Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of Foreign Ownership Policies for Broadcast, Common Carrier and Aeronautical Radio Licenses under Section 310(b)(4) of the Communications Act of 1934, as Amended	)))))	GN Docket No. 15-236

COMMENTS OF T-MOBILE USA, INC.

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COMMENTS OF T-MOBILE USA, INC.

T-Mobile USA, Inc. ("T-Mobile")[1] respectfully submits these comments in response to the above-captioned Notice of Proposed Rulemaking ("*NPRM*") seeking to simplify the foreign ownership approval process for broadcast licensees and revise the methodology all licensees should use to assess their compliance with the 25 percent foreign ownership benchmark in section 310(b)(4).[2] T-Mobile's comments will focus on the latter issue.

I. INTRODUCTION AND SUMMARY

In the *2013 Foreign Ownership Second Report and Order*, the Federal Communications Commission acknowledged that some of its policies intended to address sections 310(b)(3) and (4) needlessly impose "significant difficulties and expense" on and unnecessary barriers to

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1 T-Mobile USA, Inc. is a wholly-owned subsidiary of T-Mobile US, Inc., a publicly traded company.

2 *Review of Foreign Ownership Policies for Broadcast, Common Carrier, and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act of 1934, as Amended*, Notice of Proposed Rulemaking, GN Docket No. 15-236, FCC 15-137 (rel. Oct. 22, 2015) ("*NPRM*"). In the *2013 Foreign Ownership Second Report and Order*, the Commission applied its section 310(b)(4) methodology to petitions under section 310(b)(3) as well. *Review of Foreign Ownership Policies for Broadcast, Common Carrier, and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act of 1934, as Amended*, Second Report and Order, 28 FCC Rcd 5741, ¶ 3 (2013) ("*2013 Foreign Ownership Second Report and Order*").

licensees seeking Commission approval of foreign ownership.[3] This is perhaps nowhere more true than in the context of publicly traded companies. Although the Commission has taken noteworthy action in recent years to streamline its foreign ownership procedures,[4] existing policies for public companies remain complex and unclear; require gathering voluminous, difficult-to-obtain information about *de minimus* shareholders and entities remote in the ownership chain; and result in significant expense on licensees and the Commission. This process can discourage foreign investment, even though the Commission has recognized that such investment is "an important source of equity financing for U.S. telecommunications companies, fostering technical innovation, economic growth, and job-creation."[5]

Widely-held public companies seeking to demonstrate compliance with sections 310(b)(3) or (4) must engage in extensive and difficult fact-gathering about all of their shareholders and attributable interestholders—including shareholders holding interests of five percent or less. It is increasingly clear, however, that the results do not justify the effort. First, interests of five percent or less often are held in street name, meaning publicly traded companies may not be able to ascertain their beneficial shareholders' citizenship no matter what resources are thrown at the task. Second, the Commission's rules require this level of detail for all publicly traded companies in the attributable ownership chain, even ones multiple steps removed from the

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[3] *2013 Foreign Ownership Second Report and Order* at ¶ 3.

[4] The Commission adopted sections 1.990-1.994 of its rules, which provide a streamlined approach for section 310(b)(3) and (4) for common carrier and aeronautical licensees. 47 C.F.R. §§ 1.990-1.994. The Commission also clarified its section 310(b)(3) and (4) policies for broadcast licensees to remove uncertainty and encourage greater foreign investment. *See Commission Policies and Procedures Under Section 310(b)(4) of the Communications Act, Foreign Investment in Broadcast Licensees,* 28 FCC Rcd 16244 (2013) ("*2013 Broadcast Clarification Order*").

[5] *2013 Foreign Ownership Second Report and Order* at ¶ 3.

licensee. Such information is at best difficult, time-consuming, and expensive to obtain. Third, while shareholder surveys aim to address these roadblocks, the Commission has recognized that survey results are unrepresentative and generally unreliable. Underlying these challenges is the simple and telling fact that relevant regulatory agencies widely agree that shareholders holding interests of five percent or less cannot influence or control the core decisions of the company whose shares they own. For this reason, these minor, passive shareholders have not raised public interest concerns in the vast majority of the Commission's section 310(b) reviews to date.

