

**COLLOCATION POWER AMENDMENT
TO THE INTERCONNECTION AGREEMENT UNDER
SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996
BETWEEN
SOUTHWESTERN BELL TELEPHONE, L.P. D/B/A SBC MISSOURI
AND
BIRCH TELECOM OF MISSOURI, INC.**

This Collocation Power Amendment to the Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 (the "Amendment") by and between Southwestern Bell Telephone, L.P.¹, d/b/a SBC Missouri ("SBC Missouri") and Birch Telecom of Missouri, Inc. ("CLEC") is dated July 6, 2004.

WHEREAS, SBC Missouri and Birch Telecom of Missouri, Inc., are parties to a certain Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 ("Act") approved by the Missouri Public Service Commission ("State Commission"), as may have been amended prior to the date hereof (the "Agreement");

WHEREAS, the Parties want to amend the Agreement to establish charges for collocation DC Power, as set forth herein.

NOW, THEREFORE, in consideration of the mutual promises contained herein, the Parties agree as follows:

Unless otherwise defined herein, capitalized terms shall have the meanings assigned to such terms in the Agreement.

2. Pursuant to Attachment 13: Appendices Physical and Virtual Collocation of the Agreement, CLEC is purchasing all collocation arrangements pursuant to Local Access Tariff (P.S.C. Mo. – No. 42) – Physical and Virtual Collocation ("Tariff"), and the Parties intend that the Tariff continue to apply to all such arrangement(s) except as provided herein. This Amendment memorializes the Parties' bilateral agreement on how certain rates related to monthly recurring collocation DC Power charges (DC Power Consumption) shall be billed by SBC Missouri to CLEC to all such arrangement(s), and to any additional collocation arrangements (whether physical, virtual or cageless) that CLEC may establish during the term of the Amendment. Accordingly, this Amendment shall apply to any such existing or additional arrangement(s) only as to application of these monthly recurring DC power charges in accordance with the Amendment's provisions. The Amendment is not intended to constitute an interpretation, clarification or modification of the Tariff.
3. By executing this Amendment, CLEC represents and warrants that it at no time will draw more than 50% of the combined total capacity of the DC power leads (in amperes or "AMPs") provided by SBC Missouri for a collocation arrangement (the combined total capacity being the aggregate capacity of both leads for that collocation arrangement,

¹ On December 30, 2001, Southwestern Bell Telephone Company (a Missouri corporation) was merged with and into Southwestern Bell Texas, Inc. (a Texas corporation) and, pursuant to Texas law, was converted to Southwestern Bell Telephone, L.P., a Texas limited partnership. Southwestern Bell Telephone, L.P. is now doing business in Missouri as SBC Missouri.

including all "A" AMPs and all "B" AMPs). Based upon CLEC's representation and warranty and other good and valuable consideration as set forth herein, SBC Missouri shall prospectively bill the CLEC for DC collocation power consumption at a monthly recurring rate of \$10.61 applied to fifty percent (50%) of the total provided capacity. By way of example, where SBC Missouri has provisioned two (2) twenty (20) AMP DC power leads [for a combined total capacity of forty (40) AMPs], based upon CLEC's above representation and warranty SBC Missouri shall prospectively bill the CLEC the monthly recurring DC Power Consumption charge of \$10.61 for a total of twenty (20) AMPs (i.e., \$212.20 per month).

4. SBC Missouri has the right to periodically inspect and/or test the amount of DC power CLEC actually draws and, in the event CLEC is found to have breached the representation and warranty set forth in paragraph 3, to pursue remedies for breach of this Amendment and the Agreement.
5. The provisions of this Amendment shall remain effective until such time as the State Commission changes, by means of a final order issued in a cost proceeding establishing rates for collocation provided under 47 U.S.C. § 251(c)(6) applicable to all requesting telecommunications carriers, the monthly recurring rate(s) and billing procedure (including rate application) for SBC Missouri collocation DC power, or until expiration or termination of this Amendment, whichever occurs first. If the foregoing is triggered by a cost proceeding changing rates for collocation provided under 47 U.S.C. § 251(c)(6) applicable to all requesting telecommunications carriers, then either Party may invoke the change of law/rate (or similar) provisions of the Agreement, as may be applicable, in accordance with such provisions. In the case of either triggering event, the provisions of this Amendment shall continue to apply until thereafter replaced by a successor interconnection agreement/amendment, as the case may be. By executing this Amendment, both Parties relinquish any right, during the term of the Amendment, to a different rate and billing procedure (including rate application) from the Effective Date of this Amendment until such time as the State Commission issues a final order in a cost proceeding changing the rates for collocation provided under 47 U.S.C. §251(c)(6) applicable to all requesting telecommunications carriers, the monthly recurring rate(s) and billing procedure (including rate application) for SBC Missouri collocation DC power.
6. Nothing in this Amendment shall be deemed or considered an admission on the part of SBC Missouri as to, or evidence of, the unreasonableness of the rates and elements for collocation DC power in SBC Missouri Tariff, or of the manner in which SBC Missouri has applied or billed such rates, or any other aspect of its collocation power billing, all as existed prior to the making of this Amendment.
7. CLEC agrees to refrain from initiating or participating in any opposition activity to SBC's current power reduction charges, policies and practices. Further, CLEC agrees not to propose or support any proposal to reduce or change charges for collocation DC power charges (or changes in policies or application that result in a reduction or change), including any proposal to base DC collocation power charges on a metered "as used, per amp" basis. In addition, CLEC and SBC Missouri agree to mutually release and

