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March 6, 1991

VIA MESSENGER

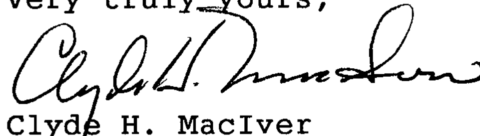
Mr. Paul Curl
Acting Secretary
Washington Utilities
and Transportation Commission
1300 S. Evergreen Park Drive S.W.
Chandler Plaza Building
Olympia, Washington 98504

Subject: In the Matter of the Adoption of WAC 480-120-021, -106, -138, and -141 Relating to Telecommunications Companies. Docket No. UT-900726

Dear Mr. Curl:

Enclosed for filing on behalf of the Northwest Pay Telephone Association are the original and nineteen copies of its Initial Comments in the above rulemaking proceeding.

Very truly yours,



Clyde H. MacIver

cc: Mr. John Fletcher (w/encl.)

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Adoption of WAC 480-120-021, -106, -138, and -141 relating to telecommunications companies.	))))))	Docket No. UT-900726 INITIAL COMMENTS OF NORTHWEST PAYPHONE ASSOCIATION

I.

INTRODUCTION

The Northwest Payphone Association (NWPA) submits the following initial comments on the draft rules relating to alternate operator services, pay telephones, and form of bills.

NWPA is an association of businesses engaged in the provision of privately owned pay telephones to members of the public. There are approximately 7,000 privately owned pay telephones serving the public within the state of Washington.

Approximately 20 percent of the privately owned pay telephones are equipped with "store and forward" technology and as such are operator service providers. The balance, approximately 80 percent of the privately owned pay telephones, are aggregators which do not provide operator services. The private pay telephone industry in Washington is moving away from offering alternate operator services and an increasing

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number are aggregators only. "Store and forward" amounts to redundant technology which should be provided from a central switch or node in the same fashion as such functionalities are provided to LEC pay telephones by the LEC's.

It is recognized that the private pay telephone industry suffers from an image problem. The industry, however, has changed dramatically. The perceptions of many regulators and consumer advocates, however, have not yet changed. Many continue to view the private pay telephone industry as a "fringe" industry characterized by "mom and pop" operators, part-time operators and individuals who are in the business on a temporary basis with the goal of achieving a quick profit.

The industry, however, has in fact undergone major changes. Small operators still exist along with the larger operators. However, most private pay telephone operators are now committed to this industry for their full time livelihood. They are professionals in the business, many with very substantial investments committed to their businesses. Independent pay telephone operators recognize that the best long term interests of the industry require sound business practices and fair treatment of end users.

The independent pay telephone operators support fully the concept of widely available service at reasonable rates. There currently exists, however, severe obstacles to achieving this goal. The draft rules would raise further barriers to fair competition by increasing the price squeeze through "price caps" and mandated "prevailing rates" without addressing the

current unfair competitive conditions and costs faced by the industry. The proposed rules address the "symptoms" of the existing unfair competitive conditions but not the underlying causes. Existing barriers to fair and effective competition will grow higher under the draft rules, a result contrary to sound regulatory policy.

The independent pay telephone provider knows that the main reason he or she has been unable to lower prices or has had to rely on surcharges is because of the unequal competitive conditions which exist, such as (1) discriminatory and excessive public access line charges, (2) outmoded telephone company tariffs, (3) unfair competition from cross-subsidized pay telephones of the LEC's and (4) the lack of access to the same services and functionalities that the LEC's make available to their own payphones, which in turn compete with the independent pay telephone.

Examples of conditions which currently confront the providers of private pay telephones and which mandate their reliance on operator service providers other than local exchange companies include, but are not limited to, the following:

1. Local exchange company public access line charges capture from 40 to 60 percent of the gross revenues of independent pay telephones. Competing LEC's, however, are not required to impute such charges to their competing payphones. In addition, competing LEC payphones are subsidized by revenues generated from other LEC telecommunication services. The LEC's

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payphones are included in the telephone companies rate base and, as such, the LEC is achieving a return on this investment independent of the specific revenues generated by the pay telephone;

