

BEFORE THE
PHILADELPHIA WATER COMMISSIONER

In the Matter of the Philadelphia Water
Department's Proposed Increase in Rates for
Water and Wastewater Utility Services

FY 2009-2012

Hearing Officer Harris T. Bock Presiding

REPLY BRIEF OF THE NEXT GREAT CITY STORMWATER SUBCOMMITTEE

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I. INTRODUCTION

The Next Great City Stormwater Subcommittee submits this Reply Brief in response to the arguments set forth in the Initial Brief filed by Sunoco, Inc. (R&M) (“Sunoco”), that the Philadelphia Water Department (“PWD” or “Department” or “Water Department”) lacks the authority to assess and collect a stormwater management service charge or, in the alternative, that it lacks the authority to assess and collect such a charge from Sunoco.

II. PROPOSED FINDINGS OF FACT

1. Stormwater complicates the Philadelphia sewage system and sewage disposal plants. (Technical Hearing Tr., 936:19-937:2, 939:3-9, J. Dahme; NGCSS St. 1, 12:9-22, W. Horner.)
2. Even when it does not pass through combined sewers, stormwater is a substance that contains any of the waste products or excrement or other discharge from the bodies of human beings or animals and any noxious or deleterious substances being harmful or inimical to the public health, or to animals or aquatic life, or to the use of water for domestic water supply or for recreation. (Technical Hearing Tr., 934:15-935:19, 937:11-14, J. Dahme; NGCSS St. 1, 18:11-16, W. Horner.)
3. Stormwater also complicates the operation of municipal separate storm sewers. (NGCSS St. 1, 12:17-20, W. Horner.)
4. Stormwater pollutes Philadelphia rivers and streams. (Technical Hearing Tr., 934:15-935:19, J. Dahme.)
5. The Water Department is providing stormwater management services to reduce the pollution of Philadelphia rivers and streams. (Technical Hearing Tr., 937:18-939:2, J. Dahme.)

6. Philadelphia rivers and streams being polluted by stormwater runoff are also those from which Philadelphia draws its drinking water. (Technical Hearing Tr., 1044:3-19, D. Katz; NGCSS St. 1, 18:11-16, W. Horner.)
7. Stormwater can impact public water supply systems, even when stormwater discharges are located downstream from those systems. (NGCSS St. 1, 18:11-16, W. Horner.)
8. Stormwater management is integral to supplying water and sewage disposal services. (Technical Hearing Tr., 934:15-935:19, 936:19-937:2, 937:11-14, 937:18-939:9, J. Dahme; 1044:3-19, D. Katz; NGCSS St. 1, 12:9-22, 18:11-16, W. Horner.)

III. PROPOSED CONCLUSIONS OF LAW

1. The Philadelphia Home Rule Charter, pursuant to which the standards for rates and charges were ordained in the Philadelphia Code, authorizes the Water Department to fix and regulate rates and charges for supplying water and for supplying sewage disposal services. Philadelphia Home Rule Charter § 5-801.
2. Among the functions that the Charter expressly authorizes the Water Department to perform is improving the City's sewage system and sewage disposal plants. Id. § 5-800.
3. Stormwater that passes through the combined sewer system along with other wastewater qualifies as sewage, and management of such stormwater qualifies as improving the City's sewage system, and, therefore, as supplying sewage disposal services.
4. Even stormwater that only flows through municipal separate storm sewers qualifies as sewage, and management of such stormwater also qualifies as improving the City's sewage system and, therefore, as supplying sewage disposal services.
5. The definition of "sewage" in Philadelphia Code Section 13-603(2)(i) is broad enough to encompass stormwater.

