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BEFORE THE ARIZONA CORPORATION COMMISSION

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Commissioner

IN THE MATTER OF THE FORMAL
COMPLAINT OF PAC-WEST
TELECOMM SEEKING
ENFORCEMENT OF THE
INTERCONNECTION AGREEMENT
BETWEEN PAC-WEST TELECOMM
AND QWEST CORPORATION

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**RESPONSE BRIEF IN SUPPORT OF
FORMAL COMPLAINT TO ENFORCE
INTERCONNECTION AGREEMENT**

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INTRODUCTION

In its Complaint and Opening Brief, Pac-West made a simple showing: The plain language of the ICA, as amended, clearly requires Qwest to compensate Pac-West for all ISP-bound traffic, and by refusing to compensate Pac-West for its ISP-bound traffic Qwest is violating the ICA. In its Opening Brief, Qwest skirts around this direct assertion with historical and technical ruminations regarding century-old “traditions” and “well established concepts” of telephone regulation. However, Qwest’s obligation to pay reciprocal compensation does not rest on Qwest’s policy preferences or “well established concepts,” but on the plain terms of a binding contract. The legal basis for enforcement of this contractual right could not be more clear. The FCC recently heard and decided a case with exactly these facts and ordered that reciprocal compensation be paid by the incumbent carrier. Indeed, every one of the arguments raised by Qwest in this case was flatly rejected by the FCC in that proceeding.

Qwest also argues that the VNXX calls are “non-local calls, really nothing more than toll calls and they are not compensable as ‘ISP-bound traffic.’” (Qwest Br. at 26.) Qwest cites no authority for this assertion, which fails in light of language in the D.C. Circuit Court of Appeals determination that ISP-bound calls are conclusively *not* 251(g) (toll) traffic. To the contrary, the FCC has concluded that a very specific rate (.0007) applies to *all* locally dialed ISP-bound traffic.¹ No one disputes that the majority of the traffic in question here is “presumed” ISP-bound traffic, as defined by the FCC. Nonetheless, Qwest has belatedly argued that a sub-set of ISP-bound traffic may be properly excluded for purposes of intercarrier compensation.² This is

¹ See Pac-West Opening Brief at 2 (Pac-West seeks recovery only for “locally dialed ISP traffic).

² This dispute was initially arbitrated by the Parties to resolve the question of whether the contract contained growth ceilings for ISP traffic exchanged in 2004. The Arbitrator ruled for Pac-West and found that Pac-West was entitled to compensation for this traffic without

wrong as a matter of policy, wrong with respect to applicable federal law, and completely contrary to Qwest's contractual obligation. Because Qwest is contractually obligated to compensate Pac-West for ISP-bound traffic, and because the FCC has determined that Pac-West is entitled to compensation, the Commission should enforce the ICA and direct Qwest to pay Pac-West the full amount Pac-West has invoiced Qwest for intercarrier compensation.

I. Qwest's Reciprocal Compensation Obligations Are Governed by Contract Law, as Reflected in the FCC's *Starpower* Decisions, and Not by Vague Concepts Underlying Telecommunications Regulation

One passage in Qwest's Brief is particularly revealing. In discussing Pac-West's argument regarding the contractual doctrine of "course of dealing," Qwest suggests that the doctrine has no bearing because: "[c]ourse of dealing' is a law of contracts doctrine, not a telephone regulatory concept." (Qwest Br. at 40 (emphasis added).) The statement articulates a central theme in Qwest's Brief, which is that although Pac-West's Complaint seeks the enforcement of a contract, contract principles are somehow irrelevant. This premise is as wrong as it sounds. Regardless of the fact that the ICA involves telecommunications services, it is still a *contract*, governed generally by the same principles as other contracts. As with any other contract, the parties that have agreed to be bound by it are not free to abandon their obligations by proclaiming their view that broad "regulatory concepts" override the language of the contract itself. The Commission need not take Pac-West's word that this contract should be enforced: The FCC confirmed this very point in a series of orders arising from a dispute over reciprocal compensation that is virtually identical to this case. *See Starpower Commc'ns, LLC v. Verizon South Inc.*, 17 F.C.C.R. 6873 (rel. Apr. 8, 2002) ("*Starpower P*"); *Starpower Commc'ns, LLC v.*

limitation. Qwest subsequently raised a new dispute, the instant dispute, as justification for its continued reciprocal compensation withholding for traffic Qwest sent to Pac-West beginning in 2004 through the present.

Verizon South Inc., 18 F.C.C.R. 23 (rel. Nov. 7, 2003) (“*Starpower IP*”).³ The FCC’s reasoning and conclusions in the *Starpower* decisions apply directly here, and demonstrate that Pac-West is entitled to the relief it seeks.

A. The FCC’s *Starpower* Decisions

1. *Starpower I*

Starpower Communications, LLC (“Starpower”), a CLEC licensed to provide local exchange services in Virginia, filed complaints against ILECs Verizon Virginia Inc. (“Verizon Virginia”) and Verizon South Inc. (“Verizon South”) seeking enforcement of the terms in its respective ICAs with these ILECS obligating them to pay Starpower reciprocal compensation for ISP-bound traffic. *See Starpower I* ¶ 1. Like Qwest, these ILECs had refused to pay for ISP-bound traffic, arguing that this traffic was not eligible for reciprocal compensation under the ICAs because under an “end-to-end” analysis the traffic was not “local.” *Id.* ¶ 22.

To assess the validity of the ILECs’ arguments, the FCC looked to the governing (Virginia) contract law principles, beginning with the bedrock doctrine that “where the terms of the contract are clear and unambiguous, we will construe those terms according to their plain meaning.” *Id.* ¶ 24 (quoting *American Spirit Ins. Co. v. Owens*, 541 S.E.2d 553, 555 (Va. 2001)). The FCC further observed that, as with other contracts, evidence of the “surrounding circumstances,” relevant “custom and usage,” and the parties’ course of performance could be considered in determining the appropriate construction of the ICAs in question. *Id.* After noting these interpretive canons, the FCC examined the relevant terms of the ICAs, focusing on the terms relating to the parties’ obligations to pay reciprocal compensation for “Local Traffic.” *See id.* ¶ 26.

³ Copies of the *Starpower* decisions are attached hereto as Exhibits 1 and 2 respectively.

With respect to the two ICAs between Starpower and Verizon Virginia, the FCC concluded that ISP-bound traffic was not compensable – not because of historical practices in the telephone industry or “well established concepts” of telecommunications regulation, but because “*the unambiguous language of the [ICAs]* compels the conclusion that ISP-bound traffic is not ‘Local Traffic,’ as that term is defined in the agreements.” *Id.* ¶ 38 (emphasis added). The FCC focused on the fact that these agreements specifically provided that traffic would be designated “local” or “non-local” by reference to the complete “end-to-end” jurisdictional nature of the call. *Id.* ¶ 26.

The FCC also acknowledged that, as Qwest has done here, Starpower had cited a number of decisions issued by other regulatory entities dealing with the treatment of ISP-bound traffic under other ICAs. The FCC determined that these decisions were not helpful, stressing that the issue before it was a contractual question that rested on the language of the particular contract in question. The decisions cited could not be dispositive, the FCC reasoned, because “none of these decisions specifically construes the contractual language at issue in this case.” *Id.* ¶ 39.

With respect to the Starpower-Verizon South ICA, however, the FCC reached the opposite conclusion regarding compensability, once again relying on the specific language of the contract. The language of the Verizon South agreement made no reference to the “end-to-end” nature of the call, instead providing simply that the parties would reciprocally terminate calls originating on each other’s networks, including “local traffic . . . as defined in [Verizon South’s] tariff.” *Id.* ¶ 42. The parties agreed that ISP-bound traffic was treated as local under the tariff, insofar as “when a Verizon South customer places a call to the Internet through an ISP, using a telephone number associated with the caller’s local calling area, Verizon South rates and bills that customer for a local call pursuant to the terms of the Tariff.” *Id.* ¶ 45. “[B]ecause the

Starpower-Verizon South Agreement adopts the Tariff's conception of local traffic," the FCC concluded, "the Agreement plainly requires Verizon to pay reciprocal compensation for the delivery of ISP-bound traffic." *Id.*

2. *Starpower II*

In its *Starpower II* decision issued the following year, the FCC followed its *Starpower I* liability-phase decision with an order requiring Verizon South to pay Starpower damages for uncompensated traffic involving all of Starpower's ISP customers, *including* customers served through VNXX arrangements. *Starpower II* ¶ 1. Verizon South had raised the same argument in the damages phase of the proceeding that Qwest makes here, urging that the CLEC's ISP-bound calls were not compensable because they were VNXX calls. *Id.* ¶ 6. The FCC disagreed, rejecting all of the arguments that Qwest has raised here.

Verizon South's chief argument in *Starpower II* was that VNXX traffic was not compensable because the categorization of a call as "local service" "hinges on the physical location of the calling and called parties, and not on the parties' respective telephone numbers." *Starpower II* ¶ 12. Because, according to Verizon South, VNXX ISP traffic does not involve calling and called parties physically located in the same calling area, Verizon South argued, these calls did not constitute compensable "local traffic." The FCC flatly rejected this theory. In concluding that the Starpower-Verizon South ICA rendered ISP-bound calls compensable, the FCC stressed, it had relied on Verizon South's "*conduct* in rating and billing ISP-bound traffic" under its Tariff, since the ICA defined "local traffic" with reference to the Tariff. *Id.* ¶ 13 (emphasis in original). In light of the ICA's reference to the Tariff, the FCC refused to permit Verizon South to argue that "local traffic" "is something different from what it plainly considered local traffic to be when rating and billing calls under the Tariff." *Id.*

To the extent that Verizon South sought to argue that the language of the Tariff did not compel it to treat VNXX calls as local, the FCC noted that Verizon South's "course of performance" in implementing the Tariff barred it from urging its new interpretation. Verizon South had consistently relied on the parties' phone numbers, rather than their physical location, to rate and bill calls as local. *Id.* ¶ 15. Further evidence that the parties to the ICA did not intend to adopt a physical-presence approach to determining the nature of calls arose from the fact that the relevant industry practice at the time of contracting was to designate calls as local or toll by reference to the calling and called parties' phone numbers, rather than their physical location. *Id.* ¶ 17. Indeed, the FCC observed, Verizon South lacked the technical *capability* to ascertain the physical locations of the parties to a VNXX call. *Id.* The FCC also noted that there was no clear consensus among courts and state commissions, either at the time the parties entered into the ICA or since, that VNXX traffic was unlawful or not subject to reciprocal compensation. *Id.* For these reasons, the FCC determined that there was no basis for concluding that when they entered into the ICA, the parties intended to link their reciprocal compensation obligations to the physical locations of the calling and called parties. *Id.*

The FCC also found it relevant that Verizon South "engaged in the very same conduct that it now alleges is unlawful when done by Starpower" by offering its customers "FX" service. *Id.* ¶ 14. Pursuant to its FX service, the FCC observed, Verizon South had billed and collected reciprocal compensation for calls placed by Starpower customers to Verizon South customers using "local" NXX numbers, even though those calls were between parties physically located in different calling areas. *Id.* As Qwest has argued here, Verizon South suggested that its FX service was different from VNXX service because FX customers were required to pay additional charges. The FCC explained that this argument "misses the point." *Id.* ¶ 15 n.60. These

additional customer charges did not change the essential fact that Verizon South had billed its FX calls as local “based upon the telephone number assigned to the customer, not the physical location of the customer,” thereby violating the very rule it sought to impose against Starpower. *Id.*

Finally, the FCC addressed in a footnote Verizon South’s various arguments to the effect that requiring it to pay reciprocal compensation for VNXX traffic would contravene “sound regulatory policy.” *Id.* ¶ 17 n.68. The FCC refused to address these arguments, noting that none of them was “relevant to the parties’ obligations under the current Agreement.” *Id.*

B. The Reasoning and Conclusions of the FCC’s *Starpower* Decisions Apply Fully to the Instant Case

As this summary makes plain – and as an examination of the Pac-West/Qwest ICA makes plainer still – the FCC’s reasoning and conclusions in the *Starpower* decisions apply with at least equal force here.

The same canons of contractual interpretation applied by the FCC in the *Starpower* cases apply to the ICA at issue here, which is governed, with respect to such state-law issues, by the laws of Arizona. (ICA § 21.1.) Arizona law provides that contracts are to be construed and enforced according to the plain meaning of their terms, *Horton v. Mitchell*, 200 Ariz. 523, 527, 29 P.3d 870, 874 (App. 2001), and that both custom and usage, *AROK Construction Co. v. Indian Construction Services*, 174 Ariz. 291, 302, 848 P.2d 870, 881 (App. 1993), and the course of performance between the parties, *Northern Arizona Gas Service, Inc. v. Petrolane Transport, Inc.*, 145 Ariz. 467, 474, 702 P.2d 696, 703-04 (App. 1984), may be considered in interpreting a contract’s plain language. Still more fundamentally, the object of contract interpretation is not to effectuate whichever party’s policy theories seem more compelling, but to “ascertain and give

effect to the intention of the parties at the time the contract was made if at all possible.” *Polk v. Koerner*, 111 Ariz. 493, 495, 533 P.2d 660, 662 (1975).

Not only are the contract-interpretation principles in Arizona the same as those applied in the *Starpower* decisions, but the Pac-West/Qwest ICA is also virtually identical in all pertinent respects to the *Starpower/Verizon South* ICA. The FCC found that the *Starpower/Verizon South* ICA required reciprocal compensation for all ISP-bound traffic because the ICA adopted the ILEC Tariff’s conception of “local traffic,” and the ILEC Tariff in turn treated locally dialed ISP-bound traffic, including VNXX traffic, as local – *i.e.*, the ILEC billed the ISP-calling customer for a local call under the Tariff. *See Starpower I* ¶ 45. The same is true here.⁴ The Pac-West/Qwest ICA defines “Local Traffic” as “intraLATA traffic within an exchange that is treated as toll free traffic as established by the Commission and *as reflected in the effective tariffs of U S West.*” ICA (definitions) (emphasis added).⁵ Further, Qwest does not dispute, nor could it, that it bills its ISP-calling customers for a local call under its Tariffs and rates those calls based on the number dialed and not based on the physical location of the called party. Indeed, this fact serves as a central theme in Qwest’s complaints of unfairness. Qwest’s course of performance in this case, like Verizon South’s in the *Starpower* case, compels the conclusion that the parties intended to designate calls as local or toll by reference to the calling and called parties’ phone numbers. In short, the FCC’s analysis in the *Starpower* decisions is directly and

⁴ As Pac-West noted in its Opening Brief, in categorizing FX traffic as either 251(g) or 251(b)(5) traffic, such traffic must be treated the same today as it was by an ILECs exchanging locally dialed FX traffic prior to the Act. The contract makes no reference to treating locally-dialed FX traffic differently from other local traffic. Therefore, the contract and proper legal analysis confirm that locally-dialed traffic, including FX traffic, is subject to compensation.

⁵ The ICA’s definition of “Extended Area Service” (EAS) contains the same reference to US West’s tariffs. *See ICA (definitions)* (“intraLATA traffic treated as ‘local’ traffic between exchanges (than as ‘toll’ traffic) as established by the Commission and *as reflected in the effective U S West tariffs*”) (emphasis added).

conclusively applicable in this case and illustrates effectively that Pac-West is entitled to compensation from Qwest for ISB-bound calls terminated by Pac-West customers.

