VII. Collocation – Physical and Virtual:

1. Collocation Power Metering:

AT&T P COLLO Issue 1: *Should AT&T, at its option, be allowed to implement power metering in its collocation space in SBC Missouri's locations?*

MCI P/V COLLO Issue 2: *Should MCIm be charged on a metered basis for power in Collocation spaces?*

Discussion:

SBC states that the Commission should reject the "power metering" proposals of both AT&T and MCI.[1] CLECs should pay for the power capacity they order, not the power they may ultimately expend. While AT&T and MCI argue the merits of various power metering approaches, they cannot agree on any specific one and they fail to point out that each approach has significant flaws. Indeed, neither CLEC provided third-party verification or any other empirical data demonstrating that any of the three approaches would yield accurate and reliable results. Neither CLEC presented evidence suggesting that the FCC was wrong when it specifically declined to order power metering nor did they accurately portray how other state commissions had recently addressed this issue.

First, SBC states, certain items are not in dispute. For example, "it is common engineering practice to design the DC Power Delivery infrastructure for the ultimate demand of the equipment to which the power cables are being installed."[2] Moreover, the Missouri Collocation tariff, in referencing the term "DC Power Consumption," specifically provides that "[t]he 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*." (emphasis added). MCI conceded at the hearing that the industry usage of "redundant DC power" is

[1] Pool Direct, pp. 3-16; Pool Rebuttal, pp. 2-13; Smith Direct, pp. 42-51; Smith Rebuttal, pp. 48-53.

[2] Henson Direct, p. 22.

associated with the amount of power provided at a capacity level, not the amount of power actually used, that is, "the sum of the two feeds [A & B leads] capacity."[3] For this reason, it is not the case, as MCI suggested, that the tariff would not enable billing for redundant power (i.e., power capacity) provided to the CLEC per its order.[4]

Second, SBC states that AT&T cannot even settle on any one of three proposed architectures, while MCI is "not proposing a specific architecture here."[5] Yet, both CLECs rely on a single jurisdiction's failed experience with a single method. MCI points to Illinois and regards it as "demonstrat[ing] the feasibility of MCI's proposal,"[6] while AT&T claims that "such an arrangement has been working in Illinois for some time."[7] Neither, however, has squarely addressed SBC's evidence demonstrating that the "return side power metering" methodology employed in Illinois is not accurate, in large part because significant amounts of current flow to the CO grounding system.[8] As SBC's witness, Pool, explained, the "DC current leaking to ground bypasses the return-side measuring devices and is therefore not measured. Thus, a 'return side' metering system will never accurately measure CLEC power usage."[9] In addition, Pool explained that Telcordia Technologies had concluded both that "it is not possible to obtain accurate power metering on the return side of the DC

[3] Tr. 108.

[4] Price Direct, p. 59.

[5] Tr. 1094.

[6] Price Direct, p. 59.

[7] Henson Direct, p. 17.

[8] Pool Rebuttal, p. 9.

[9] Pool Rebuttal, p. 9.

distribution" and that "[i]t seems that the error in metering could be about 30%-50% of the measured values."[10] MCI knew of no contrary third-party analysis.[11]

Third, AT&T's and MCI's reliance on other jurisdictions is likewise unavailing, as SBC has pointed out.[12] The Texas Commission's 2003 Order did not order power metering, but rather, that SBC use one of three charging options, only the last of which referred to power metering and, even then, only "establishment of a mutually agreeable metering arrangement."[13] While the Texas Commission, in February, 2005, directed the parties to work collaboratively to establish metering, that provides no basis for this Commission to adopt either AT&T's or MCI's proposed contract language. And, while MCI also pointed to South Carolina, that state's commission actually allowed CLECs "the option to purchase power directly from an electric company"[14] which is not an option the CLECs here have pursued -- even though MCI stated that it did not believe there is a reason why it could not be done.[15]

Finally, SBC presented substantial evidence that the other two potential methods advanced by AT&T are deficient and should not be implemented. Split Core Transducers are sensitive to magnetic fields from adjacent cables and must be calibrated to compensate for any interference. Furthermore, varying amounts of power traveling through adjacent

[10] Pool Direct, pp. 7-8; Pool Rebuttal, pp. 9-10; Frame Ground Currents at SBC Collocated Equipment, Telcordia Technologies, November 2002, p. 24.

[11] Tr. 1108.

[12] Smith Rebuttal, pp. 50-52.

[13] The Texas Commission's Order of September 15, 2003, Order in PUC Docket No. 27739, states the three monthly recurring charge options as follows: "1) total DC power consumption in terms of ampere draw of all equipment collocated by the CLEC based on the information obtained from the CLEC through its collocation application form; or 2) the maximum current carrying capacity of either 'A' or 'B' feed; or 3) based on the establishment of a mutually-agreeable metering arrangement." *See* Tr. 1090-91.

[14] Price Direct, p. 66.

[15] Tr. 1154.

cables or equipment cause varying amounts of interference and make accurate calibration very difficult. Thus, additional calibration is required any time equipment or cabling emitting a magnetic field is placed or removed within the vicinity of the SCT. The second device identified by AT&T is the hand-held meter, a device that can be used to measure the amount of power used at a single point in time. However, the hand-held meter method assumes that the usage identified in that circumstance remains uniform over a period of time. Even apart from the fact that such a method does not reflect actual power usage, the hand-held meter method is a costly and manual process.[16]

AT&T responds that power metering is a cost-based and efficient alternative that charges CLECs for the DC Power that they actually use. It is AT&T's position that CLECs should be billed for DC power based on the amount of power they use and not on any other basis. Power metering is the optimal, fairest way of enabling CLECs to pay for power on a usage basis. It is akin to the manner in which consumers pay for electrical power.

Not only is metering the most precise manner in which to assure that AT&T is only billed for the DC Power that it actually uses or consumes, it is also consistent with the manner in which SBC and other ILECs design and use DC Power infrastructure in central offices. The DC Power Plant consists of a collection of components that are all designed to provide uninterruptible DC Power sufficient for the *peak usage* of the telecommunications equipment within the central office.[17] Each component -- batteries, rectifiers, backup generator, controllers, and power distribution service cabinets -- is rated or evaluated based on the number of DC amps of power that the component can provide. The DC power engineer is responsible for monitoring the use of the DC Power Plant, noting the

[16] Pool Rebuttal, pp. 3-4.

[17] Henson Direct, at p. 24.

peak DC power usage that occurs on the power plant. It is the responsibility of the DC power engineer to ensure that there is sufficient power capacity to meet this peak demand on the power plant.[18]

SBC criticizes AT&T's power metering proposal as not being accurate because it does not provide for continuous measurement.[19] SBC's concern that a reading taken at a particular point or points in time is not representative of a CLEC's total cumulative power usage over a month is unfounded. First and foremost, electrical current in a collocation arrangement typically remains static and varies very little over time. In fact, the List 1 Drain reporting option will not vary at all from month to month so long as the equipment in the CLEC cage does not change. In addition, because the "per amp" charge compensates SBC for one amp delivered for one month, it is the *average* current flow to the collocation arrangement that is relevant, rendering continuous metering unnecessary. Moreover, under AT&T's proposal, readings can be taken as frequently as required to assure an accurate accounting of the DC power being used. In Illinois, for example, SBC takes remote readings once a day. Such data can be used to assess instantaneous power usage data as well as average consumption data over various time periods as needed.[20]

AT&T asserts that SBC is not correct that power metering is expensive and inaccurate. Witness Henson testified that these criticisms are limited to the shunt-based metering conducted on the return side. That is not the primary form of metering that AT&T is recommending.[21] Moreover, while AT&T disagrees with SBC regarding the accuracy of

[18] *Id.*

[19] *See* Pool Direct, at pp. 3-4, 12-13.

