-site material handling is not part of the LBEC stationary source, it is not being permitted through this action and, therefore, was properly excluded from the application. Accordingly, no amendment of Las Brisas’s application is required.

² PFD Cover Letter at 1.

³ *See* EDF’s Exceptions at 9-13; Sierra Club’s Exceptions at 13-14; CEC’s Exceptions at 4-6; Individual Protestant Wilson Wakefield’s Exceptions at 3-4.

proof beyond the prescribed preponderance of the evidence standard.⁴ Proof by a preponderance of the evidence “does not require the quality of absolute certainty *nor does it require that [Applicant] preclude every other possibility.* . . . All that is required is that the circumstances point to the ultimate fact sought to be established with that degree of certainty as to make the conclusion reasonably probable.”⁵ In this case, the record evidence proves by a preponderance of the evidence that the emissions from off-site material handling facilities for the LBEC are properly segregated from the LBEC stationary source because Las Brisas does not control and has never even suggested any future intent to control off-site material handling facilities.

TCEQ’s rules define “stationary source” as “[a]ll of the pollutant-emitting activities that belong to the same industrial grouping, are located in one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control)”⁶ “that emits or may emit any air pollutant subject to regulation under [the federal Clean Air Act].”⁷ Accordingly, Applicant’s burden to prove compliance with all applicable rules and statutes⁸ by a preponderance of the evidence⁹ requires that, among other things, Applicant prove that the off-site material handling facilities are not subject to Applicant’s control, and thus, are not part of the LBEC stationary source.

⁴ See 30 TEX. ADMIN. CODE § 80.17(a).

⁵ *State Farm Mut. Ins. Co. v. Davis*, 576 S.W.2d 920, 921 (Tex. Civ. App.—Amarillo 1979, writ ref’d n.r.e.) (internal citations omitted) (emphasis added); *see also Bufkin v. Tex. Farm Bureau Mut. Ins. Co.*, 658 S.W.2d 317, 320 (Tex. App.—Tyler 1983, no writ); *First State Bank v. Md. Cas. Co.*, 918 F.2d 38 (5th Cir. 1990).

⁶ 30 TEX. ADMIN. CODE § 116.12(6) (defining “Building, structure, facility, or installation” as that phrase is used in the definition of “stationary source”).

⁷ 30 TEX. ADMIN. CODE § 116.12(35) (defining “stationary source”).

⁸ See 30 TEX. ADMIN. CODE § 55.210(b).

⁹ See 30 TEX. ADMIN. CODE § 80.17(a).

Applicant – Las Brisas Energy Center, LLC – was formed by Chase Power Development, LLC solely to pursue the development of the LBEC.¹⁰ Throughout the course of this proceeding, in both the original and remand hearings, Applicant has consistently asserted that the off-site material handling facilities will be operated and controlled by another entity.¹¹

For example, initially Applicant expected to utilize the Las Brisas Terminal Company, LLC (“*LBTC*”) for off-site material handling.¹² The name “LBTC” was reserved with the Texas Secretary of State for potential use with a proposed privatization and upgrade of the existing Port of Corpus Christ Authority (“*PCCA*”) bulk terminal operations, but *LBTC* was *never formed* and there is no agreement to develop or operate a commercial bulk terminal facility on PCCA property.¹³ Additionally, as Mr. Frank Brogan testified, Applicant has only leased from PCCA the property on which the LBEC will be constructed and that lease does *not* grant Las Brisas control over any existing facilities.¹⁴ Accordingly, Applicant has proven by a preponderance of the evidence that it only intends to control the property on which the LBEC will be constructed and all other off-site facilities, including those that will provide off-site material handling services for the LBEC, will be controlled by someone other than Applicant. Even if an entity

¹⁰ See Applicant’s Exceptions (to First PFD) Att. C., Ex. A, ¶ 5 (Affidavit of Kathleen Smith in Support of Las Brisas Energy Center, LLC’s Consolidated Response to Protestants’ Motion for Summary Disposition, filed with SOAH and TCEQ and served on all parties on September 18, 2009). Other entities separate and apart from Applicant were formed to explore the potential privatization and upgrade of the existing PCCA bulk terminal operations. See *id.* ¶¶ 3, 4, 8.

¹¹ See, e.g., Applicant’s Exceptions (to First PFD) at 28 & n.96.

¹² See, e.g., Ex. 7 at 10 (“[T]he material handling activities occurring prior to the custody transfer (i.e., active storage pile, inactive storage pile, conveyors, and etc.) will be authorized under a separate NSR authorization by LBTC.”).

¹³ See Applicant’s Exceptions (to First PFD) Att. C., Ex. A, ¶¶ 4, 8, 10.

¹⁴ See Trial Tr. at 3131:2-20 (Brogan); see also PFD at 13 (“[Las Brisas] has not provided funding for the material-handling options, has not contracted for service to provide the material handling operations, and has not entered into any agreement – whether written or otherwise – to be given operational control of the options by [PCCA].”).

other than PCCA were to operate the off-site material handling facilities, a possibility emphasized by Protestants, there is simply no evidence in the record to even suggest that Applicant would have control over that entity's operations. Accordingly, because Applicant is not required to preclude every permutation of off-site material handling operations,¹⁵ the record evidence sufficiently proves by a preponderance of the evidence that Applicant will not control the off-site material handling facilities.

