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The Secretary
Federal Communications Commission
1919 M. Street N.W. Room 222
Washington, DC 20554

In the Matter of

Guidelines for Evaluating the Environmental) ET-Docket No. 93-62
Effects of Radiofrequency Radiation)

To: The Secretary:

Dear Mr. Secretary,



Re: - My ex parte #2 comment in ET-Docket 93-62 (original + 1 copy)

In accordance with 47 CFR §1.1202, 1.1203, and 1.1206, enclosed please find an original and 1 copy of an ex parte submission made to Dr. Robert F. Cleveland of the Commission Office of Engineering and Technology and with copies sent to parties on the attached certificate of service, being submitted

Please assure this submittal is put in the official record of ET-Docket 93-62.

Thank you,

Philip G. O'Reilly
Philip G. O'Reilly
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Seattle, WA 98118

Dated: March 18, 1998

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March 18, 1998

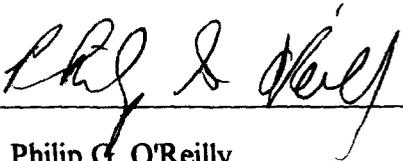
Dr. Robert Cleveland Jr.
Office of Engineering and Technology
Federal Communications Commission
2000 M Street N.W. Room 266
Washington, D.C. 20554
FAX: (202) 418-1918

Re: ET Docket 93-62, October 14, 1997 Petition for Partial Reconsideration and/or
Clarification of Ameritech

Ex parte #2 Presentation in ET-Docket 93-62, original and 1 copy filed with the
Secretary of the Commission in accordance with 47 CFR §1.1202, 1.1203, and 1.1206.

I wish to support in part the October 14, 1997 Petition for Reconsideration and/or
Clarification of Ameritech for the reasons which follow.

Thank you for giving this matter your consideration.


Philip G. O'Reilly

**Before the
FEDERAL COMMUNICATIONS COMMISSION**

Washington, DC 20554

In the Matter of)
) ET Docket No. 93-62
Guidelines for Evaluating the Environmental)
Effects of Radiofrequency Radiation)

EX PARTE #3 COMMENT IN PARTIAL SUPPORT

OF

**PETITION FOR PARTIAL RECONSIDERATION AND/OR CLARIFICATION OF
AMERITECH MOBILE COMMUNICATIONS, INC.**

Philip G. O'Reilly
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Dated: March 18, 1998

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Summary

Ameritech has sought relief from the Commission because the information is lacking that is needed to help assure it is compliance with the Commission's Radiofrequency (RF) exposure limits. The Commission must provide an information system so not only operators of wireless facilities, but also States and local jurisdictions as well as the public have the same information to help assure compliance is achieved.

By not providing the needed information and yet applying 47 USC 332(c)(7)(B)(ii) in combination with (B)(iv) to compel local jurisdictions to process wireless telecommunications applications, the Commission has commandeered local government to carry out its federal regulatory program, which is a violation of the 10th amendment and principle of republican government.

Moreover, any Commission rationale to apply 47 USC 253 or 332(c)(3) to justify preempting local government radiofrequency regulations of the wireless telecommunications facilities to protect the public health, safety, and welfare is unlawful.

Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of)
) ET Docket No. 93-62
Guidelines for Evaluating the Environmental)
Effects of Radiofrequency Radiation)

EX PARTE #3 COMMENT IN PARTIAL SUPPORT

OF

**PETITION FOR PARTIAL RECONSIDERATION AND/OR CLARIFICATION OF
AMERITECH MOBILE COMMUNICATIONS, INC.**

I, Philip G. O'Reilly, hereby submit an ex parte comment, in accordance with 47 CFR Sections 1.1202, 1.1203, and 1.1206, in support of certain requests in the Petition For Partial Reconsideration And/Or Clarification Of Ameritech Mobile Communications, Inc. filed October 14, 1997 seeking reconsideration of the Commission's Second Memorandum Opinion and Order in ET-Docket 93-62.