Given these regulatory developments and marketplace realities, there is no need for a fact-intensive inquiry into a public company's five-percent-or-less shareholders. Instead, the Commission should establish a rebuttable presumption that shareholders holding interests of five percent or less in a public company in the ownership chain do not raise public interest concerns under sections 310(b)(3) and (4) and thus need not be disclosed or considered in assessing foreign ownership under these subsections. This approach would reduce delay, uncertainty, and expense and facilitate much-needed investment in communications infrastructure while preserving the Commission's ability to consider any unique issues on an as-needed basis.

II. FOR PURPOSES OF COMPLYING WITH SECTIONS 310(b)(3) AND (4), THE COMMISSION SHOULD ADOPT A REBUTTABLE PRESUMPTION ADDRESSING SHAREHOLDERS HOLDING INTERESTS OF FIVE PERCENT OR LESS IN A PUBLIC COMPANY

The *NPRM* proposes to adopt a rule applicable to public companies that would specify the information upon which a licensee's controlling parent may rely for purposes of determining its aggregate level of foreign ownership.[6] According to the *NPRM*, "such a rule should provide greater clarity for U.S. public companies and reduce the burden of determining their aggregate

[6] *NPRM* at ¶ 26. Presumably, the rule adopted in this proceeding also would apply to public companies in a licensee's attributable ownership chain.

levels of foreign ownership given the difficulties in ascertaining the citizenship of their shareholders."[7] To that end, the *NPRM* asks when and under what circumstances a public company could be expected to know information about its shareholders.

Consistent with the *NPRM*'s stated objective of reducing the regulatory costs and burdens associated with section 310(b), the Commission should not adopt rules that would require widely-held public companies to compile information about shareholders holding interests of five percent or less. In the overwhelming majority of cases, information about these shareholders is not relevant to the Commission's foreign ownership analysis. Yet, the burden placed on licensees to gather this information is substantial. Instead, as stated above, the Commission should establish a rebuttable presumption that shareholders holding interests of five percent or less in a public company do not raise public interest concerns under sections 310(b)(3) and (4) and thus need not be disclosed or considered in assessing foreign ownership under these subsections.

A. Widely-Held Public Companies Should Not be Expected to Know Information About Shareholders Holding Interests of Five Percent or Less

The challenges facing public companies in compiling detailed information as to the citizenship of their shareholders who hold interests of five percent or less is well-documented in this and related Commission proceedings.[8] While entities (or an affiliated group of entities) holding interests of more than five percent are required by regulation to disclose their identity—including their citizenship—to the Securities and Exchange Commission ("SEC") and the

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[7] *Id.*

[8] *See, e.g., id.* at ¶ 31; *Petition for Declaratory Ruling of Pandora Radio LLC under Section 310(b)(4) of the Communications Act of 1934, As Amended,* FCC File No. BALH-20130620ABJ (filed Jun. 57, 2014); *Pandora Radio LLC Seeks Foreign Ownership Ruling Pursuant to Section 310(b)(4) of the Communications Act of 1934, As Amended,* Public Notice, DA 14-1019 (rel. Jul. 29, 2014).

company itself,[9] smaller shareholders can and in many cases do remain anonymous.[10] As such, unlike privately held companies, partnerships, and LLCs, publicly traded companies generally do not know the identity of all of their owners, particularly their smaller shareholders.

First, most shares of publicly traded companies are held in "street name" and it is usually very difficult for the company to determine citizenship of the beneficial owner of those shares.[11] Under the "street name" construct, a broker (or other intermediary) holds legal title to a share on behalf of the beneficial owner, who often is not publicly identified to the company issuing the shares. Only the broker knows the identity of the beneficial shareholder, and SEC rules specifically limit brokers from identifying shareholders without their permission.[12] Thus, by operation of SEC rules, public companies have little recourse if a shareholder decides to remain anonymous.

