Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re the Matter of	)	RECEIVED - FCC
	)	
COMPLAINT OF SKY ANGEL U.S., LLC	)	File No. 12-80 JUN 22 2011
	)	
Against Discovery Communications, LLC, *et. al.*	)	Federal Communications Commission Bureau / Office
For Violation of the Commission's Competitive	)	
Access to Cable Programming Rules	)	

To: Media Bureau

OPPOSITION OF SKY ANGEL U.S., LLC TO MOTION TO STRIKE RENEWED PETITION FOR TEMPORARY STANDSTILL

Sky Angel U.S., LLC ("Sky Angel"), by its attorneys, hereby replies to the Motion to Strike filed by Discovery Communications, LLC and Animal Planet, L.L.C. (collectively, "Discovery").[1] Although Discovery's pleading is both a Motion to Strike and a Response to Sky Angel's Renewed Petition for Temporary Standstill,[2] Discovery expends the majority of its ink in attempting to convince the Commission to reject Sky Angel's filing solely on procedural grounds. Apparently, Discovery recognizes that it could not reasonably refute the various substantive legal and factual issues Sky Angel presented in its Renewed Petition. As demonstrated below, Discovery's procedural arguments also lack merit.[3]

Contrary to Discovery's claims, Sky Angel's Renewed Petition is not redundant, as Sky Angel's initial Standstill Petition did not (and could not) include much of the facts and legal analysis contained in the Renewed Petition, which focuses upon new factual developments,

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[1] *Motion of Discovery Communications LLC to Strike Renewed Petition of Sky Angel U.S., LLC for Temporary Standstill or, in the Alternative, Response to Renewed Petition* (filed June 9, 2011) ("Motion to Strike").

[2] *Renewed Petition of Sky Angel U.S., LLC for Temporary Standstill* (filed May 27, 2011) ("Renewed Petition").

[3] Sky Angel limits the scope of the current filing to addressing the procedural issues raised by Discovery in its responsive pleading. Although the program access rules do not expressly provide for the filing of a reply to a response to a temporary standstill petition, *see* 47 C.F.R §76.1003(l), the Commission's procedural rules provide for Sky Angel's opposition to Discovery's Motion to Strike. *See* 47 C.F.R. §1.45(b).

many of which occurred shortly before Sky Angel submitted this filing.[4] In addition, because many of these decisive factual developments occurred very recently, Sky Angel could not have filed a Renewed Petition many months ago, as Discovery suggests it should have done. Moreover, because the relevant facts are rapidly and continuously evolving, and because of Discovery's ongoing failure to candidly update and correct the record in this proceeding, Sky Angel otherwise would be required to constantly file supplemental pleadings. Sky Angel, with its limited resources, should not be forced to continually incur such costs in order to undertake what the Commission's rules already require of Discovery.[5]

For the same reasons, the Commission must reject Discovery's request to strike the Renewed Petition because it was not filed in conjunction with Sky Angel's program access complaint. Sky Angel's service clearly fits within Congress' intended interpretation of the MVPD definition.[6] As a result, Sky Angel had no advance notice with respect to the complex legal and factual analysis that would be required to satisfy the Bureau that it had met its heavy burden of demonstrating that it is likely to prevail on the merits in order to obtain equitable standstill relief. As the Bureau itself noted, there is a lack of Commission precedent on this issue.[7] Sky Angel therefore could not have reasonably anticipated that the Bureau would question whether its service, which clearly meets each element contained in the MVPD definition,[8] qualified for the public interest protections afforded by the program access rules.

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[4] *See, e.g.*, *Renewed Petition* at 28-32. In its Motion to Strike, Discovery cites to *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations*, Memorandum Opinion and Order, 19 FCC Rcd 1603 (2004), for the proposition that the Commission need not entertain redundant pleadings. In that case, however, the Commission denied the pleadings because they presented no new facts and because the issues raised were irrelevant to the proceeding. In contrast, the Renewed Petition presents important new factual developments directly related to this program access proceeding generally and Sky Angel's request for a standstill specifically.

