

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Petition of Time Warner Cable for Declaratory Ruling That Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers

WC Docket No. 06-55

Reply Comments of Advance-Newhouse Communications

Advance-Newhouse Communications (“Advance-Newhouse”) hereby submits its reply comments in this matter.¹ As noted in our initial comments, Advance-Newhouse manages Bright House Networks, which offers traditional cable, high-speed data, and facilities-based Voice over Internet Protocol (“VoIP”) telephony in areas including Tampa Bay and central Florida; Birmingham, Alabama; Indianapolis, Indiana; Bakersfield, California; and Detroit, Michigan. Advance-Newhouse, therefore, will be directly affected by a decision in this matter regarding the interconnection rights of VoIP providers and the competitive local exchange carriers (“CLECs”) that serve them.

1. The Parties Opposing The Declaratory Ruling Offer No Sound Policy Rationale For Doing So.

Several rural incumbent local exchange carriers (“ILECs”), their trade associations, and state regulators oppose Time Warner’s request for a declaration that CLECs serving VoIP providers have full interconnection rights.² The legal theories that

¹ Public Notice, Pleading Cycle Established for Comments on Time Warner Cable’s Petition for Declaratory Ruling That Competitive Local Exchange Carriers May Obtain Interconnection to Provide Wholesale Telecommunications Services to VoIP Providers, DA 06-534 (March 6, 2005).

² See, e.g., Comments of the Independent Telephone and Telecommunications Alliance, *et al.* (“ITTA Comments”) at 2; Comments of the Nebraska Public Service Commission (“Nebraska PSC Comments”); Comments of the Iowa RLEC Group (“Iowa RLEC Comments”); Comments of John Staurulakis, Inc. (“JSI Comments”); Comments of the South Carolina Telephone

these parties advance are flawed, as discussed below. But notable by its absence from these comments is any remotely sound *policy* rationale for denying interconnection rights to CLECs that serve VoIP providers.

Advance-Newhouse submits that this is a fatal error. As we pointed out in our opening comments, both this Commission³ and the courts⁴ have found that the key purpose of the 1996 Act is to encourage “genuine, facilities-based competition.”⁵ It directly frustrates this purpose for state commissions to interpret the Act in a way that either flatly blocks the ability of cable-based voice telephony to compete (as both the South Carolina and Nebraska regulators have done) or that creates uncertainty about interconnection rights – uncertainty which ILECs large and small will be quick to exploit in interconnection negotiations, arbitrations, and related matters.⁶

Coalition (“SCTC Comments”); South Dakota Telecommunications Association, *et al.*, Opposition to Petition for Declaratory Ruling (“South Dakota Telecom Comments”); Comments of Southeast Nebraska Telephone Company and the Independent Telephone Companies (“Southeast Nebraska Comments”). *See also* Comments of Qwest Communications International, Inc. (“Qwest Comments”) (urging, *inter alia*, delaying a decision until other cases regarding VoIP are decided).

³ *See* In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capabilities, CC Docket Nos. 01-338 *et al.*, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, FCC 03-36 (rel. August 21, 2003) at ¶70 (“We reaffirm the conclusion in the UNE Remand Order that facilities-based competition serves the Act’s overall goals”); In the matter of Unbundled Access to Network Elements (WC Docket No. 04-313); Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338), *Order on Remand*, FCC 04-290 (rel. Feb. 4, 2005) at ¶ 3 (“By adopting this approach, we spread the benefits of facilities-based competition”).

⁴ *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 576 (D.C. Cir. 2004), (the purpose of the Act “is to stimulate competition – preferably genuine, facilities-based competition.”), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004).