Second, due to the constant trading of shares, the individuals and entities that comprise a public company's shareholders are constantly changing. Not only is it unreasonable to expect a widely-held public company to track information about its *de minimus* shareholders, such information holds little value at any given time in light of its constantly changing nature. Although the *NPRM* notes that shareholders may choose to register their shares with the company, T-Mobile notes that, after excluding its majority owner Deutsche Telekom AG,

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9 *See* 15 U.S.C. § 78m(d)(1).

10 *See* 17 C.F.R. §§ 240.14b-1; 240.14b-2.

11 To illustrate, putting aside T-Mobile's controlling parent, Deutsche Telekom AG, the overwhelming majority of T-Mobile's other shares are held in street name. While T-Mobile requests and annually receives a NOBO list that more specifically identifies the beneficial owners of shares held in street name, even this list does not fully identify the company's shareholders as some shareholders elect not to disclose their identity and others hold their shares through investment vehicles whose beneficial owners are not identified.

12 *See* 17 C.F.R. §§ 240.14b-1; 240.14b-2.

registered shareholders comprise less than 1 percent of its outstanding shares. This figure likely is common across public companies, meaning registered shareholders are unlikely to provide a representative or accurate picture of a company's foreign ownership.

Third, these challenges are even more pronounced where a publicly traded company is several ownership levels above the licensee. Commission rules currently require that licensees detail ownership through all levels of the ownership chain, reaching even entities with non-controlling equity interests several levels above. For public companies in the ownership chain, the Commission requires that licensees detail the citizenship of these companies' ultimate shareholders. Such information is at best difficult, time-consuming, and expensive to obtain—particularly for a public company's small shareholders.

Finally, while public companies may undertake surveys of shareholders' equity and voting interests, as the Commission has observed, "surveys may not be able to ascertain the beneficial shareholder's citizenship." [13] The vast majority of shareholders do not respond to surveys and thus the response pool is generally only a fraction of the total number of shareholders. The Commission previously has accepted proxy mailing addresses as an acceptable process for approximating shareholder citizenship, but this approach also is not entirely accurate and can be very expensive.

B. Information About Shareholders Holding Interests of Five Percent or Less Is Not Relevant to the Commission's Section 310(b)(3) and (4) Analysis

The Commission's public interest analysis is directed at identifying foreign interests with the potential to influence or control the licensee. A shareholder with a five percent or lower interest in a widely-held public company, however, has virtually no power or influence over the

[13] *See, e.g., NPRM* at ¶ 31.

company's policies or operation. In fact, such a shareholder likely is unknown to the company and its executives and, for that reason, cannot have any influence. While shareholders holding interests of five percent or less may be entitled to vote on certain company issues, the small amount of that individual's shares means that his or her vote will have little ability to influence corporate affairs. And, clearly such shareholders will not be in a position to influence the company's day-to-day operations.

Largely for these reasons, government policies have long recognized and reflected that shareholders holding interests of five percent or less have little ability to influence corporate affairs. The Commission, for example, has long maintained that shareholders with five percent or lower voting or equity interests do not have the ability to influence or control core decisions of the licensee—regardless of whether the licensee is a widely-held or closely-held company.[14] In fact, in the foreign ownership context, the Commission previously has observed that "an equity and/or voting interest of five percent or less may be sufficiently non-influential as a general rule that it could be disregarded without posing a realistic potential to affect the core operations of the parent or licensee or, in turn, a risk of harm to competition, national security, law enforcement, foreign policy, or trade policy."[15] Commission rules currently recognize a five percent threshold for specific approval and presumptively exempt certain non-controlling foreign interests of ten percent or less from the specific approval requirements.[16]

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14 *See, e.g.*, *Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television, and Newspaper Entities*, Report and Order, 97 FCC 2d 997, ¶ 6-29 (1984) (establishing a five percent voting stock interest as the benchmark amount for attributing ownership of a broadcast licensee's facilities to an individual corporate shareholder); *see also 2013 Foreign Ownership Second Report and Order* at ¶ 52.