2. There Are No Secondary Emissions

Secondary emissions, by definition, "must be specific, well-defined, [and] quantifiable."¹⁶ Applicant has consistently maintained that there will be no secondary emissions associated with the LBEC precisely because any off-site emissions increases are not "specific, well-defined, [and] quantifiable."¹⁷ Applicant has also maintained throughout these proceedings that secondary emissions – if they existed, which they do not – are relevant to the issuance of the permit only to the extent that such emissions are required to be greater than the allowable emissions modeled for the existing off-site material handling operations in the application, and only to the extent that they would change the results of the impacts analysis.¹⁸ Accordingly, and as explained previously in Applicant's Exceptions, for the remand proceeding Applicant developed and modeled two hypothetical scenarios strictly for demonstrative purposes¹⁹ to

¹⁵ See *State Farm Mut. Ins. Co. v. Davis*, 576 S.W.2d 920, 921 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.); *Bufkin v. Tex. Farm Bureau Mut. Ins. Co.*, 658 S.W.2d 317, 320 (Tex. App.—Tyler 1983, no writ); *First State Bank v. Md. Cas. Co.*, 918 F.2d 38 (5th Cir. 1990).

¹⁶ See 30 TEX. ADMIN. CODE § 116.12(32); 40 C.F.R. § 52.21(b)(18).

¹⁷ See Applicant's Exceptions at 18-39.

¹⁸ See Applicant's Closing Argument (First Hearing) at 20 (Dec. 14, 2009).

¹⁹ See Trial Tr. at 3134:5-18 (Brogan); see also Las Brisas Ex. 700 at 8:12-22 (Ellis).

address concerns raised by Protestants and echoed by the ALJs.²⁰ Using these hypothetical scenarios, Applicant first demonstrated on remand that the modeled emissions from PCCA Dock 2 are sufficient to cover the emissions necessary to accommodate the LBEC's material handling needs and, accordingly, that there will be no increase in PM emissions from off-site material handling sources above what was modeled.²¹ Although not necessary because of the lack of an emissions increase, Applicant also took the extra step of proving that the ultimate conclusions from its impacts analysis are unchanged when the two hypothetical scenarios are considered.

Protestants now complain that Las Brisas cannot demonstrate compliance with the applicable requirements without committing to off-site material handling options.²² The ALJs disagree and do not consider the absence of commitment to an off-site material handling plan as a ground for denying the requested permits.²³ However, the ALJs do recommend that the Commission include an ordering provision binding Las Brisas to one of the two off-site material handling options presented on remand.²⁴ Protestants' complaints and the ALJs' proffered "solution" only serve to demonstrate the very point that Applicant has emphasized throughout this proceeding: that there are no secondary emissions associated with the LBEC. The off-site material handling facilities, and consequently emissions from those facilities, are not specific, well-defined, and quantifiable. Accordingly, by recommending that the Commission bind Las

²⁰ See PFD at 37-47.

²¹ See Applicant's Exceptions at 2-5; see also Applicant's Closing Argument at 3-5.

²² See EDF's Exceptions at 5-7 and 10-16; Sierra Club's Exceptions at 7, 13-15; CEC's Exceptions at 4-5.

²³ See PFD at 37.

²⁴ See PFD at 37.

Brisas to the hypothetical scenarios created solely for demonstrative purposes and thereby specify, define, and quantify the off-site material handling emissions, secondary emissions are effectively created where none exist.

Furthermore, even assuming that secondary emissions do exist, as explained in the PFD and in Section I.A.1 above, key to the determination that the off-site material handling facilities are not part of the LBEC stationary source is the fact that Las Brisas will not have control over those facilities. Protestants are likely to argue that Las Brisas is not in a position to assure the ALJs and the Commission of the specific design as the ALJs suggest should be required of Applicant and, therefore, the proposed special condition is unenforceable.

TCEQ's air permitting regulations require that new sources of emissions be authorized directly rather than indirectly as part of a separate stationary source, as suggested here.²⁵ Specifically, TCEQ regulations do not require that any secondary emissions associated with off-site material handling be authorized through this permit process because secondary emissions, by definition, "do not come from the source . . . itself."²⁶ Instead, to the extent that any future changes to existing facilities are required to meet the needs of the LBEC, these changes would have to be authorized by the TCEQ, through a separate permitting action, prior to construction.²⁷ As the ALJs concluded in the PFD on remand, "[PCCA] will be allowed to handle only those amounts it is legally authorized to handle by TCEQ," and there is no "legal basis for requiring the applicant to . . . resolve all potential contingencies necessary for the operation of the facility

²⁵ See 30 TEX. ADMIN. CODE § 116.110 (requiring that all applicants for new facilities and changes to facilities obtain the proper air permit authorization before any actual work is begun on the facility).

²⁶ 30 TEX. ADMIN. CODE § 116.12(32); see also 30 TEX. ADMIN. CODE § 116.160(a) (providing that Prevention of Significant Deterioration permitting requirements apply to each proposed major stationary source).

²⁷ See 30 TEX. ADMIN. CODE § 116.160(a).

before the permit can be issued.”²⁸ In other words, there is “no legal requirement that [PCCA] would have to have its necessary permits in hand before LBEC could model potential emissions from [PCCA] material-handling operations or rely on such modeling to obtain Las Brisas’s requested permits.”²⁹ Likewise, there is no legal requirement that Applicant be bound by the off-site material handling scenarios it presented on remand.

B. EDF’S MOTION TO EXCLUDE EVIDENCE IS UNSUPPORTED

On August 25, 2010, the TCEQ Air Dispersion Modeling Team (“*ADMT*”) issued a memorandum documenting work conducted by Mr. Daniel Jamieson between April and August 2010 (Mr. Jamieson’s work and the resulting memorandum are collectively the “*Second Modeling Audit*”).³⁰ In its exceptions and by separate letter, EDF requests that the ALJs clarify their previous ruling regarding the propriety of the Second Modeling Audit, and order that portions of the Second Modeling Audit and related evidence be excluded from the record in this proceeding as impermissible assistance by the Executive Director to Applicant.³¹ However, no such action is necessary because the Second Modeling Audit – and admission of any evidence associated with it – does not constitute impermissible assistance to Applicant and, regardless of that determination, the Second Modeling Audit is part of the administrative record and cannot be

²⁸ PFD at 34.

²⁹ PFD at 34.