6. In authorizing the Water Department to fix and regulate rates and charges for supplying sewage disposal services, the Philadelphia Home Rule Charter expressly authorizes the Water Department to assess and collect a stormwater management service charge. Philadelphia Home Rule Charter § 5-801.
7. Among the functions that the Charter expressly authorizes the Water Department to perform in connection with supplying water are investigating and adopting methods for improving the quality of the water supply. Philadelphia Home Rule Charter § 5-800.
8. Stormwater management is a method for improving the quality of the water supply and therefore qualifies as supplying water.
9. In authorizing the Water Department to fix and regulate rates and charges for supplying water, the Philadelphia Home Rule Charter expressly authorizes the Water Department to assess and collect a stormwater management service charge. Philadelphia Home Rule Charter § 5-801.
10. The Philadelphia Water Department has express authority to assess and collect a stormwater management service charge.
11. The Philadelphia Water Department has implied authority to assess and collect a stormwater management service charge.
12. An agency's interpretation of its enabling statute is entitled to great weight and will not be overturned unless it is clearly erroneous. Eagle Env'tl. II, L.P. v. Commonwealth, 584 Pa. 494, 511, 884 A.2d 867, 878 (Pa. 2005) (citing Anela v. Pa. Hous. Fin. Agency, 547 Pa. 425, 428, 690 A.2d 1157, 1159 (Pa. 1997)).
13. Legislative enactments are generally to be construed in such a manner as to effect their objects and promote justice, and, in assessing a statute, courts are directed to consider the

consequences of a particular interpretation. Commonwealth v. Beam, 567 Pa. 492, 495, 788 A.2d 357, 359 (Pa. 2002).

14. Statutory construction is not an exercise to be undertaken without considerations of practicality, precept and experience, as ignoring such considerations may result in a forced and narrow interpretation that does not comport with legislative intent. Id. (citing Commonwealth v. Butler County Mushroom Farm, 499 Pa. 509, 454 A.2d 1 (Pa. 1982)).
15. The rule requiring express legislative delegation is tempered by the recognition that an administrative agency is invested with the implied authority necessary to the effectuation of its express mandates. Id. at 495, 788 A.2d at 359 (citing Butler County Mushroom Farm, 499 Pa. at 513, 454 A.2d at 4; Pennsylvania Human Relations Com. v. St. Joe Minerals Corp., Zinc Smelting Div., 476 Pa. 302, 310, 382 A.2d 731, 736 (Pa. 1978); Day v. Public Service Comm'n, 312 Pa. 381, 384, 167 A. 565, 566 (Pa. 1933); 2 AM. JUR. 2D ADMINISTRATIVE LAW § 62 (1994)).
16. The delegation of authority to an administrative agency has been even more liberally construed when the agency is concerned with the protection of the health and welfare of the public. Id. at 497-98, 788 A.2d at 361.
17. The Water Department has interpreted its authority, either express or implied, under the Philadelphia Home Rule Charter and the Philadelphia Code to assess rates and charges to include assessing and collecting a stormwater management service charge. Because that interpretation is not clearly erroneous, it is entitled to great weight. Eagle Envtl. II, 584 Pa. at 511, 884 A.2d at 878; see also Mid-Atlantic Power Supply Ass'n v. Pa. Public Util. Comm'n, 746 A.2d 1196, 1199 n. 5 (Pa. Cmwlth. 2000) (citing Popowsky v. Pa. Public Utility Comm'n, 669 A.2d 1029 (Pa. Cmwlth. 1995)).

VI. ARGUMENT

A. Applicable Legal Standards

The Pennsylvania Supreme Court has instructed that “an agency’s interpretation of its enabling statute is entitled to great weight and will not be overturned unless it is clearly erroneous.” Eagle Envtl. II, L.P. v. Commonwealth, 584 Pa. 494, 511, 884 A.2d 867, 878 (Pa. 2005) (citing Anela v. Pa. Hous. Fin. Agency, 547 Pa. 425, 428, 690 A.2d 1157, 1159 (Pa. 1997)). In connection with the state analog of the Philadelphia Water Commissioner, the Commonwealth Court noted that it “must defer to the discretion of the PUC [(Public Utility Commission)] when the PUC interprets its enabling statute unless the decision bears no reasonable relationship to the regulatory purpose of the legislation.” Mid-Atlantic Power Supply Ass’n v. Pa. Public Util. Comm’n, 746 A.2d 1196, 1199 n. 5 (Pa. Cmwlth. 2000) (citing Popowsky v. Pa. Public Utility Comm’n, 669 A.2d 1029 (Pa. Cmwlth. 1995)).

The Pennsylvania Supreme Court has stated that “legislative enactments are generally to be construed in such a manner as to effect their objects and promote justice, and, in assessing a statute, courts are directed to consider the consequences of a particular interpretation” Commonwealth v. Beam, 567 Pa. 492, 495, 788 A.2d 357, 359 (Pa. 2002) (citations omitted). The Court observed that “‘statutory construction is not an exercise to be undertaken without considerations of practicality, precept and experience,’ as ignoring such considerations may result in a forced and narrow interpretation that does not comport with legislative intent.” Id. (citing Commonwealth v. Butler County Mushroom Farm, 499 Pa. 509, 454 A.2d 1 (Pa. 1982)). “Based on such considerations” the Court noted, “the rule requiring express legislative delegation is tempered by the recognition that an administrative agency is invested with the implied authority necessary to the effectuation of its express mandates.” Id. at 495, 788 A.2d at

359 (citing Butler County Mushroom Farm, 499 Pa. at 513, 454 A.2d at 4; Pennsylvania Human Relations Com. v. St. Joe Minerals Corp., Zinc Smelting Div., 476 Pa. 302, 310, 382 A.2d 731, 736 (Pa. 1978); Day v. Public Service Comm'n, 312 Pa. 381, 384, 167 A. 565, 566 (Pa. 1933); 2 AM. JUR. 2D ADMINISTRATIVE LAW § 62 (1994) ("the reason for implied powers is that, as a practical matter, the legislature cannot foresee all the problems incidental to carrying out the duties and responsibilities of the agency")). The delegation of authority to an administrative agency has been even more liberally construed when the agency is concerned with the protection of the health and welfare of the public. Id. at 497-98, 788 A.2d at 361 ("[our] conclusion not only flows from the statutory framework but is bolstered by the character of the enactment, which involves the substantial public safety and welfare implications of aircraft and airport operations") (emphasis added).

B. The Philadelphia Water Department Has Express Authority to Assess and Collect a Stormwater Management Service Charge.

The Philadelphia Home Rule Charter, pursuant to which the standards for rates and charges were ordained in the Philadelphia Code¹, authorizes the Water Department to "fix and regulate rates and charges for supplying water . . . and for supplying sewage disposal services." Philadelphia Home Rule Charter § 5-801.

There does not appear to be any dispute in this matter that stormwater that passes through the combined sewer system along with other wastewater qualifies as "sewage," and that services to manage that stormwater qualify as "sewage disposal services." Among the functions that the Charter expressly authorizes the Water Department to perform is "improv[ing] the City's sewage

¹ The Next Great City Stormwater Subcommittee set forth the standards for fixing and regulating rates and charges for supplying sewage disposal services in its Initial Brief; the Subcommittee notes in addition here that the standards for fixing and regulating rates and charges for supplying water parallel those standards, see Philadelphia Code § 13-101(2).

system and sewage disposal plants.” Philadelphia Home Rule Charter § 5-800. There was ample testimony in this matter regarding the ways that stormwater complicates the Philadelphia sewage system and sewage disposal plants. The Department testified regarding how stormwater can cause combined sewer overflows that lead to the discharge of raw sewage to Philadelphia rivers and streams:

But those sewers were also designed, because they were built prior to the 1940s, to overflow into a nearby river or stream if they're filled to capacity because you don't want them backing up into basements or backing up into the street. So they were designed to overflow into our rivers and streams.

(Technical Hearing Tr., 936:19-937:2, J. Dahme). The Department also testified about how stormwater can cause flooding and basement backups.

As a result of some of the intense rainstorms we have had over the past few years, we have had a high incidence of basement backups in some of our combined sewer areas, so properties are getting a combination of sewage and stormwater backing into their basements.

(Technical Hearing Tr., 939:3-9, J. Dahme). Next Great City Stormwater Subcommittee expert Wesley R. Horner provided concurring testimony and also explained that stormwater can complicate the operation of sewage disposal plants:

Stormwater is acknowledged as a major problem in Philadelphia, where an existing system of storm drains, inlets, and conveyance piping discharges . . . stormwater into . . . wastewater treatment plants (CSO portion of the city), where, depending upon the size of the storm event, stormwater is combined with untreated wastewater for discharge into the Delaware or Schuylkill Rivers, or is directed to wastewater treatment plants to complicate their operation.