2. It is currently possible to make <u>all</u> credit card calls, including local, intralata and interlata calls, from private pay telephones with no revenue going to the private pay telephone provider, whereas the LEC always enjoys revenues from the use of its payphones;

3. U S West refuses operator services to private payphone customers, unless it is a U S West credit card call (in which event U S West retains <u>all</u> the revenues from the call), thus forcing the private pay telephone provider to contract with an operator service other than a local exchange company; and

4. Due to the opportunity to subsidize their pay telephones with other revenue sources, LECs can and do offer selected site location owners a substantial percentage (30 percent or more!) of LEC pay telephone gross revenues, including a percent of long distance revenues the LEC receives from the OCC, to induce the site location owner to accept the LEC pay telephone instead of an independent pay telephone. The same LEC will refuse, however, to share any revenues with the privately owned pay telephone provider, who, ironically, is paying public access line charges to the LEC, charges which consume 40 to 60 percent the his gross revenue. The public access line charge revenues, in effect, can be used by the LEC

as a source of funds to compete for site locations by offering revenue sharing incentives to the site location owner which the privately owned pay telephone provider cannot realistically meet.

Public access line charges, the absence of any reimbursement or sharing of local and intralata credit card or operator-assisted call revenues by LECs, and LEC refusal to provide operator services and other functions to private pay telephones, constitute some but not all of the competitive advantages enjoyed by the LECs in the promotion of their pay telephones and which make reliance on non-LEC operator service providers and surcharges essential to the survival of the private pay telephone provider.

Given (1) the absence of any semblance of a level playing field as between privately owned pay telephones and LEC pay telephones and (2) the fact that neither operating costs nor revenue opportunities of the privately owned pay telephones are comparable to the competing LEC pay telephones, the Commission should not, in the context of a rulemaking proceeding, mandate that the rates and charges for the benefit of the privately owned pay telephones must be equalized with the "prevailing" rates and charges for LEC pay telephones. Without the benefit of a proper fact finding proceeding to determine and evaluate the differences in operating costs and competitive conditions between the two competing segments of the industry, the rate mandates of the draft rules are arbitrary and reflect the wrong regulatory policy.

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As initially stated, private pay telephone providers are not in favor of consumer abuses whether they be in the form of excessive charges, inadequate information, inability to access the IXC of the caller's choice, or in any other form. It is essential, however, to the survival of the independent pay telephone industry, to develop all relevant facts, in an appropriate and fair proceeding relative to LECs, private pay telephones, and operator service providers before or in conjunction adopting those portions of the proposed rules which cap surcharges and set AOS rates and charges at prevailing U S West/AT&T rate levels.

II.

DISCUSSION

1. The Draft Rule Improperly Sets Rates and Charges; The Commission Is Not Empowered To Set Rates In A Rulemaking Proceeding.

The SBIS observes that the draft rules would require AOS companies, as a condition of service to aggregators, to assure that aggregators (i.e., privately owned pay telephones) charge no more for telecommunication services or surcharges than authorized by the Commission or by the AOS tariff pursuant to the draft rules. The SBIS recognizes that "This could limit rates charged by aggregators." and that "The economic effect... is unknown." (SBIS, page 3)

These observations are correct and serve to point out the serious dilemma, both legal and practical, for the independent pay telephone industry posed by the draft rules. The ratemaking aspects of the drafts rules are numerous,

including setting rates for directory assistance and access to local exchange, 1-800 and IXCs at specific rates and capping rates for other services at "prevailing rates" (rates of USWC and/or AT&T). The draft rules further set rates by limiting charges to consumers for any commission, location fee or surcharge and charges of any kind to a customer for the benefit of a call aggregator to twenty-five cents. (WAC 480-120-138 and 480-120-141) Put simply, the surcharge cap at 25 cents will end the business of many payphone providers unless the Commission also addresses and takes steps to reduce present barriers to effective competition.

The draft rules provide that the affected "regulated company" may seek rates different from the prevailing USWC/AT&T rates by presenting "persuasive evidence" to establish that the prevailing rates are not fair, just and reasonable. Not only is this standard too vague and ambiguous for ratemaking purposes, it provides no protection whatsoever for the aggregator pay telephone company.