³⁰ See Exs. ED-51, ED-52 (Second Modeling Audit memorandum dated August 25, 2010, and CD containing associated modeling files); Applicant’s Exceptions at 9.

³¹ See EDF’s Exceptions at 3-4; Letter from EDF to ALJs Bennett and Broyles (Dec. 21, 2010) (accompanying EDF’s Exceptions); see also EDF’s Motion to Exclude Evidence at 4 (“EDF respectfully requests an order excluding the ED’s August 25th Modeling, excluding any portion of the August 25 Modeling Audit that discusses the ED’s August 25th Modeling, excluding any modeling, analysis or testimony based on the August 25th Modeling (e.g., the Applicant’s October 1st Modeling), and excluding any other modeling, analysis or testimony by the ED that would assist the Applicant in meeting its burden of proof.”) (Oct. 7, 2010).

excluded by the ALJs. Additionally, exclusion of only a portion of the Second Modeling Audit violates the Texas Rules of Evidence.

1. The ADMT's Second Modeling Audit Does Not Constitute Impermissible Assistance To Applicant

Although Applicant provided in its exceptions a detailed explanation of how the ADMT's Second Modeling Audit cannot be considered impermissible assistance by the Executive Director to Applicant, a brief summary is provided here:

- At the outset of this matter and before the draft permit was issued, the ADMT found that Applicant's modeling was acceptable;³²
- The ADMT and Mr. Jamieson found Applicant's rebuttal and remand modeling acceptable and demonstrative of at least one valid predicted violation occurring at a time and place other than those when the proposed sources were significant *before* proceeding to address the State's State Implementation Plan ("*SIP*") concerns;³³
- Mr. Jamieson's verification of Applicant's rebuttal modeling did not take place during the contested case hearing, and, while Mr. Jamieson's verification of Applicant's remand modeling was conducted after the remand to the State Office of Administrative Hearings ("*SOAH*") and before the actual hearing, that verification did not include making any additional changes other than those made by Applicant itself;³⁴

³² See Applicant's Exceptions at 12-13.

³³ See *id.* at 12-16.

³⁴ See *id.* at 17-22.

- Mr. Jamieson’s verification of Applicant’s rebuttal modeling, although not conducted during a contested case hearing, was nonetheless presented during the remand contested case hearing because the ALJs insisted it was required by law³⁵ and the Commission specifically remanded this hearing to SOAH to take additional evidence on “[r]eview of additional modeling performed by Applicant in support of the Application;”³⁶
- Applicant’s modeling decisions and its decision not to adopt Mr. Jamieson’s modeling as its own are justified because Mr. Jamieson’s modeling solves a different problem (i.e., the SIP problem), Mr. Jamieson’s modeling is less conservative than Applicant’s modeling, and many of the differences between Applicant’s and Mr. Jamieson’s models are attributable to differences in professional judgment;³⁷ and
- Applicant has already introduced the only evidence that the ALJs claim is necessary to meet its burden of proof, i.e., evidence of the high-second-high when the proposed LBEC sources are predicted to be significant was only introduced by *Applicant’s* expert witness Mr. Kevin Ellis.³⁸

Therefore, Mr. Jamieson’s modeling and the ADMT’s Second Modeling Audit memorandum do not constitute impermissible assistance to Applicant and, accordingly, no portion of the Second Modeling Audit or any related evidence should be excluded from the record.

³⁵ See *id.* at 21-22.

³⁶ See Ex. ED-48 at 2.

³⁷ See Applicant’s Exceptions at 17-25.

³⁸ See Applicant’s Exceptions at 25-26.

2. The Second Modeling Audit And Resulting Memorandum Cannot Be Excluded From The Record

The ALJs do not have the authority to exclude from the record any portion of the ADMT's Second Modeling Audit and associated evidence, e.g., the memorandum and modeling files, as they are inherently part of the statutory administrative record to be considered by the Commission as part of this contested case. The Administrative Procedure Act includes in the "record in a contested case" "all *staff memoranda or data* submitted to or considered by the hearing officer or members of the agency who are involved in making the decision."³⁹ Likewise, TCEQ defines "administrative record" to include "[i]n all permit hearings, . . . any agency document determined by the executive director to be necessary to reflect the administrative and technical review of the application."⁴⁰ Indeed, TCEQ's contested case hearing evidentiary rules expressly provide that certain testimony or evidence given in a contested case hearing by agency staff shall not constitute assistance to the permit applicant in meeting its burden of proof because such evidence is inherent to the proceeding. Section § 80.127(h) provides that:

Testimony or evidence given in a contested case permit hearing by agency staff regardless of which party called the staff witness or introduced the evidence relating to the documents listed in § 80.118 of this title (relating to Administrative Record) or any analysis, study, or review that the executive director is required by statute or rule to perform shall not constitute assistance to the permit applicant in meeting its burden of proof.

Clearly the ADMT's Second Modeling Audit, which "was conducted to review the 24-hr PM₁₀ increment modeling files that were submitted by the applicant" and "represented the

³⁹ TEX. GOV'T CODE § 2001.060(7) (emphasis added).

⁴⁰ 30 TEX. ADMIN. CODE § 80.118(a)(6).

second modeling audit for this NSR project number”⁴¹ resulted in an “agency document determined by the executive director to be necessary to reflect the . . . technical review of the application.”⁴² Furthermore, even if portions of the ADMT’s Second Modeling Audit were focused on demonstrating compliance with the 24-hr PM₁₀ increment solely for SIP purposes,⁴³ the SIP demonstration is clearly one “that the executive director is required by statute or rule to perform”⁴⁴ and thus those portions also are covered by § 80.127(h). Accordingly, pursuant to the applicable statutory and regulatory provisions described above, evidence related to the ADMT’s Second Modeling Audit is inherently part of the record in this proceeding and cannot be excluded by the ALJs.