15 *2013 Foreign Ownership Second Report and Order* at ¶ 47, n.143.

16 *Id.* at ¶ 48.

This reasoning also underlies a number of other Commission policies that treat shareholders holding interests of five percent or less as irrelevant to ownership or public interest analyses. In media attribution rules, for example, Commission rules utilize a five percent voting stock benchmark for broadcasters based on a finding that holders of such interests do not have the ability to influence or control the licensee.[17] The Commission's cable landing license rules use a similar ownership threshold to identify required licensees.[18] Small businesses required to disclose their ownership for purposes of qualifying for designated entity benefits are not required to disclose interests of less than 10 percent.[19] Most notably, in proceedings related to the transfer of ownership of Neustar, the North American Numbering Plan Administrator, the Commission elected not to restrict five-percent-or-less ownership by telecommunications service providers ("TSPs") despite strict requirements that Neustar retain its neutrality from companies with a vested interest in the outcome of numbering administration activities.[20] The Commission found that allowing TSP interests of five percent or less would "minimize the risk of any industry segment exerting undue influence over Neustar."[21]

SEC policies similarly recognize the *de minimus* nature of ownership interests of five percent or less. Section 13(d) of the Securities Exchange Act of 1934, for example, requires a person or "group" that becomes, directly or indirectly, the "beneficial owner" of more than five

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17 *See* 47 C.F.R. § 73.3555.

18 *See* 47 C.F.R. § 1.767(h)(2).

19 *See* 47 C.F.R. §§ 1.2110, 1.2112; *see also Updating Part 1 Competitive Bidding Rules*, Report and Order, Order on Reconsideration of the First Report and Order, Third Order on Reconsideration of the Second Report and Order, and Third Report and Order, 30 FCC Rcd 7493 (2015).

20 *Neustar, Inc., Request to Allow Certain Transactions Without Prior Commission Approval and to Transfer Ownership*, Order, 19 FCC Rcd 16982, ¶ 22 (2004).

21 *Id.*

percent of a class of equity or voting securities to report the acquisition to the SEC.[22] The purpose of the disclosure requirement is to ensure that investors are alerted to potential changes in control.[23] As such, the requirement is directed at identifying interests with the potential to influence or exert control over the public company. Notably, the Exchange Act does not require beneficial owners of registered securities to report their acquisition interests of five percent or less.

In light of the realities of shareholder influence, as confirmed by numerous regulatory policies across regulatory agencies, there is no justification for requiring licensees to disclose—or for the Commission to consider—the citizenship of shareholders holding interests of five percent or less for purposes of its public interest analysis under sections 310(b)(3) and (4). Indeed, the absence of a reporting requirement under the Exchange Act for beneficial owners of five percent or less of a class of securities reinforces that neither the identity nor citizenship of such smaller shareholders may be readily available to the issuing company. The burdens associated with such disclosure requirements, therefore, far outweigh any purported benefits.

C. A Rebuttable Presumption Addressing Shareholders Holding Interests of Five Percent or Less in Public Companies Is Consistent with the Commission's Section 310(b) Obligations

The rebuttable presumption proposed herein does not raise novel issues of authority. The passive, *de minimus* interests at issue present no threat to competition or national security interests, and revised procedures would enhance opportunities for much-needed investment in the telecommunications sector. In similar factual circumstances, the Commission has long

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[22] 15 U.S.C. § 78m(d)(1).

[23] *See 2013 Foreign Ownership Second Report and Order* at ¶ 53 (citing *Securities and Exchange Commission v. Savoy Industries, Inc.*, 587 F.2d 1149, 1166 (D.C. Cir. 1978)).

recognized its authority to utilize streamlined procedures and rebuttable presumptions to ensure efficient foreign ownership reviews.

