

**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.,	)	
NuVox Communications of Missouri, Inc.,	)	
and XO Missouri, Inc.	)	
	)	
Complainants,	)	
	)	
v.	)	Case No. TC-2003-0547
	)	(with Consolidated Case Nos.
Southwestern Bell Telephone, L.P.,	)	XC-2003-0421 and
d/b/a SBC Missouri,	)	LC-2003-0570)
	)	
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 (“Complaint”) filed by XO Missouri, Inc. (XO), states to the Missouri Public Service Commission (Commission) as follows:

**I. BACKGROUND**

SBC Missouri’s physical collocation tariff was submitted to the Commission on August 24, 2001, as part of a Unanimous Stipulation and Agreement in Case No. TT-2001-298 among SBC Missouri, Commission Staff and numerous CLECs, including XO. On September 6, 2001, the Commission approved this Unanimous Stipulation and Agreement, and on October 3, 2001, the Commission approved SBC Missouri’s physical collocation tariff.

In its Complaint, XO claims it is being improperly billed for “DC Power” amperage capacity provided by SBC Missouri to XO’s collocation arrangements located in SBC Missouri central offices, under the rates, terms and conditions contained in SBC Missouri’s Commission-approved physical collocation tariff. As SBC Missouri describes below, XO is simply wrong, and is 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 that XO 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 XO.

Moreover, XO has expressly and irrevocably waived its right to dispute the tariffed charges and bring this Complaint as a result of its own failure to comply with the mandatory Billing Dispute Resolution provisions, including escrow/payment provisions, contained in the Commission-approved SBC Missouri physical collocation tariff. The tariff contains very specific requirements for a collocator to dispute “any bill for anything ordered from” the tariff.<sup>1</sup> 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.<sup>2</sup> Here, XO has wholly failed to comply with this mandatory tariff provision, which is a condition precedent to XO bringing its

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

<sup>2</sup> Id.

Complaint, and its failure to do so constitutes XO's "irrevocable and full waiver of its right to dispute the subject charges."<sup>3</sup>

As this Commission is aware, the proceeding in which SBC Missouri's physical collocation tariff was approved was extensive and disputed. SBC Missouri's physical collocation tariff was the result of extensive settlement negotiations among numerous parties, including XO. 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 XO was required to pay under SBC Missouri's new collocation tariffs actually went down once the tariffs became effective and applicable to XO's existing collocation arrangements, and XO benefited. But the physical collocation tariff authorized a new method of billing for DC power, and XO did not adjust its power requirements in light of the new DC power provisions contained in SBC Missouri's physical collocation tariff, which require collocators such as XO to pay for all DC power capacity provided by SBC Missouri.

Moreover, the SBC Missouri physical collocation tariff 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 XO disputes a bill but does not ultimately prevail. XO would have this Commission simply ignore the

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<sup>3</sup> Id.

express tariff provisions designed to ensure payment to SBC Missouri if XO does not prevail on a billing dispute. But, the Commission cannot lawfully ignore these mandatory Billing Dispute Resolution tariff provisions. Under these provisions, XO has, as a matter of law, waived its right to dispute its 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) XO has 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 XO’s right to dispute the charges which it seeks 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. XO’s claim that it 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 XO’s Failure to Comply With Mandatory Billing Dispute Resolution Requirements Contained in Section 6 of SBC Missouri’s Physical Collocation Tariff**

1. XO has 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, XO’s failure to comply with these mandatory provisions constitutes an “irrevocable and full waiver of its right to dispute the subject charges.”

Since XO has failed to comply with these mandatory tariff provisions, it has 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. XO has not complied with the mandatory Billing Dispute Resolution

provisions contained in SBC Missouri's physical collocation tariff. XO has neither paid

the entire amount billed by SBC Missouri, nor has it, in the alternative, established an appropriate interest bearing escrow account and provided evidence that it has 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. XO is required to comply with Section 6.6.1 and 6.6.2 of SBC Missouri's Commission-approved physical collocation tariff, but it did not do so. The final sentence of Section 6.6.1 of the tariff makes clear the consequences of XO'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 its Complaint, XO claims that the mandatory Billing Dispute Resolution provisions contained in the tariff do not apply, because SBC Missouri's billing for all DC power amperage capacity provided at the rates contained in the tariff, and XO's refusal to pay these tariffed rates, do not constitute a "bona fide dispute."<sup>4</sup> XO claims that because it does not wish to pay the tariffed rates for all of the amperage of DC power capacity provided by SBC Missouri, its refusal to pay does not rise to the level of a "bona fide" dispute. XO has the cart before the horse. It is XO 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. XO has failed to do so, and its failure constitutes an "irrevocable and full waiver of its right" to contest these tariffed charges.