3. EDF’s Attempt To Exclude Only A Portion Of The ADMT’s Second Modeling Audit Memorandum Contravenes The Doctrine Of Optional Completeness And Texas Rule Of Evidence 106

The ruling requested by EDF would declare as admissible only those portions of the ADMT’s Second Modeling Audit memorandum that discuss “deficiencies” allegedly associated with Applicant’s modeling *while excluding* both: (1) those portions of the memorandum that qualify and explain the alleged “deficiencies” and (2) any evidence arising from those portions of the memorandum. In other words, EDF demands that the ALJs classify as admissible only those portions of the ADMT’s Second Modeling Audit memorandum that are favorable to its case.

⁴¹ Las Brisas Ex. 910 at 1 (TCEQ Interoffice Memorandum from Dan Jamieson to Randy Hamilton, P.E., *Second Modeling Audit – Las Brisas Energy Center (RN105520779)* (Aug. 25, 2010)) (also admitted into the record as Ex. ED-51).

⁴² 30 TEX. ADMIN. CODE § 80.118(a).

⁴³ See EDF’s Motion to Exclude at 10.

⁴⁴ See Sierra Club Ex. 240 at 2 (“Second, a modeled violation of a . . . PSD increment may be predicted within the impact area, but, upon further analysis, it is determined that the proposed source will not have a significant impact . . . at the point and time of the modeled violation. When this occurs, the proposed source may be issued the permit . . . , but the State must also take the appropriate steps to substantiate the . . . increment violation and begin to correct it through the [SIP].”).

Such a ruling is expressly prohibited by the doctrine of optional completeness and Texas Rule of Evidence 106 when, as is the case here, admission of such incomplete evidence distorts the true impression of the whole and misleads the trier of fact.⁴⁵ Additional portions of a document and any other writing or recorded statement necessary to explain the admitted portion, place the admitted portion in context, avoid misleading the trier of fact, or to insure a fair and impartial understanding of the admitted portion are admissible under Rule 106.⁴⁶ As Mr. Jamieson testified, the memorandum documents his evaluation and, thus, should be considered in its entirety.⁴⁷

Accordingly, the ALJs cannot, as EDF demands, selectively admit portions of the ADMT's Second Modeling Audit. An admission of partial evidence distorts the true impression of the whole memorandum, which misleads the trier of fact due to lack of context and would be unfair to Applicant. If any portion of the ADMT's Second Modeling Audit memorandum is admitted, then under Texas Rule of Evidence 106, the rest of the document, along with the other related documents that EDF is attempting to exclude, must be admitted as well. Additionally, because there are no other objections to this evidence, any testimony related to the ADMT's Second Modeling Audit is also admissible and is entitled to full consideration by the Commission.

⁴⁵ See TEX. R. EVID. 106 ("When a writing or recorded statement or part thereof is introduced by a party, an adverse party may at that time introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. 'Writing or recorded statement' includes depositions."); see also PETER T. HOFFMAN, TEXAS RULES OF EVIDENCE HANDBOOK 86-90 (9th ed. 2009-10).

⁴⁶ *United States v. Haddad*, 10 F.3d 1252, 1259 (7th Cir. 1993) (regarding Rule 106, interpreting the analogous federal rule); see also PETER T. HOFFMAN, TEXAS RULES OF EVIDENCE HANDBOOK 87 (9th ed. 2009-10).

⁴⁷ See Trial Tr. at 2796:14-17 (Jamieson) ("The table in my audit has the model predictions, but ultimately, the audit documents my evaluation. And so I think you need look at it in its entirety.").

C. BACT FOR TOTAL PM/PM₁₀

Without providing any new arguments or justification, Sierra Club asserts that BACT for total PM/PM₁₀ should be lower than the 0.025 lbs/MMBtu emission rate recommended by the ALJs. As set forth below, in addition to lacking originality, Sierra Club's alleged justifications for a lower total PM/PM₁₀ emission limit also lack merit.

First, none of the permits referenced by Sierra Club are for circulating fluidized bed (“*CFB*”) boilers burning 100% petroleum coke. As Mr. Cabe explained in his prefiled testimony, “both the fuel burned and the boiler technology used have a significant influence on” the level of total PM/PM₁₀ emitted, “[a]ccordingly, it is not appropriate to base the BACT decision for a petroleum coke-fired CFB boiler on anything other than the controls and emission limits established as BACT for recently permitted petroleum coke-fired CFB boilers.”⁴⁸ In fact, even Dr. Sahu testified that the levels of sulfur, chlorine, and fluorine in the fuel impact the levels of condensable particulate matter (i.e., sulfuric acid, hydrochloric acid, and hydrofluoric acid) generated,⁴⁹ and that CFB boilers have historically resulted in higher levels of filterable particulate matter emissions as compared to pulverized coal or PC boilers.⁵⁰ Accordingly, Sierra Club's continued references to permit limits for the Santee Cooper Pee Dee Generating Station (PC boilers that fire a mixture of coal and petroleum coke⁵¹), the Virginia Electric and Power Company facility (CFB boilers that are not permitted to fire petroleum coke⁵²), and the Spurlock

⁴⁸ Las Brisas Ex. 600 at 23:18-22 (Cabe).

⁴⁹ See Trial Tr. at 2506:7 to 2507:11 (Sahu).

⁵⁰ See Trial Tr. at 2508:3-14 (Sahu).

⁵¹ See EDF Ex. 1 at 36:10-12 (Sahu).

⁵² See Las Brisas Ex. 4 at 13; Las Brisas Ex. 31 at 34.

Power Plant in Kentucky (which is not permitted to burn any amount of petroleum coke⁵³), no matter how often repeated, remain as irrelevant now as before when it comes to consideration of what total PM/PM₁₀ emission limit represents BACT for the 100% percent petroleum coke-fired CFB boilers proposed for the LBEC.

