Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal no. 227 of 2012 & IA no. 20 of 2014

Dated: 30th May, 2014

Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member

In the matter of:

Maharashtra State Electricity Distribution Co. Ltd.,
5th Floor, Prakashgadi,
A.K. Marg, Bandra (E),
Mumbai-400 051 …Appellant (s)

Versus

1) Maharashtra Electricity Regulatory Commission,
Centre-1, 13th Floor,
World Trade Centre, Cuffe Parade,
Mumbai-400 005

2) Prayas (Energy Group),
Amrita Clinic, Athwale Corner,
Lakdipool-Karve Road Junction,
Deccan Gymkhana, Karve Road,
Pune-411 004.

3) Mumbai Grahak Panchayat,
Grahak Bhavan,
Sant Dynaneshwar Marg,
Behind Cooper Hospital,
Vile Parle (West), Mumbai-400 056

4) Thane Belapur Industries Association,
Plot No. P-14, MIDC,
Rabale Village, PO Ghansoli,
Navi Mumbai 400 701

5) Vidarbha Industries Association,
1st Floor, Udyog Bhawan,
Civil Lines, Nagpur-440 001

6) Shri Kiran Paturkar,
President,
Federation of Industries Association,
Vidarbha,
Tope Nagar, Paonskar Layout,
AMRAVATI-440 018

7) Shri Ashish Subhash Chandarana,
Vaishnavi Food Products,
Plot No. A-1/1, MIDC,
AKOT, District AKOLA 444 101

8) Shri Hemant Kapadia
25, Shantiniketan Colony,
Near Shanimandir,
Aurangabad- 431 001

9) Shri Anil Kelkar,
Institution of Engineers,
Pune Local Centre,
1332 J.M. Road,
Shivaji Nagar, Pune-411 005,

10) Shri Siddharth Sohoni,
Chamber No. 414, Building No. 3,
District Court,
Central Bus Stand CBS,
Nashik -422 002 …Respondent(s)

Counsel for Appellant(s) : Mr. Akhil Sibbal
Mr. Varun Pathak
Mr. Suyash Guru
Mr. Samir Malik
Mr. Salim Inamdar

Counsel for the Respondent(s): Mr. Buddy A. Ranganadhan for R-1
Mr. Sakya Choudhuri
Mr. S.R. Nargolkar,
Mr. Aniket Prasoon &
Mr. Anand K. Shrivastava for consumers

JUDGMENT

RAKESH NATH, TEHNICAL MEMBER

This Appeal has been filed by Maharashtra State Electricity Distribution Company Ltd. challenging the order dated 16.8.2012 passed by Maharashtra Electricity Regulatory Commission ("State Commission") regarding

True up for FY 2010-11, ARR for the FYs 2011-12 and 2012-13 and Tariff determination for FY 2012-13.

2. The Appellant has raised the following issues in the Appeal.

i) Creation of separate category for Government owned and managed hospitals and education institution:

The Appellant in its petition had proposed to introduce a new consumer sub-category within Low Tension/High tension non-domestic (commercial) category consisting of all Government owned and operated educational institutions including higher educational institutes but excluding Government aided educational institutes. Similar approach was proposed for Government owned and operated hospitals. However, the State Commission rejected the plea of the Appellant on flawed appreciation of the judgment of the Tribunal

dated 20.10.2011 in Appeal no. 110 of 2009 and batch- Association of Hospitals Vs. MERC and others.

ii) Interest on working capital:

In the past tariff orders, the State Commission had considered interest on working capital on normative basis as stipulated in the Tariff Regulations, 2005. However, in the impugned order around 856 crores has been disallowed by the State Commission because of the significant amount of consumers' security deposit. The State Commission has not allowed any interest on working capital in the final true up for FY 2010-11 and FY 2011-12 and has only partially allowed for FY 2012-13 since the working capital requirement based on normative principle worked out to zero, as the provision of reducing the working capital by the total amount of consumer security deposit would make the net working capital negative. According to the Appellant, deduction

of security deposit amount from the working capital is wrong as the security deposits as reflecting in the books of accounts of the Appellant is only notional amount, since such amount though reflects in the Balance Sheet in the transfer scheme, the same was never actually received from the erstwhile Maharashtra State Electricity Board. However, the consumer security deposit actually received by the Appellant after the formation of the distribution company as a successor of the erstwhile Electricity Board for distribution functions may be considered for deduction from the working capital.

iii) Disallowance of interest on Income Tax paid:

An amount of Rs. 126 crores was paid towards income tax for the following reasons:

a) Rs. 8.41 crores towards interest levied under Section 210 A of the Income Tax Act, 1961; and

b) Rs. 117.58 crores towards the tax liability arising due to higher claim of depreciation.

