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June 16, 2004

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

FILED

JUN 18 2004

**Missouri Public
Service Commission**

Re: Case No. TC-2003-0547

Dear Judge Roberts:

Please find enclosed for filing in the referenced matter 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 Motion for Summary Disposition.

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.

Very truly yours,

NEWMAN, COMLEY & RUTH P.C.

By:


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MWC:ab

Enclosure

cc: General Counsel's Office
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Carl Lumley
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BEFORE THE PUBLIC SERVICE COMMISSION

FILED

JUN 16 2004

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

Missouri Public
Service Commission

Cause No. TC-2003-0547

**BIRCH TELECOM OF MISSOURI, INC., AT&T COMMUNICATIONS OF THE
SOUTHWEST, INC., TCG KANSAS CITY, INC. AND TCG ST. LOUIS, INC.'S
MOTION FOR SUMMARY DISPOSITION**

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") (collectively "Complainants") and pursuant to 4 CSR 240.2.117, file this Motion for Summary Disposition against Southwestern Bell Telephone, L.P. d/b/a SBC Missouri ("SBC Missouri"). Complainants respectfully request that the Missouri Public Service Commission ("Commission") grant Complainants' Motion and issue an Order directing SBC Missouri to charge power rates consistent with the definition of the rate element of DC Power Consumption on a per amp basis found in Section 20.5 of its Physical Collocation Tariff and Appendix Collocation of Attachment 13 of Complainants' current interconnection agreements¹ for power consumed that Complainants individually have ordered and paid for, *i.e.*, on a retroactive basis (for true-up), and for power that Complainants individually will consume on a going-forward basis; and (2) to cease and to desist its demand that Birch place disputed amounts related to this Complaint into an escrow

¹ Appendix Collocation authorizes each Complainant to obtain physical and virtual collocation under the terms, conditions, and rates consistent with the SBC Missouri Physical and Virtual Collocation Tariffs. Appendix Collocation is in each of the Complainant's respective interconnection agreement with SBC Missouri.

account on the basis that SBC Missouri's interpretation of the collocation tariffs is unlawful and inaccurate.

I. Overview

1. The two issues presented in this Motion are very straightforward and can be determined based on existing undisputed facts and the law. The two issues are:

- (1) Under Sections 20.5 and 21.4 of SBC Missouri's Physical Collocation Tariff ("Tariff") and Appendix Collocation of Attachment 13 of each Complainant's respective current interconnection agreement, as approved by the Commission, does SBC Missouri have the right to unilaterally charge for redundant power, retroactively and on a going forward basis, *in addition* to the power consumed for the collocation arrangements?
- (2) Does SBC Missouri have the right to demand that Birch place disputed amounts for the power charges in escrow before it can file this Complaint?²

Both issues require this Commission to interpret SBC Missouri's Tariff -- a tariff which is based extensively on the comparable physical collocation tariff in Texas, and which contains provisions related to DC Power Consumption that the Public Utility Commission of Texas ("PUCT") has already interpreted in favor of Complainants on the basis of a motion summary judgment.³

2. Complainants want to ensure that the Commission understands the significance of this decision. Power is the single highest cost component for collocation on a monthly basis. As such, the difference between correctly applying the Tariff rate of \$10.61 per amp for DC Power

² SBC has never made a comparable demand on AT&T, even though AT&T has disputed ongoing collocation power overcharges. SBC also has not sent AT&T a true-up bill for the collocation arrangements in Missouri.

³ See *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 L.P. for Post-Interconnection Dispute Regarding Overcharges for Power Under SBC-Texas's Physical Collocation Tariff, et al.*, PUCT Docket Nos. 27559, *et al.*, Arbitration Award (Sept. 15, 2003) ("PUCT 27559 Award" or PUCT Docket No. 27559"). A copy of the PUCT's Arbitration Award is attached as Joint Com. Ex. 1 and is incorporated herein for all purposes. Complainants identify Exhibits that they will sponsor jointly as "Joint Com. Ex. ___." Complaints will work with SBC Missouri prior to the date of the hearing to determine admissibility of the Exhibits by stipulation.

Consumption versus basically doubling the amount of amps charged (effectively increasing the rate to \$21.22) has a significant and detrimental economic impact on Complainants.⁴ Based on the Tariff, the decisions reached by the PUCT in Docket Nos. 27559 and 21333, and the law, Complainants respectfully move that the Commission order SBC Missouri to comply with the Tariff and charge only the approved rate for power consumption on a per amp basis.

3. The answer to Issue No. 1 is "no". SBC Missouri is only allowed to charge \$10.61 per amp for DC Power Consumption for power consumed, not for both the power amperage arrangement *and* redundant power (also referred to as the total carrying capacity of the arrangement). The definition of the DC Power Consumption rate, found in Section 20.5 of the Tariff, controls this dispute, as it defines the recurring monthly rate for power consumed and identifies what costs are recovered by the recurring rate.⁵ From an operational perspective, for a 40 amp power arrangement ordered by a collocator, the collocator only has the ability to effectively use 20 amps of power.⁶ The limitation of any one feed and the understanding that the second 20 amp feed is for redundancy should limit the DC power that the collocator must pay for only 20 amps. However, SBC Missouri requires, inappropriately and without support under

⁴ For example, in a situation in which Birch has a cageless collocation arrangement with a 100 amp power arrangement (*i.e.*, 2-50 amp feeds), under the lawful interpretation of the Tariff, SBC Missouri would charge Birch for \$530.50 for the DC Power consumption as compared to \$1,031.00 for DC Power consumption using SBC Missouri's latest interpretation.

⁵ SBC Missouri Physical Collocation Tariff, § 20.5, Sheet 59. A copy of § 20.5 is attached as Joint Com. Ex. 2 and is incorporated herein for all purposes. Complainants anticipate that SBC Missouri will attempt to intertwine and rely on the Power Arrangement Provisioning rate element (§ 20.15) which is the non-recurring charge for the cable, racks, and other materials needed to provision the power from the SBC Missouri power plant to the collocation arrangement. SBC Texas made a similar argument in PUCT Docket Nos. 27559 and 21333. The PUCT rejected SBC Texas' position in PUCT Docket No. 27559, finding that the two rate elements are separate; with the DC Power Consumption rate controlling for resolution of the dispute. *See* Joint Com. Ex. 1 at 9-10 (note: in the Texas tariff, the non-recurring charge is entitled "Power Delivery Arrangement" which is comparable to the Missouri rate element entitled "Power Arrangement Provisioning.").

⁶ The power for a 40 amp arrangement is provided using 2-20 amp feeds (one "A" feed and one "B" feed). The costs for the delivery of the power (*i.e.*, the actual cable feeds and racking) is included in the Power Provisioning Arrangement non-recurring charge, but this rate element defines the manner in which the power is actually delivered to the collocation arrangement using 2-20 amp feeds. SBC Missouri Physical Collocation Tariff, § 20.15, Sheet 62. A copy of § 20.15 is attached as Joint Com. Ex. 3 and is incorporated herein for all purposes.

the Tariff, that the collocator pay SBC Missouri for a full 40 amps at \$10.61 per amp (thereby effectively doubling the power consumption rates and charges); notwithstanding that the collocator does not and will not consume 40 amps of DC power. Under the terms of Section 20.5, SBC Missouri may charge for the amount of DC power consumed on a per amp basis, which is no more than 20 amps.⁷

4. The Commission should reach this same conclusion, as did the PUCT⁸, for several reasons as will be established in this Motion and supported by the attached summary judgment evidence. *First*, the DC Power Consumption rate element (§ 20.5) and the per amp DC consumption power rates (§ 21.4)⁹ approved by the Commission explicitly state that they recover the costs associated with the consumption or potential use of redundant power. *Second*, while there is an explicit definition of what SBC Missouri can charge for DC Power Consumption, there is no provision in the Tariff that allows for SBC Missouri to charge for both power consumed *and* redundant power.¹⁰ *Third*, the PUCT, which is the regulatory agency that originally arbitrated and approved the DC Power Consumption rate element (which was based on the Collocation Cost Model sponsored by AT&T and WCOM) and then interpreted the same

⁷ A fundamental problem with SBC Missouri's implementation of the Commission-approved collocation tariff is evident in SBC Missouri's most recent Collocation Application. See Joint Com. Ex. 5 at 11. That order form only permits the collocator to specify the DC power delivery arrangement; it does not separately allow the collocator to specify the amount of DC power consumption it wishes to order. SBC Missouri apparently assumes the amount of DC power consumption that should be charged for this arrangement without accounting for the fact that the second feed in the DC power delivery arrangement is there for redundancy. Such a practice is inconsistent with the Physical Collocation Tariff, which specifically provides that DC power consumption can be ordered on a per amp basis, and is not required to be ordered in 40, 100, and 200 amp increments. Compare Joint Com. Ex. 2 (§ 20.5) with Joint Com. Ex. 3 (§ 20.15).

⁸ See Jt. Com. Ex. 1 at 10.

⁹ SBC Missouri Physical Collocation Tariff, §21.4, Sheet 70. A copy of §21.4 is attached as Joint Com. Ex. 4 and incorporated herein for all purposes.

¹⁰ In the event that SBC Missouri argues that the § 20.15 (Power Arrangement Provisioning) authorizes the charge for power consumption for the power ordered and redundant power, SBC Missouri is completely wrong. The Power Provisioning Arrangement rate element and rates compensate SBC on a nonrecurring basis for the costs of the cable and racking used to provision the power to the collocation arrangement (see Joint Com. Ex. 3). The DC Power Consumption rate covers costs for the investments needed to produce the power consumed and for redundant power on a monthly recurring basis (see Joint Com. Ex. 2). See PUCT's distinction of the two rate elements in Joint Ex. 1 at 9-10.

provision in the lawful and appropriate manner, rejected SBC's contention that it was entitled to charge for redundant power in addition to the power amperage arrangement on several occasions – most notably and on point in PUCT Docket No. 27559. In each instance, where SBC raised the issue in Texas, the PUCT did not accept or revise the rate or rate elements to recognize SBC's position. *Fourth*, as recognized by the Arbitrators in PUCT Docket No. 27559, the manner in which the Tariff requires SBC Missouri to deliver the power to Complainants underscores that charging for redundant power is unwarranted. This operational perspective is consistent with the manner in which the DC Power Delivery and DC Power Consumption rates were established originally by the PUCT and then used in Missouri as the basis for the stipulated and negotiated collocation tariff terms, conditions, and rates.