[5] *See* 47 C.F.R. §76.6(a)(6) ("Parties are responsible for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding.").

[6] *See Renewed Petition* at 7-12.

[7] *See Sky Angel U.S., LLC Emergency Petition for Temporary Standstill*, Order, 25 FCC Rcd 3879, 3884 (MB 2010) ("*Preliminary Standstill Order*").

[8] *See Renewed Petition* at 12-20.

In addition, Discovery's own actions prevented Sky Angel from filing a more detailed petition simultaneously with its complaint. Discovery refused to provide any justification, reasonable or otherwise, for the threatened withholding of its programming until Sky Angel initiated this proceeding, which forced Discovery to formulate justifications for its past actions. At that point, which was only a week before the Bureau issued the *Preliminary Standstill Order*, Discovery focused upon a threshold jurisdictional issue (*i.e.*, whether Sky Angel qualifies as an MVPD), likely because it realized it would lose on the merits due to its clear discrimination against Sky Angel. Discovery also prevented a more detailed initial filing by Sky Angel because it refused, and continues to refuse, to respond to Sky Angel's discovery requests and provide information that directly relates to this proceeding and that is in Discovery's sole possession.[9]

Sky Angel also had a reasonable expectation that this dispute would be resolved, and the harm to its subscribers ended, long ago, which militated in favor of conserving its limited resources. For instance, in declining to grant an initial standstill, the Bureau "encourage[d] Discovery and Sky Angel to work toward a mutually agreeable solution that will avoid disruption of Sky Angel's customers and that sufficiently minimizes the business and legal risks to Discovery pending the outcome of the complaint proceeding."[10] Although Sky Angel has demonstrated the inaccuracy of Discovery's alleged harms, upon which the Bureau relied in the *Preliminary Standstill Order*, Discovery has steadfastly refused to work toward a mutually agreeable solution. For instance, even though Commission staff asked Discovery to consider delaying its withholding of programming from Sky Angel's subscribers, Discovery refused.[11]

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[9] To this day, Discovery has refused to respond to Sky Angel's discovery requests, and the Commission has not addressed the *Motion to Compel* filed by Sky Angel on April 16, 2010.

[10] *Preliminary Standstill Order*, 25 FCC Rcd at 3884.

[11] *See Emergency Request for Immediate Grant of Petition*, Sky Angel U.S., LLC (filed Apr. 14, 2010). Although Commission staff made this request on April 1, 2010, Discovery failed to provide its response until April 14, 2010, a mere eight days prior to the threatened, and then actual, withholding of its programming.

Sky Angel also reasonably believed that the Commission would have ruled on its program access complaint nearly ten months ago.[12]

Moreover, to the extent the Renewed Petition provides information contained in Sky Angel's Reply, this was necessitated by the program access rules and the *Preliminary Standstill Order*. Section 76.1003(l) requires that a petitioner demonstrate how grant of a standstill will meet four criteria. Accordingly, Sky Angel had no choice but to address each criterion, and it restricted the scope of the Renewed Petition to these criteria.[13] Further, Sky Angel was obligated to fully brief these criteria lest the Bureau again decline to grant a standstill because of an incomplete analysis. When the Bureau previously found that Sky Angel had not met its heavy burden of demonstrating a likelihood of success on the merits, it noted that Sky Angel had "failed to analyze whether and how it meets the key elements of the definition of the term 'MVPD'"[14] and that, "based on the limited record," it could not "conclude that Sky Angel ha[d] met its burden of demonstrating that the extraordinary relief of a standstill order is warranted."[15]

Similarly, Discovery's allegation that the Renewed Petition is "potentially frivolous" must be rejected.[16] Although Discovery continues its refusal to respond to Sky Angel's discovery requests, the Renewed Petition nevertheless contains extensive and detailed factual representations, all of which are supported by direct citations. Clearly, Sky Angel did not file the Renewed Petition "without any effort to ascertain or review the underlying facts."[17] In addition,

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[12] *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order, 22 FCC Rcd 17791, 17856 (2007) (affirming the goal of "resolving program access complaints within five months from the submission of a complaint for denial of programming cases"); *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, First Report and Order, 8 FCC Rcd 3359, 3422 (1993) ("The staff is expected to issue a ruling on the merits expeditiously.").

