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July 18, 2005

Frances Nichols-Anglin
Oregon Public Utility Commission
550 Capitol St., NE
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Re: IC-12

Dear Ms. Nichols-Anglin:

Enclosed for filing please find an original and (5) copies of Qwest Corporation's Memorandum of Law Regarding Meaning of ISP-Bound Traffic in *ISP Remand Order*, along with a certificate of service.

If you have any question, please do not hesitate to give me a call.

Sincerely,

Carla M. Butler
Sr. Paralegal

CMB:
Enclosure
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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

IC 12

QWEST CORPORATION, Complainant, v. LEVEL 3 COMMUNICATIONS, LLC, Defendant.	QWEST CORPORATION'S MEMORANDUM OF LAW REGARDING MEANING OF ISP-BOUND TRAFFIC IN *ISP REMAND ORDER*

Qwest Corporation ("Qwest") hereby submits this memorandum of law regarding the meaning of ISP-bound traffic in the Federal Communication Commission's ("FCC's") *ISP Remand Order*.[1] For the reasons that follow, the Commission should find that the *ISP Remand Order* defines ISP-bound traffic to encompass only those situations in which both the customer initiating an Internet call and the ISP equipment (modems, servers, and routers) to which that call is directed (and which controls the end user customer's interaction with the Internet) are located in the same local calling area.

INTRODUCTION

At issue in this proceeding is the treatment for compensation purposes of "VNXX" traffic under Level 3's existing interconnection agreement with Qwest in Oregon. "Virtual NXX" or "VNXX" is a shorthand way of describing the situation wherein a CLEC, such as Level 3, obtains local numbers from the North American Numbering Plan Administrator ("NANPA") in various parts of a state that are assigned to its ISP customers with no physical presence in the local calling areas ("LCAs") associated with those telephone numbers. The traffic directed to those numbers is routed to one of the CLEC's "POIs" and is then delivered to the CLEC's ISP customer (at the ISP's "server" or, more accurately, its "modem bank") at a physical location in

[1] Order on Remand, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCCR 9151 (2001) ("*ISP Remand Order*").

another LCA (or even in another state). While VNXX issues often come up in the context of ISP traffic, the concept is not strictly related to ISP traffic. A VNXX arrangement can exist for voice traffic as well (such as a calling center or a reservation center).

Qwest's interconnection agreement with Level 3 provides that "[t]he parties agree to exchange all EAS/Local §251(b)(5) and ISP-bound traffic (as that term is used in the FCC ISP Order) at the FCC order rate, pursuant to the FCC ISP Order." Level 3's fundamental argument is that the FCC, in the *ISP Remand Order*, read in combination with the *Core Forbearance Order*,[2] has preemptively required that intercarrier compensation must be paid on *all* ISP traffic, including VNXX ISP traffic. However, these orders address compensation only for local ISP traffic,[3] where the ISP is physically located in the same LCA as the customer placing the call. There was no discussion in either order of the treatment of VNXX traffic.

It is important to place the *ISP Remand Order* in its proper context. In the late 1990s, when the FCC's ISP traffic docket was initiated, ISP traffic was generally handled in one of two ways. If the ISP was located outside the end user customer's LCA, the end user would need to dial a 1+ toll call or an "800" service call to access the modem banks of the ISP. Such traffic was appropriately characterized as interexchange traffic subject to access or long distance charges. The other situation involved two LECs competing in the same LCA. In this second situation, an end-user customer of one LEC dialed a local number that allowed it to access an ISP customer of the second LEC. This was the situation the FCC addressed in its 1999 *ISP Declaratory Order* and in its 2001 *ISP Remand Order*. The FCC concluded that, because of the one-way nature of such

[2] Order, *Petition of Core Communications for Forbearance Under 47 USC § 160(c) from the Application of the ISP Remand Order*, Order FCC 04-241 WC Docket No. 03-171 (rel. October 18, 2004) ("*Core Forbearance Order*").

