

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

Birch Telecom of Missouri, inc., AT&T)	
Communications of the Southwest, Inc.,)	
TCG Kansas City, Inc., and TCG St. Louis, Inc.,)	
)	
Complainants,)	
)	
v.)	Case No. TC-2003-0547
)	
Southwestern Bell Telephone, L.P.,)	
d/b/a SBC Missouri,)	
)	
Respondent.)	

**SBC MISSOURI'S MOTION TO DISMISS,
ANSWER AND AFFIRMATIVE DEFENSES**

COMES NOW Southwestern Bell Telephone, L.P., d/b/a SBC Missouri (SBC Missouri), and for its Motion to Dismiss, Answer and Affirmative Defenses regarding the Complaint filed by Birch Telecom of Missouri, Inc. (Birch), and AT&T Communications of the Southwest, Inc., TCG Kansas City, Inc. and TCG St. Louis, Inc. (collectively AT&T), states to the Missouri Public Service Commission (Commission) as follows:

I. BACKGROUND

SBC Missouri's collocation tariffs were submitted to the Commission on August 24, 2001, as part of a Unanimous Stipulation and Agreement in Case No. TT-2001-298 between SBC Missouri, Commission Staff and numerous CLECs, including Birch and AT&T. On September 6, 2001, the Commission approved this Unanimous Stipulation and Agreement, and on October 3, 2001, the Commission approved SBC Missouri's physical and virtual collocation tariffs with an effective date of October 12, 2001.

In its Complaint, Birch and AT&T claim they are being improperly billed for “DC Power” amperage capacity provided by SBC Missouri to Birch’s and AT&T’s collocation arrangements located in SBC Missouri central offices, under the rates, terms and conditions contained in SBC Missouri’s Commission-approved collocation tariff. As SBC Missouri will describe below, Birch and AT&T are simply wrong, and are attempting to avoid paying for appropriate charges for DC power capacity provided by SBC Missouri, as required under the tariff. The tariff language contained in Section 20.5 of SBC Missouri’s physical collocation tariff requires Birch and AT&T to pay the tariffed rates for each amp of DC power capacity provided by SBC Missouri, not 50% of the amps of DC power capacity provided by SBC Missouri, as claimed by Birch and AT&T.

Moreover, both Birch and AT&T have expressly and irrevocably waived their right to dispute the tariffed charges and bring this Complaint as a result of their own failure to comply with the mandatory Billing Dispute Resolution provisions, including escrow/payment provisions, contained in the Commission-approved SBC Missouri collocation tariffs. SBC Missouri’s physical collocation tariff approved by the Commission on October 3, 2001, contain very specific requirements for a collocator to dispute “any bill for anything ordered from” the tariff.¹ As described below, these tariff provisions require a collocator to notify SBC Missouri of the amount it disputes on an SBC Missouri monthly bill (“Disputed Amounts”), and requires the collocator to either pay the entire amount billed, or to pay any undisputed amounts and establish an appropriate escrow account into which the collocator must pay all Disputed Amounts.²

¹ See SBC Missouri P.S.C. Mo.-No. 42, Local Access Tariff, Section 2, 6.6.1.

² Id.

Here, Birch and AT&T have wholly failed to comply with this mandatory tariff provision, which is a condition precedent to Birch and AT&T bringing this Complaint, and their failure to do so constitutes Birch's and AT&T's "irrevocable and full waiver"³ of their right to dispute the subject charges.

As this Commission is aware, the proceeding in which SBC Missouri's collocation tariffs were approved was extensive and disputed. SBC Missouri's physical collocation tariff was the result of extensive settlement negotiations among numerous parties, including Birch and AT&T. The physical collocation tariff that was ultimately approved by the Commission unequivocally requires collocators to pay for all DC power amperage capacity provided to a collocator on a "per amp" basis. The tariffs do not call for a collocator to pay the tariffed rates for DC power amperage capacity provided over just *one* of the two power distribution cables between SBC Missouri's DC power plant and the collocator's collocation arrangement, and to be excused from paying the tariffed rates for DC power capacity provided over a *second* cable (or "lead") to the same collocation arrangement. Many rates that Birch and AT&T were required to pay under SBC Missouri's new collocation tariffs actually went down once the tariffs became effective and applicable to Birch's and AT&T's existing collocation arrangements, and Birch and AT&T benefited. But the physical collocation tariff authorized a new method of billing for DC power, and Birch and AT&T did not adjust their power requirements in light of the new DC power provisions contained in SBC Missouri's physical collocation tariff, which require collocators such as Birch and AT&T to pay for all DC power capacity provided by SBC Missouri.