By its express language, neither section 310(b)(3) nor (4) require the Commission to engage in a case-by-case review of the factual circumstances of each application or petition for declaratory ruling. In fact, section 310(b)(4) grants the Commission discretion to allow foreign ownership unless it finds that such ownership is inconsistent with the public interest:

> No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by…any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by refusal or revocation of such license.[24]

Accordingly, the Commission has recognized that the section 310(b)(4) benchmark "is only a trigger for the exercise of [Commission] discretion."[25] A review under that section involves "a balancing…of potential trade, national security, or law enforcement concerns against enhanced opportunities for technological growth and potential job creation in the telecommunications sector."[26] In the *2013 Foreign Ownership Second Report and Order*, the Commission extended its section 310(b)(4) analysis to petitions under section 310(b)(3) as well.[27]

Consistent with its authority under section 310(b), the Commission has long used streamlined procedures and rebuttable presumptions to ensure efficient public interest

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[24] 47 U.S.C. § 310(b)(4).

[25] *See, e.g.*, *2013 Broadcast Clarification Order* at ¶ 11 (citing *Fox Television Stations, Inc.*, 10 FCC Rcd 8452, 8472 (1995)).

[26] *2013 Foreign Ownership Second Report and Order* at ¶ 56.

[27] *Id.* at ¶ 3.

investigations for its foreign ownership reviews. The instant proposal would be no different. For example, in the *Foreign Carrier Entry Order*, the Commission adopted the ECO test to replace its *ad hoc*, case-by-case analysis of foreign ownership in U.S. carriers.[28] In 1997, the Commission adopted a rebuttable presumption that foreign investment from WTO Member countries would not pose competitive concerns in the U.S. market.[29] The Commission found that realities of the global telecommunications market "substantially reduce the need to engage in detailed analysis"[30] and adopted a rebuttable presumption for investments from WTO Member countries to "avoid protracted, fact-specific investigations that…would have the effect of limiting entry to the U.S. market."[31] As discussed above, the Commission also adopted a rebuttable presumption to presume that a non-controlling foreign interest of ten percent or less in a U.S. parent or licensee is exempt under certain circumstances from the specific approval requirements of the foreign ownership rules.[32]

Most recently, the Commission eliminated the distinction between investments from WTO and non-WTO Member countries in its foreign ownership reviews.[33] The Commission noted that the distinction "impose[d] significant costs and burdens on U.S. common carrier and aeronautical licensees" that "faced significant difficulties and costs in attempting to determine the citizenship and principal place of business of investors, which often hold their interests

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28 *See Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order, 11 FCC Rcd 3873 (1995).

29 *See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market: Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891 (1997).

30 *Id*. at ¶ 56.

31 *Id.*

32 *2013 Foreign Ownership Second Report and Order* at ¶ 58.

33 *Id.* at ¶ 5.

indirectly through multiple investment vehicles and holding companies."[34] The Commission further acknowledged that "in many cases, it is not possible for companies to quantify with confidence their non-WTO Member investment, particularly where the company is publicly traded."[35]

Finally, also in the *2013 Foreign Ownership Second Report and Order*, the Commission codified a 100 percent aggregate allowance to accommodate foreign investment in a licensee and/or its U.S. parent for unnamed foreign investors as a routine condition of foreign ownership rulings.[36] Under this authority, a licensee may be up to 100 percent foreign-owned, directly and/or indirectly, on a going forward basis without prior Commission approval so long as prior approval is obtained for new foreign equity or voting interests exceeding five percent (with the exception of 10 percent or lesser interests that satisfy certain criteria). The Commission recognized that a 100 percent aggregate allowance would "afford U.S. parent companies, or their controlling or minority stakeholders (particularly publicly traded companies), sufficient flexibility to market or permit the resale of their equity securities" and "would not compromise [the Commission's] statutory obligations under the [Communications Act]."[37]

These same factors now counsel for the adoption of a similar rebuttable presumption in the context of calculating aggregate foreign ownership for shareholders holding interests of five percent or less in a public company. The express language of section 310(b), which permits the Commission to exercise its discretion in allowing foreign ownership that is consistent with the public interest, authorizes the Commission to make a finding that shareholders holding interests

[34] *Id.* at ¶ 23.