[20] Henson Rebuttal, at p. 19.

[21] Henson Rebuttal, at pp. 14-15.

return side metering, AT&T's power metering methods can be implemented on the supply side as well as on the return side and SBC has raised no concerns about the accuracy of supply side metering.

AT&T contends that SBC's "power reduction proposal" does nothing to alleviate the CLECs' concerns because, even if the CLECs were willing or able to pay SBC's charges to reduce the power arrangements they may ultimately need to reinstall at some future time, SBC's proposal results in the CLECs paying for DC power using the same flawed method SBC currently proposes, except that the CLECs will have fewer fused amps in place. SBC's recommendation does nothing to accurately measure the power AT&T uses and bill AT&T for that power.[22]

SBC contends that its "per amp method" is the most reasonable and reliable method for charging for collocation power. But AT&T's power metering proposal is also a "per amp" method – the difference is that SBC proposes that CLECs pay for DC power on a per *fused* amp basis while AT&T proposes that CLECs pay for DC power on a per amp basis for the number of amps of DC power the CLEC *actually uses*. There is no dispute in the arbitration regarding the appropriate per amp rate for DC Power, only a dispute as to how that rate is applied.

SBC also misstates the status of power metering in Texas and Illinois – two of SBC Missouri's sister states. The Texas Commission has already rejected SBC's proposal to charge the per amp charge on 100 percent of both the A and B feed amps. In fact, while the Texas Commission originally ordered SBC to calculate its monthly recurring charge for DC power consumption based on its choice of three options (List 1 Drain, the maximum

[22] *Id*. at 22.

current carrying capacity of either the A or B feed or a mutually agreeable metering arrangement[23]), the Texas Commission subsequently determined in the successor arbitration proceeding that the first two options may overstate the power usage rate. Therefore, the Texas Commission directed the parties "to work collaboratively to establish the metering arrangement and present a solution within 60 days from the final order in this proceeding."[24] Thus, power metering will soon be implemented in Texas. As far as power metering in Illinois is concerned, it is SBC – and only SBC – that deems Illinois "a failure." Power metering has been in place in Illinois for four years, without a single negative incident.

SBC also expresses concern that if the Commission adopts AT&T's proposed language, the CLECs will have an incentive to provision their power supply inefficiently by ordering more than they currently need. SBC's arguments are flawed in two important respects. *First*, from an efficiency standpoint, it is much more efficient for the CLEC to design and install its Power Delivery arrangement (spanning from the BDFB to its collocation cage) to accommodate the CLEC's *ultimate* demand rather than to install a lesser Power Delivery infrastructure arrangement and to augment it from time-to-time as its actual power demand increases – a process which is expensive and inefficient. *Second*, SBC's argument also implies that its own costs increase as the size of a CLEC's Power Delivery arrangement increases. That is not the case. The CLEC pays SBC a non-recurring charge for the design and installation of its Power Delivery arrangement, whatever

[23] Texas PUC Docket No. 27559, Complaint of Birch Telecom of Texas Ltd., L.L.P., AT&T Communications of Texas, L.P., TCG Dallas, Teleport Communications of Houston, Inc. Against Southwestern Bell Telephone Company, LP for Post-Interconnection Dispute Regarding Overcharges for Power Under SBC-Texas' Physical Collocation Tariff, Arbitration Award at p. 10 (September 15, 2003).

[24] Texas PUC Docket No. 28821, 28821-Collocation-Jt. DPL-Final, p. 2.

its size, that is separate and apart from the monthly recurring charge for DC Power Consumption.[25] The charge for the pipe is separate and distinct from the charge for the power running across it. And, as SBC's lawyer Gryzmala admitted, SBC is paid for its costs in providing the power delivery arrangement.[26]

The DC Power Plant is not engineered to meet the cumulative total power that the wiring to CLECs' collocation cages can accommodate at maximum capacity. If the CLEC orders a 200 amp power delivery arrangement (pipe) but uses only 6 amps, SBC engineers will not design the DC Power Plant any differently or bigger than if the CLEC orders a 100 amp power delivery arrangement (pipe) but still uses 6 amps because the peak power usage is based on the 6 amps actually used. Thus, whether the CLEC orders 100 amps or 200 amps does not affect the size or the cost of the DC Power Plant. More simply, the size of the pipe has little to do with the volume running through or across it.

AT&T contends that any reasonable ordering process for DC Power would recognize the important distinction between the initial, upfront ordering of the *DC Power Delivery* arrangement and the *separate* request for the amount of DC Power that the equipment in the collocation arrangement actually uses on a monthly basis. In other words, AT&T's DC power capacity on the cables extending from the BDFB to AT&T's collocation arrangement will not match its actual DC power usage except in those *very rare* instances where the collocation arrangement is fully built out and operating under peak conditions. Therefore, any attempt by SBC to equate the size of AT&T's *DC Power Delivery*

[25] Tr. 1161-62.

[26] *Id*.

arrangement with AT&T's actual usage of DC Power and to charge AT&T for DC power on that basis is necessarily not cost-based.[27]

SBC also contends that power metering will increase its installation and administration costs without any corresponding increase in CLECs' costs because the use of power metering will require the purchase and installation of metering equipment and some data conversion activity. AT&T's proposal makes it clear that it will compensate SBC for the purchase and installation of the metering equipment and for the costs incurred to read the meters: "Non-recurring charges for the establishment of a metered power usage system and recurring charges for meter reading will be paid by Collocator."[28]

Finally, SBC's assertion that AT&T's power metering proposal puts network reliability at risk is contrary to the record evidence. As AT&T witness Henson testified, the split core transducer and the handheld meter (two of AT&T's options) are placed around the DC power cables without the need to disconnect the DC power cable, break the circuit or interrupt the circuit in any way.[29]

MCI responds that this issue was triggered because SBC is misapplying its tariff and overcharging MCI for power at collocation facilities. MCI contends that SBC charges MCI for power it does not use. SBC has interpreted its tariff so that it charges MCI for the amount of power that *could* be delivered to the collocation space regardless of actual

[27] Henson Direct, at p. 33.

[28] *See* AT&T proposed language, section 19.2.3.6.

