



Broadcasting Public Notice CRTC 2006-51

Ottawa, 19 April 2006

Request to repeal section 22 of the *Broadcasting Distribution Regulations*

*In Call for comments on a request by the Canadian Cable Telecommunications Association to repeal section 22 of the *Broadcasting Distribution Regulations*, *Broadcasting Public Notice CRTC 2005-74*, 25 July 2005, the Commission invited comment on a proposal that section 22 of the *Broadcasting Distribution Regulations* (the *Regulations*) be repealed.*

*The Commission, based on its examination and analysis of the record of this proceeding, has determined that retention of all of the requirements of section 22 is no longer appropriate or necessary, and will amend section 22 of the *Regulations* to require only that Class 1 BDUs, and those Class 2 BDUs that elect to distribute audio programming services, distribute local community, campus and native radio stations, as well as at least one CBC radio station operating in French and one in English.*

Background

1. The Commission received a request from the Canadian Cable Telecommunications Association (CCTA) for the repeal of section 22 of the *Broadcasting Distribution Regulations* (the *Regulations*). Section 22 states that:
 22. (1) Except as otherwise provided under a condition of its licence, a Class 1 licensee, and any Class 2 licensee that elects to distribute an audio programming service in a licensed area, shall distribute in the licensed area
 - (a) the programming services of all local radio stations; and
 - (b) if they are not distributed under paragraph (a),
 - (i) the programming services of at least one radio station that broadcasts in English and at least one that broadcasts in French that are owned and operated by the Corporation, and
 - (ii) the educational radio programming service of an educational authority designated by the province in which the licensed area of the undertaking is located.
 - (2) Despite subsection (1), a licensee is not required to distribute the programming service of a local digital radio station that is licensed on a transitional basis.

2. In its request, the CCTA argued that very few subscribers are aware that they can receive the services of radio stations from Class 1 and Class 2 broadcasting distribution undertakings (BDUs) and that even fewer subscribers listen to these services. To support its position, the CCTA submitted the results of a telephone survey conducted on behalf of Rogers Cable Communications Inc. (Rogers). The results indicated that, while 36% of the subscribers reached by the survey are aware that they can access the radio services delivered by Rogers, only 9% of the subscribers surveyed have ever accessed those services, and only 4% of the subscribers surveyed have accessed those services recently.
3. The CCTA noted that interference-free analog channels on which to distribute these radio services are scarce in many markets, and that the licensing of new AM and FM channels exacerbates this scarcity. In its view, the analog capacity generally used for these services could better be “harvested” for use in the digital distribution of television programming services. It estimated that this analog capacity could be used to distribute as many as 30 additional standard definition digital television services or six high definition services.
4. The CCTA also argued that, even should section 22 be repealed, Class 1 and Class 2 BDUs may choose to continue to offer at least some local radio stations due to competitive pressure and subscriber interest in particular services. Further, it noted that direct-to-home (DTH) satellite BDUs, with whom Class 1 and Class 2 BDUs compete, are not required to distribute the services of any radio stations.
5. The Commission issued *Call for comments on a request by the Canadian Cable Telecommunications Association to repeal section 22 of the Broadcasting Distribution Regulations*, Broadcasting Public Notice CRTC 2005-74, 25 July 2005. Following a subsequent request by the CCTA for an opportunity to file reply comments, the Commission issued Broadcasting Public Notice CRTC 2005-74-1, 3 October 2005, in which it permitted all interested parties to file reply comments. A total of 26 parties filed comments and/or reply comments in response to these notices.

Positions of parties

6. L'Alliance des radios communautaires (ARC) opposed the CCTA request and argued that many people access the programming of radio stations via cable BDUs. In its view, cable distribution is an important tool for the development of community and campus radio stations, particularly since many small radio stations initially commenced operations as cable-only services, and that, although now licensed and available over the air, these stations have continued to depend on cable distribution to provide service in areas where there are reception problems.
7. L'Association des radiodiffuseurs communautaires du Québec (ARCQ) also opposed the CCTA request. According to ARCQ, distribution by cable BDUs is essential to community radio stations and is a vital complement to AM or FM broadcasting, since a significant number of listeners living in the service area of a community radio station would otherwise be unable to receive these stations due to such factors as their use of

low-power transmitters, the elevation of the listener's home, or the presence of buildings or other structures that obstruct the signal. It noted that, at present, new community stations that obtain an FM licence are limited to the use of frequencies that, in its view, inadequately serve the needs of the communities to which they are targeted. ARCQ also noted that cable distribution enables cultural or linguistic communities not living in the core area served by a community radio station to receive radio programs produced in their language.