A. Highlights regarding constitutional issues

Ameritech requests that,

"The Commission should place certain limited responsibilities for compliance on site owners." [Ameritech 1997 Petition at 7], and specifically requests site owners "make available to current and prospective site users information about other facilities on the tower or building," and that "future tenants perform an RF compliance evaluation" which is sent to existing users.[Ameritech 1997 Petition at 7].

Indeed, in my Ex Parte #2 comments dated March 18, 1998, I noted that many telecommunications companies indicated to the Commission that they cannot feasibly in a practical way assure that their facilities are in compliance with the Commission's radio frequency exposure guidelines without additional information concerning the locations and important characteristics of signal transmissions from facilities nearby of other operators.

B. Constitutional implications

The comments of numerous telecommunications operators, such as noted above, make it clear that the Commission must provide an up-to-date database providing the information needed,

so that at least under the assumption of full power, worst case conditions, it is possible for telecommunications operators as well as local jurisdictions to feasibly estimate what the maximum exposure in a local geographic area is. For the Commission to order the implementation of a system which its licensees repeatedly claim they cannot meet due to the lack of needed information which the Commission continues to refuse to establish, constitutes an arbitrary and capricious order, insofar as the Commission is ordering what its licensees say that cannot do, and the Commission is not providing a means to overcome the obstacle.

Furthermore, the Commission has stated that it has preempted State and local jurisdictions setting more stringent health and safety regulations pertaining to RF exposure [in FCC 97-303]. Thus, the above lack of information to help assure compliance provides good cause of why a city, county, or other local jurisdiction would not wish to issue permits for such facilities. For the Commission has ruled that such jurisdictions may not even establish regulations to assure sufficient information is available to protect the public safety and welfare of its residents.

However, 47 U.S.C. 332(c)(7)(B)(ii) requires,
"A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable time after the request is duly filed ..."

The key point above is that federal statutes compel States and local jurisdictions to process permits for siting certain wireless facilities, and yet the Commission is preempting these State and local governments from making the regulations they deem necessary to assure the public safety and welfare is protected, e.g. making regulations such requiring monitoring of exposure and the related information systems noted above which may meet the needs of Ameritech.

Thus, either B(ii) by itself, and certainly in combination with the Commission's preemption of operations to protect the public health, safety and welfare, there is the result that States and local jurisdictions are being commandeered and compelled to carry out the federal government's telecommunications regulatory program - even if these jurisdictions object to being made an instrument of such a regulatory program. If they cannot regulate to assure there is the proper information to assure compliance to their satisfaction, then they should not be compelled to do so.

Rather, just like the Social Security system or the Internal Revenue Service, the federal government should establish its own program for siting facilities when local jurisdictions wish to have no part of permitting facilities when neither the jurisdictions nor the operators indicate they can assure compliance without the needed information systems.

Thus, the lack of the needed information systems puts in stark reality the fact that 332(c)(7)(B)(ii) which states jurisdictions "shall act" is unconstitutional - violating the 10th amendment and the principle of republican government and federalism; this is especially so when B(ii) is combine with (B)(iv) which preempts any attempt by jurisdictions to establish needed RF regulations pertaining to the operation of these facilities to protect the public health and safety.

To avoid unnecessary confusion, delays, or unlawful assertion of the Commission's authority which is exceeds its delegated authority or which is based upon unconstitutional statutes, the Commission should provide some relief to the States and local jurisdictions by clarifying that States and local jurisdictions may regulate by means of health and safety, land use, zoning and other regulations pertaining to the placement, construction, modification and operation of radio facilities licensed by the Commission, including those regulations which are made on the basis of the health and safety impacts of radiofrequency emissions from radio facilities licensed by the Commission. In this way, the relief sought by the Ameritech which may not be offered by the Commission, may be sought from each of the several States and their local jurisdictions.

To recognize the above, the Commission should consider the following:

C.1. No authority to preempt health and safety regulations of personal wireless services operations.