Out of total claim of Rs. 126 crores, the State Commission for FY 2010-11, allowed Rs.92 crores and disallowed Rs. 34 crores for the reason that since the Appellant had failed to follow the Accounting Standard in claiming depreciation on the assets created through grants and consumer contribution, the interest paid on such income tax cannot be allowed. The State Commission was of the view that the interest burden due to delayed payment of income tax should not be passed on to the consumers. According to the Appellant, the State Commission ought to have allowed the interest as directed by the Income Tax authorities as the Appellant had by mistake claimed depreciation

on the assets created through grants and consumer contribution.

iv) Additional capitalization and disallowance of CAPEX:

The State Commission approved the CAPEX and capitalization as submitted by the Appellant in the tariff petition for the FY 2010-11, FY 2011-12 and FY 2012-13. However, although the capital expenditure and capitalization amount were approved, due to difference in opening balance of Gross Fixed Assts, the actual expenditure allowed in the tariff order was lower than the amount submitted by the Appellant. Thus, there was disallowance of Rs. 250 crores in relation to depreciation, Interest on Loan and Return on Equity.

3. On the above subject we have heard Mr. Akhil Sibbal, Learned Counsel for the Appellant, Mr. Buddy A. Raganadhan, Learned Counsel for the State

Commission and Mr. Aniket Prasoon and Mr. S.R. Nargolkar, Learned Counsel for the Consumers Association of Hospitals, Pune. They have also filed a reply along with affidavit that if the contention of the Appellant on the first issue regarding a separate tariff category for Government owned and operated hospitals is accepted then the same benefit ought to be extended to their Association.

4. On the basis of the submissions made by the parties, the following questions would arise for our consideration:

i) Whether the State Commission has erred in rejecting the proposal of the Appellant distribution company for creation of a distinct category for Government owned and operated hospitals and educational institutions?

ii) Whether the State Commission has erred in deducting from the working capital requirement the consumer security deposits that was never transferred to the Appellant by the erstwhile Electricity Board pursuant to unbundling of the State Electricity Board and was only a notional amount reflected in the Appellant's books of accounts?

iii) Whether the State Commission was wrong not to allow the interest of about Rs. 32 crores on Income Tax without appreciating that the error relating to claiming the depreciation on assets created through grants and consumer contribution while computing the income tax was bonafide?

iv) Whether the State Commission has committed an error in not passing on the approved capital

expenditure in full in the ARR due to difference in opening balance of Gross Fixed Assets?

5. Let us take up the first issue regarding creation of a separate category for Government owned and operated educational institutions and hospitals.

6. According to Mr. Akhil Sibbal, Learned Counsel for the Appellant, it was prayed before the State Commission that the proposed tariff for Government owned managed and operated educational institute and hospitals may be kept at par with the current Average Cost of Supply in a separate category and may not be subjected to any tariff hike. This Tribunal in its judgment dated 20.10.2011 in Appeal no. 110 of 2009 and batch had held that the real meaning of expression “purpose for which the supply is required” as used in Section

62(3) of the Electricity Act does not merely relate to the nature of activity carried out by a consumer but has to be necessarily determined for the object sought to be achieved through such activity. Further, the Tribunal in judgment dated 28.8.2012 in Appeal no. 39 of 2012 has held that the motive to earn profit is also a valid ground on the basis of which the tariff can be differentiated.

7. According to Mr. Ranganadhan, Learned Counsel for the State Commission, pursuant to the judgment of the Tribunal dated 20.10.2011 in Appeal no. 110 of 2009 and batch, the State Commission had placed the proposed consumers under the newly created 'Public Services' category for whom the tariff has been fixed lower than the commercial categories in which these consumers had been placed in the earlier tariff orders. Further, the impugned order was passed before the

judgment of the Tribunal in Appeal no. 39 of 2012 dated 28.8.2012 upholding Rajasthan Commission's order for differentiating Government owned educational institutions from privately owned educated institutions in tariff categorization.