5. The answer to Issue No. 2 is likewise “no”. SBC Missouri is not authorized to make demands that Birch place disputed amounts involving this collocation power overcharge dispute into an escrow account. The Commission should make this ultimate conclusion for several reasons. *First*, once the Commission finds that SBC Missouri was not and is not authorized under Section 20.5 of the Tariff to charge for redundant power (in addition to the collocation power amperage arrangement), then the Commission should either: (a) find that it does not have to reach this issue because SBC Missouri's position was never supported by the Tariff and, consequently, Section 6.6.1 of the Tariff does not apply; or (b) find as a matter of sound policy, that it will not require Birch to escrow monies that are in dispute related to this power overcharge dispute because there SBC Missouri created the dispute unilaterally and without any basis.

6. *Second*, if the Commission determines that it should resolve this issue in this Motion, then it should find that as a matter of law, SBC Missouri cannot demand Birch place

monies in an escrow account related to the collocation power dispute because: (a) there was and is no basis for SBC Missouri's interpretation on the collocation power charge; (b) SBC Missouri waived the right make such a claim since it did not initiate or complete the true-up within thirty days of the effective date of the Tariff as required by the M2A; (c) SBC Missouri's actions did not constitute a "bona fide dispute" since SBC Missouri invoked the interpretation without notice and invoked the interpretation in the context of a true-up as well as in monthly invoices on a going forward basis; and (d) SBC Missouri's demand that Birch place disputed monies related to the power overcharges was discriminatory since SBC Missouri did not invoke Section 6.6.1 against AT&T (and perhaps other carriers), thereby constituting undue and unlawful discrimination against Birch. Birch submits, however, that the Commission need not reach the factual disputes with respect to Issue No. 2.

III. Jurisdiction

7. The Commission has general jurisdiction over Birch, AT&T, and SBC Missouri as telecommunications companies and their telecommunications facilities pursuant to Mo. Rev. Stat. § 386.250, with all powers necessary or proper to enable it to carry out fully and effectually all of its regulatory powers as provided in Section 386.040.

8. The Commission has jurisdiction to consider complaints regarding unlawful conduct by a telecommunications company, which is alleged by Complainants against SBC Missouri, pursuant to Mo. Rev. Stat. §§ 386.310, 386.330, 386.390, 386.400, and 392.400.6.

IV. Background and Chronology

9. Each of the Complainants is a competitive facilities-based telecommunications company authorized to provide intrastate switched and non-switched local exchange and

interexchange telecommunications services in Missouri.¹¹ Birch and AT&T provide telecommunications services to residential and business customers in Missouri.¹²

10. Each of the Complainants has a Commission-approved interconnection agreement with SBC Missouri. Birch's interconnection agreement authorizes it to order collocation pursuant to the terms, conditions, and rates in SBC Missouri's Physical and Virtual Collocation Tariffs.¹³ AT&T's interconnection agreement contains Appendix Collocation also that authorizes it to obtain physical and virtual collocation under terms, conditions, and rates consistent with the SBC Missouri Physical and Virtual Collocation Tariffs.¹⁴

11. Each of the Complainants interconnects with and/or purchases unbundled network elements from SBC Missouri pursuant to their respective Commission-approved interconnection agreements, thereby enabling each Complainant to provide telecommunications services in Missouri.¹⁵

12. Each of the Complainants has historically ordered and currently orders physical collocation, either in the form of caged or cageless collocation, from SBC Missouri's collocation tariffs.¹⁶

13. On October 12, 2001, SBC Missouri's current Physical Collocation Tariff ("Tariff") took effect as a result of the Commission's approval of the Tariff in Case No. TT-2001-298.¹⁷ In approving the Tariff, the Commission approved permanent rates for SBC Missouri's physical and virtual collocation.

¹¹ This fact should be undisputed for each Complainant.

¹² This fact should be undisputed for each Complainant.

¹³ This fact should be undisputed.

¹⁴ This fact should be undisputed.

¹⁵ This fact should be undisputed for each Complainant.

¹⁶ This fact should be undisputed for each Complainant.

¹⁷ Complainants request that the Commission take official notice of the SBC Missouri Physical Collocation Tariff and the Order approving the Tariff in Case No. TT-2001-298, which are contained in the Commission's files and incorporated herein by reference.

14. Prior to the effective date of the current Tariff, Complainants paid SBC Missouri for their respective collocation arrangements based on interim rates for collocation established by the Commission in approving SBC Missouri's Missouri 271 Agreement ("M2A").¹⁸

15. Under Appendix Physical Collocation of the M2A, the parties, including SBC Missouri, AT&T, and Birch agreed that the rate elements and rates that were effective until replaced by provisions of the SBC Missouri's Tariff. Section 21 of Attachment 13 (Appendix Collocation) provides that the rate elements were to be effective until replaced by the Tariff and were subject to a true-up to the rates approved by the Commission for inclusion in the Tariff. The true-up was limited to a period of six months preceding the effective date of the tariffed rates, but excluded the period prior to the effective date of the agreement. The true-up was required to be completed within 30 days of the effective date of the Tariff.¹⁹ The Commission approved the Tariffs on October 12, 2001, with an effective date of October 12, 2001.

16. Under Section 20.5 of the Tariff, the DC Consumption rate element is defined as:

[t]he DC Power Charge consists 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 a CEV/HUT/Cabinet arrangement expressed in a monthly rate. Rates and charged are as found in Section 21.4.²⁰

17. Section 21.4 of the Tariff contains DC Power Consumption rates for caged, cageless, and caged common arrangements.²¹ The monthly rates for DC Power Consumption

¹⁸ Complainants request that the Commission take official notice of the M2A, that contains Attachment 13: Appendix Physical Collocation, which is contained in the Commission's files and incorporated herein by reference.

¹⁹ See M2A Physical Collocation Appendix, § 21 at 59. Complainants' request that the Commission take official notice of the M2A and this specific Appendix for all purposes.

²⁰ Joint Com Ex. 2.

²¹ Joint Com. Ex. 3.

include two rate components – DC Plant, on a per amp basis, and HVAC Usage on a per 10 amp basis.

18. On October 25, 2002, SBC Missouri rebilled Birch for all of the physical collocation recurring charges, which included charges for redundant power (true-up). The rebill invoice came twelve months (12) after the effective date of the Tariff and permanent rates. In the October 25, 2002 invoice, SBC Missouri also began charging Birch for DC Power Consumption based on the total carrying capacity of the arrangement on a going forward basis and continues to bill Birch for DC Power Consumption in such a manner on a monthly basis in this manner.²²

19. SBC Missouri has not sent AT&T any correspondence, notice, or invoice for a true-up for collocation rates in Missouri.²³

20. In October, 2002, SBC Missouri issued its regular monthly invoice to AT&T, which included recurring monthly charges for AT&T's collocation arrangements.²⁴ Starting with this invoice, SBC Missouri began to charge AT&T for DC Power Consumption for the total carrying capacity of each arrangement (which includes charges for redundant power) for only some cages, but not all of them. AT&T is not certain why SBC Missouri is treating some arrangements differently than others with respect to power charges.²⁵

21. Birch timely disputed in writing the recurring overcharges for power consumption and Birch timely disputed the "rebilled" invoice. AT&T timely disputed in writing the recurring overcharges for power consumption. None of the Complainants have been able to resolve this

²² These facts should be undisputed.

²³ This fact should be undisputed.

²⁴ This fact should be undisputed.

²⁵ For purposes of this Motion, however, SBC Missouri's differing treatment is not pertinent for the limited purpose of this Motion and tariff interpretation.

dispute, thus requiring the filing of the instant Complaints.²⁶ In the event that AT&T receives a true-up invoice with the disputed methodology for charging for DC Power Consumption, AT&T will dispute the invoice in a timely manner.

22. SBC Missouri implemented its interpretation of charging for the power consumed and the redundant power on a going forward basis effective July 1, 2002 in its Collocation Handbook and Collocation Application Form.²⁷ However, it appears that in cases of true-up invoices for Birch, SBC Missouri imposed the charges for the power arrangement and redundant power consumption retroactively to the dates that the collocation arrangements began.²⁸

23. Each Complainant has its own collocation arrangements with SBC Missouri. Birch uses a single arrangement footprint and type of equipment in its collocation arrangements. AT&T uses a variety of footprints and equipment in its collocation arrangements in Missouri. Each Complainant, however, purchases DC power from SBC Missouri pursuant to the terms of the Tariff and SBC Missouri delivers the power to each Complainant's respective and individual collocation arrangement.²⁹

24. Other than augments, none of the Complainants have modified the manner in which SBC Missouri delivers power to their respective individual collocation arrangements or modified the manner in which they consume power in their collocation arrangements since the effective date of the Tariff.

25. Currently, Birch has 30 physical collocation arrangements in SBC Missouri central offices and other facilities in Missouri, specifically in Kansas City and St. Louis metropolitan areas. Two of these collocation arrangements became operational in 1999, while

²⁶ This fact should be undisputed.

²⁷ Joint Com. Ex. 5, SBC Missouri's Physical Collocation Application Form, which is incorporated herein for all purposes. The Application Form is for SBC's 13-state region and applies to Missouri.

²⁸ This fact, while useful information, is not necessary for final disposition of the Motion.

the remaining arrangements became operational in 2000. All of Birch's collocation arrangements in Missouri have been in continuous use since becoming operational.³⁰

26. Currently, AT&T has fifteen (15) physical collocation arrangements in SBC Missouri central offices in Missouri, specifically in the St. Louis and Kansas City metropolitan areas. All of these collocation arrangements became operational in 2000 and have been in continuous use.

