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September 10, 2003

FILED³

SEP 10 2003

**Missouri Public
Service Commission**

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102-0360

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

Dear Judge Roberts:

Enclosed for filing in the referenced matter please find the original and five copies of Birch
Telecom of Missouri, Inc., AT&T Communications of the Southwest, Inc., TCG Kansas City, Inc.
and TCG St. Louis, Inc.'s Response to SBC Missouri's Motion to Dismiss.

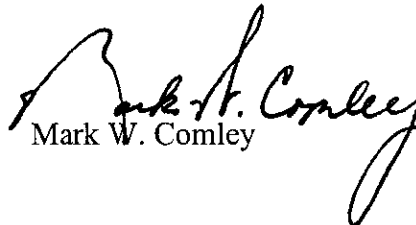
Would you please bring this filing to the attention of the appropriate Commission personnel.

Please contact me if you have any questions regarding this filing. Thank you.

Sincerely,

NEWMAN, COMLEY & RUTH P.C.

By:


Mark W. Comley

MWC:ab
Enclosure

cc: Office of Public Counsel
General Counsel's Office
Anthony K. Conroy
Rose M. Mulvany
Katherine K. Mudge
Rebecca B. DeCook

FILED³
SEP 10 2003

BEFORE THE PUBLIC SERVICE COMMISSION

Birch Telecom of Missouri, Inc., AT&T
Communications of the Southwest, Inc.,
TCG Kansas City, Inc. and TCG St. Louis, Inc.

v.

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

Case No. TC-2003-0547

Missouri Public
Service Commission

**BIRCH TELECOM OF MISSOURI, INC., AT&T COMMUNICATIONS OF THE
SOUTHWEST, INC., TCG KANSAS CITY, INC. AND TCG ST. LOUIS, INC.'S
RESPONSE TO SBC MISSOURI'S MOTION TO DISMISS**

COME NOW Birch Telecom of Missouri, Inc. ("Birch"), AT&T Communications of the Southwest, Inc., TCG Kansas City, Inc., and TCG St. Louis, Inc. (collectively "AT&T"), and file their Response to Southwestern Bell Telephone, L.P. d/b/a SBC Missouri's ("SBC") Motion to Dismiss and states to the Missouri Public Service Commission ("Commission") as follows:

I. Overview

1. SBC's Motion to Dismiss should be denied in all respects. SBC's Motion is a thinly veiled attempt to prevent this Commission from interpreting the clear terms of SBC's Physical Collocation Tariff ("Tariff") to prevent SBC from overcharging Birch and AT&T for power used in its collocation arrangements. SBC's Motion is also a thinly veiled attempt to impose escrow provisions that have no application in this dispute because SBC's imposition of non-tariffed power charges does not constitute the type of billing dispute anticipated under the escrow provisions. Through their Complaint, Birch and AT&T raised two separate and distinct issues -- both of which require the development of record evidence and briefing by the parties. SBC's Motion would inappropriately and unnecessarily prevent the Commission's full

consideration of the merits of the Complaint, without adequate due process or recourse. Accordingly, Birch and AT&T respectfully urge the Commission to deny SBC's Motion to Dismiss.

II. Argument

2. Dismissal is not an appropriate remedy in the proceeding. Neither the Commission's rules for dismissal or summary disposition support SBC's requested remedy. Most importantly, the Commission must first consider the merits of Issue No. 1, the Collocation Power Dispute, before it can make any determination as to the applicability of the escrow provisions relied upon by SBC. SBC would rather hide the facts from the Commission on the Collocation Power Dispute and unlawfully make Birch and AT&T pay double for power consumed in its collocation arrangements retroactively and on a going forward basis. The Commission should not be swayed by an "easy way out" of interpreting the clear terms and conditions of SBC's Collocation Tariff.

A. The Commission's Rule for Dismissal Does Not Support SBC's Motion.

3. SBC completely fails to cite any Commission rule in support of its Motion. SBC's failure to do so underscores the weakness of its attempt to prevent the Commission from consideration of the evidence related to the merits of Birch's and AT&T's Complaint. Neither the Commission's rule on Dismissal or Summary Disposition support SBC's Motion.