As stated above, approximately 80 percent of the independent pay telephones in the state of Washington are aggregators and not regulated operator service providers. The operator service provider serving an aggregator will have no way to demonstrate, therefore, that the surcharge set in WAC 480-120-141(10)(b), for example, results in a rate which is not fair, just and reasonable. The surcharge is required by and is passed on to the aggregator/pay telephone company. The operator service provider which implements the surcharge has no

way to bring the relevant costs and operating conditions of the independent pay telephone company before the Commission in a rate proceeding. The competitive circumstances and relevant costs which support the surcharge relate to the aggregator, not the operator services provider. Consequently, the suggestion in the draft rule that relief is available for deviation from the "prevailing rates" and the 25 cent surcharge cap is of no practical benefit to approximately 80 percent of the aggregators/pay telephones in the state of Washington.

The effect of the proposed rule is to set rates which will severely limit an essential revenue source for the independent pay telephone provider without consideration of the relevant costs and competitive conditions and without providing any practical way for the aggregator or operator service provider to establish rate levels which are truly fair, just and reasonable.

The draft rule considers only consumer costs. The costs of the provider of the subject service are not considered in the draft rule. If revenues to operator service providers and aggregators are to be set and/or limited through rates established in the draft rule, relevant costs and competitive conditions should also be considered and dealt with. The costs of USWC and AT&T are clearly not mirrored by the aggregators and non-LEC operator service providers impacted by the draft rules. Regulatory policy should not support the establishment of rates, either by rule or in a ratemaking proceeding, without recognition of related costs, even if the rates reflect the

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value of the service as well as cost elements. In particular, it would not be sound regulatory policy to adopt rates with only "consumer costs" in mind.

2. The Draft Rules Ratemaking Provisions Are Confiscatory.

Rates, even if established in a ratemaking as contrasted to a rulemaking proceeding, must not be confiscatory. Rates which are set below cost in effect unlawfully confiscate one party's property for the benefit of another. The rates set and/or capped by the draft rules are predicated on perceived consumer costs, and not the costs of the provider of the service. The effect of the rates in the draft rules would be to shift substantial revenues for the provision of operator services and pay telephone services from the privately owned pay telephone industry and non-LEC operator service providers to the LEC's. Sound regulatory policy should discourage and not encourage such a result.

Several other legal and practical issues related to the ratemaking aspects of the draft rules are discussed in NWPA's original Initial and Reply Comments filed with the Commission in this docket in 1990. To avoid undue redundancy, these written comments are incorporated herein by reference.

3. The Draft Rules Properly Include Local Exchange Companies Under the AOS Definition (WAC 480-120-021).

The LECs will resist inclusion under the rules for operator service providers. The LECs must be under the same rules as their competitors. To exclude the LECs would be a

denial of equal protection of the laws as well as bad public policy.

The LECs unquestionably compete with both other operator service providers and private payphones. LECs commonly provide billing and collection services for other operator service providers. USWC pay telephones aggregate and pass calls off to IXC's, such as AT&T, for a commission. USWC's payphones can be and are presubscribed to operator service providers pursuant to the election of the site location owner. In addition, LECs provide operator services for other LECs and payphones. USWC, Telephone Utilities, Inter Island Telephone and Contel are a few examples of LECs providing and/or using other LECs for operator services.

For uniformity for the consumer it is necessary to include LECs under the aggregator/operator service rules. Labeling, branding and other operational requirements the draft rules contemplate for operator service providers and aggregators must apply to the dominant provider of such services, the LEC's.

The LECs may contend, as they did previously, that they should not be under the proposed rules because any "consumer problems" perceived by the Commission in connection with operator service providers and/or aggregators are not of their making. This argument, if made again, barely rises to the dignity of a response. The "unlevel" playing field and pricing anomalies that exist in the AOS/aggregator market are in fact created, fostered and preserved by the LEC's, all to

their competitive advantage. The resulting impacts on costs to the consumer are unquestionably attributable in part to the activities of the LEC's in the areas of billing and collection, validation, operator services and pay telephones charges. Any rules regulating the activities of the providers of operator services and pay telephone services must necessarily, therefore, apply across the board and in particular should not exclude the dominant provider of such services. To exclude the LECs from the proposed rules would serve only to erect yet higher barriers to competition.

4. <u>FCC Rulemaking Proceeding: In The Interests Of Uniformity For Both The Operators And Consumers, The Commission Should Consider Evaluating The Outcome Of The FCC Rulemaking Proceeding Prior To Adopting Rules Herein</u>.

The FCC is currently conducting a rulemaking proceeding to adopt rules to implement the recently enacted "Operator Services Act", which will be codified as 47 U.S.C. 226. (CC Docket No. 90-313; FCC90-417; 56 FR 402) Under this rulemaking proceeding, the FCC is considering rules which, among other things, (1) require the provision of certain information to consumers by operator service providers and call aggregators; (2) prohibit the blocking of 800 and 950 access by aggregators; (3) prohibit most call splashing and charging for unanswered calls by operator service providers; (4) prohibit aggregators from charging more for 800 or 950 access code calls than for calls using the presubscribed operator service providers; (5) establish minimum standards for the routing and handling of emergency calls by operator service providers; (6)

require operator service providers to provide to inquiring consumers information about changes in services and consumer choices; and (7) require aggregator equipment or software manufactured or imported on or after April 17, 1992 to be capable of processing of 10XXX access code calls. The FCC is also proposing that operator service providers be required to file certain information regarding their rates, consumer complaints and various costs.

It is not suggested that the FCC rulemaking preempts state regulation of intrastate services as long as state regulation does not unduly interfere with federal regulation. In the interests of uniformity, however, it would be good public policy for this Commission to attempt to achieve as much consistency as possible with the federal regulations pertaining to operator and aggregator services.

For example, the draft rules here provide for a 25 cent charge to the caller for access to 1-800 and IXC service (WAC 480-120-138(4)), a charge not permitted under FCC rules. Since it is not possible to determine whether the call is interstate or intrastate at the time of access, the pay phone provider could not collect this rate from the caller without risk of violating federal rules. However, a charge to the LEC by the independent pay telephone provider would not be inappropriate in that the LEC is compensated for the access service. This is a significant issue for independent pay telephones, because 1-800 traffic constitutes approximately 35% of their traffic.

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Attached to these comments as Attachments A and B are reproductions of written comments submitted to the FCC by Senators Breaux, Kerry, Burns and Lott and Senators Gorton and Burns. These commentors express concerns regarding the public policy and competitive impacts of the FCC rulemaking proceeding and urge the Commission to consider, among other things, developing a compensation system for independent payphone operators and to carefully review current billing and collection and validation arrangements in the industry to prevent barriers from remaining or being erected that will block development of effective competition in the marketplace. The concerns expressed by the senators are shared by the Northwest Payphone Association.

The draft rules under consideration here, while dealing with some important areas relating to aggregators and operator service providers, fail to deal at all with the many current inequities in the competitive arena which must be understood and dealt with if confiscatory rates are to be avoided and barriers to effective competition in the marketplace are to be prevented.

5. Small Business Impact Statement.

Full analysis of the SBIS is not possible given the information available. However, a few observations on assumptions made in the SBIS are possible.

The SBIS assumes lost surcharge revenue will be "offset by reduced revenue sensitive expenses of 20 percent". (page 8, paragraph 6) This is an incorrect assumption. Also,

an assumption that coin revenue would increase due to reduced surcharges is not correct. Coin (local) calls are not subject to and therefore not elastic relative to surcharges.

Despite the fact that the impacts of the draft rule may be understated by a substantial amount, on its face the SBIS shows the devastation the rule would visit upon both the small and large COPTs. The SBIS analysis estimates the cost per $100 of gross sales of compliance with the draft rules. According to the SBIS, the cost of compliance with the draft rules for small and large COPTs would be 18.28 percent and 7.50 percent of gross revenues, respectively. Few business entities, and in particular COPTs, competing on an unlevel playing field with LECs, could sustain losses of up to nearly 20 percent of gross revenues and remain in business. The draft rules would most certainly result in monopolization by the dominant LECs of the payphone industry. It is respectfully submitted that this result is clearly contrary to the public interest.

III.