³ Id.

Moreover, the SBC Missouri physical collocation tariffs approved by the Commission include specific and mandatory escrow provisions in recognition that SBC Missouri is entitled to reasonable assurance of payment if a CLEC such as Birch or AT&T disputes a bill but does not ultimately prevail. Birch and AT&T would have this Commission simply ignore the express tariff provisions designed to ensure payment to SBC Missouri if Birch or AT&T do not prevail on a billing dispute. But, the Commission cannot lawfully ignore these mandatory Billing Dispute Resolution tariff provisions. Under these provisions, Birch and AT&T have, as a matter of law, waived their right to dispute their collocation bills and bring this Complaint.

II. MOTION TO DISMISS

As described below, SBC Missouri moves the Commission to dismiss the Complaint on the basis that 1) Birch and AT&T have failed to comply with the mandatory “Billing Dispute Resolution” provisions contained in Section 6 of SBC Missouri’s collocation tariff, which results in an “irrevocable and full waiver” of Birch’s and AT&T’s right to dispute the charges which they seek to dispute in the Complaint, and 2) the Complaint fails to state a claim upon which any relief can be granted. The plain language of the relevant provisions of SBC Missouri’s physical collocation tariff requires collocators to pay for all DC power amperage capacity provided by SBC Missouri. Birch’s and AT&T’s claim that they should only have to pay for half of the DC power amperage capacity provided by SBC Missouri is inconsistent with and directly contrary to the plain language of the tariff, and must be dismissed by the Commission.

A. The Complaint Must Be Dismissed Based on Birch’s and AT&T’s Failure to Comply With Mandatory Billing Dispute Resolution Requirements Contained in Section 6 of SBC Missouri’s Collocation Tariff

1. Birch and AT&T have failed to comply with the mandatory Billing Dispute Resolution provisions contained in Section 6 of SBC Missouri's physical collocation tariff. Pursuant to Section 6.6.1 of the tariff, Birch's and AT&T's failure to comply with these mandatory provisions results in an "irrevocable and full waiver of" Birch's and AT&T's right to dispute the subject charges. Since Birch and AT&T have failed to comply with these mandatory tariff provisions, they have waived any right to dispute these charges, and their Complaint must be dismissed.

2. The relevant tariff provisions are clear and compel dismissal of the Complaint. Section 6 of SBC Missouri's physical collocation tariff, approved by the Commission on October 3, 2001, contains specific requirements for a collocator to dispute "any bill for anything ordered from this tariff..." The tariff contains the following requirements relating to billing disputes:

6.6.1 Billing Dispute Resolution

In the event of a bona fide dispute between a Collocator and SWBT regarding any bill for anything ordered from this tariff, Collocator shall, prior to the Bill Due Date, give written notice to SWBT of the amounts it disputes ("Disputed Amounts") and include in such written notice the following information: (a) the date of the bill in question, (b) the Billing Account Number (BAN) number of the bill in question, (c) any USOC information questioned, (d) the amount billed, (e) the amount in question, (f) the reason that Collocator disputes the billed amount. To be deemed a "dispute" under this paragraph 6.6.1, Collocator must either (a) make payment in full to SWBT of the amount billed, or (b) provide proof (in the form of a copy of the executed written agreement with the financial institution) that it has established an interest bearing escrow account that complies with all of the requirements set forth in paragraph 6.6.2 of this tariff and proof (in the form of deposit slips(s)) that Collocator has deposited all unpaid charges into that escrow account. Failure to provide payment in full or the information and proof of compliance and deposit required by this paragraph 6.6.1 not later than twenty-nine (29) days following the Bill Due Date shall constitute Collocator's irrevocable and full waiver of its right to dispute the subject charges.