[13] Sky Angel's proper focus is clearly illustrated by the fact that each of the four primary sections of the Renewed Petition deals directly and exclusively with the demonstrations required by the temporary standstill provision.

[14] *Preliminary Standstill Order*, 25 FCC Rcd at 3882.

[15] *Id.* at 3884.

[16] *See Motion to Strike* at 3 (citing precedent related to the filing of frivolous *complaints*).

[17] *See Implementation of Section 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, 9 FCC Rcd 2642, 2657 (1993).

the Renewed Petition is not "based on arguments that have been specifically rejected by the Commission in other proceedings."[18] As the Bureau noted, its decision not to initially grant a standstill, which was based upon an incomplete record, "should not be read to state or imply that the Commission, or the Bureau acting on delegated authority, will ultimately conclude, in resolving the underlying complaint, that Sky Angel does not meet the definition of an MVPD."[19]

The Commission also must reject Discovery's claim that a standstill cannot be granted because "there is no longer an existing contract between the parties."[20] Permitting Discovery to benefit from its own illegal and unjustified actions would be contrary to the public interest, as expressed in the fundamental purposes of the program access rules. The term of the parties' Affiliation Agreement extends through December 31, 2014, and Sky Angel has not, in any way, breached the terms of that agreement and thereby provide cause for Discovery to unilaterally terminate the contract. Despite Discovery's repeated contention that it had the right to terminate the Affiliation Agreement without cause, applicable law obligates Discovery to act in good faith and deal fairly with Sky Angel,[21] a legal requirement Discovery has consistently failed to even address. Moreover, the Bureau's findings in the *Preliminary Standstill Order* have no bearing on whether Discovery has effectively terminated the Affiliation Agreement. Sky Angel initiated this proceeding because of Discovery's threatened, and now actual, violation of the program access rules, which provide a basis for mandatory access to the programming of a vertically-integrated company independent of any prior contractual agreement. Thus, the purpose of this proceeding is to determine whether Discovery must supply its programming to Sky Angel's subscribers independent of any past or present agreement between the parties. Moreover, a

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[18] *Id.*

[19] *Preliminary Standstill Order*, 25 FCC Rcd at 3884.

[20] *Motion to Strike* at 6.

[21] *See Program Access Complaint*, Sky Angel U.S., LLC, p. 7 (filed Mar. 24, 2010) (citing *First Nat'l Realty Corp. v. Warren-Ehret Co.*, 247 Md. 652, 657, 233 A.2d 811, 813-14 (1967)).

standstill simply preserves the *status quo*. As a result, the Bureau, in the *Preliminary Standstill Order*, could not, and did not, address whether Discovery could unilaterally terminate the Affiliation Agreement without cause.

Further, although Sky Angel may not have explicitly used the term "extraordinary circumstances" in its Renewed Petition, such circumstances clearly exist here, as the Renewed Petition details in several places, including in the opening executive summary.[22] In addition, the cited rule does not require that a petitioner use the term "extraordinary circumstances" to justify the necessity of its filing,[23] and neither that rule nor Commission precedent requires a prior finding that extraordinary circumstances exist.[24]

The Commission should accept the Renewed Petition because it is supported by newly discovered evidence; Sky Angel could not have known or discovered these facts at the time of its initial filings (both because many of the facts did not exist at that time and because Discovery refuses to provide factual information exclusively within its control[25]); and the new evidence will affect the Bureau's prior decision.[26] In this respect, the Renewed Petition presents an especially strong case for its acceptance because these new facts demonstrate the falsity of Discovery's

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[22] *See Renewed Petition* at ii-iii ("[T]he pleading cycle did not conclude until after the Bureau declined to grant a standstill, so Sky Angel had no opportunity to address Discovery's unexpected, and strained, legal and factual contentions made in opposition to Sky Angel's complaint and standstill petition . . . Moreover, during the thirteen months since the Bureau's order, there have been decisive legal, regulatory, and factual developments that further demonstrate the merit of Sky Angel's program access complaint, and thus the need for the Bureau to grant a temporary standstill in order to restore the *status quo* pending the outcome of this proceeding.").