CONCLUSION

The NWPA does not object to the Commission adopting rules dealing with notices, branding, access to IXCs of the consumer's choice and other service oriented requirements. The NWPA does strongly oppose, however, many of the ratemaking provisions in the draft rules in light of the inequities in the competitive environment under which private pay telephones must compete with LEC pay telephones.

The consumer is fairly protected and public policy served by the notice and branding requirements and the ability to access the IXC of choice, thereby avoiding a presubscribed carrier and surcharges altogether. Given these protections, it is respectfully submitted that the marketplace should be allowed to set the level of surcharges.

The elimination of or severe reduction in the level of surcharges, prior to the availability of other revenue sources for the independent pay telephone will end competition in the payphone industry. It is hoped and believed that the Commission will conclude that such a result would not be in the public interest.

Respectfully submitted this 6th day of March, 1991.

MILLER, NASH, WIENER, HAGER & CARLSEN

By: ______________________
CLYDE H. MacIver

Attorneys for the Independent
Payphone Association

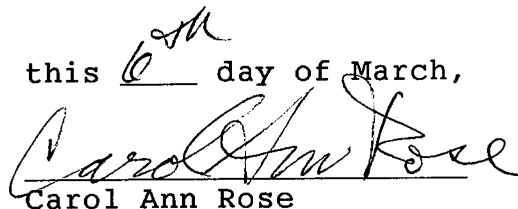
0749M

CERTIFICATE OF SERVICE

I hereby certify that I have this date served, via messenger service, the original and nineteen copies of Initial Comments of Northwest Payphone Association on the following person:

Mr. Paul Curl
Acting Secretary
Washington Utilities
and Transportation Commission
1300 S. Evergreen Park Drive S.W.
Chandler Plaza Building
Olympia, Washington 98504

DATED at Seattle, Washington, this 6th day of March, 1991.



Carol Ann Rose

0749M

ADDITIONAL VIEWS OF MESSRS. BREAUX, KERRY, BURNS, AND LOTT

As original sponsor (Senator Breaux) and co-sponsors of S. 1660 (Senators Kerry, and Burns), and as a participants [sic] in S. 1660 Committee Draft negotiations (Senator Lott), we fully support S. 1660 as passed by the Committee. A tremendous amount of effort went into producing a bill that is expected to solve serious consumer problems in a very technical and complex environment.

Largely, the legislation provides clear regulatory guidance to the FCC. Effective regulations are needed to address problems accompanying the emergence of numerous OSPs vying to serve telephone users at thousands of transient-guest and payphone locations around the country.

The problem of "blocking" is among the most serious of those facing consumers. This bill establishes a consumer's right to freely select their choice of long-distance carrier from transient user telephones. It is the consumer's power of free exercise of choice that will assure the development of beneficial competition in the OSP industry.

Central to any legislative/regulatory formula for a fair resolution of the "blocking" issue is the matter of compensation for independent or private public payphone owners. Under the current system, an independent payphone provider is compensated for calls routed to an OSP under a presubscription contract to provide long-distance services. This bill's unblocking provisions will encourage the consumer to freely choose any long-distance (interexchange) carrier.

The bill anticipates that consumers will often use independent payphones to select non-subscribed interexchange carriers via access codes, such as 1-0-XXX, 950-XXX, or an 800 number. As matters now stand, independent payphone owners will ordinarily receive no compensation for the traffic forwarded to non-affiliated interexchange carriers. Unless, of course, the payphone provider assesses an unpalatable charge directly on the end user for what are traditionally free calls.

At the same time, other telephone call handlers earn revenue on routed calls. Interexchange carriers such as MCI, Sprint, and AT&T, earn revenues for all calls carried. Local exchange carriers, the Bell operating companies, GTE, etc., earn revenues from access charges assessed on these calls. Also, to the extent that local exchange carriers include their investments in payphones in their rate bases, they

are ensured of returns on all calls. Telephone call handlers in transient facilities such as hotels, motels, and hospitals are able to assess call charges on guests' bills.

In contrast, the independent payphone owner who invests in payphone equipment and pays for installation and maintenance as well as on-going central office connection and line charges will receive no compensation for transferring consumer calls, as is required by this bill, to their choice of long-distance carriers. The independent payphone owner may even lose revenue-generating calls as their payphones are made unavailable by non-compensating callers.