4. Under the Commission rule regarding dismissal, 4 CSR 240-2.116, the Commission "prescribes the conditions under which the commission or an initiating party may dismiss a case."¹ Pursuant to this provision, a complainant may voluntarily dismiss its complaint before any testimony has been filed.² The Commission has the ability to dismiss a complaint for:

¹ 4 CSR 240-2.116, Purpose.

² *Id.* at 240-2.116(1).

(1) lack of prosecution;³ (2) a party's failure to comply with a Commission order, including failure to appear;⁴ or (3) for good cause.⁵ Neither SBC nor this Commission has made any allegations that Birch's and AT&T's Complaint should be dismissed on any of these grounds. In fact, SBC could not make any allegations under this provision, as these dismissal provisions only deal with the complaining party's or the Commission's rights with respect to dismissal.

B. The Commission's Rule for Summary Disposition Does Not Support SBC's Motion.

5. Likewise, the Commission's Summary Disposition rule, 4 CSR 240-2.117, does not provide support for SBC's Motion. In fact, SBC's Motion to Dismiss is basically a short-handed version of a motion for summary disposition, but fails to present the requisite factual or legal analysis. As stated in the purpose of the rule, Section 240-2.117 is designed to provide "disposition of a contested case by disposition in the nature of summary judgment or judgment on the pleadings."⁶ SBC's Motion seeks to have the Commission determine that Birch's and AT&T's Complaint should be dismissed summarily because they purportedly did not follow the escrow provisions⁷ or because their interpretation of the rate elements and rates in the Collocation Tariff is erroneous.⁸ SBC wants the Commission to make both determinations, basically on the merits of AT&T's and Birch's Complaint, without the benefit of any evidence even though SBC's allegations go to the heart of the two issues raised in the Complaint. But neither basis garners sufficient support for summary disposition because there are genuine issues of material fact that exist and there are no grounds for summary dismissal when the parties have

³ *Id.* at 240-2.116(2). Note that 90 days has not passed since the complaint was filed. In addition, AT&T and Birch specifically requested Commission action to set a date for SBC to file a response to their complaint once it appeared that voluntary mediation was not an option. See Letter dated July 18, 2003 to Daly Hardy Roberts from Katherine K. Mudge, filed in this docket.

⁴ *Id.* at 240-2.116(3). AT&T and Birch have met all procedural requirements to date in this docket.

⁵ *Id.* at 240-2.116(4). SBC has not requested dismissal for "good cause" and no good cause has been presented to provide AT&T and Birch with at least 10 days advance notice of the allegations.

⁶ 4 CSR 240-2.117, Purpose.

⁷ SBC's Motion to Dismiss, Answer, and Affirmative Defenses at 4 (August 18, 2003).

not been allowed to present any evidence or testimony. Before looking to the merits, or lack thereof, of SBC's allegations, a review of the standard for summary disposition reveals a significant fallacy in SBC's Motion.

4 CSR 240-2.117 provides in pertinent part:

(1) Summary Determination.

- (A) . . . any party may by motion, with or without supporting affidavits, seek disposition of all or any part of a case by summary determination *at any time after the responsive pleading*,⁹
- (B) Motions for summary determination shall state with particularity . . . each material fact as to which the movant claims *there is no genuine issue with specific references to the pleadings, testimony, discovery, or affidavits that demonstrate the lack of genuine issue as to such facts*. Each motion for summary determination shall have attached thereto a separate legal memorandum explaining why summary determination should be granted
- (C) Not more than thirty (30) days after a motion for summary determination is served, any party may file and serve on all parties a response. The response shall admit or deny each of the movant's factual statements¹⁰
- (E) The commission may grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest.¹¹

The obvious purpose of summary disposition is to enable the Commission to make determinations based on undisputed facts and/or decisions to be made as a matter of law.

