Minnesota Center for Environmental Advocacy

Using law, science, and research to protect Minnesota's environment, its natural resources, and the health of its people.

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August 5, 2016

Daniel P. Wolf
Executive Secretary
Minnesota Public Utilities Commission
121 Seventh Place East, Suite 350
St. Paul, Minnesota 55101-2147

VIA ELECTRONIC FILING

Re: *In the Matter of a Complaint of Larry Fagen Against Minnesota Valley Cooperative Light & Power Association*
MPUC Docket No. E123/CG-16-241

Dear Mr. Wolf,

In connection to the above-referenced docket please find the enclosed Initial Comments filed on behalf of Minnesota Center for Environmental Advocacy and Sierra Club. Please do not hesitate to contact me should you have any questions or concerns.

Sincerely,

/s/ Kevin P. Lee
Kevin P. Lee
Staff Attorney

KPL/el

Enclosure

cc: eService List

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In the Matter of a Complaint of Larry Fagen Against Minnesota Valley Cooperative Light & Power Association

MPUC Docket No. E123/CG-16-241

INITIAL COMMENTS OF MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY AND SIERRA CLUB

I. INTRODUCTION

In a variety of dockets before the Public Utilities Commission, Minnesota Center for Environmental Advocacy (MCEA), Sierra Club and other public interest organizations have expressed deep concerns over the treatment of distributed generation ("DG") customers by electricity cooperatives and municipal utilities in the State of Minnesota. This Docket neatly encapsulates those concerns, and MCEA and Sierra Club submit these comments to highlight the fact that this treatment is not only unlawful and unfair to customers, it also actively discourages investment in distributed generation systems, thereby impeding the state's efforts to meet renewable energy and greenhouse gas reduction goals.

Specifically, MCEA and Sierra Club address our comments to the following topics identified by the March 31, 2016 Notice of Comment Period:

1. Is it permissible for a cooperative electric association to *require* a customer to be compensated using the "kWh carry forward" method, Minn. Stat. § 216B.164, subd. 3(f)?
2. Is it permissible for a utility to waive or reduce other fees to encourage qualified facilities (QFs) to elect a specific method of compensation for excess energy, such as the kWh carry forward method? AND
3. Any other docket-related issues or concerns.

In short, § 216B.164, subd. 3 is quite clear that it is not permissible for a cooperative electric association to require a customer to be compensated using the "kWh carry forward" method. The language of the statute simply does not allow any contrary interpretation. Secondly, although it might hypothetically be permissible for the cooperative to waive or reduce other fees to encourage QFs to elect a carry forward method, it is

certainly not permissible to do so if the fee waived or reduced is merely a "very rough estimate."[1] Any waiver or reduction must clearly specify what the fee would otherwise be and how the fee is calculated. The fee information must be clearly communicated to all customers of the cooperative. The election of an accounting methodology for a DG customer's net input compensation is a critical investment decision, both for the individual customer and for the industry as a whole. It is absolutely vital that such a decision be based on clear, transparent information that allows an informed choice. Minnesota Valley Cooperative Light & Power Association's (MVCLPA) conduct in this matter falls well short of this principle, and is therefore impermissible by law.

Lastly, MCEA and Sierra Club comment to highlight two issues not specifically raised in the Notice of Comment Period: (1) our concern that the cooperative is communicating to customers that it has the authority to charge exorbitant "fixed" fees that are in fact an unlawful recovery of lost revenue, and (2) our alarm at the "chilling" effect of MVCLPA's conduct in this case. As illustrated by its cost accounting documents filed in this docket, it has become clear that the '$650' fixed fee alluded to by the cooperative represents revenue lost as a result of the customer producing his or her own electricity rather than buying it from the cooperative. Minnesota law does not allow such recovery; it only allows for the recovery of reasonable *fixed* costs not otherwise paid for by the customer.[2] Simply forcing a DG customer to pay exactly what he would have paid if he did not have a DG system is a clearly unreasonable and discriminatory method of recovering costs not otherwise paid for by the customer. MVCLPA's argument that it did not actually impose such a fee manages to be simultaneously irrelevant and untrue. It is untrue because the cooperative has indeed imposed the fee, in effect if not in practice. Coercing a customer into agreeing to the company's preferred billing accounting method by threatening a fee is legally indistinguishable from actually imposing that fee. The statement is also irrelevant, for one cannot defend an illegal fee by noting that the fee was merely threatened, not imposed.