The Ad-Hoc Association of Parties Concerned About the Federal Communications Commission Radiofrequency Health and Safety Rules ("Ad-Hoc Association") in its Petition for Reconsideration dated Sept. 6, 1996, requested the Commission clarify that local jurisdictions can regulate the monitoring of personal wireless service facilities, even when the Commission does not require it [Ad-Hoc Association Petition at 8,9]. Also, David Fichtenberg commented on the request of Ameritech that the Commission also preempt State and local jurisdiction regulation of

the operation of personal wireless services facilities. [Ameritech Mobile Communications, Inc. Petition for Reconsideration of Sep. 1996, pages 9-10]. In its comments to the request of Ameritech, focuses explicitly on the issue of regulation of operation which pertain to public health and safety, and in particular to regulating radiofrequency exposure limits, and stated,

"Congress was aware that many states and local jurisdictions had at the time of the Act (TCA) and prior to it set established radio frequency exposure limits which affected the operations of telecommunications facilities, and yet, after considering the concerns and efforts of parties to the proceeding, Congress chose to exclude 'operation' from the preempted list of function, leaving matters in this area as they were." [David Fichtenberg Comments Oct. 8, 1996, page 17].

Thus, by denying the requests of the Ad-Hoc Association and Fichtenberg, the Commission has clearly asserted that it can preempt health and safety regulations based upon the health and safety impacts of radiofrequency emissions of its facilities.

However, the Commission does not have the authority under 47 U.S.C. 332(c)(7)(B)(iv)-(v) to preempt State and local jurisdiction regulations based upon health and safety impacts of the effects of radiofrequency emissions from the Commission's personal wireless services facilities. The Commission states that it finds this claim "illogical and absurd"; yet this claim only indicates that Congress chose that all regulation of operations of personal wireless service facilities, whether or not based upon the "environmental effects" of radiofrequency emissions, should be subject to review by the court of competent jurisdiction, and not by the Commission, as provided for by Congress in 47 U.S.C. 332(c)(7)(B). It is unclear to me on what basis the Commission finds this provision by Congress "illogical or absurd," [2nd MN&O, para. 89] and in any case, the Commission must not exceed its statutory authority whether the balance and compromise of Congress seems reasonable or not. Moreover, to claim that certain remarks in the Conference report of the Telecommunications Act of 1996, Pub. Law 104-104 ("TCA") [H. Rep. No. 104-458, 94th Cong. 2nd Sess. 208-209 (1996)] imply the Commission may preempt operations, while not expressly stating so, is contrary to statute which states that,

"This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." [TCA, Section 601(c)(1)]

Accordingly, the above statute, TCA, Section 601(c)(1) explicitly prohibits the Commission from preempting "operation" on the basis of an implication. Moreover, such implication is inappropriate since the Senate/House Joint Conference explicitly removed all reference to "operate" and "operation" from the House version, H.R. 1555 of the TCA.

C. 2. The Commission has no authority to preempt State or local jurisdiction regulation of the placement, construction, modification, or operation of personal wireless services facilities on the basis of potential health and safety effects of radiofrequency emissions from such facilities.

The "environmental effects" referred to in 47 USC Section 332(c)(7)(B)(iv) are vague and do not explicitly indicate that Congress intends that health and safety regulations of States and local jurisdictions may be preempted. Thus, even though many members of Congress have with almost certainty intended to preempt health and safety regulations through the euphemism of "environmental effects" this is not acceptable -even though it may sound more palatable to their constituents so they will not be aware that a member of Congress preempted local health and safety rules.

Indeed, the courts have ruled that Congressional intent to supersede a state safety measure must be clearly manifested. [see *Maurer v. Hamilton* 309 U.S. 598.; 60 S.Ct. 726; 84 L.Ed. 969 (1940); *H.P. Welch Co. v. New Hampshire*, 306 U.S. 79, 85; 59 S.Ct. 438, 441; 83 L.Ed. 500, 505 (1939)]. Indeed, the courts tend to give greater deference to regulation that is traditionally parochial, i.e. health and safety measures [see *Inlandboatmen's Union of the Pacific v. Department of Transportation*, 119 Wn2d 697, 703; 836 P.2d 823 829 (1992); *Bravman v. Baxter Healthcare Corp.* 842 F.Supp. 747, 753 (S.D.N.Y. 1994).

