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February 14, 2003

TN REGULATORY AUTHORITY
DOCKET ROOM

VIA HAND DELIVERY

Hon. Sara Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition to Suspend BellSouth "Welcoming Reward" Tariff and Open a Contested Case Proceeding*
Docket No. 03-00060

Dear Chairman Kyle:

Enclosed are the original and fourteen copies of *BellSouth's Response to the Briefs of the Consumer Advocate Division and CLEC Coalition Supporting the Convening of a Contested Case Proceeding*. Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Guy M. Hicks

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Petition to Suspend BellSouth "Welcoming Reward" Tariff and Open a Contested Case Proceeding*

Docket No. 03-00060

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE TO THE BRIEFS OF THE CONSUMER ADVOCATE DIVISION AND CLEC COALITION SUPPORTING THE CONVENING OF A CONTESTED CASE PROCEEDING

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits its response to the *Reply of the CLEC Coalition in Support of Opening a Contested Case Proceeding* and the *Memorandum in Support of Convening a Contested Case Proceeding* filed by the Consumer Advocate and Protection Division ("CAPD").[1] As explained below, the Tennessee Regulatory Authority ("TRA" or the "Authority") should exercise its discretion and decline to convene a contested case in this matter. The parties have demonstrated no basis to convene a contested case to continue to restate and rehash these same, flawed arguments. The arguments made by the CAPD and the four CLECs in their memoranda are essentially the same arguments made at the agenda conference on February 3, 2003. Following the

[1] The "CLEC Coalition" includes only four CLECs – Access Integrated Networks, Inc., Cinergy Communications Company, Xspedious Communications Corporation, and AT&T Communications of the South Central States, Inc. Notably, while raising arguments regarding resale, the group has not chosen to refer to themselves as the "Resale Coalition". Perhaps this is because they do no more than 1% of their business in Tennessee using resale. While the Consumer Advocate Division refers to itself throughout its *Memorandum* as "the Attorney General", it is BellSouth's understanding that the *Memorandum* is being submitted by the Consumer Advocate and Protection Division, as opposed to either the Attorney General himself or the Attorney General's office acting in its capacity as legal advisor.

presentation of these arguments, the TRA properly declined to suspend the pro-competitive *Welcoming Reward* program and allowed it to go into effect in Tennessee, with the caveat that the tariff's provisions related to termination liability had to be modified.[2]

Following the agenda conference, BellSouth promptly amended its tariff to permit customers to terminate service within the first ninety days without incurring any termination liability charges. BellSouth has therefore conformed its tariff to the TRA's February 3 decision, and the benefits of the *Welcoming Reward* program are now available to Tennessee businesses.[3] The question before the Authority now is whether to convene a contested case proceeding.

The four CLECs and CAPD have now focused the arguments made in their petition to intervene to only two issues – resale and discrimination. Once again, BellSouth will demonstrate that: (1) the four CLECs are simply attempting to insulate both their business customers and new business customers from competition (and better offers) from BellSouth and (2) that the CAPD's arguments, to the extent they are different from the arguments advanced by the CLECs, are fatally flawed as a matter of law.

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[2] Director Jones dissented from the majority.

[3] The *Welcoming Reward* program provides a one-time up-front cash credit reward to new BellSouth customers in rate group 5 who sign a 12-month contract within the 90-day promotion period (February 3 through May 2, 2003). Customers are provided a one-time $100-per-line credit. *See* General Subscriber Services Tariff ("GSST") A.13.90.16.

I. THE *WELCOMING REWARD* PROGRAM IS AVAILABLE FOR RESALE IN ACCORDANCE WITH FCC RULES AND TRA ORDERS, AND THERE IS NO "PRICE SQUEEZE".

The CAPD and four CLECs claim that a contested case proceeding should be convened based on allegations that BellSouth is not complying with its resale duties and that a "price squeeze" may result if BellSouth is allowed to make this offer to new subscribers. BellSouth will address both of these arguments and will demonstrate that each is absolutely meritless.

A. There Is No Legitimate Price Squeeze Issue.

Both the CAPD and the four CLECs proffer a fundamentally flawed calculation in support of their "price squeeze" argument. Interestingly, both base their "price squeeze" argument on calculations purportedly comparing BellSouth's retail offering with the supposed price that a "reseller" would pay. One difficulty with this argument, is that the four complaining CLECs do no more than 1% of their business in Tennessee using resale.[4] The CLECs' are absolutely silent with regard to any "price squeeze" argument based on how they really operate in Tennessee, using UNEs, because an analysis using UNEs would not support the anticompetitive position these CLECs are advocating. BellSouth uses the word "anticompetitive" deliberately, because that is exactly what is at hand here. These

[4] The CLECs have asked that the specific numbers in the wireline activity reports be treated as proprietary information. Consequently, BellSouth has consistently filed such reports as proprietary documents and will not disclose individual CLEC numbers in this pleading. BellSouth's wireline activity report for November, 2002, which was filed with the Authority on January 10, 2003, demonstrates that, in the aggregate, these four CLECs obtained approximately 99% of their lines through the use of UNEs or their own facilities. Less than 1% were based on resale. Indeed, one of the four CLECs has zero resold lines and another only 12 resold lines out of tens of thousands of total access lines.

CLECs have no interest, and no track record of using resale to attract new customers that would be the subject of this tariffed offering. Rather, this entire "resale" argument is nothing more than a subterfuge to mask their real agenda – namely obtaining an unfair advantage in dealing with potential new customers, and maintaining an upper hand in their efforts to retain their existing customers by preventing BellSouth from offering discounts to those customers and potential new customers.