Second, Sierra Club's contention that the total PM/PM₁₀ emission limit should be the sum of the filterable PM/PM₁₀ emission limit and the H₂SO₄ emission limit ignores evidence from the remand hearing, including the testimony of EDF's witness, Dr. Sahu, that condensable PM/PM₁₀ emissions from a petroleum coke-fired CFB boiler consist of more than just H₂SO₄. Specifically, both Mr. Cabe and Dr. Sahu testified that condensable PM/PM₁₀ emissions from a petroleum coke-fired CFB boiler are made up not only of H₂SO₄, but also of other acid gases such as hydrochloric acid and hydrofluoric acid as well as condensable organic material.⁵⁴

Third, while Sierra Club attempts to make much of the recommendation of the ALJs that presided over the White Stallion Energy Center contested case hearing to lower the total PM/PM₁₀ emission limit for the White Stallion Energy Center, Sierra Club conveniently omits the following statement from the White Stallion PFD: "However, given the scientific uncertainty surrounding this issue, as an alternative, we would recommend that the proposed total PM limit[] of . . . 0.033 lb/MMBtu for pet coke [is] BACT, subject to downward adjustment."⁵⁵ Even more importantly, Sierra Club ignores the fact that the Commission ultimately decided to set the total

⁵³ See Trial Tr. at 2507:12-19 (Sahu).

⁵⁴ See Las Brisas Ex. 600 at 22:8-10 (Cabe); Trial Tr. at 2506:10-15 (Sahu).

⁵⁵ See *In the Matter of White Stallion Energy Center, L.L.C. Application for Air Quality Permit Nos. 86088, HAP28, PAL26, and PSD-TX-1160* Proposal for Decision; SOAH Docket No. 582-09-3008, TCEQ Docket No. 2009-0283-AIR at 75 (July 2, 2010) [hereinafter White Stallion PFD].

PM/PM₁₀ limit for the White Stallion Energy Center at 0.025 lbs/MMBtu,⁵⁶ the same limit now proposed by the ALJs for the LBEC.

D. THE ABILITY OF APPLICANT TO DESIGN AND INSTALL A CONVEYOR SYSTEM AND A SYSTEM FOR ASH LOADING INTO TRUCKS THAT WILL NOT BE A SOURCE OF EMISSIONS

None of the parties except to the ALJs' conclusion that Applicant has the ability to design and install both a conveyor system and a system for ash loading into trucks that will not be sources of emissions.⁵⁷ CEC does, however, assert that Applicant should be, but is not, "bound" by the conveyor and ash handling designs that it proposed.⁵⁸ CEC fails to recognize that, because there are no emissions authorized for the conveyor or the ash handling system in the permit, any emissions from these facilities would be in violation of Applicant's permit. Accordingly, Applicant is bound by its proposal to design and install a conveyor system and a system for ash loading into trucks that will not be sources of emissions.

⁵⁶ See *Order Regarding The Application By White Stallion Energy Center, L.L.C. for Air Quality Permit Nos. 86088, HAP28, PAL26, and PSD-TX-1160*; SOAH Docket No. 582-09-3008, TCEQ Docket No. 2009-0283-AIR at 39 (Finding of Fact ("**FOF**") 303) [hereinafter *White Stallion Order*].

⁵⁷ EDF states that Applicant's hypothetical material handling scenarios rely on construction of an "improbable...enclosed conveyor" and a "bubble" over the limestone stockpile required for the LBEC. See EDF's Exceptions at 13 n.9. EDF's description of these emission controls as improbable is not only unsupported by the record, it is disingenuous at best. TCEQ's expert witness finds nothing improbable about Applicant's ability to design an enclosed conveyor that will not be a source of emissions. See Trial Tr. at 3034:25 to 3037:10 (Hamilton) (testifying that: a) conveyor emissions are based on wind velocity and an enclosure preventing the wind from blowing on the material eliminates emissions; and b) TCEQ has reviewed this type of conveyor before). Moreover, Sierra Club's own Dr. Phyllis Fox testified at the first hearing that "BACT analyses are usually performed for these types of sources, resulting in controls such as enclosures for the storage piles, covered conveyors, and water sprays...BACT...typically requires that coke storage piles be enclosed within a barn or dome to control emissions." Sierra Club Ex. 300 at 47:33 to 49:4 (Fox).

⁵⁸ CEC's Exceptions at 6.

E. WHETHER THE MODELING INPUTS, WITH RESPECT TO MOISTURE CONTENT, FOR THE PCCA FACILITIES ARE PROPER

CEC excepts to the ALJs' finding that the modeling inputs, with respect to moisture content, are proper.⁵⁹ CEC's exceptions are based on hypothetical questions and conjecture and are entirely unsupported by the record or TCEQ guidance. There was "no testimony to controvert the evidence presented by the Applicant and ED on this issue"⁶⁰ and, since the PCCA amended its permit to require that all materials shall have a minimum moisture content of 4.8 percent, the only evidence in the record conclusively demonstrates that "LBEC's modeling that uses a 4.8% moisture content for [PCCA] Bulk Dock #2 emissions is now consistent with the Commission's modeling guidance because it uses the permit allowable rate."⁶¹

F. REMAND TO SOAH WAS APPROPRIATE AND EFFECTIVE

Sierra Club argues in its exceptions to the PFD that it was inappropriate for the Commission to remand this matter to SOAH solely for the purpose of taking additional evidence on certain specific issues.⁶² Sierra Club's position, however, plainly runs counter to applicable statutory and regulatory provisions. Specifically, Tex. Gov't Code § 2003.047(m) provides that, upon consideration of a proposal for decision, the Commission may "refer the matter back to the administrative law judge to reconsider any findings and conclusions set forth in the proposal for decision or take additional evidence or to make additional findings of fact or conclusions of law." Additionally, the Commission's rules provide that the Commission "on its own motion,

⁵⁹ See CEC's Exceptions at 6-7.