IV. Issue No. 1 – Argument and Authorities

27. SBC Missouri is authorized under the Tariff to only charge Complainants for DC power consumed on a per amp basis for power consumed. SBC Missouri is not authorized (nor has it ever been authorized) to charge for both power amperage arrangements *and* redundant power, which would be the total carrying capacity of the arrangement. SBC Missouri's unilateral and unlawful interpretation is not supported by: (1) the Tariff; (2) related regulatory decisions that approved comparable power consumption rate elements and later interpreted those provisions in favor of Complainants; or (3) the operational manner that Complainants consume power. SBC Missouri unilaterally and without Commission approval has changed the manner in which it charges for power under the Tariff, which now, according to SBC Missouri, allows it to basically double the power costs associated with each collocation arrangement.³¹

²⁹ These facts should be undisputed for each Complainant.

³⁰ These facts should be undisputed.

³¹ Not only has SBC Missouri unilaterally changed its interpretation of the Physical Collocation Tariff, it also unilaterally changed its Collocation Application and its Collocation Handbook in July 2002. Yet, under § 10.2 of the Tariff, SBC Missouri is only allowed to revise its Handbook "**by joint agreement of SBC-Missouri and all affected Collocators.**" Complainants are not aware of any SBC Missouri notification or joint agreement with affected Collocators, which included Complainants, to make changes to its Collocation Handbook. To the extent that SBC Missouri has made changes unilaterally to effectuate its change in interpretation of the power charges, then Complainants contest SBC Missouri's modifications.

A. The Dispute

28. The dispute in this case involves the issue of whether SBC Missouri can charge a collocator for the amount of DC Power consumed *and* for a comparable amount of power available for redundant power. In other words, can SBC Missouri charge for double the power consumed by the collocator (at \$10.61 per amp)? Implementation of SBC Missouri's interpretation that it can double the power charge is erroneous for several reasons that will be explained below.

29. It is important, however, to understand the technical basis of the issue. When a collocator consumes DC power in its collocation arrangements with SBC Missouri, the SBC Missouri power is delivered from SBC Missouri's power plant to SBC Missouri's Battery Distribution Fuse Bay ("BDFB") to the collocator's DC Power Panel located in the collocation arrangement.³² The collocated equipment is equipped with two feeds (A and B feeds) to draw or to use the SBC Missouri provided power.³³ For purposes of this discussion, Complainants will use the example of a 40 amp power amperage arrangement, which, as noted earlier, is comprised of a 20 amp A-feed and a 20 amp B-feed according to the Tariff.³⁴ Collocation equipment differs in terms of its engineering. In some instances, the collocator's equipment draws the power on both the A and B feed; with other types of collocated equipment, the power is drawn only using one feed. However, for purposes of this Motion, the different engineering for each

³² See Joint Com. Ex. 6 at 29 (Figure 6).

³³ See Joint Com. Ex. 6, *Direct Testimony of Steven E. Turner (Excerpts)*, PUCT Docket No. 21333 at 30 (Table 1). Mr. Turner's Direct Testimony was admitted in PUCT Docket No. 21333 as AT&T/MCI-W Ex. 1. *Also see* Joint Com. Ex. 7, *Excerpts from AT&T/MCI-W Collocation Cost Model* filed February 16, 2000, PUCT Docket No. 21333 at 3 and 21.

³⁴ It is important to understand that prior to the current Tariff, there were other DC Power Arrangements that had different increments of DC Power across the A-feed and the B-feed. The examples used in this filing only use examples from the current form of the Tariff. Nonetheless, SBC Missouri has retroactively applied its interpretation to charge for the redundant power to older DC power arrangements. Specifically, under the previous tariff, a 40 amp DC Power Arrangement was made up of a 40 amp A-Feed and a 40 amp B-Feed. Prior to the current tariff, SBC Missouri would only charge for 40 amps of consumption across this arrangement. However, SBC Missouri is

piece of collocation equipment is irrelevant – it is only important to know the manner in which the equipment draws power using the A and B feeds, and to recognize that the equipment is engineered so that it will not draw the full engineered carrying capacity of power.

30. When the PUCT was asked to resolve this identical dispute between AT&T, Birch, and SBC Texas, based on the same technical understanding of how power is consumed in a collocation arrangement, the PUCT, which originally approved the DC Power Consumption rate element and rate (which was used as the starting point for the Missouri Tariff) held:

The Arbitrators find SBC's position that the appropriate charge for the consumption should be the total carrying capacity of the DC power arrangement is counter to the tariff provisions. If SBC Texas's arguments were correct, then there would be no need to have section 20.5 of the tariff which sets out the rate element for DC power consumption separate and apart from section 20.17, the DC power arrangement. This issue has been raised previously by SBC Texas during the post-arbitration workshop in Docket No. 21333 and the Arbitrators in that proceeding disagreed with SBC Texas, clarifying that a 40-ampere arrangement consists of 2-20 amp feeds, and it does not allow it to carry a 40-ampere load for each feed. . . . Accordingly, consistent with the tariff's clear language, the Arbitrators find that it is inappropriate to charge collocators for the DC consumption based on the total current carrying capacity of the "A" and "B" feeds rather than the actual usage, either retroactively or on a going forward basis.³⁵

31. Complainants submit that this conclusion is supported by the Tariff, the decisions reached in PUCT Docket Nos. 27559 and 21333, and the operational manner that power is used (which is consistent with the manner in which the DC Power Delivery and DC Power Consumption charges were calculated).

B. The Tariff

32. There is no provision in the Tariff that authorizes SBC Missouri to charge for DC power for *both* power consumed *and* redundant power. Section 20.5 defines the DC Power Consumption rate element, and Section 21.4 contains the DC Power Consumption recurring

now charging for 80 amps of consumption even though nothing changed with the way that these arrangements are used.

charges on a per amp basis for each form of collocation. Neither of these sections contains any provision which allows SBC Missouri to charge for both power consumed and redundant power (total carrying capacity). Indeed, it is clear from both the title (DC Power **Consumption**) and the description of the DC Power Consumption rate element that this rate element should apply to power **consumed** and includes all costs for the “use of the DC power system, with AC input and AC backup for redundant DC power expressed on a per amp basis.”³⁶

33. When the Commission approved the Tariff, effective October 12, 2001, the primary change to the DC Power Consumption rate element and rate was that the rate element would be charged on a per amp basis (consistent with the same rate element in Texas and other states). Under the interim Missouri rates, for DC Power Consumption, which basically remained unchanged, SBC Missouri charged and interpreted the DC Power Consumption rate element to permit SBC Missouri to charge *only* for the power amperage for the collocation arrangement (*i.e.*, charge for only 20 amps of power consumption in a 40 amp arrangement); an interpretation of the Tariff language of which Complainants agree. At no time did SBC Missouri seek to modify the DC Power Consumption rate element to allow it to charge for the power amperage arrangement *and* redundant power.

34. It was only in the true-up invoice to Birch, and then to all of the Complainants in monthly invoices, that SBC Missouri unilaterally and unlawfully invoked its new interpretation of provisions that had not changed in real substance from the interim tariff to the permanent Tariff, effective October 12, 2001. Based on this new and unauthorized interpretation, SBC Missouri began to unilaterally double the amount of assumed power consumption to include redundant power. It goes without saying that this is an extremely dangerous precedent if SBC

³⁵ Joint Com. Ex. 1 at 10 (footnotes omitted).

³⁶ Joint Com. Ex. 2.

Missouri is allowed to take this type of unilateral action based on its tariff interpretation it may have at any given time.

34. Without an affirmative or explicit authorization to charge for both power amperage arrangements and redundant power, SBC Missouri is prohibited from demanding or receiving the overcharges.³⁷ SBC Missouri has never been able to: (1) point to any Tariff provision that affirmatively authorized SBC Missouri to charge for both the power arrangement and redundant power; (2) justify a change in interpretation of the Tariff, which has not been modified, effective October 12, 2001; or (3) point to any aspect of the Order approving the Joint Stipulation and Agreement, the Tariff, or the parties' interconnection agreements to supports its new interpretation of which it is entitled to charge for power.

35. Moreover, SBC Missouri's unilateral, obscure, and unexplained implementation of this new interpretation as of July 1, 2002 in its Collocation Handbook and application form further underscores that there is no provision in the Tariff that authorized SBC Missouri to charge for both power consumed and redundant power. Only after investigation into the true-up invoices and/or the significant increase in monthly invoices for collocation, did the affected Complainants determine that SBC Missouri implemented its interpretation of the Tariff (effective as of October 12, 2001) in its Collocation Handbook and Order form in July 2002, to enable it to charge for both per amperage arrangements and redundant power on a going forward basis.³⁸ The date -- July 1, 2002 -- is odd because it does not correspond to any date regarding the final modifications to the Tariff. The date is also odd because SBC Missouri, in the true-up invoices sent to Birch, has retroactively charged for double power consumption back to the origination date of the collocation arrangement. SBC Missouri did not seek a modification to the

³⁷ Mo. Rev. Stat. § 392.480.

³⁸ See Joint Com. Ex. 5 at 11.

Tariff, nor did the Commission effectuate any change in the Tariff effective July 1, 2002.³⁹ Nor did SBC Missouri issue any notification to collocators to effectuate the change in its Handbook or Application Form.

36. SBC Missouri also failed to comply with the M2A, which required the true-up to be completed within six months of the effective date of the Tariff, which would have been April 12, 2002. Yet, SBC Missouri did not send the re-bill invoice to Birch until October 25, 2002 and has never sent a true-up bill to AT&T.

C. PUCT Docket Nos. 27559 and 21333

37. SBC Missouri has never been able to cite to any aspect of the record of this Commission's approval of the M2A, the interconnection agreements, or the Tariff to justify its overcharging for DC Power consumption. Generally, in other proceedings, SBC, through its subsidiary in Texas, has attempted to rely on decisions or statements (normally used out of context) made in the PUCT's Arbitration Award in PUCT Docket No. 21333 that established permanent collocation rates for SBC Texas' Physical and Virtual Collocation Tariffs.⁴⁰ Complainants anticipate that SBC Missouri will attempt to follow the same process in this instant proceeding.

38. The SBC Missouri Collocation Tariff, particularly the terms, conditions, and rate element definitions, is based largely on the SBC Texas Physical Collocation Tariff. Using the SBC Texas Tariff as a starting point, AT&T, Birch, SBC Missouri, and other parties negotiated the SBC Missouri Tariffs that were ultimately approved by the Commission.