[29] Henson Rebuttal, at p. 18.

consumption.[30] MCI's proposed language gives MCI the option of implementing metered power. Furthermore, MCI will assume the costs of implementing metered power.[31]

A question was raised during the hearing concerning MCI's proposed language of who will install the metering equipment. MCI's language refers to "MCIm's certified vendor;" however, during the hearing this matter was clarified such that MCI would use a vendor on SBC's approved list to install such equipment.[32] MCI currently uses metered power in Illinois and has for a number of years.[33] Metering power would enable MCI to pay for the power it actually uses, rather than paying SBC for a "block" of power, whether or not MCI actually used the power.[34]

The Texas commission addressed the issue of collocation power in its most recent arbitration proceeding, stating:

> [T]he Commission finds that the power equipment is necessary to operate the network components in the collocation space. Although SBC provides the required power from a centralized location, CLECs are requesting to allow installation of their own power distribution equipment in the collocation space in order to effectively manage the distribution of power. This capability is necessary to manage additions and changes to its network equipment without relying on SBC to extend the power from a centralized location for each addition and/or modification to its network equipment. The Commission finds that a CLEC should be allowed to install its own power distribution equipment in its collocation space provided that such placement does not affect the structural integrity of the building.[35]

[30] Price Direct, at pp. 58-59.

[31] Price Direct, at p. 61.

[32] Tr. 1169.

[33] Price Direct, at pp. 60-61.

[34] Price Direct, at pp. 61-65.

[35] Texas PUC, Docket 28821, Arbitration Award, Collocation DPL, SBC Issue 6, Section 3.1 (*quoted in* Price Direct, pg. 67)

Finally, MCI's proposal is technically feasible as metering has been in place in Illinois for a number of years. SBC claims that the return shunt metering underreports the amount of power used. However, MCI asserts that SBC had the opportunity to raise this issue in a cost proceeding in Illinois but failed to do so. If SBC's claims were as serious as it now claims they are, surely it would have raised them in the Illinois cost proceeding when it had the opportunity to do so.[36]

Decision:

The Arbitrator concludes that charges should be based on the power actually consumed by the CLECs. A negotiated solution would likely have resulted in a better result than any of those proposed by the parties. In the absence of such a result, charges should be based on the rated power draw of the equipment actually installed in the collocation space.

2. Decommissioning:

Xspedius P/V COLLO Issue 5: *Should the ICA delineate specific requirements for partial collocation space decommissioning and removal of unneeded cables and equipment?*

Discussion:

SBC states that the Commission should approve its proposed language regarding the costs associated with cable removal and project management fees. No other CLEC Coalition member (indeed, no other CLEC at all) opposes this language, and Xspedius' reasons are insufficient.[37]

[36] Tr. 1156-57.

[37] Pool Direct, pp. 23-24; Pool Rebuttal, pp. 14-15.

SBC contends that Xspedius is wrong when it claims that when a CLEC pulls unused cable up above the collocation cage, "SBC may remove it."[38] SBC contractually required to remove the cable; removal is not merely an option. Agreed-upon language in the Power Reduction (Section 2.23.3) and Interconnection Termination Reduction (Section 2.23.4) portions of ICA specifically states that SBC "will perform the power cable removal work above the rack level" and "will perform the interconnection cable removal work above the rack level" (respectively) (emphasis added).

SBC asserts that Xspedius is likewise wrong that "SBC can just leave the unused cable above the cage, and then use it in the future."[39] First, the ICA forecloses that option. Second, the notion of reuse wrongly assumes that any future need will require the same type and length of cabling. Third, leaving disconnected cabling in the cable racking would eventually congest or clog the cable rack, thus ultimately blocking the path for SBC as well as for other CLECs. Finally, splicing of the cable in the racking would create the risk of electrical and fire hazards.[40]

SBC states that Xspedius' challenge to SBC's proposed project management fee is also without merit. No other CLEC challenges that charge, which represents the general engineering and central office management coordination and other activities that are not recovered in the elements identified by XO.[41] Additionally, SBC contends that it is quite reasonable that the many tasks that must be accomplished in decommissioning space be

[38] Krabill Direct, p. 15.

[39] Krabill Direct, p. 15.

[40] Pool Rebuttal, p. 15.

[41] Smith Rebuttal, pp. 55-56.

properly managed so that the vacated space may be made immediately ready for another CLEC.[42]

Xspedius responds that, in the K2A and O2A successor proceedings, SBC proposed terms governing partial decommissioning. The CLEC Coalition accepted those terms and settled the issue. However, XO was not a party to those cases or those settlements, and now challenges two elements of SBC's proposal: (1) whether a CLEC should have to pay for SBC's decommissioning activities regardless of whether those activities are ever performed, and (2) whether SBC should be permitted to charge "project management" fees for decommissioning.[43]

When a CLEC such as Xspedius reduces either the size of its collocation space or the amount of power or number of power feeds that are part of a collocation arrangement, one of the activities that may occur is "cable mining," or removing cable that is no longer used. This is done if needed to free up capacity on a cable rack or to prevent overcrowding of collocation space.[44] In all partial decommissions, SBC charges CLECs to perform cable mining, but XO does not believe it should pay for such activities unless they are actually performed by SBC.

SBC witness Pool addressed this issue for SBC. Pool did not testify that SBC will *always* perform this function. Instead, he stated that there may be a delay in performing the function because SBC decommissions space in the most efficient manner so it may wait and consolidate one CLEC's work with another's.[45] Pool also testified that leaving

[42] Pool Direct, pp. 23-24.

[43] Krabill Collocation Direct, at pp. 14-15.

[44] *Id.* at 15.

[45] Pool Direct, at p. 22.

unused cable in a rack could eventually congest the rack. However, SBC does not acknowledge that, with the diminishing size of fiber-optic cable, such overcrowding may in fact *never* occur.[46]

The only justification SBC offers for charging in advance for a service that may never be performed is that the CLEC may go out of business before SBC performs the function and seeks to collect.[47] Xspedius states that, while this may have some legitimacy in the case of total decommissioning of a space, it cannot be justified in partial decommissioning where the CLEC remains in the space as a wholesale customer and is merely reducing the size of its installation. SBC also posits that it might be precluded from billing for cable mining because of limitations on back-billing.[48] However, billing for a function when it is performed is *current* billing, not back-billing, so such a justification is inadequate as well.

XO also objects to SBC's "project management" charges in connection with decommissioning activities. Coalition witness Krabill testified that SBC proposes charging a project management fee of $2,004 for "re-fusing" or reducing the power coming into the collocation cage from 100 amps to 50 amps. In addition, SBC charges a $503 application fee and separate line items associated with each labor component to accomplish the task, which, combined, are less than the "project management" fee.[49] SBC offered no justification for its high project management fees in either direct or rebuttal. SBC did not produce a cost study to support any of the new collocation rates presented in its arbitration

[46] Pool Rebuttal, at p. 15; *but see* Krabill Collocation Direct at 15.

[47] Smith Rebuttal, at pp. 56-57.

[48] Smith Direct, at p. 54.

[49] Krabill Collocation Direct at 15-16. *See* SBC's CLEC Coalition Arbitration Petition attachment titled "SBC 13STATE COLLOCATION RATE SUMMARY" for these costs.

petition and doesn't even claim that its rates meet the TELRIC standard for collocation charges.[50]

Xspedius asserts that a customer should not have to pay for goods that are never delivered or services that are never performed. Cable mining is no exception. The Commission should rule that SBC may not charge for decommissioning activities unless and until it actually provides such services to the CLEC. As to the disputed charges for project management, the Commission cannot rule in favor of SBC because SBC presented no testimony and no cost studies to support its rates.