II. The Plain Language of the ICA (the *ISP Amendment*) Provides an Independent Basis for Affirming Qwest's Obligation to Compensate Pac-West for ISP-Bound Traffic Terminated by Pac-West

In *Starpower*, Verizon South was required to pay reciprocal compensation based on its obligation to reciprocally terminate "local traffic . . . as defined in [Verizon South's Tariff]" and based on Qwest's course of performance. The language of the *ISP Amendment* in this case presents an additional and independent basis for requiring Qwest to pay the compensation it owes for ISP-bound traffic. As explained in Pac-West's Complaint and Opening Brief, the *ISP Amendment* features the plain and unambiguous statement that Qwest will "exchange ISP-bound traffic at the FCC ordered rates pursuant to the [FCC ISP Order]." *ISP Amendment* (emphasis added). The reference to exchanging traffic "at the FCC ordered rates" would lack all sense if the parties did not intend that reciprocal compensation would be paid for this traffic. See *Reserve Ins. Co. v. Staats*, 9 Ariz. App. 410, 412, 453 P.2d 239, 241 (App. 1969) ("an interpretation which gives effective meaning to all of the provisions of a contract is to be preferred to an interpretation which leaves a part of the contract ineffective."). This *ISP Amendment* requirement is additional evidence that the parties considered and agreed upon a method for paying compensation for ISP-bound traffic.

Contrary to what Qwest has suggested, nothing in the plain language of the *ISP Amendment* suggests that the parties' intention in amending the ICA was to introduce a crucial distinction based on the geographical "end points" of an ISP call. Indeed, Qwest does not argue that, but instead suggests that the FCC's description of "ISP-bound" traffic in the *ISP Remand Order*, which is referred to in the *ISP Amendment*, effectively causes such a distinction to be imported into the ICA. But Qwest is compelled to concede that there is *no* affirmative language

in the *ISP Remand Order* that creates any such distinction or defines any protocol as to how it might be drawn. (Qwest Br. at 17.) All Qwest can offer to support its conclusion is selective italicization of passages from the *ISP Remand Order* that contain references to “local” telephone service and “local” competition. (Qwest Br. at 16.) But Qwest is merely assuming its own conclusion. In quoting these passages, Qwest is positing, without explanation, that the FCC here meant for the term “local” to have the meaning that Qwest would give it. In fact, there is no evidence that the FCC’s references to “local” service in the *ISP Remand Order* were meant to refer only to service in which the calling and called parties were physically located in the same local calling area. The FCC itself has acknowledged that “use of term ‘local’ could mean *either* traffic subject to local rates or traffic that is jurisdictionally intrastate.” *In the Matter of Petition of WorldCom, Inc.*, DA 02-1731 (rel. Jul. 17, 2002) ¶ 315 n.1047 (emphasis added). Indeed, the very language quoted by Qwest suggests that these references were *not* intended to limit the service discussed to traffic between end-users physically located in the same local calling area, insofar as the FCC noted that ISP customers “typically” – *i.e.*, not *always* – access the Internet through an ISP server located in their local calling area. (Qwest Br. at 16.)

For these reasons, Qwest’s attempt to fundamentally modify the substance of the ICA by importing a theory that is absent from the *ISP Remand Order* is misguided. Indeed, Qwest’s theory is particularly dubious in light of the fact that the *ISP Amendment* must be read together with the remainder of the ICA, which – as noted above – includes a provision defining “Local Traffic” by reference to Qwest’s Tariffs, under which locally dialed traffic is treated as local. *See supra; Hiatt v. Howard*, 17 Ariz. App. 1, 6, 494 P.2d 1347, 1352 (1972) (“in construing a provision of a document, that provision must be read in connection with all other provisions of the instrument”). In short, Qwest’s argument amounts to a headlong *flight* from the plain

language of the ICA and Qwest's own tariffs, rather than a legitimate attempt to construe it in accordance with the parties' original intent.

Qwest similarly fails to contradict Pac-West's showing that relevant custom and usage and the parties' course of performance undermine Qwest's interpretation of the ICA. At the time the ICA was executed, the custom and usage in the industry was "that calls are designated as either local or toll by comparing the NPA-NXX codes of the calling and called parties," rather than by ascertaining the calling and called parties' geographical locations. *Starpower II* ¶ 17. Indeed, it is clear that the parties did not contemplate that the local/toll distinction would be drawn by reference to the geographical locations of the calling and called parties, because when they entered into the contract neither party had the technical *capacity* to ascertain the geographical locations of the calling or called parties. As the FCC has repeatedly confirmed, the parties still lack the capacity to rate calls based on geographic location. *See WorldCom* ¶ 301 ("We agree with the petitioners that Verizon has offered no viable alternative to the current system, under which carriers rate calls by comparing the originating and terminating NPA-NXX codes. We therefore . . . reject Verizon's language that would rate calls according to their geographical end points.").

The parties' course of performance further confirms this common-sense conclusion. Indeed, Qwest does not dispute the fact that it paid reciprocal compensation for ISP-bound traffic for over three years before articulating this new basis for non-payment. This fact provides strong evidence that Qwest's new understanding of the ICA does not reflect the parties' intent at the time of contracting. *Polk*, 111 Ariz. at 495, 533 P.2d at 662 (a contract must be construed to "ascertain and give effect to the intention of the parties at the time the contract was made if at all possible"); *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 681 P.2d 390 (App.

1983) (contract interpretation reflected in the conduct of the parties before any controversy as to meaning arises will be enforced if reasonable).

Finally, all of Qwest's arguments regarding the nature and legitimacy of VNXX traffic are thoroughly addressed, and properly disposed of, in the *Starpower* decisions. Qwest's historical and policy arguments regarding VNXX service have no bearing on the question of whether Qwest is disregarding its contractual obligations under the ICA. Qwest's obligation to comply with the contract that it signed is unaffected by the fact that other regulatory bodies, construing different contractual instruments, or creating binding agreements, have reached varying conclusions regarding the compensability of VNXX traffic. Qwest is not entitled to demand that Pac-West be prohibited from billing calls as local based on the calling and called parties' phone numbers when Qwest *itself* does so with respect to its FX service. In short, Qwest's theories regarding national intercarrier compensation incentives and purported inequities are nothing more than diversions – a lengthy bid to divert the Commission's attention from the fact that Qwest seeks to disregard the contract to which it voluntarily agreed to be bound.⁶

III. The ISP-Bound Calls Are Not 251(g) (Toll) Traffic and Thus Are Subject to the ISP-Bound Traffic Compensation Rate

Qwest argues that ISPs are the “heirs to the old ‘enhanced service provider’ designation” and entitled to a compensation system whereby the “point of presence” of the enhanced service provider is the “point of presence” of the retail customer. Without citing any legal authority, Qwest asserts that this truism requires that an ISP be treated exactly the same as other end-user customers in determining whether a call to the ISP is a toll call or a local call. Thus, according to

⁶ These argument are properly before the FCC in the docket currently pending on intercarrier compensation

Qwest, calls made to ESPs by customers physically located in a different local calling area have historically been considered toll calls, and §251(g) of the 1996 Act preserves such treatment. Qwest's assertion is wrong on its face. Historically, Qwest treated locally dialed calls to ESPs as local calls. Qwest has offered no evidence that it rated calls to or from ESPs on the basis of the physical location of the customers. Additionally, in 2002, the D.C. Circuit Court of Appeals held unambiguously that § 251(g) *does not apply* to ISP-bound traffic exchanged between LECs – and thus that calls made to an ISP are not toll calls even if they leave the local calling area.

WorldCom, Inc. v. F.C.C., 288 F.3d 429, 432 (D.C. 2002). This holding was based upon the understanding that prior to and following passage of the Act, Qwest exchanged such traffic with other LECs as local, not toll, traffic, without regard to the physical location of either of the parties to the call. The pre-Act treatment of this traffic dictates the compensation obligations of the carriers even after the Act. When Qwest's customers and Pac-West's customers have telephone numbers assigned to the same local calling area, therefore, the traffic exchanged between them has been, and continues to be, subject to reciprocal compensation – not access charges, regardless of the physical location of those customers. Accordingly, § 251(g) does not apply to that traffic, rather the traffic is 251(b)(5) traffic and subject to reciprocal compensation as prescribed by the contract as amended. *See Pac-West Opening Br. 12-14.*

IV. The Permissibility of VNXX Is Not at Issue in This Proceeding

Although mentioned in passing by Qwest, the permissibility of “VNXX” under state law and applicable rules is not at issue in this proceeding. As Qwest stated in its brief:

If Pac-West were to offer a true FX service, in which its customer was responsible for establishing a physical presence in each local calling area and the traffic was transported to the ISP's server in that manner, **Qwest would have no objection to that type of service.**

Qwest Opening Brief at 31 (emphasis added). Pac-West's network does reach most, if not all, local calling areas in which Pac-West has local telephone numbers. Pac-West, therefore, has established a physical presence for its customers in each local calling area, and Pac-West transports the traffic from the local calling area to those customers. While Qwest continues to dispute its obligation to compensate Pac-West for terminating that traffic, Qwest concedes that "this would address the issue of misassignment of numbers." Qwest Opening Brief at 31, n.60. Accordingly, the permissibility of "VNXX" service is not an issue in this proceeding.

V. Sweeping Policy Changes That Ignore the Law Are Ill-Advised

Qwest accuses Pac-West of using "a false dialing pattern," (Qwest Opening Br. 17), allowing "disguised" toll calls and participating in a "dialing scheme." These assertions are not supported by any legal authority, nor could they be. As the *Starpower* decision makes plain, the VNXX service offered by Pac-West is the functional equivalent of the FX service offered by Qwest and is not unlawful. From the customer's perspective, the VNXX service operates just like the FX service. *See* Pac-West Opening Br. 10-12. To the extent Qwest is arguing that the law should be changed to prohibit VNXX service, or render it ineligible for intercarrier compensation, that would entail a new and separate prospective generic proceeding applicable to all carriers.⁷ In contrast, this matter concerns the enforceability of an existing contract with existing rights and obligations that define Qwest's obligation to provide intercarrier compensation.

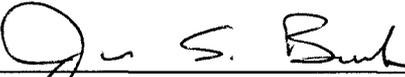
⁷ Such a proceeding might be appropriate as part of, for example, the FCC's docket on *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, but not in the instant matter.

CONCLUSION

Nothing in Qwest's 45-page brief regarding the history and traditions of telephone regulation undermines the conclusion mandated by basic contract-law principles. Pursuant to these principles, as applied by the FCC in the *Starpower* decisions, the Commission should find that Qwest is obligated to compensate Pac-West for all ISP-bound traffic and grant the relief requested in Pac-West's Complaint.

RESPECTFULLY SUBMITTED this 19th day of October, 2005.

OSBORN MALEDON PA

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2002 WL 518062 (F.C.C.), 17 F.C.C.R. 6873, 17 FCC Rcd. 6873

(Cite as: 2002 WL 518062 (F.C.C.), 17 F.C.C.R. 6873)

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Federal Communications Commission (F.C.C.)

Memorandum Opinion and Order

*1 IN THE MATTER OF STARPOWER COMMUNICATIONS, LLC, COMPLAINANT,
v.

VERIZON SOUTH INC., RESPONDENT.
File No. EB-00-MD-19

STARPOWER COMMUNICATIONS, LLC, COMPLAINANT,
v.

VERIZON VIRGINIA INC., RESPONDENT.
File No. EB-00-MD-20

FCC 02-105

Adopted: March 28, 2002

Released: April 8, 2002

**6873 By the Commission: Commissioner Martin approving in part, dissenting in part, and issuing a statement.

I. INTRODUCTION

1. In this order, pursuant to sections 208 and 252(e)(5) of the Communications Act of 1934, as amended ("Act"), [FN1] we deny a formal complaint that Starpower Communications, LLC ("Starpower") filed against Verizon Virginia Inc. ("Verizon Virginia"), and we grant a formal complaint that Starpower filed against Verizon South Inc. ("Verizon South"). [FN2] In its complaints, Starpower seeks to recover, pursuant to three interconnection agreements with **6874 Verizon, payment of reciprocal compensation for the delivery of traffic bound for Internet service providers ("ISPs"). We conclude that the two interconnection agreements between Starpower and Verizon Virginia do not obligate Verizon Virginia to pay reciprocal compensation for ISP-bound traffic. We reach the contrary conclusion (i.e., that reciprocal compensation for ISP-bound traffic must be paid) with respect to the interconnection agreement between Starpower and Verizon South.

II. BACKGROUND

A. The Parties and the Interconnection Agreements

2. Starpower is licensed to provide local exchange services in Virginia. [FN3] Verizon Virginia and Verizon South are incumbent local exchange carriers ("ILECs")

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2002 WL 518062 (F.C.C.), 17 F.C.C.R. 6873, 17 FCC Rcd. 6873

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also licensed to provide local exchange services in Virginia. [FN4]

3. Starpower and Verizon interconnect their networks to enable an end user subscribing to Starpower's local exchange service to place calls to and receive calls from end users subscribing to Verizon's local exchange service. [FN5] Toward this end, Starpower entered into two interconnection agreements with Verizon Virginia and an interconnection agreement with Verizon South. [FN6] We describe below the relevant terms of each agreement.

1. Starpower-Verizon Virginia Agreements

a. The First Starpower-Verizon Virginia Agreement

4. On July 17, 1996, Verizon Virginia executed an interconnection agreement ("MFS-Verizon Virginia Agreement") with MFS Intelnet of Virginia, Inc. pursuant to section 252(a) of the Act. [FN7] The MFS-Verizon Virginia Agreement was filed with, and approved by, the **6875 Virginia State Corporation Commission ("Virginia SCC") on October 11, 1996. [FN8]

5. By letter dated February 4, 1998, and pursuant to section 252(i) of the Act, [FN9] Starpower notified Verizon Virginia that it elected to obtain interconnection, services, and network elements upon the same terms and conditions as those provided in the MFS-Verizon Virginia Agreement. [FN10] On February 19, 1998, Verizon Virginia provided Starpower with a draft interconnection agreement based upon the MFS-Verizon Virginia Agreement. [FN11] At that time, Verizon Virginia expressed its opinion that the "reciprocal compensation provisions set forth in the [MFS-Verizon Virginia Agreement] ... do not apply to Internet-bound traffic because such traffic is not intraLATA traffic." [FN12] In a March 4, 1998 memorandum from Starpower to Verizon Virginia, Starpower disagreed with Verizon Virginia's interpretation of the reciprocal compensation provisions of the MFS-Verizon Virginia Agreement. [FN13] Despite this dispute, in March 1998, Starpower and Verizon Virginia executed an interconnection agreement - the First Starpower-Verizon Virginia Agreement - based on the terms of the MFS-Verizon Virginia Agreement. [FN14] The First Starpower-Verizon Virginia Agreement was filed with, and approved by, the Virginia SCC on June 17, 1998. [FN15]

*2 6. Section 1.61 of the First Starpower-Verizon Virginia Agreement defines "Reciprocal Compensation" in the following manner:

As described in the Act and refers to the payment arrangements that recover costs incurred for the transport and termination of Local Traffic originating on one Party's network and terminating on the other Party's network. [FN16]

According to the First Starpower-Verizon Virginia Agreement, "As Described in the Act" means "as described in or required by the Act and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the [Virginia SCC]." [FN17] "Local Traffic" is "traffic that is originated by a Customer of one Party on that Party's network and terminates to a **6876 Customer of the other Party on that other Party's network, within a given local calling area, or expanded area service ('EAS') area, as defined in [Verizon Virginia's] effective Customer tariffs" [FN18] This language closely resembles the language that the Commission used in April 1996 to describe the type of traffic

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that was likely subject to reciprocal compensation under section 251(b)(5) of the Act: [FN19] "The statutory provision appears at least to encompass telecommunications traffic that originates on the network of one LEC and terminates on the network of a competing LEC in the same local service area" [FN20]

7. Section 5.7 of the First Starpower-Verizon Virginia Agreement delineates the parties' reciprocal compensation obligations as follows:

The Parties shall compensate each other for transport and termination of Local Traffic in an equal and symmetrical manner at the rates provided in the Detailed Schedule of Itemized Charges (Exhibit A hereto) or, if not set forth therein, in the applicable Tariff(s) of the terminating party, as the case may be The Reciprocal Compensation arrangements set forth in this Agreement are not applicable to Switched Exchange Access Service. All Switched Exchange Access Service and all Toll Traffic shall continue to be governed by the terms and conditions of the applicable federal and state Tariffs.