³⁹ The July 1, 2002 date used by SBC Missouri cannot be tied to any regulatory action or to any notification by SBC Missouri that it had changed its interpretation of the Tariff with respect to power consumption charges.

⁴⁰ PUCT Docket No. 21333, *Proceeding to Establish Permanent Rates for Southwestern Bell Telephone Company's Physical and Virtual Collocation Tariffs*; Revised Arbitration Award (April 12, 2001) ("PUCT Docket No. 21333").

39. As a result, Complainants submit that there are two Texas regulatory proceedings that also support Complainants' Motion and of which the Commission should seriously consider and review. The first and most recent docket is PUCT Docket No. 27559, which involved a complaint similar in nature and identical with respect to this power consumption overcharge dispute.⁴¹ The second docket is PUCT Docket No. 21333, which, as mentioned above, is the regulatory proceeding in which the PUCT established permanent physical and virtual collocation tariff rates. In PUCT Docket No. 21333, the DC Power Consumption rate element and rate were disputed and ultimately resolved by the PUCT. In each instance in that docket, where SBC Texas, a sister-affiliate of SBC Missouri, claimed that it should be allowed to apply the DC Power Consumption to the total carrying capacity of the arrangement (which included redundant power), the PUCT rejected SBC Texas' position. Both dockets are important because the Missouri Physical Collocation Tariff is, in large part, based upon the Texas Physical and Virtual Collocation Tariffs. While the parties in Missouri were able to reach a stipulation about the collocation tariffs and rates, that stipulation was based significantly on language and components to the Texas Physical and Virtual Collocation Tariffs that were established via arbitration, with record evidence, in PUCT Docket No. 21333. In fact, the disputed provisions of the Missouri Tariff are largely the same as the comparable provisions in the Texas Physical and Virtual Collocation Tariffs. Complainants submit that the record evidence and decision reached in PUCT Docket No. 21333, as well as the affirmation that Complainants' interpretation is correct on this issue, provide additional precedential and factual support for Complainants' Motion.

1. PUCT Docket No. 21333

40. The evolution of the rate element definition of DC Power Consumption in the physical collocation tariff in Texas (§ 20.5) and the arbitrated calculation of the per amp

⁴¹ Joint Com. Ex. 1.

recurring rates for DC Power Consumption (§ 21.5) in the Texas Collocation Tariff found in the evidentiary record and decisions reached in PUCT Docket No. 21333 support Complainants' Motion in the instant proceeding. The record evidence, decisions, and PUCT interpretations of its decisions, provide background and context to support Complainants' position – a position that was ultimately affirmed by the PUCT in Docket No. 27559 (and for which Complainants seek a similar ruling in Missouri). Complainants submit that it is more efficient from a resource and time perspective to provide the Commission with the relevant record evidence and arguments in PUCT Docket No. 21333, than to relitigate the issue in Missouri – particularly when the Missouri Tariff resulted from a joint stipulation among the parties, including SBC Missouri and Complainants. Accordingly, as appropriate, Complainants submit the record evidence, transcripts, or decisions from PUCT Docket No. 21333 to assist the Commission in making its decision here.

41. Under the terms of the Tariff (both in Texas and Missouri) there are two rates associated with DC Power. One is entitled "Power Provisioning Arrangement" (§ 20.15) which is a non-recurring rate charged one time for each collocation arrangement to compensate SBC for "the cable and the cable rack including support and fabrication material expressed as a monthly rate for either 2-20 AMP, 2-50 AMP, or 2-100 AMP feeds."⁴² The second rate, of which is the rate element in controversy in this proceeding, is the DC Power Consumption rate, which, as quoted earlier, is the recurring charge on a monthly basis charged for the amount of power consumed and covers the costs of the Power Plant, back-up and redundant power.⁴³

⁴² Joint Com. Ex. 3. In the Texas tariff, and as the Commission will see referred to in record references, this rate element is called the Power Delivery Arrangement charge. The components are identical – just the title is different.

⁴³ Joint Com. Ex. 2.

42. To understand that there is a difference in these rates (and the cost components that are included in each one) it is important to understand the evolution of the dispute in PUCT Docket No. 21333 that was ultimately resolved against SBC.

43. By way of background, Complainants provide the procedural context of the decisions reached in PUCT Docket No. 21333. The PUCT had already established *permanent* terms and conditions, and *interim* rates for physical and virtual collocation in SBC Texas' § 271 proceeding.⁴⁴ The PUCT opened Docket No. 21333 to establish the permanent rates.⁴⁵ The Commission also determined that it would use the AT&T/WCOM Collocation Cost Model ("CCM") to establish the permanent rates, allowing parties to propose differing inputs.⁴⁶

44. As part of the physical collocation terms and conditions approved in SBC Texas' § 271 proceeding, the Commission approved the following rate element definition for DC Power Consumption:

The DC Power charge consists of use of the DC power plant system, with AC input and AC backup for 20, 40, 50, 100, 200 or 400 amps (redundant) feeder increments. Rates and charges are as found in Section 21.5.⁴⁷

At the time that the PUCT approved this rate element in the § 271 proceeding, SBC Texas charged for power amperage arrangements based on the amount of power consumed for the arrangement, and did not charge for the total carrying capacity (which included redundant power) just as SBC Missouri had been doing also until it implemented this new interpretation.

⁴⁴ *Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market*, Project No. 16251, Order No. 52 at 3 (Sept. 8, 1999) ("SBC-T's § 271 Proceedings").

⁴⁵ *Id.*

⁴⁶ *Id.* After PUCT Docket No. 21333 was initiated, SBC Texas attempted have the PUCT reverse its decision on use of the CCM. SBC-Texas' requests were denied. See PUCT Docket No. 21333, Order Ruling on Motion for Reconsideration on Collocation Cost Model at 2 (Jan. 13, 2000).

⁴⁷ See SBC-T § 271 Proceeding, Order No. 59, Order Approving Revised Physical and Virtual Collocation Tariffs (Oct. 29, 1999).

45. The CCM presented by AT&T/WCOM in PUCT Docket No. 21333 calculated the DC Power Consumption rate on a per amp basis which ultimately resulted in the rate element definition being modified to a per amp basis with no reference to the units of power (*i.e.*, 20, 40, 50, 100, *etc.*) consistent with the DC Power Rate Element definition cited above.⁴⁸ As per the procedure allowed in the Texas proceeding, the parties could propose their own inputs using the CCM, resulting in their respective proposed rates. SBC Texas, through its proposed revisions to the CCM, apparently modified inputs related to Power Delivery (the non-recurring charge) by including a larger size cable for the power. SBC Texas' charge also affected the input into the DC Power Consumption rates. Effectively, SBC Texas' modification to the power cable size (oversized) was designed to carry the full power amperage on a single feed. The disputed issues regarding power delivery are found and discussed in Attachment A, Items 12 and 13.⁴⁹ However, in the context of SBC Texas' cross-examination of Mr. Steven E. Turner, expert witness for AT&T/WCOM, it became apparent that SBC Texas had a different view of how power was provided to collocators and what costs should be included than what was included in the CCM. SBC Texas counsel Kirk Kridner cross-examined Mr. Turner regarding Items 12 and

⁴⁸ Joint Com. Ex. 4. Note that there is a diagram of the CCM's assumptions regarding both power delivery and power consumption at page 29 (Figure 6). There are two locations in the CCM that would account for the power delivery as explained by Mr. Steven E. Turner. Specifically, in the Physical Collocation Power Delivery Elements, which included Total Investments and Items included in Power Consumption Charge and the Summary of the Collocation Cost Model. In the Collocation Cost Model, items included in the calculation of the Power Consumption rate included: BDFB, Cable Rack Occupancy, Cable A, 48V DC Power Plan, and DC Electrical & Auto Start Diesel. As noted in the Power Delivery Sheet, the power delivery inputs and investments are used as part of the calculation for the power delivery costs. Therefore, the other relevant document is the Power Delivery Element Sheet from the CCM. *See*, Joint Com. Ex. 7.

⁴⁹ In PUCT Docket No. 21333, "Attachment A" was originally submitted by SBC Texas witnesses Cromwell and Cathcart to identify SBC Texas specific disputed inputs, assumptions, and methodologies. *See* PUCT Docket No. 21333, SWBT Exs. 1A and 5A. The different components of the CCM were divided into "Items." In response, Mr. Turner likewise prepared an Attachment A, that responded to SBC Texas' positions. *See* AT&T/MCI-W Ex. 6 in PUCT Docket No. 21333. Consequently, the Arbitrators used this format in the Arbitration Award and Revised Arbitration Award to identify its decisions regarding specific disputed inputs. Then, the Arbitrators asked Mr. Turner to take the Arbitrators' Attachment A, and input those decisions into the CCM.

13 – specifically, the correct size (or gauge) of the power cable (related to power delivery, not consumption).⁵⁰

Q (*Cross-Mr. Kridner*) Why is it you're using six gauge when our power wheel tells us that if we want to be carrying 40 amps of power for 35 feet, we should be using a two gauge?

A. (*Mr. Turner*) Because we are not running 40 amps of power across the wire.

Q. Not running 40 amps, what are we running?

A. (*Turner*) The way the collocation cost model is set up is that when you order 40 amps of power, you get it in two 20 amp feeds, 20 amp on the A side and 20 amp feeds on the B side over the 35 feet and . . . that would be the problem you are having in your analysis. When you are trying to figure out if my wire gauge is incorrect, you would have to also take into account that we are really running – when you run those four wires, you are running two 20 amp feeds from A and B to get the four wires.

Q. Well, let me ask you to start with: Wouldn't you agree with me that if you order 40 amps of power in a Southwestern Bell office – first off, Southwestern Bell is going to provide what's called redundant power, redundant power leads?

A. That's exactly what I just defined.

Q. And redundant power leads, though, means if you order 40 amps you get two power leads each with 40 amps. So if the A lead fails, you still have 40 amps being delivered to you on the B lead?

A. It depends on exactly the configuration of how you are setting up your power. I'm as happy as a lark to go into all the details if you would like for me to.

Q. Well, would you agree if – what you are doing as far as costing in your collocation cost model is – it calls for 40 amps. What you doing is you're providing two leads of 20 amps each, an A lead of 20 amps and a B lead of 20 amps? . . .