Even if the CLECs were actually interested in using resale as an entry vehicle, their analysis misses the mark. Consistent with the FCC's Rule and the TRA's Order,[5] the wholesale discount will be applied to the underlying services, the 1FB business lines. Once they have purchased this service via "resale," the CLECs are free to do exactly what BellSouth is doing, namely, giving the customer a $100 credit. In fact, as shown by the calculation below, in order to provide the same offer, given its wholesale discount on the underlying service, the reselling CLEC could provide less than $25 per line and still match the BellSouth offer:

Resale Analysis for *Welcoming Reward*

	BellSouth	**Reseller**
Monthly Tariff Rate	$ 39.70	$ 33.35
Annual Revenue	$476.40	$400.18
Less Reward	(100.00)	(23.78)
Total Revenue	$376.40	$376.40

[5] *See* 47 C.F.R. §51.613(a)(2) and *Second and Final Order of Arbitration Awards,* entered January 23, 1997 in Docket No. 96-01152, at pp. 14-16.

As shown above, the CLEC need only offer customers $23.78 to price its offer at the same level as BellSouth's.

Lest the CLECs protest that they cannot possibly provide less than $25.00 to customers, BellSouth suggests that the Authority recall that it is a common practice for CLECs, including "Coalition"-member AT&T, to offer cash rewards for customers who switch service providers in excess of this small amount. AT&T makes mass mailings to prospective new customers across Tennessee and the nation that enclose checks that are redeemable for cash upon the customer's switching its long distance, toll, and local service to AT&T. (See, for example, Exhibit 1, attached, which is copies of such promotional CLEC checks ranging from $15 to $50.) This is a common CLEC practice, and one that the CLECs should not be heard to complain about at this late date.

Resellers can easily match or better BellSouth's offer. All they have to do is offer their own cash reward in conjunction with the tariffed services made available to them at the wholesale discounted rate. There is no "price squeeze" because resellers will always have the benefit of the 16% discount for the underlying tariffed service in addition to whatever reward they choose to offer.

In summary, BellSouth's wholesale price is not higher than BellSouth's retail price for the same service under a resale analysis, properly done. The CLECs, for obvious reasons, failed to provide any analysis of what would occur if they competed in the manner that they actually operate in Tennessee, using UNEs or their own facilities. It is obvious that such an analysis would demonstrate

absolutely no "price squeeze" no matter how generously the term was applied. There is no price squeeze. The entire "price squeeze" argument is simply a red herring used by the CLECs, and embraced by the CAPD without critical analysis, in an effort to derail a legitimate competitive offer that BellSouth wants to extend to subscribers in Tennessee.

B. BellSouth Is Properly Applying Applicable Resale Discounts.

The argument that BellSouth is not properly discounting the offer for resellers is equally deficient. The essence of the promotion, in BellSouth's view, and in the subscribers' view, no doubt, is the $100 award received by qualified subscribers in the 90-day period. As the TRA well knows, promotions of less than 90 days are subject only to the wholesale discount on the ordinary tariff retail price for the underlying service and not subject to wholesale discount off the promotion price. In contrast, those same rules provide that promotions offered for more than 90 days are required to be resold at the reduced promotional less the wholesale discount. The CLECs and CAPD ignore the application of the specific rule for short promotions.

To try to leverage an additional discount, and avoid the FCC rules governing short-term promotions, the four CLECs and CAPD argue that the *Welcoming Reward* program is a long-term, as opposed to a short-term, promotion. Both argue that *Welcoming Reward* is a long-term promotion because the customer signs a 12-month agreement. The CAPD argues that the termination liability provision in the tariff "clearly supports the Attorney General's assertion that the tariff's promotional

rates are in effect for longer than 90 days." (*See* CAPD Brief at p. 5.) This is nonsensical. The awards are available only in the 90-day promotion period.

These arguments regarding the proper resale discount have been rejected by the FCC. The FCC has recognized that promotions serve pro-competitive purposes that would be undermined if they had to be made available at the promotional rate minus the avoided cost discount. To preserve incumbents' incentives to offer such promotions, the FCC has held that short-term promotional prices – those promotions that last for no more than 90 days – do not constitute retail prices and thus are not subject to the statutory wholesale rate obligation.[6] Accordingly, the underlying service, as opposed to the short-term promotion, must still be made available for resale, but only at the normal retail (tariffed) rate minus the statutory wholesale discount. The TRA has required that long-term promotions, defined as promotions that are offered for more than 90 days, should be made available for resale at the stated tariff rate, less the wholesale discount or at the promotion rate, without the wholesale discount.[7] Consistent with the FCC, the TRA *Order* does not require that short-term promotions, defined as promotions that are offered for 90 days or less, be subject to such wholesale discounts. The TRA also stated that the benefits of the promotion must be realized within the time period of the

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[6] *See* 47 C.F.R. §51.613(a)(2).

[7] BellSouth has since agreed to make ***long***-term promotions available so that CLECs will have the benefit of both the promotional discount and the wholesale discount rate previously ordered by the Authority. (*See* John Ruscilli affidavit submitted to the FCC in connection with BellSouth's Tennessee/Florida application, at pp. 64-65.)

promotion.[8] The CLECs' and CAPD's arguments would turn these rulings on their heads.

The *Welcoming Reward* program is available for 90 days, from February 3 through May 2, 2003. (*See* A.13.90.27A.) It is therefore a short-term promotion. Also, all of the benefits of the promotion, the $100-per-line credits, are awarded up front, "at the time BellSouth becomes the local service provider", and therefore within the time period of the promotion. (*See* A.13.90.27B.1.) As stated in the tariff, the program is available for resale. Consistent with the FCC's Rule and the TRA's Order, the wholesale discount will apply to the underlying services, such as a 1FB business line, but that is the extent of the discount under this offer. As stated above, the CLECs are free to resell the underlying services with the wholesale discount and offer credits or other rewards just as BellSouth does.

Moreover, the four CLECs' and CAPD's reliance on the *Order Denying Tariff* is misplaced. In that *Order*, the issue was whether or not a certain promotion could be filed as a "special promotion" on one-day's notice to the TRA as opposed to being filed as a tariff with a 30-day review period.[9] The issue was not whether the special promotion was a short-term or long-term promotion. The concept of "special promotions" relates to filing procedures. The concept of "short-term promotions" relates to resale obligations. The *Order Denying Tariff* relating to

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[8] *See Second and Final Order of Arbitration Awards,* entered January 23, 1997 in Docket No. 96-01152, at pp. 14-16.