Neither basis exists in this proceeding. Moreover, it is clear from the rules, that the Commission

⁸ *Id.* at 10.

⁹ Birch and AT&T submit that SBC's Motion to Dismiss is prematurely filed as it was filed coincident and as part of SBC's general denial of the Complaint.

¹⁰ If the Commission treats SBC's Motion as one for Summary Disposition, the answer time frame is much lengthier than for a response to a motion. However, the undersigned counsel appreciates SBC's cooperation in providing extensions due to circumstances beyond our control. Nonetheless, the time frame for a response under the summary disposition rule is longer and would allow more time. However, AT&T and Birch do not believe that this is necessary as it should become very obvious that there are disputes of material facts in this proceeding; particularly with respect to the escrow provisions, the intent of the parties in reaching the Unanimous Stipulation, and the use of power in collocation arrangements.

¹¹ 4 CSR 240-2.117 (emphasis added).

contemplates that the parties be allowed, *after the filing of a response*, to develop a record, either through discovery, testimony, or affidavits, to ascertain whether there are, in fact, material facts in dispute. As Complainants will describe in more detail below, there are significant and material facts in dispute. SBC has not complied with the requirements for a summary disposition, and accordingly, SBC's Motion should be dismissed.

C. Material Facts Are in Dispute.

6. Based on the pleadings, which at this time are the only documents in the record for which a determination on summary disposition could be made, there are significant disputes on material facts.¹² For ease of review and clarity as to the material facts that are in dispute, Birch and AT&T are attaching a paragraph-by-paragraph response as contemplated by 4 CSR 240-2.117(1)(C) as Attachment 1, which is incorporated herein for all purposes. For this proceeding, it is essential that a record be developed as to both issues. With respect to the escrow provisions, at the very minimum, Birch and AT&T submit that there are disputes of material facts, including, but not limited to, Birch's and SBC's business agreement that Birch did not have to deposit funds into escrow, and, therefore SBC waived these provisions; Birch's and AT&T's compliance with the billing dispute rules; SBC's failure to make any claim on AT&T to place funds into escrow even though AT&T withheld disputed amounts; the amounts in controversy to ascertain whether Section 6.6.2 of the Tariff apply; and the factual ramifications of imposition of the escrow provisions. As to the Collocation Power Dispute, there are significant disputes of material facts, including, but not limited to, how power is used in

¹² SBC failed to file a Motion for Summary Disposition properly under the Commission's Rule. There are no affidavits, testimony, or any other evidence presented to support SBC's Motion. However, to ensure that Birch's and AT&T's positions are very clear, attached is Attachment 1, which is a paragraph by paragraph response to SBC's Motion to Dismiss as would be required under 240-2.117(C), if this rule applied. By filing this Attachment, Birch and AT&T are not waiving their rights allowed under 240-2.117(C), which would allow them to file responsive legal memoranda, affidavits, or under 240-2.117(D), which would allow time for discovery. Birch and AT&T provide this response as a streamlined method to underscore the material facts (raised by SBC) in dispute.

collocation power equipment, the development of the rate elements and rates for DC Power Consumption and DC Power Delivery Arrangements; and the parties' intent in the development of a stipulation on these and other components of the Tariff. Unlike the Texas Collocation Proceeding, in which the parties relied on an extensive record for the development of the rate elements and rates at issue, in this proceeding, there is no prior record that can be relied upon in the context of summary disposition.¹³ Therefore, Birch and AT&T, as the Complainants, recognize the need to develop the facts required to support their Complaint and are prepared to do so.¹⁴ With material facts in dispute, Birch and AT&T submit that summary disposition is not appropriate or applicable, and, therefore, SBC's Motion should be denied.