A. No, that's not correct. Normally what you'll have . . . is a load on your equipment that's needed, and it depends on the time [sic] of equipment. There are two different types of power configurations used typically in the industry.

But typically what would happen is if you had a 40-amp load on a piece of equipment, you would feed that off of two fuses so that you would have redundant

⁵⁰ The size of the power cable is directly affected by the load that will be placed on the cable, along with the length of the cable. See, PUCT Docket No. 21333, Hearing on the Merits, Transcript Excerpts at 349-50 (Sept. 27, 2000). A copy of these transcript excerpts is attached as Joint Com. Ex. 8 and incorporated herein for all purposes.

power, and you would feed part of [sic] the load to that equipment of A side and part off of B. . . .⁵¹

46. Then, SBC Texas counsel attempted to explain, via cross-examination, that SBC Texas' proposed inputs attempt to implement SBC Texas' theory that SBC could charge, as part of its non-recurring charge for Power Delivery, for the full carrying capacity of each feed (which it would later contend also applied to DC Power Consumption).

Q. (Mr. Kridner) Right. But would you agree with me that the Southwestern Bell inputs to the model cost out providing the full 40 amps on both the A side and the B side?

A. (Mr. Turner) It does, but then you are really buying 80 amps of power from Southwestern Bell, not 40.

. . .

Q. If – using the analysis that you are using, if you wanted to compare 40 amps of collocation cost model power to 40 amps of power provided by Southwestern Bell's cost model, really what you would do is you would look at 20 amps of Southwestern Bell power to 40 amps of collocation cost model?

A. If that's, in fact, how you use the cost model. It's not . . . clear to me that that's exactly what you have done. And what we are now blending over into is a terms and conditions issue.

I think the terms and conditions for ordering power are clear, and I believe that the way the collocation cost model calculates the cost for power delivery is consistent with what happens in the terms and conditions.⁵²

47. The Arbitration Award in PUCT Docket No. 21333, issued on March 2, 2000, did not explicitly address the issue of whether SBC Texas could charge for both power amperage arrangement and redundant power either under the DC Power Delivery Rate or the DC Power

⁵¹ *Id.* at 345-47 (emphasis added).

⁵² *Id.* at 347-50 (emphasis added). The Arbitrators did not have any clarifying question regarding the redundant power dispute.

Consumption charge.⁵³ Instead, the Arbitrators determined the power delivery cable costs per foot to be:

- The Arbitrators determine the cable cost per foot is as follows:
for the 40-ampere cable ---- \$16.65,
for the 100-ampere cable----\$29.39, and
for the 200-ampere cable--- \$61.56.⁵⁴
...
- The 40 ampere, 100, ampere, and 200 ampere loads shall be considered in estimating the cost of cabling.
- Based on the above findings, the Arbitrators determine the cable sizes to be 1/0 for the 40 ampere cable, 4/0 for the 100 ampere cable, and 500 MCM for the 200 ampere cable. The Arbitrators determined the cable sizes by using the Marconi wheel, a device presented as evidence by SWBT. The Arbitrators find that the wire sizes are related to the distance, voltage drop, and the ampere load.⁵⁵

48. At that point, it was up to the parties, and specifically Mr. Turner, to take the Arbitrators' decisions and input them into the CCM to derive the Arbitrators' collocation rates.⁵⁶ To afford the parties with the opportunity to seek clarifications to ensure that the Arbitrators' decisions were accurately incorporated into the CCM, the Arbitrators held post-Award workshops.

49. At the March 6, 2001 post-Award workshop, Mr. Turner sought clarification of the decisions (shown above) regarding the power cable costs related to Power Delivery costs. There was no clarifying discussion about the implications of the decisions on the Power

⁵³ Complainants do not question or complain that the issue was not directly addressed initially by the Arbitrators, as SBC Texas did not distinctly raise it in its testimony or in Attachment A. It was only through Mr. Turner's cross-examination by SBC Texas counsel that the issue even made it into the record.

⁵⁴ Joint Com. Ex. 8, Arbitration Award, Att. A at 51. A complete excerpt of the Award, Attachment A, Items 12 and 13 are provided in Joint Com. Ex. 9.

⁵⁵ *Id.* at 51-52.

⁵⁶ While Mr. Turner was tasked with the implementation of the Arbitrators' Award into the CCM, SBC Texas was also given the opportunity to review Mr. Turner's work and to participate and ask questions during the post-Award workshops.

Consumption recurring charge or the definition of the DC Power Consumption rate.⁵⁷ There was extensive discussion related to the manner in which the Award (and the CCM) calculated the costs for the power cables used to deliver power to the collocation arrangement and the size and number of those cables. Judge Srinivasa clarified certain aspects of the calculation for the number and size of the cables, which resulted in a *reduction* to the price for power delivery and ultimately power consumption costs, contrary to SBC Texas' position. With Judge Srinivasa's clarifications, Mr. Turner incorporated the Arbitrators' decisions. However, it became clear that another post-Award workshop was needed since a number of remaining clarifications were needed.

50. A second post-Award workshop was held on March 21, 2001. The issue regarding power costs again arose, with Judge Srinivasa providing *a defining moment* as to the proper calculation (and ultimately application) of the power costs. Again, the discussion excerpts below appear lengthy, but provide the support for Complainants' position.

Mr. Turner: . . . Okay, I'm going to move now to the next area, which is [sic] Items 12 and 13, which is the DC power delivery cable link and cable cost per foot, and before I jump into that, could I just ask – because we had a lot of discussion on this at the last hearing, and then the arbitrators issued an order clarifying arbitrators' Phase I award, and in the case of the 40-amp and 100-amp arrangements, the modified it consistent with what we had discussed, which is to divide the value by four, but for the 200 amp or the two 100-amp feeds, it appeared that you had something else in mind there, and I was wondering if you could help us understand that.

Mr. Srinivasa: Right. Based on questions that were raised during the clarifying session last hearing, *arbitrators had to go back and rethink about – instead of sizing it for two 100 amps, it was two 50 amps. Cable size was also . . . actually, the cable was resized to handle 50 amperes, and then we came up with the rates for two 50-ampere cables. That means that there are four cables that can carry 50 amps, and that's what the rate is. It's \$7.34, and for the 200 ampere, we modified the two 100 amperes, and the cables were sized to carry 100 amps. There are four cables there also. The price is \$28.82. Actually, it's the costs.*

⁵⁷ At this point, given the needed focus on the DC Power Consumption charge, Complainants are not providing the extensive transcript citations related to this discussion. If needed, Complainants will provide in further support of its Motion.

...

Mr. Srinivasa: Instead of 500 MCM cable [for the 200-amp], now it's 4/0 cable for the 100 ampere. 4/0 cable for the 100 ampere cable, the rates turned out to be that based on R.S. Means, Page 447.

Mr. Turner: Thank you. Well, I'm just going to, at this point, type in those changes. The way you do that is to go to the conductivity element backup worksheet, consistent with the discussion we had before, and go to Cell K16 is the per-foot price, and this is for the two 100-amp feeds. I'm going to type in the value of 28.82. Then Cell K17, which is the two 50-amp arrangements, you type in the value of \$7.34.

Mr. Srinivasa: Also in the description column you have to change it.

Mr. Turner: It actually says that over in the notes column. It says, "Includes 50 amp A and B feed plus two battery runs," as being what a 100 amp arrangement is.

Mr. Srinivasa: Right. It's four 55 feet --

Mr. Turner: Oh, I see what you're saying. You want me to correct the note as well.

Mr. Srinivasa: Right.

Mr. Turner: Let me do that then. So Cell A16 would be four by 55 feet.

...

Mr. Turner: Do you want me to change the parenthetical? Instead of saying 200 amp total say 2 100-amp feeds?

Mr. Srinivasa: Yes.

Mr. Turner: Okay. Let me see how you wrote that.

Mr. Srinivasa: 2-100 amps.

Mr. Turner: 2-100 amps. That changes Cell A16. Now I'm going to now change Cell A17 to be four by 55 feet.

Mr. Srinivasa: Is that for the --

Mr. Turner: This is for the two 50-amp arrangements. You can tell me the cable size there.

Mr. Srinivasa: No. 4 for the 20 amp and 1/0 for the 50 amp.

Mr. Turner: You want me to change this to say 2-50 amps. Then this – I'm now going to change Cell A18 to say four by 55 feet.

Mr. Srinivasa: Instead of No. 6, it will be No. 4.

Mr. Turner: This should be 2-20 amps. Then the last change that I haven't done yet is K18 should read \$4.44.

Mr. Srinivasa: Does Southwestern Bell have any question on that?

Ms. Cathcart (SBC cost witness): No questions.

Mr. Turner: Okay. Now, you need to go to the delivery input. . . . and I would suggest, too, just to be consistent, that we change the description here as well. Would that be helpful?

Mr. Srinivasa: Yes.

Mr. Turner: So for the two 20-amp arrangements, it was a No. 4 cable, I believe.

Mr. Srinivasa: That's correct.

Mr. Turner: For the two 50-amp arrangements, it's a 1/0 cable, and for the two 100-amp arrangements it's a 4/0 cable. Our marks are correct.⁵⁸

51. Judge Srinivasa's clarification *explicitly rejected* SBC Texas' position that the rates should account for oversized power cables that each would carry the full amperage for the collocation equipment. In each instance, for the 40 amp, 100 amp, and 200 amps arrangements used to calculate the per amp rate, the Arbitrators modified the description to read 2-20 amp feeds, 2-50 amp feeds, and 2-100 amp feeds, respectively. More importantly, the cable sizes for each arrangement were reduced so that they would only be sized for the 20, 50, or 100 amp feeds – again, an explicit rejection of SBC Texas' position. Ultimately, it was these power cost components that were used to arrive at the DC Power Consumption recurring rates found in Section 21.5.