Negotiators strived for a balanced proposal that would maximize possibilities for achieving a principal objective: an environment wherein consumers would have access to their carriers of choice. To assure such an environment the bill imposes severe penalties for "blocking," whether in transient facilities or at independent payphones. At the same time it demands the removal of technological and other disincentives to unblocking, including fraud protection considerations, and the denial of commissions, which will encourage all PBX equipment owners in transient facilities to allow consumers their choice of long-distance carrier.

But the bill voted out of Committee broke the circle of carefully crafted incentives deemed necessary to reaching the unblocking objective. Up to the day prior to mark-up, the draft of the bill supported by Senators who participated in negotiating its terms included a mandatory requirement that the FCC develop a compensation system for independent payphone operations. This mandatory language became permissive (the bill approved by the committee, directs the FCC to "consider whether compensation should be provided") as the Committee chose to allow the Commission to examine the compensation question in light of their resolution of complex forms-of-access-codes issues.

We support compensation for independent payphone operations. Independent payphone owners alone would be subjected to a legal requirement that they tie up their equipment with free calls. They argue with justification that fair play requires an order to the FCC to institute a system which will assure compensation for such calls.

Our expectations are that the unblocking objective should be achieved in the earliest possible time, and a resolution of the compensation question is a sine qua non for achieving that end. If

consumer problems in the OSP industry are not resolved in a reasonable time, these issues will be re-visited.

JOHN B. BREAUX
JOHN F. KERRY
CONRAD BURNS
TRENT LOTT

0752M

ADDITIONAL VIEWS OF MESSRS. GORTON AND BURNS

We welcome the Committee's consideration and approval of S. 1660, the Telephone Operator Consumer Services Improvement Act of 1990. We are writing separately because of our desire to underscore to the Federal Communications Commission the need to carefully review current billing, collection, and validation arrangements in this industry.

In the discussions surrounding S. 1660, we became aware of wide disparities in the costs and availability of certain services between AT&T and other operator service providers. Many local exchange carriers (LECs) provide billing and collection services and access to validation data to AT&T but not to any other OSPs. Further, among the LECs that provide these essential services to the OSPs, there are significant price differences in the charges for those services. The substantial gap in what AT&T frequently pays to the LEC versus any other OSP for billing, collection, and validation services and the unavailability of those services at any price to AT&T's competitors suggest that these differences may be acting as a barrier to fuller development of operator services competition.

Competitive OSPs contend that billing and collection rates that they pay range from a low of about 25 cents per bill and 4 cents per call to a high of around 55 cents per bill and 15 cents per call. Moreover, many BOCs appear to offer volume discounts to the few carriers--possibly only AT&T--who could qualify and which result in a lower per call price for billing and collection services. Such a result clearly would be untenable under the Commission's access charges scheme, in which all carriers pay charges based on uniform, undiscounted rates for local exchange access.

OSPs are wholly dependent on the LECs for validation of calling cards and billed telephone numbers (either collect or third party billed) and for the provision of billing and collection services for those calls. The inability to obtain such services from the LECs has caused many problems for the industry. Today, AT&T is the only carrier capable of accepting, validating, and collecting all billing methods. This situation poses unfair constraints on competitive carriers. We urge the FCC to consider ways to eliminate this problem.

The "bottleneck" nature of billing, collection, and validation services does present the opportunity for discriminatory treatment of various competitors. Equally important is the effect that pricing

differences for these services appears to be having on the ultimate rates charged to the consumer. If competition in the operator services market is to flourish on a price basis, the Commission will also need to examine the rates charged for billing, collection, and validation to ensure that those essential services are provided to all OSPs on a nondiscriminatory basis.

It is not our intent to allow barriers to be erected that may block development of competition in this marketplace. Accordingly, we strongly encourage the FCC to address expeditiously the availability and cost of billing, collection, and validation in the context of the rulemaking required under section 4 of the bill. It is our hope that through the Commission's prompt resolution of these issues no single carrier will enjoy any competitive advantage arising from discriminatory or preferential treatment. This can only lead to a more fully competitive industry and lower rates for consumers of these services.

SLADE GORTON
CONRAD BURNS

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