II. BACKGROUND

Larry Fagen, a customer of MVCLPA's who had previously installed a solar PV system connected with MVCLPA's distribution network, installed an additional 9.156kW solar PV array onto his pre-existing system on January 4, 2016.[3] On January 15, 2016, MVCLPA installed a new meter at Mr. Fagen's site and left

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[1] *IN THE MATTER OF A COMPLAINT OF LARRY FAGEN AGAINST MINNESOTA VALLEY COOPERATIVE LIGHT & POWER ASSOCIATION,* Docket No. E-123/CG-16-241, Initial Response of MVCLPA, April 21, 2016, at p. 7.

[2] Minn. Stat. § 216B.164, subd. 3(a).

[3] *IN THE MATTER OF A COMPLAINT OF LARRY FAGEN AGAINST MINNESOTA VALLEY COOPERATIVE LIGHT & POWER ASSOCIATION,* Docket No. E-123/CG-16-241, Amended Complaint of Larry Fagen, March 28, 2016, at p. 4.

a copy of its uniform state-wide contract for Mr. Fagen to sign.[4] Under the section governing how Mr. Fagen would be compensated for electricity generated by his system, MVCLPA had pre-selected a "carry-forward" option, under which he would receive a kWh credit on his monthly bill.[5] Any credits remaining at the end of the year would be cancelled.[6]

Mr. Fagen inquired with MVCLPA about alternative options for calculating his compensation for net input into the cooperative's system. Minn. Stat. § 216B.164, subd. 3(a) states that "[i]n the case of net input into the utility system by a qualifying facility having less than 40-kilowatt capacity, compensation to the customer shall be at a per kilowatt-hour rate determined under paragraph (c), (d), or (f)." The method pre-selected by the cooperative is found in paragraph (f) of that subsection, which states:

> A customer with a qualifying facility or net metered facility having a capacity below 40 kilowatts that is interconnected to a cooperative electric association or a municipal utility may elect to be compensated for the customer's net input into the utility system in the form of a kilowatt-hour credit on the customer's energy bill carried forward and applied to subsequent energy bills. Any kilowatt-hour credits carried forward by the customer cancel at the end of the calendar year with no additional compensation.[7]

MVCLPA informed Mr. Fagen that there "really [were] no other options," and that if he wanted to use any other compensation method the cooperative would charge an annual fee of $650.[8] MVCLPA does not dispute that it had pre-selected the carry-forward billing option, and it appears to believe that it has the authority to deny DG customers any other compensation method. MVCLPA's Initial Response states:

> [T]he Cooperative has affirmatively chosen to utilize the carry-forward compensation methodology for members installing new net metering systems after July 1, 2015, and in doing so, elected not to charge such customers for the fixed costs that would otherwise be recoverable pursuant to Minn. Stat. § 216B.164, subd. 3(a). The Cooperative strongly believes that this policy is in the best interests of both the individual members affected, because such members avoid what could be significant charges for such cost recovery, and the Cooperatives member base as a whole, since the use of the carry-forward methodology fairly reflects the balance between a net metering system customer's net input and output from the electrical system.[9]

Although its response is not explicit on this matter, it seems clear that the cooperative believes that it has the authority to *require* the carry-forward method, noting in its response that "the plain language of Minn. Stat.

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[4] *Id.*
[5]*IN THE MATTER OF A COMPLAINT OF LARRY FAGEN AGAINST MINNESOTA VALLEY COOPERATIVE LIGHT & POWER ASSOCIATION,* Docket No. E-123/CG-16-241, Appendix A to Complaint of Larry Fagen, "Minnesota Valley's Delivered Uniform State-wide Contract," March 22, 2016, at p. 1.
[6] *Id.*
[7] Minn. Stat. § 216B.164, subd. 3(f).
[8] Amended Complaint, *supra* at 4.
[9] MVCLPA Initial Response, *supra* at 3-4.