8. Association of hospitals, Pune have also stated that their members were also rendering public service at 'no profit no loss' basis and, therefore, if the impugned order is altered for the benefit of Government owned and managed hospitals, the same ought to be extended to them.

9. We find that the Tribunal in judgment in Appeal no. 110 of 2009 and batch had held that the State Commission should not have grouped the hospitals, and educational institutions along with consumers of commercial categories such as multiplexes, shopping malls, hotels,

cinema theaters, etc., and should have provided for a new category for them and given them a competitive tariff having regard to the purpose for which the electricity is used by them. Accordingly, the State Commission has created a separate category viz. public services, for educational institutions and hospitals with lower tariff than the tariff applicable to commercial category.

10. We cannot say that the impugned order, is in violation of the Tribunal' s judgment in Appeal no. 110 of 2009 or is illegal being inconsistent with the provision of Section 62 (3) of the Electricity Act. If the State Commission has decided to keep all the educational institutes and the hospitals irrespective of whether these are owned and managed by the Government or owned by private entities under the same category using broad application of "purpose for which supply is required", we

cannot say that the decision of the State Commission is illegal. However, as decided by the Tribunal in judgment dated 28.8.2012 in Appeal no. 39 of 2012, subsequent to the date of the impugned order, the State Commission can differentiate the retail supply tariff of Government owned and operated educational institutions and hospitals from privately owned and operated educational institutes and hospitals, as 'purpose of supply' can be differentiated on the ground of motive to earn profit.

11. The FY 2012-13 is long over and as accepted by the Learned Counsel for the parties, no purpose will be served to remand the matter to the State Commission to re-consider the proposal of the Appellant for creating a separate category for the Government owned and operated educational institutions and hospitals for

FY 2012-13. The Appellant has also not suffered financially on this account as its ARR has not been affected by non-categorization of the Govt. hospitals and educational institutions in a separate category. However, the State Commission shall consider the proposal of the Appellant in this regard if submitted in future tariff petition and decide the issue after considering the suggestions and objections of the public. Accordingly, decided.

12. The second issue is regarding consumer security deposit.

13. According to Mr. Akhil Sibbal, Learned Counsel for the Appellant, the State Commission should have considered actual cash receipts of consumer security deposit received by the Appellant after formation of the distribution company MSEDCL post the unbundling of

the Electricity Board, in the present case from 5.6.2005 and not as per the cumulative balance reflected in MSEDCL's books of accounts which included the consumer security deposit taken by the Electricity Board and which has not been actually received by the Appellant. The Tariff policy under paragraph 8.2.1.(4) states that the working capital should be allowed duly recognizing the transition issues filed by the utilities such as progressive improvement in recovery of bills.

14. Mr. Akhil Sibbal has further submitted that short term loans are a must for smooth functioning of the organization to meet the liabilities regarding fuel/power purchase. The Appellant is required to borrow from financial institutions to meet the working capital requirement, since the amount of security deposit as appearing in their books of accounts is only notional.

15. According to Shri Buddy A. Ranganadhan, Learned Counsel for the State Commission, the amount of consumer security deposit as reflected in the balance sheet of the Appellant has rightly been deducted from the working capital as per the Tariff Regulations. In fact, the Appellant in its petition in case no. 19 of 2012 has stated that it held consumer security deposit of Rs. 4117 crores upto FY 2010-11 and claimed interest of Rs. 211 crores on the entire security deposit. Even while claiming truing up of FY 2010-11 the Appellant had claimed Rs. 211 crore as part of other interest and finance charges being interest on consumer security deposit, which had been allowed by the State Commission in the ARR.