- 6.6.2 Collocator shall pay all undisputed amounts to SWBT when due and shall pay all Disputed Amounts when due into an interest bearing escrow account with a Third Party escrow agent mutually agreed upon by the Parties. To be acceptable, the Third Party escrow agent must meet all of the following criteria:
- A. The Financial institution proposed as the Third Party escrow agent must be located within the continental United States;
 - B. The Financial institution proposed as the Third Party escrow agent may not be an affiliate of Collocator; and
 - C. The financial institution proposed as the Third Party escrow agent must be authorized to handle Automatic Clearing House (ACH) (credit transactions) (electronic funds) transfers;
 - D. In addition to the foregoing requirements for the third Party escrow agent, the Collocator and the financial institution proposed as the Third Party escrow agent must enter into a written agreement that the escrow account meets all of the following criteria:
 - (1) The escrow account is an interest bearing account;
 - (2) All charges associated with opening and maintaining the escrow account will be borne by the Collocator;
 - (3) That none of the funds deposited into the escrow account or the interest earned thereon may be subjected to the financial institution's charges for service as the Third Party escrow agent;
 - (4) All interest earned on deposits to the escrow account shall be disbursed to Collocator and SWBT in the same proportion as the principal; and
 - (5) Disbursements from the escrow account shall be limited to those: authorized in writing by both collocator and SWBT (that is, signatures(s) from representative(s) of Collocator only are not sufficient to properly authorize any disbursement); or made in accordance with the final, non-appealable order of the arbitrator appointed pursuant to the provisions of paragraph 6.6.7 of this tariff; or made in accordance with the final, non-appealable order of the court that had jurisdiction to render the arbitrator's award pursuant to paragraph 6.6.7 of this tariff.
- 6.6.3 Disputed Amounts in escrow shall be subject to Late Payment Charges as set forth in paragraph 6.7 of this tariff.
- 6.6.4 Upon receipt of the notice and both forms of proof required by paragraph 6.6.1 of this tariff, SWBT shall make an investigation as shall be required by the particular case, and report the results to the Collocator. Provided

that Collocator has furnished all of the information and proof required by paragraph 6.6.1 on or before the Bill Due Date, SWBT will report the results of its investigation within 60 calendar days following the Bill Due Date. If the Collocator is not satisfied by the resolution of the billing dispute under this paragraph 6.6.4, the Collocator must notify SWBT in writing within thirty days following receipt of the results of SWBT's investigation that it wishes to involve the informal resolution of bill disputes afforded under paragraph 6.6.5 of this tariff.

3. Neither Birch nor AT&T has complied with the mandatory Billing Dispute Resolution provisions contained in SBC Missouri's physical collocation tariff. Neither Complainant has paid the entire amount billed by SBC Missouri, nor have they, in the alternative, established an appropriate interest bearing escrow account and provided evidence that they have paid the entire amount in dispute into this account, as specifically required under Sections 6.6.1 and 6.6.2 of SBC Missouri's Commission-approved physical collocation tariff.

4. Birch and AT&T are required to comply with Section 6.6.1 and 6.6.2 of SBC Missouri's Commission-approved physical collocation tariff, and did not do so. The final sentence of Section 6.6.1 of the tariff makes clear the consequences of Birch's and AT&T's failure to comply with these mandatory tariff provisions:

Failure to provide payment in full or the information and proof of compliance and deposit required by this paragraph 6.6.1 not later than twenty-nine (29) days following the Bill Due Date shall constitute Collocator's irrevocable and full waiver of its right to dispute the subject changes.

5. In their Complaint, Birch and AT&T claim that the mandatory Billing Dispute Resolution provisions contained in the tariff and described above do not apply, because SBC Missouri's billing for all DC power amperage capacity provided at the rates contained in the tariff, and Birch's and AT&T's refusal to pay these tariffed rates, does

not constitute a “bona fide dispute.”⁴ Birch and AT&T claim that because they do not wish to pay the tariffed rates for all of the amperage of DC power capacity provided by SBC Missouri, their refusal to pay does not rise to the level of a “bona fide” dispute. Birch and AT&T have the cart before the horse. It is Birch and AT&T that must raise a bona fide dispute with respect to tariffed charges SBC Missouri has billed in order to avail themselves of the dispute resolution process, including specifically complying with the tariff requirement to either pay any charges they dispute or establish an appropriate escrow account. Birch and AT&T have failed to do so, and their failure constitutes an “irrevocable and full waiver” of their right to contest these tariffed charges.

