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September 2, 2011

VIA COURIER

Mr. Jeff Derouen
Executive Director
Public Service Commission
211 Sower Boulevard
P. O. Box 615
Frankfort, KY 40602

RECEIVED

SEP 02 2011

PUBLIC SERVICE
COMMISSION

Re: Ballard Rural Telephone Cooperative Corporation, Inc., *et al.*,
Complainants v. BellSouth Telecommunications, Inc., d/b/a AT&T
Kentucky, Defendant
PSC 2011-00199

Dear Mr. Derouen:

Enclosed for filing in the above-referenced case are the original and ten (10) copies of Brief of BellSouth Telecommunications, LLC d/b/a AT&T Kentucky in Response to Public Service Commission Request.

Please let me know if you have any questions.

Sincerely,


Mary K. Keyer

Enclosures

cc: Parties of Record

942499

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the matter of:)	
)	
BALLARD TELEPHONE COOPERATIVE)	
CORPORATION, INC., ET AL,)	
)	
COMPLAINANTS)	
)	
v.)	CASE NO.
)	2011-00199
BELLSOUTH TELECOMMUNICATIONS,)	
LLC D/B/A AT&T KENTUCKY,)	
)	
DEFENDANT)	
)	
)	
AND)	
)	
BELLSOUTH TELECOMMUNICATIONS,)	
LLC D/B/A AT&T KENTUCKY,)	
)	
THIRD PARTY COMPLAINANT)	
)	
v.)	
)	
HALO WIRELESS, INC.,)	
)	
THIRD PARTY DEFENDANT)	

**BRIEF OF BELLSOUTH TELECOMMUNICATIONS, LLC D/B/A AT&T KENTUCKY IN
RESPONSE TO PUBLIC SERVICE COMMISSION REQUEST**

BellSouth Telecommunications, LLC d/b/a AT&T Kentucky (“AT&T Kentucky”), by counsel, files this brief in response to the request made by the Staff of the Public Service Commission of Kentucky (“Commission”) in the Informal Conference held in this

case on August 17, 2011.¹ The Staff requested an analysis of the effect of the Chapter 11 bankruptcy filing by Third Party Defendant Halo Wireless, Inc. ("Halo") on the Commission's jurisdiction and authority to enforce the laws of the Commonwealth of Kentucky and other applicable laws against Halo. Specifically, the Commission Staff requested the parties to address whether Halo's bankruptcy filing precludes the complaint filed by the rural local exchange carriers ("RLECs")² against AT&T Kentucky from going forward without the participation of Third Party Defendant Halo, and, notwithstanding the effects of an automatic stay under the bankruptcy laws, what actions the Commission can or cannot take regarding the issues raised by AT&T Kentucky and the RLECs about Halo's traffic.

SUMMARY OF THE ARGUMENT

The above-captioned proceeding arises from a dispute among the Complainants, AT&T Kentucky and Halo Wireless, Inc., regarding the scope and applicability of, among other things, the Kentucky Restructured Settlement Plan (the "KRSP"), implementing this Commission's May 6, 1991, Order in Administrative Case No. 323,

¹ AT&T Kentucky files this brief pursuant to the Commission Staff's request and in no way intends to violate the automatic stay in place in the Halo bankruptcy proceeding. Indeed, as discussed both below and in a motion filed by AT&T Kentucky and certain of its affiliates in the Halo bankruptcy proceeding, AT&T Kentucky believes that the automatic stay does not apply to prevent this matter from proceeding in this forum, provided that Third Party Defendant Halo participates in the proceeding. Notably, AT&T Kentucky does not seek the imposition of any monetary damages or penalty against Halo in this proceeding, and AT&T Kentucky acknowledges that any damages awarded to any party by the Commission will be collectible only in connection with Halo's bankruptcy proceeding.