D. The Escrow Provisions Do Not Control.

7. As Birch and AT&T explained in their Complaint, one of the primary reasons that the escrow provisions do not apply to this dispute is that SBC's unilateral and nonsensical interpretation of its Tariff does not constitute an "item" or "charge" under that Tariff.¹⁵ SBC should not be allowed to invoke a new interpretation of a rate element and rates twelve months after the tariff became effective that essentially allows SBC to charge double for power in collocation arrangements, and then, claim that even after over seven months of disputes over bills, that now Birch and AT&T have waived their right to dispute. In order to determine if the escrow provisions apply, *e.g.*, if SBC's interpretation is a "bona fide dispute" contemplated by

¹³ PUC Docket No. 27559, *Complaint of Birch Telecom of Texas, Ltd., L.L.P., AT&T Communications of Texas, L.L., TCG Dallas, and Teleport Communications of Houston, Inc. Against Southwestern Bell Telephone, L.P. for Post-Interconnection Dispute Regarding Overcharges For Power Under SBC-Texas' Physical Collocation Tariff* (filed March 26, 2003). In the Texas proceeding, the parties filed Motions for Summary Judgment relying on the extensive record developed in PUC Docket No. 21333. The parties anticipate that the Arbitrators will issue a decision on the pending motions on or before September 15, 2003.

¹⁴ As will be discussed at the prehearing conference, scheduled for September 11, 2003, Birch and AT&T anticipate that they, as will SBC, need to coordinate the Missouri procedural schedule with comparable schedules to be set in Kansas and Oklahoma on the same disputes. Birch and AT&T will have a proposal for all three states on a "rolling basis" to enable efficient use of the parties' resources, recognizing that it is likely that Birch, AT&T, and SBC will need to use the same, or at least some of the same, witnesses in each state complaint proceeding.

¹⁵ Complaint at ¶¶ 64, 65; *also see* Attachment 1 at ¶¶ 3, 5.

the escrow provisions or if SBC's interpretation constitutes an "item" or "charge", the Commission will first need to dispose of or at least consider the merits of Issue No. 1, the Collocation Power Dispute. Birch and AT&T submit that after the Commission considers evidence and analysis of the relevant portions of the Tariff on this issue, the Commission will find that SBC's interpretation was and is not supported by the Tariff. Thus, it can then proceed to determine if SBC's interpretation can be given any credence or weight, as to the applicability of the escrow provisions. Birch and AT&T submit that at the end of the proceedings, the Commission will not find any support for SBC's assertions or interpretation of the Tariff, and will find that the issue is not a "bona fide dispute" on a "rate" or "item" contained in the Tariff. But, it only makes the decision on Issue No. 2 (escrow dispute) once it reaches the merits on Issue No. 1 (Collocation Power Dispute). Accordingly, SBC's Motion should be denied because the Commission will need to consider the merits of the Collocation Power Dispute before it can make any determination as to the applicability of the escrow provisions.

E. The Commission has Full Authority to Grant the Requested Relief.

8. This Commission has complete and full authority to grant the requested relief. Essentially, SBC's second ground for dismissal is merely its theory or response to Issue No. 1, dealing with the Collocation Power Dispute; it is not an analysis to show that the claim and ultimate remedy sought by Birch and AT&T cannot be granted as a matter of law. SBC does not cite any statutory or regulatory law to support its conclusion that the Commission has the authority to dismiss for failing to state a claim, but more importantly, all SBC does is state its position with respect to the Collocation Power Dispute. SBC's position on that issue is not one

of tariff interpretation, but also includes a number of alleged facts that Birch and AT&T specifically deny.¹⁶

9. In sharp contrast to the lack of legal authority by SBC, Complainants have provided ample statutory and regulatory authority that enables the Commission to enforce its orders and tariffs.¹⁷ The Commission explicitly has the right and jurisdiction to investigate complaints, including those brought by competitive carriers for alleged violations of the law, rules, or Commission orders.¹⁸ The Commission has explicit authority to interpret tariffs and to find that SBC has violated the law by imposing charges greater than those contained in the Tariff, the interconnection agreements, and the Commission's Orders¹⁹; attempting to impose charges outside the provisions of the Tariff²⁰; by attempting to change tariffed rates without submitting the proposed changes to the Commission for approval²¹; violated the terms of the interconnection agreement²²; and violated federal law by imposing rates that exceed the total element long run incremental costs of providing such services.²³ SBC does not claim otherwise. Instead, SBC merely claims that Birch's and AT&T's complaint is incorrect based on SBC's loose interpretation of the tariff provisions. That analysis, while a basis to respond to the merits of Birch's and AT&T's complaint, is not a basis for summarily dismissing the Complaint as a matter of law. As Birch and AT&T have explained and provided ample examples, the issue presented in this proceeding is not appropriate for summary disposition because there are significant disputes on material facts. Thus, the second basis for SBC's Motion is meritless and should be denied.