⁶⁰ OPIC's Closing Argument at 8.

⁶¹ PFD at 43.

⁶² See Sierra Club's Exceptions at 2-6. Sierra Club previously filed a Notice of Procedural Irregularities on July 20, 2010, to which Applicant responded on July 30, 2010.

may order the judge to reopen the record for further proceedings on specific issues in dispute.”⁶³ As evidenced by these statutory and regulatory provisions, Sierra Club’s claim that the Commission’s remand of specific issues back to SOAH was improper is legally incorrect.

Additionally, as described above in Section I.B.1 and in more detail in Applicant’s Exceptions, the Executive Director’s technical review of Applicant’s rebuttal and remand hearing modeling was appropriate. Accordingly, remand to SOAH for the taking of additional evidence was not only legally permissible, but also the appropriate action to take given the issues in dispute. Furthermore, as described in more detail below in Section I.G.6 of this reply brief, Sierra Club’s repeated attempts to subject Las Brisas’s CFB boilers to case-by-case MACT review are misguided and do not warrant further consideration by the Commission.

G. ISSUES RAISED BY PROTESTANTS THAT ARE OUTSIDE THE SCOPE OF THIS REMAND PROCEEDING

Protestants included in their exceptions other issues that either were not remanded by the Commission or are totally unsupported by the evidence in the record:

1. BACT – CO And H₂SO₄

Sierra Club takes issue with the proposed findings that an emission rate of 0.11 lb/MMBtu on a 12-month rolling average represents BACT for carbon monoxide (“CO”) emissions and that an emission rate of 0.022 lb/MMBtu on a 3-hour average represents BACT for H₂SO₄ emissions. Because BACT for CO and H₂SO₄ was not among the remanded issues, no new evidence was introduced on this issue during the remand hearing. Accordingly, Applicant responds to Sierra Club’s exceptions simply by referring the Commissioners to its

⁶³ 30 TEX. ADMIN. CODE § 80.265.

prior briefing on this topic, specifically Sections VI.E (CO) and VI.G (H₂SO₄) of its initial Closing Arguments and Response to Closing Arguments.

2. BACT – State vs. Federal Definitions

EDF and Sierra Club allege that the Executive Director incorrectly relied on the Texas, and not the federal, definition of BACT and, furthermore, failed to require consideration of clean fuels as well as alternative production processes and innovative combustion techniques such as integrated gasification combined cycle (“IGCC”) technology as part of its BACT analysis. As explained below, Protestants’ claims that federal law, in this instance the federal definition of BACT, must be applied in this case are simply incorrect. Also incorrect are their assertions that application of the federal BACT definition, were it required, would have resulted in a different outcome.

Protestants’ BACT definition arguments are not new and, in fact, have been raised by Sierra Club and other protestants in similar permit hearings.⁶⁴ In the *Coletto Creek* PFD issued earlier this year, ALJs Newchurch and Wilfong properly concluded that “these arguments that federal law must be applied in this case in lieu of state law lack important nuance and are overly broad and incorrect.”⁶⁵ As ALJs Newchurch and Wifong explained:

[Protestants] are incorrect because Texas law requires the TCEQ – and every other Texas agency – to follow its own rules until they are changed.⁶⁶ Additionally, SOAH is not a reviewing court with

⁶⁴ See *Application of IPA Coletto Creek, LLC for State Air Quality Permit 83778 and Prevention of Significant Deterioration Air Quality Permit PSD-TX-1118 and for Hazardous Air Pollutant Major Source [FCAA § 112(g)] Permit HAP-18* Proposal for Decision; SOAH Docket No 582-09-2045, TCEQ Docket No 2009-0032-AIR at 8 (“Sierra Club even asks the ALJs to find that the BACT analysis and resultant emission limitations are inadequate because the TCEQ’s definition of BACT violates the FCAA.”) (Feb. 8, 2010) [hereinafter *Coletto Creek PFD*].

⁶⁵ *Id.* at 9.

⁶⁶ *Id.* (citing TEX. WATER CODE § 5.103(c) (“The commission shall follow its own rules as adopted until it changes them in accordance with [the APA].”); *Rodriguez v. Serv. Lloyds Ins. Co.*, 997 S.W.2d

jurisdiction to determine whether a state agency's rules comply with federal law and strike them down if they do not. Instead, the ALJs must apply the rules of the state agency for which the ALJs are preparing a Proposal for Decision (PFD).⁶⁷ Moreover, an agency's interpretations of its own rules are entitled to deference.⁶⁸

Thus, even if a TCEQ rule conflicted with an EPA rule or the [federal Clean Air Act] – as the Protestants argue, but the ALJs do not assume – the TCEQ must follow its rules for purposes of determining whether the Application in this case should be granted. Given that, there is no need for the ALJs or the Commission to consider the Protestants' federal-supremacy arguments in this case. To the extent that Protestants wish to claim that TCEQ is not interpreting a state program that is equivalent to the federal program, they would need to make those arguments in another forum with jurisdiction to decide them.⁶⁹

Furthermore, while the TCEQ did recently revise its Prevention of Significant Deterioration (“*PSD*”) permitting rules to incorporate the federal definition of BACT,⁷⁰ in doing so the Commission made it clear that, contrary to Protestants allegations, the absence of such a reference in its prior PSD rules did not result in any less stringent controls. Specifically, in responding to comments regarding the validity of permits issued during the time when the federal definition was not incorporated, the Commission stated:

Although [references to the federal regulations] were missing from § 116.160, in its permitting actions, the TCEQ did not and does not circumvent [federal new source review] requirements and does not allow a control technology review to be conducted that results in

248, 255 (Tex. 1999); *Public Util. Comm'n v. Gulf States Util. Co.*, 809 S.W.2d 201, 207 (Tex. 1991) (finding that if a Texas agency fails to follow clear, unambiguous language in its own regulations, its action is arbitrary and capricious)).