Rather, the Commission must understand that the "environmental effects" referred to in 47 332(c)(7)(B)(iv) only pertain to those 'environmental effects' about which the Commission has expertise, i.e. the effects of radiofrequency of a certain power to interfere with broadcasts from other facilities.

For example, the courts have ruled,

"the FCC does not have the responsibility for public safety with regard to cellular telephones as its responsibilities lie in regulating frequency standards...Accordingly, since Congress has not empowered the FCC to regulate cellular telephones with regard to health effects and public safety, it has not regulated so pervasively as to preclude state action on that subject." [Verb v. Motorola, Inc. et al 672 N.E. 2nd (Ill.App. 1 Dist 1996).]

Furthermore, in the TCA section 253 on "Barriers to Entry", Congress further establishes that States may regulate any radio facilities *"to protect the public safety and welfare"* [47 U.S.C section 253(b)], even when it may effect the ability of companies to provide telecommunications services

Therefore, the Commission erroneously implies that regulations based upon "environmental effects" includes public health and safety regulations based upon potential public health and safety effects of radiofrequency emissions from any of the Commission's licensed radio facilities. Indeed, since to preempt health and safety regulations the Commission must imply such preemption as included in regulations based upon the "environmental effects" of radiofrequency emissions, the Commission is violating statute, since the TCA Section 601(c)(1) prohibited any preemption of State or local law by implications derived from the TCA but not explicitly stated.

Furthermore, when Congress enacted 47 USC 332(c)(3) pertaining to commercial mobile services and facilities, while Congress removed State and local jurisdiction over economic regulation, specifically rate or entry regulation, it specifically authorized continued State and local regulation of the "terms and conditions of such services" including facilities siting issues such as zoning and stated, as follows,

"It is the intent of the Committee that the States still would be able to regulate the terms and conditions of the services. By 'terms and conditions,' the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facility siting issues (e.g. zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under 'terms and conditions' " H.R. Rep. No. 111, 103rd Cong., 1st Sess. 261 (1993) [emphasis added]. [noted by Concerned Communities and Organizations ("CCO") in its Sep.. 10, 1997 Comments in Docket DA 96-2140, pertaining to public notice FCC 97-264.

C.3. For the Commission to maintain that the reference in 47 USC 332(c)(7)(B)(iv) to regulations based upon "environmental effects" of radiofrequency includes regulations of

health and safety regulations would render the statute unconstitutional; and in any case, there are reasons to find all of the 47 USC (c)(7)(B)(i) to (v) unconstitutional.

This is because:

C.3(1) Separation of Powers provisions would not followed in 47 USC 332(c)(7)(B)(iv) providing preemption authority to the FCC. The checks and balances structure of the Constitution requires Congress to put forth a proper criteria when delegating authority to an executive agency. Yet the aforementioned statute provides no criteria to the Commission, but only states that whatever regulations based on the environmental effects the Commission may make, these may not be preempted. It may also be argued that a proper delegation of authority requires the agency being given preemption authority to have expertise in the field being preempted; yet the FCC does not have expertise in health and safety matters, and has acknowledged this [e.g. see FCC 96-326 at para. 28]

C.3(2) The 5th Amendment due process provisions are violated. Due process requires agencies with preemption authority have expertise in preempted area. If health and safety regulations are to be preempted, due process requires Congress explicitly provide for this. Moreover, if a reasonable knowledgeable person would be fearful of living or working in areas exposed at the allowed exposure limits, this will render such areas unfit for the purposes intended and be a 'taking' of property without due compensation. Furthermore, since the Food and Drug Administration ("FDA") has told the FCC that allowed limits "*can cause injury or death*" due to interference with medical devices, [see FDA letter of July 17, 1997 from E. Jacobson to R. Smith, Chief of the Commission's Office of Engineering and Technology], persons being put at such risk are also having their 5th amendment rights violated.