¹⁶ See Attachment 1 at ¶ 11.

¹⁷ See Complaint at 1 and ¶ 8.

¹⁸ Mo. Rev. Stat. §§ 386.310, 386.330.1, 386.390.1, and 392.240.2.

¹⁹ Mo. Rev. Stat. §§ 392-200.1, 392.240.2.

²⁰ *Id.* at § 392.480.

²¹ *Id.* at § 392.230.3.

²² See Interconnection Agreements of all Parties, General Terms and Conditions, § 18.1.

10. SBC is simply wrong as to the basis for Birch's and AT&T's Complaint with respect to the Collocation Power Dispute. Birch and AT&T do not claim that they should not pay for power that is used over both feeds of the equipment in their respective collocation arrangements.²⁴ As Birch and AT&T noted, power consumed by telecommunication equipment can run over a single or both power cables. Birch and AT&T should be charged for the amount consumed or used; not the amount that theoretically can be carried over both feeds. Prior to SBC's unilateral and new interpretation, even SBC did not charge for power that could theoretically be consumed over both leads. But, as the facts will establish, telecommunications equipment is designed in such a manner that each piece of equipment has two power feeds (A and B). For a 40 amp arrangement, while the power cables are sized to carry a maximum load of 40 amps on each lead, in fact, at no time does the power consumed ever exceed 40 amps, whether it runs over one or both feeds. Under SBC's theory, Birch and AT&T would be charged for the maximum amount of power based on the size of each cable, or 80 amps, regardless of the amount consumed or even ordered. Under Birch's and AT&T's reading of Section 20.5, Birch and AT&T would pay no more than the amount used on the collocation arrangement (regardless of whether the power goes over one or two cables), or at the most, only, 40 amps. The development of the "per amp" DC Power Consumption rate supports Birch's and AT&T's position, which they are prepared to present in evidence. Therefore, as can be seen herein, SBC's claim that the rate is not stated on a "per amp for only one feed" is irrelevant because SBC completely misrepresents Birch's and AT&T's position on the DC Power Consumption rate.

²³ 47 U.S.C. §§ 251(c)(6) and 252(d)(1); 47 CFR 51.501-.09.

²⁴ SBC Motion at ¶ 11.

11. Section 20.5 supports Birch's and AT&T's position. As Birch and AT&T will establish in evidence, the definition of DC Power Consumption did not change significantly in Missouri, other than making the rate on a "per amp" basis. In other words, prior to SBC's latest interpretation of this rate element, the language was basically the same, including recognition that the DC Power element included AC input and AC backup for redundant DC Power.²⁵ Until SBC's latest interpretation, it charged Birch and AT&T for the amount of power used in the collocation arrangement, based on the engineering and specifications as placed on the collocation applications. SBC did not charge Birch and AT&T, in any state in the former Southwestern Bell Telephone Company region, for power "over both leads"; instead, it charged based on the power specifications for the telecommunications equipment. Then, magically, SBC instituted, without any notice or discussion, a new interpretation on language that effectively did not change, to enable it to charge basically double for DC Power Consumption. Birch and AT&T are prepared to show that the manner in which they receive DC power has not changed since they originally began collocation in SBC facilities. Furthermore, Birch and AT&T are prepared to show that DC Power Consumption rate element and rate that they originally proposed, and the rate elements and rates that were ultimately agreed upon, supported charging for the amount of power consumed, not on the amount of power that each lead is sized for. The DC Power Consumption rate element and rate enable SBC to recover the appropriate costs for its power plant, batteries, and other cost components that enable it to plan and to provide power for use in the collocation arrangements.