52. After the permanent rates were calculated (based on the Phase I Arbitration Award and the clarifications provided during both post-Award workshops), the PUCT then required the parties to prepare physical and virtual compliance tariffs incorporating the final decisions reached in the Revised Arbitration Award. Although the parties worked out a significant number of issues, there remained various disputes on tariff language on terms, conditions, and rates that needed to be clarified. The Arbitrators held a third post-Award workshop on May 2, 2001 to address the disputes. In the context of this workshop, the issue of redundant power/power amperage arrangements arose with respect to whether revisions needed to be made to Section 20.5, which was the definition for the DC Power Consumption rate element based on the decisions reached regarding power delivery.⁵⁹ AT&T/WCOM contended that the approved DC Power Consumption rate element definition should retain the word “redundant” to be consistent with the manner that the power consumption rates were calculated (particularly in light of Judge Srinivasa’s clarification at the March 21, 2001 workshop). SBC Texas’ position was that it wanted to remove the word “redundant”. But in this workshop, Judge Srinivasa specifically noted that one of the two feeds in the power arrangement would provide the redundant power capability; again, supporting Complainants’ position. The following excerpt crystallizes the issue:

Ms. Peng (SBC counsel): Now, the next issue, Your Honor, is Southwestern Bell had requested the deletion of “redundant” because it’s our understanding that based on the award, we are not providing redundant power.

⁵⁸ Joint Com. Ex. 10, PUCT Docket No. 21333, Workshop Transcripts Excerpts at 32-36 (Mar. 21, 2001)(emphasis added). A copy of the full discussion on Items 12 and 13 is included in Joint Com. Ex. 10, which is incorporated herein for all purposes.

⁵⁹ In addition to the issue of whether the word “redundant” should be removed from the Rate Element definition, the parties also had other disputes regarding the definition. Each of the disputes was resolved without the need for Commission decision.

Mr. Srinivasa: See, the DC power panel is designed to provide with a 20 – we'd have two 20-amp feeds, two 50-amps and two 100 amps. That's how the rates are set. When you have two, that means there was an agreement –

Ms. Mudge: We will also note that that language – that language that Southwestern Bell proposes to delete is in the current tariff.

Mr. Srinivasa: So your position is that it should be left intact.

Ms. Mudge: Absolutely.

...

Ms. Peng: Your Honor, my understanding of the reasoning behind the deletion of the word "redundant" is that the way the power has been ordered to be provided by Southwestern Bell for the 40 amp – for a 40-amperage, we do the two 20 amp leads, that provides a total of 40 amps. It is not 40 amps redundant. So to state it's redundant would require another two feeds to provide a second 40 amps of power in case the first failed. So what we have been ordered to provide is not redundant and that's why we had requested the deletion of that term.

Ms. Mudge: We completely disagree with that. The way it is costed and the way we talked about – and this was a disputed issue in the arbitration award. We talked about the issue of redundancy ad nauseam. And, in fact, Southwestern Bell is providing redundant, but the difference is that they are providing – for example, in 40, it is two 20-amp feeds. So I think . . . that this is an issue that I think goes back to a dispute we had in the arbitration, one that we believe is – was decided appropriately in the award,. And as a result, we think that the language should remain the way it is.

Mr. Srinivasa: Ms. Cathcart, we talked about this in the clarification session that we had. How many cables there were: Two cables, four cables. Each cable has a fuse associated with that in the DC power panel.

Ms. Cathcart: That's correct.

Mr. Srinivasa: So the reason why four cables were sized was if someone requests two 20-ampere, you have the other two cables as a redundant provision.

...

Mr. Srinivasa: Arbitrations' decision – on Page 51 it says," Arbitrators recommend that the cost for four cables is as follows: The two 20-ampere cables, \$4.44"; four cables, A and B lead – A lead 20-amp, B lead 20 amp and then you have another 20 amp and another 20 amp. If something fails, the other one still services 20 amp. It is not 40 amp.

Ms. Mudge: That's right.

Ms. Cathcart: No. It is 40 amps together. You have two leads that are two cables each. You have a battery and a return cable, and therefore, you have two cables in one lead that's going to supply 20 amps of power. You have two cables in the second lead that's going to provide –

Mr. Srinivasa: Isn't that a backup?

Ms. Cathcart: No, not if they have ordered 40 amps of power.

Mr. Srinivasa: If they've ordered 40 amps, then you have to size two – four 40 amp cables. And there is no rate element here for 40 amp that is nonstandard.

Ms. Cathcart: My understanding is that the power delivery comes in 40-amp, 100-amp, and 200-amp increments and that the 40-amp increment consists of two 20-amp leads, which means that it will provide totally 40 amps of power with no backup power to those 40 amps.

Mr. Srinivasa: Well, *what is clear or what is contained in the . . . arbitrators' award is for 40-amperes, that means you are providing them two 20-ampere, two A feeds, two B feeds, each cable capable of carrying 20 amps. It was not to allow them to carry 40 amps on that, even though – that was the clarification that we made. It's not a 40-ampere service, two 20-ampere service. If they want 40-ampere service, then you have to size four cables, each one capable of carrying 40 amps, and that's not even priced out here.*⁶⁰

53. As a result of this discussion in the third post Award workshop, it became clear that for purposes of DC Power Consumption and application of the rate would be on a per amp basis for the amount consumed, not on the full carrying capacity of both power cable feeds. Most notably, no changes to the rates in Section 21.5 (DC Power Consumption – Texas) were made, because it was clear that SBC Texas' position had been rejected.

54. The PUCT approved the Arbitrators' Revised Arbitration Award and approved the physical collocation tariff, making modifications that did not address the power issue.⁶¹ SBC Texas then requested that the PUCT place the Award on the Open Meeting Agenda to be

⁶⁰ Joint Com. Ex. 11, Docket No. 21333, Workshop Transcript Excerpts at 111-18 (May 2, 2001)(emphasis added). A complete copy of the discussion regarding Items 12 and 13 is included in Joint Com. Ex. 11, and is incorporated herein for all purposes.

⁶¹ Joint Com. Ex. 12, PUCT Docket No. 21333, Order Approving Revised Arbitration Award at 5 (June 7, 2001). A complete copy of the Order is included as Joint Com. Ex. 12, and is incorporated herein for all purposes.

considered, which is tantamount to an appeal of the Award. The PUCT did not vote to place the Award on the agenda. SBC Texas then later filed a Motion for Reconsideration, which has never been ruled upon by the PUCT.

55. Complainants submit that the evolution of the costs for power delivery and power consumption found in PUCT Docket No. 21333 supports findings that: (a) the DC Power Consumption Rate is a recurring monthly charge on the amount of power consumed not on the carrying capacity of both A and B feeds; and (b) the PUCT rejected SBC's position that it was authorized to charge for both power consumed and redundant power.

2. PUCT Docket No. 27559

56. The second Texas regulatory proceeding that supports Complainants' Motion is the Arbitration Award found in PUCT Docket No. 27559. As explained earlier, Birch and AT&T (the Texas affiliates of the parties in this proceeding) brought a comparable complaint against SBC Texas alleging that SBC Texas was overcharging for DC Power Consumption (by charging for power consumed and redundant power).⁶² The PUCT resolved the dispute via motion for summary disposition based on the identical information provided herein.⁶³ As cited above, the Arbitrators, and ultimately the PUCT found that, "under Sections 20.5 and 21.5 of the Permanent Collocation Tariff, [SBC Texas] is authorized to charge for only the power consumed

⁶² In PUCT Docket No. 27559, there was a second issue related to allegations of violations of Texas statutes which prohibits a telecommunications service provider from demanding compensation for power charges in excess of a Commission-approved tariff. Complainants do not raise this issue in the Missouri proceeding. Additionally, the issue of the dispute over placement of funds in escrow was not addressed in the PUCT Docket No. 27559, since SBC Texas' tariff does not require placement of disputed funds in escrow.

⁶³ In PUCT Docket No. 27559, Birch, AT&T, and other Complainants submitted their Motion for Summary Disposition with supporting record evidence that is also attached to the Missouri Motion for consistency. In response, SBC Texas filed its own Motion for Summary Judgment, attaching record evidence from Docket No. 21333 as well. The Arbitrators held oral argument and asked clarifying questions of the parties. The Arbitration Award is based on the motions for summary judgment and the Texas Commission's interpretation of its tariff. In this proceeding, Complainants request the same process in order to efficiently resolve this complaint.

by the collocator.”⁶⁴ The Arbitrators further found “[a]ccordingly, consistent with the tariff’s clear language, the Arbitrators find that it is inappropriate to charge collocators for the DC consumption based on the total current carrying capacity of the “A” and “B” feeds rather than the actual usage, either retroactively or on a going forward basis.”⁶⁵

57. Complainants submit that the PUCT’s interpretation of the DC Power Consumption and Power Delivery charges are persuasive precedent since Sections 20.5, 20.15, and 21.4 of the Tariff are based heavily on the Texas tariff provisions.

D. Operational Power Use

58. The actual provisioning and use of the DC power does not support SBC Missouri’s new interpretation of the Tariff. As explained in great detail above, SBC Missouri’s position is not consistent with the how the DC Power rates were calculated using the CCM, a model which was used as a basis for the rate elements and rates, was used as the starting point for the Missouri negotiations for the collocation tariff. As Mr. Turner explained in PUCT Docket No. 21333, the CCM costed power for 40 amp, 100 amp, and 200 amp power arrangements using the assumptions of 2-20 amp, 2-50 amp, and 2-100 amp feeds.⁶⁶ As Mr. Turner further explained, these assumptions were consistent with the manner in which collocators used power.⁶⁷

59. Complainants further submit that the ultimate conclusions are also supported by the manner that SBC provides power to collocation arrangements. The manner in which SBC Missouri delivers power to the Complainants’ respective collocation arrangements has not changed since the arrangements began, notwithstanding SBC Missouri’s new interpretation

⁶⁴ Joint Com. Ex. 1 at 2.

⁶⁵ *Id.* at 10.

⁶⁶ Joint Com. Ex. 8 at 345-47.

⁶⁷ *Id.*

(apparently implemented in its Handbook and Application Form and purportedly effective July 1, 2002).⁶⁸ More importantly, the manner in which Complainants' consume power using existing collocation equipment has not changed since the arrangements became operational.