8. While recognizing that BDU capacity is not unlimited, the Canadian Association of Broadcasters (CAB) opposed the CCTA request and argued that the CCTA has not provided a compelling argument for the repeal of section 22. In the CAB's view, the principle set out in section 3(1)(t)(i) of the *Broadcasting Act* (the Act), that BDUs should "give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian services," is furthered by the requirements of section 22, and this principle should remain a cornerstone of broadcasting policy. It considered that cable carriage is important to local radio stations, and particularly to AM stations, since the quality of the signal received via cable BDUs is often much better than that received over the air. It further argued that the level of tuning to a Canadian programming service does not constitute a legitimate argument for the removal of the requirement to distribute the service. The CAB further argued against the repeal of section 22 on the grounds that its requirements provide a *de facto* safeguard against undue preference by ensuring that both affiliated and non-affiliated services are distributed by BDUs.
9. As an alternative to the repeal of section 22, the CAB proposed that the section be amended to require that the signals of all local radio stations be distributed on a digital basis. The CAB argued that this would not only free up analog capacity and eliminate interference problems, but would also allow these stations to be more easily accessed by subscribers and provide additional promotional opportunities through the BDUs' interactive programming guides. In order to implement this option, the CAB considered that only the definition of "basic service" in section 1 of the Regulations would need to be amended so as to remove the reference to section 22.
10. The Canadian Broadcasting Corporation (CBC) also opposed the CCTA request and argued that section 22 plays a role in helping the CBC achieve its mandate as a public broadcaster. In its view, the CCTA has failed to make a case for "blanket removal of regulatory oversight in this area," or to demonstrate that any particular BDU is burdened by capacity or interference problems related to the distribution of these radio signals. Further, the CBC disputed the findings of the study submitted by the CCTA, and noted that Board of Broadcast Measurement (BBM) data from its Spring 2005 study indicated that "a quarter of Canadians receive AM and FM radio stations through cable TV."
11. The CKUA Radio Network (CKUA) supported the CCTA request, provided that BDUs be required, by condition of licence, to distribute community and campus stations on a digital basis, and that all BDUs be required to contribute a percentage of their gross annual revenues to a new Community Radio Fund. In general, CKUA noted that there are substantial differences between the for-profit commercial radio sector and the not-

for-profit community and campus sector. While commercial stations have sufficient capital to establish and maintain substantial over-the-air transmission facilities, community and campus radio stations do not possess the same financial resources, nor do they receive government funding like the CBC. According to CKUA, its proposed Community Radio Fund would have a significant positive impact on the struggling community and campus radio sector, and would redress inequities between these stations and their commercial and CBC counterparts.

12. Mark MacLeod of Re: Radio Consulting opposed the CCTA request. Mr. McLeod stated that, as an independent consultant specializing in non-commercial radio, he has experience with “many community and campus groups where inclusion of distribution on ‘cable FM’ is a major inspiration for their pursuit of a broadcasting licence.” In particular, Mr. MacLeod noted the importance of cable distribution to new community stations in mid- and small-size markets where the FM band is becoming congested. He argued that the distribution of the signals of campus stations by cable BDUs permits reception by students and faculty residing off-campus, and also provides revenue-earning opportunities that make these stations less dependent on student fees. He noted that both types of stations benefit from cable distribution where terrain limits reception.
13. In its comments, the National Broadcast Reading Service (NBRS) asked that the Commission confirm that its service, which is distributed under an order issued pursuant to section 9(1)(h) of the Act, would continue to be distributed in a digital environment and would not be affected by a repeal of section 22. NBRS also recommended a number of other amendments to the Regulations for the purpose of ensuring that “mandatory audio programming services” are treated in the same manner as mandatory television programming services, are accorded digital distribution, and are listed in the interactive programming guides of BDUs.
14. The National Campus and Community Radio Association (NCCRA) opposed the repeal of section 22 of the Regulations on the grounds that this would have an adverse impact on campus, community, native, French-language, developmental and instructional radio stations. The NCCRA was concerned that, in the absence of the section 22 requirements, some radio services would cease to operate, particularly those that are available only via cable BDUs. In its view, BDU distribution is an important tool, particularly for campus and community stations that have few resources, operate in markets where only a limited amount of spectrum is available, and/or have a limited range due to geographical factors. It noted that the stations of some of its members are available to more potential listeners via cable than over the air and considered that, although the proportion of cable subscribers that access radio stations via cable may be small, a significant number of those subscribers may be doing so in order to receive community or campus stations. The NCCRA also submitted a list of 14 services that are distributed solely by cable BDUs, and 53 stations that are distributed both on FM frequencies and by cable BDUs.