[9] The TRA determined in November, 2000 that BellSouth's submission did not meet definition of a "special promotion" as recognized by the Authority. As such, the TRA decided that the submission was improperly proffered as an alleged "special promotion" rather than as a regular tariff pursuant to TRA Rule 1220-4-1-.04. (*See* p. 4 of *Order Denying Tariff,* Docket No. 99-00936, November 7, 2000.)

"special promotion" filing procedures provides no support whatsoever to the claim by the four CLECs and the CAPD that *Welcoming Reward* is a long-term promotion.

Out of an abundance of caution BellSouth filed this program under the 30-day review period. Given that BellSouth did not even seek to use the one-day notice procedure allowed for "special promotions", the *Order Denying Tariff* is not applicable to the *Welcoming Reward* program. The CAPD and four CLECs' attempt to twist BellSouth's careful filing, which allowed the Authority a full thirty days to review the program, into an argument that the *Welcoming Reward* program is a long-term promotion, is unpersuasive.

In summary, there is simply no merit at all to any argument raised by the CLECs or the CAPD regarding the impact of this promotion on BellSouth's resale obligations or on the ability of the CLECs to compete with BellSouth for these customers. These arguments simply do not warrant the convening of a contested case.

II. THE *WELCOMING REWARD* PROGRAM IS NOT UNDULY DISCRIMINATORY.

A. It Is Absolutely Rational To Distinguish New Potential Customers From Existing Customers In Competitive Markets.

As the second prong of their attack on this promotional tariff, the four CLECs and the CAPD argue that the *Welcoming Reward* tariff is unduly discriminatory because it is available to new customers, but not existing customers. The underlying premise of their argument is that there is no rational distinction between new customers and existing customers and that a tariff making

such a distinction must therefore be unreasonably discriminatory. In a competitive market this argument is totally without merit. Attracting ***new*** customers is the hallmark of a competitive marketplace. Moreover, as explained below, if adopted, this argument would have dramatic anti-competitive effects in that it would provide an overwhelming ***disincentive*** for BellSouth to offer lower prices to attract new customers through promotional offerings, a result the FCC has specifically said is undesirable.[10] The bottom line is that the CLECs' and CAPD's draconian interpretation of similar situation would drastically reduce the benefits Tennessee customers would expect to receive as a result of competition.

The tactic of levying "discrimination" attacks against BellSouth offerings that are designed to provide lower rates and additional competitive choices to Tennessee consumers is not new. Instead, this is merely a continuation of the same tactics certain CLECs and the CAPD employed – unsuccessfully – in the Bank and the Store Proceedings.[11]

As BellSouth explained during the Bank and the Store Proceedings, Tennessee law does not prohibit a public utility from offering different rates – it only prohibits a utility from offering different rates to similarly situated customers. In *Southern Ry. Co. v. Pentecost*, 330 S.W.2d 321, 325 (Tenn. 1969), for

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[10] *See* p. 13, below. (The FCC has noted that restrictions on winback activities "may deprive customers of the benefits of a competitive market ....")

[11] *See*, In Re: Proceeding for the Purpose of Addressing Competitive Effects of Contract Service Arrangements Filed by BellSouth Telecommunications, Inc. in Tennessee, Docket No. 98-00559; BellSouth Telecommunications, Inc.'s Tariff to Offer Contract Service Arrangement TN98-6766-00 for Maximum 13% Discount on Eligible Tariffed Services, Docket No. 98-00210; BellSouth Telecommunications, Inc.'s Tariff to Offer Contract Service Arrangement KY98-4958-00 for an 11% Discount on Various Services, Docket No. 98-00244. (The "Bank" and the "Store" case.)

example, the Tennessee Supreme Court held that a railroad did not engage in undue discrimination by charging some customers $18 per car while charging a nearby customer $33 per car. The Supreme Court explained that carriers

> are only bound to give the same terms to all persons alike under the same conditions and circumstances, and *any fact that produces an inequality of condition and a change of circumstances justifies an inequality of charge.*

Id.

With regard to the *Welcoming Reward* program, the "inequality of condition" or a "change of circumstances" is dramatic: new (potential) customers are differently situated than existing (actual) customers. Any business person would whole-heartedly agree that there is a mountain of difference between the customer he has and the customer he does not have. All competitive markets turn on the efforts to attract those potential customers. Consequently, existing customers and non-customers (potential customers) cannot be said to be similarly situated for purposes of telecommunications service in Tennessee. In the face of competition, BellSouth must make greater efforts to obtain new customers than to retain existing ones. Moreover, those efforts result in tangible savings and benefits to customers. As a matter of state law, therefore, existing and new customers are not similarly situated and BellSouth's tariff is not unduly discriminatory. As a matter of TRA policy, those kinds of promotional efforts deliver discounts to customers and should be encouraged – not discouraged.

B. The Fact That All Promotions Last For Only A Limited Time Provides No Basis To Argue Discrimination.

In an attempt to salvage its discrimination argument, the CAPD argues that "... the Tariff draws two arbitrary lines in time, and customers who are otherwise the same but for their failure to subscribe to service within a time period created by the Tariff, are treated differently in their purchase of an entire year's worth of service." The CAPD further claims that "... the mere passage of time is not sufficient justification to treat similarly-situated customers differently." (*See* CAPD Brief at p. 7.) This argument ignores the fundamental fact that both FCC Rules and TRA orders specifically contemplate short-term promotions, which by their very nature are limited in scope and time. Moreover, all promotions have an end date. Taken to its logical conclusion, the CAPD's argument would require that the TRA deny all promotions, both short-term and long-term, as discriminatory because they treat customers differently based on the "mere passage of time" – specifically the passage of the end date of the promotion.

Obviously, all promotions have a beginning and an end. Consequently, the CAPD's argument would undermine all promotions of any type. Because promotions have an end, there were always be some customers who could take advantage of a promotion, because they acted within the predetermined time period in which the promotion was in effect, and other customers who did not, perhaps because they were not interested in the service at the time the promotion was offered, or perhaps because they were not subscribers to any telephone

service in Tennessee when the promotion was offered. There will always be the customer who took the promotion on the 90th day, and the customer who, on the 91st day, wishes he had taken the promotion. If that means the promotion was discriminatory, then there is no such thing as a lawful promotion.