⁶⁷ *Id.* (citing TEX. GOV'T CODE § 2001.058(b), (e)(1)).

⁶⁸ *Id.* (citing *Public Util. Comm'n of Tex. v. Gulf States Util. Co.*, 809 S.W.2d 201, 207 (Tex. 1991)).

⁶⁹ *Id.*

⁷⁰ See 35 Tex. Reg. 5,344, 5,344 (June 18, 2010).

technology that is less stringent than BACT as defined in federal rule.⁷¹

Despite this, EDF, in its exceptions, implies that application of the state BACT definition resulted in the failure to consider IGCC technology. However, as Applicant explained in its initial Response to Closing Arguments, it is settled Texas law that an application for a PSD permit need not include other electric generation technologies such as IGCC as part of the BACT analysis even under the federal BACT definition.⁷²

Similarly, Sierra Club's contention that application of the state BACT definition resulted in the failure to consider clean fuels is also unfounded. While Applicant does not concede that consideration of clean fuels is required under the federal BACT definition, even if it is, clean fuels, like all other control options, must be subject to the limitation recently expressed by the Amarillo Court of Appeals that in a BACT analysis TCEQ "need not consider any control technology that would require such a redesign of the facility that it would constitute an alternate proposal."⁷³ Accordingly, TCEQ was not required to consider fuels other than petroleum coke for the LBEC because, as indicated in the permit application, the use of petroleum coke is "fundamental to the project's design" and "LBEC is not viable without petroleum coke as the fuel."⁷⁴

3. Carbon Dioxide

Sierra Clubs excepts to the Findings of Fact and Conclusions of Law addressing carbon dioxide ("**CO₂**"), including the findings and conclusions that CO₂ is not regulated under the

⁷¹ *Id.* at 5,347.

⁷² See Applicant's Response to Closing Arguments (First Hearing) at 75.

⁷³ *Blue Skies Alliance v. Tex. Comm'n on Env't'l Quality*, 283 S.W.3d 525, 535 (Tex. App.—Amarillo 2009, no pet.).

⁷⁴ Las Brisas Ex. 6 at 00043.

Federal and Texas Clean Air Acts. The Commission recently objected to EPA's definition of "subject to regulation" and, in doing so, addressed the claims upon which Sierra Club's exceptions regarding CO₂ are based.⁷⁵ Accordingly, Applicant will not separately address Sierra Club's claims here.

4. New NAAQS For NO₂ And SO₂

Sierra Club and EDF take exception to the ALJs' refusal to address the question of whether Applicant was required to demonstrate compliance with national ambient air quality standards ("~~NAAQS~~") that became effective well after the Executive Director completed its technical review of the application on January 7, 2009.⁷⁶ As set forth below, these standards, which were promulgated by EPA months after technical review of the application was complete and which have yet to be adopted by TCEQ, are not relevant to the Commission's consideration of whether the application for the LBEC should be granted.

EPA made revisions to the NAAQS for nitrogen dioxide ("~~NO₂~~") through a federal rulemaking that became effective April 12, 2010,⁷⁷ and to the NAAQS for sulfur dioxide ("~~SO₂~~") through a federal rulemaking that became effective August 23, 2010.⁷⁸ Although Protestants claim that these NAAQS "take effect immediately"⁷⁹ with respect to permit applications in Texas, such is not the case. Instead, Texas law requires TCEQ to follow its own rules until they

⁷⁵ See Letter from General Greg Abbott and Chairman Bryan Shaw, Ph.D., to EPA Administrator Lisa Jackson and Regional Administrator Alfredo Armendariz (Aug. 2, 2010), http://www.eenews.net/assets/2010/08/04/document_gw_01.pdf.

⁷⁶ See Las Brisas Ex. 19.

⁷⁷ See 75 Fed. Reg. 6,474, 6,474 (Feb. 9, 2010).

⁷⁸ See 75 Fed. Reg. 35,520, 35,520 (June 22, 2010).

⁷⁹ Sierra Club's Exceptions at 16.

are changed,⁸⁰ and TCEQ has not taken any action to adopt the new NAAQS promulgated by EPA. While Protestants claim that no action by TCEQ is required, Texas law precludes the automatic incorporation of rules issued by another agency.⁸¹ Accordingly, because TCEQ has not taken action to adopt the new NAAQS promulgated by EPA, those standards cannot have taken legal effect in Texas.

Moreover, even if the new NAAQS were self-executing as criteria for reviewing permit applications in Texas, they would not apply to the Las Brisas application because the Executive Director's technical review of the application was completed well before the new standards were promulgated. Prior TCEQ precedent, specifically the *Mirant Order*,⁸² holds that new permitting standards issued or promulgated after technical review are not applicable in permit proceedings.⁸³ Furthermore, because the new NAAQS were both promulgated by EPA before

⁸⁰ See TEX. WATER CODE § 5.103(c) ("The commission shall follow its own rules as adopted until it changes them in accordance with [the APA]."); *Rodriguez v. Serv. Lloyds Ins. Co.*, 997 S.W.2d 248, 255 (Tex. 1999); *Public Util. Comm'n v. Gulf States Util. Co.*, 809 S.W.2d 201, 207 (Tex. 1991) (if a Texas agency fails to follow clear, unambiguous language in its own regulations, its action is arbitrary and capricious).

⁸¹ See, e.g., *Ex parte Elliott*, 973 S.W.2d 737, 741-42 (Tex. App.—Austin 1998, pet. ref'd). In *Ex parte Elliott*, the Austin Third Court of Appeals found the definition of "hazardous waste" under the Texas Solid Waste Disposal Act to violate the non-delegation clause of the Texas Constitution if interpreted to mean that EPA had the power to change the definition on an ongoing basis from time to time. However, the court interpreted the definition to be constitutional because it could be read to incorporate by reference the federal law as it existed when the statutory definition was adopted. The Commission very recently acknowledged the constitutional constraint applied in *Ex parte Elliott* in its letter to EPA refusing to accept EPA's actions with respect to greenhouse gases as sufficient to make greenhouse gases regulated under the Texas air permit program. See Letter dated August 2, 2010, *supra* note 75.