15. Sixteen individuals submitted comments in this proceeding. Thirteen of these opposed the CCTA request based on their specific concern that, if the request was granted, the service of Seaside FM (CFEP-FM, a Type B community radio station originating in Eastern Passage, Nova Scotia) might no longer be available to them via cable. These parties noted that CFEP-FM is a low-power station whose signal they are unable to receive directly over the air.
16. Of the other individuals, Mike Shacklock opposed the CCTA request due to concerns that it would limit the availability of low-power community stations, particularly in high-rise buildings where over-the-air reception is limited by “concrete and steel” construction. Mr. Shacklock specifically noted problems with the over-the-air reception of CJCH in Bedford, Nova Scotia. Neil Wood opposed the CCTA request, arguing that it would result in the “denial of a community’s right to have access to all means of information, which is vital in times of emergency.” Denis Labreche, however, supported the repeal of section 22 of the Regulations, provided that the services of local stations are distributed digitally by cable BDUs.
17. Quebecor Media Inc. (QMI) fully supported the CCTA request. Based on its own experience, QMI supported the CCTA’s position that very few subscribers are aware that radio stations may be received from BDUs and that fewer still make use of these services. It further agreed with the CCTA that repeal of section 22 would permit BDUs to free up much-needed analog capacity for the distribution of television services. QMI also suggested that it was unfair that cable BDUs be required to operate under section 22 of the Regulations while multipoint distribution system (MDS) and DTH satellite BDUs have no similar requirements.
18. TELUS Communications Inc. (TELUS) also supported the CCTA request. TELUS noted that the requirements of section 22 are 30 years old.¹ It contended that radio is a mature and robust industry, that radio stations do not depend on their distribution by Class 1 and Class 2 BDUs, and that the requirements of section 22 do not serve any useful purpose. It claimed, in particular, that section 22 does little to increase the penetration of radio stations, since their services are much more easily and inexpensively accessed over the air. It concluded that the very small benefit that the requirements of section 22 of the Regulations provides for radio stations should be weighed against the significant costs borne by BDUs in making these services available.
19. The CCTA argued in its reply comments that its request is consistent with section 3(1)(t)(ii) of the Act, which states that “distribution undertakings should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost”. It also viewed its request as being consistent with the objective set out in section 5(2)(c) of the Act, which states that the Canadian

¹ As noted by both the CCTA and TELUS, the original requirements for the carriage of radio signals were applied in 1975 to cable television systems, they being the only type of broadcasting distribution undertaking then in operation. The requirements were intended as a “special measure” to aid in the development of what was then a fledgling FM radio industry. In *Cable carriage of Audio Services*, Public Notice CRTC 1984-124, 28 May 1984, the requirements were expanded to include AM stations, based on the Commission’s determination at the time that cable television undertakings had “ample capacity to add a wide variety of additional new audio services.”

broadcasting system should be regulated and supervised in a flexible manner that is “readily adaptable to scientific and technological change.” The CCTA argued that the requirements of section 22 represent an inefficient use of technology, and impose a burden on the channel capacity of Class 1 and Class 2 cable BDUs to which other types of BDUs are not subjected.