C.3(3) The First Amendment free speech rights are violated insofar as by preempting land use decisions based upon the health and safety effects of radiofrequency emissions, there is a 'chilling effect' or attempt to regulate the content of speech on allowing public comment of its concerns on this issue during land use hearings and related proceedings. For example, in Seattle, Washington, a hearing officer dismissed an appeal by a local neighborhood association requesting reconsideration of a decision that the installation of a personal wireless services facility will result

in "no probable significant environmental impacts."; the dismissal was based upon 47 USC Section 332(c)(7)(B)(iv). [see dismissal of Appeal of the Rainier Valley Association For Safe Wireless Technology in Appendix to this Comment] This lack of even allowing an opportunity for public comment on the health and safety impacts of a Commission facility is an example of the chilling effect this statute has on free speech.

C.4 The 10th Amendment, which the Supreme Court has recently given greater weight [see New York vs. U.S. 112 S.Ct.2408 (1992)] reserves to the States the traditional role of land use zoning and other regulations, especially for health and safety considerations.

Moreover, the Supreme Court has held,

"States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead 'leaves to the several States a residuary and inviolable sovereignty' [The Federalist No. 39. p. 245, C. Rossiter ed. 1961]....Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program." [see New York v. U.S. 112 S.Ct. 2408, 2435 (1992), and citations therein]

In New York v. US above, the Supreme Court also ruled,

"Low-Level Radioactive Waste Policy Act's 'take title' provision [in 42 U.S.C.A. section 2021 et seq.] offering states choice of either accepting ownership of waste generated within their borders or regulating according to instructions of Congress, neither of which options could be constitutionally imposed as freestanding requirement, was outside Congress' enumerated powers and infringed upon state sovereignty in violation of Tenth Amendment." [New York vs U.S at 2410],

and "either accepting ownership of waste or regulating according to Congress' instructions - the provision lies outside Congress' enumerated powers and is inconsistent with the Tenth Amendment" [New York v. U.S. at 2413]

But now we have the same situation regarding personal wireless services facilities under 47 USC section 332(c)(7)(B)(iv) if we interpret regulations based upon "environmental effects of radiofrequency emissions" to imply including regulations based upon the health and safety effects of radiofrequency emissions. For under this interpretation Congress would be compelling states to incorporate into its zoning laws and proceedings regulations for the placement, construction, and modification of such facilities, and in effect commandeering part of the administration of state and local governments to carry out the will of Congress.

Yet, "Constitution does not give Congress authority to require states to regulate, no matter how powerful the federal interest involved..." [New York v. U.S. at 2410]

Moreover, the above consideration applies to all of 47 USC section 332(c)(7)(B), for therein Congress is compelling states and local governments to allow the placement of personal wireless communication facilities with their corresponding non-ionizing radiation, and with the necessity to establish regulatory measures to address zoning, construction and other regulations required by law of jurisdictions to be prudent in the zoning, placement, construction, and operation, and related regulations of any structure according to the particular issues and risks associated with each structure.

Therefore, just as certain Low-Level Radioactive Waste Policy Act provisions commandeer states and local jurisdictions to establish a regulatory program, such commandeering being found unconstitutional, so too are 47 332(c)(7)(B) provisions unconstitutional.

C.5 Because the Commission may justify preemption on the basis of 47 USC section 332(c)(3), Regulatory treatment of mobile services: State Preemption, it should recognize that for the above reasons, this section is likewise be unconstitutional.

In 47 USC section 332(c)(3) it states,
"no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."

If we interpret "regulate the entry" to a narrowly defined economic regulation special to newcomers, then there appears to be no constitutional problem. However, if the Commission broadly interprets "regulate the entry" to pertain to preempting zoning, land use, associated health and safety regulations including those due to the health and safety impacts of radiofrequency emissions, and other regulations, then the same constitutional problems noted above exist.