12. Finally, the DC Power Delivery rate element or rates has nothing to do with this dispute or provides any support for SBC's position. As Birch and AT&T are prepared to show, the development of the DC Power Delivery rate element and rate, which are non-recurring rates

²⁵ Tariff, Section 20.5, Att. 1 to Complaint.

to recover costs, are designed to recover completely different costs for purposes of the power arrangement. This rate element enables SBC to recover for the costs of the cables (or leads), as well as other components, but it does not define or correspond to the per amp rate for DC Power Consumption, which is a recurring rate on a per amp basis. For all of these reasons then, the Commission should not find that as a matter of summary disposition, that SBC's "theory" or interpretation of the tariff is correct, and should deny SBC's Motion.

III. Conclusion

13. SBC's Motion to Dismiss is not timely filed or supported by the Commission's rules or record (or lack thereof). SBC's Motion is nothing more than a short-hand attempt to obtain summary decision without taking any steps to support its request. Dismissal is not appropriate under the Commission's rule as there are substantive factual and legal issues and remedies to be determined. SBC's Motion is not supported by any legal or factual analysis that would enable the Commission to make a determination as a matter of law. Instead, as Birch and AT&T have shown in its Complaint and in this response, there are significant disputes on material facts with respect to both issues presented. In order for the Commission to reach the final resolution of both disputes, it is necessary that an evidentiary record be developed. SBC's half-hearted attempt to gain summary dismissal without sufficient factual or legal grounds should be soundly and quickly rejected by the Commission.

14. For all of these reasons, Birch and AT&T respectfully request that the Commission deny SBC's Motion to Dismiss, and grant all further relief to which Birch and AT&T are entitled.

Respectfully submitted,

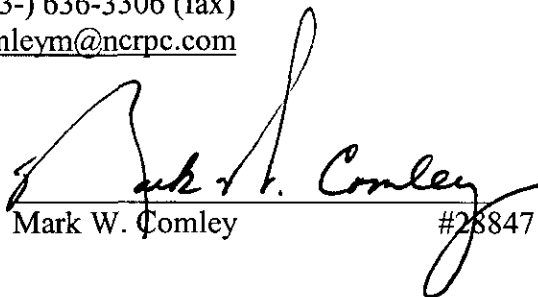
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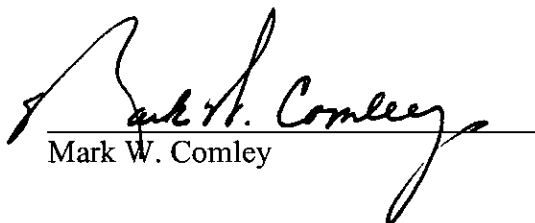
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ATTORNEYS FOR BIRCH TELECOM Ltd, L.P.,
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SOUTHWEST, INC., TCG KANSAS CITY, INC.
AND TCG ST. LOUIS, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 10th day of September, 2003, to General Counsel's Office at gencounsel@psc.state.mo.us; Office of Public Counsel at opcservice@ded.state.mo.us; and Anthony K. Conroy, Southwestern Bell Telephone Company, at anthony.conroy@sbc.com.


Mark W. Comley

Attachment 1

Birch's and AT&T's Response to SBC's Motion to Dismiss¹

1. Birch and AT&T deny that they failed to comply with the Billing Dispute Resolution provisions contained in SBC's Physical Collocation Tariff. Birch and AT&T deny that failure to place funds in escrow with respect to this Complaint does not constitute a waiver of Birch's and AT&T's right to dispute the charges. Accordingly, Birch and AT&T deny that the Complaint must be dismissed.