[23] *See* 47 C.F.R. §76.7(d).

[24] *See, e.g., Comcast Cable Comms., Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 1200, 1205, n. 45 (MB 2011) ("[D]espite the [petitioner's] failure to file a Motion to explain the extraordinary circumstances prompting the necessity for such filing, we will consider the pleading for purposes of having a complete record before us."); *Mediacom Delaware LLC*, Memorandum Opinion and Order, 26 FC Rcd 3668, 3671 (MB 2011) ("[D]espite the parties' failure to file Motions to explain the extraordinary circumstances prompting the necessity of such filings, we will incorporate the pleadings in this proceeding for purposes of having a complete record before us."); *Comcast Cable Comms., Inc.*, Declaratory Ruling, 29 FCC Rcd 6, 13 (MB 2004) ("We find that, whatever the possible procedural flaws in these filings, they have added substance to the record in this case . . ."); *CoxCom, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 3233, n. 3 (MB 2010).

[25] *See W.S. Butterfield Theatres, Inc. v. FCC*, 237 F.2d 552, 555 (D.C. Cir. 1956) (finding the delay "excusable" because "[t]he only reason the appellants' effort to reopen was not made earlier in the proceedings was that the new events which occasioned it were kept secret by [the competing applicant] for several months.").

[26] *See KFPW Broadcasting Co.*, 44 FCC 2d 310, ¶ 7 (1973).

alleged "harms," which was a decisive factor in the Bureau's decision.[27] In addition to refuting Discovery's alleged harms, these new facts also go to the very heart of this program access complaint proceeding because they prove that Discovery discriminates against Sky Angel.[28]

Discovery's continuing lack of candor and possible misrepresentations[29] also weigh heavily in favor of accepting the Renewed Petition. In finding that Discovery would be harmed by a standstill, the Bureau relied upon Discovery's representations that Sky Angel's continued distribution of its programming would result in "damaged relationships" and "significant legal risks" because Discovery allegedly did not permit this type of distribution to any other MVPD.[30] Even if Discovery's claims were true at the time (which is unknown to the FCC and Sky Angel), they are false now[31] because, since at least November 2010 (months after the *Preliminary Standstill Order*), Discovery has permitted millions of subscribers of large MVPDs, such as DISH, to receive its programming via the Internet.[32] Because the Bureau expressly relied upon these inaccurate representations, it must not refuse the new evidence presented in the Renewed Petition, particularly because Discovery should already have included these facts in the record, at which time the Bureau likely would have reconsidered its *Preliminary Standstill Order* on its

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[27] *See Enterprise Co. v. FCC*, 231 F.2d 708, 711 (D.C. Cir. 1955) ("The relevancy of the new developments to the highly important question of diversification and concentration of control of media for mass communication is clear . . . The new arrangements, therefore, argue persuasively in favor of their consideration by the Commission . . ."); *Butterfield*, 237 F.2d at 556 ("The new evidence here goes to the foundation of the Commission's decision, so that refusal to reopen the record deprives appellants of their rights . . ."); *Golden State Broadcasting Corp.*, 102 FCC 2d 797, ¶ 4 (1985) ("[W]e feel that under the circumstances of this case, the public interest considerations weigh more heavily in favor of the rule of changed circumstances. Both the Review Board and ALJ considered comparative coverage the single most important determinative factor in this case . . .").

[28] *See Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 283 (D.C. Cir. 1971) ("This court's decisions in various cases also reflect a doctrine favoring remand, in the interest of a just result, where there has been a change in circumstances, subsequent to administrative decision and prior to court decision, that is not merely 'material' but rises to the level of a change in 'core' circumstances, the kind of change that goes to the very heart of the case.").