For should the Commission broadly interpret "regulate the entry" to mean almost any regulation, and permits the above preemptions in order to speed the implementation of, say, Digital TV, or to preempt moratoria, then the Commission's interpretation would render this section unconstitutional for the same reasons as above. This is:

C.5(1) In adequate separation of powers due to improper delegation of authority, with vague or absent criteria for implementing regulations.

C.5(2) 5th amendment due process violations

C.5(3) 1st amendment free speech violations

C.5(4) 10th amendment violations, especially encroaching upon the traditional land use, zoning, and health and safety regulations traditionally reserved to states and local jurisdictions. Since 332(c)(3) does not explicitly provide for preempting zoning and health and safety regulations violates both TCA section 601(c)(1) and historical precedent requiring such explicit preemption. Likewise the violations in *New York v. US* 112 S.Ct. 2408 (1992) described above also occur.

Also, any other sections of 47 USC 151 et seq. that may be interpreted by the Commission as giving it authority to preempt state and local zoning, land use, and health and safety regulations are unconstitutional.

Moreover, it should be noted that the Commission has actually made the above interpretations of sections 253 and 332(c)(3) in proposing to preempt state and local jurisdiction laws [see public notice FCC 97-264 and FCC 97-182

C.6. The Commission exceeded its statutory authority by rejecting the request of the Ad-Hoc Association that it put in the Commission's standard that exposures from its facilities be "kept as low as reasonably achievable", ("ALARA"). As noted by the Ad-Hoc Association, this is essentially the directive of the National Institute of Occupational Safety and Health to the Commission in its letter of January 10, 1994 [see Ad-Hoc Reply comments of Oct. 8, 1996 page 9, and see Ex parte comments dated June 10, 1997, page 38-41]. But moreover, Congress also requires it of the Commission stating,

"In all circumstances, except in case of radio communications or signals relating to vessels in distress, all radio stations, including those owned and operated by the United States, shall use the minimum amount of power necessary to carry out the communication desired." [47 USC Section 324].

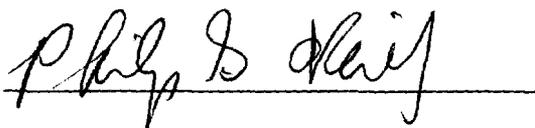
Inclusion of this statute, which is essentially the same as the Ad-Hoc ALARA in the Commission's rules will give appropriate direction to states and local jurisdictions to seek ways

regarding placement, appropriate transmitters, and other criteria to achieve the objectives of the Congressional statute, NIOSH, and the Ad-Hoc Association ALARA request. This will provide additional means for those who are at risk to becoming electrically injured to seek relief.

Conclusion: Because of the above, the Commission should reverse its decision concerning its authority to preempt State and local jurisdiction RF regulation of operations of personal wireless service facilities or that of other radio facilities in order to protect the public health, safety and welfare.. It should also report that it does not have the authority to preempt the health and safety regulations of states and local jurisdictions pertaining to the placement, construction, modification, or operation of any of its radio facilities, as to do so would either exceed the Commission's statutory authority or would result in the statute being interpreted as unconstitutional. It also should adopt the "as low as reasonably achievable" standard which is essentially already statute [47 USC section 324].

Indeed, the Commission should recognize that 47 U.S.C. 332(c)(7)(B)(ii) violates the 10th amendment, especially in combination with 47 USC 332(c)(7)(B)(iv) when the Commission preempts State and local jurisdiction RF regulations of operations of RF facilities to protect the public health, safety and welfare. Thus, the Commission should within its rules allow more stringent State and local jurisdiction regulation of its facilities in order to protect the public health, safety, and welfare. In this way those in the population at especially high risk of being electrically injured due to Commission licensed facilities may find relief by seeking protective regulations that states or local jurisdictions may enact.

Respectfully submitted,



Philip G. O'Reilly
4847 South Graham Street
Seattle, WA 98118

Dated: March 18, 1998

Certificate of Service

I, Philip G. O'Reilly, hereby certify that I have on this 18th day of March, 1998, sent by first class mail, postage pre-paid, a copy of the foregoing ex parte comment to the following parties:

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