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<sup>4</sup> XO Complaint, para. 38.

6. XO also claims that the escrow provisions of the tariff do not apply because the amounts at issue exceed one percent of the amounts charged to XO under the tariff in the preceding 12 months.<sup>5</sup> XO 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, XO's position is directly inconsistent with the clear language of the tariff. XO 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, XO argues that the Billing Dispute Resolution provisions contained in SBC Missouri's Commission-approved collocation tariff "are contrary to sound public policy and should not be enforced."<sup>6</sup> XO's argument should be rejected.

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, among SBC Missouri, Commission Staff, and numerous CLECs, including XO. On September 6, 2001, the Commission approved this Unanimous Stipulation and Agreement, and on October 3, 2001, the Commission approved SBC Missouri's physical collocation tariff with an effective date of October 12, 2001. This tariff – including specifically the Billing Dispute Resolution provisions contained in Section 6.6.1 of the tariff – cannot be ignored at the request of a party that has decided not to comply with the tariff's requirements. As the Commission is aware, its approved tariffs have the force and effect of law,<sup>7</sup> and the Commission does not have authority to choose not to apply a

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<sup>5</sup> XO Complaint, para. 40.

<sup>6</sup> XO Complaint, para. 37.

<sup>7</sup> 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).



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 XO's failure to comply with provisions contained in SBC Missouri's Commission-approved physical collocation tariff, and permit XO to escape its waiver of its right to bring this Complaint.

9. XO's Complaint should be dismissed on the basis that XO has 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, XO's failure to comply (i.e., either payment of the disputed charges or establishing an appropriate escrow account for payment) constitutes an "irrevocable and full waiver" of XO's right to dispute these charges and bring this Complaint.

**B. XO'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 XO, as well as all collocators, to pay the tariffed rates for all DC power capacity provided by SBC Missouri. XO's claim that it 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 XO under SBC Missouri's collocation tariff for the DC power capacity it provides to XO. SBC Missouri believes the tariff provisions are clear and require XO to pay the monthly recurring charge contained in the tariff for all DC power amperage made available to XO 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. XO argues that it is 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 XO'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 XO's argument, nothing in the description of the DC power Consumption rate element in SBC Missouri's collocation tariff requires or even suggests that XO only has 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 XO's argument. Rates for DC power are described as "per amp," not "per amp for only one feed" as XO would have the Commission believe.

14. Other provisions of the physical collocation tariff compel the conclusion that XO is 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>
21.14 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 XO now contends, 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 XO must pay the “per amp” monthly recurring charge for all DC power capacity provided by SBC Missouri, over both leads. Thus, for example, where XO has 100 amps of DC power available over each of two separate power leads to their collocated facilities, XO 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, XO’s Complaint should be dismissed by the Commission. The plain language of the tariff makes it clear that XO’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 XO’s Complaint. To the extent SBC Missouri does not specifically admit any allegation in the Complaint, SBC Missouri denies each such allegation.

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

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

3. SBC Missouri admits the allegations contained in paragraph 3 of the Complaint.

4. SBC Missouri admits that the Commission has general jurisdiction over SBC Missouri and XO, but denies the remaining allegations contained in paragraph 4 of the Complaint.

5. SBC Missouri admits the allegations contained in paragraph 5 of the Complaint.

6. SBC Missouri admits the allegations contained in paragraph 6 of the Complaint.

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

8. 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 XO for all DC power capacity provided to XO, as required under the tariff. SBC Missouri does not have sufficient information to admit or deny whether Complainant received its bill for the true up until November 24, 2001, and therefore denies same.

9. SBC Missouri does not have sufficient information to either admit or deny the allegations contained in paragraph 9 of the Complaint, and therefore denies same.

10. SBC Missouri does not have sufficient information to either admit or deny the allegations contained in paragraph 10 of the Complaint, and therefore denies same.

11. SBC Missouri does not have sufficient information to either admit or deny the allegations contained in paragraph 11 of the Complaint, and therefore denies same.

12. SBC Missouri admits the allegations of paragraph 12 of the Complaint.

13. SBC Missouri admits that XO requested collocation power capacity and related HVAC in each instance of a new collocation arrangement. SBC Missouri does not have sufficient information to admit or deny the remaining allegations of paragraph 13, and therefore denies same.

