September 25, 2008

Marlene Dortch
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notice of Written *Ex Parte* Presentation
MB Docket Number 07-198 (Review and Examination of Wholesale Tying and Bundling Practices)

Dear Ms. Dortch,

On behalf of Consumers Union, Free Press, and Public Knowledge, Media Access Project ("MAP") submits this written *ex parte* presentation in response to Viacom Inc.'s ("Viacom") *Ex Parte* Presentation of August 21, 2008 ("*Viacom Letter*") and Motion Picture Association of America Inc.'s ("MPAA") *Ex Parte* Presentation of September 10, 2008 ("*MPAA Letter*"). Both MPAA and Viacom have disingenuously attempted to question and curtail the Commission's legal authority to adopt rules relating to tying and bundling practices.

For the record, Consumers Union, *et al.* have never stated the Commission should ban outright such practices, but rather should adopt rules which will enable MVPDs to purchase programming at reasonable rates, terms, and conditions. Several parties have stated that tying practices hinder the ability of MVPDs to purchase stand-alone programming under reasonable conditions, thus preventing them from being competitive and offering diverse programming. *See, e.g.*, *Ex Parte Notice* of OPASTCO ("*OPASTCO Ex Parte*"), MB 07-198 (August 15, 2008) at 2-3; Comments of American Cable Association ("*ACA Comments*"), MB 07-198 (January 3, 2008) at 12, 16-17). Thus, Consumers Union, *et al.* have stated that in addition to tying options, the Commission has the authority to adopt provisions which will ensure that MVPDs also have the ability to purchase programming at reasonable rates, terms, and conditions.

Despite Viacom's and MPAA's rhetoric, as already demonstrated in Consumers Union, *et al.*'s July 25, 2008 Written *Ex Parte* presentation ("*MAP Ex Parte*") and as further demonstrated below, the Commission certainly has the authority to adopt rules that ensure that MVPDs are not effectively forced into tying arrangements because they are unable to purchase the desired stand-alone programming under reasonable rates and conditions. Moreover, such rules are not in conflict with the First Amendment. Finally, Viacom's apparent concern that the offering of stand-alone channels at reasonable rates and conditions will harm minority programming is simply not genuine or true.

I. The Commission Has the Authority to Adopt Rules for Both Vertically and Non-vertically Integrated Programmers.

MPAA and Viacom mistakenly assert that the Commission has no authority to ensure a competitive and diverse programming market. However**,** the Commission clearly has the authority to do so pursuant to Sections 616, 628, and 303, or pursuant to its ancillary jurisdiction. Further, neither Section 624 nor the First Amendment prevents the Commission from adopting rules that ensure the availability of programming channels at reasonable rates, terms, and condition.

A. Sections 628 and 616 Do Not Prevent the Commission from Adopting Rules that Ensure MVPDs can Acquire Programming at Reasonable Rates, Terms, and Conditions.

1. Section 628.

Both Viacom and MPAA assert that Section 628 prevents the Commission from adopting rules that will empower MVPDs to purchase stand-alone programming channels at reasonable rates and conditions. Despite Viacom's and MPAA's assertions that Section 628 is narrow and does not enable the Commission to adopt such provisions, the Commission can clearly adopt such rules pursuant to Section 628, as already demonstrated in detail in the *MAP Ex Parte*. *See MAP Ex Parte*

at 2-3. Requiring programmers to offer programming at reasonable rates, terms, and conditions fits squarely within the Commission's authority. *See id.*

Moreover, the essence of the *Viacom Letter* is that since it is allegedly an independent programmer, the Commission does not have the authority to adopt rules pursuant to Section 628 that would require Viacom to offer its programming at reasonable rates, terms, and conditions. Though Viacom technically operates as a separate company from CBS Network ("CBS"), it can hardly be said that Viacom is an independent programmer when one person, Sumner Redstone, controls the majority of the voting stock of CBS and Viacom and is the chairman of both companies. Fortune Magazine, "Redstone's Next Move," (Ed. Richard Siklos, June 27, 2008), *available at* http://money.cnn.com/2008/06/27/news/companies/siklos_redstone.fortune/index.html. Indeed, Viacom clearly benefitted when it merged with CBS and, despite operating as a separate company from CBS, continues to benefit from the merger in continuing to secure carriage of its programming. *See* Mike Farrell, *Is Retrans Cash Viable?*, Multichannel News (April 25, 2005) ("Retrans has been a great value to MTV Networks over the last five years since we merged with CBS as we've been able to mop up all kinds of analog and digital space").

