

Merger Enforcement: A Quest for Efficiency

New York State Bar Association
Antitrust Section Annual Meeting

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"Don't anybody move: this is a merger."

Overview

- Merger Review Process Efficiency
 - HSR process
 - Burdens/Trends
 - Merger Review Process Initiative (2001 Initiative & 2006 amendments)
- Merger Enforcement Efficiency
 - Transparency
 - Mergers 2006 Highlights



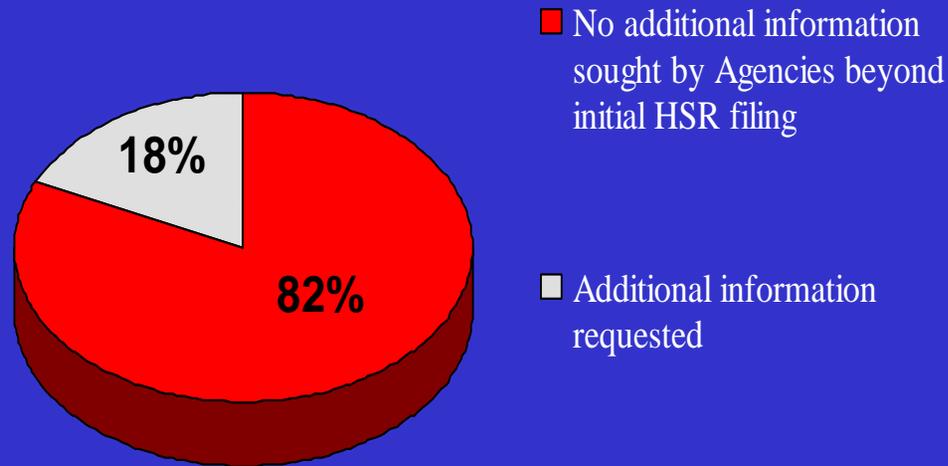
Merger Review Process Efficiency

- HSR premerger review process
 - Since 1976, investigate most potentially anticompetitive transactions before merger is consummated
 - More effective relief and greater certainty to merging parties
- Enforcement Goals:
 - Identify potentially anticompetitive transactions quickly so that remainder can close
 - Reach the right enforcement decision quickly and with minimal burdens necessary



Process Efficiency

Transactions Cleared Without Additional Agency Review (FY 2002-2006)

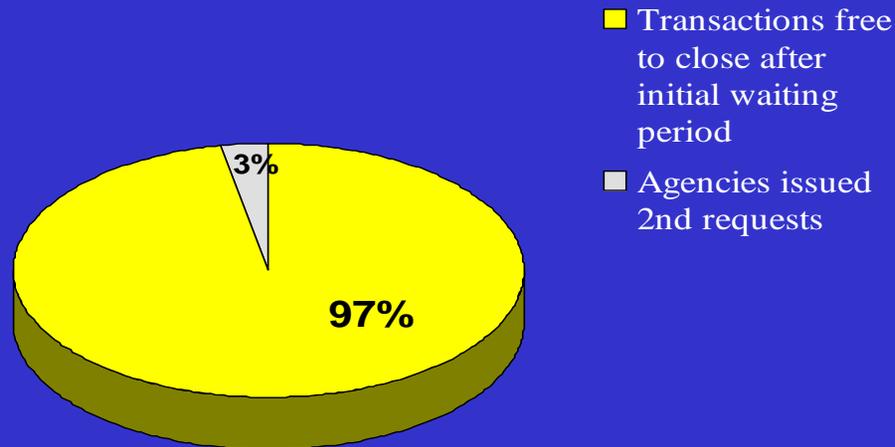


- 5,927 of 7,210 transactions proceeded without the Agencies requesting information beyond the initial HSR filing



Process Efficiency

Transactions Cleared Without Agency Second Requests (FY 2002-2006)

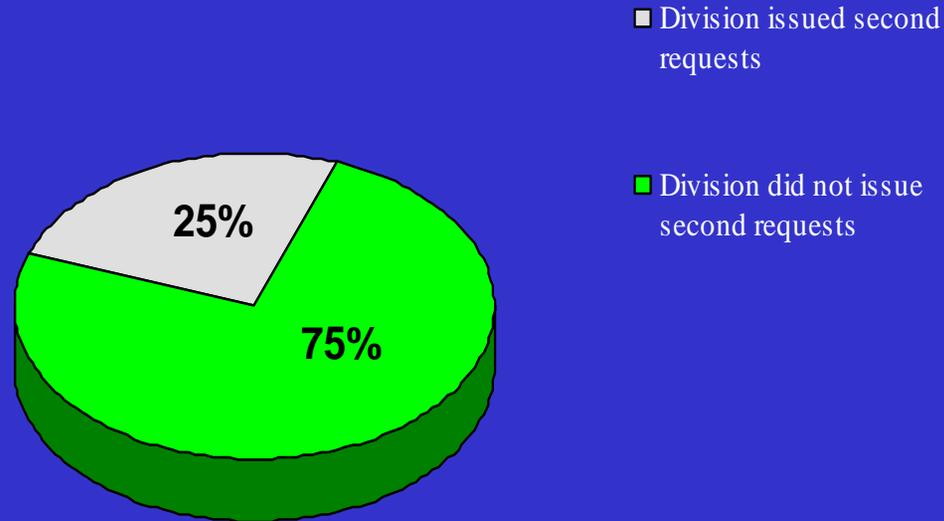


- Agencies issued 2nd requests in 214 (3%) of 7,210 transactions



Process Efficiency

Antitrust Division Investigations Resulting in 2nd Requests (FY 2002-2006)



- 2nd requests issued in 99 out of 398 Division investigations



Process Efficiency

- Volume of information produced
 - Ten years ago: Few hundred boxes a “large” production
 - Now: Terabytes, millions of pages common
 - Verizon/MCI and SBC/AT&T: 25 million pages
- Concern for agencies as well as parties



Process Efficiency

- Explanatory Trends:
 - Technological change – electronic documents/data
 - E.g., emails
 - Complex products, specialized services, rapid change
 - E.g., TVs
 - Merger analysis is increasingly sophisticated and data-intensive
 - E.g., merger simulations and critical loss analysis



The Shape of Things to Come

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"As precedent your Honor I offer the entire legal history of western civilization on CD ROM."

Process Efficiency

- Conclusions:
 - The volume of information will continue to increase
 - Identify transactions that do not threaten harm to competition before issuing second requests wherever possible
 - Improve ability to identify and process relevant information



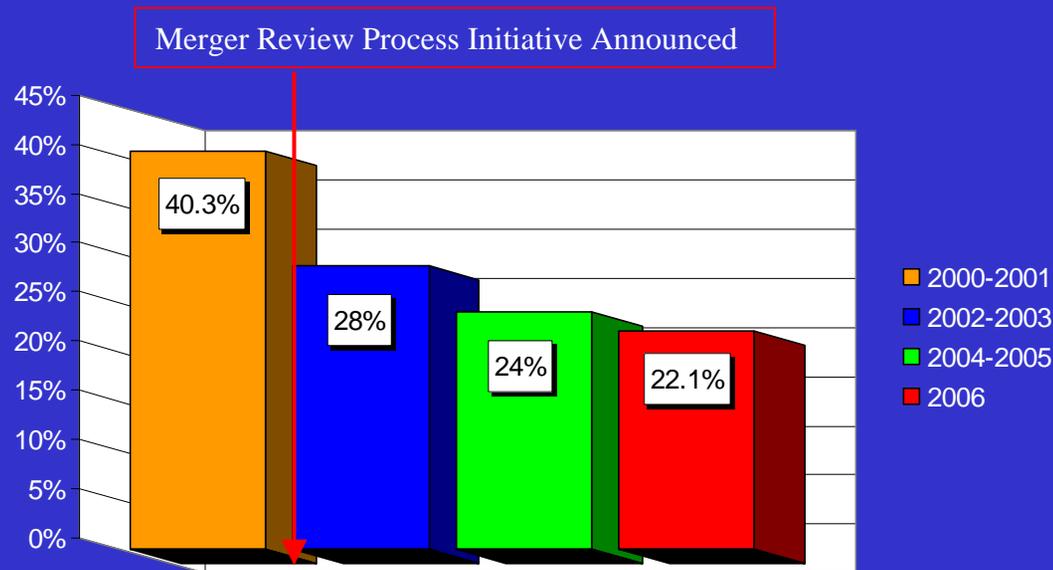
Merger Review Process Initiative

- 2001 Merger Review Process Initiative
 - Aggressive & efficient use of initial waiting period
 - Tailor 2nd request investigations
 - Focus investigations on dispositive issues (*e.g.* exchange mergers)
 - Encourage open communication/dialogue
 - Scheduling agreements



Merger Review Process Initiative

Antitrust Division Investigations Resulting in Second Requests (FY 2000-2006)

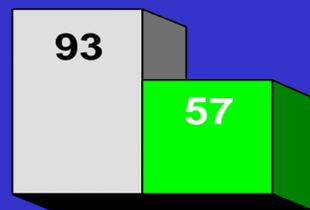


- More effective use of the initial waiting period has enabled the Division to conclude more investigations without issuing 2nd requests.