Decision:

There are two issues here: fees for cable mining and fees for project management. With respect to cable mining, the Arbitrator concludes that CLECs must pay these fees to SBC in advance, regardless of whether the activity ultimately ever occurs. It is similar in this way to the Negative Net Salvage issue encountered in traditional utility rate cases, in which ratepayers properly pay utilities now for future retirements that may well never occur.

As for project management, the Arbitrator agrees with Xspedius that the charges proposed by SBC are unsupported and thus cannot be included in the ICA.

3. Access to Information:

CLEC Coalition P/V COLLO Issue 6: ***Should the ICA include requirements that SBC Missouri provide to CC, at CC's request, various collocation reports necessary for the CC to perform its ongoing activities?***

Discussion:

[50] Tr. at 359-360.

SBC states that the Commission should reject the CLEC Coalition's language proposing detailed information about their collocation arrangements. When SBC explained that it already provides all of the information that a CLEC needs and that the information is posted online for access to by all CLECs for a small fee ($25),[51] the CLEC Coalition complained about the fee. The fee is fair and reasonable, given the higher actual cost of producing the report and given that the report would provide the same information that CLECs have access to when SBC Missouri turns over their frame termination information after the collocation arrangement is installed.[52]

The CLEC Coalition responds that, in its Direct Testimony, it narrowed its request for new collocation reports and requested instead that the current CFA inventory report be provided at cost-based rates.[53] The Coalition complains that SBC "arbitrarily" charges $25 per report, as was announced in its Accessible Letter entitled "Collocation Connecting Facility Assignment (CFA) Inventory Reports."[54] A follow-up Accessible Letter noted that the price would be $25 until a cost study was completed, but there have been no subsequent letters sent or cost studies performed.[55] Over the course of more than three years since March 29, 2002, the Coalition asserts that it is likely that SBC has recovered the costs incurred to create this automated report.[56] The CLECs therefore believe there should be no charge in the future for this report, unless SBC demonstrates that there are costs associated with providing the report that are not apparent.

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[51] Smith Direct, pp. 50-51.

[52] Smith Rebuttal, p. 58.

[53] Krabill Collocation Direct at 19.

[54] CLECALL02-042, dated March 29, 2002.

[55] CLECALL02-054, dated April 30, 2002, at p. 18.

[56] *Id*.

In rebuttal testimony, SBC witness Smith stated that a cost study has recently been completed and that it shows the cost of the report to be higher than SBC's current charge to CLECs.[57] However, SBC has not provided that cost study either to the CLEC Coalition, the Commission or to the Arbitrator. Consequently, it is not possible to tell whether SBC is improperly loading in charges for updating its own records that SBC would need to maintain regardless of whether any CLEC ever asked for the report. The Coalition seeks a ruling from this Commission that SBC provide its cost information to the Coalition and that SBC continue to charge for the report only to the extent there are incremental costs associated with the report that are unnecessary for SBC's own internal recordkeeping.

Decision:

The Arbitrator concludes, for the reasons stated above, that SBC's language is preferable.

4. Picking and Choosing Between ICA and Tariff:

CLEC Coalition P/V COLLO Issue 7: ***Should the Collocation Appendix, in addition to incorporating the requirements of the Collocation Tariffs, contain additional contract language addressing situations on which the Tariff is silent?***

CLEC Coalition P/V COLLO Issue 8: ***Should the terms and conditions concerning collocation be governed by the current SBC Missouri Local Access Tariff (Physical Collocation and Virtual Collocation) , supplemented by Appendix Collocation, or should all the terms be contained in the Agreement?***

CLECC P/V COLLO 9: ***Should SBC be permitted to implement new collocation rates that are contrary to, or omitted from, the current collocation tariff, absent cost studies or other justification for same?***

WilTel P COLLO Issue 1: ***Should this agreement prohibit WilTel from ordering physical collocation by other means, such as pursuant to tariff?***

[57] Smith Rebuttal at 58.

SBC's Statement of the Issue: *Should this agreement provide the sole and exclusive terms for ordering Physical Collocation?*

Discussion:

SBC states that its proposed language provides that a CLEC may request or continue collocation arrangements under the ICA but that it cannot also request them or continue them through the tariff. A CLEC must reasonably be expected to choose which among the two it wants, for all rates, terms and conditions associated with its collocation arrangements. In other words, SBC asserts that a CLEC should not be allowed to arbitrage its orders so as to pick and choose between whichever of the two vehicles it wants. The CLECs have not provided any competing language.[58]

The Coalition states that, near the close of the M2A successor negotiations window, SBC presented the CLEC Coalition with all new collocation appendices that contain comprehensive terms and prices; SBC further represented it intended such new terms to replace the current collocation tariffs. SBC then stated that the parties' relationship must be governed either by existing tariffs in their entirety or SBC's newly-proposed appendices.[59] As demonstrated by the Coalition's testimony as summarized herein, such a position is wholly inconsistent with the parties' practice to date or with the position taken by SBC in its other Southwest Region states.

The CLEC Coalition has provided extensive background on the development of the tariff in Missouri, which began in 2000 at the request of CLECs.[60] Ultimately, the current collocation tariff resulted from a three-state settlement wherein CLECs and SBC

[58] Smith Direct, pp. 51-53; Smith Rebuttal, pp. 53-55.

[59] Smith Direct at 52-53.

[60] Cadieux Collocation Direct, at 10-12.

agreed to virtually identical tariffs in Oklahoma, Kansas and Missouri.[61] The Commission approved the parties' stipulations in Case No. TT-2001-298 in April and September 2001,[62] and the parties have been operating under the tariffs in all three states ever since.[63]

When the parties have had disputes under the terms of the tariff, the implementation of settlements has been accomplished – at SBC's insistence – by amendments to the interconnection agreement.[64] Similarly, in the K2A and O2A successor proceedings, SBC proposed implementation of settled language for Issues 1 and 5 by incorporating the terms of the settlement into the Collocation Appendix, which then serves as a supplement to the tariff.[65] Hence, the current practice in Missouri and elsewhere in SBC states is that the collocation tariff provides a general source of collocation rates, terms and conditions, but the parties are also permitted to address specific bilateral matters via supplemental provisions implemented – either through mutual agreement or arbitration – via the collocation appendices to their interconnection agreements. There is nothing wrong or unfair about that practice and it is one to which SBC has not only acquiesced but, indeed, previously insisted upon.

In Missouri, however, the Coalition states, SBC has now taken an entirely new approach.[66] SBC seeks to require the CLECs to choose between the collocation tariff and

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[61] *Id.* at 9.

[62] *Id.* at 11-12.

[63] *Id.* at 12.

[64] Cadieux Collocation Rebuttal, at p. 7. *See, e.g.,* Case No. XK-2004-2001, Application of NuVox Communications of Missouri, Inc., for Approval of an Amendment to Its M2A Interconnection Agreement with Southwestern Bell Telephone Company Pursuant to Section 252(e) of the Telecommunications Act of 1996, Order Approving Amendments to Interconnection Agreement (Jan. 26, 2004).