⁸² *An Order Issuing Permit Numbers 40619 And PSD-Texas-933 To Mirant Parker, LLC*; TNRCC Docket No. 2000-0346-AIR; SOAH Docket No. 582-00-1045 (Jan. 7, 2002), available at <http://www5.tceq.state.tx.us/ceen/> (search "TCEQ Docket Number" for "2000-0346-AIR," then follow "2000-0346-AIR" hyperlink) [hereinafter *Mirant Order*].

⁸³ In the *Mirant* case, the Commission addressed the question of how to handle new permitting standards issued after the conclusion of technical review but prior to permit issuance. Prior to *Mirant*'s filing of its application, the Executive Director's staff had published a BACT limit of 9 parts per million ("ppm") for nitrogen oxide ("NO_x") emissions for gas-fired combined cycle power plants. However, just

the Commission issued its July 1, 2010 order remanding this matter to SOAH for the purpose of reopening the record and taking additional evidence,⁸⁴ had the Commission deemed it necessary to deviate from the *Mirant* precedent with respect to the new NAAQS, it could have included consideration of the new standards among the issues remanded. Clearly, it did not and there have been no developments that would justify deviating from that precedent at this late juncture.⁸⁵

5. PM_{2.5} Surrogacy Policy And PM Continuous Emissions Monitoring System (“CEMS”)

EDF, Sierra Club, and CEC claim that Applicant and TCEQ failed to justify reliance on the PM_{2.5} surrogacy policy,⁸⁶ and Sierra Club claims that the application and draft permit erroneously fail to require a PM CEMS.⁸⁷ These issues were not remanded by the Commission and there was no new evidence presented with regard to these issues at the remand hearing. Notably, the permit issued recently by the Commission to White Stallion Energy Center did not require PM CEMS⁸⁸ and did not include any disavowal of the surrogacy policy.⁸⁹ Nothing in the

days after the Executive Director completed its technical review of *Mirant*’s application, the Commission published a new, 5 ppm NO_x BACT limit for gas-fired combined cycle power plants. The Commission determined that the new 5 ppm BACT standard did not apply, but rather the 9 ppm standard that existed when the Executive Director completed its technical review of the application applied. *See Mirant Order* at 7 (FOFs 36-37).

⁸⁴ Although the new SO₂ NAAQS did not become effective until August 23, 2010, it was promulgated by EPA in the Federal Register on June 22, 2010. *See* 75 Fed. Reg. 35,520, 35,520 (June 22, 2010).

⁸⁵ Applicant also notes that this permit proceeding is not the Commission’s one and only chance to impose any necessary restrictions on NO₂ and SO₂ emissions from the LBEC. Rather, the Commission has the power to regulate emissions from all sources in Texas, including the LBEC, as needed to achieve and maintain NAAQS compliance through the SIP process. *See* TEX. HEALTH & SAFETY CODE § 382.011.

⁸⁶ *See* EDF’s Exceptions at 22-24; Sierra Club’s Exceptions at 25; CEC’s Exceptions at 10.

⁸⁷ *See* Sierra Club’s Exceptions at 26.

⁸⁸ *See White Stallion Order* at 52 (FOF 375), 58 (Conclusions of Law (“*COLs*”) 33-34).

instant case merits different treatment and, accordingly, Protestants' exceptions do not merit reconsideration.

6. Case-By-Case MACT

Various Protestants also except to the ALJs' proposed Findings of Fact and Conclusions of Law regarding case-by-case MACT.⁹⁰ The ALJs properly found that "[t]he LBEC petroleum coke-fired CFB boilers are exempt from case-by-case MACT review."⁹¹ Not only was this issue not remanded by the Commission, it was already decided in the Interim Order⁹² and, accordingly, there was no new evidence presented on this issue at the remand hearing. For these reasons and the extensive prior briefing on this topic, there is no need for Applicant to respond to these exceptions.

II. CONCLUSION

As set forth more fully above and in Applicant's previous briefs, Las Brisas proved its application complies with all applicable statutory and regulatory requirements. Accordingly, its permit application to construct the LBEC should be granted by the Commission. Las Brisas respectfully requests that the Commission issue an order adopting Las Brisas's proposed findings of fact and conclusions of law as filed with its Exceptions and granting TCEQ State Air Quality Permit Nos. 85013, HAP48, and PSD-TX-1138.

⁸⁹ Indeed, the Commission expressly found that "[a] demonstration of compliance with the PM₁₀ NAAQS suffices to demonstrate compliance with the PM_{2.5} NAAQS." See *White Stallion Order* at 14 (FOF 98), 55 (COL 11).

⁹⁰ See EDF's Exceptions at 16-18; Sierra Club's Exceptions at 22-23; CEC's Exceptions at 8-10.

⁹¹ ALJs' Proposed Order at 42 (COL 35).

⁹² See Ex. ED-48.

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CERTIFICATE OF SERVICE

I hereby certify that, on this the 3rd day of January, 2011, a true and correct copy of the foregoing document has been served via hand delivery, facsimile, electronic mail, overnight mail, U.S. Mail, and/or Certified Mail, Return Receipt Requested, on the parties on the following service list.

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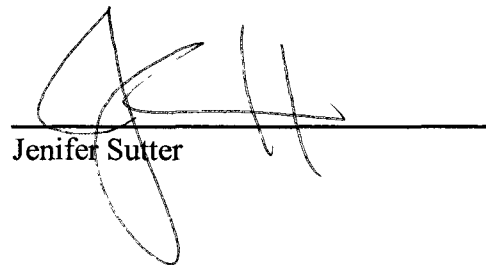
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