* * *

The designation of Traffic as Local or Toll for purposes of compensation shall be based on the actual originating and terminating points of the complete end-to-end call, regardless of the carriers involved in carrying any segment of the call. [FN21]

These provisions are the only ones in the First Starpower-Verizon Virginia Agreement governing **6877 compensation for Local Traffic, [FN22] and the word "termination" is undefined. [FN23]

8. After the First Starpower-Verizon Virginia Agreement took effect, the parties exchanged traffic. [FN24] Starpower subsequently submitted invoices to Verizon Virginia seeking, among other things, compensation for transporting and terminating calls originating with Verizon Virginia's customers and delivered to Starpower's customers, including calls to ISPs and calls accessing the Internet through ISPs served by Starpower. [FN25] Starpower asserts that such ISP-bound calls from Verizon Virginia customers constitute "Local Traffic" within the meaning of the First Starpower-Verizon Virginia Agreement. [FN26] Verizon Virginia disagrees, and has paid only a portion of the amounts billed by Starpower. [FN27]

*3 9. By letter dated April 1, 1999, Verizon Virginia notified Starpower that it had elected to terminate the First Starpower-Verizon Virginia Agreement, according to the agreement's terms. [FN28] Following Verizon Virginia's notice, the First Starpower-Verizon Virginia Agreement terminated as of July 1, 1999, although the agreement continued in effect pending execution or adoption of a new agreement. [FN29]

b. The Second Starpower-Verizon Virginia Agreement

10. On June 16, 1997, Verizon Virginia entered into an interconnection agreement ("MCImetro-Verizon Virginia Agreement") with MCImetro Access Transmission Services of Virginia, Inc. pursuant to section 252(a) of the Act. [FN30] The MCImetro-Verizon Virginia Agreement was filed with, and approved by, the Virginia

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SCC on July 16, 1997. [FN31]

11. By letter dated June 10, 1999, Starpower notified Verizon Virginia that, following expiration of the First Starpower-Verizon Virginia Agreement, Starpower wished to adopt the MCImetro-Verizon Virginia Agreement pursuant to section 252(i) of the Act. [FN32] Effective October 19, 1999, the parties entered into a written agreement, known as the "Adoption Agreement," memorializing Starpower's adoption of the terms and conditions of the MCImetro-Verizon Virginia Agreement. [FN33] The Virginia SCC approved the resulting interconnection ****6878** agreement ("Second Starpower-Verizon Virginia Agreement") on April 25, 2000. [FN34] The Adoption Agreement contains a clause in which the parties essentially agree to disagree about the applicability of the interconnection agreement's reciprocal compensation provisions to ISP-bound traffic. [FN35] Specifically, Starpower articulated its belief that the agreement's reciprocal compensation arrangements "apply to Internet traffic," but acknowledged that Verizon Virginia takes the opposite view and that, by signing the Adoption Agreement, Verizon Virginia does not waive any claims or defenses pertaining to the issue. [FN36]

12. Part B of the Second Starpower-Verizon Virginia Agreement defines "Reciprocal Compensation" as:
refer[ring] to a reciprocal compensation arrangement between two carriers in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of Local Traffic that originates on the network facilities of the other carrier. [FN37]
According to the agreement, "Local Traffic" is:
traffic that is originated by an end user subscriber of one Party on that Party's network and terminates to an end user subscriber of the other Party on that other Party's network within a given local calling area, or expanded area ("EAS") service, as defined in Bell Atlantic's Tariffs, or, if the Commission has defined local calling areas applicable to all Local Exchange Carriers, then as so defined by the Commission. [FN38]
This language closely resembles the Commission's then-existing rule regarding the types of traffic subject to reciprocal compensation under section 251(b) of the Act:
***4** For purposes of this subpart, local telecommunications traffic means ... Telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider that originates and terminates within a local service area established by the state commission [FN39]

13. Section 4 of Attachment I to the Second Starpower-Verizon Virginia Agreement ****6879** governs the parties' reciprocal compensation obligations and provides, in relevant part:
[Starpower] may choose to deliver both Local Traffic and toll traffic over the same trunk group(s), pursuant to the provisions of Attachment IV. In the event [Starpower] chooses to deliver both types of traffic over the same traffic exchange trunks, and desires application of the local call transport and termination rates, it will provide Percent Local Usage ("PLU") information to [Verizon Virginia] as set forth in Attachment IV. In the event [Starpower] includes both interstate and intrastate toll traffic over the same trunk, it will provide Percent Interstate Usage ("PIU") to [Verizon Virginia] as set forth in

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Attachment IV. [Verizon Virginia] shall have the same options, and to the extent it avails itself of them, the same obligation, to provide PLU and PIU information to [Starpower]. To the extent feasible, PLU and PIU information shall be based on the actual end-to-end jurisdictional nature of each call sent over the trunk. [FN40]

14. The above reciprocal compensation provisions are the only ones in the Second Starpower-Verizon Virginia Agreement governing compensation for Local Traffic, [FN41] and the word "termination" is undefined. [FN42]

15. The parties exchanged traffic under the Second Starpower-Verizon Virginia Agreement as they did under the First Starpower-Verizon Virginia Agreement, [FN43] and Starpower submitted invoices to Verizon Virginia seeking, among other things, compensation for transporting and terminating ISP-bound traffic. [FN44] Verizon Virginia denies that such traffic constitutes "Local Traffic" and has refused to pay reciprocal compensation. [FN45] The Second Starpower-Verizon Virginia Agreement currently governs the exchange of traffic between Starpower and Verizon Virginia. [FN46]

2. Starpower-Verizon South Agreement

16. On September 5, 1996, MFS Intelnet of Virginia, Inc. and Verizon South executed an interconnection agreement ("MFS-Verizon South Agreement") pursuant to section 252(a) of the Act, [FN47] which the Virginia SCC approved on July 9, 1997. [FN48] By letter dated **6880 February 17, 1998, Starpower notified Verizon South that it had elected to obtain interconnection with Verizon South by adopting the MFS-Verizon South Agreement pursuant to section 252(i) of the Act. [FN49] Verizon South subsequently advised the Virginia SCC of Starpower's adoption of the MFS-Verizon South Agreement. [FN50] The Virginia SCC declined to take any action to approve Starpower's adoption of the MFS-Verizon South Agreement, however, because Starpower's adoption of the agreement had not been negotiated or arbitrated. [FN51] By letter dated October 1, 1998, the parties "agree[d] they will honor the [section] 252(i) adoption by ... Starpower of the rates terms and conditions of the [MFS-Verizon South Agreement] as effective and binding upon ... [Verizon South] and Starpower in accordance with the 252(i) adoption letter[] executed by the parties on ... March 11, 1998...." [FN52]

*5 17. Section VI.A of the Starpower-Verizon South Agreement provides that the parties "shall reciprocally terminate POTS calls originating on each others' networks." [FN53] "POTS" stands for "Plain Old Telephone Service" traffic, which "includes local traffic (including EAS) as defined in [Verizon South's] tariff." [FN54] Verizon South's General Customer Services Tariff, in turn, defines Local Service as "[t]elephone service furnished between customer's stations [sic] located within the same exchange area." [FN55] The Starpower-Verizon South Agreement obligates the parties to pay reciprocal compensation "[f]or the termination of local traffic." [FN56] The agreement, however, does not separately define the word "termination," [FN57] and no other provisions of the agreement govern compensation of local traffic. [FN58] The Starpower-Verizon South Agreement remains in effect today. [FN59]

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B. Procedural History

18. In 1999, Starpower filed petitions with the Virginia SCC seeking declarations requiring Verizon South and Verizon Virginia to pay reciprocal compensation to Starpower for the delivery of ISP-bound traffic pursuant to the terms of the foregoing interconnection agreements. [FN60] The Virginia SCC declined jurisdiction over Starpower's petitions and **6881 encouraged Starpower to seek relief from this Commission. [FN61]

19. In March 2000, Starpower filed a petition with the Commission requesting that, pursuant to section 252(e) (5) of the Act, [FN62] the Commission preempt the jurisdiction of the Virginia SCC over the Starpower/Verizon South and Starpower/Verizon Virginia contract disputes. [FN63] On June 14, 2000, the Commission granted Starpower's preemption petition, stating that it would resolve the following question: "whether the existing interconnection agreements between Starpower and GTE [i.e., Verizon South] and Bell Atlantic [i.e., Verizon Virginia] require GTE and Bell Atlantic to pay compensation to Starpower for the delivery of ISP-bound traffic." [FN64]

20. On November 28, 2000, Starpower filed formal complaints with the Commission against Verizon Virginia and Verizon South. In short, the complaints allege that Verizon violated the unambiguous terms of the interconnection agreements with Starpower by failing to compensate Starpower for the "transportation and termination of local calls originated by [Verizon] end-users and bound for [ISPs] purchasing local exchange service from Starpower." [FN65] The complaints seek orders from the Commission declaring that (1) Starpower is entitled to be compensated for transporting and terminating calls to ISPs under the terms of the interconnection agreements; and (2) Verizon is liable to pay Starpower all past due amounts under the agreements, together with applicable interest and/or late fees, and to compensate Starpower for transporting and terminating calls to ISPs until the Second Starpower-Verizon Virginia Agreement and the Starpower-Verizon South Agreement are "superceded [sic] in accordance with the Act and the terms of the Agreement [s]." [FN66]

*6 21. In a December 8, 2000 Supplemental Submission, Starpower requested that, in addition to the relief sought in the complaints, the Commission enter an award of damages in a subsequent phase of the proceeding. [FN67] The Commission treated the Supplemental Submission as a motion to bifurcate the issue of liability from the issue of damages and, on January 16, 2001, granted the motion. [FN68]

22. On December 27, 2000, Verizon filed answers to Starpower's complaints. The **6882 answers assert, inter alia, that ISP-bound traffic is not eligible for reciprocal compensation under the unambiguous terms of the interconnection agreements, because under an "end-to-end" analysis such traffic is jurisdictionally interstate. [FN69]

III. DISCUSSION

A. The Interconnection Agreements Determine the Parties' Reciprocal Compensation Obligations for ISP-Bound Traffic.

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23. The Commission twice has held, and the parties do not dispute, that during the period relevant here, carriers could address in their interconnection agreements the issue of compensation for the delivery of ISP-bound traffic. [FN70] The parties appear to agree that their interconnection agreements do, in fact, address and conclusively govern this compensation issue. [FN71] Thus, the question we confront in this proceeding is whether any of the three interconnection agreements at issue entitle Starpower to receive reciprocal compensation for the delivery of ISP-bound traffic.

B. The "Plain Meaning" Rule under Virginia Law Governs Our Interpretation of the Parties' Interconnection Agreements.

24. In interpreting the interconnection agreements at issue in this case, we stand in the shoes of the Virginia SCC. [FN72] We agree with the parties that Virginia law supplies the applicable rules of contract interpretation. [FN73] Virginia adheres to the "plain meaning" rule: "where the terms **6883 of the contract are clear and unambiguous, we will construe those terms according to their plain meaning." [FN74] Although the cornerstone of a "plain meaning" analysis is a contract's language, [FN75] in ascertaining the parties' intent " as expressed by them in the words they have used," [FN76] a court also may examine the "surrounding circumstances, the occasion, and [the] apparent object of the parties." [FN77] In particular, as both parties acknowledge, a court may consider the legal context in which a contract was negotiated, because the laws in force at the time a contract is made become "as much a part of the contract as if incorporated therein." [FN78] Moreover, "custom and usage may be used to supplement or explain a contract," as long as this type of evidence is not inconsistent with the contract's express terms. [FN79] Furthermore, course-of-performance evidence can be considered to ascertain a contract's meaning rather than to "create a new, additional contract right." [FN80]

*7 25. All parties invoke the "plain meaning" rule in support of their case. [FN81] According to Starpower, "as interpreted under the 'plain meaning' rule ... the Agreements unambiguously comprehend ISP-bound traffic within the ambit of the term 'local traffic,'" which renders the delivery of such traffic compensable. [FN82] Verizon similarly relies upon the "plain meaning" rule to argue that the interconnection agreements unambiguously do not require payment of reciprocal **6884 compensation for the delivery of ISP-bound traffic. [FN83] For the reasons described below, applying Virginia's rules of contract interpretation, we agree with the parties that all three agreements at issue are unambiguous regarding compensation for the delivery of ISP-bound traffic. We further conclude that the Starpower-Verizon South Agreement requires reciprocal compensation for the delivery of ISP-bound traffic, whereas the Starpower-Verizon Virginia Agreements do not.

C. Neither the First Starpower-Verizon Virginia Agreement nor the Second Starpower-Verizon Virginia Agreement Obligates Verizon Virginia to Pay Reciprocal Compensation to Starpower for the Delivery of ISP-Bound Traffic.

1. The Starpower-Verizon Virginia Agreements Do Not Require Reciprocal Compensation for the Delivery of Traffic that Is Jurisdictionally Interstate under

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the Commission's Traditional End-to-End Analysis.

26. We begin by examining the relevant terms of the First and Second Starpower-Verizon Virginia Agreements. Under both agreements, the parties must pay reciprocal compensation for the transport and termination of only "Local Traffic." [FN84] Neither agreement states expressly whether ISP-bound traffic is "Local Traffic." Instead, both agreements generally define "Local Traffic" according to whether a call from one party's network "terminates" on the other party's network. [FN85] Although neither agreement defines the word "terminates," both agreements provide a criterion for determining whether traffic terminates on the other party's network for the purposes of the agreements' reciprocal compensation provisions. Specifically, paragraph 5.7.5 of the First Starpower-Verizon Virginia Agreement provides that traffic shall be designated local or non-local based upon the "actual originating and terminating points of the complete end-to-end call." [FN86] Paragraph 4.1 of the Second Starpower-Verizon Virginia Agreement similarly states that whether traffic is subject to local call transport and termination rates depends on the "actual end-to-end jurisdictional nature of each call sent over the trunk." [FN87]

27. We believe that each agreement's use of the phrase "end-to-end" is an incorporation of the Commission's long-standing method of determining the jurisdictional nature of particular traffic. Specifically, the Commission traditionally has determined the jurisdictional nature of communications by the end points of the communications, rejecting attempts to divide communications at any intermediate points of switching or exchanges between carriers. [FN88] In **6885 Teleconnect, for example, the Commission stated that, in assessing the jurisdictional nature of a call, "both court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communication." [FN89] And in the ONA Plans Order, the Commission stated that a service is jurisdictionally interstate "when it involves communications or transmissions between points in different states on an end-to-end basis." [FN90] In fact, the District of Columbia Circuit Court of Appeals expressly has acknowledged that "the end-to-end analysis applied by the Commission here is one that it has traditionally used to determine whether a call is within its interstate jurisdiction." [FN91] This Court also said that "[t]here is no dispute that the Commission has historically been justified in relying on this [end-to-end] method when determining whether a particular communication is jurisdictionally interstate." [FN92]

*8 28. In light of this pervasive precedent, we believe that the phrase "end-to-end," used in the context of classifying communications traffic, had achieved a customary meaning in the telecommunications industry. [FN93] Thus, the two agreements' use of the term of art "end-to-end" signifies that the determination whether certain traffic falls within the category of compensable "Local Traffic" turns on the jurisdictional nature of the traffic, as divined via the Commission's traditional mode of analysis. In other words, according to the agreements, a call constitutes compensable "Local Traffic" only if it is not jurisdictionally interstate under the Commission's end-to-end analysis.