[65] Cadieux Collocation Rebuttal, at p. 8.

[66] Smith Direct, at p. 52, noting that SBC's proposal to have its new Collocation Appendix cover all aspects of collocation "is a different approach from SBC Missouri's norm of pointing to the Collocation Tariff."

SBC's proposed 13-state collocation appendix. While the Commission is familiar with the collocation tariff, having approved it after an extensive evidentiary investigation, SBC's 13-state proposal (and its differences from the collocation tariff) has not been subjected to similar scrutiny and has not been detailed and justified in SBC's testimony in this case.[67]

The Coalition notes that SBC claims it has merely added a few "enhancements"[68] to the tariff. But SBC has actually changed or deleted key provisions in the existing tariff, extending application intervals and deleting the third party engineer process for review of SBC's assertions that central offices have no more space for collocation.[69] SBC has eliminated references to cost-based rates, changed some existing rates and introduced new ones with no cost proceeding or PSC oversight.[70] To demonstrate how extensive SBC's changes are, the Coalition presented two exhibits giving a side-by-side comparison of both the tariff terms and existing rates.[71] These exhibits amply show how massive SBC's changes are.[72]

The Coalition states that SBC's only justification for its new approach is "to form a basis of consistency across its 13 state region and to be in line with all other 251 product offerings in the ICA that each have their terms, conditions, and rates outlined in

[67] Cadieux Collocation Rebuttal, at pp. 8-9.

[68] Smith Direct, at p. 52.

[69] Krabill Collocation Rebuttal, at p. 10.

[70] *Id.*

[71] *See* Krabill Collocation Rebuttal, Schedules NRK-1 and NRK-2.

[72] As noted in the Coalition's testimony, SBC presented its new structure to the Coalition just a few weeks before the arbitration window closed and scheduled the sole negotiations call only two weeks before the petition was to be filed – and then did not have personnel available to explain or justify the changes. No meaningful negotiation on the terms was possible because of SBC's delay. Cadieux Direct, at p. 9.

appendices."[73] Rather than promoting consistency, however, SBC's approach is totally inconsistent with Kansas, Oklahoma and Texas, where the existing framework has been retained throughout the X2A successor proceedings.

The Coalition asserts that SBC witness Smith states that a CLEC has a choice between the new SBC attachment and the tariff. SBC's DPL position, however, indicates otherwise. There, SBC states that it "wants the Commission to require the CLEC Coalition to use the comprehensive Physical Collocation Appendix documentation provided by SBC Missouri which was developed from the Missouri State Tariff"[74] – in other words, SBC seeks to force CLECs to abandon a tariff that was the result of a previous 3-state settlement and is still operable in Oklahoma and Kansas.[75]

The CLEC Coalition requests that the Commission affirmatively rule (1) that CLECs do not have to adopt SBC's new appendix in lieu of ordering from the tariff, and (2) that the parties should incorporate their settled issues and the Commission's rulings on the remaining disputed issues into their existing collocation appendix, along with a reference to the collocation tariff incorporating its terms and rates by reference.

WilTel states that SBC's proposed Section 1.4 is, like Section 2.20 of the UNE Appendix, a prohibition on WilTel's right to order physical collocation services pursuant to tariff or other means. WilTel contends that SBC's proposed restriction on WilTel's right to order UNEs pursuant to tariff or other means, violates SBC's obligations under the Act.[76]

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[73] Smith Direct, at p. 52.

[74] Physical Collocation Final Joint DPL (SBC MISSOURI Preliminary Position) at 72.

[75] It is important to note that – as far as the CLEC Coalition is aware – SBC has made no filing to the Commission seeking to cancel its Missouri collocation tariff. Thus, SBC's position in this case effectively constitutes a "stealth" collateral attack on the collocation tariff and on the settlement process that produced it. The Commission should not countenance this type of indirect undermining of the collocation tariff.

[76] 47 U.S.C. § 251(c)(3).

WilTel cannot be precluded from ordering collocation under arrangements outside of the ICA, particularly by tariff. Contrary to what SBC would have this Commission believe, doing so does not conflict with the ICA. If SBC's true concern is that WilTel would seek, in a single service order, to apply terms and conditions from both the ICA and a tariff, this concern is unfounded. Requiring WilTel to order collocation under this ICA if it wants to collocate at all would effectively give SBC substantial control over how its competitors access collocation and under what rates, terms and conditions. WilTel advises the Commission that SBC's proposed provision should be rejected entirely.

SBC replies that its proposed Collocation Appendix adequately covers all aspects of collocation, so as to ensure consistency across its 13-state region and to be in line with all other § 251 product offerings in the ICA that each have their terms, conditions, and rates outlined in appendices. The appendix includes all of the rates, terms and conditions of the approved collocation tariff.

Decision:

As the Arbitrator has stated elsewhere, CLECs may order products and services either under their ICA or under SBC's tariff, whichever is more advantageous.

5. What rates should apply to WilTel's collocations?

<u>WilTel P COLLO Issue 14</u>: ***Should SBC be permitted to re-price in accordance with this ICA any existing collocation arrangements that WilTel ordered pursuant to a tariff and not pursuant to this ICA or a pre-existing ICA?***

<u>SBC's Statement of the Issue</u>: ***Should WilTel be allowed to keep embedded base rates for collocation?***

Discussion:

SBC states that the Commission should reject WilTel's proposed language that would allow it to apply the collocation rates offered within the agreement to any existing

arrangements that were ordered under SBC's tariff "at its sole option and discretion." WilTel has already agreed to language stating (in Section 17.4.1) that "[t]he parties agree that the Collocation Rates shall apply, on a prospective basis only, beginning on the Effective Date of this Agreement." WilTel has also agreed that the "new rates in this Agreement should apply prospectively for existing collocation services ordered under a previous interconnection agreement which this Agreement will be superceding."[77]

The rates should apply on a going-forward basis to all existing arrangements, whether those were placed via ICA or tariff, and certainly not to those tariffed arrangements only "at [WilTel's] sole option and discretion." Otherwise, SBC asserts that "WilTel will have its cake and eat it too," because while it professes that SBC "has no basis to transfer [tariffed] arrangements to this Agreement," it also says "[i]f, on the other hand, WilTel chooses to transfer such collocation arrangements from tariff arrangements to this Agreement, then WilTel should be free to do so."[78] SBC contends that this is precisely the kind of arbitrage that the Commission should not allow.

WilTel responds that, contrary to SBC's position statement, WilTel agrees to have the new rates in this Agreement apply prospectively for existing collocation services ordered under a *previous interconnection agreement* which this Agreement will be superceding. However, SBC's proposed language would have the pricing in this Agreement apply automatically to collocation ordered pursuant to tariff without WilTel's consent and without amending its tariff. SBC should not be permitted to unilaterally alter WilTel's pre-existing collocation arrangements ordered pursuant to tariff without amending its tariff. Provided that WilTel chooses to maintain such collocation arrangements under the

[77] Porter Rebuttal, p. 22.