⁵ *Id.*

⁶ Advance-Newhouse has had direct experience with these types of problems. During 2004 and early 2005, Advance-Newhouse’s efforts to compete with Verizon in Florida were impeded by Verizon’s policy of refusing to efficiently port out the telephone numbers of customers seeking to use Advance-Newhouse’s VoIP service in cases where the customer had digital subscriber line (“DSL”) service on the account. The dispute was eventually settled following this Commission’s clear statement that the presence of DSL did not justify delays in porting out numbers. Even so, Verizon at various points raised the fact that Advance-Newhouse

In these circumstances, the purposes of the Act would be served by a swift and clear declaration that CLECs supplying cable-based VoIP providers with interconnection to the public switched telephone network (“PSTN”) have full and complete interconnection rights under Section 251 of the Act – including, specifically, the rights provided for in Sections 251(b) and 251(c). Denying such rights – or simply letting the matter drag on unresolved – plays into the hands of those who would frustrate the growth of facilities-based competition, contrary to the basic objective of the Act.

This stark reality – the fact that, in the real world, denying interconnection rights to CLECs serving VoIP providers would directly impede the growth of competition – necessarily frames the Commission’s *legal* task in this proceeding. The question before the Commission is not an abstract exercise in applying common carrier law to a novel fact situation. Getting the right answer – that is, the pro-competitive answer – goes to the core of the Commission’s task in implementing the 1996 Act. As a result, the Commission should resolve this matter by asking whether anything *precludes* the Commission from construing Section 251 and related provisions to grant CLECs the interconnection rights they need to serve VoIP providers. Unless granting such rights is forbidden by the Act – which, plainly, it is not – then the only result consistent with the on-the-ground reality of facilities-based competition as it is actually developing – that is, by means of cable-based VoIP services – is to grant Time Warner’s request for a declaratory ruling.⁷

obtained its PSTN connectivity by means of a third-party CLEC as a basis for denying Advance-
Newhouse’s standing even to complain about the problem. *See also* Sprint Nextel Corporation’s
Comments in Support of Petition for Declaratory Ruling (“Sprint-Nextel Comments”) at 7-10
(noting delay and uncertainty caused by ILECs opposing interconnection rights of CLECs serving
VoIP providers); Comments of Alpheus Communications, LP, *et al.* at 13-17.

⁷ Some commenters allude to the special protections from interconnection obligations
provided to rural ILECs by Section 251(f). *See, e.g.*, Comments of Home Telephone Company,
Inc. and PBT, Inc. at 3; Southeast Nebraska Comments at 9 n.31; SCTC Comments at 3 n.5, 14
n.40, & 15. This matter, however, does not implicate that statutory provision. Granting Time
Warner’s petition is necessary for getting the interconnection process *started*. To the extent that
an ILEC has, and chooses to assert, rights under Section 251(f), nothing in Time Warner’s
declaratory ruling request would affect those rights.

2. Parties Opposing Time Warner’s Declaratory Ruling Rely On Flawed Legal Arguments, Which The Commission Should Reject.

Parties opposing Time Warner’s declaratory ruling rely on two key legal arguments to assert that CLECs serving cable VoIP providers do not have full interconnection rights under Section 251 of the Act. First, they claim that because CLECs serving VoIP providers are not traditional “common carriers,” they lack interconnection rights under Section 251. Second, Qwest in particular claims that traffic to and from information service providers is not subject to interconnection obligations under Section 251. The Commission should reject these arguments.

a. Time Warner’s Petition Turns On How To Interpret The Communications Act, Not The Common Law Of Common Carriage.

Several parties oppose Time Warner’s request for a declaratory ruling by arguing that CLECs serving VoIP providers are not really “common carriers” as that term has evolved at common law.⁸ If such a CLEC is not acting as a “common carrier,” they argue, the CLEC has no interconnection rights under Section 251, and state commissions and ILECs are justified in refusing to acknowledge such rights.

This argument is wrong for two reasons. First, CLECs serving VoIP providers are indeed “common carriers.” But second – and more fundamentally – the argument is misplaced. The scope of the interconnection rights granted by Section 251 is determined by the specific language and terminology that Congress used in that provision – language that pointedly does *not* refer to the term “common carrier,” even though that term has been in the Act since its enactment in 1934. What matters is not the scope of the common law doctrine of common carriage, but, rather, the meaning and purpose of the specific language in Section 251 (and the statutory terms that section uses). While there is some overlap between these concepts, it is not appropriate to deny CLEC

⁸ See, e.g., Nebraska PSC Comments at 10-13; Qwest Comments at 4-5 & 7 n.15; Southeast Nebraska Comments at 7 n.23, 19-25; Iowa RLEC Comments, *passim*.

interconnection rights based on a narrow or strict reading of the common law of common carriage.