6. Birch and AT&T also claim that the escrow provisions of the tariff do not apply because the amounts at issue exceed one percent of the amounts charges to Birch under the tariff in the preceding 12 months.⁵ Birch claims that because of the amount in dispute, mandatory arbitration does not apply, and therefore the escrow provisions are not applicable to the dispute. Again, Birch’s position is directly inconsistent with the clear language of the tariff. Birch can point to no provision in the tariff which limits the applicability of the Billing Dispute Resolution provisions contained in Section 6.6.1 of the tariff, including the escrow requirement, to arbitrated disputes.

7. Finally, Birch and AT&T argue that the Commission should not “impose” the Billing Dispute Resolution provisions contained in SBC Missouri’s Commission-approved collocation tariff, because if the Commission did so, “it would be contrary to sound regulatory and public policy.”⁶ Birch’s and AT&T’s argument should be rejected.

⁴ Birch and AT&T Complaint, paras. 63-65.

⁵ Birch and AT&T Complaint, para. 67.

⁶ Birch and AT&T Complaint, para. 66.

8. SBC Missouri's physical collocation tariff – including specifically Section 6.6.1 of the tariff – resulted from a Unanimous Stipulation and Agreement in Case No. TT-2001-298, between SBC Missouri, Commission Staff, and numerous CLECs, including Birch and AT&T. On September 6, 2001, the Commission approved this Unanimous Stipulation and Agreement, and on October 3, 2001, the Commission approved SBC Missouri's collocation tariffs with an effective date of October 12, 2001. These tariffs – including specifically the Billing Dispute Resolution provisions contained in Section 6.6.1 of SBC Missouri's physical collocation tariff – cannot be ignored at the request of two parties that have decided not to comply with the tariff requirements. As the Commission is aware, its approved tariffs have the force and effect of law,⁷ and the Commission does not have authority to choose not to apply a tariff provision. Unless and until a tariff is lawfully changed, on a prospective basis, the tariff must be followed. The Commission cannot issue any order that has the effect of excusing Birch's and AT&T's failure to comply with provisions contained in SBC Missouri's Commission-approved physical collocation tariff, and permit Birch and AT&T to escape their waiver of their right to bring this Complaint.

9. Birch's and AT&T's Complaint should be dismissed on the basis that Birch and AT&T have failed to comply with the Billing Dispute Resolution provisions contained in Section 6.6 of SBC Missouri's physical collocation tariff. Under the express provisions contained in Section 6.6.1 of the tariff, Birch's and AT&T's failure to comply (i.e., either payment of the disputed charges or establishing an appropriate escrow

⁷ See, State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41, 49 (Mo. Banc 1979); Bauer v. Southwestern Bell Tel. Co., 958 S.W.2d 68, 570 (Mo. App. 1997).

account for payment) constitutes an “irrevocable and full waiver” of Birch’s and AT&T’s right to dispute these charges and bring this Complaint.

B. Birch’s and AT&T’s Complaint Must Be Dismissed for Failing to State a Claim Upon Which Relief Can Be Granted

10. The plain language of the relevant provisions of SBC Missouri’s physical collocation tariff requires Birch and AT&T, as well as all collocators, to pay the tariffed rates for all DC power capacity provided by SBC Missouri. Birch’s and AT&T’s claim that they should only have to pay for half of the DC power capacity provided by SBC Missouri is contrary to the plain language of the tariff, and must be dismissed by the Commission.

11. The central dispute in this case is whether SBC Missouri is correctly billing Birch and AT&T under SBC Missouri’s collocation tariff for the DC power capacity it provides to both Birch and AT&T. SBC Missouri believes the tariff provisions are clear and require Birch and AT&T to pay the monthly recurring charge contained in the tariff for all DC power amperage made available to Birch and AT&T over both power leads. SBC Missouri provides requested DC power capacity to collocators pursuant to the rates, terms and conditions contained in the Commission-approved tariff. Birch and AT&T argue that they are only required to pay the monthly recurring rate contained in the tariff for the DC power amperage provided by SBC Missouri over one of the power cables running to their collocation arrangements, and should get the DC power capacity provided over the second power cable to these arrangements for free. The plain language of the tariff does not support and is inconsistent with Birch’s and AT&T’s argument.