[78] Porter Rebuttal, pp. 22-23.

tariff pursuant to which it was ordered, then SBC has no basis to transfer such arrangements to this Agreement and it would be unlawful to do so. If, on the other hand, WilTel chooses to transfer such collocation arrangements from tariff arrangements to this Agreement, then WilTel should be free to do so. SBC can always seek to change its tariff to reflect the rates it seeks to change. WilTel urges the Commission to adopt its proposed language.[79]

Decision:

The Arbitrator has already determined that CLECs may order collocation either under the ICA or under SBC's tariff as the CLEC may choose. In view of this decision, the Arbitrator necessarily prefers WilTel's language here.

6. Technical Feasibility:

WilTel P COLLO Issue 2: ***Should a presumption of technical feasibility of a collocation arrangement arise if any state commission has mandated such an arrangement?***

SBC's Statement of the Issue: ***Should the FCC standard in determining technical feasibility be applied in the appendix?***

Discussion:

SBC states that its proposed language is based squarely on the governing FCC rule and thus should be approved by the Commission.[80] SBC further states that the Commission should reject WilTel's proposed language, which emphasizes that the collocation is technically feasible if it has been "mandated by any state commission." The governing FCC Rule 51.321 makes no such reference. Instead, Rule 51.321(c) provides that a CLEC "seeking a particular collocation arrangement, either physical or virtual, is

[79] *See* Ex. 3, pp. 12-13, for proposed contract language for this Issue.

[80] Smith Rebuttal, p. 59.

entitled to a presumption that such arrangement is technically feasible if any LEC has deployed such collocation arrangement in any incumbent LEC premises." Moreover, SBC contends that WilTel's language is unnecessary because, to the extent that a collocation arrangement may be deployed as a consequence of a final, nonappealable state commission order, the FCC's rule would be applicable to it.

WilTel responds that, in Section 2.15 of this Appendix,[81] the parties are attempting to set forth certain presumptions that a collocation arrangement is technically feasible. WilTel's proposed addition to this Section sets out, almost verbatim, one such arrangement which the FCC has held to be a presumption of technical feasibility. The FCC has held that a presumption exists if any state commission mandates a particular collocation arrangement.[82] Therefore, WilTel contends, its proposed language is clearly supported and should be adopted.

Decision:

The Arbitrator concludes, for the reasons stated above, that WilTel's language is preferable.

7. Multi-functional Equipment:

WilTel P COLLO Issue 9: ***Must SBC allow WilTel to collocate multi-functional equipment under this Appendix?***

SBC's Statement of the Issue: ***Should equipment that is to be collocated serve other purposes than what is listed in this appendix?***

Discussion:

[81] *See* Ex. 3, pp. 2-3, for proposed contract language for this Issue.

[82] *See In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability,* 14 FCC Rcd 4761, 4765 (1999).

SBC states that the Commission should approve its language.[83] Only that language – which focuses on the word "solely" - reflects the "if and only if" provisions of the FCC's Rule 51.323(b)(3) regarding the collocation of multifunctional equipment.[84] SBC asserts that it should not be vulnerable to claims that other types of equipment may be collocated. Notwithstanding WilTel's selective citation to paragraph 32 of the FCC's Collocation Remand Order, SBC contends that the same order later squarely rejects CLECs' requests to collocate "a vast array of multi-functional equipment without regard to the effect such actions would have on the incumbents' ability to use and manage their own property."[85] Thus, neither the collocation of "traditional circuit switches" or equipment used "only to deliver information services" would qualify.[86]

WilTel responds that SBC's proposed use of the word "solely" in Section 9.1.2[87] conflicts with WilTel's right to collocate "Multifunctional Equipment" in accordance with FCC rulings.[88] Under SBC's proposal, SBC could potentially deny WilTel the ability to collocate such equipment even in situations where WilTel is permitted to do so by law. WilTel acknowledges that any such equipment must be necessary for interconnection or for access to UNEs and, in cases where it is, WilTel contends that SBC must allow it to collocate such equipment. WilTel's proposed changes to Section 9.1.1 and 9.1.2 are

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[83] Pool Direct, pp. 30-31.

[84] FCC Rule 51.323(b)(3) states: "Multi-functional equipment shall be deemed necessary for interconnection or access to an unbundled network element *if and only if* the primary purpose and function of the equipment, as the requesting carrier seeks to deploy it, meets either or both of the standards set forth in paragraphs (b)(1) and (b)(2) of this section." (Emphasis added).

[85] *Collocation Remand Order,* ¶ 45.

[86] *Id.,* ¶¶ 48-49.

[87] *See* Ex. 3, pp. 7-8, for proposed contract language for this Issue.

[88] *See In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability,* 16 FCC Rcd 15435, ¶ 32 *et seq.* (2001).

intended to clarify that WilTel is permitted to collocate equipment that is considered "Multi-functional Equipment" as defined in Section 9.1.5 of this Appendix and as permitted by the FCC. For these reasons, WilTel's proposed language should be adopted.

Decision:

For the reasons stated above, the Arbitrator concludes that WilTel's proposed language is preferable.

8. Improper Collocation:

WilTel P COLLO 11: ***(a) Is it reasonable to allow SBC to determine at its discretion whether WilTel's equipment is necessary for interconnection or access to UNEs? (b) Is it reasonable to allow SBC to expel WilTel from the space and invoke other drastic remedies during a bona fide dispute over equipment?***

SBC's Statement of the Issue: ***(a) Should WilTel be allowed to collocate equipment that SBC believes is not necessary for interconnection or for access to Lawful UNEs? (b) Should non-removal of equipment, that is not compliant with the terms of this Appendix, be considered a violation of the terms of this Appendix?***

Discussion:

SBC states that the Commission should approve its language to the effect that a requested collocation must be necessary for interconnection or for access to UNEs because that language is consistent with the FCC's collocation rules.[89] The Commission should not approve WilTel's language proposing that non-compliant equipment be left in place during WilTel's dispute. There is no question that the equipment must be necessary,[90] but WilTel's proposed language fails to address that requirement. Moreover,

[89] Smith Direct, pp. 58-59.

[90] Rule 51.323(b) states that an ILEC "shall permit the collocation and use of any equipment necessary for interconnection or access to unbundled network elements." Subpart (1) states: "Equipment is necessary for interconnection if an inability to deploy that equipment would, as a practical, economic, or operational matter, preclude the requesting carrier from obtaining interconnection with the incumbent LEC at a level equal in quality to that which the incumbent obtains within its own network or the incumbent provides to any affiliate, subsidiary, or other party." Subpart (2) states: "Equipment is necessary for access to an unbundled network element if an inability to deploy that equipment would, as a practical, economic, or operational matter,

it is of no consequence that SBC might rest its objection upon its "belief" on what is necessary. The agreed-upon "determines" language in the very next clause ("or determines that the Collocator's equipment does not meet the minimum safety standards") is also predicated on SBC's having formed a belief.

SBC further states that, in Rule 51.323(c), the FCC has expressly provided that there are certain grounds on which an ILEC may not deny collocation, for example, safety or engineering standards more stringent than those applied to the ILEC's own equipment or failure to comply with performance standards. However, whether an ILEC believes certain equipment is "necessary" is not one of them. An ILEC is expressly permitted to object to improper collocation.[91] In doing so, however, the ILEC must then "prove to the state commission that the equipment is not necessary for interconnection." If the state commission determines that an ILEC is wrong in its belief, the equipment will be allowed to be collocated, but not otherwise.