As just noted, the claim that CLECs serving VoIP providers are not common carriers is wrong on its own merits, as various commenters explain. CLECs serving VoIP providers *are* “common carriers.” Being a carrier does not require serving end users directly. Instead, a carrier may provide wholesale services to third parties, who then serve end users. As a result, CLECs serving VoIP providers count as “common carriers,” even if they themselves do not serve, or even offer to serve, any end user customers. The VoIP provider(s) they serve are the only customers they need for common carrier status.⁹

The Nebraska PSC and others, however, make a slightly more subtle claim. They argue that whether a CLEC serving a VoIP provider is a common carrier is inherently a fact-specific question, based on such considerations as whether the CLEC offers the precise services it supplies to the VoIP provider indifferently to all comers, under tariff, etc.¹⁰ Since the common law of common carriage normally requires such an indifferent “holding out,” they argue, a CLEC that negotiates an individual contract with a VoIP provider loses common carrier status and therefore, according to these commenters, loses its statutory interconnection rights.

⁹ See, e.g., Joint Comments of BridgeCom International, Inc. *et al.*, *passim*. In particular, there is no merit to the claim that offering services under contract disqualifies the provider as a common carrier. See, e.g., Sprint-Nextel Comments at 13-20; Comment of Alpheus Communications, LP, *et al.*, *passim*; Comments of Global Crossing North America, Inc. at 5. This Commission has either permissively or mandatorily detariffed a variety of interstate common carrier services, including both traditional long distance service and CLEC switched access service, without ever suggesting that the providers ceased being common carriers for that reason. Moreover, back when long distance services were tariffed, the Commission permitted “individual case basis” arrangements to be filed as tariffs even though in practical terms many such arrangements were only provided to the original party buying them. See Sprint-Nextel Comments at 16 (citing cases showing that common carrier status is not lost because services provided under contract, not tariff). Still another example is commercial mobile radio services. The Act directly states that CMRS providers are common carriers, *see* 47 U.S.C. § 332(c)(1), but that did not prevent the Commission from detariffing them. Similarly, the common carrier status of CMRS does not forbid individual haggling over contract terms. See *Orloff v. Vodafone Airtouch Licenses LLC*, 17 FCC Rcd. 8987 (2002). So it just doesn’t matter that a CLEC serving a VoIP provider might choose to do so under an individually-negotiated contract.

¹⁰ Nebraska PSC Comments at 6, 9, 10-12; Southeast Nebraska Comments at 10, 18-22; South Dakota Telecom Comments at 9-12.

This argument leads to the second point noted above, *viz.*, that the interconnection rights established by Section 251 do not come from the common law of common carriage at all, and are not limited by that concept. To the contrary, they exist because Congress enacted a specific statute to create them, and their scope is determined by examining the specific statutory language that Congress used to establish them – read in light of Congress’s purpose in enacting the statute in the first place. So, even if the common law would not deem CLECs serving VoIP providers, in some situations, to be “common carriers,” that does not matter. What matters is the statutory language.¹¹

Focusing, then, on the statutory language, it is notable that in creating new interconnection rights and obligations in Section 251, Congress did not refer to or rely on the notion of common carriage – despite the fact that the Communications Act has contained a definition of “common carrier” that has remained unchanged since 1934.¹² In establishing the new interconnection rights and obligations in Section 251, Congress studiously ignored that term – and, instead, used *new* statutory terms with specific, *new* statutory definitions. Congress spoke of the rights and obligations of “incumbent local exchange carriers,” “local exchange carriers,” and “telecommunications carriers.”¹³ Moreover, in establishing those rights and obligations, Congress did not refer to “carriage” or to any “common carrier” service. Instead, Congress referred to specific, newly-defined types of service – “telecommunications service,” “telephone exchange

¹¹ Put another way, the Commission’s decision here will be reviewed in court for compliance with the *Chevron* standard – that is, the question on review will be whether the Commission’s interpretation of its statute is reasonable. Traditional principles of common carriage may be relevant to some aspects of this issue, but the statutory language and purpose, not the common law of common carriage, controls. In this regard, Advance-Newhouse’s opening comments explained that, under the relevant statutory terms – primarily the definitions of “telecommunications carrier,” “telephone exchange service,” and “exchange access” – CLECs providing PSTN connectivity to cable-based VoIP providers have full interconnection rights under Sections 251(b) and (c). *See* Advance-Newhouse Comments at 4-7.