Additionally, localized flooding problems have worsened in Philadelphia, related to increased storm intensity documented in recent years which exceeds the capacity of the [combined] storm sewer system . . . in certain neighborhoods and along certain blocks. When intense storms occur and runoff is not able to be removed, backups result in the form of street flooding as well as significant basement flooding that includes untreated stormwater runoff as well as untreated sewage.

(NGCSS St. 1, 12:9-22, W. Horner) (emphasis added). Thus, management of stormwater that flows into combined sewers clearly qualifies as “improv[ing] the City’s sewage system and sewage disposal plants” and, therefore, as “supplying . . . sewage disposal services.” Therefore, in authorizing the Water Department to “fix and regulate rates and charges for supplying . . . sewage disposal services,” the Philadelphia Home Rule Charter expressly authorizes the Water Department to assess and collect a stormwater management service charge. See Philadelphia Home Rule Charter § 5-801.

Even Sunoco concedes that, “[g]iven the definition of ‘sewage’ contained in the Philadelphia Code, it appears that . . . stormwater [conveyed via the City’s combined sewers] that is contaminated or combined with human waste or other noxious or deleterious substances being harmful or inimical to the public health would qualify as ‘sewage.’” (Initial Brief of Sunoco, p. 25.) Sunoco argues, however, that stormwater “which only flows through the municipal separate storm sewers” does not qualify as sewage, and refers to the definition of “sewage” in Philadelphia Code Section 13-603(2)(i) to support its argument. (Initial Brief of Sunoco, p. 25.) The definition of “sewage” in Philadelphia Code Section 13-603(2)(i), however, clearly is broad enough to encompass stormwater. Even when it does not pass through combined sewers, stormwater is a substance that “contains any of the waste products or excrement or other discharge from the bodies of human beings or animals and any noxious or deleterious substances being harmful or inimical to the public health, or to animals or aquatic life, or to the use of water for domestic water supply or for recreation” (Philadelphia Code § 13-603(2)(i)). As the Water Department testified at the technical hearing:

So it's really about managing the stormwater as it impacts our streams from what falls on our land. We also have problems with the pollutants that are picked up by stormwater runoff. Water is sort of the universal solvent. So when water hits the land, it picks up waste, gasoline, any kind of products that are on our land, fertilizers from lawns, takes

that into our sewer systems, and we have an impact to the quality of that stormwater runoff.

(Technical Hearing Tr., 934:15-935:19, J. Dahme) (emphasis added). In stormwater passing through separate sewers, these pollutants enter Philadelphia rivers and streams. As the Water Department testified, “we have rainwater falling onto the streets going into storm drains, and these separate storm drains and sewers take it right into the stream.” (Technical Hearing Tr., 937:11-14, J. Dahme) (emphasis added). Mr. Horner explained how these nonpoint source loads are “harmful or inimical to the public health, or to animals or aquatic life, or to the use of water for domestic water supply or for recreation,” when he testified:

[The] discharge of pollutants leads to water quality problems which adversely impact and limit overall water quality, fish life and vibrancy of the entire aquatic ecosystem, public water supply systems (i.e., intakes) downstream, and human recreational use.

(NGCSS St. 1, 18:11-16, W. Horner) (emphasis added). Thus, even stormwater “which only flows through the municipal separate storm sewers” clearly qualifies as “sewage” under the definition that Sunoco references. Moreover, Mr. Horner made clear that stormwater also complicates the operation of municipal separate storm sewers. In direct testimony, he stated that “localized flooding problems have worsened in Philadelphia, related to increased storm intensity documented in recent years which exceeds the capacity of the storm sewer system, combined and separated, in certain neighborhoods and along certain blocks.” (NGCSS St. 1, 12:17-20, W. Horner) (emphasis added). Therefore, management of such stormwater also qualifies as “improv[ing] the City’s sewage system” and, therefore, as “supplying . . . sewage disposal services.” In authorizing the Water Department to “fix and regulate rates and charges for supplying . . . sewage disposal services,” therefore, the Philadelphia Home Rule Charter expressly authorizes the Water Department to assess and collect a stormwater management service charge. See Philadelphia Home Rule Charter § 5-801.

