

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c.C-34, as amended;

IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;

AND IN THE MATTER OF certain policies and procedures of Reliance Comfort Limited Partnership.

BETWEEN:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE FILED / PRODUIT August 21, 2013 Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 40

THE COMMISSIONER OF COMPETITION

Applicant

- AND -

RELIANCE COMFORT LIMITED PARTNERSHIP

Respondent

**REQUEST FOR LEAVE TO INTERVENE
ON BEHALF OF NATIONAL ENERGY CORPORATION**

National Energy Corporation (operating as National Home Services) (“National”) requests leave of the Competition Tribunal pursuant to subsection 9(3) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19, as amended, and section 43 of the *Competition Tribunal Rules*, to intervene in this proceeding. In support of this request, National relies on the Affidavit of Gord Potter, sworn August 20, 2013 (the “Potter Affidavit”).

A. Name and Address of Proposed Intervenor

The name and address of National is:

National Energy Corporation
25 Sheppard Avenue West
Suite 1700
Toronto, Ontario
M2N 6S6

Attention: Gord Potter

Phone: 416.673.4765
Fax: 416.747.5872

The address for service for National is:

Davies Ward Phillips & Vineberg LLP
155 Wellington Street West
Toronto, ON M5V 3J7

Attention: Adam Fanaki

Phone: 416.863.5564
Fax: 416-863-0871

B. National

1. National operates under the name "National Home Services" and supplies natural gas and electric water heaters for rental and related services to new and existing homeowners in Ontario and Québec.
2. National is a wholly-owned subsidiary of Just Energy Group Inc. ("Just Energy"), a corporation arranged pursuant to the *Canada Business Corporations Act* that is publicly traded on the Toronto Stock Exchange and the New York Stock Exchange with its head office in Mississauga, Ontario. Just Energy has operations in Canada, the United States and the United Kingdom.

3. In 2008, National began supplying water heater rentals to residential customers located in certain parts of the principal operating territory of Direct Energy Marketing Limited ("Direct Energy") in Ontario.
4. When National entered into the principal operating region of Direct Energy in 2008, Direct Energy was a party to a Consent Order issued by the Competition Tribunal that prohibited Direct Energy from, among other things, preventing competitors from disconnecting and returning water heaters or engaging in other forms of anti-competitive conduct.
5. In 2010, National began supplying water heater rentals to residential customers located in the principal operating region of the Respondent, Reliance Comfort Limited Partnership ("Reliance"), consisting of southwestern Ontario, northern Ontario and eastern Ontario (defined as the "Relevant Market" in the Notice of Application filed by the Commissioner of Competition (the "Commissioner's Application")).
6. When National entered into the Relevant Market in 2010, Reliance – unlike Direct Energy – was not operating under a Consent Order from the Competition Tribunal or similar remedy that prohibited Reliance from engaging in anti-competitive conduct.
7. As described in further detail below, immediately after National entered into the Relevant Market, Reliance began to engage in a number of anti-competitive acts to prevent National from effectively competing and expanding in the Relevant Market.
8. As a result of Reliance's anti-competitive conduct, National's ongoing attempts to expand in the Relevant Market have been constrained or impeded.
9. Since 2010, National has secured approximately 69,100 customers or approximately 6% of the approximately 1.2 million available water heater rental customers located in the Relevant Market. Reliance remains the dominant supplier of water heater rentals in the Relevant Market, with more than 1,100,000

water heater rental customers or approximately 92% of all available water heater rental customers.

10. Although National holds a relatively small share of the Relevant Market, National is the largest competitor to Reliance for the supply of water heater rental services in the Relevant Market. National is also the only competitor to Reliance for water heater rentals with operations in several regions throughout Ontario and Quebec.

C. Test For Intervention

11. National satisfies all of the criteria for intervenor status in this proceeding. In particular:
 - (a) National has been and continues to be directly affected by Reliance's anti-competitive acts, including the exclusionary water heater return policies and procedures implemented by Reliance;
 - (b) The matters alleged to affect National are within the scope of the Tribunal's consideration and are matters sufficiently relevant to the Tribunal's mandate;
 - (c) The representations to be made by National are relevant to issues specifically raised in the Commissioner's Application; and
 - (d) National will bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it.
12. Each element of the test for intervention is outlined more specifically below and in the Potter Affidavit that forms part of this Request for Leave to Intervene.