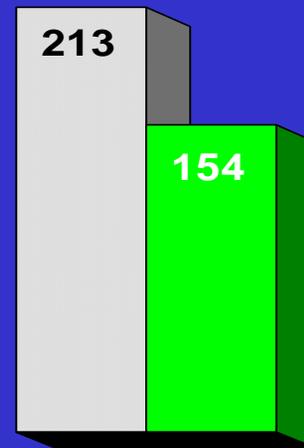
Merger Review Process Initiative

Average Days between Preliminary Investigation Opening and Early Termination/Close



3 yr. averages

Average Duration of 2nd Request Investigations



2 yr. averages



Merger Review Process Initiative

- 2006 Amendments
 - Announced in December ‘06
 - Internal review of merger investigations
- “Process & Timing Agreement” merger review option
 - Limit number of custodians/provide post-complaint discovery
 - Contested litigation rare
- Revised Model 2nd Request



Better Information Collection

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“What burns me up is that the answer is right here somewhere, staring us in the face.”

Merger Enforcement Efficiency

Transparency



Merger Enforcement Transparency

- Parties: Encourage open dialogue during investigation
- Public: Enforcement actions
- Public: Decisions to close
 - Closing statements (e.g., AT&T/Bellsouth and Whirlpool/Maytag)
 - 2006 DOJ/FTC Commentary on the Horizontal Merger Guidelines
 - NY State Bar Association Annual Meeting Dinner



Mergers 2006 – Highlights

- 1860 transactions notified to the agencies (8.9% increase over FY 2005)
 - Over 580 transactions filed so far in FY 2007
- Antitrust Division:
 - Opened 77 HSR + 20 non-HSR merger investigations
 - Issued 17 2nd requests
 - 16 Transactions Modified
 - 10 merger challenges filed
 - 6 transactions restructured in response to Division investigations



Mittal/Arcelor

- \$33 billion steel merger, hostile transaction
- Anticompetitive effects in the \$2.3 U.S. tin mill products market
- Consent decree requires sale of Dofasco (Arcelor subsidiary) or alternative tin mill product assets (Sparrows Point, MD or Weirton, WV) if Dofasco sale not possible



Mittal/Arcelor

“Pocket” decrees

- Used by Division for some time, but rare
 - Insurance policy on a fix-it-first remedy
 - Insurance policy on regulatory fixes (e.g., FCC/radio station mergers)
 - May be used in rare cases where antitrust review interferes with market by operation of law (e.g., foreign tender offer regulations)





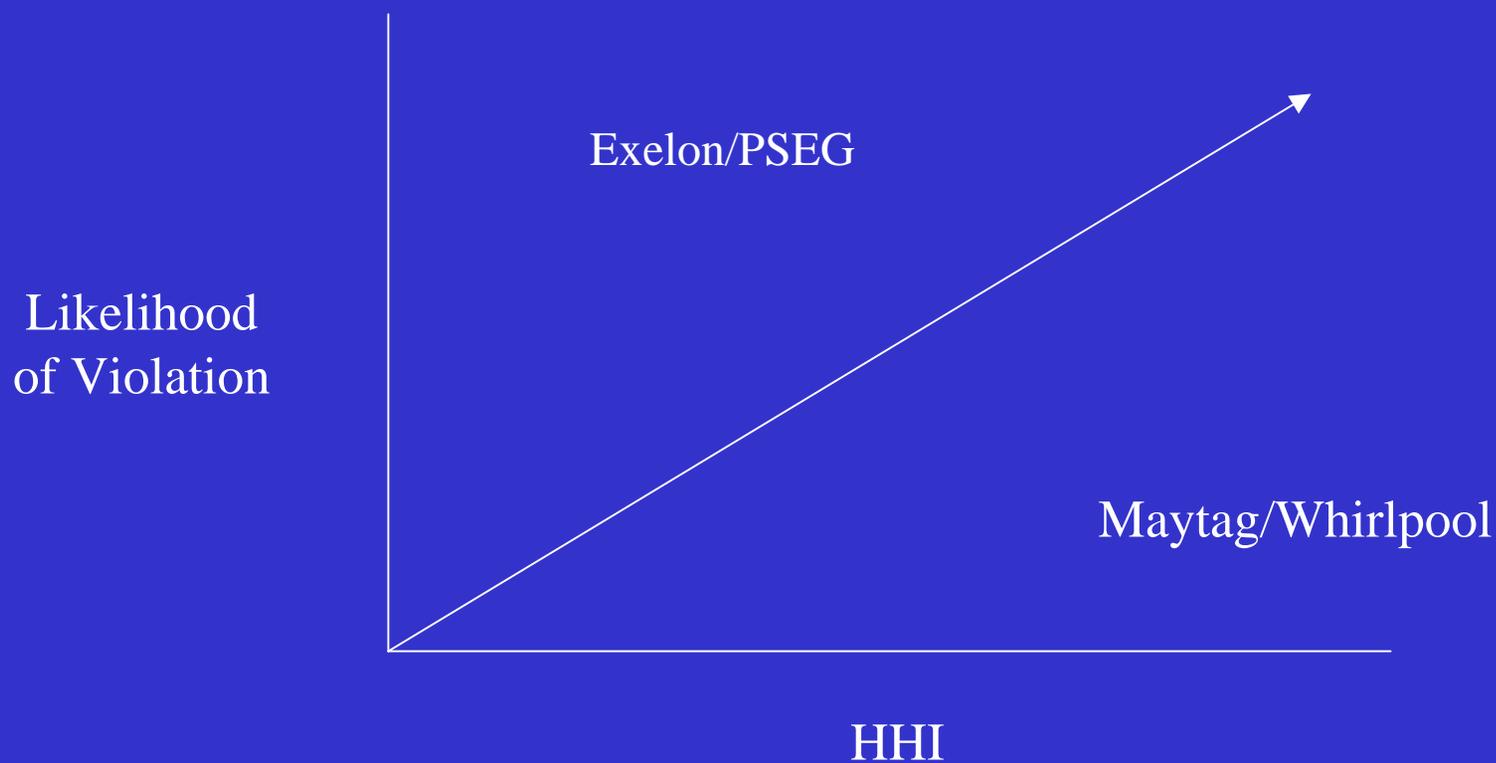
**"Can we, just for a moment, Your Honor,
ignore the facts?"**