12. DC power arrangements are included as a specific rate element in SBC

Missouri's physical collocation tariff as follows:

20.5 DC Power Consumption

The DC Power Charge consists of use of the DC Power system, with AC input and AC backup for redundant DC Power expressed on a per amp basis. The cost for HVAC to support DC Power Consumption is recovered as a separate but related rate element on a per 10-amp basis. DC Transmission Energy Charge provided per 2" mounting space consists of the AC energy to provide redundant DC Power to an CEV/HUT/Cabinet arrangement expressed in a monthly rate. Rates and charges are as found in paragraph 21.4

Contrary to Birch's and AT&T's arguments, nothing in the description of the DC power Consumption rate element in SBC Missouri's collocation tariff requires or even suggests that Birch and AT&T only have to pay for the "per amp" capacity provided on only one of its two power leads. To the contrary, this rate element requires that the DC power Charge is on a "per amp" basis, whether power is made available over one or two power leads.

13. In addition, Section 21.4 of SBC Missouri's physical collocation tariff, which is referenced in the DC Power Consumption rate element description and contains the rates for DC Power Consumption, provides as follows:

	<u>USOC</u>	<u>Rate Per Month</u>	<u>Nonrecurring Charge</u>
21.4 DC Power Consumption (Caged, Cageless, and Caged Common Arrangements)			
- Per AMP	SP1PT	\$10.61	None
- HVAC (Per 10 Amps)	XXXX	\$14.62	None
Adjacent On-Site Arrangements			
- DC Power Consumption (CEV, Hut, and Cabinet)	SP1PT	\$10.61	None
- Per 2" Mounting Space	SP1QK	\$ 1.27	None

Again, nothing in this description of the rates for DC power contained in SBC Missouri's physical collocation tariff supports Birch's and AT&T's argument. Rates for DC power

are described as “per amp,” not “per amp for only one feed” as Birch and AT&T would have the Commission believe.

14. Other provisions of the physical collocation tariff compel the conclusion that Birch and AT&T are wrong. Section 21.14 of the tariff, which contains the rates for DC power Arrangement Provisioning (referring to SBC Missouri’s provision of the actual power leads), describes the applicable rates as follows:

	<u>USOC</u>	<u>Rate Per Month</u>	<u>Nonrecurring Charge</u>
21.4 Power Arrangement Provisioning (Caged, Cageless, and Caged Common) Collocation			
- 2-20 AMP Power Feeds	SP1QU	\$ 7.74	\$1,570.84
- 2-50 AMP Power Feeds	SP1QW	9.57	1,954.85
- 2-100 AMP Power Feeds	SP1QX	11.39	2,344.44
(Adjacent On-Site Collocation) Power Delivery Provisioning Charge			
- 2-100 AMP Power Feeds	XXXX	13.84	7,853.86
- 2-200 AMP Power Feeds	XXXX	13.84	14,584.00
- 2-300 AMP Power Feeds	XXXX	13.84	20,338.00
- 2-400 AMP Power Feeds	XXXX	13.84	28,143.00

In this section, the tariff contains specific language which provides for a monthly recurring rate applicable to two power feeds. In Section 21.4 of the tariff, however, which is at issue in this case, the language is equally clear in describing a monthly recurring rate that is applicable on a “per AMP” basis, irrespective of the number of feeds. Had the parties to the Stipulation and Agreement in Case No. TT-2001-298 intended for the DC Power Consumption monthly recurring rates to apply to only one of the power leads, as AT&T and Birch now contend, the language of the tariff section at issue in this case (Section 21.4) would have mirrored the language of Section 21.14 of the tariff (quoted above), and would have provided for a monthly recurring rate based on the DC power capacity provided over a single power lead, but describing the available DC power arrangements as either “2-20, 2-50 or 2-100 AMP Power Feeds.” Section 21.4 of the SBC Missouri physical collocation tariff does not contain this rate structure, however. The language of Section 21.4 makes it clear that collocators such as Birch and AT&T must pay the “per amp” monthly recurring charge for all DC power capacity provided by SBC Missouri, over both leads. Thus, for example, where Birch or AT&T have 100

amps of DC power available over each of two separate power leads to their collocated facilities, Birch or AT&T is required to pay for 200 amps of DC power that SBC Missouri makes available to the collocation arrangement.

15. For the reasons described above, Birch's and AT&T's Complaint should be dismissed by the Commission. The plain language of the tariff makes it clear that Birch's and AT&T's Complaint fails to state a claim upon which relief can be granted.

III. ANSWER

SBC Missouri provides the following answer to the numbered paragraphs of Birch's and AT&T's Complaint. To the extent SBC Missouri does not specifically admit any allegation in the Complaint, SBC Missouri denies this allegation.