29. Indeed, Starpower acknowledges - at least with respect to the First

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Starpower-Verizon Virginia Agreement - that the compensation due under the agreement for the delivery of ISP-bound traffic hinges on the traffic's jurisdictional nature. In particular, a declarant on behalf of Starpower who participated in the negotiation of the MFS-Verizon Virginia Agreement states: "[Verizon Virginia] is correct that the parties 'intended to ensure that the actual jurisdictional nature of the traffic-as traditionally construed by the FCC-would control its characterization for compensation purposes.'" [FN94] Although the declarant further states that ISP-bound traffic nonetheless is subject to reciprocal compensation, "given the parties' understanding and stated ****6886** belief that calls to ISPs were Local Traffic," [FN95] his admission regarding the importance of the jurisdictional nature of traffic is clear. [FN96]

30. Given that the First and Second Starpower-Verizon Virginia Agreements link compensation to jurisdiction, those agreements exclude ISP-bound traffic from the scope of their reciprocal compensation provisions. This is because the Commission has long categorized traffic to enhanced service providers ("ESPs"), including ISPs, as predominantly interstate for jurisdictional purposes. [FN97] The Commission recently affirmed this conclusion: "Most Internet-bound traffic traveling between a LEC's subscriber and an ISP is indisputably interstate in nature when viewed on an end-to-end basis." [FN98] Accordingly, under the unambiguous terms of the First and Second Starpower-Verizon Virginia Agreements, ISP-bound traffic does not constitute compensable "Local Traffic," because ISP-bound traffic is jurisdictionally interstate.

31. Buttressing this conclusion is the fact that the agreements' definitions of "Local Traffic" closely resemble the Commission's preexisting descriptions of the kind of traffic subject to the reciprocal compensation mandate of section 251(b)(5) of the Act. Specifically, the First Starpower-Verizon Virginia Agreement defines "Local Traffic" as traffic that originates on one party's network and terminates on another party's network within a local calling area or expanded service area. [FN99] This tracks the Local Competition Order NPRM's description of telecommunications encompassed by section 251(b)(5) as (at least) traffic that originates on one LEC's network and terminates on a competing LEC's network in the same local service area. [FN100] Moreover, the Second Starpower-Verizon Virginia Agreement defines "Local Traffic" as traffic that originates on one party's network and terminates on another party's network within a local calling area as defined by tariff or the Commission. [FN101] Former section 51.701(b) of the Commission's rules similarly characterized "local telecommunications traffic" as telecommunications traffic between a LEC and another telecommunications carrier that ****6887** originates and terminates within a local service area as defined by a state commission. [FN102] These striking similarities reveal an intent to track the Commission's interpretation of the scope of section 251(b)(5), i.e., whatever the Commission determines is compensable under section 251(b)(5) will be what is compensable under the agreements. Although the Commission's rationale has evolved over time, the Commission consistently has concluded that ISP-bound traffic does not fall within the scope of traffic compensable under section 251(b)(5). Consequently, for this reason, as well, we find that the First and Second Starpower-Verizon Virginia Agreements exclude ISP-bound traffic from the definition of "Local Traffic" (and therefore from reciprocal compensation obligations).

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*9 32. One final note. In his Separate Statement, Commissioner Martin dissents from our conclusions regarding the First and Second Starpower-Verizon Virginia Agreements, because he does not wish to "support[] the use of the Commission's end-to-end analysis," on which the "D.C. Circuit [has] cast serious doubt." [FN103] We find no tension between this decision and the D.C. Circuit's ruling in the Bell Atlantic Remand Order. [FN104] The end-to-end jurisdictional analysis is used here strictly to assist in a matter of contract interpretation. The Commission indisputably utilized the "end-to-end" jurisdictional analysis at the time the parties entered the First and Second Starpower-Verizon Virginia Agreements, and we conclude only that the parties incorporated that analysis into their contracts.

2. The Context of the Starpower-Verizon Virginia Agreements Does Not Trump Their Plain Language Linking Compensation to Jurisdiction.

33. Starpower contends that the "purpose, structure and substance" of the First and Second Starpower-Verizon Virginia Agreements support its interpretation of the term "Local Traffic." [FN105] In particular, Starpower points out that (1) the primary purpose of the agreements is to set forth the types of traffic the parties will exchange and the terms and conditions under which exchange and compensation will occur; (2) no provision of the agreements excludes ISP-bound traffic from the definition of "Local Traffic"; (3) no provision of the agreements provides an alternative designation for ISP-bound traffic, if it is not "Local Traffic"; (4) the agreements do not provide an alternative means of compensation for ISP-bound traffic, if it does not qualify for reciprocal compensation; and (5) no provision of the agreements requires the parties to transport ISP-bound traffic separately or to maintain a separate accounting for the traffic. [FN106] Starpower argues that, in light of these circumstances, the parties must have intended compensable "Local Traffic" to include ISP-bound traffic. [FN107]

34. We disagree with Starpower's argument. As an initial matter, even assuming that **6888 Starpower correctly characterizes the "purpose" of the agreements, that does not mean that the agreements were intended to provide compensation for every type of traffic the parties exchange. To the contrary, as discussed above, paragraphs 5.7.5 and 4.1 require ISP-bound traffic to be characterized as jurisdictionally interstate, thereby removing it from the definition of "Local Traffic." [FN108] This undermines Starpower's second observation as well, because the agreements do, in fact, contain provisions (i.e., paragraphs 5.7.5 and 4.1) specifically excluding ISP-bound traffic from the definition of "Local Traffic." Starpower's third, fourth, and fifth assertions focus on the absence of language providing an alternative designation for ISP-bound traffic, an alternative means of compensating the parties for transport and termination of ISP-bound traffic, or a requirement that the parties separately track ISP-bound traffic. Even assuming Starpower's characterization of the contracts is correct (and Verizon Virginia argues that it is not), [FN109] we cannot conclude that the absence of certain contractual language has more persuasive force than the existence of other language addressing the precise question at hand - i.e., whether ISP-bound traffic constitutes "Local Traffic," as that term is defined in the agreements.

*10 35. As stated above, Starpower asserts correctly [FN110] (and Verizon Virginia concurs) [FN111] that, in construing the agreements, the Commission may

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take account of the regulatory context in which the parties negotiated the agreements. Starpower further asserts correctly [FN112] (and Verizon Virginia concurs) [FN113] that the relevant regulatory context in which the parties negotiated was that, for many purposes, the Commission treated ISP-bound traffic as though it were local. [FN114] For example, ISPs may purchase their links to the public switched telephone network through local business tariffs rather than through interstate access tariffs; [FN115] moreover, for separations purposes, ILECs must characterize expenses and revenues associated with ISP-bound traffic as intrastate. [FN116] Starpower then argues that, because the Commission treats ISP-bound traffic as local for many regulatory purposes, the parties had a reasonable expectation that the term "Local Traffic" includes ISP-bound traffic. [FN117]

****6889** 36. Again, we disagree. First, although the context cited by Starpower has some force, another part of the relevant regulatory context is that, under an end-to-end analysis, the Commission has long held that ISP-bound traffic is interstate for jurisdictional purposes. The agreements' compensation provisions specifically refer to this latter context. Moreover, the Commission's regulatory treatment of ISP-bound traffic as local for certain purposes only makes it possible that parties agreed in interconnection agreements to include such traffic within the ambit of calls eligible for reciprocal compensation. It does not mean that the parties inevitably did so. With respect to the Starpower-Verizon Virginia Agreements, we believe the parties unambiguously agreed not to treat ISP-bound traffic as "Local Traffic" for reciprocal compensation purposes. They did so by linking compensation to the jurisdictional nature of the traffic, rather than to the separations, tariff, or other local-pointing nature of the traffic. They also did so by tracking the Commission's construction of section 251(b)(5). In the face of such language, we cannot find the regulatory context cited by Starpower to be dispositive.

37. In a related vein, Starpower correctly notes that, in granting Starpower's Petition for Preemption, we stated that we would apply, inter alia, the principles that we previously suggested state commissions utilize when construing the reciprocal compensation provisions of interconnection agreements. [FN118] Specifically, in the Declaratory Ruling, we observed that "state commissions have the opportunity to consider all the relevant facts, including the negotiation of the agreements in the context of this Commission's longstanding policy of treating [ISP-bound] traffic as local, and the conduct of the parties pursuant to those agreements." [FN119] Accordingly, we identified several "illustrative" factors that it "may be appropriate for state commissions to consider," including:
***11** whether incumbent LECs serving ESPs (including ISPs) have done so out of intrastate or interstate tariffs; whether revenues associated with those services were counted as intrastate or interstate revenues; whether there is evidence that incumbent LECs or CLECs made any effort to meter this traffic or otherwise segregate it from local traffic, particularly for the purpose of billing one another for reciprocal compensation; whether, in jurisdictions where incumbent LECs bill their end users by message units, incumbent LECs have included calls to ISPs in local telephone charges; and whether, if ISP traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for this traffic. [FN120]

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38. Starpower argues that application of these factors requires a ruling in its favor. [FN121] Starpower observes, inter alia, that Verizon serves ISPs out of intrastate tariffs and counts **6890 revenues associated with calls to ISPs as intrastate revenue. [FN122] These facts are true, [FN123] and we remain of the view that they are relevant context that we should consider in construing the First and Second Starpower-Verizon Virginia Agreements. We do not believe, however, that this evidence of context outweighs the specific language in the First and Second Starpower-Verizon Virginia Agreements characterizing the compensability of traffic on the basis of its jurisdictional nature. Again, the unambiguous language of the First and Second Starpower-Verizon Virginia Agreements compels the conclusion that ISP-bound traffic is not "Local Traffic," as that term is defined in the agreements. To be sure, the Declaratory Ruling acknowledged that parties to interconnection agreements could have agreed to treat ISP-bound traffic as local traffic. [FN124] The converse, however, is equally true. [FN125]

3. State Regulatory Decisions Construing Other Interconnection Agreements Are Not Dispositive.

39. We do not find dispositive the many state regulatory commission decisions cited by Starpower and holding that ISP-bound traffic is subject to reciprocal compensation. [FN126] As Starpower's own brief highlights, [FN127] none of these decisions specifically construes the contractual language at issue in this case, which, as discussed above, makes the jurisdictional nature of traffic determinative of whether it constitutes compensable "Local Traffic." [FN128]

40. One decision merits additional discussion. Starpower contends that the Virginia SCC's decision in Cox Virginia Telcom [FN129] is dispositive, because, as to Verizon Virginia, it is **6891 preclusive under the doctrine of collateral estoppel, and because it is a binding determination by a state commission that, pursuant to the Order on Remand, the Commission cannot preempt. [FN130] We disagree. First, Starpower has not demonstrated that the requirements for collateral estoppel have been satisfied. Under Virginia law, in order for collateral estoppel to apply, the "factual issue sought to be litigated actually must have been litigated in the prior action." [FN131] The meaning of the agreements between Starpower and Verizon Virginia was not at issue in Cox Virginia Telcom. Accordingly, Starpower cannot avail itself of the collateral estoppel doctrine in this proceeding. In any event, at Starpower's request, this Commission already has preempted the Virginia SCC's authority to interpret the "interconnection agreements between Starpower and GTE and Bell Atlantic." [FN132] The Virginia SCC has not yet addressed the dispute between the parties to these agreements, and we believe the case is appropriate for our resolution.

* * *

*12 41. In sum, utilizing a plain meaning analysis, we find that the First and Second Starpower-Verizon Virginia Agreements exclude ISP-bound traffic from the scope of their reciprocal compensation provisions. Specifically, for purposes of defining compensable "Local Traffic," the language of the agreements expressly references and incorporates the Commission's historic reliance on an "end-to-end" analysis of traffic for determining the traffic's jurisdictional nature. Because

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the Commission long has held, under an end-to-end analysis, that ISP-bound traffic is predominantly interstate for jurisdictional purposes, such traffic falls outside the definition of "Local Traffic," as used in the agreements. Moreover, the language of the agreements manifests an intent to track the Commission's construction of the scope of compensable traffic under section 251(b)(5), and the Commission consistently has excluded ISP-bound traffic from the reach of that statutory provision. In our view, therefore, the language of these agreements outweighs the contrary evidence of context on which Starpower relies. Thus, neither the First Starpower-Verizon Virginia Agreement nor the Second Starpower-Verizon Virginia Agreement requires Verizon Virginia to pay Starpower reciprocal compensation for the delivery of ISP-bound traffic.

****6892 D.** The Starpower-Verizon South Agreement Obligates Verizon South to Pay Reciprocal Compensation to Starpower for the Delivery of ISP-Bound Traffic.

42. Compared to the Starpower-Verizon Virginia Agreements, the Starpower-Verizon South Agreement is relatively terse regarding reciprocal compensation. It obligates the parties to "reciprocally terminate [Plain Old Telephone Service] calls originating on each others' networks," [FN133] including "local traffic ... as defined in [Verizon South's] tariff." [FN134] According to Verizon South's General Customer Services Tariff ("Tariff"), [FN135] "Local Service" is "[t]elephone service furnished between customer's stations [sic] located within the same exchange area." [FN136] The parties agreed to compensate each other at an "equal, identical and reciprocal rate" for the "termination of local traffic." [FN137] The Starpower-Verizon South Agreement does not separately define the phrase "local traffic" or the word "termination."

43. As with the Starpower-Verizon Virginia Agreements, each party argues that the "plain meaning" of the Starpower-Verizon South Agreement supports its position: Starpower contends that the agreement clearly compels payment of reciprocal compensation for the delivery of ISP-bound traffic; [FN138] Verizon maintains that the agreement clearly does not. [FN139] For the reasons discussed below, we find that the Starpower-Verizon South Agreement requires Verizon South to pay Starpower reciprocal compensation for the delivery of ISP-bound traffic.

44. As noted above, the Starpower-Verizon South Agreement's definition of compensable "local traffic" is derived from the Tariff. [FN140] Thus, whatever traffic is "local" under the Tariff is compensable traffic under the Starpower-Verizon South Agreement.

*13 45. The parties agree that ISP-bound traffic is "local traffic" under the Tariff. Specifically, the parties stipulate that, when a Verizon South customer places a call to the Internet through an ISP, using a telephone number associated with the caller's local calling area, Verizon South rates and bills that customer for a local call pursuant to the terms of the Tariff. [FN141] Consequently, ISP-bound traffic falls within the Tariff's definition of "Local Service." Accordingly, because the Starpower-Verizon South Agreement adopts the Tariff's conception of local traffic, we conclude that the Agreement plainly requires Verizon to pay reciprocal compensation for the delivery of ISP-bound traffic.

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****6893** 46. Verizon South contends that it would be "remarkably unfair" for the Commission to rely on Verizon South's manner of billing for termination of ISP-bound traffic, because it merely reflects Verizon South's adherence to the "positive requirements of federal law." [FN142] This objection is meritless, because Verizon South voluntarily agreed to link the compensability of traffic under the Starpower-Verizon South Agreement to the classification of traffic in the Tariff.

47. Verizon South further claims that the parties intended the Starpower-Verizon South Agreement to follow the requirements of federal law, by distinguishing in the agreement between "local traffic" on the one hand and exchange access traffic on the other. [FN143] According to Verizon South, this difference "tracks precisely the distinction that the Commission drew in [paragraph 1034] of the Local Interconnection Order," [FN144] where the Commission concluded that "reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area" [FN145] We disagree. The Starpower-Verizon South Agreement does not track the language used by the Commission to implement section 251(b)(5). In particular, the agreement's definition of "local traffic" neither speaks in terms of "origination" and "termination" of traffic, nor references local calling areas. In this way, it differs significantly from the Starpower-Verizon Virginia Agreements. [FN146] Moreover, unlike the Starpower-Verizon Virginia Agreements, [FN147] the Starpower-Verizon South Agreement does not link a call's compensability to the Commission's traditional end-to-end jurisdictional analysis.