[3] It is important to note that the FCC has repeatedly ruled that ISP-bound traffic is interstate in nature because the ultimate end points of the calls are at websites across the country or in many cases in other parts of the world. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-carrier Compensation for ISP-Bound Traffic*, 14 FCCR 3689, ¶¶ 1, 10-20 (1999) ("*ISP Declaratory Order*"); *ISP Remand Order*, ¶¶ 14, 58-62. Nonetheless, for intercarrier compensation purposes, the relevant end points are the physical location of the calling party and the physical location of the ISP's servers or modem banks.

traffic, requiring reciprocal compensation payments on local ISP traffic was distorting the development of competition in the local markets. *ISP Remand Order*, ¶¶ 67-76. It is against this backdrop that the meaning of the *ISP Remand Order* should be evaluated.

ARGUMENT

The *ISP Remand Order* defines ISP-bound traffic to encompass *only* those situations in which both the customer initiating an Internet call and the ISP equipment to which that call is directed are located in the same local calling area. This is true for three reasons. First, the prior and subsequent history of the *ISP Remand Order* before the FCC and the courts makes it clear the *ISP Remand Order* addresses only local ISP traffic. Second, it is necessary to interpret the *ISP Remand Order* to apply only to local ISP traffic in order to preserve the existing access charge regime as the FCC intended. Finally, the OPUC has ruled that reciprocal compensation should only apply to Internet traffic that originates and terminates in the same local calling area.

I. The *ISP Remand Order's* Prior and Subsequent History Confirm that the *ISP Remand Order* Applies only to Local ISP Traffic

In defining ISP-bound traffic in the *ISP Remand Order*, the FCC stated that "*an ISP's end-user customers typically access the Internet through an ISP Server located in the same local calling area*, and that the end users pay the local exchange carrier for connections to the local ISP." *Id.*, ¶ 10. The FCC specifically identified the issue it was addressing as "whether reciprocal compensation obligations apply to the delivery of calls from *one LEC's end-user customer to an ISP in the same local calling area* that is served by a competing LEC." *Id.*, ¶ 13. (Emphasis added.)[4] Thus, the *ISP Remand Order* did not address the situation where a CLEC's ISP-customers servers or modems are located outside of the LCA of the calling party.

[4] That the FCC recognized that it was dealing only with "local" traffic is also clear from paragraph 12:

> The 1996 Act set standards for the introduction of competition into the market *for local telephone service*, including requirements for interconnection of competing telecommunications carriers. As a result of

In another portion of the *ISP Remand Order*, the FCC specifically recognized that a separate category of ISP traffic continued to exist that was, and would remain, subject to access charges:

> *Congress preserved the pre-Act regulatory treatment of all the access services enumerated under Section 251(g).* These services thus remain subject to Commission jurisdiction under Section 201 (or, to the extent they are *intra*state services, they remain subject to the jurisdiction of state commissions), whether those obligations implicate pricing policies as in *Comptel* or reciprocal compensation. *This analysis properly applies to the access services that incumbent LECs provide (either individually or jointly with other local carriers) to connect subscribers with ISPs for Internet-bound traffic. ISP Remand Order*, ¶ 39. (Emphasis added; footnote omitted.)

In recognizing the existence of such non-local ISP traffic, and providing that it did not fall under its interim regime, it is clear that the FCC did not intend its order to address anything other than local ISP traffic.

That this proposition is true is likewise demonstrated by the earlier FCC order, commonly referred to as the *ISP Declaratory Order*,[5] where the FCC—applying the so-called "one call analysis"—determined that ISP-bound traffic actually terminates at the ultimate websites the end user customer seeks access to, that those websites are geographically diverse, and therefore the traffic is not local, but interstate in nature. *Id.*¶¶ 4-7. CLECs had argued for a two-call theory, the first call from the end user customer to the point at which the traffic ceased to be telecommunications (i.e. where it the traffic was converted into Internet Protocol ("IP") at the ISP's modems and servers), and the second call from the ISP equipment in IP to the ultimate websites. After analyzing the issue, the FCC noted that "when two carriers collaborate to