² Specifically, the Complainants are: Ballard Rural Telephone Cooperative Corporation, Inc. ("Ballard Rural"), Brandenburg Telephone Company ("Brandenburg"), Duo County Telephone Cooperative Corporation, Inc. ("Duo County"), Foothills Rural Telephone Cooperative, Inc. ("Foothills"), Gearheart Communications Co., Inc. ("Gearheart"), Highland Telephone Cooperative, Inc. ("Highland"), Logan Telephone Cooperative, Inc. ("Logan Telephone"), Mountain Rural Telephone Cooperative Corporation, Inc. ("Mountain Rural"), North Central Telephone Cooperative Corporation ("North Central"), Peoples Rural Telephone Cooperative, Inc. ("Peoples"), South Central Rural Telephone Cooperative Corporation, Inc. ("South Central"), Thacker-Grigsby Telephone Company, Inc. ("Thacker-Grigsby"), and West Kentucky Rural Telephone Cooperative Corporation, Inc. ("West Kentucky") (sometimes referred to herein as the RLECs).

and a determination whether traffic initiated by Halo Wireless, Inc. is or is not intraLATA toll traffic (as defined in and covered by the KRSP) for which compensation is due from AT&T Kentucky to the RLECS. As the Commission has already determined, Halo is an indispensable party to the full and proper resolution of those issues. Because these issues fall squarely within the police and regulatory power of the Commission and the statutory exception to the automatic stay in Halo's bankruptcy as interpreted by numerous courts, see 11 U.S.C. section 362(b)(4), the Commission can and should continue exercise of its police and regulatory power to determine the issues at bar, with Halo's required involvement. In the alternative, if the Commission (or the Bankruptcy Court) should conclude that the exception does not apply, then the Commission should find that the RLECs' complaint against AT&T Kentucky and AT&T Kentucky's third party complaint against Halo are subject to the automatic stay and *both* should be stayed until such time as the stay is lifted or modified.

In no event, however, should the Commission proceed without Halo, or allow the Complainants to pursue claims against AT&T Kentucky alone. Indeed, given that the Commission already has determined that Halo's activities are at the "center" of the pending dispute, the Commission cannot proceed without Halo, because to do so would run counter to the promotion of judicial economy, uniformity and fairness to both creditors and Halo, the Debtor. See *Middleton & Dugger Plumbing & Heating v. Richardson Builders (In re Richardson Builders)*, 123 B.R. 736, 739-41 (Bankr. W.D. Va. 1990) (mechanic's lien enforcement action against subcontractor could not proceed without necessary party general contractor, a debtor in bankruptcy); *AgriBank v. Fay (In re Fay)*, 155 B.R. 1009, 1011-12 (Bankr. E.D. Mo. 1993) (action on note could not

proceed against multiple defendants without necessary party defendant, debtor in bankruptcy); *In re Stanton*, 121 B.R. 438, 439-42 (Bankr. S.D.N.Y. 1990) (action against multiple defendants in connection with alleged negligent management of apartment complex, seeking damages against, among others, debtor in bankruptcy, could not proceed without necessary party debtor); *In re Mack*, 347 B.R. 911, 915-16 (Bankr. M.D. Fla. 2006) (fraud and RICO action in Kentucky federal district court against multiple defendants, including debtor in bankruptcy, could not proceed without debtor). Thus, if the Commission should determine that the police and regulatory exception to the bankruptcy stay does not apply here, and that the stay operates to preclude Halo's involvement in the case, the Commission should not permit this matter to continue until the stay is lifted – that is, the RLECs should not be permitted to pursue their complaint against AT&T Kentucky alone.

ARGUMENT AND AUTHORITIES

1. Factual and Procedural Background.

In 2009, Halo obtained an FCC-issued Radio Station Authorization, and in 2010 adopted a series of interconnection agreements (the "Interconnection Agreements") with various AT&T companies, including AT&T Kentucky, pursuant to which the AT&T companies provide valuable services to Halo, for the exchange of CMRS, *i.e.*, wireless, traffic in various states. Notwithstanding AT&T Kentucky's compliance with the terms and conditions of the Kentucky Interconnection Agreement, Halo repeatedly breached the Agreement and has perpetrated a scheme to avoid paying access charges to AT&T Kentucky and to the Complainants, by the following acts (among other wrongful acts):

- sending wireline-originated traffic to AT&T Kentucky, notwithstanding that the Interconnection Agreement permits Halo to send AT&T Kentucky only wireless-originated traffic;

- failing to provide proper call information, through alteration or deletion of call origination details, in an effort to disguise wireline-originated traffic as wireless-originated traffic and to prevent AT&T Kentucky from properly billing and collecting for services rendered to Halo; and

- failing to pay all amounts due and owing to the Complainants and failing to pay for transport facilities provided by AT&T Kentucky.