2. Birch and AT&T deny that the tariff provisions "compel" dismissal of the Complaint. Birch and AT&T admit that SBC has quoted selected provisions of Sections 6.6.1, 6.6.2, 6.6.3, and 6.6.4 of the Physical Collocation Tariff accurately, but deny their applicability to the power collocation dispute, referred to as Issue No. 1, in the Complaint.

3. Birch and AT&T deny that they did not comply with the applicable billing dispute provisions. As noted in Paragraph 17 of the verified Complaint, Birch timely disputed SBC's true-up calculation for DC Power Consumption rates. Birch further disputed that SBC was allowed to charge late charges. Birch also timely disputed and continues to dispute all overcharges regarding power consumption. *See* Complaint, ¶ 18. AT&T timely and properly disputed SBC's going forward calculations for DC Power Consumption. *Id.* at ¶ 30. Moreover, Birch denies that the escrow provisions apply due to the 8 month standing business agreement made between Birch and SBC that Birch did not have to place disputed amounts in escrow for any state in the Southwestern Bell Telephone Company region. As stated in the Complaint, AT&T and Birch deny that the billing dispute escrow provisions apply to the collocation power consumption because: (1) SBC's demand to Birch to place amounts in escrow contradicts SBC's

¹ Birch and AT&T reserve the right to modify and to supplement this response if SBC amends its Motion or ultimately files a motion for summary disposition.

and Birch's business agreement (*id.* at ¶¶ 60, 61); (2) SBC had never demanded that AT&T place any funds in dispute, notwithstanding that AT&T has withheld disputed amounts since October 2002 (*id.* at ¶¶ 62, 29, 30); (3) SBC's only recent demand for escrow payment is not applicable because the collocation power dispute is not a bona fide dispute regarding bills issued on a timely basis for collocation ordered because SBC's unlawful overcharge is not based on a "charge" or "item" in the tariff since Complainants have not changed the manner in which they consume power (*id.* at ¶ 64); (4) SBC's demand to double charge for power without any basis in the tariff does not constitute a "bona fide dispute" under Section 6.6.1 that would enable SBC to unilaterally and without notice simply change its interpretation of an existing provision (as opposed to implementing a new provision)(*id.* at ¶ 65); (5) the escrow provisions do not cover "true-up" bills or disputes (*id.* at ¶ 65); and (6) Section 6.6.2.D(5) specifically prevent application of the escrow provisions because the amounts in dispute exceed one percent of the amounts charged to Birch and AT&T under the Tariff. (*id.* at ¶ 67).

4. Birch and AT&T deny that they were required to place disputed funds in escrow for the reasons stated in Paragraph 3, above. There are material disputed facts, including, Birch's business agreement with SBC in which SBC agreed that Birch did not have to place funds in escrow; and SBC's demands for escrow payments are inconsistent with the manner in which both Birch and AT&T had been doing business regarding disputing SBC's unilateral overcharge for power. AT&T and Birch deny that their failure to place funds in escrow constitute a waiver of the right to dispute the overcharges.

5. Birch and AT&T admit that one of the grounds for the inapplicability of the escrow provisions is that the dispute does not constitute a "bona fide dispute." Birch and AT&T deny the remaining allegations and conclusions made by SBC. Birch and AT&T timely and

properly disputed the charges, withheld payment, for unilateral and unlawful charges that are not based on the collocation tariff.

6. Birch and AT&T deny that Section 6.6.2(D)(5) makes it clear that the escrow provisions do not apply. Material facts in dispute include the amount in controversy to establish that the amounts in dispute exceed 1% of the total amounts billed by SBC to Birch and AT&T for collocation. Based on the evidence to be presented, Birch and AT&T will establish the applicability of this provision.

7. Birch and AT&T admit that they contend that the Commission should not impose the escrow provisions because it would be contrary to sound regulatory and public policy. Birch and AT&T deny the remaining allegations and conclusions made by SBC. Birch and AT&T will establish the factual ramifications for imposing the escrow provisions (as alleged in ¶ 66) when SBC is simply allowed to unilaterally alter its interpretation of a tariff provision that did not change (except for the rate). Birch and AT&T deny that the “argument” should be rejected; but, instead, submit that Birch and AT&T should be allowed to establish the material facts to support this position.