D. Matters Required to be Addressed in a Motion for Leave to Intervene

13. Subsection 43(2) of the *Competition Tribunal Rules* (the "Rules") requires a person making a motion for leave to intervene to set out:

- (a) the title of the proceedings in which the person making the motion wishes to intervene;
 - (b) the name and address of that person;
 - (c) a concise statement of the matters in issue that affect that person and the unique or distinct perspective that the person will bring to the proceeding;
 - (d) a concise statement of the competitive consequences arising from the matters referred to in subparagraph (c) with respect to which that person wishes to make representations;
 - (e) the name of the party, if any, whose position that person intends to support;
 - (f) the official language to be used by that person at the hearing of the motion and, if leave is granted, in the proceedings; and
 - (g) a description of how that person proposes to participate in the proceedings.
14. The title of the proceedings and the name and address of National are set out above. The concise statements referred to in Rules 43(2)(c) and (d) are set out below.

E. Matters in Issue that Affect National

- 15. National is directly affected by the matters identified in the Commissioner's Application.
- 16. National is a competitor to Reliance for the rental of natural gas and electric water heaters and the supply of related services to residential customers in the Relevant Market.

17. Reliance has engaged in anti-competitive conduct that constrains or prevents National from securing new customers and expanding in the Relevant Market, including the following:
- (a) The vast majority of homeowners in the Relevant Market are existing customers of Reliance. When an existing customer of Reliance decides to switch to National, the Reliance water heater tank located in the customer's home will be disconnected by National and replaced with a new water heater tank. The old Reliance water heater is returned to one of Reliance's depots by National.
 - (b) Historically, Reliance's competitors and customers routinely disconnected and returned old Reliance rental water heater tanks to Reliance without any form of pre-authorization.
 - (c) However, shortly after National entered into the Relevant Market in 2010, Reliance began to impose arbitrary restrictions to prevent National from being able to return water heater tanks from former Reliance customers in a timely and efficient manner.
 - (d) Specifically, Reliance began to impose on its customers a new requirement that prohibited customers or competitors from returning water heater tanks without first obtaining a "Removal Reference Number" or "RRN" from Reliance.
 - (e) Reliance has used, and continues to use, the RRN policy to attempt to prevent customers from switching to National or other competitors. For example, Reliance requires customers to contact Reliance by telephone to obtain the RRN, Reliance often keeps customers that are seeking an RRN on hold for an excessive period of time, and Reliance threatens to apply additional charges to customers who elect to continue with their request to terminate the rental agreement with Reliance.

- (f) National has attempted to assist its customers through the RRN process by attempting to obtain an RRN on behalf of the customer or by participating with the customer on calls with Reliance. Reliance has refused to permit National to obtain an RRN on behalf of its customers or even to permit National to join in on calls by customers attempting to obtain an RRN, notwithstanding that such customers have requested that National participate in these calls.
- (g) Reliance also began to impose limitations on the process for returning tanks to Reliance's return depots. These restrictions include limiting the number of tanks that National can return at any given time, restricting the return of tanks to only certain days or hours within a day, restricting the locations at which National may return tanks, including refusing to accept tanks at locations where Reliance previously accepted tanks from National, and imposing other restrictions that frustrate National's efforts to return Reliance water heater tanks in an efficient manner.
- (h) Reliance also charges excessive "damages fees" for scratches and dents to tanks that are returned with ordinary wear and tear, as well as for tanks that are clearly outside of their useful life and that will simply be disposed of by Reliance.
- (i) Reliance is constantly changing the policies applicable to its return depots and applying different policies at different return depot locations without providing any advance notice. These restrictions make it even more difficult for National to effectively compete.
- (j) As a result of Reliance's restrictions on the return of water heater tanks, National is currently storing more than 2,100 tanks that it has not been able to return to Reliance. National has been required to expand its warehouse facilities to store water heater tanks that Reliance will not accept on a timely basis.