16. Let us examine the Tariff Regulations. The relevant Regulation 76.8.1 is reproduced as under:

"76.8.1 The Distribution Licensee shall be allowed interest on the estimated level of working capital for the financial year, computed as follows:

(a) One-twelfth of the amount of Operation and Maintenance expenses for such financial year; plus

(b) One-twelfth of the sum of the book value of stores, materials and supplies including fuel on hand at the end of each month of such financial year; plus

(c) Two months equivalent of the expected revenue from sale of electricity at the prevailing tariffs; minus

(d) Amount held as security deposits under clause (a) and clause (b) of sub-section (1) of Section 47 of the Act from consumers and Distribution System Users; minus

(e) One month equivalent of cost of power purchased, based on the annual power procurement plan."

Thus, the amount held as security deposit under Section 47(1)(a) and (b) from the Consumers and Distribution System users has to be deducted from the working capital allowed to the distribution licensee.

17. Admittedly the security deposit amount as received by the Electricity Board is reflected in the books of accounts of the Appellant. After taking into account the security deposit of the consumers as reflected in the books of accounts of the Appellant, as per the Tariff Regulation, the net working capital amount work out to be negative. Thus, the interest on working capital has been rightly disallowed by the State Commission in consonance with the Regulations.

18. Regulation 76.8.3 stipulates that interest shall be allowed on the amount held as security deposit from the distribution system users and consumers. Accordingly, the Appellant has claimed interest on the entire consumer security deposit as reflected in its books of accounts which has also been allowed by the State Commission in the ARR.

19. According to Section 47(1) of the Electricity Act, the distribution licensee is entitled to recover security from the consumers as determined by the Regulations for payment to him of all monies which may become due to him in respect of electricity supplied and provision of electrical line or plant or meter. As per Section 47(4) of the Electricity Act, the distribution licensee has to pay interest equivalent to bank rate or more as specified by the State Commission and refund such security on the request of the person who gave such security.

20. The Appellant has claimed and also allowed by the State Commission the interest on entire security deposit as reflected in the books of accounts of the Appellant as expenditure in the ARR and, therefore, the Appellant cannot claim that for computing the working capital requirements, the amount of consumers security which

was collected by the Electricity Board should not be deducted.

21. The State Government under the transfer scheme under Section 131 of the Electricity Act has vested in the Appellant distribution licensee the property, interest in property and rights and liabilities as successor of the Electricity Board for distribution business. Accordingly, the balance sheet of the Appellant has been drawn up and the consumer security amount as held by the Electricity Board just prior to the unbundling stand transferred in the books of accounts of the Appellant through the transfer scheme. The Appellant is now responsible to meet the liability of the erstwhile Electricity Board in respect of the consumer security deposit. In case the consumer security deposit has been utilized by the erstwhile Electricity Board to meet

its revenue gap in the past due to its own inefficiency or otherwise and is not available as cash to the Appellant on unbundling of the Board, it could not be a reason for not considering the entire amount of consumer security deposit as reflected in the books of accounts of the Appellant in calculating the working capital requirement as per the Regulations. We feel that the consumers cannot be burdened by restricting the deduction of consumer security deposit to the amount actually recovered by the Appellant after formation of the distribution company as a successor of the erstwhile Electricity Board, while computing the working capital requirements.

22. Thus, we do not find any merit in the contention of the Appellant in this regard.

23. The third issue is regarding disallowance of interest on income tax paid.

24. According to Mr. Akhil Sibbal, Learned Counsel for the Appellant, error relating to claiming the depreciation on the assets created through grants and consumer contribution was bonafide and that the interest of Rs.33.84 crores paid by the Appellant is interest calculated under Section 234 B and 234 C which was assessed by the Income Tax department at the time of scrutiny and assessment. Therefore, the interest is not due to late payment of income tax but due to the fact that the amount was reassessed by the income tax authority and the interest on income tax was computed from the date of filing or due date of filing of income tax return. The interest on income could not have been

foreseen by the Appellant at the time of filing of income tax return.

25. According to Mr. Sibbal, the interest on income tax cannot be considered as a part of the income tax as they are different from each other and interest should be termed as a cost for the company and cannot be linked to the income tax per say.

26. According to Mr. Buddy A. Ranganadhan, Learned Counsel for the State Commission, Appellant had failed to deduct the funds received from the consumer contribution from the fixed assets while claiming depreciation as per the Accounting Standard. Therefore, the income tax department reassessed the income tax and charged interest on the differential income tax for the delay in payment of income tax. The

State Commission as per the requirement of the Electricity Act, 2003 did a prudent check and disallowed the interest charges.