8. Birch and AT&T admit that the Tariff resulted from a Unanimous Stipulation and Agreement. Birch and AT&T further admit that the Commission approved SBC’s collocation tariff with an effective date of October 12, 2001. Birch and AT&T deny that they are asking the Commission to “ignore” Section 6.6.1, but rather that the provisions do not apply in this instance for all of the reasons stated herein. Birch and AT&T deny the remaining statements made in this paragraph.

9. For the reasons stated herein, Birch and AT&T deny that the Complaint should be denied. Material facts remain in dispute, including the existence of a business arrangement

between Birch and SBC that preclude imposition of the escrow provisions; SBC has never made any demand on AT&T for placement of funds into an escrow notwithstanding AT&T's withholding of disputed amounts since October 2002; and (3) the underlying dispute does not constitute a bona fide dispute under the Tariff because SBC's overcharge for power is based on a unilateral change in interpretation, not on a change in the rate element or rate that was never approved by the Commission, or agreed to by the parties to the Unanimous Stipulation.

10. Birch and AT&T deny that the tariff supports SBC's unilateral interpretation to over-recovering for power consumed in collocation arrangements. Birch and AT&T deny that they are asking to pay one-half of the tariffed rates for DC Power Consumption. Birch and AT&T submit that the facts will show that SBC is charging double for the price of DC Power Consumption.

11. Birch and AT&T agree that the central dispute of the Complaint deals with the amount that SBC can charge for DC Power Consumption under the Tariff. In order to reach the issue of whether the escrow provision applies, the Commission must first deal with the central issue regarding the power dispute. For the reasons stated in the Complaint, Birch and AT&T deny the remaining allegations made by SBC, and rely on ¶¶ 33-59 of their Complaint. Facts outlined in those paragraphs are material and apparently are in dispute, given that SBC fails to identify the facts it relies upon to support its position.

12. Birch and AT&T admit that SBC quoted Section 20.5 correctly. Birch and AT&T deny the remaining portions of SBC's statements, except for the statement that the DC Power Consumption rate is stated on a "per amp" basis.

13. Birch and AT&T admit that SBC quoted Section 21.4 correctly. For the reasons stated in the Complaint, Birch and AT&T deny the remaining portions of SBC's statements.

14. Birch and AT&T admit that SBC quoted Section 21.14 correctly, but deny that the Power Arrangement Provisioning has any relation or correlation to the DC Power Consumption Rates. Material facts in dispute include: (1) the manner in which the DC Power Consumption and DC Power Arrangement rate elements and rates were costed and based under the Collocation Cost Model (to show the differences in the two rate elements and rates); (2) the basis upon which the two rate elements and rates were ultimately reached (again to show the differences in the two rate elements and rates); (3) the different components of each element to establish that the rate elements and rates have no relationship to one another; and (4) the application of such rates, to establish that the DC Power Arrangement non-recurring charges has any relation to the recurring charges for DC Power Consumption. Since SBC failed to establish the facts to support its conclusion that Section 21.14 has any bearing on the Power Dispute outlined in the Complaint, Birch and AT&T reserve the right to dispute any additional facts that SBC may claim. Birch and AT&T further deny that, as active participants in the Unanimous Settlement, they intended the consequences outlined by SBC. Instead, Birch and AT&T will establish their intent in agreeing to the rate elements and rates for Sections 21.4 (DC Power Consumption) and 21.14 (DC Power Arrangements). There is a significant dispute as to the material facts of what the parties intended or agreed to with respect to these provisions. SBC cannot impose its interpretation without meaningful testimony and facts. Finally, AT&T and Birch specifically deny SBC's allegations regarding use of collocation power and design of the equipment used in collocation arrangements. There is a significant dispute as to the material facts of use of power in collocation arrangements and the use of two power leads for collocation equipment.

15. For the reasons stated herein, Birch and AT&T deny that their Complaint should be dismissed on any grounds.