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> interconnection and *growing local competition*, more than one LEC may be involved in the delivery of telecommunications *within a local service* area. Section 251(b)(5) of the Act addresses the need for LECs to agree to terms for the mutual exchange of traffic over their interconnecting networks. It specifically provides that LECs have the duty to "establish reciprocal compensation arrangement for the transport and termination of telecommunications."
>
> The FCC also determined, in the *Local Competition Order*, that section 251(b)(5) reciprocal compensation obligations "'apply only to traffic that originates and terminates *within a local area'* as defined by the state commissions." See *ISP Remand Order*, ¶ 12. (Emphasis added.)

[5] Declarartory Ruling, *In the Matter of Implementatioin of the Local Compentition Provisions in the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd. 3689 (February 26, 1999) ("*ISP Declaratory Order*").

complete a local call, the originating carrier is compensated by its end user and the terminating carrier is entitled to reciprocal compensation pursuant to section 251(b)(5) of the Act." *Id.*, ¶ 9. (Emphasis added). Ultimately, the FCC concluded that the traffic did not terminate at the ISP's local server (*Id.* ¶ 12) but instead is a "continuous transmission from the end user to a distant Internet site." *Id.* ¶ 13. Although the FCC concluded that ISP-bound traffic is non-local interstate traffic, to the extent parties had agreed to pay reciprocal compensation on such traffic, the traffic would continue to be treated as local and reciprocal compensation would continue to apply until the FCC had adopted final rules. *Id.*, ¶ 22. It is critical to understand the FCC's conclusion that the traffic should be treated as "local," because that conclusion was premised on its understanding that the typical means of accessing the Internet, "an ISP customer dials a seven-digit number to reach the ISP server *in the same local calling area*." *Id.*, ¶ 4.

The *ISP Remand Order*, as its name suggests, was an FCC order on remand from an appeal of the FCC's earlier *ISP Declaratory Order*. In the decision that remanded the *ISP Declaratory Order* back to the FCC, the D. C. Circuit stated that the issue before the FCC in the *ISP Declaratory Ruling* was "whether calls to internet service providers ("ISPs") *within the caller's local calling area* are themselves 'local.'" *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d. 1, 2 (D.C. Cir. 2000). The *ISP Remand Order* was likewise appealed to the D. C. Circuit, which unequivocally stated that in the *ISP Remand Order* the FCC "held under § 251(g) of the Act it was authorized to 'carve out' from § 251(b)(5) *calls made to internet service providers ("ISPs") located within the caller's local calling area.*" *WorldCom v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002). (Emphasis added.)

The *Core Forbearance Order* does not change anything. It dealt with the application of the *ISP Remand Order*, and specifically addressed whether certain provisions in the *ISP Remand*

Order should continue to apply to ISPs. Because the *ISP Remand Order* did not address non-local ISP traffic, the *Core Forbearance Order* did not address the issue either.

Sound public policy counsels against permitting Level 3 to recover intercarrier compensation on VNXX traffic. The customer who places the call to an ISP is acting as a customer of the ISP on Level 3's network. If Level 3 is allowed to collect intercarrier compensation for traffic that is properly thought of as Level 3's own toll traffic, the end result is regulatory arbitrage in which Level 3 profits at Qwest's expense. Level 3 will collect revenue primarily from other carriers rather than its own customers. Such a result creates incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, as Congress had intended in the Act. Moreover, the large one-way flows of cash make it possible for LECs serving ISPs to afford to pay their own customers to use their services, driving ISP rates to consumers to uneconomical levels. *ISP Remand Order*, ¶¶ 70-71, 74-76. In the *ISP Remand Order*, the FCC sought to curtail these market distorting incentives, not to expand them. *Id.* ¶¶ 4-7.