§ 216B.164, subd. 3(a) does not provide that the customer has the unilateral right to elect which method of compensation to receive."[10]

The cooperative alleges that the carry-forward method was chosen by the Board "in lieu of seeking to recover the fixed costs not already paid for through net metering customers' existing billing arrangements were they to simply be paid out of pocket for all net input into the electric system at the Cooperative's average retail utility energy rate."[11] By an amendment passed in 2015, cooperatives are allowed to assess additional fees to DG customers "to recover the fixed costs not already paid for by the customer through the customer's existing billing arrangement."[12] Those fees "must be reasonable and appropriate for that class of customer based on the most recent cost of service study."[13] In other words, the cooperative presented Mr. Fagan with a classic Hobson's choice: either use the carry-forward methodology and let your generation credits expire at the end of the year, or use an average retail rate but pay an annual fee of roughly $650. MVCLPA does not dispute this account of their interaction with Mr. Fagen; it is drawn from its own Response in this case.[14]

The "very rough estimate"[15] of $650, which the cooperative used to illustrate the total amount of "fixed costs" that it would seek to recover from Mr. Fagen if he chose an average retail rate compensation method, is based on an accounting provided in responses to Information Requests in this case. MVCLPA's Response to the Department of Commerce's Information Request No. 1 included a "net metering cost of service analysis that identifies the portion of the Single Phase Energy Charge that is recovering distribution fixed costs."[16] This accounting is the same accounting referred to in the cooperative's Initial Response, which describes an estimated annual fee to recover fixed costs in terms of a per/kW rate of roughly $3.50.[17] According to the actual Net Metering Cost Analysis filed with its IR Response, that rate is actually $4.77 for every kW in excess of 3.5 kW, not to exceed $89/month.[18]

The cooperative's accounting of this fee is simple. It starts with Annual Distribution Fixed Costs for Residential Customers of $6,496,476 (Line 11). MVCLPA subtracts from that the amount received through

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[10] MVCLPA Initial Response, *supra* at 4.
[11] *Id.* at 3.
[12] Minn. Stat. § 216B.164, subd. 3(a).
[13] *Id.*
[14] MVCLPA Initial Response, *supra* at 3-5.
[15] *Id.* at 3.
[16] *IN THE MATTER OF A COMPLAINT OF LARRY FAGEN AGAINST MINNESOTA VALLEY COOPERATIVE LIGHT & POWER ASSOCIATION,* Docket No. E-123/CG-16-241, MVCLPA Response to DOC IR No. 1, July 15, 2016, at p. 1.
[17]MVCLPA Initial Response*, supra* at 3.
[18] *IN THE MATTER OF A COMPLAINT OF LARRY FAGEN AGAINST MINNESOTA VALLEY COOPERATIVE LIGHT & POWER ASSOCIATION,* Docket No. E-123/CG-16-241, MVCLPA Response to DOC IR No. 1, "MREA Net Metering – Public Version," July 15, 2016, at p. 1.

the currently monthly customer charge of $20, totaling revenue of $1,192,080 (Line 12). The remaining distribution fixed costs are recovered through a volumetric charge, which is calculated by dividing the fixed distribution costs not recovered in the monthly customer charge by the annual residential energy sales (Lines 13 & 14). The result is $0.0435, representing a volumetric, per/kWh fee to recover fixed distribution costs not otherwise recovered by the monthly customer charge of $20 (Line 15).

The cooperative then estimates how many kWh a customer's DG system would generate, assuming a capacity factor of 15% and monthly operations of 730 hours (Line 18 & 19). Multiplying the estimated kWh by the per/kWh rate for fixed costs, the cooperative arrives at $4.77 per kW (Line 20). The end result is that the fee recovers what the customer *would have paid* had they not used the electricity generated by their system, and instead purchased it from the cooperative.

The fee, whether it is actually assessed or simply communicated to the customer, seeks to recover revenue that the cooperative lost due to lower sales to its DG customers. That recovery, however, is not allowed by state law, and it was therefore inappropriate for MVCLPA to use the threat of that fee to influence Mr. Fagen's contract decision. Their conduct violates the law's clear directives that only the customer may elect a carry-forward methodology, and that distributed generation must be given maximum encouragement.