27. Let us examine the Tariff Regulations. The relevant Regulations 76.2.2 is reproduced as under:

"76.2.2 The Distribution Licensee shall include an estimate of his income-tax liability along with the application for determination of tariff, based on the provisions of the Income Tax Act, 1961:

Provided that any change in such income-tax liability on account of assessment under the Income-tax Act, 1961 shall be dealt with as being on account of uncontrollable factors:"

According to the Regulations, the distribution licensee has to estimate the income tax liability based on the provisions of the Income Tax Act, 1961 and claim the same in the ARR. Any change in income tax liability on account of assessment under the Income Tax Act 1961

shall be dealt with as being on account of uncontrollable factor.

28. In the present case, the Appellant made a mistake in assessing its income tax by not deducting the consumer contribution while calculating the depreciation as per the Accounting Standards and thus paid less income tax than was admissible. The Income Tax authorities on assessment found the mistake and claimed additional income tax with interest for delayed payment from the due date. According to the Regulations, the Appellant is entitled to claim any change in income tax on account of assessment under the Income Tax Act to be dealt as uncontrollable factor but it does not entitle him to claim interest for the delayed payment if the additional tax liability is not on account of uncontrollable factors. Admittedly the

Appellant did not follow the Accounting Standards while filing self assessment of its income tax. The Appellant is entitled to claim additional income tax as assessed by the Income Tax authority as expenditure in ARR as per the Regulations but it is not entitled to claim the interest on income tax caused due to its not following the Accounting Standard. The State Commission on prudent check rightly felt that the liability of interest on income tax due to the Appellant not following the Accounting Standard should not be passed on the consumers.

29. The ruling of the Income Tax Tribunal relied by the Learned Counsel for the Appellant in the case of ITAT of Panaji, Salgaocar Mining Ind. (P) Ltd Vs. JCIT, ITA no. 31/PNJ/2002 that interest cannot be construed to be part of the income tax will be of no help to the

Appellant. The interest on income tax due to Appellant not following the Accounting Standard is not a prudent expenditure and the same cannot be allowed as a cost in the ARR of the Appellant.

30. Thus, the third issue is also decided against the Appellant.

31. The fourth issue is regarding disallowance of the approved capital expenditure due to difference in opening balance of Gross Fixed Assets.

32. According to the Appellant, the difference in opening balance is due to following reasons:

    i) The State Commission had considered 50% of the approved capitalization for DPR Schemes and the total capitalization on Non-DPR Schemes had been capped at 20% of that for approved DPR

schemes in past years in earlier tariff orders due to non-submission of Cost Benefit Analysis report by the Appellant.

ii) The opening GFA for FY 2007-08 has been adjusted in line with the direction of the State Commission i.e. taken as per audited closing GFA of FY 2006-07, however, the corresponding adjustments in the accumulated depreciation was not carried out in the subsequent filings, which resulted in negative net assets in certain blocks of fixed assets.

iii) Disallowance of depreciation on the assets which did not form part of CAPEX Scheme (such as Land & Land Rights, building, vehicles, office equipment, etc.) and the cost is incurred by the Appellant through internal funding.

iv) Difference in computation of Debt: Equity ratio for funding arrangement due to difference in consumer contribution and grants.

33. According to the Appellant, the cost benefit analysis report till FY 2010-11 has been submitted and accordingly the State Commission has approved capital expenditure and Capex related expenses. However, the opening GFA, opening balance of loan, funding pattern for capital expenditure schemes were considered based on figures arrived after approving the capitalization of 50% against the DPR Schemes and 20% on the capitalization of Non-DPR Schemes.

34. Thus, the difference in GFA is arising mainly on the following counts:

(i) Difference of Rs. 160 crores in the opening balance in GFA of FY 2007-08.

(ii) Difference of Rs. 815 crores in capitalization approved for FY 2007-08.

(iii) Difference of Rs. 208 crores in capitalization approved for FY 2009-10.