1. SBC Missouri does not have sufficient information to either admit or deny the allegations contained in this numbered paragraph of the Complaint, and therefore denies same.

2. SBC Missouri does not have sufficient information to either admit or deny the allegations contained in this numbered paragraph of the Complaint, and therefore denies same.

3. SBC Missouri does not have sufficient information to either admit or deny the allegations contained in this numbered paragraph of the Complaint, and therefore denies same.

4. SBC Missouri does not have sufficient information to either admit or deny the allegations contained in this numbered paragraph of the Complaint, and therefore denies same.

5. SBC Missouri admits that AT&T provides telecommunications services to residential and business customers in Missouri.

6. SBC Missouri does not have sufficient information to either admit or deny the allegations contained in this numbered paragraph of the Complaint, and therefore denies same.

7. SBC Missouri admits the allegations contained in paragraph 7 of the Complaint.

8. SBC Missouri admits that the Commission has general jurisdiction over SBC Missouri, Birch and AT&T, but denies the remaining allegations contained in this numbered paragraph of the Complaint.

9. SBC Missouri admits the allegations contained in this numbered paragraph of the Complaint.

10. SBC Missouri admits that prior to the effective date of its physical collocation tariff, the M2A contained interim rates, terms and conditions for physical collocation. SBC Missouri denies that its physical collocation tariff precludes SBC Missouri from appropriately billing Birch and AT&T for all DC power capacity provided to Birch and AT&T, as required under the tariff.

11. SBC Missouri admits the allegations contained in this numbered paragraph of the Complaint.

12. SBC Missouri admits the allegations contained in this numbered paragraph of the Complaint.

13. SBC Missouri does not have sufficient information to either admit or deny the allegations contained in this numbered paragraph of the Complaint, and therefore denies same.

14. SBC Missouri does not have sufficient information to either admit or deny the allegations contained in this numbered paragraph of the Complaint, and therefore denies same.

15. SBC Missouri does not have sufficient information to either admit or deny the allegations contained in this numbered paragraph of the Complaint, and therefore denies same.

16. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

17. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

18. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

19. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

20. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

21. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

22. SBC Missouri admits that it has communicated with Birch regarding Birch's failure to pay the amounts due for collocation DC power capacity under SBC

Missouri's tariff. SBC Missouri denies the remaining allegations of this numbered paragraph of the Complaint.

23. SBC Missouri admits the allegations contained in this numbered paragraph of the Complaint.

24. SBC Missouri admits the allegations contained in this numbered paragraph of the Complaint.

25. SBC Missouri does not have sufficient information to either admit or deny the allegations contained in this numbered paragraph of the Complaint, and therefore denies same.

26. SBC Missouri does not have sufficient information to either admit or deny the allegations contained in this numbered paragraph of the Complaint, and therefore denies same.

27. SBC Missouri does not have sufficient information to either admit or deny the allegations contained in this numbered paragraph of the Complaint, and therefore denies same.

28. SBC Missouri does not have sufficient information to either admit or deny the allegations contained in this numbered paragraph of the Complaint, and therefore denies same.

29. SBC admits that it has billed AT&T for DC power amperage capacity on a per amp basis as provided in the Commission-approved SBC Missouri collocation tariffs, and that AT&T refuses to pay these tariffed charges. SBC Missouri denies the remaining allegations of this numbered paragraph.

30. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

31. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

32. SBC Missouri denies that AT&T has discussed its failure to pay the DC power charges contained in SBC Missouri's physical collocation tariff. SBC Missouri denies the remaining allegations of this numbered paragraph of the Complaint.

33. SBC Missouri does not have sufficient information to either admit or deny the allegations contained in this numbered paragraph of the Complaint, and therefore denies same.

34. SBC Missouri admits that Complainants order, and SBC Missouri provides, the DC power amperage capacity requested by Complainants, and that Complainants are required to pay for this DC power capacity provided by SBC Missouri on a "per amp" basis, as provided in SBC Missouri's physical collocation tariff. Complainants do not purchase power from SBC Missouri, as they allege in their Complaint. Rather, Complainants are required to pay the rates contained in the Commission-approved tariff that are applicable to the DC power capacity requested by the Complainants and provided by SBC Missouri. SBC denies the remaining allegations of this numbered paragraph of the Complaint.

35. SBC Missouri denies that Complainants have accurately quoted Section 20.5 of SBC Missouri's physical collocation tariff in this numbered paragraph of the Complaint.