On May 24, 2011, the Complainants filed against AT&T Kentucky before this Commission a complaint alleging that AT&T Kentucky is delivering access traffic to the RLECs from Halo without compensating the RLECs accordingly for access services. Since Halo's traffic is at the heart of this dispute, on July 18, 2011, AT&T Kentucky filed a Motion for Leave to File Third Party Complaint against Halo. On August 5, 2011, the Commission granted AT&T Kentucky's motion, finding that the "delivery of Halo's traffic to the RLECs is the center issue in the RLECs complaint." This Commission further stated that "it is clear that Halo's participation in this matter is necessary."

On August 8, 2011, in the wake of this Commission's ruling and numerous other state commission challenges to Halo's actions, Halo filed a voluntary petition for relief under Title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Eastern District of Texas (the "Bankruptcy Court"), in Plano, Texas, a Dallas suburb. The filing itself was remarkable for its lack of information concerning Halo and for its failure to identify either the RLECs or AT&T Kentucky, or

any of the numerous state public commissions, including this Commission, with or before which Halo has numerous disputes.³

Notwithstanding failing to notify the Bankruptcy Court of such disputes, Halo immediately filed notices and suggestions of its bankruptcy in the numerous court and commission proceedings pending against it, including this Commission, to seek application of the “automatic stay in bankruptcy” provided by section 362 of the Bankruptcy Code.⁴

This brief is intended to provide the Commission with controlling legal authority for application of Bankruptcy Code section 362(b)(4) (“Section 362(b)(4)”) to these proceedings. Section 362(b)(4) is a long-standing exception to the “automatic stay” and expressly permits this Commission to continue exercise of its police and regulatory powers with respect to Halo’s wrongful activities. See, e.g., *Secretary of the Labor Cabinet, Ky. v. T.S.P. Co. (In re T.S.P. Co.)*, 2011 WL 1431473 (Bankr. E.D. Ky. April 14, 2011) (holding Section 362(b)(4) excepts proceedings before the Kentucky Occupational Safety and Health Review Commission from the automatic stay in

³ In fact, other than seeking employment of general bankruptcy and special counsel and an extension of time to file its schedules and statement of financial affairs, to date, Halo has only provided the Bankruptcy Court with the bankruptcy petition and a List of 20 Largest Unsecured Creditors, containing only eight claimants, ranging from an allegedly disputed claim by “AT&T Corporation [sic]” of more than \$2.9 million to a trade debt of less than \$400. Halo’s listing of “AT&T Corporation” as a creditor is incorrect; in fact Halo owes numerous AT&T companies, including AT&T Kentucky, at least \$2.7 million collectively, but AT&T Corporation, a separate entity, is not a party to any Interconnection Agreement with Halo. None of the Complainants is listed even though Halo is keenly aware of the pendency of these proceedings and the Complainants’ claims.

⁴ On August 25, 2011, AT&T Kentucky and certain of its affiliates (the “AT&T Companies”) filed in the Halo bankruptcy proceeding its Motion of the AT&T Companies to Determine Automatic Stay Inapplicable and for Relief from the Automatic Stay. In that motion, the AT&T Companies sought an order clarifying that section 362(b)(4) of the Bankruptcy Code exempts from the automatic stay the AT&T Companies’ prosecution of the state public service commission proceedings in multiple states, including AT&T Kentucky’s third party complaint against Halo in this docket, and the proceeding commenced by AT&T Kentucky against Halo in Case No. 2011-00283. In the alternative, the motion seeks an order from the bankruptcy court lifting the automatic stay to allow such commission proceedings to continue and to permit the AT&T Companies to commence similar proceedings in additional states.

bankruptcy of a defendant accused of violating Kentucky's Occupational Safety and Health Act).