Maytag/Whirlpool

- Residential washers and dryers
- High market shares creates initial presumption
- Initial Presumption Rebutted
 - Well-established rival brands (GE/Frigidaire/Kenmore)
 - Recent entrants with growing share (LG/Samsung)
 - Large retailers (2/3rds of sales) can shift shares
 - Excess capacity (U.S./Mexico/Korea)
 - Customers/Internal Documents



Mergers 2006 – Year in Review

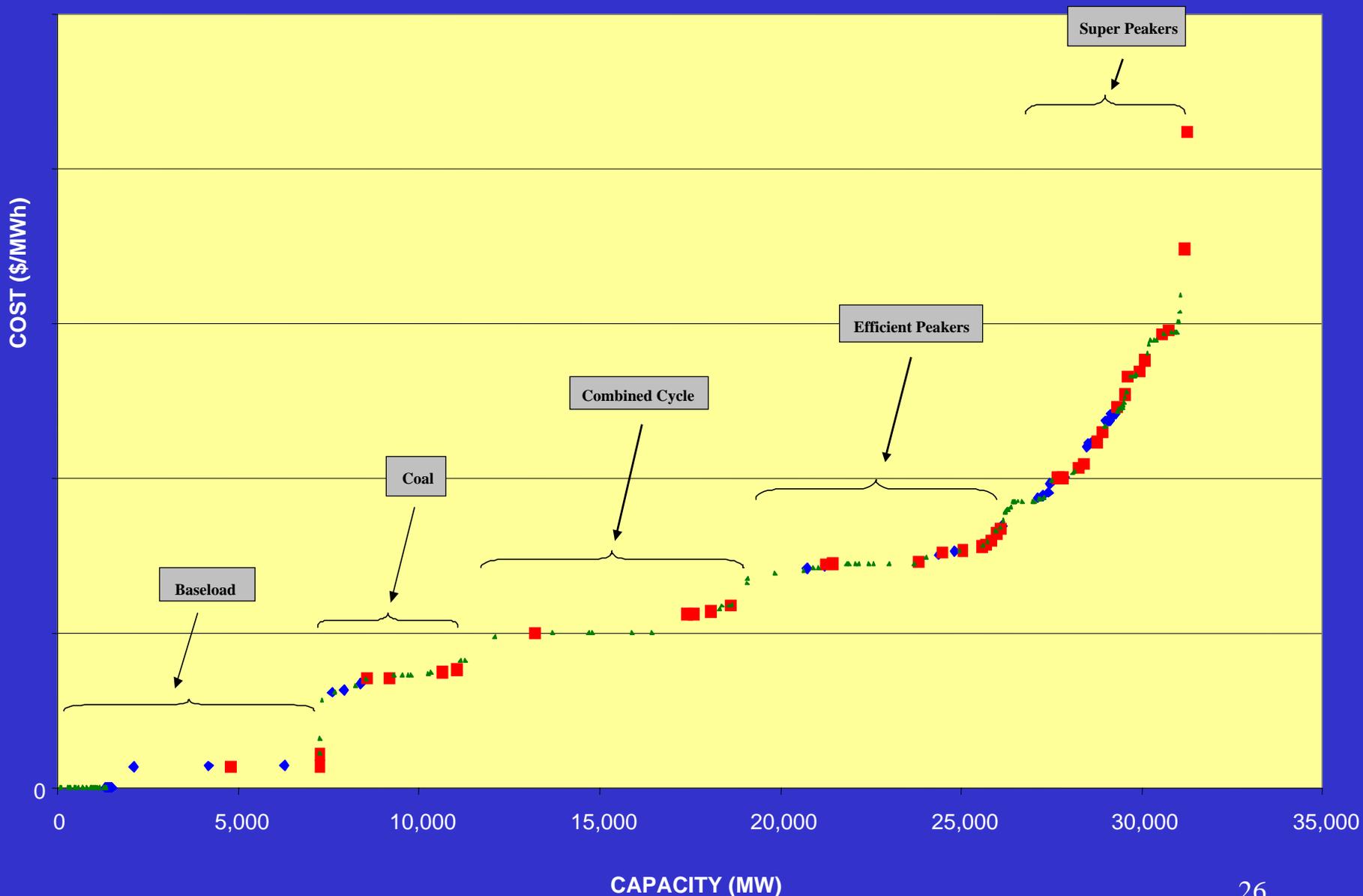


Exelon/PSEG

- \$16 billion electricity generation merger
- Focus on mid-Atlantic region (NJ and PA)
- Complex merger analysis:
 - Electricity generating plants not the same (hydro/nuclear/coal/gas turbine)
 - “Fuel curve”
 - Auction process