48. Finally, we believe Verizon South places too much stock in a recent decision by the United States Court of Appeals for the Fourth Circuit, which found that "many so-called 'negotiated' provisions [of interconnection agreements] represent nothing more than an attempt to comply with the requirements of the 1996 Act." [FN148] AT&T v. BellSouth is inapposite, because the interconnection provision at issue in that case (pertaining to unbundled network elements) obligated BellSouth to offer a service that it clearly was required to provide by then-controlling federal law. "Where a provision plainly tracks the controlling law," the Court said, "there is a strong presumption that the provision was negotiated with regard to the [Act] and the controlling law." [FN149] The Court found that, where an interconnection agreement "was clearly negotiated with regard to the 1996 Act and law thereunder," the contested provision could be reformed if there were a change in controlling law. [FN150] In this case, there was no controlling federal law mandating ****6894** a particular compensation arrangement for ISP-bound traffic. To the contrary, the Commission explicitly allowed the parties to negotiate regarding the issue and settle on whatever compensation terms they deem appropriate. [FN151]

***14** 49. In sum, given the Starpower-Verizon South Agreement's reference to the Tariff, whatever calls Verizon South bills to its customers as local calls under the Tariff must be compensable local calls under the Starpower-Verizon South Agreement. Because it is undisputed that Verizon bills ISP-bound traffic as local calls under the Tariff, such calls are compensable under the Starpower-Verizon South Agreement. Thus, Verizon must pay reciprocal compensation to Starpower for the termination of ISP-bound traffic.

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IV. CONCLUSION AND ORDERING CLAUSES

50. For the above reasons, we find that the two interconnection agreements between Starpower and Verizon Virginia do not require Verizon Virginia to pay reciprocal compensation to Starpower for the delivery of ISP-bound traffic. We further find, however, that the interconnection agreement between Starpower and Verizon South does require Verizon South to pay reciprocal compensation to Starpower for the delivery of ISP-bound traffic.

51. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 208, and 252(e)(5) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, and 252(e)(5), that the complaint filed by Starpower against Verizon Virginia is hereby DENIED.

52. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 208, and 252(e)(5) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, and 252(e)(5), that the complaint filed by Starpower against Verizon South is hereby GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

Acting Secretary

FN1. 47 U.S.C. §§ 208, 252(e)(5).

FN2. Verizon Virginia Inc. formerly was known as Bell Atlantic-Virginia, Inc. Answer of Verizon Virginia Inc., File No. EB-00-MD-20 (filed Dec. 27, 2000) ("Verizon Virginia Answer") at 1. Verizon South Inc. formerly was known as GTE South Incorporated. Answer of Verizon South Inc., File No. EB-00-MD-19 (filed Dec. 27, 2000) ("Verizon South Answer") at 1. We refer to Verizon Virginia and Verizon South collectively as "Verizon."

FN3. Joint Statement, File No. EB-00-MD-20 (filed Jan. 12, 2001) ("Starpower-Verizon Virginia Joint Statement") at 1, ¶ 1; Joint Statement, File No. EB-00-MD-19 (filed Jan. 12, 2001) ("Starpower-Verizon South Joint Statement") at 1, ¶ 1.

FN4. Starpower-Verizon Virginia Joint Statement at 1, ¶ 2; Starpower-Verizon South Joint Statement at 1, ¶ 2. Specifically, Verizon Virginia serves a portion of the Washington, D.C. local access and transport area ("LATA"), including parts of Arlington and Fairfax counties in Virginia, while Verizon South serves a different portion of the Washington, D.C. LATA, including the area surrounding Dulles International Airport in Virginia. Starpower-Verizon Virginia Joint Statement at 8, ¶ 38; Starpower-Verizon South Joint Statement at 5, ¶ 21.

FN5. Starpower-Verizon Virginia Joint Statement at 8, ¶ 37; Starpower-Verizon South Joint Statement at 4, ¶ 19.

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FN6. Formal Complaint, File No. EB-00-MD-19 (filed Nov. 27, 2000) ("Starpower-Verizon South Complaint"), Exhibit A (MFS/GTE Interim Virginia Co-Carrier Agreement ["Starpower-Verizon South Agreement"]); Formal Complaint, File No. EB-00-MD-20 (filed Nov. 27, 2000) ("Starpower-Verizon Virginia Complaint"), Exhibits D (Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996, dated as of March 9, 1998, by and between Bell Atlantic-Virginia, Inc. and Starpower Communications, LLC) ["First Starpower-Verizon Virginia Agreement"] and I (Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996, dated as of October 19th, 1999, by and between Bell Atlantic-Virginia, Inc. and Starpower Communications, LLC ["Second Starpower-Verizon Virginia Agreement"]).

FN7. Starpower-Verizon Virginia Joint Statement at 2, ¶ 4. See 47 U.S.C. § 252(a) (ILECs may negotiate and voluntarily enter into interconnection agreements with requesting carriers, which then must be submitted for approval to the appropriate State commission).

FN8. Starpower-Verizon Virginia Joint Statement at 2, ¶ 5.

FN9. 47 U.S.C. § 252(i) ("A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.").

FN10. Starpower-Verizon Virginia Joint Statement at 2, ¶ 6.

FN11. Starpower-Verizon Virginia Joint Statement at 2, ¶ 7.

FN12. Starpower-Verizon Virginia Complaint, Exhibit B (Letter dated February 19, 1998 from Sara Cole, Senior Legal Assistant, Bell Atlantic, to Russell M. Blau, counsel for Starpower); Verizon Virginia Answer at 10, ¶ 19.

FN13. Starpower-Verizon Virginia Joint Statement at 2, ¶ 8.

FN14. Starpower-Verizon Virginia Joint Statement at 2, ¶ 9.

FN15. Starpower-Verizon Virginia Joint Statement at 2, ¶ 10.

FN16. Starpower-Verizon Virginia Joint Statement at 3, ¶ 11; Starpower-Verizon Virginia Complaint, Exhibit D (First Starpower-Verizon Virginia Agreement) at 8, ¶ 1.61.

FN17. Starpower-Verizon Virginia Joint Statement at 3, ¶ 12; Starpower-Verizon Virginia Complaint, Exhibit D (First Starpower-Verizon Virginia Agreement) at 2, ¶ 1.7.

FN18. Starpower-Verizon Virginia Joint Statement at 3-4, ¶ 14; Starpower-Verizon Virginia Complaint, Exhibit D (First Starpower-Verizon Virginia Agreement) at 6, ¶ 1.44.

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FN19. 47 U.S.C. § 251(b)(5).

FN20. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Notice of Proposed Rulemaking, 11 FCC Rcd 14171, 14249, ¶ 230 (1996) ("Local Competition Order NPRM") (emphasis added) (subsequent history omitted).

FN21. Starpower-Verizon Virginia Joint Statement at 3, ¶ 13; Starpower-Verizon Virginia Complaint, Exhibit D (First Starpower-Verizon Virginia Agreement) at 17-18, ¶¶ 5.7.2, 5.7.3, 5.7.5. "Switched Exchange Access Service" is defined in section 1.66 of the First Starpower-Verizon Virginia Agreement as the "offering of transmission and switching services for the purpose of the origination or termination of Toll Traffic." Starpower-Verizon Virginia Joint Statement at 4, ¶ 15; Starpower-Verizon Virginia Complaint, Exhibit D (First Starpower-Verizon Virginia Agreement) at 9, ¶ 1.66. "Toll Traffic," in turn, means "traffic that is originated by a Customer of one Party on that Party's network and terminates to a Customer of the other Party on that Party's network and is not Local Traffic or Ancillary Traffic. Toll Traffic may be either 'IntraLATA Toll Traffic' or 'InterLATA Toll Traffic,' depending on whether the originating and terminating points are within the same LATA." Starpower-Verizon Virginia Joint Statement at 4, ¶ 16; Starpower-Verizon Virginia Complaint, Exhibit D (First Starpower-Verizon Virginia Agreement) at 9, ¶ 1.76.

FN22. Starpower-Verizon Virginia Joint Statement at 4, ¶ 18.

FN23. Starpower-Verizon Virginia Joint Statement at 4, ¶ 17.

FN24. Starpower-Verizon Virginia Joint Statement at 9, ¶ 42.

FN25. Starpower-Verizon Virginia Joint Statement at 9, ¶ 41.

FN26. Starpower-Verizon Virginia Joint Statement at 9, ¶ 42.

FN27. Starpower-Verizon Virginia Joint Statement at 9, ¶ 43.

FN28. Starpower-Verizon Virginia Joint Statement at 5, ¶ 22.

FN29. Starpower-Verizon Virginia Joint Statement at 5, ¶ 22. The reason that the First Starpower-Verizon Virginia Agreement remained in effect beyond July 1, 1999 is unclear from the record.

FN30. Starpower-Verizon Virginia Joint Statement at 5, ¶ 24; Starpower-Verizon Virginia Complaint, Exhibit F (MCImetro/Bell Atlantic Interconnection Agreement 1997).

FN31. Starpower-Verizon Virginia Joint Statement at 6, ¶ 25.

FN32. Starpower-Verizon Virginia Joint Statement at 6, ¶ 26.

FN33. Starpower-Verizon Virginia Joint Statement at 6, ¶ 27.

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FN34. Starpower-Verizon Virginia Joint Statement at 6, ¶ 27.

FN35. Starpower-Verizon Virginia Joint Statement at 6, ¶ 28.

FN36. Starpower-Verizon Virginia Complaint, Exhibit I (Second Starpower-Verizon Virginia Agreement) at 5, ¶ 2.1.

FN37. Starpower-Verizon Virginia Joint Statement at 6, ¶ 29. The parties did not include a complete copy of the Second Starpower-Verizon Virginia Agreement as an exhibit to any of their pleadings. Rather than referencing multiple exhibits when discussing the agreement, we hereafter cite exclusively to the parties' joint stipulations regarding the agreement's terms.

FN38. Starpower-Verizon Virginia Joint Statement at 7, ¶ 31.

FN39. 47 C.F.R. § 51.701(b) (amended 2001).

FN40. Starpower-Verizon Virginia Joint Statement at 6-7, ¶ 30.

FN41. Starpower-Verizon Virginia Joint Statement at 8, ¶ 34.

FN42. Starpower-Verizon Virginia Joint Statement at 7, ¶ 32.

FN43. Starpower-Verizon Virginia Joint Statement at 9, ¶ 42.

FN44. Starpower-Verizon Virginia Joint Statement at 9, ¶ 41.

FN45. Starpower-Verizon Virginia Joint Statement at 9, ¶ 43.

FN46. Supplemental Joint Statement, File No. EB-00-MD-20 (filed Oct. 26, 2001) ("Starpower-Verizon Virginia Supplemental Joint Statement") at 2.

FN47. Starpower-Verizon South Joint Statement at 2, ¶ 4.

FN48. Starpower-Verizon South Joint Statement at 2, ¶ 5.

FN49. Starpower-Verizon South Joint Statement at 2, ¶ 6.

FN50. Starpower-Verizon South Joint Statement at 2, ¶¶ 6-7.

FN51. Starpower-Verizon South Joint Statement at 2, ¶ 8.

FN52. Starpower-Verizon South Joint Statement at 2, ¶ 9.

FN53. Starpower-Verizon South Joint Statement at 3, ¶ 10.

FN54. Starpower-Verizon South Joint Statement at 3, ¶ 11.

FN55. Starpower-Verizon South Joint Statement at 3, ¶ 12.

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FN56. Starpower-Verizon South Joint Statement at 3, ¶ 13.

FN57. Starpower-Verizon South Joint Statement at 4, ¶ 17.

FN58. Starpower-Verizon South Joint Statement at 4, ¶ 18.

FN59. Supplemental Joint Statement, File No. EB-00-MD-19 (filed Oct. 26, 2001) ("Starpower-Verizon South Supplemental Joint Statement") at 2.

FN60. Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, Memorandum Opinion and Order, 15 FCC Rcd 11277, 11278, ¶ 3 (2000) ("Preemption Order").

FN61. Preemption Order, 15 FCC Rcd at 11278, ¶ 4.

FN62. 47 U.S.C. § 252(e)(5) ("If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.").

FN63. Preemption Order, 15 FCC Rcd at 11278, ¶ 4.

FN64. Preemption Order, 15 FCC Rcd at 11281, ¶ 9.

FN65. See Starpower-Verizon Virginia Complaint at 1; Starpower-Verizon South Complaint at 1.

FN66. Starpower-Verizon Virginia Complaint at 41; Starpower-Verizon South Complaint at 33.

FN67. Supplemental Submission, File Nos. EB-00-MD-19, -20 (filed Dec. 8, 2000) ("Supplemental Submission") at 2.

FN68. Letter dated January 19, 2001 from William H. Davenport, Special Counsel, Market Disputes Resolution Division, Enforcement Bureau, to Russell M. Blau and Michael L. Shor, counsel for Starpower, and Lawrence W. Katz and Aaron M. Panner, counsel for Verizon, File Nos. EB-00-MD-19, -20 (rel. Jan. 19, 2001) at 1. See 47 C.F.R. § 1.722.

FN69. See, e.g., Starpower-Verizon Virginia Answer at 1-2; Starpower-Verizon South Answer at 1-2.

FN70. See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9160, ¶ 16 (2001) ("Order on Remand") (citing Implementation of the Local Competition Provisions in the

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Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689, 3703, ¶ 22 (1999) ("Declaratory Ruling"), vacated and remanded sub nom. Bell Atlantic Tel. Cos. v. FCC, 206 F.3d 1 (D.C. Cir. 2000) ("Bell Atlantic Remand Order"). On April 27, 2001, the Commission adopted an interim compensation mechanism pertaining to the exchange of ISP-bound traffic. See Order on Remand, 16 FCC Rcd at 9151. The established regime, however, "applies as carriers renegotiate expired or expiring interconnection agreements. It does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions." Id., 16 FCC Rcd at 9189, ¶ 82. The three interconnection agreements involved in the instant proceeding do not contain change of law provisions that would be triggered by the Order on Remand.

FN71. Starpower-Verizon Virginia Joint Statement at 4, ¶ 8; at 8, ¶¶ 34, 37; Starpower-Verizon South Joint Statement at 4, ¶¶ 18-19. See also Starpower-Verizon Virginia Complaint at 21-25; Starpower-Verizon South Complaint at 13-17; Starpower-Verizon Virginia Answer at 32-50; Starpower-Verizon South Answer at 20-32; Starpower Supplemental Brief at 11-27; Brief of Defendants Verizon Virginia Inc. and Verizon South Inc., File Nos. EB-00-MD-19, -20 ("Verizon Brief") at 4-13.

FN72. See 47 U.S.C. § 252(e)(5); Preemption Order, 15 FCC Rcd 11277, 11278, ¶ 5.

FN73. See Starpower Supplemental Brief at 12; Verizon Brief at 2, n.2. See also Starpower-Verizon Virginia Complaint, Exhibit D (First Starpower-Verizon Virginia Agreement) at 57, ¶ 29.5 ("The construction, interpretation and performance of this Agreement shall be governed by and construed in accordance with the laws of the state in which this Agreement is to be performed [Virginia], except for its conflict of laws provisions. In addition, insofar as and to the extent federal law may apply, federal law will control."); Starpower-Verizon Virginia Complaint, Exhibit F (MCImetro-Verizon Virginia Agreement) at Part A-7, ¶ 7.1 ("The validity of this Agreement, the construction and enforcement of its terms, and the interpretation of the rights and duties of the Parties, shall be governed by the Act and the laws of the Commonwealth of Virginia, without regard to its conflicts of laws rules."); Starpower-Verizon South Complaint, Exhibit A (MFS-Verizon South Agreement) at 27, ¶ XIX.J ("This Agreement shall be governed by and construed in accordance with the domestic laws of the state of Virginia and shall be subject to the exclusive jurisdiction of the courts therein."). See generally *Southwestern Bell Tel. Co. v. PUC of Tex.*, 208 F.3d 475, 485 (5th Cir. 2000) (applying Texas law in construing reciprocal compensation provisions of interconnection agreements) ("Southwestern Bell").