60. The example used earlier can illustrate this point from an operational perspective. One power feed (the B-Feed) provides redundancy to the primary power feed (the A-Feed) in the event that there is a power failure on one side of the frame or the other. In other types of collocated equipment, both feeds (A and B) draw power from SBC Missouri, but either will act as the redundant power source if the other feed fails. While the operational power draw in each example differs, importantly the amount of power drawn does not. In each instance, the collocator draws power that does not exceed the 20 amps delivered across this arrangement with redundancy in place. Yet, in both cases, the A and B feed can and do act as redundant power feeds, if needed. Most importantly then, in both examples, the arrangements do not draw a maximum of 40 amps of DC Power (which effectively is what SBC Missouri is charging for each arrangement). Even where a collocator's equipment uses both feeds at the same time, the maximum drain across both feeds combined would never exceed 20 amps, and the equipment is able to get all of its power needs from one feed if the other one fails. In contrast, SBC Missouri's interpretation charges Complainants for the full 40 amps of DC Power (assuming no redundancy) even though they do not use even 20 amps of DC Power (where the collocator is assuming redundancy). Consequently, it would be completely inappropriate and inconsistent to charge Complainants for 40 amps of power when, in fact, they only use up to the maximum 20 amps available with a 40 amp redundant arrangement, based on the engineering configuration of the collocated equipment.

⁶⁸

Joint Com. Ex. 5.

E. Summary and Conclusion on Issue No. 1

61. SBC Missouri's attempt to unilaterally and without authority to double the monthly recurring power consumption charges for Complainants' collocation arrangements in Missouri, retroactively for Birch, and prospectively for Birch, and AT&T, violates the express provisions of the Tariff, the applicable interconnection agreements, and the Commission Orders. The Tariff and interconnection agreement establish that application of the power consumption charges will be based on the DC Power consumed, not the total carrying capacity of both leads. This interpretation is also confirmed by the conduct and practices of the parties in ordering, provisioning, billing and paying for power consumption prior to October 2001.

62. SBC Missouri's attempt to unilaterally alter its conduct and practices regarding power consumption charges is not in good faith, and is contrary to the express requirements of the interconnection agreements, and the common law. SBC Missouri violated Section 18.1 of the General Terms and Conditions of the M2A, and amending the provision dealing with collocation charges without negotiation and mutual consent.⁶⁹

63. SBC Missouri's attempt to retroactively impose its purported double charges for collocation power consumption violates the express provisions of the Tariff and interconnection agreements, in that there was to be a one-time true-up for charges incurred and the true-up was to be completed within thirty (30) months of the effective date of the Tariff. By failing to meet this timeframe or request any extension, SBC Missouri has waived its right to seek a true-up.

64. By purporting to charge more than the amounts allowed by the Tariff and unilaterally attempt to change the interpretation and application of the Tariff, without any notice

⁶⁹ See Birch Current Agreements, General Terms & Conditions, § 18.1 and AT&T Current Agreements, § 18.1. Complainants request that the Commission take official notice of the Complainants' respective interconnection agreements with SBC Missouri.

or sanction by the Commission, SBC Missouri has violated Mo. Rev. Stat. § 392.480 and § 392.230.3.

65. For all of these reasons, Complainants respectfully request that their Motion be granted with respect to Issue No. 1 finding that SBC Missouri is authorized only to charge for DC Power consumed and not for the full carrying capacity of the arrangement.

V. Issue No. 2 – Argument and Authorities

66. This dispute involves Birch only – a fact that underscores SBC Missouri's discriminatory application of tariff provisions that are not applicable in this proceeding. SBC Missouri is not authorized to make demands that Birch place disputed amounts involving this collocation power overcharge dispute into an escrow account. The Commission should make this ultimate conclusion for several reasons.

67. *First*, once the Commission finds that SBC Missouri was not and is not authorized under Section 20.5 of the Tariff to charge for the total carrying capacity (which includes redundant power) then the Commission should either: (a) find that it does not have to reach this issue because SBC Missouri's position was never supported by the Tariff and, consequently, Section 6.6.1 of the Tariff does not apply; or (b) find as a matter of sound policy, that it will not require Birch to escrow monies that are in dispute related to this power overcharge dispute because there SBC Missouri created the dispute unilaterally and without any basis.

68. *Second*, if the Commission determines that it should resolve this issue in this Motion, then it should find that as a matter of law, SBC Missouri cannot demand Birch place monies in an escrow account related to the collocation power dispute because: (a) there was and is no basis for SBC Missouri's interpretation on the collocation power charge; (b) SBC Missouri waived the right to make such a claim since it did not initiate or complete the true-up within 30

days after the effective date of the Tariff; (c) SBC Missouri's actions did not constitute a bona fide dispute since SBC Missouri invoked the interpretation without notice and invoked the interpretation in the context of a true-up as well as in monthly invoices on a going forward basis; and (d) SBC Missouri's demand that Birch place disputed monies related to the power overcharges was discriminatory since SBC Missouri did not invoke Section 6.6.1 against AT&T (and perhaps other carriers), thereby constituting undue and unlawful discrimination against Birch. Birch submits, however, that the Commission need not reach the factual disputes with respect to Issue No. 2.

69. SBC Missouri (as well as all of the SBC affiliates) have known since the DC Power Consumption rate element and rate was developed in Texas that it had no authority to charge collocators for the amount consumed and for redundant power. SBC chose to implement its new interpretation effective July 1, 2002, a date that does not correspond to any effective date in the *Missouri Collocation Tariff* (October 12, 2001) or in the dates for the true-up period. Yet, unilaterally and without explanation, SBC Missouri not only implemented an interpretation that is not supported by the clear language of the Tariff, the development of the DC Power Consumption charges, or even the operational manner in which power is consumed, it also did so in a discriminatory and unlawful manner.

70. As noted earlier, on October 25, 2002, twelve months after the effective date of the Tariff and permanent collocation rates, SBC Missouri issued a regular monthly invoice to Birch, which included charges for Birch's current collocation arrangements. Upon investigation of the invoice and all subsequent invoices to date, Birch determined that, SBC Missouri began to charge and was charging Birch for DC Power Consumption based on the total carrying capacity of the arrangement, rather than for power consumed. Birch timely disputed the collocation

power charges on the basis that SBC Missouri was not authorized under the Tariff to charge for redundant power.

71. On the same date, October 25, 2002, SBC Missouri rebilled Birch on a retroactive basis for all of the physical collocation recurring charges, which included recurring power charges. Birch timely and properly disputed this amount as being an improper calculation of the true-up for DC Power Consumption rates during the true-up period.⁷⁰

72. On May 14, 2003, SBC Missouri notified Birch, for the first time, via letter, that it would not accept Birch's billing disputes (even though Birch had been disputing such bills since November 2002) until and unless Birch deposited all disputed amounts related to the issue of power Charges into an escrow account. At no time prior to the issuance of such notice, did SBC Missouri deny Birch's billing dispute or demand that Birch place disputed amounts in an escrow account. In fact, pursuant to the business-to-business arrangement between Birch and SBC Missouri, Birch was not required to pay any disputed amounts to SBC Missouri or place disputed funds into escrow. Upon receipt of SBC Missouri's demand, however, Birch objected and escalated the issue to SBC Missouri upper management for SBC Missouri to comply with its agreement.

73. In addition to the SBC Missouri notification to Birch, in late April 2003, for the first time since Birch started disputing the overcharges for power consumption, SBC Missouri sent Birch a written "dispute denied" notification. SBC Missouri's summary denial did not provide a basis for the denial. It was not clear at the time, nor is it clear today, why SBC Missouri suddenly started to "reject" a billing dispute that Birch had initiated in November 2002.

⁷⁰ Birch also determined that SBC Missouri was also charging Birch late payment charges on the disputed amounts despite SBC Missouri's and Birch's arrangement that Birch did not have to pay the disputed amounts until the issue was resolved. At this time, however, for purposes of this Motion, Birch will not address this issue since SBC Missouri had no authority to overcharge for DC Power Consumption to begin with.

74. Both of these communications came after seven (7) months of Birch's regular billing dispute of the power consumption overcharges and eight (8) months after the business-to-business arrangement that Birch would not pay any disputed monies while the dispute was pending. SBC Missouri and Birch have discussed extensively this issue. However, no agreement has been reached.

75. To date, AT&T has not received any correspondence, notice, or invoice from SBC Missouri for a true-up for collocation rates in Missouri. Nor has SBC Missouri ever demanded that AT&T place disputed amounts for power consumption overcharges in escrow even though AT&T has withheld its disputed amounts related to the Power Charges and does so on a monthly basis.

76. SBC Missouri does not have the ability to invoke Section 6.6.1 of the Tariff in order for the Complainants to file the pending complaint or to participate in dispute resolution regarding SBC Missouri's unilateral and unlawful overcharging for power consumption.

77. SBC Missouri cannot invoke Section 6.6.1 because it did not timely send true-up invoices to Birch (and has never sent one to AT&T) or complete a true-up within thirty days after the effective date of the Tariff. Section 21 of the M2A Physical Collocation Appendix provides:

The interim rates listed below will be in effect only until the effective date of the Missouri Public Service Commission's order establishing permanent rates in Case No. TT-2001-298 or another appropriate case established by the Missouri Public Service Commission to establish permanent rates, terms and conditions for Physical Collocation. The interim rates set forth below are subject to true up to the permanent Physical Collocation rates established by the Missouri Public Service Commission in Case No. TT-2001-298 or another appropriate case. Any refund or additional charges due as a result of true up shall be paid within thirty days of the effective date of the Commission's order adopting permanent Physical Collocation rates. The time period subject to true up shall be limited to six months, retrospectively from the effective date of the Commission's final order

adopting permanent Physical Collocation rates, but shall not include any period prior to the effective date of this agreement with CLEC.⁷¹

This provision requires SBC Missouri to have initiated and completed the true-up within thirty days of the effective date of the Tariff (October 12, 2001) in order that CLECs would either obtain a credit or be required to pay additional monies. SBC Missouri did not send Birch a true-up invoice until twelve months after the effective date of the Tariff (October 25, 2002) and did not seek any form of extension or waiver from Section 21 of the collocation appendix in the interconnection agreement. Moreover, SBC Missouri has never sent a true-up invoice to AT&T, thereby waiving SBC Missouri's right to seek a true-up from AT&T as well. SBC Missouri's failure to timely initiate and to complete the true-up precludes and forecloses SBC Missouri from demanding in an untimely and discriminatory manner that Birch (only) place disputed monies into an escrow before it could file a complaint.