Sunoco also argues that “[t]hose properties or portions of property which do not generate stormwater that enters combined or municipal separate storm sewers simply receive no ‘sewage disposal services,’ and hence PWD has no power to impose charges for such services on such properties under Charter § 5-801.” (Initial Brief of Sunoco, p. 27.) This argument ignores that in addition to fixing and regulating rates and charges for supplying “sewage disposal services,” the Charter also authorizes the Water Department to fix and regulate rates and charges for “supplying water,” Philadelphia Home Rule Charter § 5-800. Among the functions that the Charter expressly authorizes the Water Department to perform in connection with supplying water are “investigat[ing] and adopt[ing] methods for improving the quality of the water supply.” Philadelphia Home Rule Charter § 5-800.

The Water Department testified at length in the technical hearing about how stormwater pollutes Philadelphia rivers and streams. For example, the Department stated:

The picture you see on the bottom is a picture of a typical stream system in the City of Philadelphia. You see a creek that its sides, you know, the banks are blown apart, the beds are gone, tree roots are exposed. That is really volume. So this is one of our major pollutant problems right now. While we're collecting it off of the streets, that stormwater is taken directly to a sewer system which delivers that to a nearby stream and that volume sort of rampaging through these systems under heavy weather conditions is really what is causing a real impact to our stream systems and our rivers. So it's really about managing the stormwater as it impacts our streams from what falls on our land.

(Technical Hearing Tr., 934:15-935:9, J. Dahme). The Water Department is providing stormwater management services to reduce the pollution of Philadelphia rivers and streams. As the Department testified:

For the Department there are increasing stormwater management costs. As I mentioned, stormwater volume and the quality has been identified as the number-one pollutant to our rivers and streams today. . . . Now we're really focused on stormwater. That is the major, number-one pollutant. So as a result of that we expect to spend 2 to 4 billion dollars over the next 20 to 30 years making these infrastructure improvements. It might be underground storage tanks, large sewer relief systems. But as I mentioned, we're also looking to do what we call recapturing the rainwater at the source, doing things on the

land so you mimic what Mother Nature is doing, and I will be showing you some examples of that, how can you capture that stormwater, allow it to infiltrate . . .

(Technical Hearing Tr., 937:18-939:2, J. Dahme).

Significantly, the Philadelphia rivers and streams being polluted by stormwater runoff are also those from which Philadelphia draws its drinking water. As the Water Department testified:

You know, it's the City's policy that we want to protect and preserve our rivers, even forgetting about just the environmental impacts. . . . These rivers that are taking in our stormwater inflow and pollutants are our source waters. We draw water from the Schuylkill and from the Delaware, and the other smaller creeks flow into that. So since that's where we get our drinking water from, we want to make sure we protect our source waters.

(Technical Hearing Tr., 1044:3-19, D. Katz) (emphasis added). Mr. Horner also testified about how stormwater can impact public water supply systems, even when stormwater discharges are located downstream from those systems. (NGCSS St. 1, 18:11-16, W. Horner) (“[T]his combined discharge of pollutants leads to water quality problems which adversely impact and limit . . . public water supply systems (i.e., intakes) downstream. . . . The “downstream” concept is further aggravated in this case because the Delaware and Schuylkill are tidally influenced here, meaning that pollutants discharged can actually move upstream during the incoming tides.”) (emphasis added).

Thus, stormwater management is a method for improving the quality of the water supply, and “investigat[ing] and adopt[ing]” such methods are among the functions that the Charter expressly authorizes the Water Department to perform in connection with “supplying water,” see Philadelphia Home Rule Charter § 5-800. Therefore, in authorizing the Water Department to “fix and regulate rates and charges for supplying water,” the Philadelphia Home Rule Charter expressly authorizes the Water Department to assess and collect a stormwater management service charge. See Philadelphia Home Rule Charter § 5-801.

For these reasons, the Philadelphia Water Department has express authority to assess and collect a stormwater management service charge, not only for providing management services of stormwater “conveyed via the City’s combined sewers,” but also for providing such services of stormwater “which only flows through the municipal separate storm sewers” or does not enter “combined or municipal separate storm sewers.”