WilTel responds that SBC has misrepresented the first part of this Issue.[92] SBC's proposed language would allow SBC to make a unilateral determination, in its sole discretion, of whether it "believes" that WilTel's equipment is necessary for interconnection or access to UNEs. This is not a requirement under FCC rules and it further places SBC in the position of controlling WilTel's access to interconnection or UNEs, thereby creating the

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preclude the requesting carrier from obtaining nondiscriminatory access to that unbundled network element, including any of its features, functions, or capabilities."

[91] FCC Rule 51.323(c) provides in pertinent part: "Whenever an incumbent LEC objects to collocation of equipment by a requesting telecommunications carrier for purposes within the scope of section 251(c)(6) of the Act, the incumbent LEC shall prove to the state commission that the equipment is not necessary for interconnection or access to unbundled network elements under the standards set forth in paragraph (b) of this section."

[92] *See* Ex. 3, pp. 9-11, for proposed contract language for this Issue.

potential for discrimination.[93] If SBC has reason to believe that WilTel's equipment does not comply with FCC rules, then SBC has the right to challenge the use of such equipment pursuant to the dispute resolution procedures under the ICA, including negotiating with WilTel over whether it is appropriate or not. Allowing SBC to unilaterally determine that WilTel cannot place certain equipment in collocation would, however, potentially cause WilTel harm because the language prohibits WilTel from collocating the equipment until the dispute is resolved. For these reasons, WilTel contends, SBC's language should be rejected.

WilTel points out further that its proposed last sentence is intended to avoid the potential circumstance that SBC would seek to expel WilTel from the space and forcibly remove its property, even during a bona fide dispute over whether certain equipment is properly collocated under this Section 10.1.3. WilTel argues that, during a bona fide dispute, SBC should not be permitted to seek such drastic remedies and WilTel's proposed language is reasonable in that regard and therefore should be adopted.

Decision:

For the reasons stated above, the Arbitrator concludes that WilTel's language is preferable.

9. Damaged Space:

<u>WilTel P COLLO Issue 4</u>: ***Should SBC waive non-recurring charges associated with establishing substitute space if WilTel is required to relocate due to damage caused by SBC or its contractors?***

<u>SBC's Statement of the Issue</u>: ***Should SBC be required to waive non-recurring charges should the CLEC be required to relocate due to damage in the Dedicated Space used in Collocation?***

[93] *See* 47 U.S.C. § 251.

Discussion:

SBC states that the Commission should reject WilTel's language proposing that no non-recurring charge will be assessed for a new arrangement where the original arrangement was damaged, where the damage was "caused in whole or in part" by SBC. Both parties have agreed on language that obligates SBC, upon the Collocator's election, to provide the Collocator with a comparable substitute collocation arrangement at another mutually agreeable location, at the applicable nonrecurring charges for that arrangement and location.

SBC states further that, while WilTel's proposed language suggests that there is a difference if the damage was caused by SBC, there is no such difference. The Dedicated Space where WilTel's collocation facilities are located are fully insured and it does not matter if the damage was caused by WilTel, SBC or a third party, the insurance will pay for the damage. SBC will assess the appropriate charges for the relocation, but insurance will reimburse WilTel in such a scenario. It would be unreasonable for WilTel to receive both an insurance payment for relocation costs and a credit from SBC.[94] Moreover, SBC asserts that WilTel's language is overbroad, for it would apply no charge even where SBC may have been at fault only "in part" and WilTel's actions also may have contributed to the damage.

WilTel responds that SBC's statement of this issue is misleading.[95] The true issue here is whether SBC should be responsible for damage that it causes to its own collocation space, including responsibility for assuming the costs of relocating its tenants. Section 4.5.1.1 addresses situations where there is damage to the dedicated space in

[94] Smith Direct, p. 56.

[95] *See* Ex. 3, pp. 3-4, for proposed contract language for this Issue.

which WilTel is collocated. One provision states that if the damage requires WilTel to move to substitute dedicated space, WilTel will incur the applicable nonrecurring charges for the new space. WilTel contends that it should only incur such charges if WilTel is responsible for the damage necessitating the move. However, if SBC or its contractors are to blame for the damage to the space, WilTel should not incur any charges associated with making the move to the new space, a move that would not occur but for SBC's actions. In such cases, WilTel's move is not by choice, but rather is necessitated because of SBC or its contractors. WilTel's additional language proposed at the end of the section is intended to address this problem and should be adopted.

Further, WilTel states that this is not an insurance issue. The issue is SBC's attempt to impose a nonrecurring charge upon a tenant for a move that is caused by SBC. Expecting WilTel to file a claim with its insurer to recover such a charge, thereby resulting in the potential for increased premiums and costs of insurance to WilTel, is unacceptable and contrary to the Act.[96] WilTel's response is that SBC must be the responsible party, not WilTel and not WilTel's insurers. For these reasons, this Commission should adopt WilTel's proposed language.

Decision:

The Arbitrator agrees with WilTel. Where SBC or its contractors have caused the damage and necessitated the move to a new space, SBC must foot the bill.

10. Pulling Cabling:

WilTel P COLLO Issue 5: *Is it reasonable to expect SBC to supply, pull and install connection cabling at WilTel's request?*

[96] *See* 47 U.S.C. § 251(c)(6) (obligating SBC to provide services under just and reasonable rates, terms and conditions).

SBC's Statement of the Issue*: Should SBC be required to supply, pull and install connection cabling at the Collocator's request?*

Discussion:

SBC states that the Commission should reject WilTel's proposed language. By WilTel's own admission, it's language would "delegat[e]" work to SBC that WilTel -- and every other CLEC -- can do for itself.[97] WilTel does not deny that the connection cable and associated equipment are owned by the CLEC and that cable pulling is directly related to the management of the CLEC's network.[98] It is of no consequence that WilTel "would expect to pay" SBC for the work as there appears to be no language proposed by WilTel that would provide for such payment.[99]

WilTel responds that it has proposed that SBC perform the work of supplying, pulling and installing connection cabling between WilTel's dedicated space and the POT Frame/Cabinet (also known as the POT bay) located in the Common Area of the collocation space.[100] WilTel contends that its proposal is reasonable because SBC is in control of the Common Area of the collocation space and is in a better position to perform work in this area with less risk of damage to the Common Area.[101] Furthermore, WilTel does not intend, nor would expect, that SBC perform such work at no charge. WilTel would expect to pay reasonable rates as set forth in the pricing appendix for such work.

Decision:

[97] Schwebke Rebuttal, p. 5.

[98] Pool Direct, p. 28.

[99] Scwebke Rebuttal, p. 5.

[100] Ex. 8, at p. 4:22-24; *See* Ex. 3, p. 5, for proposed contract language for this Issue.

[101] *Id.* at p. 5, lines 1-2.

The Arbitrator concludes that SBC's language is preferable because WilTel's language does not specifically provide for reasonable compensation to SBC.