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

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

16. SBC Missouri does not have sufficient information to either admit or deny the allegations contained in paragraph 16 of the Complaint, and therefore denies same.

17. SBC Missouri does not have sufficient information to either admit or deny the allegations contained in paragraph 17 of the Complaint, and therefore denies same.

18. SBC Missouri admits that at the time XO's Missouri collocations were constructed, XO was operating under its initial interconnection agreement, and that XO initially received collocation services from SBC Missouri pursuant to that agreement. Under the agreement, rates for collocation power were to be established by an individual-

case-basis (“ICB”) price quote from SBC Missouri prior to commencement of the collocation. SBC Missouri does not have sufficient information to admit or deny the remaining allegations of paragraph 18, and therefore denies same.

19. SBC Missouri admits that effective July 25, 2001 XO adopted the M2A interconnection agreement (“M2A”) and, thereafter, began receiving collocation services pursuant to that agreement. SBC Missouri further admits that Complainant has accurately quoted Section 20.5 from Appendix 13 of the M2A and from SBC Missouri’s physical collocation tariff. SBC also admits that Complainant orders, and SBC Missouri provides, the DC power amperage capacity requested by Complainant, and that Complainant is 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.

Complainant does not purchase power from SBC Missouri, as it alleges in its Complaint. Rather, Complainant is required to pay the rates contained in the Commission-approved tariff that are applicable to the DC power capacity requested by the Complainant and provided by SBC Missouri. SBC Missouri further 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 19 of the Complaint.

20. SBC Missouri does not have sufficient information to either admit or deny the allegations contained in paragraph 20 of the Complaint, and therefore denies same.

21. SBC Missouri admits that it has billed XO for DC power amperage capacity on a per amp basis as provided in the Commission-approved SBC Missouri

collocation tariffs, and that XO refuses to pay these tariffed charges. SBC Missouri denies the allegations of paragraph 21 of the Complaint.

22. SBC Missouri denies the allegations of paragraph 22 of the Complaint.

23. SBC Missouri does not have sufficient information to either admit or deny the allegations contained in paragraph 23 of the Complaint, and therefore denies same.

24. SBC Missouri does not have sufficient information to either admit or deny the allegations contained in paragraph 24 of the Complaint, and therefore denies same.

25. SBC Missouri denies the allegations of paragraph 25 of the Complaint.

26. SBC Missouri denies the allegations of paragraph 26 of the Complaint.

27. SBC Missouri denies the allegations of paragraph 27 of the Complaint.

28. SBC Missouri denies the allegations of paragraph 28 of the Complaint.

29. SBC Missouri denies the allegations of paragraph 29 of the Complaint.

30. SBC Missouri denies the allegations of paragraph 30 of the Complaint.

31. SBC Missouri denies the allegations of paragraph 31 of the Complaint.

32. SBC Missouri denies the allegations of paragraph 32 of the Complaint.

33. SBC Missouri denies the allegations of paragraph 33 of the Complaint.

34. SBC Missouri does not have sufficient information to admit or deny the allegations of paragraph 34, and therefore denies same.

35. SBC Missouri admits that it has not suggested to XO that it might discontinue collocation services to XO. SBC Missouri denies the remaining allegations of paragraph 35 of the Complaint.

36. SBC Missouri denies the allegations of paragraph 36 of the Complaint.



37. SBC Missouri denies the allegations contained in this numbered paragraph of the Complaint. XO is 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 XO does not prevail on its claims. Further, XO has waived any allegation that the dispute resolution provisions contained in the Commission-approved tariff is against public policy or otherwise inapplicable.

38. SBC Missouri admits that Section 6.6.1 of its Physical Collocation tariff applies to a “bona fide dispute.” SBC Missouri denies the remaining allegations of paragraph 38 of the Complaint.

39. SBC Missouri denies the allegations of paragraph 39 of the Complaint.

40. SBC Missouri denies the allegations of paragraph 40 of the Complaint.

41. SBC Missouri denies the allegations of paragraph 41 of the Complaint.

#### **IV. AFFIRMATIVE DEFENSES**

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

A. Complainant has waived its right to dispute the charges that form the basis of its Complaint;

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

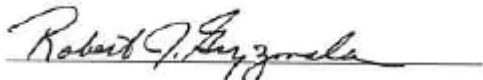
C. Missouri law requires SBC Missouri to charge Complainant the rates contained in SBC Missouri’s Commission-approved collocation tariff; and

D. Complainant’s 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 Complainant.

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 September 25, 2003.

  
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