FN74. *American Spirit Ins. Co. v. Owens*, 261 Va. 270, 275, 541 S.E.2d 553, 555 (2001). See also *Berry v. Klinger*, 225 Va. 201, 208, 300 S.E.2d 792, 796 (1983).

FN75. See, e.g., *Lerner v. Gudelsky Co.*, 230 Va. 124, 132, 334 S.E.2d 579, 584 (1985) ("The writing is the repository of the final agreement of the parties."); *Berry v. Klinger*, 225 Va. at 208, 300 S.E.2d at 796 (a court must construe a contract's "language as written").

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FN76. Ames v. American Nat'l Bank, 163 Va. 1, 38, 176 S.E. 204, 216 (1932).

FN77. Flippo v. CSC Assoc. III, L.L.C., 262 Va. 48, 64, 547 S.E.2d 216, 226 (2001) (quoting Christian v. Bullock, 215 Va. 98, 102, 205 S.E.2d 635, 638 (1974)).

FN78. Marriott v. Harris, 235 Va. 199, 215, 368 S.E.2d 225, 232 (1988); Paul v. Paul, 214 Va. 651, 653, 203 S.E.2d 123, 125 (1974). See Starpower Supplemental Brief at 15; Verizon Brief at 14.

FN79. Chas. H. Tompkins Co. v. Lumbermans Mut. Cas. Co., 732 F. Supp. 1368, 1374 (E.D. Va. 1990) (applying Va. law) ("Chas. H. Tompkins Co."). See Piland Corp. v. REA Constr. Co., 672 F. Supp. 244, 247 (E.D. Va. 1987); Va. Code Ann. § 8.1-205(4) ("The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.").

FN80. Chas. H. Tompkins Co., 732 F. Supp. at 1375.

FN81. Starpower-Verizon Virginia Complaint at 22; Starpower-Verizon South Complaint at 14; Starpower Supplemental Brief at 12-16; Starpower-Verizon Virginia Answer at 32-33; Starpower-Verizon South Answer at 21-22; Verizon Brief at 2-3. We note, however, that a contract is not rendered ambiguous simply because each side argues that the contract plainly means the opposite of what the other side contends. Dominion Savings Bank, FSB v. Costello, 257 Va. 413, 416, 512 S.E.2d 564, 566 (1999) (citing Ross v. Craw, 231 Va. 206, 212-13, 343 S.E.2d 312, 316 (1986)).

FN82. Starpower-Verizon Virginia Complaint at 22-25; Starpower-Verizon South Complaint at 14-17; Starpower Supplemental Brief at 11.

FN83. Verizon Virginia Answer at 34-37; Verizon South Answer at 21-25; Verizon Brief at 13.

FN84. Starpower-Verizon Virginia Joint Statement at 3, ¶¶ 11, 13; at 6, ¶ 29; Starpower-Verizon Virginia Complaint, Exhibit D (First Starpower-Verizon Virginia Agreement) at 8, ¶ 1.61; at 18, ¶ 5.7.2.

FN85. Starpower-Verizon Virginia Joint Statement at 3-4, ¶ 14; at 6, ¶ 29; Starpower-Verizon Virginia Complaint, Exhibit D (First Starpower-Verizon Virginia Agreement) at 18, ¶ 5.7.2.

FN86. Starpower-Verizon Virginia Joint Statement at 3, ¶ 13; Starpower-Verizon Virginia Complaint, Exhibit D (First Starpower-Verizon Virginia Agreement) at 18, ¶ 5.7.5 (emphasis added).

FN87. Starpower-Verizon Virginia Joint Statement at 7, ¶ 30 (emphasis added).

FN88. See Teleconnect Co. v. Bell Telephone Co. of Pa., Memorandum Opinion and Order, 10 FCC Rcd 1626 (1995) ("Teleconnect"), aff'd sub nom. Southwestern Bell

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Tel. Co. v. FCC, 116 F.3d 593 (D.C. Cir. 1997); Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, Memorandum Opinion and Order, 7 FCC Rcd 1619 (1992); Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order, 4 FCC Rcd 1 (1988) ("ONA Plans Order"), aff'd sub nom. California v. FCC, 4 F.3d 1505 (9th Cir. 1993); In the Matter of Southwestern Bell Telephone Company, Order Designating Issues for Investigation, 3 FCC Rcd 2339 (1988) ("SWBT Order").

FN89. Teleconnect, 10 FCC Rcd at 1629, ¶ 12 (emphasis added).

FN90. ONA Plans Order, 4 FCC Rcd at 141, ¶ 274 (emphasis added). See SWBT Order, 3 FCC Rcd at 2341, ¶ 28 (concluding that "switching at the credit card switch is an intermediate step in a single end-to-end communication") (emphasis added).

FN91. Bell Atlantic Remand Order, 206 F.3d at 3.

FN92. Bell Atlantic Remand Order, 206 F.3d at 5.

FN93. See generally Va. Code Ann. § 8.1-205(2) ("A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question.").

FN94. Starpower Supplemental Brief, Attachment 1 (Declaration of Gary J. Ball ["Ball Decl."] at 6, ¶ 16). Although Starpower does not make a similar admission with respect to the Second Starpower-Verizon Virginia Agreement, the centrality of jurisdiction cannot be disputed, given the agreement's specific reference to the actual end-to-end "jurisdictional nature" of calls. See Starpower-Verizon Virginia Joint Statement at 7, ¶ 30.

FN95. Starpower Supplemental Brief, Attachment 1 (Ball Decl. at 6, ¶ 16).

FN96. Our conclusion that the First Starpower-Verizon Virginia Agreement invokes the Commission's end-to-end jurisdictional analysis for determining reciprocal compensation obligations is confirmed by the agreement's definition of "Reciprocal Compensation." Specifically, "Reciprocal Compensation" means as "As Described in the Act," which, in turn, means "... as from time to time interpreted in the duly authorized rules and regulations of the FCC or the [Virginia SCC]." See Starpower-Verizon Virginia Joint Statement at 3, ¶¶ 11, 12; Starpower-Verizon Virginia Complaint, Exhibit D (First Starpower-Verizon Virginia Agreement) at 2, ¶ 1.7; at 8, ¶ 1.61.

FN97. See, e.g., MTS and WATS Market Structure, Memorandum Opinion and Order, 97 FCC2d 682, 711, ¶ 78 (1983) ("[among the variety of users of access service are ... enhanced service providers]"); Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Notice of Proposed Rulemaking, 2 FCC Rcd 4305, 4305, ¶ 1 (1987) (noting that ESPs use "exchange access service"); Southwestern Bell Tel. Co. v. FCC, 153 F.3d 523, 543 (8th Cir. 1998) (affirming the jurisdictionally-mixed nature of ISP-bound traffic).

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FN98. Order on Remand, 16 FCC Rcd at 9178, ¶ 58. See also Order on Remand, 16 FCC Rcd at 9175, ¶ 52 ("ISP traffic is properly classified as interstate, and it falls under the Commission's section 201 jurisdiction"). Because the Commission's treatment of ISP-bound traffic for jurisdictional purposes has remained consistent over time, there is no need for us to consider the effect of any changes in the law regarding reciprocal compensation for the delivery of ISP-bound traffic. See Starpower Supplemental Brief at 27-35.

FN99. Starpower-Verizon Virginia Joint Statement at 3-4, ¶ 14; Starpower-Verizon Virginia Complaint, Exhibit D (First Starpower-Verizon Virginia Agreement) at 6, ¶ 1.44.

FN100. Local Competition Order NPRM, 11 FCC Rcd at 14249, ¶ 230.

FN101. Starpower-Verizon Virginia Joint Statement at 7, ¶ 31.

FN102. 47 C.F.R. § 51.701(b) (amended 2001).

FN103. Starpower Communications, LLC v. Verizon South Inc.; Starpower Communications, LLC v. Verizon Virginia, Inc., File Nos. EB-00-MD-019, EB-00-MD-020, Separate Statement of Commissioner Kevin J. Martin, Approving in Part and Dissenting in Part at 1-2 (citing Bell Atlantic Remand Order, 206 F.3d at 5)).

FN104. 206 F.3d at 5-6.

FN105. Starpower-Verizon Virginia Complaint at 21-22; Starpower Supplemental Brief at 18.

FN106. Starpower-Verizon Virginia Complaint at 34-35; Starpower Supplemental Brief at 19. See also Starpower-Verizon Virginia Complaint at 7, ¶ 20, 22; at 11, ¶ 39; at 13, ¶ 46; at 17-18, ¶¶ 61-62; at 21, ¶ 73.

FN107. Starpower Supplemental Brief at 19.

FN108. Moreover, as Verizon Virginia correctly notes, Starpower was not without a means to recover its costs of delivering ISP-bound traffic, if such traffic were not eligible for compensation under the agreements. See Verizon Brief at 12-13. Nothing prohibited Starpower from looking to its ISP customers to recover its costs.

FN109. See Verizon Brief at 11-13.

FN110. See Starpower Supplemental Brief at 22-24.

FN111. See Verizon Brief at 14.

FN112. Starpower-Verizon Virginia Complaint at 33-34; Starpower-Verizon South Complaint at 21-23; Starpower Supplemental Brief at 24-25.

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FN113. Verizon Brief at 16-17.

FN114. See, e.g., Order on Remand, 16 FCC Rcd at 9158, ¶ 11; at 9176-77, ¶ 55; Declaratory Ruling, 14 FCC Rcd at 3703, ¶ 23.

FN115. See, e.g., Order on Remand, 16 FCC Rcd at 9158, ¶ 11; Declaratory Ruling, 14 FCC Rcd at 3703, ¶ 23.

FN116. See, e.g., Order on Remand, 16 FCC Rcd at 9176, ¶ 55 n.105; General Communication, Inc. v. Alaska Communications Systems Holdings, Inc. and Alaska Communications Systems, Inc. d/b/a ATU Telecommunications d/b/a Anchorage Telephone Utility, Memorandum Opinion and Order, 16 FCC Rcd 2834, 2843, ¶ 22 (2001) ; Declaratory Ruling, 14 FCC Rcd at 3692, ¶ 5.

FN117. Starpower-Verizon Virginia Complaint at 34-35; Starpower-Verizon South Complaint at 23-27; Starpower Supplemental Brief at 24-26.

FN118. Preemption Order, 15 FCC Rcd at 11281, ¶ 9.

FN119. Declaratory Ruling, 14 FCC Rcd at 3704, ¶ 24.

FN120. Declaratory Ruling, 14 FCC Rcd at 3704, ¶ 24.

FN121. Starpower-Verizon Virginia Complaint at 31-35; Starpower-Verizon South Complaint at 23-27; Starpower Supplemental Brief at 24-26.

FN122. Starpower-Verizon Virginia Complaint at 16-17, ¶ 58; Starpower-Verizon South Complaint at 10-11, ¶ 34; Starpower Supplemental Brief at 25-26. Starpower further observes that no provision of the interconnection agreements requires segregation of ISP-bound traffic, and that, in the absence of reciprocal compensation for ISP-bound traffic, the parties would not be compensated for transporting and terminating the traffic. *Id.* We already addressed these assertions in connection with Starpower's argument that the purpose, structure, and substance of the agreements support its interpretation of the term "Local Traffic." See discussion, *supra*, paragraph 34.

FN123. Verizon Virginia Answer at 58.

FN124. See Declaratory Ruling, 14 FCC Rcd at 3704, ¶ 24.

FN125. Furthermore, we decline Starpower's invitation to consider evidence regarding Verizon Virginia's negotiation of and performance under the underlying MFS-Verizon Virginia and MCImetro-Verizon Virginia Agreements. See Starpower Supplemental Brief at 19-22. As stated above, course-of-performance evidence cannot be used to contradict clear contractual language.

FN126. Starpower-Verizon Virginia Complaint at 18-20, ¶¶ 68-69; at 27-38; at 35-39; Starpower-Verizon South Complaint at 19-20; at 27-31; Starpower Supplemental Brief at 4; at 22-23; at 33-34.

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FN127. See Starpower Supplemental Brief at 23-24.

FN128. Indeed, even decisions discussing agreements containing terms that are virtually identical to the Starpower-Verizon Virginia Agreements did not substantively address the import of the language that we find to be controlling. See Complaint of MFS Intelnet of Md., Inc. against Bell Atlantic-Maryland, Inc. for Breach of Interconnection Terms and Request for Immediate Relief, Case No. 8731, Order (Md. P.U.C. June 11, 1999) ("MFS/Bell Atlantic"); Petition for Declaratory Order of TCG Delaware Valley, Inc. for Clarification of Section 5.7.2. of Its Interconnection Agreement with Bell Atlantic-Pennsylvania, Inc., Case No. P-00971256, Opinion and Order (Pa. P.U.C. June 16, 1998) at 22-23.

FN129. Petition of Cox Virginia Telcom, Inc., Case No. PUC970069, Final Order (Va. S.C.C. Oct. 27, 1997) ("Cox Virginia Telecom") at 2 (holding that "calls to ISPs as described in the Cox petition constitute local traffic under the terms of the agreement between Cox and [Verizon Virginia] and that the companies are entitled to reciprocal compensation for the termination of this type of traffic").

FN130. Starpower-Verizon Virginia Complaint at 29-31; Second Supplemental Brief of Starpower Communications, LLC, File Nos. EB-00-MD-19, -20 (filed May 30, 2001) ("Starpower Second Supplemental Brief") at 4-7; Reply Brief of Starpower Communications, LLC, File Nos. EB-00-MD-19, -20 (filed June 6, 2001) ("Starpower Reply Brief") at 3.

FN131. See, e.g., *Angstadt v. Atlantic Mut. Ins. Co.*, 249 Va. 444, 446-47, 457 S.E.2d 86, 87 (1995) (citing *Hampton Roads San. Dist. v. City of Va. Beach*, 240 Va. 209, 213, 396 S.E.2d 656, 658 (1990)). The parties urge us to apply Virginia law of collateral estoppel rather than federal law. See Starpower-Verizon Virginia Complaint at 31; Starpower Second Supplemental Brief at 4; Verizon Virginia Answer at 55-56; Supplemental Reply Brief of Verizon Virginia Inc. and Verizon South Inc., File Nos. EB-00-MD-19, -20 (filed June 6, 2001) ("Verizon Supplemental Reply Brief") at 2. We need not decide whether Virginia law or federal law controls, because federal law similarly requires that an issue actually be litigated for collateral estoppel to apply. See, e.g., 1B J. Moore, *Federal Practice* ¶ 0.405[1], pp. 622-24 (2d ed. 1974) (quoted in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 (1979)).

FN132. Preemption Order, 15 FCC Rcd at 11281, ¶ 9 (emphasis added).

FN133. Starpower-Verizon South Joint Statement at 3, ¶ 10.

FN134. Starpower-Verizon South Joint Statement at 3, ¶ 11.

FN135. The parties agree that Verizon South's General Customer Services Tariff is the tariff to which the relevant provisions of the interconnection agreement refer. Starpower-Verizon South Joint Statement at 3, ¶ 12; Letter from Aaron Panner, counsel for Verizon, to David Strickland, Attorney-Advisor, Market Disputes Resolution Division, Enforcement Bureau, File No. EB-00-MD-19 (dated Jan. 9, 2002).

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FN136. Starpower-Verizon South Joint Statement at 3, ¶ 12.