Such a conclusion, however, would be completely inconsistent with the law. The TRA, like the FCC, has already decided that both short and long-term promotions are a lawful and proper means of competing in the marketplace. Both BellSouth and its competitors use limited-time promotions frequently, and customers unquestionably benefit from those promotions. The concept of promotions encouraging potential customers to "act now" to obtain a limited time offer is hardly unusual. The CAPD's narrow reading of the meaning of "undue discrimination" is itself anti-competitive in that, if adopted, it would result in few, if any, promotions being offered to Tennessee businesses and consumers.

If the Authority agrees with BellSouth and continues to allow promotions, there is no need to convene a contested case to decide that issue. There is no fact question involved. It is simply a question of law. Indeed it is difficult to fathom how a short-term promotion could be constructed by BellSouth or one of its competitors if "the mere passage of time is not sufficient justification to treat similarly-situated customers differently."

The CAPD also argues that there must be "some further examination of the circumstances to determine whether such discrimination is unjust or whether there is a just and rational basis for such discrimination." As explained above, there is a

world of difference between a prospective "new" customer and an existing customer. Clearly, there is a rational business basis for distinguishing between the two, and ignoring this distinction long recognized in every competitive market would undermine the benefits flowing to customers in a competitive market place. The CAPD has submitted nothing to support its argument that existing customers and noncustomers are similarly situated. There is no need for "further examination" of the obvious difference between the two.

C. The CLECs Rely On Inaccurate Citations And Non-analogous Hypotheticals, But Offer No Legitimate Argument That The *Welcoming Reward* Tariff Is Discriminatory.

The CLECs' arguments regarding price discrimination are no more compelling than those discussed above. The CLECs offer two arguments in support of their assertion that BellSouth's *Welcoming Reward* tariff is discriminatory.

First, the CLECs attempt to compare the *Welcoming Reward* tariff to a hypothetical tariff offering "new customers better and faster repair service than existing customers." Unfortunately for the CLECs, the hypothetical bears no relationship to the facts in this case. BellSouth is not proposing to treat two similarly situated customers differently on an ongoing basis. BellSouth is simply trying to obtain new customers, who will then receive exactly the same service as existing customers. Whether or not the hypothetical tariff posited by the CLECs would be discriminatory under Tennessee law is irrelevant, because such a tariff is in no way similar to the tariff at issue. Obviously, to be compelling, a hypothetical argument must be ***analogous*** to the actual case. When it is not, the argument

merely demonstrates that if things were different, then they would not be the same.

The CLECs reference, without citation, case law describing preferences that are acceptable and reasonable and preferences that are "improper". The CLECs then note that BellSouth has not cited to a case specifically holding that a carrier may "discriminate in price or service between two otherwise identical subscribers simply because one is a new customer and the other an existing customer." (*See* CLEC Brief at p. 2.) Notably, however, the CLECs have cited no case stating that such a distinction would constitute price discrimination under Tennessee law. Moreover, the CLECs' contention is wrong in that BellSouth has cited, and discussed in its briefs, case law in Tennessee noting that "any fact" constituting a difference in situation justifies a difference in price. *Southern Ry. Co. v. Pentecost*, 330 S.W.2d 321, 325 (Tenn. 1969). The operative "fact" in this instance is the fact that the eligible customer is a ***new*** customer, which the carrier seeks to attract through its promotion. As noted above, the importance of attracting new customers in a competitive marketplace is fundamental. The General Assembly has made clear its pro-competitive policy for telecommunication. It would be nonsensical to ignore facts relevant to the fundamentals of the competitive market place when deciding which "facts" are relevant in this context. Moreover, as noted above, the Tennessee Supreme Court has made it clear that "any" fact can be considered in determining whether unjust discrimination has occurred.

Next, the CLECs rely on a definition of "similarly situated customer" purportedly found on page 27 of the General Terms Section of BellSouth's Tennessee Statement of Generally Available Terms ("SGAT"). (*See* CLEC Brief at p. 3.) ***This quotation is incorrect. The General Terms Section of the Tennessee SGAT has no page 27, and the quoted language does not appear anywhere in the approved Tennessee SGAT.*** Rather, it appears that the CLECs' reference is to language found instead in the SGAT filed in Kentucky. Tennessee's SGAT, approved by the both FCC and the TRA, does not contain such a definition of similarly situated customers.[12]

Because the definition appears in the Kentucky SGAT in the section addressing CSAs, it is not surprising that the Tennessee SGAT is different. Tennessee's rules for CSAs are different than those in any of BellSouth's other eight states. As has been discussed at length in the CSA docket, BellSouth and other CLECs have maintained that determining whether customers are similarly situated, for purposes of CSAs (tariffs designed specifically for particular customers but available to similar customers) is a function best left to case-by-case situations. Accordingly, this argument is also unpersuasive.

Moreover, the CLECs cite to the Kentucky Commission decision is equally inapposite, even if the same language appeared in the Tennessee SGAT (which of

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[12] Obviously, parties are expected to provide reliable and accurate citations in arguments to the TRA. Prior to making this filing, BellSouth has informed counsel for the CLECs of this error in citation and that no such language is contained in the Tennessee SGAT. BellSouth's approved SGAT was served on parties to the 271 case (including "Coalition" member AT&T) and is on file with the TRA.

course, it does not). In the Kentucky Commission decision, briefly stated, one customer was arguing that another similarly situated customer was receiving the same services at a different, and lower price. BellSouth agreed that in terms of quantity and quality, there were no substantial differences in the services used by the two different subscribers. The point of the case was that the complaining subscriber had entered into a two year contract to purchase the services in question, and at the time the contract was entered into, the prices the complaining subscriber received were appropriate, when compared to the other prices similarly situated customers were paying. BellSouth argued that the test for whether similarly situated customers were being treated appropriately had to be conducted at the time the contract was entered into, and the fact that a second subscriber received a still lower price at some time later, while the complaining subscriber was still operating under its two year contract, was irrelevant. In terms of the case in Kentucky, this meant that the complaining subscriber had made a binding business choice to enter into a term contract. The Kentucky Commission agreed with BellSouth that the proper point for analysis was at the time the contract was made, but found that the complaining subscriber's contract had been amended during the two year period, ***after*** the similarly situated new customer had been offered lower rates, concluding that the proper test point was the time when the contract was amended. Consequently the Kentucky Commission found that the complaining subscriber was entitled to the lower rates offered the second subscriber. In the case at hand, there are two classes of subscribers: (1) current subscribers and (2)

potential subscribers. The two classes are obviously different, and nothing in the Kentucky Commission decision cited by the CLECs, even if the CLECs had gotten the facts right, would have any bearing on the matter before the Authority.