20. The CCTA noted that the majority of radio stations distributed under section 22 are private commercial stations that, in its view, would not be affected by a repeal of this section of the Regulations. With respect to community and campus radio stations, it argued that their signals are meant to reach the communities or campuses that they are licensed to serve, and that they should not rely on cable carriage to reach other audiences or a broader geographic area. It noted in this regard that each radio station is subject to a general condition of licence requiring that it be operated on the basis of the contours approved in its application. The CCTA further noted that the majority of the stations identified by the NCCRA as being potentially affected by the CCTA’s request are actually closed-circuit programming undertakings that Class 1 and Class 2 BDUs are not required to distribute under section 22 of the Regulations.
21. The CCTA disagreed with the CAB’s contention that section 22 serves to safeguard against undue preference. According to the CCTA, the prohibition against providing an undue preference in section 9 of the Regulations is a sufficient safeguard, and it is inappropriate to assume that an undue preference would take place should section 22 be repealed.
22. The CCTA and TELUS also disagreed with the suggestion that section 22 should be amended to require the digital distribution of local radio signals. The CCTA noted that section 22 already permits Class 1 BDUs to distribute local radio signals on either an analog or a digital basis. The CCTA further argued that, contrary to the suggestion by the CAB, this proposal could not be implemented by simply removing the reference to section 22 contained in the definition of “basic service” in section 1 of the Regulations since, in its view, a new obligation cannot be imposed by amendments to one of its underlying definitions.

Commission’s analysis and determinations

23. The Commission notes that the issues raised in this proceeding involve potentially competing objectives of the Act. For example, the CAB and Mr. MacLeod were of the view that the requirements of section 22 of the Regulations are consistent with section 3(1)(f)(i) of the Act, which states that “distribution undertakings should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations”. The CCTA’s position, however, was that its request to repeal section 22 is consistent with section 3(1)(f)(ii) of the Act, which states that “distribution undertakings should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost.” The CCTA also considered

its request to be consistent with the regulatory objective set out in section 5(2)(c) of the Act, which states that the “Canadian broadcasting system should be regulated and supervised in a flexible manner that is readily adaptable to scientific and technological change.”

24. In the Commission’s view, the distribution of all local radio stations by Class 1 and Class 2 BDUs does not generally represent the most effective or efficient use of distribution technology. The primary means of reception for radio stations is over-the-air reception, and cable serves as a supplement to that reception. Thus, based on the objective stated within section 3(1)(t)(ii) of the Act, it would be reasonable to amend or repeal section 22 of the Regulations.
25. However, as noted above, certain parties argued that listeners make significant use of certain radio signals delivered to them by BDUs. They disputed the conclusions of the study submitted by the CCTA. Having reviewed the BBM data available, the Commission is of the view that this data does not provide sufficient information to determine, in any meaningful way, the extent to which Canadians access radio stations through BDUs. Similarly, while the survey submitted by the CCTA clearly indicates that only a small proportion of Rogers subscribers access radio stations through Class 1 or Class 2 BDUs, none of the parties who submitted comments in this proceeding provided any quantitative evidence of the extent to which subscribers in other regions not served by Rogers make use of the radio signals distributed by their cable BDU. Thus, this evidence does not, in and of itself, support the repeal of section 22 in its entirety. This is discussed further below.
26. With respect to the suggestion by some parties that section 22 be amended to require the digital distribution of local radio signals, the CCTA noted correctly that section 22 already permits BDUs to distribute local radio stations on either an analog or a digital basis. However, Class 1 and Class 2 BDUs have generally distributed the signals of local radio stations in the manner in which they are received, i.e., analog distribution of analog signals and digital distribution of digital signals. As noted by TELUS, because most radio stations currently broadcast only in analog, converting their signals for digital distribution would involve on-going additional costs for BDUs, including the purchase of specific equipment, such as FM demodulators and digital encoders, for each signal to be distributed in this manner. Digital distribution would also mean that subscribers currently accessing these services would no longer be able to tune to these stations in the manner to which they are accustomed, i.e., via their existing radio receivers. In the Commission’s view, requiring the digital distribution of all local radio signals would place additional costs on Class 1 and Class 2 BDUs, but would yield no additional benefits. Consequently, the Commission rejects this alternative.
27. The Commission also disagrees with the CAB’s argument that section 22 is necessary as a safeguard against undue preference, in addition to the provisions contained in section 9 of the Regulations. In the Commission’s view, there is little evidence in this proceeding that BDUs would distribute additional affiliated stations and/or cease distribution of only unaffiliated stations should the Commission repeal section 22. Further, the limited

evidence concerning subscribers who access radio stations via BDUs suggests that the resulting preference or disadvantage of such an action would not likely have sufficient impact to support a finding of undue preference.