III. AN ELECTRIC COOPERATIVE MAY NOT REQUIRE A CUSTOMER TO ELECT THE 'CARRY FORWARD' COMPENSATION METHODOLOGY

MVCLPA's belief that it alone has the ability to choose a carry-forward methodology, over the objections of its customer, is directly contrary to state statute. The language is so clear, in fact, that the cooperative's stance to the contrary is of great concern to MCEA and Sierra Club. The protection of DG customers against discrimination or unfair treatment by cooperatives lies predominantly with the cooperatives' Boards. If those same cooperatives are blatantly ignoring what few statutory restrictions do in fact apply to them, it raises very serious questions concerning the cooperatives' ability to self-regulate in a manner that furthers the statewide goals of maximizing distributed generation and reducing greenhouse gas emissions. This concern is only heightened by the manner in which MVCLPA purports to be able to recover revenues lost by customers using on-site generation, contrary to state law.

The carry-forward provision of state law states:

> A customer with a qualifying facility or net metered facility having a capacity below 40 kilowatts that is interconnected to a cooperative electric association or a municipal utility <u>**may elect**</u> to be compensated for the customer's net input into the utility system in the form of a kilowatt-hour credit on the customer's energy bill carried forward and applied to subsequent energy bills. Any kilowatt-

> hour credits carried forward by the customer cancel at the end of the calendar year with no additional compensation.[19]

As far as customer choice is concerned, the statute needs no explanation. It is unclear why the MVCLPA maintains that it has the authority to override a customer's choice to "affirmatively [choose] to utilize the carry-forward compensation methodology."[20] Its citation to state case law on statutory interpretation is unavailing because the statute is clear in its meaning, but MVCLPA chooses to believe it means the opposite of what the words themselves say.[21]

The cooperative's only other argument on this point is that it did not deny Mr. Fagen the right to choose his preferred compensation method because the methods in subsections (d) and (f) are not mutually exclusive.[22] This contention is similarly perplexing, as it directly contradicts MVCLPA's statements in the same brief that the carry-forward method was used "in lieu of" simply compensating the customers at the average retail rate and recovering fixed costs not otherwise paid for. Whether or not the two methods are mutually exclusive is a legal question that does not need to be answered to resolve this dispute; it is undisputed that the cooperative informed Mr. Fagen that the two methods were indeed mutually exclusive: either use carry-forward billing or use average retail rate with an annual fee for fixed costs. Its behavior toward its own customers, as described in its own Response, is based on the two methods being exclusive alternatives, despite what its Initial Response says a page later.

Quite simply, the statute itself brooks no contrary interpretation: the option to choose a carry-forward compensation method lies solely with the customer, and it is therefore clearly impermissible for a cooperative to *require* it from a customer.

IV. AN ELECTRIC COOPERATIVE MAY NOT INFLUENCE A DG CUSTOMER'S COMPENSATION CHOICE BY OFFERING TO WAIVE OR REDUCE A FEE THAT IS A "VERY ROUGH ESTIMATE"

MVCLPA's response to Mr. Fagen's complaint repeatedly asserts that it did not assess the $650 fee, and that it in fact has no intention of ever imposing such a fee on its customers.[23] That fee was merely a "rough estimate" to demonstrate to Mr. Fagen that it would advantageous for him to use the carry-forward

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[19] Minn. Stat. § 216B.164, subd. 3(f) (emphasis added).
[20] MVCLPA Initial Response, *supra* at 3.
[21] MVCLPA argues in its Initial Response that they can override the customer compensation choice because subd. 3(a) only provides for three options, without specifically saying that the choice lies solely with the customer. *See* Initial Response at 5. This argument is somewhat confusing, given that the carry-forward option chosen by the cooperative over its customer's objection does in fact specify that the choice lies solely with the customer.
[22] Initial Response, *supra* at 5.
[23] *Id.* at 3, 7.

method, rather than choosing to be compensated at the average retail rate.[24] Even though that fee never appears on a bill, MVCLPA does not deny that it informed Mr. Fagen that the fee *would apply* if he did not choose the carry-forward option.[25] The cooperative clearly states in its response that it believes it has the *right* to charge the $650 fee under Minn. Stat. § 216B.164, subd. 3(a), even if it has not charged any customers with that fee.[26] According to MVCLPA, it has not ever had to actually assess the fee simply because it has been successful in its efforts to control the customer's decision, whether by pre-selecting the carry-forward option or by threatening the large annual fee.