D. The CLECs' "Concerns" about Winbacks Are Nothing More Than An Attempt To Deprive Customers Of Good Competitive Offers, And The FCC Has Found That Winbacks Are Pro-competitive.

The CLECs, in conclusion, argue that "it is time" for the Authority to determine whether tariffs aimed at "winning back CLEC customers" are appropriate in Tennessee.[13] The answer to that question is that winbacks are good for competition and consequently good for customers. As discussed below, the FCC has already come to the conclusion that winbacks have positive pro-competitive results.

If BellSouth is not allowed to compete for that group of potential customers who need service in Tennessee, but who are not presently receiving it from BellSouth, then the notion of competition in Tennessee has now been given a definition that will not be found in any standard dictionary. In the CLECs' view, and evidently in the view of the CAPD, competition in Tennessee means that CLECs are free to leverage any advantage they want to get new customers, and once they have those customers, other CLECs can compete to take those customers, but BellSouth cannot. To put a point on this, evidently it would be fine

[13] BellSouth notes that this tariff is not, in fact, a "winback" tariff. Rather, eligibility for this tariff promotion does not turn on whether any customer is a CLEC customer. Rather, all new customers, whether they had service previously with BellSouth, whether they had no previous service, or whether they previously had CLEC service, are eligible for the tariff promotion. Thus, once again, the CLECs' brief contains, at best, sloppy statements about relevant facts.

for AT&T to offer $100 to AIN's customers to get them to move to AT&T, but that is "anticompetitive" if BellSouth were to do it. Certainly such an analysis could hardly stand a very close scrutiny under such things as the constitutionally guaranteed rights to equal protection, or even to free speech, something that should warrant careful thought. Most importantly, such an argument urges a bad result for Tennessee customers who want ***more*** choices, discounts, and offers – not less.

The CAPD also spends much of its Brief arguing that "the policy against unjust discrimination among telecommunications customers is still the law of the land. ..." (*See* CAPD Brief at p. 8.) BellSouth does not take issue with this statement. Indeed, it is a straw man argument. BellSouth's tariff is not unjustly or unduly discriminatory for the reasons stated. In an attempt to address the FCC's specific endorsement of winback offerings as being pro-competitive, the CAPD, but not the four CLECs, relies on a statement made by the FCC in the context of a Notice of Proposed Rulemaking in 1998. Specifically, the FCC stated that

> although Section 10 [of the Federal Telecommunications Act] now gives the Commission the authority to forebear from enforcing Sections 201 and 202 if certain conditions are satisfied ... based on the record before us, we decline to forebear from enforcing the core common carrier obligations of Section 201 and Section 202 at this time.[14]

That the FCC declined, in 1998, to lift all of the regulatory provisions of Sections 201 and 202 under its forbearance authority, in no way demonstrates that

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[14] *See Memorandum Opinion and Order and Notice of Proposed Rulemaking,* FCC 98-134, 13 FCC Rcd. 16587, ¶¶15-18 (July 2, 1998).

BellSouth's *Welcoming Reward* program is discriminatory. The CAPD cites nothing from the FCC relevant to BellSouth's tariff. Again, BellSouth is not arguing that unjust discrimination is appropriate; BellSouth is arguing that the *Welcoming Reward* program does not unduly discriminate.

The more useful and germane guidance from the FCC is its specific endorsement of winback offerings as bring pro-competitive. Originally, in a 1998 order on customer proprietary network information ("CPNI"), the FCC prohibited carriers from using or accessing CPNI to regain the business of a customer that had switched to another provider.[15] The following year, however, the FCC lifted this restriction on winback activities, expressly finding that "winback campaigns are consistent with Section 222(c)(1)"[16] of the federal Act.[17] In that Order, the FCC stated that "all carriers should be able to use CPNI to engage in winback marketing campaigns to target former customers that have switched to other carriers," and it added that "we are persuaded that winback campaigns are consistent with Section 222(c)(1) and in most instances facilitate and foster competition among carriers, benefiting customers without unduly impinging upon their privacy rights."[18]

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[15] Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket Nos. 96-115 and 96-149, Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, ¶85 (1998).

[16] This section of the Act governs how carriers "use, disclose, or permit access to" CPNI. *See* 47 U.S.C. §222(c)(1).

[17] *See Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information; Implementation of the Non-Accounting safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, CC Docket No. 96-115 and 96-149, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409, ¶67 (1999) (the 'CPNI Reconsideration Order").

[18] *Id.* at ¶67.

More specifically, the FCC noted that *restrictions on winback activities "may deprive customers of the benefits of a competitive market,"* explaining that:

> *Winback facilitates direct competition on price and other terms*, for example, by encouraging carriers to "out bid" each other for a customer's business, enabling the customer to select the carrier that best suits the customer's needs.
>
> Some commenters argue that ILECs should be restricted from engaging in winback campaigns, as a matter of policy, because of the ILEC's unique historic position as regulated monopolies. Several commenters are concerned that the vast stores of CPNI gathered by the ILECs will chill potential local entrants and thwart competition in the local exchange. We believe that such action by an ILEC is a significant concern during the time subsequent to the customer's placement of an order to change carriers and prior to the change actually taking place. Therefore, we have addressed that situation in Part V.C.3, infra. *However, once a customer is no longer obtaining service from the ILEC, the ILEC must compete with the new service provider to obtain the customer's business. We believe that such competition is in the best interest of the customer and see no reason to prohibit ILECs from taking part in this practice.*[19]

It would indeed be a strange turn of events if "competition" were defined only as CLECs taking BellSouth customers. Logic dictates that competition has to be a two-way street. The CLECs' call to silence BellSouth in its efforts to "outbid" the CLECs for a customer's business is illogical, inconsistent with FCC precedent, and – most importantly – bad for Tennessee customers. Consistent with the FCC's Order and simple logic, the Authority should allow BellSouth to offer the *Welcoming Reward* program.