discharge each other from all claims which each Party may have against the other arising directly or indirectly out of, or relating in any way, to charges for DC collocation power. The billing arrangement described in Paragraphs 2, 3 and 4 ("Billing Arrangement"), above, is integrally related to the overall settlement and the mutual release and discharge. Said mutual release and discharge, and the Billing Arrangement are expressly contingent upon:

- A. approval by the State Commission of the terms and conditions of this Amendment; and
 - B. CLEC's withdrawal from participation in CLEC's complaint or complaints with the State Commission arising directly or indirectly out of, or relating in any way to charges for DC collocation power ("Collocation Power Complaint(s)"), to the extent CLEC has filed such Collocation Power Complaint(s); and
 - C. an exchange of consideration between the Parties in connection with said settlement, including a payment from CLEC to SBC of a mutually agreed upon amount.
8. The effective date of this Amendment shall be the day upon which the State Commission approves this Amendment under Section 252(e) of the Act or, absent such State Commission approval, the date this Amendment is deemed approved by operation of law ("Amendment Effective Date"). In the event that all or any portion of this Amendment as agreed-to and submitted is rejected and/or modified by the State Commission, this Amendment shall be automatically suspended and, unless otherwise mutually agreed, the Parties shall expend diligent efforts to arrive at mutually acceptable new provisions to replace those rejected and/or modified by the State Commission; provided, however, that failure to reach such mutually acceptable new provisions within thirty (30) days after such suspension shall permit either Party to terminate this Amendment upon ten (10) days written notice to the other.
9. EXCEPT AS MODIFIED HEREIN, ALL OTHER TERMS AND CONDITIONS OF THE UNDERLYING AGREEMENT SHALL REMAIN UNCHANGED AND IN FULL FORCE AND EFFECT. This Amendment will become effective as of the Amendment Effective Date, and will terminate on the termination or expiration of the Agreement. This Amendment does not extend the term of the Agreement.
10. In entering into this Amendment, neither Party is waiving, and each Party hereby expressly reserves, any of the rights, remedies or arguments it may have at law or under the intervening law or regulatory change provisions in the underlying Agreement with respect to any orders, decisions, legislation or proceedings and any remands thereof, including, without limitation, the following actions, which the Parties have not yet fully incorporated into this Agreement or which may be the subject of further government review: *Verizon v. FCC, et al*, 535 U.S. 467 (2002); *USTA, et. al v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) and following remand and appeal, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004); the FCC's Triennial Review Order (rel. Aug. 21, 2003); and the FCC's Order on Remand and Report and Order in CC Dockets No. 96-98 and 99-68, 16 FCC Rcd 9151 (2001), (rel. April 27, 2001), which was remanded in *WorldCom, Inc. v. FCC*, 288 F.3d

429 (D.C. Cir. 2002). Further, neither Party will argue or take the position before any state or federal regulatory commission or court that any provisions set forth in this Amendment constitute an agreement or waiver relating to the appropriate routing, treatment and compensation for Voice Over Internet Protocol traffic and/or traffic utilizing in whole or part Internet Protocol technology; rather, each Party expressly reserves any rights, remedies, and arguments they may have as to such issues including but not limited, to any rights each may have as a result of the FCC's Order *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361 (rel. April 21, 2004).

- 1 This Amendment constitutes the entire amendment of the Agreement and supersedes all previous proposals, both verbal and written, regarding the subject matter covered by the Amendment. To the extent there is a conflict or inconsistency between the provisions of this Amendment and the provisions of the Agreement (including all incorporated or accompanying Appendices, Addenda and Exhibits to the Agreement), the provisions of this Amendment shall control and apply but only to the extent of such conflict or inconsistency. The Parties further acknowledge that the entirety of this Amendment and its provisions are non-severable, and are "legitimately related" as that phrase is understood under Section 252(i) of Title 47, United States Code.
12. This Amendment may be executed in counterparts, each of which shall be deemed an original but all of which when taken together shall constitute a single agreement.

IN WITNESS WHEREOF, each Party has caused this Amendment to be executed by its duly authorized representative.

Birch Telecom of Missouri, Inc.



Printed: JOHN IVANUSKA

VICE PRESIDENT

Date: June 29, 2004

AECN/OCN # _____

**Southwestern Bell Telephone L.P. d/b/a
SBC Missouri
by SBC Telecommunications, Inc., its
authorized agent**

By: 

Printed: Glen Sirles

Title *For/* President-Industry Markets

Date: 7-6-2004