It is of course clear that § 216B.164 allows cooperatives to potentially charge some additional fee to DG customers, if they meet the burden of establishing that the fixed costs attributable to that customer are not otherwise recovered in the existing billing arrangement. The reasonableness and methodology for calculating such a fee is currently under investigation by the Commission in Docket Nos. 16-09 and 16-512. In the event that some fee is approved by the Commission, it would accordingly be permissible and, indeed, desirable for a cooperative to inform its customers what that fee would be if they chose to endure it rather than use the carry-forward methodology. Informed choice is obviously always preferable to uninformed choice. What is not permissible, however, is for a cooperative to simply "ballpark" what that fee would be in an attempt to convince a customer to use the billing method preferred by the cooperative. Customer coercion should always be met skeptically, but customer coercion based on numbers that are conceded as "very rough estimates" must be disallowed as a clear violation of the DG customer's ability to choose his own preferred compensation method under Minn. Stat. § 216B.164, subd. 3(a).

MVCLPA's repeated insistence that the $650 fee was never actually imposed on Mr. Fagen is misguided. Threatening a fee is legally identical to imposing one.[27] Customers of MVCLPA face a Hobson's choice: they must either pay the excessive and illegal fee of roughly $650, or they must choose a billing system that they do not want (or choose not to install the system at all). The cooperative has effectively *forced* the customer's decision by threatening such an exorbitant amount, and it simply cannot now claim that it has not in fact charged the fee. MVCLPA has very effectively controlled customer behavior for its own advantage just by threatening the fee. Such behavior is legally indistinguishable from actually charging the fee, and MVCLPA's claim that they have not imposed any such fee is disconcertingly misleading and disingenuous.

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[24] *Id.* at 3.
[25] *Id.*
[26] *Id.* at 7.
[27] *See, e.g., Putnam v. Time Warner Cable of Southeastern Wisconsin,* 649 N.W.2d 626, 642 (Wisc. 2002) (finding that a cable company's assertion of the right to impose a late fee on customers was ripe for declaratory judgment, because the fee had been threatened, if not actually imposed on a late customer); *see also Minnesota Citizens Concerned for Life v. FEC*, 113 F.3d 129, 131 (8th Cir. 1997) (under federal law, the "credible threat" of a future injury "itself works an injury" to the affected citizen).

V. MVCLPA'S 'POTENTIAL' FEE OF ROUGHLY $650 IS AN UNLAWFUL ATTEMPT TO DISCRIMINATE AGAINST DG CUSTOMERS BY RECOVERING LOST REVENUE

Although the annual fee for fixed costs was communicated to Mr. Fagen as a very rough estimate, the cooperative provided a much more specific accounting of that fee as a result of Mr. Fagen's formal complaint. As described above, that fee is derived from the volumetric charge for fixed distribution costs, which the cooperative calculates by dividing its fixed distribution costs (less costs recovered by the monthly customer charge) by its average annual sales, in kWh.[28] That volumetric charge for the recovery of fixed distribution costs is then multiplied by the estimated kWh produced by the customer's DG system to arrive at the estimated amount of fixed distribution costs that the customer *would have paid* if he had purchased the electricity from the cooperative rather than generating it himself.

MCEA and Sierra Club initially note that this calculation (most directly exemplified by Document ID 20167-123356-02) is clearly within the purview of the Commission's investigation in Docket Nos. 16-09 and 16-512 and should be reviewed in that matter. Nevertheless, we comment here to highlight the fact that this fee represents an attempt to recover lost revenue, not the actual fixed costs attributable to servicing DG customers. As such, the fee is clearly unlawful, whether it has been imposed on customers or not. Because this issue will be taken up separately in Docket Nos. 16-09 and 16-512, MCEA and Sierra Club will comment only briefly on this matter.