2. Section 616.

While Viacom may be correct in asserting that Section 628 relates to vertically integrated programming,[1] the Commission can still nonetheless ensure that Viacom offers its programming under reasonable rates, terms, and conditions. As already demonstrated in the *MAP Ex Parte*, Section 616 provides the Commission with the necessary authority to adopt rules relating to tying and bundling practices. *See MAP Ex Parte* at 6.

[1]MPAA essentially adopts Viacom's Section 616 argument against the Commission's authority to adopt rules relating to the sale of programming channels. *See MPAA Letter* at 5-6.

Nonetheless, Viacom asserts that Section 616 was designed "to *help* the owners of independent programming networks, such as Viacom...." *Viacom Letter* at 6. Such an assertion is simply ludicrous and self-serving. In adopting Section 616, even Congress recognized that certain programmers do not need protection against cable operators. The Senate noted that "there are certain major programmers that are more able to fend for themselves. It is difficult to believe a cable system would not carry...ESPN or...CNN." SEN. REP. NO. 102-92 page 24. Similarly, Viacom cannot claim that Section 616 exists to somehow protect Viacom from the market power of cable operators.

Even so, Viacom's assertion that Section 616 was solely intended to protect independent programmers is also misleading because Viacom fails to link the need to ensure that independent programmers are able to retain carriage on cable with Congress' overriding concern for consumers. The findings in the Conference Report recognize that "[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views through multiple technology media." CONF. REP. No. 102-862 page 56. Further, the Statement of Policy in the Conference Report recognizes that Congress intended the Act to "promote information diversity," to "protect consumers by regulating where effective competition does not exist as a substitute for market forces," and to "ensure that consumers and programmers are not harmed by undue market power." CONF. REP. NO. 102-862 page 51. In other words, Congress' intent was to implement ways to ensure that consumers had access to a diversity of voices and competition. Section 616, as discussed in the *MAP Ex Parte*, allows the Commission to promote a diversity of voices and competition by adopting rules that relate to both program carriage and related practices. *See MAP Ex Parte* at 6.

Yet, Viacom and MPAA attempt to claim that Section 616 only authorizes "a specific set of

regulations governing the behavior of *cable operators* and other *MVPDs*." *Viacom Letter at 5-6*. *See also*, *MPAA Letter* at 5-6. This assertion, however, fails to note that Section 616 allows the Commission to adopt rules "between cable operators or other multichannel video programming distributors and *video programming vendors*." 47 U.S.C. §536(a) (emphasis added). "Video programming vendor" is clearly defined as "a person engaged in the production, creation, or wholesale distribution of video programming for sale." 47 U.S.C. §536(b). Thus, as already demonstrated in the *MAP Ex Parte*, the Commission has the authority to adopt rules to ensure that MVPDs are able to purchase stand-alone programming from video programmers at reasonable rates, terms, and conditions.

B. Section 303 Does Not Prevent the Commission from Adopting Rules that Ensure MVPDs can Acquire Programming at Reasonable Rates, Terms, and Conditions.

MPAA further asserts, incorrectly, that Section 303 prevents the Commission from adopting rules in this proceeding. However, even the Commission, recognizing that tying arrangements are permitted as part of the retransmission consent negotiations, noted that it "will continue to monitor the situation with respect to potential anti-competitive conduct by broadcasters in this context. If, in the future, cable operators can demonstrate harm to themselves or their subscribers due to tying arrangements, [the Commission] will be in a better position to consider appropriate courses of action." *In the Matter of: Carriage of Digital Television Broadcast Signals, Amendments to Part 76 of the Commission's Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999,* 16 FCCRcd 2598, 2613 (2001). Several entities have noted the harm to their ability to compete and offer diverse programming as a result of these practices. *ACA Comments* at 12-13,

OPASTCO Ex Parte at 2-3, Comments of Dish Network ("*Dish Comments*"), MB 07-198 (January 7, 2008) at 3-6. Thus, the Commission itself has recognized that it can review the practice of tying and take action if necessary.

C. The Commission Also Retains Ancillary Jurisdiction to Adopt Rules that Ensure MVPDs can Acquire Programming at Reasonable Rates, Terms, and Conditions.

Predictably, MPAA and Viacom assail the fact that the Commission retains ancillary jurisdiction to adopt rules relating to tying and bundling. Viacom complains that Consumers Union, *et al*. have failed to demonstrate "that regulation of the provision of video programming networks would in fact be ancillary to the responsibilities that have been tasked to the Commission by Congress." *Viacom Letter* at 8. *See also*, *MPAA Letter* at 8-9. However, the Commission itself has recently affirmed that "the [Communications] Act gives the Commission 'broad authority' under its ancillary authority to regulate interstate and foreign communications 'even where the Act does *not* apply.'" *In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management*," ¶8, WC Docket No. 07-52 (rel. August 20, 2008) (citations omitted).

Here, the Act clearly does apply. Consumers Union, *et al*. will not repeat their arguments here since they have already demonstrated that Title I grants the Commission jurisdiction to adopt rules that govern the ability of MVPDs to access programming, and requiring programmers (regardless of whether they are independent or vertically integrated programmers) to offer

programming on a stand-alone basis under reasonable rates and terms, and that limiting the use of tying agreements is reasonably ancillary to the Commission's effective performance of its statutorily mandates responsibilities. *See MAP Ex Parte* at 7-8.

Nevertheless, Viacom and MPAA suggest that the Courts have somehow reined in the use of ancillary jurisdiction. *Viacom Letter* at 7, fn 26 *citing Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008), *American Library Assoc. v. FCC*, 406 F.3d 689 (D.C. Cir 2005), and *MPAA v. FCC*, 309 F. 3d 796 (D.C. Cir. 2002); *MPAA Letter* at 7-9, *citing MPAA v. FCC and American Library Association.*

The fact is, the Courts have affirmed the Commission's Title I authority. For instance, in *CCIA v. FCC*, 693 F.2d 198 (D.C. Cir 1982), in affirming the Commission's Title I authority to regulate the "enhanced services" and sale of customer premise equipment previously regulated under Title II and reclassified under Title I, the D.C. Cir. said:

> The Commission's exercise of ancillary jurisdiction to impose the separation requirement on AT&T is an integral part of the *Computer II* regulatory scheme. Several parties attack the validity of this assertion of ancillary jurisdiction by the Commission. *In United States v. Southwestern Cable Co.*, 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968), it was settled beyond peradventure that the Commission may assert jurisdiction under section 152(a) of the Act over activities that are not within the reach of Title II. In that case, however, the Supreme Court limited the Commission's jurisdiction to that which is "reasonably ancillary to the effective performance of the Commission's various responsibilities."...In designing the Communications Act, Congress sought "to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications." Congress thus hoped "to avoid the necessity of repetitive legislation." In *Computer II* the Commission took full advantage of its broad powers to serve the public interest by accommodating a new development in the communications industry, the confluence of communications and data

> processing. Because the Commission's judgment on "how the public interest is best served is entitled to substantial judicial deference," the Commission's choice of regulatory tools in *Computer II* must be upheld unless arbitrary or capricious. Our review of the Commission's decision convinces us that the Commission acted reasonably in defining its jurisdiction over enhanced services and CPE. We therefore uphold the *Computer II* scheme.

CCIA, 693 F.2d at 213-14 (internal citations omitted).

Further, broad reliance on *MPAA v. FCC* and *American Library Association* is misplaced since both cases are limited to Title III jurisdiction. Nonetheless, rather than limiting ancillary authority, both *American Library Association* and *MPAA* go to great lengths to distinguish the facts of those cases from *CCIA*. In *MPAA v. FCC*, the Commission attempted to require mandatory video description. *MPAA v. FCC*, 309 F.3d at 800. However, the D.C. Circuit found that requiring video description mandated creation of specific content, and the Communications Act prohibits the Commission from dictating content to broadcasters. *Id.* at 805 ("Government regulation over the content of program broadcasting must be narrow, and that broadcast licensees must retain abundant discretion over programming choices"). Here, the Commission is by no means dictating content.

In *American Library Association*, the court invalidated the Commission's broadcast flag regulations because broadcast flag regulated use of the content *after* a transmission, falling outside the Commission's ancillary jurisdiction which regulates "communication by wire or radio." *American Library Assn*, 406 F.3d at 695. Regulation of communication and its means of transmission is presumptively permissible under statutory authority, and *American Library Association* merely holds that regulation of specific communication *after* its transmission is not. *Id.* at 707. The proposal at hand has nothing to do with adopting provisions after the transmission of content. Thus, there is no

reason to suggest that the Commission is constrained from using its ancillary jurisdiction.

Moreover, Viacom's reliance on *Alliance for Community Media* is misplaced, as the Court determined the Commission did in fact have ancillary authority, regardless of the Court's feeling on the merits of the policy choice. *Alliance for Cmty Media*, 529 F.3d at 783 ("we need not conclude that the agency construction was the only one it permissibly could have adopted or even the reading we would have reached if the question initially had arisen in a judicial proceeding") (internal quotation omitted). Rather, the Court held that the agency was not unreasonable in determining it could, under a statute allowing it to regulate franchise fees, regulate the charges imposed on users of cable equipment. *Id.* at 783-84. Just like *Alliance for Community Media*, as already demonstrated, the Commission has ample ancillary jurisdiction to adopt rules pursuant to the Commission's mandated responsibility to ensure competition and diversity in programming . *See MAP Ex Parte* at 6-8; 11-12.

D. Section 624 Does Not Prevent the Commission from Adopting Rules that Ensure MVPDs can Acquire Programming at Reasonable Rates, Terms, and Conditions.

Viacom and MPAA further assert that Section 624(f) somehow prevents the Commission from adopting rules regarding the provision of cable services. *Viacom Letter* at 4, citing 47 U.S.C. §544(f); *MPAA Letter* at 7-8. However, the D.C. Circuit has held otherwise. In *United Video v. FCC*, 890 F.2d 1173, 1189 (D.C. Cir. 1989) ("*United Video*"), the D.C. Circuit determined that Section 624(f) "does not suggest a concern with regulations of cable that are not based on the content of cable programming."

In *United Video*, the Court reviewed the Commission's newly reinstated "syndicated exclusivity" rules ("syndex"). These rules allowed content providers to strike exclusive deals with

broadcasters to show specific programs or channels, and allowed the broadcasters the rights to forbid other broadcasters (particularly cable services) from importing the content. *Id.* at 1178. Cable operators challenged the rules as arbitrary and capricious and argued that they especially violated Section 624(f), because syndex regulation was an impermissible effort to regulate the video programming offered by cable companies, and that the plain meaning of the statute thereby prohibited the regulation. *Id.* at 1187.

The Court disagreed and found that the express language of the statute hardly clarified its application at all. *Id.* at 1187-88 ("[w]e first hold that §544(f) is not so clear that we must ascertain its plain meaning without resort to legislative history"). The Court concluded that, rather than prohibiting any affirmative or negative requirements for video programming, the proper understanding of Section 624(f) is that it prohibits the Commission from exercising editorial discretion over content provision. *Id.* at 1189. However, Section 624(f) does not prohibit Commission "regulations of cable that are not based on the content of cable programming, and do not require that particular programs or types of programs be provided." *Id.* Therefore, the Court held that since the syndex rules applied to all exclusive programming, regardless of content, the rules did not violate Section 624(f). *Id.* at 1190.

Courts have followed this reasoning in subsequent cases. In *Storer Cable Communications v. City of Montgomery, Ala.*, 806 F.Supp. 1518 (M.D. Ala. 1992) ("*Storer Cable*"), the City of Montgomery sought to require Turner Networks and ESPN to provide the same programming to Montgomery Cablevision as they contemporarily provided Storer Cable. *Id.* at 1526. Storer Cable, Turner Networks, and ESPN sued on a number of issues, one of which was the prohibition against

imposing content requirements under Section 624(f). *Id.* at 1527-28. Following *United Video*, the Court noted that Section 624(f) is limited to content-based discrimination and regulation. *Storer*, 806 F.Supp at 1545-46, citing *United Video*, 890 F.2d at 1187-88. The Court held that "content-based" regulation required an effort by the government to regulate the "message" of the programming. *Storer*, 806 F.Supp at 1546. The Court further held that the broad programming requirement, "[t]o the extent that it might require the plaintiffs to license programming, it would do so on basis of the market effects of the targeted licenses, not on the content of programming.... For these reasons, Ordinance 48-90 is not preempted by subsection (f) of § 544." *Id.*[2]

Despite Viacom's and MPAA's baseless assertions, Consumers Union, *et al*. are requesting a content-neutral requirement. There is no request that one channel or another be made available, nor is there a request to secure certain programs from certain channels. There is no content consideration whatsoever. Indeed, the proposal is even less targeted than the provisions in *Storer Cable*, because rather than focusing on two specific content providers, this proposal is merely aimed at eliminating the harmful practice of tying and bundling. This is a content-neutral method to achieve the content-neutral goal of allowing cable providers more flexibility in choosing programming, and lower the bar for entry for smaller and independent content-providers. Therefore, contrary to Viacom's and MPAA's claims, Section 624(f) is not applicable and would not invalidate this effort.

[2]The Court recognized that this rule had previously applied explicitly to regulations by the Commission, and extended the rule to local municipalities. *Id.* at 1546, fn. 24, citing *United Video,* 890 F.2d 1173.

II. The First Amendment Does Not Prevent the Commission From Adopting Rules that Ensure MVPDs can Acquire Programming at Reasonable Rates, Terms, and Conditions.

Viacom and MPAA claim that the First Amendment somehow prevents the Commission from adopting rules that relate to the carriage of video programming. As already demonstrated in the *MAP Ex Parte*, such rules would not implicate First Amendment scrutiny. *See MAP Ex Parte* at 13-15.

However, while MPAA admits that if a First Amendment review was warranted, intermediate scrutiny would apply, *see MPAA Letter* at 9-10, Viacom believes that strict scrutiny would apply. However, reliance on a First Amendment claim is misplaced and misleading. While the regulation of speech - including television - triggers First Amendment review, overwhelming precedent, including cases cited by Viacom in its *Letter*, establishes that a strict scrutiny standard is only used when the regulation sought is directed towards the content of the media itself. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("*Turner I*") ("regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny [citation omitted] because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue."), citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

In *Turner I*, the Court examined the Commission's "must carry" rules that required cable providers to transmit local broadcast stations over their cable service. *Id.* at 622. Cable companies appealed these rules to the Supreme Court, claiming, among other charges, that these regulations were impermissible regulations on cable companies' "editorial discretion" in electing which channels to carry, in violation of the First Amendment. *Id.* at 622-23. However, the Supreme Court, explicitly held that the regulations required cable companies to carry no specific programs or messages and were content-neutral, even though it could be considered editorial oversight. *Id.* at 643-44

("[a]lthough the provisions interfere with cable operators' editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations, the extent of the interference does not depend upon the content of the cable operators' programming. The rules impose obligations upon all operators"). Thus, the application of intermediate scrutiny was proper because "[n]othing in the Act imposes a restriction, penalty, or burden by reason of the views, programs, or stations the cable operator has selected or will select." *Id*. at 644.