11. Pulling Entrance Facility Cables:

WilTel P COLLO Issue 8: ***Should SBC be required to pull the Interconnection Arrangement(s) cables from the entrance manhole(s) to the Collocator at its equipment in the Dedicated Space or POT Frame.***

Discussion:

SBC states that the Commission should reject WilTel's proposed language because it confuses two types of cabling, interconnection cabling and entrance facilities. After the Collocator pulls its entrance facilities – not "Interconnection Arrangement cables" - into the manhole with sufficient length in the cable, SBC states that it will extend these facilities through the cable vault to the dedicated space. Given that WilTel's language misstates the matter, it should be rejected.[102]

WilTel states that this matter *may* be resolved.

Decision:

In the event that it is not resolved, the Arbitrator finds for SBC for the reasons stated above.

12. Insurance:

WilTel P COLLO Issue 6: ***What insurance requirements should WilTel require of its contractors?***

SBC's Statement of the Issue: ***Should the Collocator require all contractors to carry the same insurance requirements?***

Discussion:

[102] Pool Direct, pp. 29-30.

SBC states that the Commission should approve its language proposing that WilTel maintain the same insurance requirements as all other CLECs. It should not approve WilTel's open-ended language that would allow WilTel to obtain insurance in coverage amounts "to be determined at Collocator's discretion." The mere fact that no other CLEC objects to SBC's language demonstrates that it is reasonable. SBC contends that WilTel is wrong when it suggests that the insurance requirement "would impact WilTel and other CLECs."[103] Moreover, SBC asserts that WilTel's language is overly broad on its face – it would allow WilTel to procure insurance in a coverage amount as little as $1, for the language prescribes no minimum level at all.

WilTel responds that its proposed language in Section 5.8.1.2[104] is reasonable because WilTel is in the best position to know the work being performed by its subcontractors and, thus, the risk posed by such work.[105] WilTel requires its subcontractors to maintain insurance coverage that is commensurate with the risk involved in the situation in which their work is being performed. It may not be reasonable to expect a given contractor to acquire insurance coverage in these amounts when their exposure will be substantially lower, if any at all.

Decision:

The Arbitrator concludes that SBC's position should be adopted. If WilTel orders collocation through the tariff, the insurance amounts in the tariff are applicable. If WilTel orders collocation through this ICA, then the insurance amounts in this ICA are applicable.

[103] Porter Rebuttal, p. 18.

[104] *See* Ex. 3, pp. 5-6, for proposed contract language for this Issue.

[105] Ex. 7, at p. 16:25-28, 17:1-6.

The insurance requirement is intended ultimately to protect SBC, therefore, leaving the coverage amount to WilTel's discretion is inappropriate.

13. Collocation Disputes:

WilTel P COLLO Issue 7: *Should all billing disputes and payment related matters be handled in accordance with the General Terms and Conditions?*

Discussion:

SBC states that the Commission should reject WilTel's proposed language regarding billing disputes. The billing and dispute language is specific to caged, shared cage, cageless, and caged common collocation arrangements, allowances for interruptions, details for investigative reports, and many more provisions that the General Terms and Conditions section of the ICA do not specifically reference. Moreover, unlike UNEs or Resale, Collocation deals with real estate and construction that cannot be dealt with in a like manner.[106] No other CLEC has objected to this language.

WilTel responds that the Parties are negotiating billing and payment language for this ICA generally in the General Terms and Conditions, so it is redundant and potentially conflicting to provide similar language in this Appendix.[107] Aside from payment billing dates, which WilTel acknowledges may be different than other service billing dates, there is no collocation-specific payment or billing language that should be restated in this Appendix.

Decision:

The Arbitrator agrees with WilTel. The dispute resolution procedures should be collected in the General Terms and Conditions section of the ICA and the language should be drafted so that it is applicable to all disputes that may arise between the parties.

[106] Smith Direct, p. 57.

[107] Ex. 7, at p. 17:12-21.

14. Dispute Resolution:

WilTel P COLLO Issue 12: ***Should SBC be permitted to refuse to allow WilTel to place new collocation service orders during the pendency of any bona fide dispute over a separate collocation service order? If so, at what point in time should it be permitted?***

SBC's Statement of the Issue: ***When should SBC refuse additional applications for service and/or complete pending orders?***

Discussion:

SBC states that the Commission should approve its language proposing that once a notice has been sent to the Collocator of default in performance of any material provision of the Collocation Appendix, SBC shall have the authority to refuse additional applications for service and to refuse to complete any pending orders for additional space or service.[108] WilTel argues that it should not be denied the "opportunity to cure such default."[109] WilTel would have no concern at all had it not defaulted in the first instance. Moreover, SBC contends that its approach provides WilTel with a powerful incentive for compliance with the ICA to the extent that, once the default is cured, additional orders can be taken. SBC asserts that WilTel's unreasonable proposal would allow it to continue to submit new applications for service once the notice of default has been sent by SBC, leaving SBC with no remedy for the breach.[110]

WilTel responds that its proposed language is more reasonable than SBC's proposed language because it makes no sense for SBC to have the option to refuse to complete any new or pending orders if the parties are engaged in the dispute resolution process in an effort to settle any dispute. WilTel contends that adoption of SBC's proposed

[108] Smith Direct, pp. 58-59.

[109] Porter Rebuttal, p. 21.

[110] Smith Direct, p. 59.

language would penalize WilTel for pursuing bona fide disputes and could be used by SBC as a means of pressuring WilTel into settling such disputes. SBC's right to pursue these remedies should not arise until the dispute resolution process has run its course.

Decision:

The Arbitrator agrees with WilTel. During the pendency of a dispute between the parties that is the subject of the dispute resolution process, business should continue as normal. Only where a CLEC defaults and does not pursue the agreed dispute resolution process may SBC refuse to fill any new orders or refuse to complete pending orders.

15. Custom Work:

WilTel P COLLO Issue 13: ***Is it reasonable for SBC to expect full payment for custom work prior to its completion?***

SBC's Statement of the Issue: ***When should WilTel pay SBC for Custom Work Charges?***

Discussion:

SBC states that the Commission should approve its language under which the remaining 50% due for Custom Work done for a CLEC should be payable when 50% of the Custom Work is completed rather than at the end of the job. Custom Work is outside the normal work that is done to prepare collocation space and is only undertaken at the request of the CLEC. This kind of work would not ever be constructed for another CLEC, nor could another CLEC use it.[111]

WilTel responds that SBC's language unreasonably provides that SBC should get paid in full before the work is completed.[112] WilTel proposes to pay SBC 50% of the nonrecurring charges before SBC has begun work and then to pay the remaining 50% after

[111] Smith Direct, p. 60.

[112] *See* Ex. 3, pp. 11-12, for proposed contract language for this Issue.

the work is completed. This arrangement, WilTel contends, is more commercially reasonable. Moreover, WilTel points out that SBC agreed with WilTel's position in its testimony, so SBC does not really even disagree with WilTel on this issue.[113]

Decision:

The Arbitrator agrees with WilTel. It is normal commercial practice, so far as the Arbitrator knows, to pay half down and half upon satisfactory completion.

[113] Ex. 11, at p. 60:18-20.