¹² *See* 47 U.S.C. § 153(10) (defining “common carrier”); M. Paglin, Ed., *A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934* (New York: 1989) at 922 (text of original definition of “common carrier”).

¹³ The definition of each of these terms was added to the Communications Act by the Telecommunications Act of 1996. *See* 47 U.S.C. § 251(h) (new definition of ILEC); 47 U.S.C. § 153(26) (new definition of “local exchange carrier”); 47 U.S.C. § 153(44) (new definition of “telecommunications carrier”).

service,” and “exchange access.”¹⁴ The only reasonable conclusion to be drawn from this drafting history is that the scope of the new Section 251 obligations must be determined by reference to the actual statutory language Congress used, not generic common law principles of “common carriage.”

Of course, the new statutory terminology is not a complete break with history. To the contrary, in most situations, there is no real distinction between whether an entity is a “common carrier” under common-law principles or a “telecommunications carrier” under the statutory language of 47 U.S.C. § 153(44).¹⁵ But when someone argues that the new, pro-competitive *statutory* interconnection rights do not apply to CLECs serving VoIP operators because those entities are not *common law* “common carriers” – exactly what some claim here – alarm bells should go off. The term “common carrier” simply does not appear in Section 251, so it makes no sense to claim that Section 251 rights and duties are delimited based on that pointedly absent term. To the contrary, Section 251 defines interconnection rights and duties using other statutorily-defined terms – “telecommunications carrier,” “local exchange carrier,” “telephone exchange service,” etc. As a result, arguments that seek to rely on the common law notion of common carriage to circumscribe statutory rights in Section 251 are, inherently, beside the point.

In this regard, the law is clear that – despite the overlap between them – “the two terms, ‘telecommunications carrier’ and ‘common carrier’ are not necessarily identical.” *Virgin Islands Telephone, supra*, 198 F.3d at 927. The court in that case said that it “need not decide today what differences, if any, exist between the two.” *Id.* Fair enough, in the context of that case. But when, as here, parties seek to limit the statutory interconnection rights of “telecommunications carriers” by arguing that the affected

¹⁴ The statutory definitions of “telecommunications service” and “exchange access” are entirely new in the 1996 Act. See 47 U.S.C. § 153(16) (new definition of “exchange access”); 47 U.S.C. § 153(46) (new definition of “telecommunications service”). The original Communications Act included a definition of “telephone exchange service,” but that definition was substantially amended by the 1996 Act. See 47 U.S.C. § 153(47)(B) (new, expanded definition of “telephone exchange service”).

¹⁵ See *Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921, 926 (D.C. Cir. 1999).

entities are not common-law “common carriers,” the differences between the two concepts becomes critical indeed.

As a result, if (as it should do) the Commission concludes that CLECs serving VoIP providers are indeed “common carriers” under traditional principles, then there is no need to explore the differences between the two terms. But if the Commission gives any credence to claims that a CLEC serving a VoIP provider is not a traditional “common carrier” that does not end the inquiry. Instead, it would just highlight the need to consider the specific statutory definitions in light of the purposes of the 1996 Act. As Advance-Newhouse explained in its opening comments, under the relevant statutory language, CLECs serving VoIP providers are plainly acting as “telecommunications carriers,” irrespective of their status as common-law “common carriers.”¹⁶

Because what matters is the statute, not common law principles of common carriage, the Nebraska PSC is wrong when it asserts that a CLEC serving a VoIP provider lacks interconnection rights if it does not offer its wholesale services on a traditional “common carrier” basis.¹⁷ The statutory definition of “telecommunications carrier” (and, more precisely, the related definition of “telecommunications service”) does not require the affected entity to offer services under tariff, or indifferently to all similarly situated customers, whether wholesale or retail. It requires that the telecommunications functionality (transmitting end user information between points designated by the user) either be literally or “effectively” available to the public. Providing PSTN connectivity to cable-based VoIP providers – even if under the terms of a unique, privately-negotiated contract – clearly makes the PSTN connectivity “effectively” available to the public. As a result, a CLEC performing that function is a “telecommunications carrier” with full interconnection rights under Section 251, irrespective of the status of its activity under the common law of common carriage.