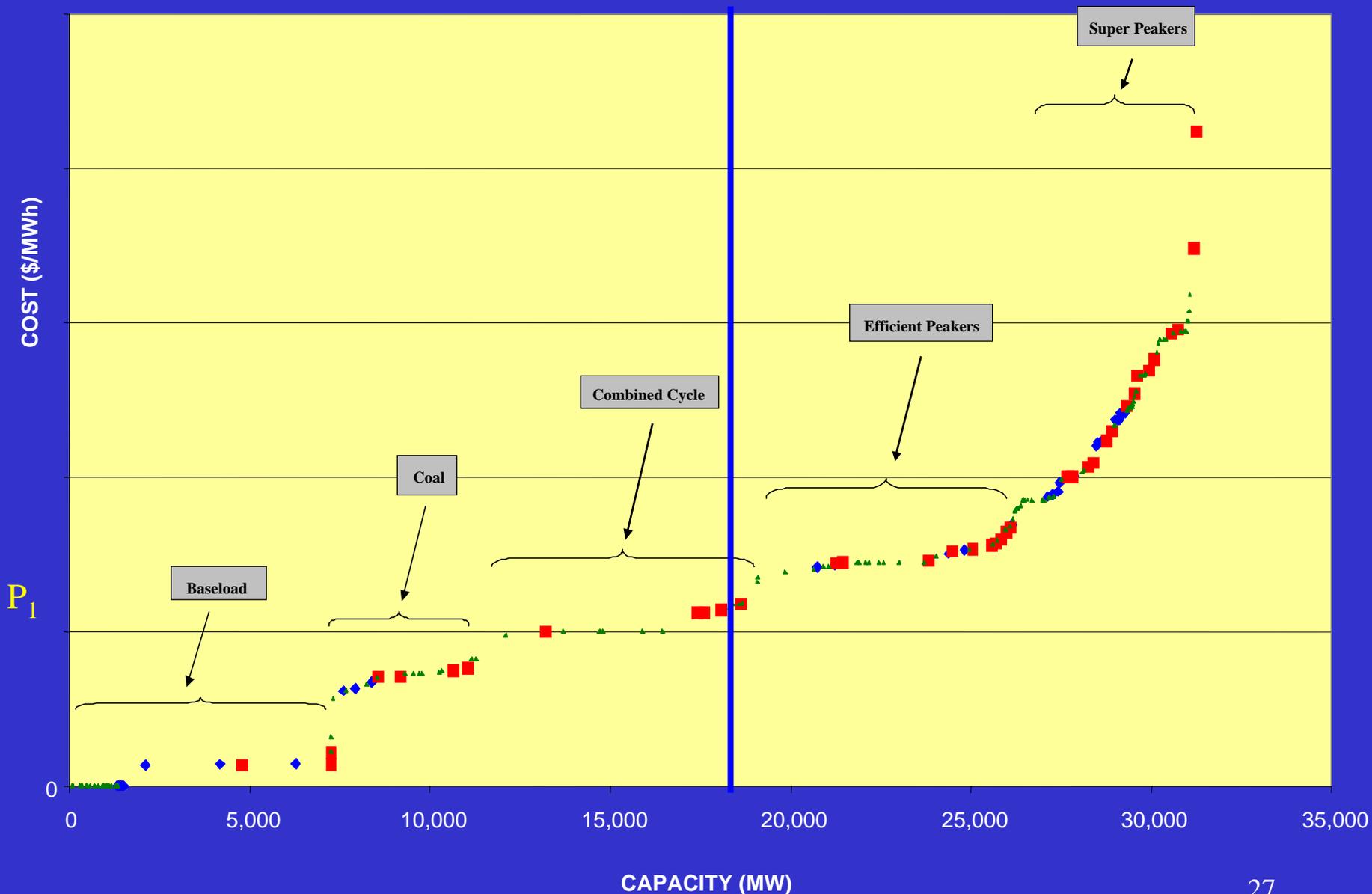


Exemplar Cost Curve



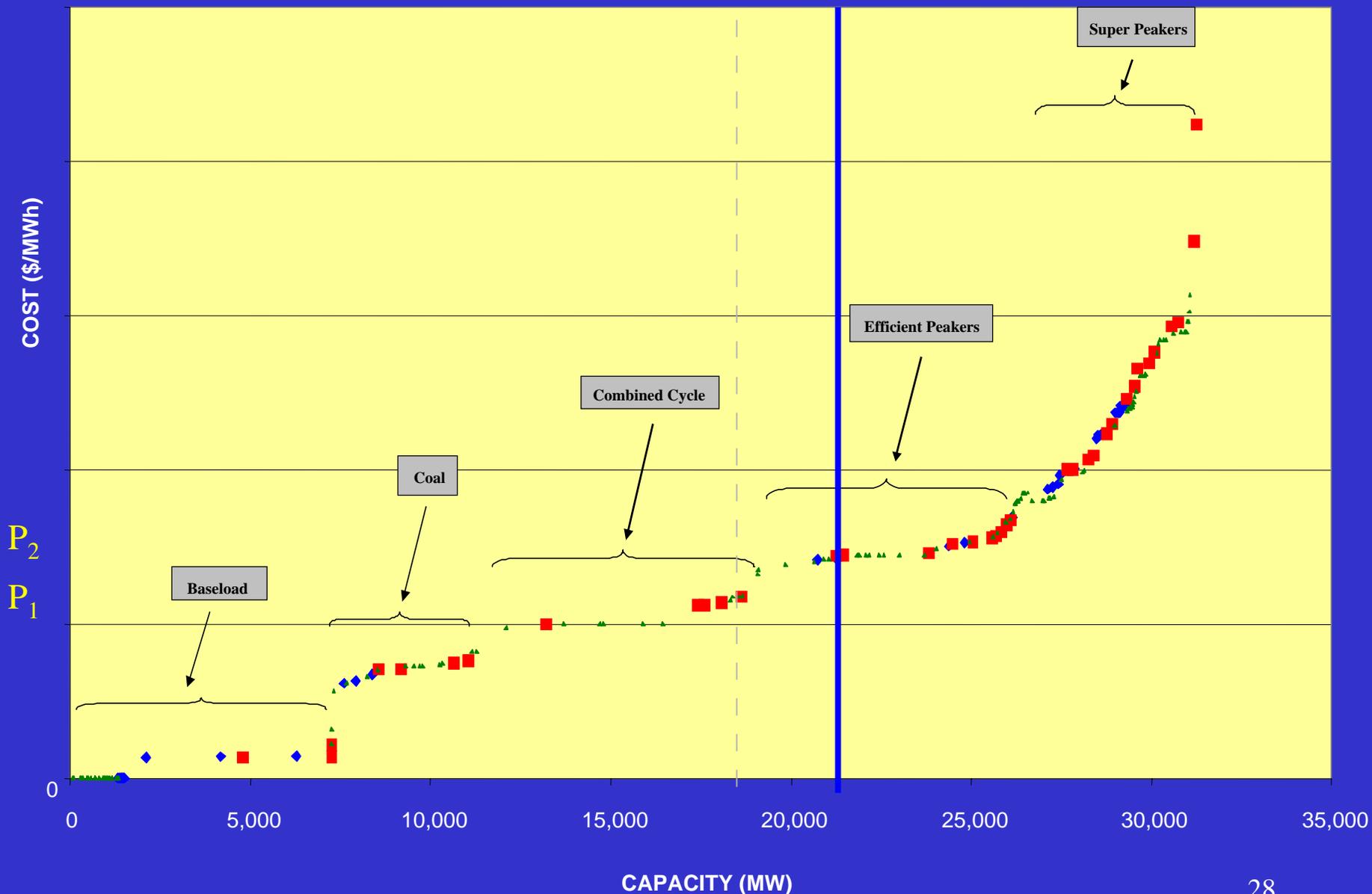
Note: For illustrative purposes only – not an actual representation of market conditions.