[29] *See Motion of Sky Angel U.S., LLC for Imposition of Sanctions Against Discovery Communications, LLC for Lack of Candor and for Possible Misrepresentation* (filed May 27, 2011) ("Sanctions Motion"); *Reply of Sky Angel U.S., LLC to Opposition to Motion for Imposition of Sanctions* (filed June 21, 2011) ("Sanctions Reply").

[30] *See Preliminary Standstill Order*, 25 FCC Rcd at 3883.

[31] *See Enterprise*, 231 F.2d at 709 (ordering the Commission to reopen the record because of new evidence even though the court found "no basis upon which to disagree with the [FCC's] decision as of the time it was rendered.").

[32] *See Sanctions Motion*; *Sanctions Reply*.

own motion due to changes in decisional facts. Thus, allowing Discovery to continue to benefit from its own lack of candor and possible misrepresentations would be inequitable.[33]

Ignored in Discovery's procedural claims is the simple fact that Sky Angel's program access complaint still remains pending before the Commission. There is no procedural bar to requesting a standstill in conjunction with a pending program access complaint.[34]

In addition, grant of a standstill now would substantially further the public interest.[35] Because the Commission's overriding concern must be the public interest, it therefore should not strike the Renewed Petition on purely procedural grounds[36] as "public interest considerations . . . far outweigh considerations of administrative orderliness."[37] Similarly, with respect to the grant of special temporary authorizations, the Commission has consistently found that the restoration of service to the public constitutes "extraordinary circumstances."[38] Further, although the passage of time has harmed Sky Angel and its subscribers, Discovery's earlier claims of its own harm are false, and such passage of time has not caused new facts to become irrelevant to the

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[33] *See Greater Boston*, 463 F.2d at 278 ("[T]he deeprooted policy in favor of the repose of judgments and the interest in finality, must yield to the overriding interest of correcting injustices . . . where enforcement of the judgment is manifestly unconscionable.") (internal quotations and citations omitted); *id.* at 283 ("The clearest case for remand appears when there is an allegation of impropriety, comparable to a charge of fraud upon the agency . . ."); *id.* at 290 ("When there is fraud on the agency, or concealment, a serious matter is involved . . . Certainly it provides reason for expansion on remand . . ."); *In re Applications of Franklin D. R. McClure, et al.*, 5 FCC 2d 148 (Rev. Bd. 1966) (finding serious questions as to whether competing applicant failed to comply with Section 1.65, and concluding that "[i]ssues inquiring into these matters appear warranted and will therefore be added.").

[34] *See Daytona Broadcasting Co., Inc.*, 97 FCC 2d 212, ¶ 21 (Rev. Bd. 1984) ("[T]he rule of 'changed circumstances' [ ] militates toward the recognition of potentially decisional facts available to the agency after the close of the evidentiary record, but while the case remains within the jurisdiction of the agency . . .").

[35] *See Renewed Petition* at 20-23, 38-42.

[36] *See WSTE-TV, Inc. v. FCC*, 566 F.2d 333, 337 (D.C. Cir. 1977) ("The overriding concern of the Commission in the granting or denial of applications must be the public interest. The Commission's dismissal of WSTE's supplement on purely procedural grounds cannot be upheld, therefore, unless it is clear that the Commission considered whether the public interest would be served by reviewing the supplement on its merits.").

[37] *Southwest Broadcasting Co.*, 16 RR 2d 963, ¶ 6 (1969); *see Enterprise*, 231 F.2d at 713 ("The Commission must have latitude in bringing finality to its choice between applicants but the circumstances to which we have referred impel us to conclude that in the public interest the Commission, in the exercise of a sound discretion, should have reopened the record for reception of evidence of the new developments and to complete comparative consideration in light of those developments."); *Crosthwait v. FCC*, 584 F.2d 550, 555-56 (D.C. Cir. 1978) ("We think the Commission improperly invoked its procedural regulations as a basis for declining reconsideration . . . We conclude that the policy of finality does not justify a refusal to confront squarely Folkways' assertion that acceptance of its amendment would advance the public good.").