¹⁶ See Advance-Newhouse Comments at 4-7.

¹⁷ Nebraska PSC Comments at 10-13.

Advance-Newhouse submits that the entire argument about common carrier status shows why it is essential that the Commission grant Time Warner's petition. Various commenters note that the question of whether a particular entity is a "common carrier" is highly fact-intensive.¹⁸ If the Commission were to erroneously link Section 251 statutory interconnection rights to common law "common carriage," that would mean that every slight variation in the entity or business models used to connect facilities-based VoIP providers to the PSTN would provide yet another opportunity for opponents of competition to argue that the new variation fails the fact-specific "common carrier" test. By contrast, the Commission clearly has the authority – and the duty – to declare how its own statute – the Communications Act – is to be interpreted. It would severely frustrate the objective of a nationwide pro-competitive policy to make the scope of federal statutory interconnection rights dependent on the vagaries of individual fact-finding inquiries about whether particular business models do or do not comport with traditional common-law notions of "carriage."

For these reasons, the Commission should reject the claim that an entity's interconnection rights turn on its status as a common law common carrier. Instead, the Commission should make clear that the scope of the interconnection rights under Section 251 depends entirely on the statutory language that Congress used to define those rights, and that it would frustrate the development of facilities-based competition to limit interconnection rights based on a strict or narrow application of common law notions of common carriage.

b. The Commission Should Reject Qwest's Effort To Limit The Interconnection Rights Of CLECs Based On The Nature Of Their Customers Services.

Qwest makes a particularly pernicious argument that the Commission should expressly reject. Qwest argues that if a CLEC serves an entity that provides information services, the resulting traffic is not "telecommunications" traffic to which interconnection

¹⁸ See note 10, *supra*.

obligations apply.¹⁹ Under this logic, if this Commission finds that VoIP is an information service rather than a telecommunications service, that automatically means that CLECs serving VoIP providers have no right to exchange that traffic with ILECs.

The Commission should rule that Qwest's argument is without merit. Whether a CLEC is providing "telecommunications service" depends on whether the CLEC is offering a telecommunications function, such as connectivity to the PSTN – not on what its customers (in this case, VoIP providers) *do* with that connectivity.

The fallacy of Qwest's position is perhaps clearer by initially considering point-to-point services rather than switched services. Suppose that an information service provider has two different locations with computers that need to communicate with each other in order to make the information service work. If the information service provider buys a "pipe" to link those two locations (*i.e.*, a special access service), the pipe is plainly "telecommunications," since it entails "transmission" of "information of the user's choosing" between the locations specified by the user – in this case, the information service provider's two facilities. Now suppose that instead of linking two of its own locations, the information service provider wants the pipe to connect its computers with the location of one of its large customers. Clearly, the pipe provides telecommunications functionality – transmitting customer-provided information between points designated by the customer – so, again, the entity that sells the pipe is selling telecommunications, which makes it a telecommunications carrier.

Now suppose that the amount of data that needs to go between the information service provider and any one customer is not so great as to require a dedicated pipe. In this case the information service provider will buy dial-up lines so that it can send and receive individual calls. Going from a dedicated pipe to a circuit-switched arrangement does not change the underlying nature of the activity – sending data between and among

¹⁹ Qwest Comments at 5 ("almost all aspects of interconnection between a VoIP provider and an ILEC are dependent on whether the VoIP provider is providing a telecommunications service or an information service"); *id.* at 6-7. See also JSI Comments at 11 (referring to Time Warner as seeking to exchange "non-telecommunications traffic with the RLECs").

customer-specified locations. So, the information service provider is *still* buying “telecommunications service” when it connects to the public *switched* network – and the entity selling those connections is still a “telecommunications carrier.”