Exemplar Cost Curve



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Exemplar Cost Curve



Note: For illustrative purposes only – not an actual representation of market conditions.

Exelon/PSEG

- Likelihood of substantial anticompetitive effects in the \$19.8b mid-Atlantic wholesale electricity market
- Consent decree: Divest 6 electricity plants (5,600 megawatts of generating capacity) in PA and NJ
- Transaction ultimately abandoned



Telecommunications Mergers

- Verizon/MCI
- SBC/AT&T
- AT&T/BellSouth
- Sprint/Nextel
- Cingular/AT&T Wireless



Wireless Telecommunications

	<u>DynaTAX 8000X</u>	<u>RAZR</u>
<i>Introduced</i>	1983	2004
<i>Weight</i>	2 pounds	3 ounces
<i>Cost</i>	\$4,000	\$200-400
<i>Talk time</i>	30 minutes	7 hours



Wireless Telecommunications

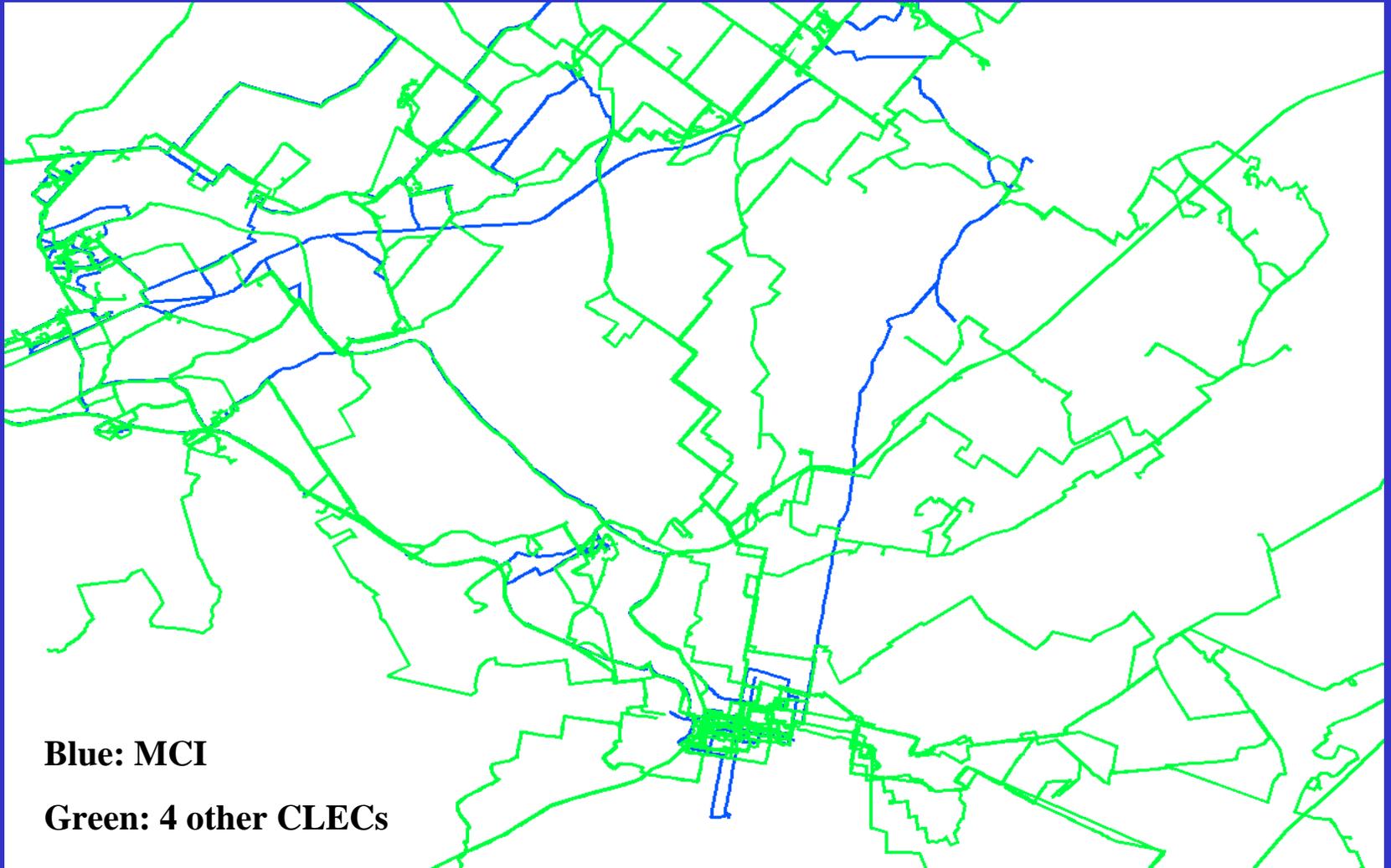
	<u>1985</u>	<u>2006</u>
<i>subscribers</i>	203,000	219 million
<i>revenues</i>	\$354 million	\$118 billion
<i>Avg. monthly bill</i>	\$95 (1988)	\$49.30
<i>Avg. minutes of use</i>	140 (1993)	740 (2005)
<i>Effective price</i>	44 cents/minute (1993)	7 cents/minute (2005)
<i>Penetration</i>	<1% in 1985	over 71% (2005)
<i>Cell sites</i>	599	over 197,000
<i>Direct employees</i>	1,697	238,236