The prior and subsequent history of the *ISP Remand Order* demonstrate conclusively that it sets compensation only for local ISP traffic. Other state commissions have agreed with Qwest. In an order dated December 22, 2004, the Indiana Utility Regulatory Commission concluded that the *ISP Remand Order's* compensation plan applied only to local traffic.[6] In its decision, the Indiana Commission stated the following:

> It is clear that the ISP Remand Order's rate plan for ISP-Bound traffic applies only to ISP-bound traffic that terminates at an ISP in the same local exchange in which the call originates. The issue addressed by the FCC in the ISP Remand Order was whether, as the CLECs contended, traffic bound to an ISP "in the same local calling area" was local traffic subject to reciprocal compensation under Section 251(b)(5). The FCC did *not* address traffic bound to an ISP in a different local calling area. That is because there was

[6] *In the Matter of Level 3 Communications, LLC's Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, and the Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Indiana Bell Telephone Company d/b/a SBC Indiana*, Cause No. 42663 INT-01, at 81 (Ind. Util. Reg. Comm'n, December 22, 2004).

> (and is) no question that such traffic is interexchange, not local, and is thus not subject to reciprocal compensation. (Emphasis original).

A Kansas Commission arbitrator reached the same conclusion in another Level 3/SBC arbitration decision:

> SBC's definition of ISP-Bound Traffic is approved. *The ISP Remand Order's rate plan for ISP-Bound traffic applies only to ISP-bound traffic that terminates at an ISP in the same local exchange in which the call originates.* The issue addressed by the FCC in the ISP Remand Order was whether, as the CLECs contended, traffic bound to an ISP 'in the same local calling area' was local traffic subject to reciprocal compensation under Section 251(b)(5). ISP Remand Order, ¶ 13. The FCC did not address traffic bound to an ISP in a different local calling area. *That is because there was no question that such traffic was interexchange, not local, and thus not subject to reciprocal compensation.*[7]

By agreement of the parties, the original date for the Kansas Commission to issue its decision on the Arbitrator's decision was extended from March 9, 2005 to August 6, 2005.

II. The *ISP Remand Order* Must be Interpreted to Apply Only to Local ISP Traffic In Order to Preserve the Existing Access Charge Regime as the FCC Intended

In the *ISP Remand Order*, the FCC determined that ISP-bound traffic was not subject to reciprocal compensation because section 251(g) of the Act exempted all access services from section 251(b)(5).[8] Accordingly, the FCC concluded that "unless and until the Commission by regulation should determine otherwise, Congress preserved the pre-Act regulatory treatment of all the access services enumerated under section 251(g)." *ISP Remand Order*, ¶ 39. This conclusion is significant because to preserve the existing access charge regime as the FCC intended, the *ISP Remand Order* must be interpreted to apply only to local ISP traffic.

The FCC has a long history of determining the appropriate treatment of traffic bound for enhanced service providers (providers of communications that modify content). In 1983, the

[7] Arbitrator's Order No. 10, *Re Level 3 Communications, LLC*, Docket No. 04-L3CT-1046-ARB, 2005 WL 562645, ¶ 271 (Kan. SCC, February 7, 2005). (emphasis added).

[8] The FCC concluded that Section 251(g) of the Act exempted both interstate and intrastate access services from Section 251(b)(5). *See ISP Remand Order*, ¶ 37, fn. 66.

FCC issued an order creating the so-called ESP Exemption.[9] While referred to as the "ESP Exemption," it is not really an exemption, but rather a decision, based on a number of policy considerations, that enhanced service providers were entitled to connect their points of presence through tariffed local retail services (rather than through tariffed Feature Group access services that other carriers were required to purchase), even though the facilities were really being used for services classified as interstate.[10] The FCC assigned the same status to private systems (e.g., PBX systems) that accessed local exchange systems for connecting interstate calls.[11] In other words, the FCC treats the point of presence of an enhanced service provider as if that point of presence is the location of a retail customer.