- (k) In circumstances where National has not been able to return Reliance's tank to a Reliance depot, Reliance will continue to bill the homeowner, even after Reliance has been informed of the homeowner's decision to switch to National. In some cases, this can result in several months of double-billing to customers. National is often required to assume these additional charges to the customer, thereby further increasing National's costs.
18. As a result of Reliance's anti-competitive conduct, National's ability to effectively compete and to expand in the Relevant Market is impeded or constrained.
 19. Reliance's practice of anti-competitive acts has had and is having the effect of preventing and lessening competition substantially. In the absence of Reliance's water heater return policies and other anti-competitive conduct, National would expand in the Relevant Market thereby increasing competition substantially.
 20. As a competitor to Reliance and as a firm attempting to compete and expand in the Relevant Market, National has a direct and significant interest in the outcome of this proceeding and the competitiveness of this industry.
 21. Indeed, National's ability to effectively compete and operate successfully in the Relevant Market is dependent upon the outcome of this proceeding. In the absence of an appropriate remedy with respect to Reliance's anti-competitive conduct, National will continue to be constrained from effectively competing and expanding in the Relevant Market.
 22. Accordingly, National is directly and significantly affected by the outcome of this proceeding.
- F. Matters Alleged to Affect National are Within the Scope of the Tribunal's Consideration**
23. The matters that affect National are within the scope of the Tribunal's consideration and are relevant to the Tribunal's mandate to hear and determine the issues raised by the Commissioner's Application.

24. The matters that affect National relate to:
- (a) The impact or likely impact of Reliance's exclusionary water heater return policies and procedures and other anti-competitive conduct on the ability of competitors to effectively compete and expand in the Relevant Market;
 - (b) The impact of Reliance's anti-competitive acts on customers or potential customers of competitors, including the impact of this conduct on the ability of competitors, such as National, to effectively induce customers to switch suppliers;
 - (c) The impact or likely impact of Reliance's conduct upon competition in the Relevant Market generally and National, in particular;
 - (d) Barriers to entry and ease of entry into the Relevant Market, including the impact of Reliance's conduct in creating artificial barriers to entry and expansion for rivals, such as National, and raising rival's costs; and
 - (e) The impact of the Commissioner's proposed remedies on competitors, such as National, and on competition in the Relevant Market.
25. These matters are within the scope of the Tribunal's consideration of this matter and are relevant to the Tribunal's mandate to hear and determine the issues.

G. National's Proposed Topics are Relevant to the Issues Raised by the Proceeding

26. National's proposed topics are relevant to the issues raised by the Commissioner's Application and are relevant to the Tribunal's mandate to hear and determine the issues.
27. National's proposed topics (the "National Proposed Topics") address the matters that affect National in this proceeding and include:
- (a) the development of the Ontario rental water heater industry as it relates to National;

- (b) the issue of Reliance's anti-competitive acts as they relate to National, including the impact of Reliance's exclusionary water heater return policies and procedures and other anti-competitive conduct on the ability of National to effectively compete and expand in the Relevant Market;
 - (c) the impact of Reliance's anti-competitive acts on customers or potential customers, including the impact of this conduct on the ability of National to effectively induce customers to switch suppliers;
 - (d) National's interactions with Reliance with respect to the matters at issue in the proceeding, including dealings with Reliance regarding the water heater removal and return process;
 - (e) National's perspective as a participant in the industry on the appropriate definition of the product and geographic markets;
 - (f) the issue of Reliance's dominant position as it affects National and competition in the Relevant Market generally;
 - (g) the issue of the substantial lessening or prevention of competition as it relates to National and competition in the Relevant Market generally;
 - (h) barriers to entry and ease of entry into the Relevant Market, including the impact of Reliance's conduct in creating artificial barriers to entry and expansion for National and raising National's costs;
 - (i) the statements made and conclusions drawn by Reliance concerning National in the Response of Reliance filed in this proceeding; and
 - (j) the impact of the Commissioner's proposed remedies on National and on competition in the Relevant Market.
28. The National Proposed Topics are relevant to the issues raised by the Commissioner's Application, including, but not limited to, the following issues raised in the Commissioner's Application:

- (a) The definition of the relevant market for the supply of water heater rental services in Ontario [paras. 29 to 32 of Commissioner's Application];
- (b) Whether Reliance is the dominant supplier of water heater rental services in the Relevant Market [paras. 14, 35 and 36 of Commissioner's Application];
- (c) The history and development of Ontario's rental water heater industry [paras. 7 to 14 of Commissioner's Application];
- (d) Whether Reliance's water heater return policies and procedures have the effect of imposing significant costs on competitors and preventing customers from switching to those competitors, thereby excluding competitors in the Relevant Market [paras. 2, 42 and 43 of Commissioner's Application];
- (e) Whether Reliance's conduct has had and is having the effect of preventing and lessening competition substantially in the Relevant Market [paras. 3 and 48 to 51 of Commissioner's Application];
- (f) Whether in the absence of Reliance's water heater return policies and procedures, competitors would likely enter or expand in the Relevant Market [paras. 3, 42 and 43 of Commissioner's Application];
- (g) Whether Reliance's water heater return policies and other conduct creates significant barriers to entry [paras. 17 and 18 of Commissioner's Application]; and
- (h) The nature of the remedies required to address Reliance's conduct and specifically, whether the relief sought by the Commissioner should be granted [para. 55 of Commissioner's Application].

H. National's Unique or Distinct Perspective

29. National will bring a unique or distinct perspective to the proceeding for the following reasons:
- (a) National is Reliance's largest competitor for the supply of natural gas and electric water heater rentals and related services in the Relevant Market;
 - (b) Although National has supplied water heater rental services in Ontario since 2008, National is a relatively recent entrant into the Relevant Market having commenced operations in that region in 2010, and is therefore uniquely positioned to provide a perspective on the barriers to entry and other conditions of entry into the Relevant Market;
 - (c) National commenced supplying water heater rental services in the principal operating region of Direct Energy in 2008. At that time, Direct Energy was a party to a Consent Order issued by the Competition Tribunal that subsequently expired on April 30, 2012. National is therefore uniquely positioned to provide a perspective on the conditions of entry and expansion both in the presence of, and in the absence of, the Consent Order;
 - (d) The anti-competitive conduct of Reliance was implemented primarily or entirely as a result of National's entry into the Relevant Market;
 - (e) National began offering water heater rental services prior to the implementation of the anti-competitive conduct of Reliance, but has also attempted to enter into other local regions within the Relevant Market following the anti-competitive conduct of Reliance. National is therefore positioned to provide the Tribunal with a unique perspective on the impact of Reliance's anti-competitive conduct on barriers to entry and the costs associated with customer switching, as well as the conditions of competition generally in these regions;

- (f) Although National has a substantially smaller presence in the Relevant Market than Reliance, there is no other competitor to Reliance for water heater rental services that operates in the Relevant Market with the same scope and scale as National;
 - (g) Unlike smaller competitors to Reliance, National also supplies water heater rental services in several parts of Ontario and Quebec. National is therefore positioned to provide the Tribunal with a broader perspective on the supply of water heater rental services in areas both within and outside of the Relevant Market;
 - (h) National has been supplying water heater rental services in Ontario since 2008 and is therefore able to provide the Tribunal with a valuable perspective on the conduct of the participants and the industry generally over the longer term; and
 - (i) As recognition of National's role in the Relevant Market, National is the subject of a number of specific allegations in the Response of Reliance filed on August 12, 2013, including paragraphs 14, 48, 55 and 73 of Reliance's Response.
30. National also has a perspective that is unique or distinct from that of the Commissioner of Competition. As an experienced participant in the industry, as the target of Reliance's anti-competitive conduct and as a firm that is attempting to expand in the Relevant Market, National will bring a perspective to the issues and evidence that is distinct from the Commissioner's perspective.
31. In addition, although National intends to support the position of the Commissioner generally, based on the allegations in the Commissioner's Application, there are topics on which the position of the Commissioner and National appears to differ. For example, the following:
- (a) **Anti-Competitive Conduct:** The Commissioner's Application does not appear to address the full scope of the anti-competitive conduct of

Reliance. Additional anti-competitive conduct includes (at least) the following: (i) Reliance has engaged in price discrimination or similar forms of discriminatory promotional programs that target only those customers that are the subject of National's marketing efforts or who have recently elected to switch to National; and (ii) Reliance has refused to permit National to act as an agent for customers with respect to the process for obtaining the RRN required by Reliance for the return of a tank.