35. On the above issues, learned counsel for the State Commission has made the following submissions:

(i) With regard to difference in opening balance in GFA of FY 2007-08, the State Commission in its order in case 116 of 2008 had trued up the ARR of FY 2007-08 and the State Commission had observed discrepancies in Audited Annual Accounts in relation to gross block compared to gross block presented in the previous year's annual accounts. Further, the State Commission had disallowed capitalization of Rs. 80 crores in relation to single phasing scheme. This had resulted reduction in approved asset base by

Rs. 80 crores and the same was reflected in the approved opening GFA of FY 2007-08. In the present appeal the Appellant had disputed opening balance of FY 2007-08 claiming retrospective adjustments of the expenses related to the disapproved capitalization. The Commission normally approves opening GFA in any particular year based on closing GFA of the previous year, unless there is a reason to revisit GFA of the previous year. In the present case the State Commission, so far has not received any prayer, with supporting reason, computation and explanation from the Appellant to reconsider and revisit its opening GFA of FY 2007-08. Therefore, the question of reconsidering the same would not arise.

(ii) Regarding difference of Rs. 815 crores in capitalization approved for FY 2007-08, the State Commission had allowed capitalization of Rs. 463 crores as against the claim of Rs. 1278 crores resulting in the said difference in capitalization. In the truing up of FY 2007-08 (case 116 of 2008) the Appellant had claimed total capitalization of Rs. 1108 crores for FY 2007-08 but the State Commission restricted it to Rs. 463.16 cores as per the in-principle approval that had been granted by the State Commission for carrying the capital expenditure. Till date the Appellant had not filed any claim with supporting reason, computation and explanation before the State Commission to reconsider and revisit the capitalization of FY 2007-08. The State Commission for FY 2008-09 had disallowed

capitalization due to non-submission of cost benefit analysis, but when the Appellant submitted the requisite details in the tariff petition for FY 2012-13, the State Commission approved these expenses after considering the Appellant's prayer supported by the requisite reasoning and computational details.

(iii) As regarding difference of Rs. 208 crores in capitalization for FY 2009-10, while truing up of FY 2009-10, in case No. 100 of 2011, the State Commission had approved capitalization of Rs. 2065 crores as per the submissions made by the Appellant. However, the Appellant later filed a review petition seeking review of capitalization to Rs. 2273 crores which was not allowed.

36. We find that the main reason in difference in the opening GFA in the impugned order is due to

disallowance of certain capitalization in the earlier orders for previous years due to non-submission of the requisite details. The State Commission in the past had reconsidered the capitalization when the Appellant had furnished the requisite details. Therefore, we give liberty to the Appellant to file a petition raising its claims with supporting reason, computation and explanation and the State Commission shall consider the same and decide according to law. Accordingly, directed.

37. **Summary of our findings:**

i) **Creation of separate category for Government owned and managed hospitals and education institution: The impugned order is not in violation of this Tribunal's judgment in Appeal no. 110 of 2009 and not inconsistent with the provisions of**

Section 62(3) of the Electricity Act, 2003. However, it is open to the State Commission to differentiate the retail supply tariff of Government owned and operated educational institutions and hospitals from privately owned and operated ones in terms of the findings of this Tribunal in judgment dated 28.8.2012 in Appeal no. 39 of 2012. The State Commission shall consider the proposal of the Appellant in this regard if submitted in future and decide the issue after considering the suggestions and objections of the public.

ii) Interest on working capital: The contention of the Appellant regarding deduction of consumer security deposit from the working capital requirement is rejected as it is inconsistent with the Tariff Regulations and the consumers cannot be

burdened on this account especially as they had deposited the security with the erstwhile Electricity Board which is reflected in the books of accounts of the Appellant.

iii) **Disallowance of interest on income tax: The claim of the Appellant regarding interest on income tax assessed by the Income tax authorities due to mistake in self assessment of income tax by the Appellant due to not following the Accounting Standards is rejected as the imprudent expenditure cannot be allowed by the State Commission.**

iv) **Additional capitalization and disallowance of CAPEX: We have granted liberty to the Appellant to file a petition raising its claims with supporting**

documents and the State Commission shall consider the same and decide according to law.

38. In view of above, the Appeal is dismissed as it has no merit. The State Commission shall consider the additional capitalization at the appropriate time in future if raised by the Appellant as observed by us in this judgment.

39. Pronounced in the open court on this **30th *day of May, 2014***.

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

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REPORTABLE/~~NON-REPORTABLE~~

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