The FCC applied the same approach under the Act when it dealt with traffic routed to the Internet. The FCC determined that ISPs, one of the heirs to the old "enhanced service provider" designation, were entitled to the same treatment for compensation purposes. Thus, when an ISP Provider is served by a CLEC like Level 3, the same analysis applies under section 251(g) of the Act. The ISP Server is treated as an end-user location for the purposes of compensation.

Level 3's position is directly contrary to FCC precedent, which requires that an ISP be treated exactly the same as other end-user customers in determining whether a call to the ISP is a toll call or a local call. In other words, a call from one LCA to an ISP Server located in another LCA is treated as a toll call. Implicit in Level 3's proposed interpretation of the *ISP Remand Order* is that the FCC, without analysis or even intent, has accidentally changed the entire

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[9] *See* Third Report and Order, *In the Matter of MTS and WATS Market Structure*, 93 FCC 2d 241, 254-55 ¶ 39, and n. 15, 320, ¶ 269 (1983); *modified on recon.*, 97 FCC 2d 682 (1984) ("*First Order on Reconsideration*"), *further modified on recon.*, 97 FCC 2d 834 (1984) ("*Order on Further Reconsideration*"), *aff'd in principal part and remanded in part sub nom., NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

[10] *See, e.g.*, First Report and Order, *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, 12 FCC Rcd 15982, 16131-34, ¶¶ 341-48 (1997); *see also, generally*, Order, *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631 (1988).

[11] *See* Memorandum Opinion and Order, *In the Matter of WATS-Related and Other Amendments of Part 69 of the Commission's Rules*, 2 FCC Rcd 7424, 7425, ¶¶ 13-15 (1987).

landscape of access charges and issued a blanket exemption for all calls to and from all ISP servers, no matter where located (as long as they send the call to the Internet). However, Level 3 provides no support for the proposition that the FCC has made such a major policy shift.

Level 3's argument that the *ISP Remand Order* applies to *all* ISP traffic is, in effect, a claim that the FCC intended in the *ISP Remand Order* to preempt state commissions with respect to intrastate access charges by requiring them to treat all ISP traffic under the compensation regime of the *ISP Remand Order*. To reach that conclusion, however, Level 3 is compelled to engage in a tortuous analysis that ignores the explicit language of the order itself, not to mention the language of two federal appellate courts discussed above that defined the issue before the FCC as whether "local" ISP-bound traffic is subject to the interim regime of *the ISP Remand Order*. Completely absent from that analysis is any explicit FCC statement that it was broadening the scope of its inquiry in such a significant manner. To suggest that this was the FCC's implicit intent requires one to ignore the manner in which the FCC normally preempts state authority on an issue of the significance of intercarrier compensation. Typically, when the FCC has preempted state commission authority on an issue, it has been very explicit that (1) it is preempting state action, (2) it clearly defines the extent of the preemption, and (3) it explicitly engages in a step-by-step basis for the preemption. It did none of those things in the *ISP Remand Order.*

A pertinent recent example of the FCC's approach to preemption is the *Vonage* order,[12] where the FCC preempted the Minnesota Commission's effort to assert state regulatory authority over DigitalVoice, a Vonage VoIP product. In making its decision to preempt the Minnesota Commission action, the FCC engaged in a disciplined, step-by-step analysis of the issues. For example, it first examined "the distribution of authority over communications services between

[12] Memorandum Opinion and Order, *In the Matter of Vonage Holdings Corporation for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission,* FCC 04-267, WC Docket No. 03-211 (November 12, 2004). ("*Vonage Order*").

federal and state agencies under the Act." *Vonage Order*, ¶¶ 15, 16-18. The FCC then reviewed the relevant judicial precedents that recognize and define circumstances "where state jurisdiction must yield to federal jurisdiction through the [FCC's] authority to preempt state regulations that thwart the lawful exercise of federal authority over interstate communications. *Id.*, ¶¶ 15, 19. The third step was an analysis of the service in question in the context of "the impossibility of separating DigitalVoice into interstate and intrastate components." *Id.* ¶¶ 15, 20-22. Finally, the FCC discussed the need to preempt in the context of whether the state action thwarted "valid federal objectives." *Id.*, ¶¶ 15, 23-37.