- (b) **Relief Sought:** National also does not believe that the relief sought by the Commissioner is sufficient to address the anti-competitive conduct of Reliance. For example, with respect to the tank return process, the relief sought should include (at least) the following elements: (i) Reliance should be prohibited from implementing any restrictions or limitations that would prevent National or any other licenced third party from disconnecting and returning a used water heater tank on behalf of a customer to Reliance; (ii) Reliance should be prohibited from preventing a customer of Reliance from electing to have a tank disconnected and removed by any licenced service provider (including National) or to remove their own tank; (iii) Reliance should be required to designate specific "Return Locations" where a customer or a licenced third party (including National) is entitled to return disconnected water heaters between normal business hours; (iv) Reliance should be required to identify a sufficient number of Return Locations to adequately serve customers throughout their respective service areas; (v) Reliance should be prohibited from implementing any capacity restrictions or other restraints on the number of water heaters that can be returned to any of the Return Locations in a given period of time; and (vi) Reliance should be prohibited from continuing to bill customers following the point of time at which Reliance is advised that the customer has switched to an alternate supplier.

32. National's unique position as a firm continuously attempting to expand in the Relevant Market and to enter into certain local regions within the Relevant

Market, as a target of Reliance's anti-competitive conduct, and as the most significant competitor to Reliance for water heater rental services places National in a unique position to assist the Tribunal in its consideration of relevant issues.

I. Granting Leave to National is Consistent with Prior Decisions of Tribunal

33. Granting leave to intervene to National is also consistent with prior decisions of the Tribunal. In *American Airlines, Inc. v Canada (Competition Tribunal)*,¹ Iacobucci C.J. stated as follows regarding the intent underlying the provisions of the *Competition Tribunal Act* authorizing intervenors:

It is evident from the purpose clause [of the Competition Act] that the effects of anti-competitive behaviour, such as a merger that has the result of substantially lessening competition, can be widespread and of great interest to many persons. In these matters, Parliament has provided for the Director to serve as the guardian of the competition ethic and the initiator of Tribunal proceedings under Part VII of the Competition Act; but Parliament has also provided a means to ensure that those who may be affected can participate in the proceedings in order to inform the Tribunal of the ways in which matters complained of impact on them. I would ascribe to Parliament the intention to permit those intervenors not only to participate but also to do so effectively. A restrictive interpretation of subsection 9(3) could in some cases run counter to the effective handling of disputes coming before the Tribunal.²

34. Although the principal issue considered in *American Airlines, supra*, was the scope of interventions before the Tribunal, Iacobucci C.J. also recognized that even where the position of an intervenor and the Commissioner are generally aligned, the intervenor is entitled to provide its unique perspective through broader rights of participation in the proceeding. As Iacobucci C.J. stated:

It seems to me that permitting intervenors to play a role wider than simply presenting argument is also a fairer way of treating them. Although the Director is supporting the wider

¹ [1989] 2 FC 88 (FCA) [*American Airlines*].

² *Ibid* at para 25.

interpretation before us, it is not difficult to envision future situations where the Director and an intervener might disagree on some matter of fact or evidence of which the Tribunal should be apprised. It is therefore not only logical to give the Tribunal the jurisdiction to decide the issue rather than simply leaving it to the Director to decide in each case, but it is also fair.³

35. Consistent with this general principle, the Tribunal has frequently granted leave to intervene to competitors that have been or will be harmed through the anti-competitive conduct of a respondent. For example, in *Canada (Director of Investigation and Research, Competition Act) v A.C. Nielsen Company of Canada Limited*,⁴ the Tribunal granted leave to Intervene to Information Resources, Inc. ("IRI"). IRI was a potential competitor to A.C. Nielsen that intervened in the proceeding on the basis that the anti-competitive conduct of A.C. Nielsen prevented it from entering into the relevant market.