FN137. Starpower-Verizon South Joint Statement at 3, ¶ 13.

FN138. Starpower-Verizon South Complaint at 14-17; Starpower Supplemental Brief at 16-27.

FN139. Starpower-Verizon South Answer at 20-32; Verizon Brief at 4-13.

FN140. Starpower-Verizon South Joint Statement at 3, ¶ 11.

FN141. Starpower-Verizon South Joint Statement at 7-8, ¶ 36.

FN142. Verizon South Answer at 35; Verizon Brief at 31-32.

FN143. Verizon South Answer at 24; Verizon Brief at 8-10.

FN144. Verizon South Answer at 24; Verizon Brief at 8 (citing Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499 (1996) (subsequent history omitted) ("Local Competition Order")).

FN145. Local Competition Order, 11 FCC Rcd at 16013, ¶ 1034.

FN146. See discussion, *supra*, section III.C.

FN147. See discussion, *supra*, section III.C.

FN148. AT&T Communications of S. States, Inc. v. BellSouth Telecommunications, 223 F.3d 457, 465 (4th Cir. 2000) ("AT&T v. Bell South "). See Verizon South Answer at 24-25; Verizon Brief at 9-10; Supplemental Brief of Verizon Virginia Inc. and Verizon South Inc., File Nos. EB-00-MD-19, -20 (filed May 30, 2001) ("Verizon Supplemental Brief") at 2-3.

FN149. *Id.*

FN150. *Id.*

FN151. See Declaratory Ruling, 14 FCC Rcd at 3703, ¶ 24.

****6895 SEPARATE STATEMENT OF COMMISSIONER KEVIN J. MARTIN, APPROVING IN PART
AND DISSENTING IN PART**

Re: Starpower Communications, LLC v. Verizon South Inc.; Starpower Communications, LLC v. Verizon Virginia Inc., Memorandum Opinion and Order, File Nos. EB-00-MD-19 & EB-00-MD-20

I dissent in part from this Order, because I question its analysis of the two Verizon Virginia interconnection agreements. As the Order acknowledges, both of these agreements require the payment of reciprocal compensation for "Local

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Traffic," and both agreements define "Local Traffic" in terms of where a call "terminates." The Order finds that ISP-bound traffic is not "Local Traffic," because, the Order concludes, under an "end-to-end" analysis, ISP-bound traffic does not terminate within a local service area. The Order does not offer any definition of "termination."

This analysis is essentially the same as that employed by the Commission in its first declaratory ruling on reciprocal compensation, which was subsequently vacated by the D.C. Circuit. See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling, 14 FCC Rcd 3689 (1999). In that ruling, the Commission applied an "end-to-end" analysis and concluded that calls to ISPs do not terminate at the ISP's local server, but instead continue to the "ultimate destination or destinations, specifically at a[n] Internet website that is often located in another state." Id. ¶ 12.

The D.C. Circuit cast serious doubt on this analysis, concluding that the Commission had not adequately explained its reasoning. *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000). Among other things, the Court stated:

[U]nder 47 CFR § 51.701(b)(1), "telecommunications traffic" is local if it "originates and terminates within a local service area." But, observes MCI WorldCom, the Commission failed to apply, or even to mention, its definition of "termination," namely "the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises." Calls to ISPs appear to fit this definition: the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the "called party."

Id. at 6 (citations omitted; emphasis added).

The current Order appears to suffer the same flaws as those identified by the D.C. Circuit. While this proceeding is not the appropriate place to reconsider the Commission's treatment of reciprocal compensation - that issue is again before the D.C. Circuit - I am not comfortable supporting the use of the Commission's end-to-end analysis here without a better explanation and more full response to the questions raised by the D.C. Circuit. Accordingly, I dissent in part from this Order.

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(Cite as: 2003 WL 22518057 (F.C.C.), 18 F.C.C.R. 23625)

H

Federal Communications Commission (F.C.C.)

Memorandum Opinion and Order

*1 IN THE MATTER OF STARPOWER COMMUNICATIONS, LLC, COMPLAINANT,
v.

VERIZON SOUTH INC., RESPONDENT.

File No. EB-00-MD-19

FCC 03-278

Adopted: November 5, 2003

Released: November 7, 2003

**23625 By the Commission:

I. INTRODUCTION

1. In this Order, we grant a supplemental complaint for damages filed by Starpower Communications, LLC ("Starpower") against Verizon South Inc. ("Verizon South") [FN1] pursuant to section 252(e)(5) of the Communications Act of 1934, as amended ("Act") and section 1.722 of the Commission's rules. [FN2] In the liability phase of this proceeding, the Commission found that the parties' interconnection agreement requires Verizon South to pay reciprocal compensation for Starpower's delivery of traffic originated by Verizon South's customers and bound for Starpower's Internet service provider ("ISP") customers. [FN3] Consistent with that finding, we **23626 award damages to Starpower for reciprocal compensation that Verizon South owes for Starpower's delivery of traffic to all of Starpower's ISP customers, including such customers served by Starpower through "virtual NXX" arrangements. [FN4] As explained below, because Verizon South stipulated that it rates and bills these ISP-bound calls as local traffic under its applicable state tariff, and because the interconnection agreement requires Verizon South to pay reciprocal compensation for the termination of local traffic as defined in that tariff, we conclude that Starpower is entitled to the damages it seeks.

II. BACKGROUND

A. The Parties and Their Interconnection Agreement

2. Starpower is a competitive local exchange carrier ("CLEC") licensed to provide local exchange services in Virginia. [FN5] Verizon South is an incumbent local exchange carrier also licensed to provide local exchange services in Virginia. [FN6]

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3. Pursuant to a written agreement ("Agreement"), Starpower and Verizon South interconnected their networks to enable end users subscribing to Starpower's local exchange service to place calls to and receive calls from end users subscribing to Verizon South's local exchange service. [FN7] The Agreement provides that the parties "shall reciprocally terminate POTS calls originating on each others' networks." [FN8] "POTS" stands for "Plain Old Telephone Service" traffic, which "includes local traffic (including EAS) as defined in [Verizon South's] tariff." [FN9] Verizon South's General Customer Services Tariff ("Tariff"), in turn, defines Local Service as "[t]elephone service furnished between customer's stations [sic] located within the same exchange area." [FN10] The Agreement obligates the parties to pay reciprocal compensation "[f]or the termination of local traffic." [FN11] No other provisions of the Agreement govern compensation for **23627 the delivery of local traffic. [FN12] The Agreement currently is in effect and will remain in effect until it is superceded by a new agreement. [FN13]

B. The Liability Order

*2 4. Since April 1999, Verizon South has delivered to Starpower, at the point of interconnection between their respective networks, ISP-bound calls originated by Verizon South's customers. [FN14] Starpower, in turn, delivered these calls to its ISP customers and billed Verizon South for reciprocal compensation for each call. [FN15] Pursuant to the Agreement, Starpower based the reciprocal compensation charges on its records of total minutes of usage for traffic sent by Verizon South to Starpower over trunk groups provided by Starpower. [FN16] Verizon South disputed and refused to pay Starpower's reciprocal compensation charges for delivering the ISP-bound traffic, [FN17] claiming that such traffic is not subject to reciprocal compensation under the Agreement because such traffic is jurisdictionally interstate, not local. [FN18] Hence, Starpower initiated legal processes to recover reciprocal compensation payments from Verizon South, which ultimately resulted in the Commission's Liability Order. [FN19]

5. The Liability Order found that the Agreement obligates Verizon South to pay reciprocal compensation to Starpower for whatever calls Verizon South bills to its own customers as local calls under the Tariff, regardless of whether a call is jurisdictionally interstate. [FN20] The Liability Order so held because the Agreement expressly links compensability for reciprocal compensation purposes to Verizon South's own customer billing determinations. [FN21] Because it was undisputed that Verizon South bills ISP-bound traffic as local calls under its Tariff, the Commission concluded that such calls are compensable under the Agreement, and that Verizon South therefore must pay reciprocal compensation to Starpower for the delivery of such **23628 calls. [FN22] In reaching this conclusion, the Commission relied on the parties' stipulation that "when a Verizon South customer places a call to an ISP, or to the Internet through an ISP, using a telephone number associated with the caller's local calling area, Verizon South rates and bills such customer, if at all, for a local call pursuant to the terms of [the Tariff]." [FN23]

6. Pursuant to Commission rules, [FN24] Starpower then filed its Supplemental Complaint seeking an order requiring Verizon South to pay all past due reciprocal compensation, including interest, and all future reciprocal compensation as it

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accrues, for delivering traffic identified as local traffic under the terms of the Agreement, including ISP-bound traffic. [FN25] Verizon South challenges Starpower's entitlement to such damages, arguing for the first time, inter alia, that the calls at issue constitute virtual NXX traffic, which allegedly is not compensable under the Liability Order's interpretation of the Agreement. [FN26]

C. Virtual NXX Traffic

7. Telephone numbers consist of ten digits in the form NPA-NXX-XXXX. The first three digits, or the "NPA," refer to the area code. The second three digits, or the "NXX," refer to the central office code. [FN27] Pursuant to standard industry practice, an NXX code generally corresponds to a particular geographic area -- or "rate center" -- served by a local exchange carrier ("LEC"). [FN28] By contrast, "virtual NXX" codes are central office codes that correspond to a ****23629** particular rate center but are assigned to a customer located in a different rate center. [FN29] For example, if a customer physically located in a rate center in Key West, Florida, received a telephone number containing an NXX code associated with a rate center in Miami, Florida, that customer would have a virtual NXX code.

***3** 8. The disputed traffic in this proceeding consists exclusively of calls from Verizon South's customers in Virginia that Starpower delivered to its ISP customers' modem banks that are physically located at Starpower's switch in Lanham, Maryland. [FN30] Although Lanham, Maryland is outside the local calling area of substantially all of Verizon South's customers located in Virginia, Starpower assigned its ISP customers in Lanham, Maryland NPA-NXX telephone numbers that correspond with Verizon South's local calling areas in Northern Virginia -- i.e., Starpower utilized virtual NXX codes. [FN31] Consequently, when a Verizon South customer physically located in Northern Virginia calls a Starpower ISP customer whose modem is physically located in Lanham, Maryland, the Verizon South customer dials a number that ordinarily would correspond with a caller physically located in Northern Virginia.

9. For purposes of billing its own customers, Verizon South rates calls to Starpower's customers as either "local" or "toll" based on the NPA-NXX code assigned to the Starpower customer, not based on the physical location of the Starpower customer. [FN32] In other words, for each call, Verizon South compares the NPA-NXX of the calling party's telephone number with the NPA-NXX of the called party's number, and if the NPA-NXXs correspond to the same local calling area, Verizon South rates and bills the call as a local call under its Tariff, regardless of whether the two parties actually are physically located in the same local calling area. Consequently, when billing its own customers, Verizon South rated as local all calls placed by its customers in Northern Virginia and delivered by Starpower to ISP modem banks in Lanham, Maryland, because the NPA-NXXs for both the calling and called parties corresponded to Verizon South's Northern Virginia local calling areas. [FN33] In the absence of this virtual NXX arrangement that Starpower used, Verizon South's Northern Virginia customers would have incurred toll charges for calls placed to Starpower's Lanham, Maryland ISP customers. [FN34]

****23630** 10. Verizon South provides a service to its own customers that is

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similar to the virtual NXX service Starpower provides to its ISP customers. Specifically, Verizon South's Foreign Exchange service permits a customer to obtain a telephone number associated with a local exchange area in which that customer has no physical presence. [FN35] Verizon South rates calls to and from its Foreign Exchange customers as local or toll based upon the telephone number assigned to the customer (not the physical location of the customer), [FN36] and it bills and collects reciprocal compensation for calls that it rates as local. [FN37]

III. DISCUSSION

A. The Agreement Obligates Verizon South to Pay Starpower Reciprocal Compensation for Delivering Virtual NXX Calls that Verizon South Bills to Its Own Customers as Local Calls.

11. The Agreement obligates the parties to pay reciprocal compensation for the termination of "local traffic ... as defined in [Verizon South's] tariff." [FN38] Thus, as discussed above, the Liability Order determined that whatever traffic Verizon South rated and billed its own customers as local under the Tariff is compensable traffic under the Agreement. Accordingly, based on Verizon South's conduct in rating and billing calls to ISPs, the Liability Order held that Verizon South owed reciprocal compensation for Starpower's delivery of ISP-bound calls. [FN39] Central to this finding was Verizon South's stipulation that when one of its customers places a call to an ISP, using a telephone number associated with the caller's local calling area, Verizon South rates and bills the customer for a local call pursuant to the terms of the Tariff. [FN40] Although Verizon South argued during the liability phase that it would be unfair for the Commission to rely on Verizon South's manner of billing ISP calls to determine what traffic is local under the Tariff, [FN41] the Commission soundly rejected the argument because, in the Agreement, Verizon South voluntarily linked the compensability of traffic to Verizon South's own classification of traffic in the Tariff. [FN42]

*4 12. Despite these findings, Verizon South argues that the Liability Order only held that, under the Agreement, the Tariff's definition of "local service" is controlling, and made no conclusion that ISP-bound traffic is compensable local traffic. [FN43] Verizon South further argues **23631 that the Tariff's definition of "local service" hinges on the physical location of the calling and called parties, and not on the parties' respective telephone numbers. [FN44] To support this argument, Verizon South observes that the Tariff defines local service as "telephone service furnished between customer's stations located within the same exchange area." [FN45] Thus, in Verizon South's view, "local service" under the Tariff consists solely of calls between customer stations physically located in the same calling area. [FN46] Consequently, Verizon South asserts that, because virtual NXX traffic does not travel between customer stations physically located within the same local exchange areas, it is not compensable "local service" as defined in the Tariff. [FN47] Therefore, according to Verizon South, it owes no reciprocal compensation for Starpower's delivery of virtual NXX traffic from Verizon South's customers in Northern Virginia to Starpower's ISP customers in Lanham, Maryland.

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13. Verizon South misapprehends the Liability Order, which expressly found that Verizon South's conduct in rating and billing ISP-bound traffic determines whether traffic is local under the Tariff. [FN48] Regardless of Verizon South's present construction of its Tariff, [FN49] Verizon South previously stipulated that, for rating and billing purposes, it considers the traffic at issue to be local under the Tariff. [FN50] In other words, Verizon South stipulated that, in determining whether traffic is local under the Tariff, it looks to the respective telephone numbers of the call's parties, not the parties' physical location. Verizon South cannot now distance itself from this stipulation by arguing that local traffic, in fact, is something different from what it plainly considered local traffic to be when rating and billing calls under the Tariff. [FN51] Thus, Verizon South's acknowledged treatment of virtual NXX calls as local under the Tariff establishes its contractual obligation to pay reciprocal compensation for Starpower's delivery of such calls under the Agreement. [FN52]

14. We also find relevant Verizon South's concession that it engaged in the very same conduct that it now alleges is unlawful when done by Starpower. Specifically, Verizon South billed and collected reciprocal compensation for calls placed by a CLEC customer to a Verizon South Foreign Exchange customer with a "local" NXX, even when those calls were between **23632 parties physically located in different local calling areas. [FN53] Verizon South has failed to demonstrate why its contractual obligation to Starpower should be different from its own practice.