[38] *See, e.g.*, *Community Radio of Saratoga Springs*, Memorandum Opinion and Order, 2 RR 2d 290 (1964).

Commission's determinations regarding either a standstill or the pending program access complaint.[39] In circumstances such as here, the Commission's procedural rules, which provide it broad discretion, do not explicitly prohibit consideration of the Renewed Petition.[40]

Finally, in arguing that Sky Angel's demonstration of harm absent a standstill is unsupported by any facts and therefore must be stricken from the record,[41] Discovery apparently failed to adequately review either the Bureau's previous finding or Sky Angel's Renewed Petition. In the *Preliminary Standstill Order*, the Bureau concluded "that Sky Angel will be harmed absent grant of the standstill as a result of the loss of current and potential subscribers who might choose not to subscribe to Sky Angel's service without the Discovery programming."[42] Further, in demonstrating the harm it has suffered, and will continue to suffer, without a standstill, Sky Angel cited to and quoted numerous orders in which the Commission expressly found that withholding programming has a significant impact on subscribership to rival MVPDs, and that this harm is exacerbated when the MVPD is a new entrant and when the programming at issue is highly-rated or otherwise highly-desired by consumers.[43] Sky Angel also is prepared to document to the FCC, upon request from the Commission's staff, that Sky Angel has lost hundreds of subscribers specifically because Discovery cut off its programming.

Discovery's attempt to have the Commission strike Sky Angel's Renewed Petition, rather than address it on the merits, is yet another example of its ongoing quest to impermissibly withhold programming from Sky Angel and its subscribers, as Discovery has sought to do from

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[39] *See Crosthwait*, 584 F.2d at 557 ("To boot, the Commission has not articulated how the passage of time from its denial of Folkways' petition for reconsideration has made reassessment of Folkways' supporting equitable arguments inappropriate.").

[40] *See Meredith Corp. v. FCC*, 809 F.2d 863, 869 (D.C. Cir. 1987) ("[S]ection 405 has never been construed to be an absolute bar on reconsideration of issues raised after thirty days."); *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976) ("[T]he seemingly mandatory language of section 405 does not prevent the entertainment of rehearing petitions beyond the statutory period where extraordinary circumstances indicate that justice would thus be served.").

[41] *See Motion to Strike* at 9.

[42] *Preliminary Standstill Order*, 25 FCC Rcd at 3883 (emphasis added).

[43] *See Renewed Petition* at 34-37.

the beginning of this dispute. Discovery has refused to participate in discovery, it has refused to work toward a mutually agreeable solution, and it even refused to delay its withholding despite a request made by Commission staff. Amazingly, Discovery now asserts that this adjudication would be best resolved through a lengthy rulemaking.[44] If the Commission continues to permit Discovery's stalling tactics, Discovery will win this dispute, and the public interest will suffer, regardless of the Commission's ultimate ruling on Sky Angel's program access complaint. The most expedient way to prevent Discovery from obtaining the exact result it has always sought, even without a decision in this proceeding, would be to grant Sky Angel's Renewed Petition, which simply seeks to provide the Commission with a complete and updated record, and thereby allow the Commission to accurately balance the equities involved in a standstill determination,[45] and thus properly preserve the *status quo*, which would cause no harm to Discovery.

Respectfully submitted,

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[44] *See Motion to Strike* at 8.

[45] *See WMOZ, Inc. v. FCC*, 344 F.2d 197, 198 (D.C. Cir. 1965) (remanding to Commission because "a full record, compiled as has been suggested, may advance the interests of justice.").

Certificate of Service

I, Judy Norris, a legal secretary with the firm of Holland & Knight LLP, hereby certify that on the 22nd day of June 2011, a copy of the foregoing *Opposition of Sky Angel U.S., LLC to Motion to Strike Renewed Petition for Temporary Standstill* was deposited in the U.S. mail, postage prepaid, first-class, addressed to:

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