2. Scope of the Commission's Jurisdiction and Nature of its Power. While under Kentucky law the Commission's jurisdiction is limited with respect to nonbasic service,⁵ broadband service,⁶ and wireless service,⁷ the Commission continues to maintain jurisdiction with respect to "[a]ny agreement or arrangement between or among ILECs"⁸ and maintains its authority "to arbitrate and enforce interconnection agreements" with wireless carriers.⁹ The ICA between Halo and AT&T Kentucky, which is an incumbent local exchange carrier ("ILEC") as defined in the Telecommunications Act of 1996, falls within this authority. In addition, the Commission has jurisdiction to address issues arising under the KRSP, an agreement among the RLECs and AT&T Kentucky.

3. The Commission's Activities with Respect to Halo Are Excepted from the Automatic Stay in Bankruptcy.

The Commission proceedings involving Halo are not subject to the automatic stay in bankruptcy. Section 362(b)(4) states that the automatic stay does not apply to the "continuation of an action or proceeding by a governmental unit ... to enforce [its] police or regulatory power." 11 U.S.C. § 362(b)(4). In these proceedings pending before this Commission, the RLECs seek a ruling requiring AT&T Kentucky to pay their tariffed access rates for termination of Halo traffic, and AT&T Kentucky in turn seeks a

⁵ See KRS 278.543(5) and (6), and KRS 278.544(4).

⁶ See KRS 278.5462(1).

⁷ See KRS 278.54611(1).

⁸ See KRS 278.542(1)(a) and (b).

⁹ See KRS 278.54611(2).

ruling that Halo is responsible for such charges.¹⁰ As discussed below, the fixing of monetary damages against a debtor in bankruptcy by a state regulatory body is not a violation of the automatic stay, so long as that regulatory body does not seek to enforce such monetary award (because such enforcement must take place in the bankruptcy court, unless the bankruptcy court orders otherwise). Accordingly, these matters fall precisely within the police and regulatory power exception.

The police and regulatory power exception of section 362(b)(4) is based on the "compelling need for the government to continue to protect the public when a debtor files for bankruptcy and to prevent a debtor from frustrating necessary governmental functions by seeking refuge in bankruptcy court." *In re Gandy*, 327 B.R. 796, 801-02 (Bankr. S.D. Tex. 2005). A "fundamental policy behind the police or regulatory power exception ... is 'to prevent the bankruptcy court from becoming a haven for wrongdoers.'" *Id.* (quoting *Commodity Futures Trading Comm'n v. Co Petro Mktg. Group Inc.*, 700 F.2d 1279, 1283 (9th Cir. 1983)). The §362(b)(4) exception "accomplishes this goal by allowing the government to enforce various laws and regulations against a debtor." *In re Gandy*, 327 B.R. at 802.

To determine whether an action qualifies as a proceeding pursuant to a governmental unit's police or regulatory power, and therefore falls outside the ambit of the automatic stay, courts traditionally apply two tests: the pecuniary purpose test and

¹⁰ In a separate proceeding before this Commission, Case No. 2011-00283, AT&T Kentucky seeks, among other things, state regulatory orders (a) prohibiting Halo from avoiding tariffed switched access charges (by improperly sending wireline-originated traffic, disguised as wireless-originated traffic, to AT&T Kentucky for termination by the RLECs) and (b) requiring Halo to provide proper call information (rather than the altered or deleted call origination details Halo has used to prevent AT&T Kentucky and the RLECs from properly billing and collecting for services rendered) since such actions are in violation of the parties' Interconnection Agreement. That proceeding falls within the police and regulatory power exception to the automatic stay as well, because as with the instant proceeding, AT&T Kentucky does not seek the *enforcement* of any monetary damages ruling.

the public policy test. See, e.g., *Berg v. Good Samaritan Hospital, Inc. (In re Berg)*, 230 F.3d 1165 (9th Cir. 2000); *Chao v. Hospital Staffing Services, Inc.*, 270 F.3d 374, 385 (6th Cir. 2001). Under the pecuniary purpose test, reviewing courts focus on whether the governmental proceeding relates primarily to the protection of the government's pecuniary interest in the debtor's property. In the recent *T.S.P. Co.* case, *supra*, the United States Bankruptcy Court for the Eastern District of Kentucky considered the applicability of the automatic stay to an administrative proceeding before a hearing officer for the Kentucky Occupational Safety and Health Review Commission. In *T.S.P. Co.*, the court found that the automatic stay did not apply to such a proceeding before the hearing officer made a determination regarding the validity of health and safety citations issued against the debtor. 2011 WL 1431473at *5. The *T.S.P. Co.* court emphasized that the commission's attempt to *enforce* a regulation did not violate the automatic stay so long as the hearing officer did not seek to adjudicate a proposed penalty. *Id.* at 4. The court's determination that the automatic stay did not apply was further influenced by the fact that the Kentucky statute at issue provided for a right to appeal to the state circuit court; upon such an appeal, but no earlier, the proceeding would become a "civil action" potentially subject to removal. *Id.* at 2-5.

Here, the Commission proceedings have nothing to do with the government's interest in Halo's property, but rather directly involve the enforcement of regulations designed to ensure fair and legitimate competition in the telecommunications industry. As with the proceedings in *T.S.P. Co.*, the Commission does not seek to impose a financial penalty upon Halo; rather, it merely seeks to investigate allegations of wrongful and illegal conduct by Halo and enforce its regulations. And just as in *T.S.P. Co.*, any

decision by the Commission may be appealed to an appropriate court. See KRS 278.410 (providing a right to appeal to Franklin Circuit Court to “any party to a commission proceeding or any utility affected by an order of the commission”) and 47 U.S.C. § 252(e)(6) (providing an aggrieved party a right to appeal to federal district court a state commission determination made under Section 252).

Under the public policy test, reviewing courts must distinguish between proceedings adjudicating private rights and those effectuating public policy. *Chao* at 385-86. In the case of *In re Cajun Electric Power Cooperative, Inc.*, 185 F.3d 446 (5th Cir. 1999), the Fifth Circuit held that the Louisiana Public Service Commission (the “LPSC”) could continue with a proceeding considering a decrease in the rates the debtor utility could charge its customers. The court repeatedly emphasized “that [the debtor] is a regulated utility and that the LPSC has an obligation under state law to protect the public interest.” *Id.* at 454. In *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1107-09 (9th Cir. 2005), the Ninth Circuit rejected a debtor’s arguments that the police power exception applies only when the government is suing in furtherance of its *own* police and regulatory power. The Ninth Circuit explained that “[a] number of cases make clear that the § 362(b)(4) exception extends to a government’s enforcement of laws enacted by other governments.” *Id.* at 1108 (citing cases). The same is true here. The Commission is charged with implementing federal law under the Federal Telecommunications Act of 1996 in which Congress established a carefully crafted regulatory scheme to implement competition in the local telecommunications industry. Pursuant to 47 U.S.C. § 252, state regulatory commissions are to oversee the

establishment of interconnection agreements between carriers such as AT&T Kentucky and Halo.

The fact that the instant Commission proceedings were not initiated by a governmental unit is not relevant to applicability of the police and regulatory exception. The Section 362(b)(4) exception permits the state public utility commissions to exercise their regulatory power to address actions such as those at issue here. Moreover, where, as here, the Commission has determined that the bankruptcy debtor's regulated activities are at the "center" of the pending dispute, the Commission cannot proceed without Halo.

Circuit courts have opined that "the exception to the automatic stay in § 362(b)(4) ... should be construed broadly so as not to override state laws enacted to protect some public interest." *In re Commonwealth Oil Refining Co.*, 805 F.2d 1175, 1184 (5th Cir. 1986) (citing *Penn Terra Ltd. v. Dept. of Environmental Resources*, 733 F.2d 267, 273 (3rd Cir. 1984)); see also *Ohio v. Mansfield Tire & Rubber Co. (In re Mansfield Tire & Rubber Co.)*, 660 F.2d 1108 (6th Cir. 1981) (holding that the police powers exception excepted from the automatic stay the efforts of the Ohio commission charged with adjudicating workers' compensation claims).

Section 362(b)(4)'s exception to the automatic stay is clearly applicable to these state regulatory proceedings.¹¹ The Commission is empowered to approve, interpret and enforce the Interconnection Agreement and applicable law, in accordance with police regulatory power designed to protect the public safety and welfare. Interconnection agreements, including the Agreement between Halo and AT&T

¹¹ Courts have recognized that, when acting in its regulatory capacity, the Federal Communications Commission is not subject to the automatic stay. See, e.g., *In re FCC*, 217 F.3d 125, 134-37 (2d Cir. 2000) (holding FCC decision was regulatory in nature and bankruptcy court lacked power to enjoin it).

Kentucky, are the federally-mandated mechanism for implementing a federal public policy of promoting competition in the local telecommunications industry, while at the same time protecting the rights of ILECs – like AT&T Kentucky and the RLECs -- to be properly compensated for their services. Allowing a carrier like Halo to perpetuate its scheme of non-payment gives Halo an anti-competitive advantage over other carriers, particularly other carriers that *do* pay what they owe for services provided, and can cause substantial financial damage to the Complainants and AT&T Kentucky.

Enforcing laws designed to ensure both fair and legitimate competition in the industry as well as fair compensation systems between carriers is clearly regulatory action aimed at protecting the public interest in a sound telecommunications industry. Such rationales transcend mere pecuniary interests to protect the public and implement federally-mandated competition. See *In re Gandy*, 327 B.R. at 806 (holding Deceptive Trade Practices Act enforcement action fell under § 362(b)(4) exception because “the purpose of the Deceptive Trade Practices Act is to further the public policy of protecting Texas consumers from actions such as those alleged to have been committed by [the debtor]”).

4. The Commission’s Authority to Exercise Its Regulatory Power

Courts have held that regulatory agencies need not seek relief from the automatic stay before commencing or continuing an action to enforce their regulatory authority. See *In re FCC*, 217 F.3d 125, 134-9 (2d Cir. 2000) (automatic stay did not prevent FCC from enforcing its licensing regulations against chapter 11 debtor, and bankruptcy court lacked jurisdiction to review FCC’s regulatory actions); *EEOC v. McLean Trucking Co.*, 834 F.2d 398, 400 n.2 (4th Cir. 1987) (“The EEOC is not required

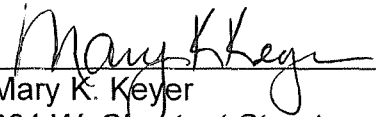
to seek relief from stay in bankruptcy court before commencing or continuing an action in exercise of its police or regulatory power” against chapter 11 debtor); *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 940 (6th Cir. 1986) (NLRB permitted to continue with unfair labor practices proceeding against chapter 11 debtor without seeking relief from stay). See also *Brock v. Morysville Body Works, Inc.*, 829 F.2d 383, 388-9 (3rd Cir. 1987) (automatic stay did not prevent OSHA from enforcing citation against chapter 11 debtor). Notably, in *T.S.P. Co.*, *supra*, the court relied on the *Brock* holding that a federal OSHA citation could be enforced against a chapter 11 debtor without violating the automatic stay in determining that the state OSHA regulations in *T.S.P. Co.* could also be enforced without violating the automatic stay. 2011 WL 1431473 at *5. Similarly, the other above-cited holdings regarding federal agencies’ authority to enforce their regulations without violating the automatic stay could also be extended to apply to state agencies or commissions.¹²

CONCLUSION

Because section 362(b)(4) of the Bankruptcy Code exempts the instant Commission proceedings from the automatic stay, the Commission should proceed with this matter and require Halo’s continued participation. As the Commission has already determined that Halo’s actions are central to this case, the Commission should not permit these cases to go forward against AT&T Kentucky alone. Accordingly, should the Commission (or the Bankruptcy Court) determine that Halo’s involvement is precluded by operation of the automatic stay, it should suspend the proceeding until the stay is lifted.

¹² Again, AT&T Kentucky in no way intends to violate the automatic stay in place in the Halo bankruptcy proceeding. Rather, it cites the Commission to the above-referenced cases in response to the Commission’s inquiry regarding its authority in light of such automatic stay.

Dated: September 2, 2011


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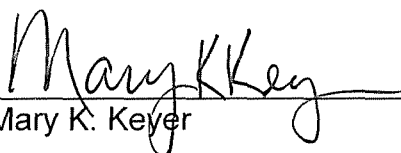
CERTIFICATE OF SERVICE – PSC 2011-00199

I hereby certify that a copy of the foregoing was served on the following individuals by mailing a copy thereof via U.S. Mail, this 2nd day of September 2011.

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