This is exactly the result that Qwest is trying to avoid. Qwest says that when a CLEC meets the PSTN connectivity needs of information service providers, somehow that means that the CLEC is not providing telecommunications service. Therefore, under this logic, the traffic to and from the information service provider is not telecommunications traffic, and Qwest has no obligation to interconnect with respect to it. This is obviously wrong, for the reasons just discussed.

Qwest’s argument is especially pernicious because under it, interconnection rights only apply to “plain old telephone service.” Any CLEC that tries to meet the PSTN connectivity needs of information service providers would see its interconnection rights – and, therefore, its ability to serve its customers – evaporate. So if (as directly relevant to Time Warner’s petition) the Commission were to conclude that VoIP service is an information service rather than a telecommunications service, under this argument an ILEC would have no obligation to exchange VoIP-originated or –terminated traffic with the CLEC providing PSTN connectivity.

The inevitable effect of this argument is to impede the growth of competition and new technologies. Every time a CLEC tried something new – or served a new class of provider – the issue of interconnection rights would need to be relitigated. Some ILECs may like this argument because it slows down competition and innovation. But, for that very reason, the argument is contrary to the language and purposes of the 1996 Act.²⁰

²⁰ For example, as noted in Advance-Newhouse’s opening comments, Congress expressly expanded the definition of “telephone exchange service” to include any service, using any “system of switches, transmission equipment, or other facilities (or combination thereof)” that is “comparable” to traditional telephone service. 47 U.S.C. § 153(47). Similarly, a telecommunications service is a telecommunications service “regardless of the facilities used.” 47 U.S.C. § 153(464).

The purpose of the 1996 Act is to make it easier and more efficient for innovative technologies and service providers to obtain seamless interconnection to the PSTN – not to set up artificial barriers to such interconnection. So, the Commission should hold that the way to decide if an entity is offering telecommunications service is by assessing the functions that the entity itself performs in light of the relevant statutory definitions – not be looking at what the entity’s *customers* do with the services they receive. The Commission should also specifically hold – following up on its observations in *Vonage*²¹ and the E911 ruling²² – that a CLEC supplying PSTN connectivity to an interconnected VoIP provider is providing a “telecommunications service,” completely irrespective of whether the VoIP provider is deemed to be offering an “information service.”²³

²¹ In the matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, *Memorandum Opinion And Order*, 19 FCC Rcd 6429 (2004) at ¶ 8.

²² In the matter of IP-Enabled Services; E911 Requirement for IP-Enabled Service Providers, *First Report and Order and Notice of Proposed Rulemaking*, WC Docket Nos. 04-36, 05-196 (rel. June 3, 2005) at ¶ 38.

²³ For this reason, among others, the Commission should not defer action on Time Warner’s petition for declaratory ruling while all the regulatory details surrounding interconnected VoIP services are worked out. *See, e.g.*, ITTA Comments at 2, 12; Qwest Comments at 6-7. The right of CLECs serving VoIP providers to seamless interconnection with ILECs is simply not affected by whether VoIP providers are information services or not.

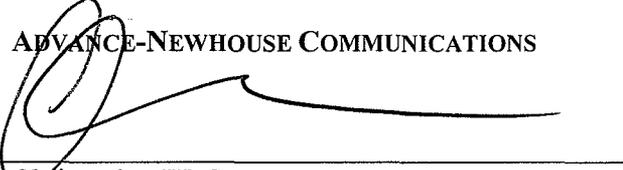
3. Conclusion.

As noted in Advance-Newhouse's opening comments, competition from cable-based VoIP services is the only presently viable form of landline facilities-based competition in the residence market. The Commission should do everything within its power to facilitate such competition. That means that the Commission should promptly grant Time Warner's request for a declaratory ruling that CLECs providing PSTN connectivity to VoIP providers are, indeed, "telecommunications carriers" under the Act, with full interconnection rights under Section 251.

Respectfully submitted,

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