In other words, on an issue that the FCC perceived to be important, it did not just casually preempt a state commission; instead, it engaged in a disciplined and detailed analysis that led to an explicit decision on the issue. To suggest that, in the *ISP Remand Order*, the FCC preempted state commissions on the breadth of the compensation regime that it was imposing on ISP-bound traffic, particularly in light of statements within the order itself suggesting its scope was local ISP-bound traffic (not to mention the D. C. Circuit decision on appeal that the issue before the FCC was local ISP traffic), is totally inconsistent with the process that the FCC followed in *Vonage*. It strains credulity to suggest that the FCC would preempt the existing intrastate access charge regime without so much as a discussion of the preemption concept, let alone a clear statement of the parameters of its decision.

III. Qwest's Position is Supported by a Commission Decision

Qwest's position that Internet traffic should only be subject to reciprocal compensation if the call is physically originated and terminated in the same local calling area is directly supported by a 1999 Commission decision. In an arbitration decision involving GTE and ELI

(*GTE/ELI Decision*),[13] the Commission ruled that the terminating end of an ISP-bound call for reciprocal compensation purposes is where the ISP modems are located.

In that arbitration, the ILEC (GTE), relied on an end-to-end analysis for its argument that the websites should be considered the end points for reciprocal compensation purposes. The Arbitrator, Administrative Law Judge Sam Petrillo, rejected that argument, however, and ruled that it is the "ISP modems" that constitute the termination point for reciprocal compensation purposes, but also ruled that GTE was liable for reciprocal compensation on traffic *only* when the ISP modems were within the *same local calling area* as the calling party. The language that the Arbitrator used could not be more clear:

> GTE raises concerns that some calls from end users to ISPs are actually routed to ISP modems located outside the local calling area. GTE contends that traffic that does not attach to local call scope *ISP modems* should not be eligible for reciprocal compensation because these services are properly interstate or intrastate intraLATA toll calls. Because the record in this case does not discuss the methods used to distinguish local calls from toll calls, there is no way to know whether there are problems identifying this type of traffic. Assuming the traffic can be identified, it should be possible to ascertain whether calls from end users are directed to ISP modems located within the local exchange calling area. *To the extent that calls to ISP providers are not directed to an ISP modem within the local calling area, they are not local calls and should not be eligible for reciprocal compensation.* See Order No. 99-218, p. 9.

The Commission agreed with the Arbitrator's findings and affirmed that portion of the Arbitrator's Decision. Order No. 99-218. Thus, the Commission ruled that the ISP modems are the terminating point for calls for reciprocal compensation purposes and that only if those modems were in the same local calling area as the calling party would the payment of reciprocal compensation be required. Thus, the Commission's decision directly supports the underlying reasoning of the *ISP Remand Order*.

[13] Commission Decision, *In the Matter of the Petition of Electric Lightwave, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions with GTE Northwest Inc., Pursuant to the Telecommunications Act of 1996,* Order No. 99-218, docket ARB 91 (March 17, 1999) ("*GTE/ELI Decision*").

CONCLUSION

For the foregoing reasons, Qwest respectfully submits that the Commission should find that the *ISP Remand Order* defines ISP-bound traffic to encompass only those situations in which both the customer initiating an Internet call and the ISP equipment (modems, servers, and routers) to which that call is directed are located in the same local calling area.

DATED this 18th day of July, 2005.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IC 12

I hereby certify that on the 18th day of July 2005, I served the foregoing **QWEST CORPORATION'S MEMORANDUM OF LAW REGARDING MEANING OF ISP-BOUND TRAFFIC IN *ISP REMAND ORDER*** in the above entitled docket on the following persons via U.S. Mail, by mailing a correct copy to them in a sealed envelope, with postage prepaid, addressed to them at their regular office address shown below, and deposited in the U.S. post office at Portland, Oregon.

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