[35] *Id.*

[36] *Id.* at ¶ 81.

[37] *Id.* at ¶ 80.

of five percent or less generally do not raise public interest concerns. In addition, just as the Commission previously has made blanket findings that certain foreign interests are not contrary to the public interest, the Commission can here similarly adopt a rebuttable presumption that interests of five percent or less in a widely-held, publicly traded company are not contrary to the public interest and need not be considered further. Finally, a rebuttable presumption in the calculation of aggregate foreign ownership is particularly appropriate given that the Commission has codified as one of the routine terms and conditions of foreign ownership rulings a 100 percent foreign ownership allowance expressly waiving the need for subsequent review of five percent or lesser interests.[38]

III. ONCE SHAREHOLDERS HOLDING INTERESTS OF FIVE PERCENT OR LESS IN PUBLICLY TRADED COMPANIES ARE DISREGARDED, THE SECTION 310(b)(3) AND (4) ANALYSIS CAN PROPERLY FOCUS ON OWNERS KNOWN TO THE COMPANY THAT COULD POTENTIALLY INFLUENCE COMPANY POLICIES AND OPERATIONS

A rebuttable presumption for shareholders holding interests of five percent or less in public companies holds many advantages over the adoption of highly detailed criteria for calculating aggregate foreign ownership under sections 310(b)(3) and (4). What may be appropriate tools to calculate foreign ownership for a particular company today may be less relevant to other companies or in the future. The public interest would be better served by the adoption of reasonable standards focused on the information that is available to licensees and relevant to a section 310(b) public interest analysis.

For example, requiring publicly traded companies to enroll in SEG-100, as proposed in the *NPRM*, would serve only to increase regulatory and compliance costs and burdens on

[38] *See* 47 C.F.R. § 1.994.

licensees, without any concomitant benefit.[39] Because the SEG-100 program requires participation of the actual shareholder, it may be prone to the same issues currently facing shareholder surveys—namely, lack of participation. Participation in the program also would require companies to expend resources to obtain and sift through NOBO lists. Such lists hold questionable value, given that they are unlikely to disclose the identity of all beneficial owners.[40] There is no reason to believe that the SEG-100 program would result in a more accurate picture of a licensee's foreign ownership than existing practices.

By adopting a rebuttable presumption that shareholders holding interests of five percent or less in a public company do not raise public interest concerns and thus need not be disclosed or considered in assessing foreign ownership, the Commission will ensure that its section 310(b)(3) and (4) analysis will focus properly on owners known to the company that could possibly influence company policies and operations, thereby raising potential competition and national security concerns. Focusing on known owners with interests of more than five percent will ensure accurate reporting and certifications to the Commission, rather than the guesswork licensees are forced to engage in under existing policies. Such policies also will complement SEC rules that require reporting of more than five percent interests.

IV. CONCLUSION

For the reasons described herein, the Commission should not adopt the highly detailed criteria for calculating aggregate foreign ownership under sections 310(b)(3) and (4) proposed in the *NPRM*. The Commission instead should recognize that shareholders holding interests of five percent or less in a public company cannot influence the decisions of the company and therefore

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39 *NPRM* at ¶ 32.

40 *See, supra*, n.11.

do not raise any public interest concerns. Given this reality, the Commission can best streamline its foreign ownership process by adopting a rebuttable presumption that shareholders holding interests of five percent or less in a public company do not raise public interest concerns under sections 310(b)(3) and (4) and thus need not be disclosed or considered in assessing foreign ownership under these subsections. Such a presumption is fully consistent with the public interest and the Commission's obligations under section 310(b) and will encourage greater foreign investment as sought in the *NPRM*.

Respectfully submitted,

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