C. The Philadelphia Water Department Has Implied Authority to Assess and Collect a Stormwater Management Service Charge.

Even if the Philadelphia Water Department does not have express authority to assess and collect a stormwater management service charge, it has implied authority to do so. Testimony in this proceeding has demonstrated that stormwater management is integral to supplying water and sewage disposal services. As explained in greater detail above, the Water Department must manage stormwater to improve its sewage disposal services, which are complicated by stormwater, and also must manage stormwater to improve its water supply, which is impaired by stormwater. It is unlikely, however, that the drafters of the Charter could have foreseen how integral stormwater management would become to supplying water and sewage disposal services, as our understanding about the polluting effects of stormwater, and the resulting federal and state regulations requiring stormwater management, evolved more recently. In such situations, courts have tempered the rule requiring express legislative delegation and have found that agencies are invested with implied authority to effectuate their express mandates. See Beam, 567 Pa. at 495, 788 A.2d at 359 (citing 2 AM. JUR. 2D ADMINISTRATIVE LAW § 62). That the Water Department’s supply of water and sewage disposal services concerns the protection of the health and welfare of the public calls for an even more liberal interpretation of its delegation of authority. See id. at 497-98, 788 A.2d at 361.

The language of the Charter indicates that the drafters intended to authorize the Water Department to recover its costs relating to supplying water and sewage disposal services. The Charter states:

The standards pursuant to which rates and charges shall be fixed by the department shall be such as to yield to the City at least an amount equal to operating expenses and interest and sinking fund charges on any debt incurred or about to be incurred for water supply, sewage and sewage disposal purposes.

Philadelphia Home Rule Charter § 5-801. An annotation to the Charter indicates that the drafters also intended that the Water Department be vested with powers and duties to perform services that are functionally related to other services that it performs:

The principal function of the Water Department is to furnish the City with an adequate water supply of improved quality. Because City sewage systems and sewage disposal facilities are closely related functionally to the water system of the City, their operation and maintenance are also vested in the Water Department.

Philadelphia Home Rule Charter § 5-800 Annotation (emphasis added). Therefore, a “forced and narrow interpretation” of the authority of the Water Department that would not permit the recovery of its costs for stormwater management, when such stormwater management is functionally related -- indeed, integral -- to its express powers and duties of supplying water and sewage disposal services, does not “comport with legislative intent.” Beam, 567 Pa. at 495, 788 A.2d at 359. Cf. Gericke v. Philadelphia, 353 Pa. 60, 70, 44 A.2d 233, 238 (Pa. 1945) (“whether or not council intended to make the expense of disposing of storm water an element in the sewerage charge, the direct benefit to the property served amply warrants the city in including it in the charge”) (emphasis added). Moreover, the “consequences” of such an interpretation would leave the Water Department with no immediate means of recovering costs that are integral to its powers and duties. It is hard to believe that the drafters of the Charter would have intended such an absurd result. See Beam, 567 Pa. at 495, 788 A.2d at 359.

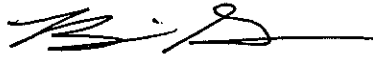
For these reasons, the Philadelphia Water Department has implied authority to assess and collect a stormwater management service charge.

VII. CONCLUSION

The Water Department has interpreted its authority, either express or implied, under the Philadelphia Home Rule Charter and the Philadelphia Code to assess rates and charges to include assessing and collecting a stormwater management service charge. Because that interpretation is not “clearly erroneous,” it is “entitled to great weight.” Eagle Env'tl. II, 584 Pa. at 511, 884 A.2d at 878; see also Mid-Atlantic Power Supply Ass'n, 746 A.2d at 1199 n. 5. For these reasons, the Next Great City Stormwater Subcommittee respectfully requests that the Hearing Officer reject the arguments set forth in the Initial Brief filed by Sunoco and find that the Philadelphia Water Department possesses the authority to assess and collect a stormwater management service charge, both generally and as applied to Sunoco.

For all of the foregoing reasons, and for the reasons set forth in its Initial Brief, the Next Great City Stormwater Subcommittee respectfully requests that the Hearing Officer recommend (1) that the proposed stormwater rate design contained in the rate request filed by the Water Department be approved, and (2) that the Water Department proceed with its plans to establish Model Green Neighborhoods, a pilot program aimed at extending the stormwater credit program to residential customers in the next rate proceeding.

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Dated: 3/2/09

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing document upon the following individuals, by Email and First Class Mail.

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