(from CTIA & FCC reports)



Tunney Act Proceeding

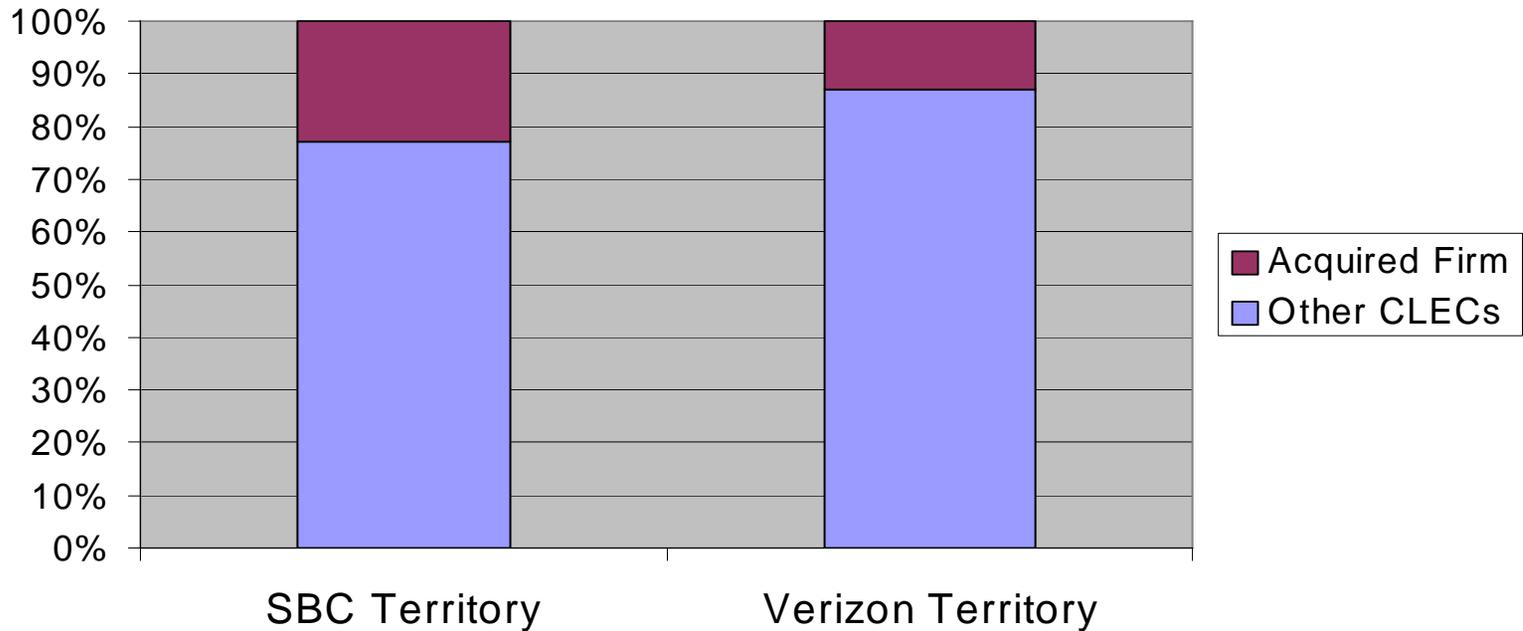
Metro Area in Verizon Territory: CLEC Fiber



Tunney Act Proceeding

Other Competitive Fiber

Percentage of Known CLEC Fiber Route Miles in Divested Markets



DFA/Southern Belle

- Dairy processing: anticompetitive effects in school milk contracts in 100 school districts in Kentucky & Tennessee
- Case history
- Pre-trial settlement



Benefits of Greater Transparency

- Predicting Enforcement Actions
 - Finding Violation
 - Remedy
- More efficient planning by business
- More efficient review and resolution
 - Fewer contested challenges
 - Faster resolution through consent decrees



Greater Process Efficiency and Enforcement Transparency

WIN-WIN-WIN

Division-Business-Consumer Welfare



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