78. Section 6.6.1 of the Tariff should not be invoked or applicable because it is intended to apply to bona fide disputes regarding bills issued on a timely basis for collocation ordered pursuant to the provisions of the Tariff. For all of the reasons stated with respect to Issue No. 1 above, SBC Missouri's unilateral and unlawful overcharge of the power consumption rate should not be considered a "charge" or "item" from the Tariff as there is no provision in the Tariff that authorizes SBC Missouri to charge for the total carrying capacity of the power arrangement. There has been no change in the Tariff that would support SBC Missouri's unilateral retroactive and going forward interpretation of rates that were approved by the Commission. Complainants have not changed the manner in which they use or consume power for collocation from SBC Missouri. In addition, SBC Missouri has not changed the manner in which it provides the power; it has only changed, unilaterally and without notice, the

⁷¹ M2A Physical Collocation Appendix, § 21 at 59.

manner in which it interprets the tariff provisions resulting in the overcharges. As a result, by its own terms, Section 6.6.1 of the Tariff does not apply and should be considered a prerequisite for filing a complaint or seeking Commission resolution of the substantive dispute.

79. Section 6.6.1 of the Tariff also should not be invoked because SBC Missouri created, by its own unilateral actions, the dispute – which should not be considered a “bona fide dispute” under the Tariff. Section 6.6.1 was never intended to permit SBC Missouri to unilaterally change the interpretation of existing provisions and charges assessed to Complainants and then to require the Complainants to put the disputed amounts into escrow. Rather, Section 6.6.1 was intended, if at all, to apply to disputes regarding legitimately approved tariff charges that the parties dispute. In other words, Section 6.6.1 should not be read to allow and to promote SBC Missouri creating a dispute and then to penalize the Complainants for disputing a unilateral interpretation that has led to basically doubling the overcharges for power consumed for collocation.

80. Section 6.6.1 of the Tariff also does not apply to disputes regarding a true-up because the true-up is required by the Joint Stipulation and Agreement, not by the Tariff. On its face, there is no provision in Section 6.6.1 that would expand the application of the escrow provisions to a Joint Stipulation reached by the parties, nor does it apply to a retroactive application of rates that were approved. The substantive dispute arises solely as a result of a dispute over the implementation of language in the Tariff that arose solely from SBC Missouri’s attempt to retroactively impose a new interpretation (for Birch’s true-up) and impose that new interpretation on a going-forward basis. Accordingly, this dispute is not a bona fide dispute that is subject to the billing dispute provisions of the Tariff.

81. In addition, Section 6.6.1 of the Tariff should not be imposed because it would be contrary to sound regulatory and public policy. Basically, if SBC Missouri's interpretation of the billing dispute provision is correct, SBC Missouri can force a CLEC to place extensive amounts of cash into an escrow solely as a result of SBC Missouri's unilateral and arbitrary actions or interpretations. Allowing SBC Missouri to unilaterally compel Birch (or AT&T) to tie up significant cash which, in fact, is working capital used for the Complainants to provide services to its customers, solely because SBC Missouri changes its interpretation of an existing tariff provision, is not reasonable or sound, and a dangerous precedent if allowed to stand. Denial of working capital caused by an unwarranted escrow can have significant detrimental consequences. Moreover, allowing SBC Missouri to demand that amounts be placed in escrow can reinforce SBC Missouri's ability to "game the system" with a CLEC's ability to dispute even the applicability of the tariff provision. If such practices were permitted, there would be no limit to the amount of CLEC money that SBC Missouri could tie up simply by placing unlawful, unfounded, and unreasonable charges on its invoices in bad faith.

82. Finally, the escrow provisions of the Tariff do not apply because the amounts exceed one percent (1%) of the amounts charged to Birch under the Tariff in the preceding twelve months. Because of the amount in dispute, mandatory arbitration does not apply under Section 6.6.6 of the Tariff. The escrow provisions only apply to arbitrated disputes, in that there is no provision for release of funds from escrow except in relation to an arbitration.

83. For all of these reasons, Complainants respectfully request that the Commission grant their Motion with respect to Issue No. 2, finding that Section 6.6.1 of the Tariff cannot be invoked against Complainants as a prerequisite to filing the Complaint.

VI. Conclusion and Request for Relief

84. SBC Missouri's overreaching and unsupported interpretation of the Physical Collocation Tariff through its unilateral and unlawful overcharging for power consumption rates must be stopped immediately. There is no support for SBC Missouri's unilateral interpretation in the Tariff or in the manner that collocation power is provided and SBC's position has been consistently rejected in other state regulatory proceedings. Moreover, the technical method that SBC Missouri provides power to the collocation arrangements supports Complainants' interpretation.

85. In addition, SBC Missouri should not be allowed to invoke, even in a tardy manner, the requirements of Section 6.6.1 as they are not applicable to this situation. SBC Missouri waived its right to make such a demand because it failed to initiate and to complete the true-up within six months of the effective date of the Tariff. The dispute is created solely by SBC Missouri's unilateral and unsupported interpretation that was implemented far after the Commission's approval of the Tariff and without notice. SBC Missouri cannot be allowed to benefit from Section 6.6.1 when it created the dispute based solely on its own without any basis or cause.

86. For the reasons stated herein, Complainants, individually and collectively, respectfully request that the Commission:

1. grant Complainants' Motion for Summary Disposition and find that SBC Missouri is authorized under Sections 20.5 and 21.4 of the Tariff to charge for the power actually consumed by the collocater, and is not authorized to charge for redundant power in addition to the power amperage arrangements;

2. grant Complainants' Motion for Summary Disposition that SBC Missouri cannot invoke Section 6.6.1 of the Tariff as it has not done so timely, consistently, or appropriately under the terms of the Tariff; and
3. grant any further relief to which Complainants show themselves to be justly entitled to.

Respectfully submitted,

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By 
Mark W. Comley #28847

ATTORNEYS FOR BIRCH TELECOM Ltd, L.P.,
AT&T COMMUNICATIONS OF THE
SOUTHWEST, INC., TCG KANSAS CITY, INC.
and TCG ST. LOUIS, INC.

CERTIFICATE OF SERVICE

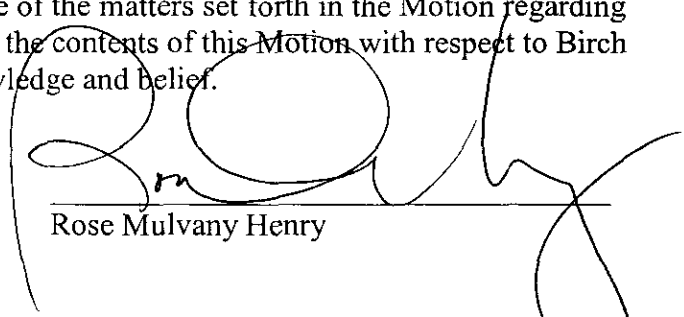
I hereby certify that a true and correct copy of the foregoing document was served on the counsel of record via hand-delivery, first-class mail, email or telecopier to all parties of record on this 16th day of June, 2004.


Mark Comley

STATE OF MISSOURI)
)
COUNTY OF JACKSON)

VERIFICATION

I, Rose Mulvany Henry, first being duly sworn, state on my oath that I am over the age of twenty-one years old and of sound mind, and am with Birch Telecom, Inc. I am authorized to act on behalf of Birch Telecom of Missouri, Inc. regarding the foregoing document. I participated in the preparation of the foregoing Motion for Summary Disposition. I have knowledge of the matters set forth in the Motion regarding Birch Telecom of Missouri, Inc. and that the contents of this Motion with respect to Birch is true and correct to the best of my knowledge and belief.



Rose Mulvany Henry

On this 15th day of June, 2004, before me, a Notary Public, personally appeared Rose Mulvany Henry, and being first duly sworn on her oath stated that she is over twenty-ones years old of sound mind, and she signed the foregoing document and the facts contained therein are true and correct according to the best of her information, knowledge, and belief.

IN WITNESS WHEREOF, I have herein set my hand and offered my official seal in the County and State aforesaid, the day and year above-written.

SUBSCRIBED AND SWORN to before me this 15th day of June, 2004.



BARBARA P. FILLINGER
Jackson County
My Commission Expires
June 6, 2008



Notary Public

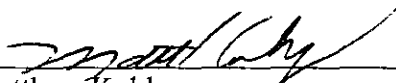
My Commission Expires:

June 6, 2008

STATE OF Missouri)
)
COUNTY OF Cole)

VERIFICATION

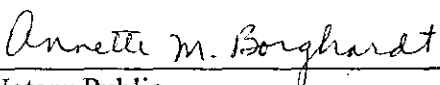
I, Matthew Kohly, first being duly sworn, state on my oath that I am over the age of twenty-one years old and of sound mind, and am with AT&T Communications of the Southwest, Inc., TCG Kansas City, Inc., and TCG St. Louis, Inc. I am authorized to act on behalf of AT&T Communications of the Southwest, Inc., TCG Kansas City, Inc., and TCG St. Louis, Inc. regarding the foregoing document. I participated in the preparation of the foregoing Motion for Summary Disposition. I have knowledge of the matters set forth in the Motion regarding AT&T Communications of the Southwest, Inc., TCG Kansas City, Inc., and TCG St. Louis, Inc. and that the contents of this Motion with respect to AT&T Communications of the Southwest, Inc., TCG Kansas City, Inc., and TCG St. Louis, Inc. is true and correct to the best of my knowledge and belief.


Matthew Kohly

On this 15th day of June, 2004, before me, a Notary Public, personally appeared Matthew Kohly, and being first duly sworn on her oath stated that he is over twenty-ones years old of sound mind, and he signed the foregoing document and the facts contained therein are true and correct according to the best of his information, knowledge, and belief.

IN WITNESS WHEREOF, I have herein set my hand and offered my official seal in the County and State aforesaid, the day and year above-written.

SUBSCRIBED AND SWORN to before me this 15 day of June, 2004.


Notary Public

My Commission Expires:

