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November 17, 2006

VIA E-MAIL

Oregon Public Utility Commission
Attn: Filing Center
550 Capitol St NE #215
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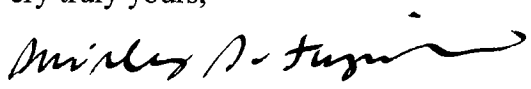
Re: Joint Comments on Behalf of Portland General Electric Company, PacifiCorp, and Idaho Power Company; Docket AR 510

Dear Sir/Madam:

Enclosed for electronic filing in Docket AR 510 before the Oregon Public Utility Commission is one copy of the Joint Comments on behalf of Portland General Electric, PacifiCorp, and Idaho Power Company. Courtesy Copies are being provided to the AR 510 service list by electronic mail and U.S. mail.

Please contact us if you have any questions.

Very truly yours,



Shirley S. Fujimoto

Enclosure

BEFORE THE
PUBLIC UTILITY COMMISSION OF OREGON

AR 506/510

In the Matter of	)	
	)	
Rulemaking to Amend and Adopt Permanent Rules in OAR 860, Divisions 024 and 028, Regarding Pole Attachment Use and Safety	)	JOINT COMMENTS OF PORTLAND GENERAL ELECTRIC, PACIFICORP, and IDAHO POWER COMPANY

Portland General Electric ("PGE"), PacifiCorp, and Idaho Power Company ("Idaho Power") (collectively, the "Utilities") hereby submit these joint comments in the above-captioned proceeding to strongly recommend that the Oregon Public Utility Commission ("Commission" or "OPUC") address wireless attachments to utility poles only in a separate proceeding. As explained herein, there are a broad range of unique issues that are raised by the prospect of wireless attachments, and the OPUC should not heed the advice of the wireless carriers and others who would prefer that rules be adopted quickly without consideration of those issues affecting safety, risk, reliability, and good engineering practices.

I. DISCUSSION

A. Wireless Attachments Raise a Host of Policy and Practical Issues that the OPUC Should Resolve Only After it Has Developed a Comprehensive Record that Addresses all Relevant Issues

The Utilities support the OPUC Staff's recommendation that any regulation of wireless attachments be addressed through workshops and a separate rulemaking proceeding.[1] The wireless carriers would have the OPUC believe that extending the wireline pole attachment rules

[1] Second Round of Comments of Oregon Public Utility Commission Staff at 1 (filed Nov. 8, 2006) ("OPUC Staff Second Comments").

to wireless attachments is a simple step that can be accomplished merely by inserting the word "wireless" into the Oregon regulations. They incorrectly imply that the OPUC can impose a regulatory regime on wireless attachments without any examination of the practical and policy impacts of such a decision. Their last-minute participation in this proceeding should be seen as "gaming" the process in order to take advantage of the proposed rules, which everyone else who has expressed an opinion on the subject agrees were not intended to cover wireless attachments.

The wireless carriers would have the OPUC ignore the significant distinctions between wireline pole attachments and wireless attachments in terms of the types of equipment, types of facilities, locations of attachments, and the impact on utility equipment that do not easily fit into the traditional pole attachment regulatory schemes.[2] As noted in the comments filed individually by the Utilities, wireless attachments may be located above or below the electric lines raising new safety, risk, reliability, and space allocation issues. In many instances, wireless attachments require much more associated equipment and facilities per attachment than traditional wireline attachments. Accordingly, the FCC and other state authorities that have examined the need to regulate wireless attachments have done so based on a much more thorough record than has been developed in this docket to date.

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[2] In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, *Report and* Order, 13 FCC Rcd 6777 at ¶ 38 (1998) ("*Telecom Order*") ("Telecommunications carriers and the utility pole owners acknowledge that determining an appropriate formula for wireless attachments is difficult."); In the Matter of Certain Pole Attachment Issues Which Arose In Case 94-C-0095, State of New York Public Service Commission, *Opinion and Order Setting Pole Attachment Rates*, Case 95-C-0341, Opinion No. 97-10 (1997) ("*NY PSC Order*"). ("Wireless attachment to utility poles may or may not resemble or conform to the traditional use of such facilities").

The fact is that wireless attachments are significantly and critically different than the wireline attachments that the parties have been discussing to date, and they raise significantly different issues. Indeed, it would benefit all interested parties for the OPUC to take a methodical approach to examining and addressing wireless attachment issues, since it would most likely have to expend even greater time and resources to resolve these issues in the future, when conflicts in application or interpretation inevitably will arise. Therefore the OPUC should establish a separate proceeding devoted solely to wireless attachments. In this regard, it would be helpful to consider the example of other states that have already reviewed, in depth, issues related to wireless attachments.

Safety

The Utilities agree with the OPUC Staff that there are serious issues of safety and reliability that need to be examined separately for wireless attachments – a process which the parties have not undertaken to date.[3] The OPUC should not rush to apply its wireline pole attachment rules to wireless attachments until it has thoroughly reviewed all of the complex safety and reliability issues related to such attachments.

For example, the California Public Utility Commission ("CPUC") concluded that there is a need for specific safety requirements for wireless attachments made in the communications space on utility poles. The CPUC's Administrative Law Judge ("ALJ") and the parties reached a proposed settlement agreement among all of the participants, including the wireless carriers, that proposed a significant amount of vertical clearance between wireless antennas and supply

[3] OPUC Staff Second Comments, Attachment A.

conductors, including supporting elements of the equipment, to avoid creating a physical obstruction and exposing the worker to potential electric shock.[4] The OPUC will want to consider these issues and perform its own analysis.

The CPUC also determined that "pole-top installations of RF antennas are complex, involving such technical concerns as pole strength, coaxial cable provisions, clearances, and the location above electrical equipment."[5] Despite a recommendation from a wireless carrier that the CPUC mandate access for wireless attachments at the top of utility poles, the CPUC, with the support of all other parties to the proceeding, has deferred consideration of pole-top antennas until it develops a more complete record.

In New York, the Public Service Commission ("NY PSC") approved a Wireless Pole Attachment Tariff by Niagara Mohawk Power Corporation only after determining that the "proposed installations do not appear to compromise the safety of the poles."[6] The NY PSC based its determination on the fact that all of the wireless attachments would conform to all applicable safety codes, would be placed on relatively clean poles free of any other major equipment, and that any work to be performed in the electrical space would be done only by qualified electrical workers.

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[4] Order Instituting Rulemaking to Revise Commission General Order Number 95 Pursuant to D.05-01-030, California Public Utilities Commission, *Proposed Decision of ALJ Walker, Opinion Adopting Proposed Rule 94 in General Order 95 Dealing With Installation of Wireless Antennas on Utility Poles*, at 17, Rulemaking 05-02-023 (Oct. 10, 2006) ("*ALJ Proposed Decision*").

[5] *ALJ Proposed Decision* at 10 (Also raising the concern that antenna installers must pass through or near high-voltage equipment to reach the pole top).

[6] Joint Petition of Niagara Mohawk Power Corporation and National Grid Communications Inc. for Approval of a Pole Attachment Rate for Certain Wireless Attachments to Niagara Mohawk's Distribution Poles, New York Public Service Commission, *Order Approving Petition With Modifications*, Case 03-E-1578, (April 7, 2004) ("*Niagara Mohawk Order*").

Radiofrequency Radiation

Another issue that other states have examined regarding the installation of wireless antennas on utility poles is the potential exposure of utility workers to radiofrequency ("RF") radiation posed by the installation of wireless antennas on utility poles. Any FCC applicant or licensee who wishes to operate a facility that, by itself, or in combination with other sources of emissions (*i.e.*, other transmitting antennas) will cause radiation exposure to the general population or to workers in excess of the FCC's limits must file an environmental assessment with the FCC. In California, the ALJ heard testimony from the CPUC's Consumer Protection and Safety Division ("CPSD") that "a jointly used pole presents a unique working environment because workers are unable to move freely away from the sources of RF exposure."[7] The CPSD also testified that utilities must have an immediate means of reducing transmitter power in emergency situations, such as vehicular accidents with power poles, downed power lines, or fire. Based on this testimony, the CPUC concluded that "the evidence presented at hearing supports the need for a locally controllable means of reducing or shutting off antenna power when that is necessary to enable pole workers to work on the pole . . . ."[8]

Environmental Impacts

Other states that have addressed wireless attachments have also examined the potential impact of wireless attachments on the environment. Before approving Niagara Mohawk's proposed tariff for wireless attachments, the NY PSC reviewed the exact type of attachments to ensure that they "will cause no changes to the operation of the distribution system that will result

[7] *ALJ Proposed Decision* at 12.

[8] *Id.* at 13.

in significant environmental impacts" or "physical construction or disturbance of the environment."[9] The NY PSC also reviewed the proposed equipment to ensure that it would not create a visual intrusion and to determine whether any tree trimming would be necessary. Similarly, the OPUC should consider the environmental impact of wireless attachments on utility poles and how such attachments may adversely affect property owners or local wildlife before it decides whether it should mandate access.[10]

Timing Issues

Based on the need to carefully consider the new issues raised by wireless attachments, other state commissions have generally taken more time to craft rules for wireless attachments than the wireless carriers are willing to allow the OPUC in this proceeding. The wireless carriers in this proceeding have recommended that the OPUC simply adopt rules based on the record and approach used by the Utah Public Service Commission ("Utah PSC"). However, it is important to note that when the Utah Division of Public Utilities ("DPU") requested the PSC to open a docket to investigate new and revised regulations on the joint use of properties by utilities, the DPU specifically stated that the investigation should address whether wireless attachments should be treated differently due to physical differences in attachment configuration.[11] While the Utilities disagree with the approach ultimately adopted by the Utah PSC, they note that the

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[9] *Niagara Mohawk Order* at 5-7.

[10] *Joint Pole Authorizations*, Above Ground Level, at 20 (Aug./Sept. 2005) (Describing how using an existing utility pole for a cell site can raise environmental and local zoning issues).

[11] In the Matter of an Investigation into Pole Attachments; Docket No. 04-999-03, Utah Division of Public Utilities, *Request to Open an Investigative Docket* (Mar. 11, 2004).

proceeding at the Utah PSC took over one year and was not rushed through in a few weeks as the wireless carriers are asking of the OPUC.

Similarly, and as the OPUC Staff points out, a rulemaking proceeding devoted solely to adopting uniform rules for wireless attachments has been pending for almost two years at the CPUC.[12] In 2001, the CPUC initiated a proceeding to revise its rules regarding the construction of overhead and underground electric supply and communications systems. Despite sixteen months of twice-monthly two- to three-day public workshops, the CPUC was unable to resolve all of the issues relating to uniform construction standards for attaching wireless antennas to jointly used facilities. Thus, it directed its staff to further investigate the issues raised by wireless attachments in a separate proceeding. The CPUC conducted seven days of workshops, held evidentiary hearings where it received expert witness testimony, and received further briefing from the parties. On April 25, 2006, the ALJ issued a Proposed Decision. However, before the CPUC acted on the ALJ's Proposed Decision, the wireless carriers, electric utilities, cable operators and the major landline carriers in the state executed a comprehensive and unopposed settlement agreement resolving all issues in this proceeding.

The NY PSC also devoted over two years to its rulemaking proceeding on pole attachments.[13] Under the procedures established in that proceeding, the parties first attempted to address pole attachment issues through a collaborative process. However, after seventeen months of mediation, the parties were unable to reach agreement on an appropriate rate formula and established a separate proceeding before an ALJ. In setting out the scope of remaining

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[12] *ALJ Proposed Decision*

[13] *NY PSC Order.*

issues, the ALJ provided clear notice to all parties that the proceeding would include consideration of matters pertaining to attachments by wireless carriers.[14] After conducting a hearing and receiving briefing regarding the parties' legal positions and public policy arguments on wireless attachment issues, and conducting four days of evidentiary hearings, the ALJ was presented with a thorough record of the unique issues relating to wireless attachments and was able to make an informed decision that was adopted by the NY PSC.[15]

Market Based Approach to Rates

Other agencies that have examined wireless pole attachments have generally adopted a light regulatory approach. The FCC has determined that wireless carriers in states subject to FCC pole attachment regulation are entitled to the benefits and protections of Section 224, but it did not establish a specific rate formula. The FCC noted that rates will be determined on an *ad hoc* basis when a dispute arises after good faith negotiations between the parties are unsuccessful. The FCC acknowledged that regulation of wireless attachments needed special consideration because "[t]here are potential difficulties in applying the Commission's rules to wireless pole attachments" and that "previous and proposed rate formulas do not account for the unusual requirements of wireless attachments."[16] In the ten years since adoption of the 1996 Telecommunications Act and the expansion of FCC pole attachments jurisdiction to all

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[14] *Id., Ruling Establishing Procedure and Addressing Other Matters* at 8 (Sept. 10, 1996).

[15] *Id., Recommended Decision By Administrative Law Judge William Bouteiller* (Dec. 31, 1996).

[16] *Telecom Order* at ¶ 41. The OPUC currently applies a formula to attachments in Oregon that is similar to the "cable rate formula" utilized by the FCC. To the extent that the FCC has acknowledged that its proposed rate formulas cannot be directly applied to wireless attachments because of the unusual requirements for such attachments, it is disingenuous for the wireless carriers to suggest that the OPUC should take its specific current rate formula and apply it directly to wireless attachments.

telecommunications service providers, there has only been one complaint filed with FCC regarding wireless pole attachments.[17] Moreover, even in that one case the FCC ultimately concluded that the parties would have to negotiate a wireless attachment rate.

The fact that wireless attachments are unique and require separate rates, terms, and conditions for access to utility poles is supported by the approach taken by the NY PSC. The NY PSC included a market-based approach in its regulation of wireless attachments. It held that "if a wireless firm requires a nonstandard or unique attachment to a utility pole, and if the utility is willing to make the necessary modifications to the pole to accommodate such a use, the price and terms should be determined through private negotiations."[18] The NY PSC's approach makes it clear that nonconforming wireless attachments are permitted only where the parties are able to agree upon mutually acceptable terms through private negotiations.

Accordingly, the NY PSC determined that if the parties are able to successfully negotiate the rates, terms, and conditions for the use of electric utility distribution poles by wireless carriers, that competitive negotiations are preferable to implementing a regulatory approach. The NY PSC also concluded that the adoption of formal regulations for wireless attachments to high-voltage transmission lines was unnecessary as the electric utilities and wireless carriers were able to set their own, market-based rates for such attachments.

In 2006, the NY PSC approved a joint tariff petition by Niagara Mohawk and National Grid Communications, Inc. for approval of an annual pole attachment rate for Distributed

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[17] Omnipoint Corporation v. PECO Energy Company, *Memorandum Opinion and Order*, DA 03-587, 18 FCC Rcd 5484 (Enf. Bur. 2003).

[18] *NY PSC Order* at 22.

Antenna System ("DAS") wireless attachments to Niagara Mohawk's distribution poles requiring excess height exclusively for wireless attachments.[19] The tariff rate approved by the NY PSC took into account that the wireless attachments used more of the pole than traditional attachments. The NY PSC also agreed that if a wireless carrier wanted a taller pole, Niagara Mohawk could install a taller pole at the carrier's expense and charge a higher rate for the wireless attachment.

By contrast, the OPUC has not yet had the opportunity to fully evaluate the potential impact of the wireless carriers' recommendations that the OPUC should simply extend the proposed wireline attachment rules to wireless attachments. The experience of other state commissions that have addressed access for wireless attachments demonstrates that there are unique and complex issues that must be considered. Therefore, the Utilities strongly urge the OPUC to defer consideration of wireless attachments as part of a separate proceeding so that a more thorough record can be developed.

B. There is No Evidence of Major Marketplace Controversies Over Wireless Attachments Necessitating that the OPUC Immediately Impose Inappropriate or Inadequate Regulations

In addition to the numerous issues that the OPUC needs to address before deciding how to regulate wireless attachments, it must consider whether and to what extent it should disrupt the thriving market-based system that has operated efficiently and productively for several years. A freely competitive market has allowed wireless carriers to deploy their facilities in an

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[19] Tariff Filing by Niagara Mohawk Power Corporation d/b/a National Grid to Make Revisions to Rule 35 – Cable Television Pole Attachment Rate and Electric Distribution Pole Wireless Attachment Rate, New York Public Service Commission, Case 06-E-0082 (June 2, 2006) ("*Niagara Mohawk Wireless Attachment Tariff*").

economically fair and efficient manner. Nor is there any evidence that private negotiations between the parties is causing wireless carriers to lose access to critical sites or disrupt their ability to provide service to the public.

Despite their claims to the contrary, wireless carriers do not require mandated access to utility facilities given the large number of siting options for their equipment. Their systems are being deployed in Oregon and elsewhere and customers are receiving service at competitive rates. It is also worth pointing out that if the Commission decides in a later docket to regulate access and rates for wireless attachments to utility property, this is likely to act as a disincentive for other entities to make wireless sites available, depressing the overall market for commercial communications sites that have been specifically developed for these purposes and potentially leading to a decrease in new communications siting options for wireless carriers.

In fact, the wireless carriers in this proceeding acknowledge that they have successfully obtained access to utility poles in Oregon for over ten years based on private negotiations.[20] Yet, wireless carriers have not complained to the Utilities regarding the negotiated access or the terms and conditions for access, nor have they raised any allegation that they are being unfairly denied access to utility poles. If wireless carriers are concerned that this well-established process of private negotiations has prevented them from gaining access to utility poles, they fail to explain why they did not come forward earlier to seek regulatory relief from the OPUC or, failing that, the FCC.[21] Wireless carriers were able to gain access to sites before this proceeding, and will

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[20] Joint Supplemental Comments of T-Mobile West Corporation, D/B/A T-Mobile, New Cingular Wireless PCS, LLC, Sprint Spectrum L.P., and Nextel West Corp. at 2, n. 4 (filed Nov. 6, 2006) ("Wireless Carriers' Supplemental Comments").

[21] OPUC Staff Second Comments at 1.

continue to gain access to sites even if the OPUC defers consideration of wireless attachments for a separate proceeding. There is simply no need to rush to judgment as the wireless carriers are arguing.

In the FCC's most recent report analyzing the state of competition in the commercial mobile radio services ("CMRS") market, the FCC concluded that there is effective competition and that wireless carriers continue to expand their coverage areas.[22] During 2005, the number of mobile telephone subscribers in the United States rose from 184.7 million to 213 million, increasing the nationwide penetration rate to approximately 71 percent.[23] The FCC examined the potential barriers to entry and did not discuss a lack of siting options for wireless carriers.[24] Nor did the wireless carriers raise any concerns with the FCC regarding their ability to locate sites for their facilities. Thus, the evidence clearly establishes that there is a competitive marketplace for siting of wireless equipment, as noted by the growth of the wireless industry without regulated access to utility poles.

Utility poles are not essential facilities for wireless equipment because wireless equipment can be sited on numerous other structures. Wireless carriers have the ability to place their equipment on buildings, communications towers, water towers, streetlight poles, church

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[22] In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, WT Docket No. 067-17, *Eleventh Report*, FCC 06-142, at 4-5 (rel. Sept. 29, 2006) ("*Eleventh CMRS Competition Report*").

[23] *Id.* at 5.

[24] *Id.* at 38.

steeples, and other sites.[25] Indeed, most other sites are usually taller than utility poles and serve as a better option for wireless antennas. Access to these sites for wireless attachments is determined by market rates and there is a strong competitive industry for wireless siting facilities with market rates.[26] The Executive Branch has even mandated that federal government buildings, facilities, and public lands be made available for the siting of wireless equipment at market rates.[27] As one example, the United States Forest Service, under the Department of Agriculture, has adopted rental rates for use of federal lands under its jurisdiction as communications sites, based on type of use and population of surrounding area using figures that approximate commercial market rates for communications sites.[28]

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[25] While providing that local communities retain control over decisions regarding the siting of wireless facilities, Section 332 of the Communications Act places restrictions on their ability to deny applications for wireless siting authority. If any state or local government violates these provisions, the wireless carriers can seek accelerated judicial review within 30 days of the adverse decision, regardless of whether the state has certified that it regulates pole attachments. 47 U.S.C. § 332(c)(7).

[26] *By the Numbers, Tower Companies*, RCR Wireless News (Oct. 30, 2006); *Tower Companies Stress Service Even as They Fatten Portfolios*, RCR Wireless News (June 12, 2006); *Globat Tower Goes West with Chinook, Crown Castle Refinances*, RCR Wireless News (June 5, 2006); *Tower Leasing and Resources*, Wireless Estimator, http://www.wirelessestimator.com/industrydoc.cfm?ContentID=7.

[27] *Facilitating Access to Federal Property for the Siting of Mobile Services, President's Memorandum on Mobile Service Antennas*, 31 Weekly Comp. Pres. Doc. 1424, 60 Fed. Reg. 42,032 (Aug. 10, 1995); *Placement of Commercial Antennas on Federal Property,* 62 Fed. Reg. 32611, 32613 (June 16, 1997) (General Services Administration guidelines providing that "Executive departments and agencies should charge fees based on market value"); *Placement of Commercial Antennas on Federal Property*, 64 Fed. Reg. 30523 (June 8, 1999) (Extending guidelines indefinitely).

[28] Forest Service Handbook 2709.11, Special Uses Handbook, Chapter 90 – Communications Site Management, Interim Directive No. 2709.11-2005-3 (Dec. 15, 2005).

II. CONCLUSION

The OPUC should establish a separate proceeding to consider all of the potential safety, reliability, and operational implications of imposing a regulated system of access for wireless attachments to utility poles. There are simply too many critical issues that have not yet been addressed in this proceeding that the OPUC needs to take into account before adopting any rules for wireless attachments. Wireless attachments are unique and do not conform to the traditional use of utility poles. Accordingly, the OPUC should resist the last-minute efforts by wireless carriers to secure regulated access identical to that extended to wireline attachments and continue to allow the parties to privately negotiate access and rates. There is no need to rush to adopt rules for wireless attachments given that the marketplace has proven to be an effective way for wireless carriers to gain access to utility and other infrastructure.

Respectfully submitted,

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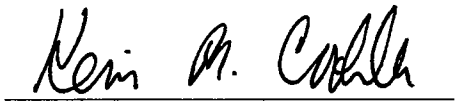
Dated: November 17, 2006

CERTIFICATE OF SERVICE

I, Kevin M. Cookler, hereby certify that on November 17, 2006, copies of the foregoing Joint Comments of Portland General Electric, PacifiCorp, and Idaho Power were sent via e-mail and Federal Express overnight mail to the Oregon Public Utility Commission.

A copy of the filing was also sent to the parties indicated on the attached service list.



Kevin M. Cookler

Summary Report

AR 510 DIVISION 028 RULES RELATING TO SANCTIONS FOR ATTACHMENTS TO POLES

Category: Administrative Rule

In the Matter of Permanent Division 028 Rules regarding Sanctions related to Pole Attachments.

(This docket was opened at the direction of the Commission in response to the industry comments in docket AR 506.)

Filing Date: 9/13/2006

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Summary Report

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Summary Report

AR 510 DIVISION 028 RULES RELATING TO SANCTIONS FOR ATTACHMENTS TO POLES

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