At the federal level, section 202(a) of the Telecommunications Act of 1934, as amended, prohibits a carrier from making any "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or

[19] *Id.* at ¶¶69-70 (emphasis supplied).

services." Nor can a carrier "give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."[20] As the FCC has stated, however, the Act does not bar *all* rate discrimination, only "unjust and unreasonable discrimination."[21]

In fact, the FCC has long used the *competitive necessity* doctrine in weighing whether price differences may be justified when carriers seek to apply particular rates in particular situations or for particular customers or groups of customers.[22] The FCC has repeatedly ruled that carriers may respond to specific competitive threats with rates or offerings designed to meet those threats. Moreover, the competitive necessity doctrine has been widely applied in similar situations by other agencies to allow regulated companies to meet specific competitive threats with offerings targeted to win back or retain customers. In addition, promotional offerings have also been endorsed as competitively desirable and even exempted from general costing rules.[23] Promotions that address the threat that ILECs face from rival carriers are an example of offerings to targeted groups of

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[20] *See 47 U.S.C. § 202(a).*

[21] *See Connecticut Office of Consumer Counsel, et al. v. AT&T Communications, Memorandum Opinion and Order*, File No. E-88-061, 4 FCC Rcd 8130 (1989) at para. 12.

[22] *See inter alia, American Telephone & Telegraph Co. Charges, Regulations, Classifications, and Practices for Voice Grade/Private Line Service (High Density—Low Density) Filed with Transmittal No. 11891,* Interim Decision and Memorandum Opinion and Order, Docket No. 19919, 55 F.C.C. 2d 224 (1975); and *in the matter of American Telephone and Telegraph Co., Revisions of Tariff FCC No. 260 private Line Services, Series 5000 (Telpak)*, Memorandum Opinion and Order, Docket No. 18128, 61 F.C.C. 2d 587 (1976).

[23] *See Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Order and Notice of Proposed Rulemaking, 8 FCC Rcd at 3717 (1993).

customers that are justified under the competitive necessity doctrine. As a matter of federal law, therefore, BellSouth's tariff is not unduly discriminatory.

III. THE TRA SHOULD EXERCISE ITS DISCRETION AND DECLINE TO CONVENE A CONTESTED CASE.

The CLECs' filing does not require the TRA to convene a contested case. The Supreme Court of Tennessee has stated that "the TRA has the power to convene a contested case hearing ***if it chooses to exercise the authority,***" *Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 763 (Tenn. 1998) (emphasis added), and it held that §65-5-203(a) does not impose a mandatory duty upon the TRA to convene a contested hearing in every case upon the filing of a written complaint. *Id.* at 764. Stated simply, this precedent establishes that parties cannot demand that the TRA convene a contested case even though they have raised no factual issues and no compelling legal argument. As explained above, the arguments asserted by the CAPD and the four CLECs are without merit as a matter of law. The TRA, therefore, should not allow the four CLECs to insulate themselves from competition by filing a Petition that raises meritless legal issues and no factual issues.

Moreover, if the Authority convened a contested case proceeding every time a local exchange carrier filed a petition against another carrier's proposed tariff or promotion, the tariffs and promotions filed by carriers competing with one another could grind to a halt, to the detriment of customers who would benefit from those tariffs and promotions.

CONCLUSION

The *Welcoming Reward* tariff is not unduly discriminatory. Moreover, BellSouth has complied with its resale obligations in connection with this tariff and the CLECs are free to construct similar or better offers to business customers in Tennessee. The CAPD and four CLECs have had ample opportunity to make their arguments.[24] The Authority made the correct, pro-competitive decision in allowing the tariff to go into effect. All of the issues raised by the four CLECs and the CAPD are without merit as a matter of law. There is no need for a contested case proceeding or hearing.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

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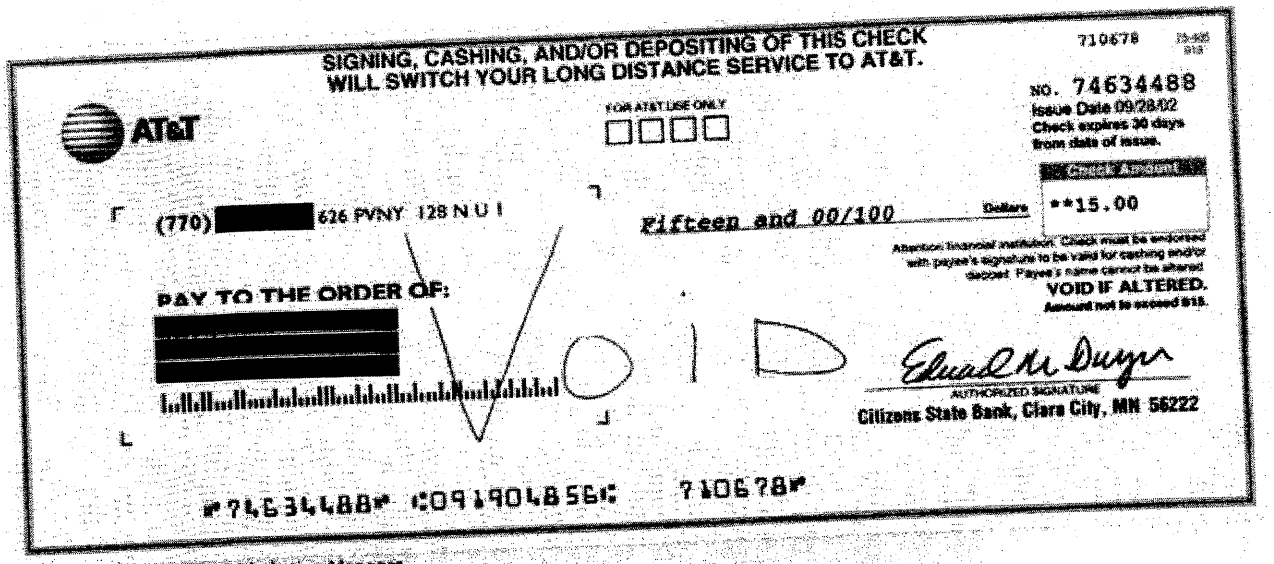
[24] The CAPD and four CLECs have filed petitions to intervene, made extensive oral argument and submitted written briefs in reply to BellSouth's arguments. In each instance, these arguments have raised no compelling new arguments, and no showing has been made that the parties urging the TRA to convene a contested case are aware of any factual evidence relevant to this matter. The supposition that these parties are entitled to insist that the TRA convene a contested case, simply in order to "be heard", is inconsistent with the *Greer* case. As a practical matter, these parties ***have*** been heard, and they are not saying anything new. The TRA need not use its limited resources to convene a contested case on the basis of the unpersuasive arguments raised by the CLECs and CAPD.



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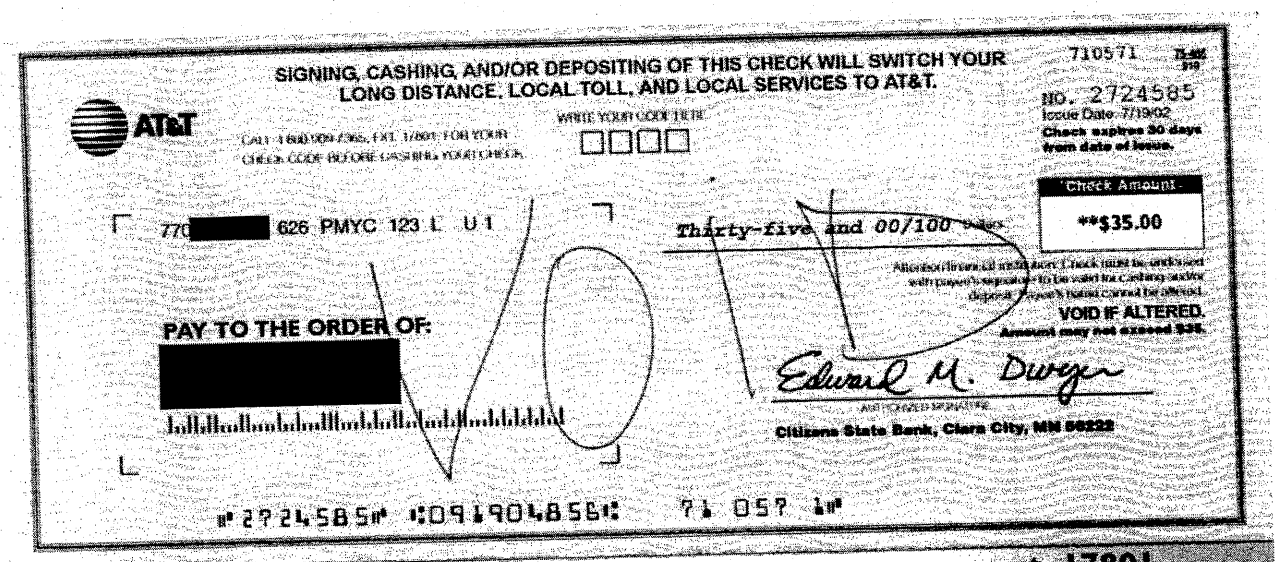

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AT&T Marketing Manager

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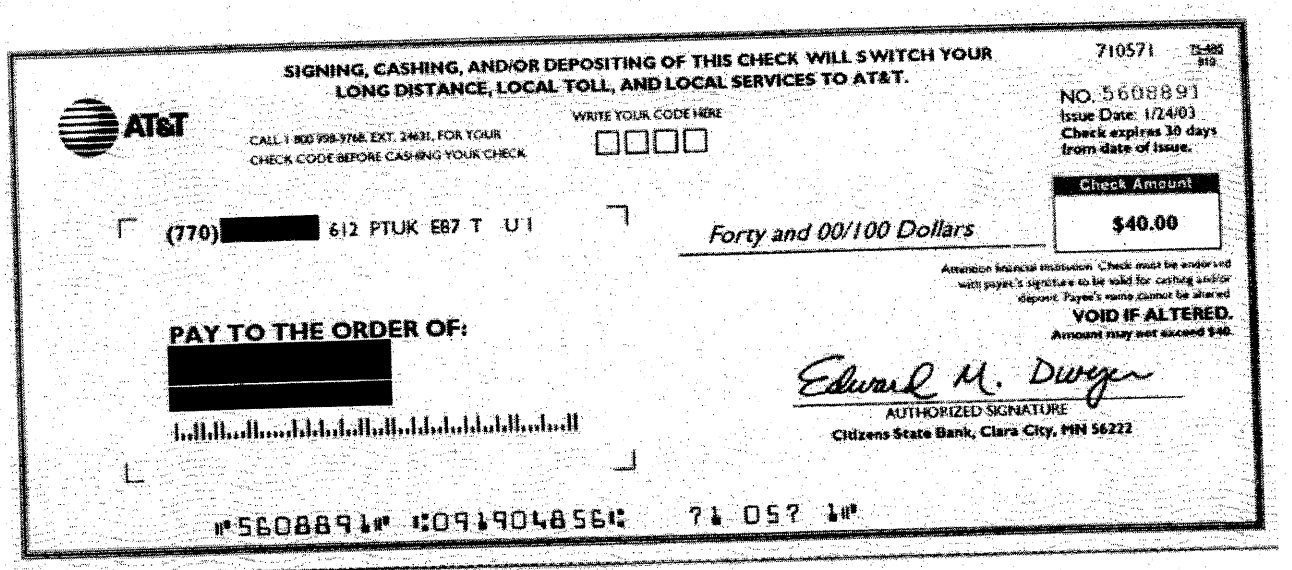