Upon remand, the Commission regulation met the standards applied under intermediate scrutiny, and cable companies again appealed to the Supreme Court. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 180-81 (1997) ("*Turner II*"). The Supreme Court affirmed. *Id.* at 189. The Court held that the Commission's "must-carry" rules satisfied intermediate scrutiny because they served "three interrelated interests:" (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming." *Id*. Moreover, "it is undisputed the Government has an interest in "eliminating restraints on fair competition..., even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment." *Id*. at 190.

The Court then held that the "must-carry" rules were not impermissibly burdensome, because "[c]ontent-neutral regulations do not pose the same 'inherent dangers to free expression,' [*Turner I*, 512 U.S. at 663], that content-based regulations do, and thus are subject to a less rigorous analysis, which affords the Government latitude in designing a regulatory solution." *Turner II*, 520 U.S. at 213. Though the "must-carry" rules did "have the potential to interfere with protected speech," the rules were limited enough to not overly burden free speech. *Id.* at 217-18. The Court concluded

content-neutral regulations are permissible "so long as [the] policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination." *Id.* at 224.

The adoption of rules to ensure reasonable rates, terms and conditions are, like the "must-carry" rules, a content-neutral effort to promote fair competition and expand the availability of information from a multiplicity of sources. As others have illustrated, the current market state suppresses the availability of information by arrogating excess power to content providers. *See, e.g., Dish Comments* at 3-6; *ACA Comments* at 12-13; *OPASTCO Ex Parte* at 2-3. These providers refuse to sell popular channels to cable operators without the operators also buying other, less desirable channels, or must otherwise pay a disproportionately high price for the popular channels. These channels, such as Viacom's MTV, are treated as essential facilities for cable operators, without which their service would not be commercially viable. This is plainly contrary to the public interest. Rules relating to tying are not aimed at barring the sale of MTV, or any other popular channel, in particular, but rather to end the anti-competitive and harmful practice of bundling and tying. This is a content-neutral effort, and will allow more competition for cable carriage, especially for smaller and independent content providers, thereby expanding the availability of information from a multiplicity of sources. This proposal does not run afoul of the First Amendment.

III. Commission Action Will Not Harm the Availability of Diverse Programming.

Viacom asserts that rules relating to tying and bundling will somehow "*hinder* the development and dissemination of diverse programming networks," *Viacom Letter* at 9, including minority and niche programming. However, Viacom's concern regarding such programming is simply not genuine. As American Cable Association recently pointed out, despite grand claims that wholesale unbundling would have a negative impact on minority and niche programming, it has "been

shown that large programmers use their market power to coerce...providers into carrying their affiliated networks, but by and large, they do not do so to ensure carriage of their minority-focused channels." *See Letter from Matthew M. Polka, President and CEO, American Cable Association*, MB Docket No. 07-198 (September 8, 2008). In fact, Viacom itself "does not bundle any of its marquee networks for general audiences, such as Nickelodeon or MTV, with any of its minority-focused networks, including Black Entertainment Television...Networks and Logo, in the deals available to and accepted by the vast majority of independent operators." *Id.*

In actuality, tying arrangements have had a "devastating impact" on independent, stand-alone networks. *See Letter from Michael Schwimmer, Chief Executive Officer, Si TV, Inc.*, MB Docket No. 07-198 (February 12, 2008). As Mr. Schwimmer points out, from personal experience in carriage negotiations, "unrestrained tying practices, when combined with the current state of consolidation among both cable operators and programmers alike, have left American viewers without...rich and diverse content from a broad array of providers." *Id.* Thus, Viacom's supposed concern over the impact of wholesale bundling on diverse programming networks is simply without merit.

IV. Conclusion

The Commission has the authority to adopt rules that ensure that MVPDs are not effectively forced into tying arrangements because they are unable to purchase the desired stand-alone programming under reasonable rates and conditions. Moreover, such rules are not in conflict with the First Amendment. Finally, the offering of stand-alone channels at reasonable rates and conditions will not harm minority programming.

Respectfully submitted,

/s/

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