28. In light of the above considerations, the Commission is of the view that section 22 of the Regulations, in its current form, is no longer appropriate. The Commission notes, however, that the “local radio stations” distributed under section 22 include various types of stations, such as commercial, CBC, educational, community, campus and native radio stations. These stations operate under varying economic and technical conditions, as well as distinct regulatory frameworks. Accordingly, the Commission considers it appropriate to address the CCTA’s request to repeal section 22 in relation to its potential impact on each of these distinct types of radio stations.

Potential impact on commercial radio stations

29. No compelling evidence was presented in this proceeding to demonstrate that commercial stations are in any way dependent upon cable distribution to reach their audiences. By and large, these stations operate at high power and on protected frequencies that provide the best quality of over-the-air reception of any type of radio station, and allow them to serve extensive audiences without the aid of BDU distribution.
30. The vast majority of radio stations distributed by Class 1 and Class 2 BDU licensees under section 22 of the Regulations are commercial radio stations. In the Commission’s view, there is little reason why these BDU licensees should continue to be required to devote scarce capacity to distribute the signals of commercial stations, since they are readily accessible over the air. Accordingly, the Commission will no longer require Class 1 and Class 2 BDU licensees to distribute the signals of local commercial radio stations. The Commission notes that the removal of this requirement alone will free up most of the bandwidth currently used by Class 1 and Class 2 BDUs to distribute radio stations and will, thereby, enable these BDUs to make use of this bandwidth for the other purposes noted by the CCTA.

Potential impact on CBC stations

31. Much like commercial radio stations, CBC stations operate at high power, using protected frequencies, thus enabling high quality over-the-air reception by listeners within their licensed service areas. CBC stations are thus unlikely to be dependent on distribution by Class 1 or Class 2 BDUs. However, given the important objectives served by the programming of the CBC, as identified in sections 3(1)(l), (m) and (n) of the Act, and particularly in light of the scarcity of French-language programming outside of Quebec and the CBC’s mandate for providing such programming, the Commission considers it appropriate to maintain requirements relating to the distribution of CBC stations by Class 1 and Class 2 BDUs. The Commission notes, however, that the CBC operates multiple stations in many of the markets served by such BDUs. For this reason, the Commission has decided that it will no longer require Class 1 and Class 2 BDUs to supplement the over-the-air reception of all local CBC radio stations. In the Commission’s view, the requirement in section 22(1)(b)(i) of the Regulations that

Class 1 and Class 2 BDUs distribute at least one English-language and one French-language CBC station is sufficient to ensure access to CBC radio programming. This change will permit BDUs to free up additional bandwidth for other purposes.

Potential impact on educational radio stations

32. As noted at paragraph 1 of this notice, Class 1 and Class 2 BDUs are required to distribute “the educational radio programming service of an educational authority designated by the province in which the licensed area of the undertaking is located.” However, there is no longer any radio station that meets this definition. Accordingly, the Commission has determined that the requirement to distribute such stations should be removed from section 22 of the Regulations.

Potential impact on community and campus radio stations

33. As a matter of Commission policy², the licensees of community and campus radio stations are not-for-profit organizations. The Commission’s primary objective for such stations is the provision of programming services that differ in style and substance from those provided by commercial stations and the CBC, and that add diversity to the broadcasting system in both music and spoken word. In the case of community stations, the Commission’s policy emphasizes that their programming should be “relevant to the communities served, including official language minorities.” While there are some exceptions, most community and campus stations operate at low-power on unprotected frequencies, or on frequencies that may be prone to interference.
34. The Commission recognizes the special role of all community radio stations in addressing the interests of the communities they serve, and in contributing to the diversity of the Canadian broadcasting system. Of the 90 community radio stations currently licensed, 51 are French-language stations. These stations play a distinct and important role with respect to the provision of French-language programming, both within and outside of Quebec. This role is especially important in those communities served by approximately half of the French-language community stations, where French is the official language of the minority.
35. The CCTA was correct in its observation that community and campus stations are licensed to serve the particular communities that fall within the official contours of their signals. The Commission notes that the original intent of the requirements contained in section 22 was generally to take advantage of the distribution networks of cable systems to distribute local radio signals and, thereby, provide improved reception for listeners within the local community served by those signals. The intent was never to provide broader coverage for a radio station, and hence, a broader audience outside of its licensed service area. However, the argument made by parties opposed to the CCTA’s request was not that community and campus stations are entitled to broader distribution outside