36. Similarly, in *Canada (Competition Act, Director of Investigation and Research) v Tele-Direct (Publications) Inc.*,⁵ the Tribunal granted leave to intervene to White and NDAP/DAC, two potential competitors of Tele-Direct. The Tribunal stated, in part:

We accept that as a publisher of telephone directories, White is directly affected by these proceedings. The same is true for NDAP/DAC as a competitor or potential competitor to Tele-Direct in the provision of advertising services. We also accept that both intervenors have special knowledge and expertise that may assist the Tribunal and that, although they support the Director's position generally, their business interests are different from his public interest mandate.⁶

37. In *Canada (Commissioner of Competition) v Air Canada* (2001),⁷ the Tribunal granted leave to intervene to WestJet Airlines, a competitor to Air Canada that

³ *Ibid* at para 27.

⁴ [1994] CCTD No 2 (Request for Leave to Intervene of IRI: File No CT-94/01).

⁵ [1995] CCTD No 4, 61 CPR (3d) 528.

⁶ *Ibid* at p 4.

⁷ [2001] CCTD No 5, 2001 Comp Trib 4.

was a target of the anti-competitive acts that the Commissioner alleged in the application against Air Canada.

38. More recently, in *Canada (Commissioner of Competition) v Toronto Real Estate Board*,⁸ the Tribunal granted leave to intervene to RealtySellers, a new company that intended to expand into the relevant market, but was allegedly prevented from entering as a result of the conduct of the respondent.
39. In *Canada (Commissioner of Competition) v Air Canada (2011)*,⁹ the Tribunal granted leave to intervene to WestJet in its capacity as a competitor or potential competitor to Air Canada on a number of the routes that were the subject of the impugned arrangement.

J. Scope of Participation

(i) The Party whose Position National Intends to Support

40. National's primary intention in seeking leave to intervene is to assist the Tribunal in understanding the impact of Reliance's anti-competitive conduct and in identifying the appropriate remedies to address such conduct. If granted leave to intervene, National will generally support the Commissioner's Application.

(ii) A Description of the How National Proposes to Participate in the Proceeding

41. National requests to participate in this proceeding on the following terms:
 - (a) to review any discovery transcripts and access any documents of the Parties produced on discovery (subject to any Confidentiality Order issued by the Tribunal), but not participate directly in the discovery process;
 - (b) to produce an affidavit of relevant documents and to make a representative of National available for examination for discovery on the topics for which National has been granted leave to intervene;

⁸ [2011] CCTD No 22, 2011 Comp Trib 22.

⁹ [2011] CCTD No 21, 2011 Comp Trib 21.

- (c) to adduce non-repetitive *viva voce* evidence at the hearing of the Commissioner's Application relating to the topics for which National has been granted leave to intervene;
- (d) to conduct non-repetitive examinations and cross-examination of witnesses on the topics for which National has been granted leave to intervene;
- (e) to file expert evidence within the scope of its intervention in accordance with procedures set out in the *Competition Tribunal Rules*;
- (f) to attend and make representations at any pre-hearing motions, case conferences or scheduling conferences; and
- (g) to make written and oral argument, including submissions on any proposed remedy.

(iii) Hearing Request

42. If either of the parties oppose National's Request for Leave to Intervene, National respectfully requests an oral hearing of the motion.

(iv) Costs and Other Procedural Matters

43. If leave to intervene is granted, National would not seek costs, and requests that it not be made liable for the costs of any party or other intervenor.
44. National undertakes to comply with the *Competition Tribunal Rules* and with any direction of the Tribunal with respect to the conduct of this proceeding.
45. National reserves its right to request further terms with respect to its intervention as it may advise and as the Tribunal may permit as the matter proceeds.

(v) The Official Language to be used by National at the Hearing of the Motion and, if leave is Granted, in the Proceeding

46. National intends to use English at the hearing of the Request for Leave to Intervene and, if leave is granted, in the proceeding.

DATED at Toronto, Ontario, this 21st day of August, 2013.



Adam Fanaki

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CT-2012-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;

AND IN THE MATTER OF certain policies and procedures of Reliance Comfort Limited Partnership.

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