The recovery of lost revenue, as opposed to fixed costs *actually attributable* to serving DG customers, is unlawful for three reasons. First, lost revenue is not a "fixed cost." The cooperative in this case has imposed a *volumetric* charge based on an estimate of how many kWh the customer has avoided purchasing from their utility. MVCLPA is essentially attempting to recover what it has lost due to a customer not buying as much of its product. The cooperative's fee would apply equally to any customer using less electricity, whether it is because they have purchased a more efficient appliance or because he simply made an effort to turn lights off more often. Those customers too would have paid less of the volumetric charge for fixed distribution costs, and yet those customers are not subject to an annual fee to recover that deficit. The fact that the fee is selectively applied only to DG customers, and not to customers that are simply more energy efficient, is clear evidence of a discriminatory practice that violates Minn. Stat. § 216B.164, subd. 1 and subd. 3(c).

Second, the recovery of lost revenue is not a "reasonable" fee as required by the statute. A reasonable fee would be one that is based on an accurate accounting of the true costs (and benefits) of integrating DG

[28] MVCLPA Response to DOC IR No. 1, "MREA Net Metering – Public Version," *supra* at 1.

customers into a cooperative's distribution system, not one based on a ballpark of how much a customer would have paid if he had never installed his DG system. Lastly, such a fee selectively punishes customers producing their own electricity, contrary to the law's directive to "at all times" interpret the statute to "give the maximum possible encouragement to cogeneration and small power production."[29]

VI. MVCLPA'S CONDUCT IN THIS MATTER SIGNIFICANTLY DISCIMINATES AGAINST DG CUSTOMERS AND 'CHILLS' INVESTMENT IN DG SYSTEMS, CONTRARY TO STATE LAW

Finally, MCEA and Sierra Club submit these comments to highlight two aspects of this case that merit particular attention: the fact that MVCLPA is giving its DG customers a "choice" that is based on an exorbitant fee, and the resulting 'chilling' effect that such conduct has on DG investments and deployment.

MCEA and Sierra Club understand that traditional utility business models are evolving as distributed generation gradually becomes more widely used. We also understand that integrating DG customers is fundamentally different from servicing traditional customers. At this point, we are all working through how to meet state energy policies and customer demand; MVCLPA's attempt to address these concerns, however, sets the wrong course and sends the wrong message. Rather than attempt a detailed accounting of the true costs *and benefits* (in reduced transmission and distribution capacity costs, etc.) attributable to DG systems, the cooperative informed its customers that it would seek to recover the very same volumetric charge for fixed distribution costs that the customer saved by not buying as much electricity. Such a practice discriminates against DG customers by assessing fees that other customers do not pay, even though they too have purchased less electricity from the cooperative.

MCEA and Sierra Club are also concerned that this method of assessing a fee for fixed distribution costs will "chill" much needed investments in distributed generation. The fees fundamentally alter the economics of small scale distributed generation, punishing renewable energy at a time when the state is seeking to encourage it. Not only does this behavior discourage investment in distributed generation, it is clearly contrary to state law, which prohibits discrimination against distributed generation customers. But perhaps most importantly, our state has established a very clear mandate to encourage cost-effective DG investment as much as possible, and cases such as this one demonstrate how easily that mandate can be undermined by the actions of the institutions charged with operating our state's electricity distribution infrastructure.

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[29] Minn. Stat. § 216B.164, subd. 1.

VII. RECOMMENDATIONS

In accordance with the law's directive to maximize encouragement of cogeneration and small power production, MCEA and Sierra Club urge the Commission to:

1. Rule in favor of Mr. Fagen on all claims;
2. Order that the methods of compensating DG customers for net input into a cooperative's distribution system under Minn. Stat. § 216B.164, subd. 3(a) are solely at the customer's election, not the cooperative's;
3. Grant the relief requested by Mr. Fagen, including reasonable attorney's fees as authorized by Minn. Stat. § 216B.164, subd. 5; and
4. Order that the accounting of MVCLPA's net-metering fixed distribution cost illustrated by Document ID 20167-123356-02 be included for investigation in Docket Nos. 16-09 and 16-512.

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