² See *Campus radio policy*, Public Notice CRTC 2000-12, and *Community radio policy*, Public Notice CRTC 2000-13, both dated 28 January 2000.

of their licensed service areas, but that these stations face certain difficulties, including the technical limitations associated with their use of low-power unprotected frequencies, that impede their ability to reach listeners within the communities they are licensed to serve.

36. There is little information regarding the extent to which listeners access community and campus radio stations through BDUs, and thus uncertainty regarding how dependent such stations might be on this form of distribution. The Commission is nevertheless concerned that these stations may face significant limitations in their ability to serve the communities they are licensed to serve, leaving them more dependent on distribution by BDUs than would be other stations, such as commercial or CBC stations. This concern is heightened in the case of community stations that operate in the official language of the minority, since their listeners would generally have access to relatively fewer services in their official language than those whose language is the official language of the majority. For these reasons, the Commission is not prepared at this time to eliminate the regulatory requirement pertaining to the distribution of the signals of local community and campus stations by Class 1 and Class 2 BDUs.

Potential impact on native radio stations

37. Only the NCCRA made reference to the impact that the implementation of the CCTA's request might have on native stations. Sections 3(1)(d)(iii) and 3(1)(o) of the Act provide that the programming of the Canadian broadcasting system should serve the needs and interests, and reflect the circumstances and aspirations, of aboriginal cultures and peoples. In the Commission's view, native stations may experience difficulties similar to those that affect community and campus radio stations. In addition, the Commission notes that, since most native stations operate in areas not served by Class 1 and Class 2 BDUs, a continued requirement to distribute these stations would affect relatively few Class 1 and Class 2 BDUs and would not be unreasonably burdensome. Taking these factors into consideration, the Commission concludes that it would be appropriate to maintain the requirement that Class 1 and Class 2 BDUs distribute the signals of local native stations.

Other issues

38. Certain issues were raised by NBRS and CKUA that are not directly related to the substantive issues addressed in this proceeding. The NBRS asked that the Commission confirm that its service, which is distributed pursuant to a mandatory distribution order issued under section 9(1)(h) of the *Act*³, would continue to be distributed in a digital environment and would not be affected by the repeal of section 22. The NBRS also recommended a number of other amendments to the Regulations for the purpose of ensuring that "mandatory audio programming services" be treated in the same manner as mandatory television programming services, that these services be accorded digital distribution, and that they be listed in the interactive programming guides of BDUs.

³ The mandatory distribution order related to the NBRS service is contained in *National Broadcast Reading Service Inc. (VoicePrint)*, Decision CRTC 2000-380, 11 September 2000.

39. CKUA proposed that all BDUs be required to contribute a percentage of their gross annual revenues to a new Community Radio Fund, arguing that such a fund would have a significant positive impact on the struggling community and campus radio sector, and would aid in redressing inequities between these stations and commercial/CBC stations.
40. The Commission notes that the amendments to section 22 discussed in this public notice will not affect the distribution of the service provided by the NBRs. The Commission considers, however, that the further amendments proposed by the NBRs are outside the scope of this proceeding, as is CKUA's request that the Commission establish requirements for contributions to a new Community Radio Fund.

Proposed amendments to the Regulations

41. In order to give effect to the determinations in this notice, the Commission proposes to amend section 22 of the *Broadcasting Distribution Regulations* to replace the current requirements with a more limited requirement that Class 1 and Class 2 BDUs distribute local community, campus and native radio stations, as well as one English- and one French-language CBC radio station. These amendments, once implemented, will permit Class 1 and Class 2 BDUs to use the majority of the bandwidth currently dedicated to the distribution of radio stations under section 22 of the Regulations for the distribution of other services, such as those noted by the CCTA in its proposal. The Commission will call for comments on proposed amendments to the Regulations in a later public notice.

Secretary General

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