36. SBC Missouri admits that Section 21.4 of its physical collocation tariff includes the rates and charges for DC Power Consumption, and provides that the monthly recurring rate is expressed and billed on a “per AMP” basis. SBC Missouri denies the remaining allegations of this numbered paragraph of the Complaint.

37. SBC Missouri admits that this matter is “straight forward,” but denies Birch’s and AT&T’s version of the matter. Because Complainants have failed to comply with Section 6.6.1 of SBC Missouri’s Commission-approved physical collocation tariff, there are no “Disputed Amounts” under the tariff. SBC Missouri denies the remaining allegations contained in this numbered paragraph of the Complaint.

38. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

39. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint. The manner in which DC power is billed under the terms of the SBC Missouri collocation tariff approved by the Commission has changed.

40. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

41. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

42. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint. If a collocater purchases 40 amps of available DC power (provisioned over 2 20-amp power leads), SBC Missouri’s collocation tariff requires the collocater to pay for this DC power capacity on a “per AMP” basis, i.e., to pay the monthly recurring rate for 40 AMPs of available DC power.

43. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint. See SBC Missouri's answer to paragraph 42 of the Complaint.

44. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

45. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

46. SBC Missouri admits that its Commission-approved physical collocation tariff bears an effective date of October 12, 2001. SBC Missouri denies the remaining allegations contained in this numbered paragraph of the Complaint.

47. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint. SBC Missouri has attempted to bill Complainants as required by the tariff, but Complainants have refused to pay the charges required by the tariff.

48. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

49. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

50. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

51. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

52. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint. The SBC Missouri physical collocation tariff approved by the Commission requires collocators to pay the tariffed rate for all DC power capacity

provided to a collocator, on a “per AMP” basis, irrespective of how collocators choose to utilize the power capacity provided.

53. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

54. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

55. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

56. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

57. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint. SBC is not attempting to change its physical collocation tariff. It is Birch and AT&T that is trying to avoid paying the monthly recurring DC power charges contained in SBC Missouri’s Commission-approved physical collocation tariff.

58. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

59. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint. SBC Missouri is not seeking to amend the terms of the interconnection agreements with either of the Complainants.

60. SBC Missouri admits that it notified Birch of the requirements contained in its physical collocation tariff relating to billing disputes, including the escrow requirements. SBC Missouri denies the remaining allegations contained in this numbered paragraph of the Complaint.

61. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

62. SBC denies that AT&T has any right, under the Commission-approved SBC Missouri physical collocation tariff, to dispute its collocation bills by simply withholding billed amounts. As described above, the tariff contains very specific requirements relating to disputes over billing, and neither Birch nor AT&T has complied with these mandatory requirements. It is not SBC Missouri's obligation under the tariff to ensure that AT&T complies with the escrow requirements contained in that tariff.

63. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

64. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

65. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint.

66. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint. Birch and AT&T are obviously concerned about their "working capital," but they would have this Commission unlawfully ignore the clear tariff provisions designed to ensure payment to SBC Missouri if Birch and AT&T do not prevail on their claims. Further, Birch and AT&T have waived any allegation that the dispute resolution provisions contained in the Commission-approved tariff are against public policy or otherwise inapplicable.

67. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint. Complainants can point to no provision in the tariff which limits the

applicability of the clear billing dispute resolution provisions contained in the tariff, including the escrow requirement, to only arbitrated disputes.

IV. AFFIRMATIVE DEFENSES

SBC Missouri asserts the following affirmative defenses to the allegations contained in the Complaint:

A. Complainants have waived their right to dispute the charges that form the basis of their Complaint;

B. Complainants have failed to state any claim upon which the Commission can lawfully grant any relief;

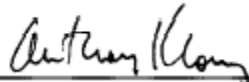
C. Missouri law requires SBC Missouri to charge Complainants the rates contained in SBC Missouri's Commission-approved collocation tariff; and

D. Complainants' Complaint is barred by the doctrines of estoppel and waiver, as described above.

WHEREFORE, having fully answered the Complaint, SBC Missouri requests that the Commission enter an order dismissing the Complaint in this case, and denying any of the relief requested by Complainants.

Respectfully submitted,

Southwestern Bell Telephone, L.P.,
d/b/a SBC Missouri

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this document was served on all counsel of record by electronic mail on August 18, 2003.



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