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Gina Grossmann
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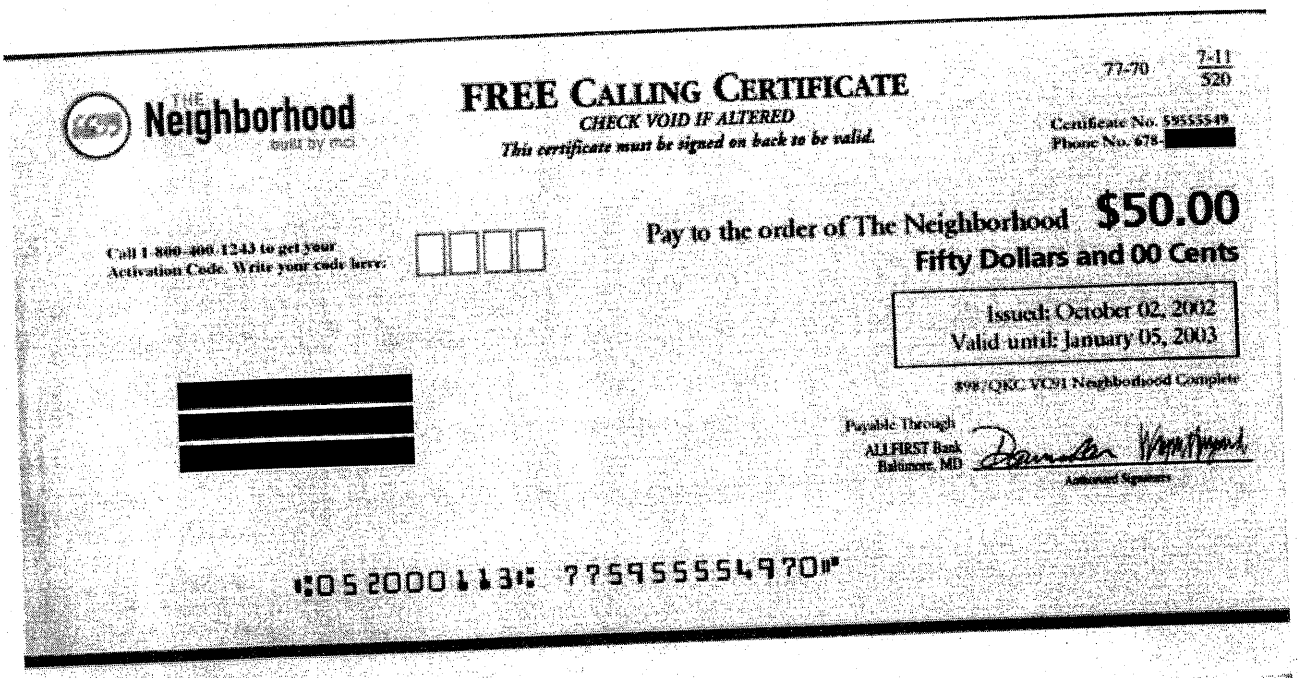

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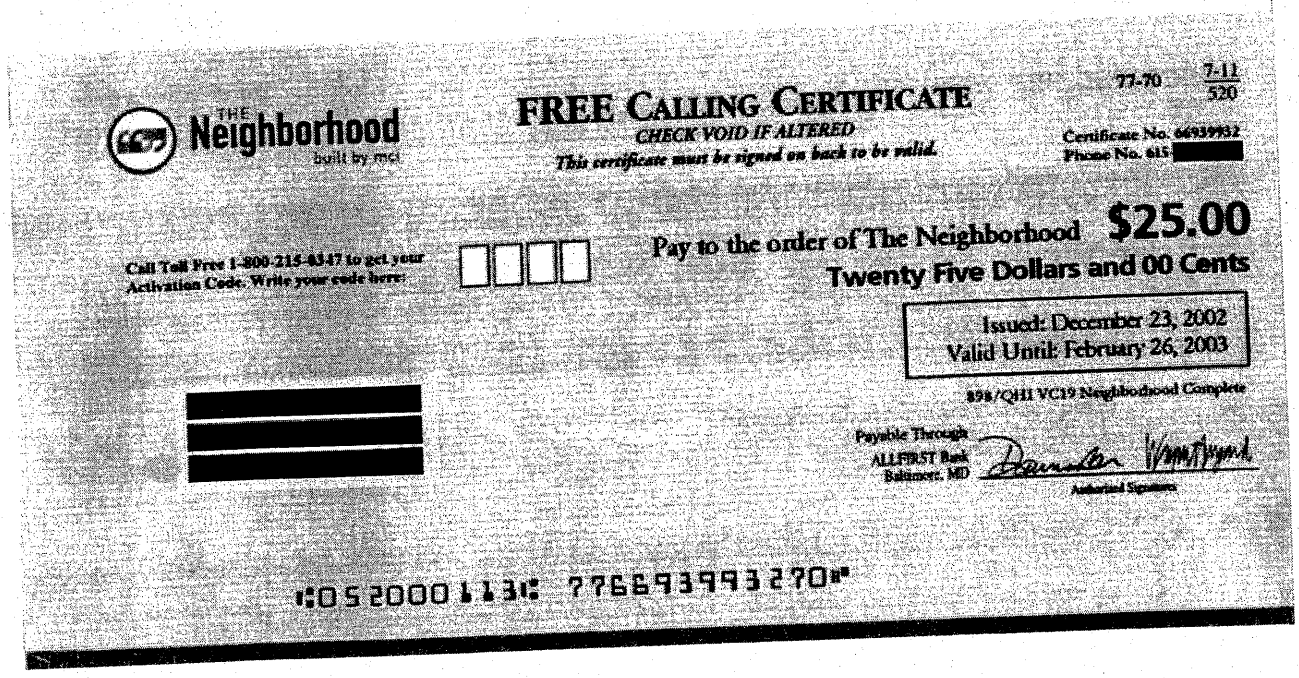

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