15. Even if we focus exclusively on the language of the Tariff, as Verizon South urges us to do, [FN54] Verizon South's argument that virtual NXX traffic is not compensable under the Agreement still fails. First and foremost, the Tariff does not expressly address whether the "location" of a customer station turns on physical presence or number assignment, so Verizon South's course of performance in implementing the Tariff - which relied exclusively on the latter - is compelling. [FN55] Moreover, other provisions of the Tariff suggest that a customer's physical location is not determinative in defining local traffic. The Tariff's definition of "local calling area," for example, refers to "a geographical area in which a customer has access for placing and receiving local calls at a fixed monthly rate or at a lower basic monthly rate plus usage charge for each local call completed." [FN56] The definition does not refer to a geographical area in which a customer is physically located. [FN57] Similarly, the Tariff defines "exchange service" in terms of the manner in which calls are billed, rather than the physical location of the customer: "Exchange service is a general term describing as a whole the facilities provided for local intercommunication, together with the right to originate and receive a specified or an unlimited number of local messages at charges in accordance with the provisions of this tariff." [FN58] This comports with the Tariff's specification that customers subscribing to Verizon South's Foreign Exchange service pay the same local service rate to call the "foreign" exchange in which they are not physically located as customers who are physically located within the same local exchange area. [FN59] In short, the Tariff's conception of local traffic includes all traffic for which a customer is billed at a local rate, regardless of the customer's physical location. [FN60]

*5 16. Moreover, Verizon South offers no persuasive evidence that, at the time

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the parties ****23633** entered into the Agreement, they intended that a customer's physical location rather than number assignment would dictate compensation obligations under the Agreement. In fact, the record shows just the opposite.

17. First, as stated repeatedly above, for purposes of billing its own customers, Verizon South always has rated calls to Starpower telephone numbers as either local or toll based on the NPA-NXX code assigned to the Starpower customer. [FN61] And at all relevant times, industry practice among local exchange carriers similarly appears to have been that calls are designated as either local or toll by comparing the NPA-NXX codes of the calling and called parties. [FN62] Indeed, Verizon South apparently lacks the technical capability to identify virtual NXX calls as non-local based on the physical end points of the call. [FN63] Furthermore, Verizon South presents no evidence in this record that the parties proposed or discussed alternatives to the industry-wide system of rating calls by NPA-NXX. [FN64] Finally, at the time the parties entered into the Agreement, no court ****23634** or state commission (including Virginia's) or Commission decision had declared virtual NXX arrangements to be unlawful or held that virtual NXX traffic was not subject to reciprocal compensation; [FN65] and state commissions that since have addressed the issue have split on whether virtual NXX calls should be treated as local traffic subject to reciprocal compensation. [FN66] In sum, neither the legal context in which the parties entered the Agreement, nor any other evidence in this record, [FN67] provides any basis to conclude that the parties intended to link reciprocal compensation obligations to the physical location of the parties' customers. [FN68]

****23635** B. We Award Interest to Starpower in Accordance with Virginia Law.

18. The parties agree that if Starpower prevails, it should receive prejudgment interest on any damages awarded. [FN69] They disagree, however, on the rate of interest that we should apply. Starpower argues that because Virginia law governs the parties' obligations under the Agreement, Virginia law should supply the appropriate interest rate. [FN70] Starpower contends that section 6.1-330.54 of the Virginia Code provides an annual interest rate of nine percent for both prejudgment and post-judgment interest on contractual obligations, where no different rate is fixed by the contract. [FN71] In contrast, Verizon South argues that, consistent with past precedent, we should award prejudgment interest equal to the Internal Revenue Service Rate for overpayments and underpayments ("IRS rate"), and that this rate will ensure that Starpower receives proper compensation for the time-value of money. [FN72] Verizon South also contends that section 8.01-382 of the Virginia Code, a companion statute to section 6.1-330.54, renders the Virginia interest rate inapplicable, because it provides that interest applies only to "action[s] at law or suit[s] in equity," not to Starpower's regulatory claim regarding the interpretation and enforcement of an interconnection agreement under the Act. [FN73]

*6 19. We agree with Starpower. It is well established that the award of prejudgment interest in complaint proceedings is a matter left to our sound discretion, and is one in which we are guided by considerations of fairness. [FN74] In awarding prejudgment interest in this proceeding, ****23636** we look primarily to the Commission's finding in the Liability Order that Virginia law

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supplies the applicable rules of contract interpretation. [FN75] Indeed, the parties agreed that the Agreement would be governed and construed in accordance with Virginia law. [FN76] Accordingly, we conclude that it is appropriate and fair to award prejudgment interest at the Virginia statutory interest rate applicable to judgments enforcing contracts, namely, section 6.1-330.54 of the Virginia Code.

20. We disagree with Verizon South that we are barred from applying a Virginia interest rate in this case because this is not an action at law or a suit in equity. [FN77] Verizon South cites no authority holding that section 6.1-330.54 is inapplicable to an award on a contract entered by a regulatory agency in an adjudicatory context. In fact, the only Virginia statute Verizon South addresses is section 8.01-382. Although section 8.01-382 begins with the phrase "[i]n any action at law or suit in equity," section 6.1-330.54 does not, and instead applies without qualification to "an action arising from a contract." Starpower argues persuasively that section 8.01-382 is a procedural statute that governs the manner of entering judgments in court proceedings and does not specify an interest rate at all. [FN78] Indeed, section 8.01-382 looks to section 6.1-330.54 to supply the statutory interest rate, which, in contract actions, is nine percent. [FN79] The only alternative Verizon South offers is for us to apply the IRS rate, [FN80] which we have done in other proceedings. Although it would not be improper to apply the IRS rate, we find the Virginia rate to be the better choice, given the parties' and the Commission's conclusion that Virginia law generally controls the parties' rights in this proceeding. Accordingly, we award prejudgment interest at the rate specified in section 6.1-330.54 of the Virginia Code.

21. For all the same reasons, we also conclude that it is appropriate and fair to apply the nine percent rate contained in section 6.1-330.54 to post-judgment interest due to Starpower. [FN81] Starpower argues that the nine percent rate should apply until the earlier of the date of payment by Verizon South or the entry of a judicial judgment on Starpower's claim, because an order by the Commission does not have the legal effect of a federal court judgment. [FN82] We need not reach the issue of when prejudgment interest ends and post-judgment interest begins, because section 6.1-330.54 establishes a nine percent rate for both prejudgment and post-judgment interest.

****23637 C. Damages Calculation**

*7 22. The parties have stipulated that, for traffic exchanged through May 2003, the amount of reciprocal compensation that has been invoiced and remains unpaid totals \$12,059,149. [FN83] The parties further stipulate that any interest due to Starpower should accrue beginning 30 days from the date of each invoice that Starpower sent to Verizon South. [FN84] Based on these stipulations and our findings above, we award damages to Starpower in the amount of \$12,059,149, plus all reciprocal compensation amounts due and owing between June 1, 2003 and the date of this Order under the analysis set forth herein, plus interest, as set forth below.

IV. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), and

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252(e)(5) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 252(e)(5), that the Supplemental Complaint filed by Starpower is hereby GRANTED.

24. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 252(e)(5) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 252(e)(5), that Verizon South shall pay Starpower, within 90 days of release of this Order, damages in the amount of \$12,059,149, plus all reciprocal compensation amounts due and owing between June 1, 2003 and the date of this Order under the analysis set forth herein, plus interest at an annual rate of nine percent, computed beginning 30 days from the date of each invoice that Starpower sent to Verizon South and continuing through the date of payment.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Secretary

FN1. Supplemental Complaint for Damages, File No. EB-00-MD-19 (filed June 7, 2002) ("Supplemental Complaint"). On November 28, 2000, Starpower filed its initial complaint. See Complaint, File No. EB-00-MD-19 (filed Nov. 28, 2000) ("Complaint"). In a December 8, 2000 Supplemental Submission, Starpower requested that, in addition to the relief sought in the Complaint, the Commission enter an award of damages in a subsequent phase of the proceeding. Supplemental Submission, File No. EB-00-MD-19 (filed Dec. 8, 2000) ("Supplemental Submission") at 2. The Commission treated the Supplemental Submission as a motion to bifurcate the issue of liability from the issue of damages, and, on January 16, 2001, granted the motion. Letter dated January 19, 2001 from William H. Davenport, Special Counsel, Market Disputes Resolution Division, Enforcement Bureau, to Russell M. Blau and Michael L. Schor, counsel for Starpower, and Lawrence W. Katz and Aaron M. Panner, counsel for Verizon South, File No. EB-00-MD-19 (rel. Jan. 19, 2001) at 1. See 47 C.F.R. § 1.722.

FN2. 47 U.S.C. § 252(e)(5); 47 C.F.R. § 1.722.

FN3. Starpower Communications, LLC v. Verizon South Inc., Memorandum Opinion and Order, 17 FCC Rcd 6873 (2002) ("Liability Order"), rev'd on other grounds sub nom. Starpower Communications, LLC v. FCC, 334 F.3d 1150 (D.C. Cir. 2003) (reversing portion of order ruling in Verizon Virginia Inc.'s favor with respect to two different interconnection agreements than those at issue here).

FN4. See ¶ 8, infra, for a description of virtual NXX arrangements.

FN5. Report and Revised Joint Statement, File No. EB-00-MD-19 (filed Aug. 14, 2002) ("Damages Phase Joint Statement") at 2, ¶ 1.

FN6. Damages Phase Joint Statement at 2, ¶ 1.

FN7. Joint Statement, File No. EB-00-MD-19 (filed Jan. 12, 2001) ("Liability Phase

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Joint Statement") at 2, ¶ 9. By letter dated February 17, 1998, Starpower notified Verizon South that Starpower had elected to obtain interconnection with Verizon South by adopting, pursuant to section 252(i) of the Act (47 U.S.C. § 252(i)), the interconnection agreement that Verizon South had entered into with MFS Intelenet of Virginia on September 5, 1996 ("Verizon South-MFS Intelenet Agreement"). The Virginia State Corporation Commission ("Virginia SCC") approved the Verizon South-MFS Intelenet Agreement on July 9, 1997. Joint Statement, File No. EB-00-MD-19 (filed Jan. 12, 2001) ("Liability Phase Joint Statement") at 2, ¶ 5. The Virginia SCC declined to take any action to approve Starpower's adoption of the Verizon South-MFS Intelenet Agreement, because the adopted agreement had not been negotiated or arbitrated. Id. at 2, ¶ 8. Subsequently, by letter dated October 1, 1998, Starpower and Verizon South "agree[d] they will honor the [section] 252(i) adoption by ... Starpower of the rates terms and conditions of the [Verizon South-MFS Intelenet Agreement] as effective and binding upon ... [Verizon South] and Starpower in accordance with the 252(i) adoption letter[] executed by the parties on ... March 11, 1998...." Id. at 2, ¶ 9.

FN8. Liability Phase Joint Statement at 3, ¶ 10.

FN9. Liability Phase Joint Statement at 3, ¶ 11.

FN10. Liability Phase Joint Statement at 3, ¶ 12.

FN11. Liability Phase Joint Statement at 3, ¶ 13.

FN12. Liability Phase Joint Statement at 4, ¶ 18.

FN13. Supplemental Joint Statement, File No. EB-00-MD-19 (filed Oct. 26, 2001) ("Liability Phase Supplemental Joint Statement") at 2; Damages Phase Joint Statement at 6, ¶ 23.

FN14. Damages Phase Joint Statement at 4, ¶¶ 9-10.

FN15. Damages Phase Joint Statement at 4, ¶¶ 10-11.

FN16. Supplemental Complaint at 6-7, ¶¶ 18-21; Damages Phase Joint Statement at 4, ¶ 11.

FN17. Verizon South did not dispute any reciprocal compensation charges billed by Starpower for non-ISP-bound traffic. Supplemental Complaint at 7-8, ¶¶ 22- 23.

FN18. Damages Phase Joint Statement at 4, ¶ 12.

FN19. In 1999, Starpower filed petitions with the Virginia SCC seeking a declaration requiring Verizon South to pay reciprocal compensation for Starpower's delivery of ISP-bound traffic under the terms of the parties' Agreement. The Virginia SCC declined jurisdiction. Starpower then filed a petition with this Commission requesting that, pursuant to section 252(e)(5) of the Act, 47 U.S.C. § 252(e)(5), the Commission preempt the jurisdiction of the Virginia SCC over the reciprocal compensation dispute. Liability Order, 17 FCC Rcd at 6880-81, ¶¶ 18-19.

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The Commission granted the preemption petition, stating that it would resolve the question of whether the Agreement requires Verizon South to pay reciprocal compensation to Starpower for the delivery of ISP-bound traffic. Id. at 6880-81, ¶¶ 18-20 (citing Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, Memorandum Opinion and Order, 15 FCC Rcd 11277, 11281, ¶ 9 (2000)). Starpower then filed its Complaint. See note 1, supra.

FN20. Liability Order, 17 FCC Rcd at 6892-93, ¶¶ 44-46, 49.

FN21. Liability Order, 17 FCC Rcd at 6892-93, ¶¶ 44-46, 49.

FN22. Liability Order, 17 FCC Rcd at 6892-93, ¶¶ 44-46, 49.

FN23. Liability Phase Joint Statement at 7-8, ¶ 36. See Liability Order, 17 FCC Rcd at 6892, ¶ 45.

FN24. 47 C.F.R. §§ 1.721, 1.722.

FN25. Supplemental Complaint at 8-9. Verizon South filed a Petition for Review of the Liability Order in the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals subsequently dismissed the Petition, holding that because the Commission had not yet resolved Starpower's claim for damages under the Agreement, the Liability Order is not a final agency action subject to court review. *Verizon South Inc. v. FCC*, No. 02-1131, Order (D.C. Cir. Sept. 26, 2002).

FN26. Answer of Verizon South Inc. to Starpower's Supplemental Complaint for Damages, File No. EB-00-MD-19 (filed June 27, 2002) ("Supplemental Answer") at 2-3, 4-6, 12-13, ¶¶ 4-9; Opening Brief on the Merits of Verizon South Inc., File No. EB-00-MD-19 (filed Oct. 2, 2002) ("Verizon South Opening Brief") at 2-8; Response Brief on the Merits of Verizon South Inc., File No. EB-00-MD-19 (filed Oct. 11, 2002) ("Verizon South Response Brief") at 3; Reply Brief on the Merits of Verizon South Inc., File No. EB-00-MD-19 (filed Oct. 18, 2002) ("Verizon South Reply Brief") at 2-3. Because we address Verizon South's virtual NXX defense on its merits, we do not address the question of whether Starpower's complaint in the liability phase of this proceeding provided sufficient notice to Verizon South of Starpower's intent to collect compensation for virtual NXX calls that Verizon South should have raised its virtual NXX defense in its answer in the liability phase. See 47 C.F.R. §§ 1.720(a) ("[a]ll matters concerning a ... defense ... should be pleaded fully and with specificity"); 1.724(b) (the defendant's answer "shall advise the complainant and the Commission fully and completely of the nature of any defense, and shall respond specifically to all material allegations of the complaint"); Starpower's Reply to Verizon South's Answer, File No. EB-00-MD-19 (filed July 2, 2002) ("Starpower Reply") at 4-9; Opening Brief of Starpower Communications, LLC, File No. EB-00-MD-19 (filed Sept. 27, 2002) ("Starpower Opening Brief") at 5-22; Reply Brief of Starpower Communications, LLC, File No. EB-00-MD-19 (filed Oct. 18, 2002) ("Starpower Reply Brief") at 6-11 (arguing that Verizon South's defense should be barred as untimely). Contra

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Verizon South Response Brief at 11-18 (arguing that Starpower did not make clear in its original complaint that it was claiming compensation for virtual NXX traffic).

FN27. See 47 C.F.R. §§ 52.7(a), (c)

FN28. See, e.g., In the Matter of Numbering Resource Optimization, Second Report and Order, Order on Reconsideration in CC Docket No. 96-98 and CC Docket No. 99-200, and Second Further Notice of Proposed Rulemaking in CC Docket No. 99-200, 16 FCC Rcd 306, 384 n.11 (2000). Rate centers are telephone company-designated geographic locations that are assigned vertical and horizontal coordinates within an area code. Newton's Telecom Dictionary, 17th Edition, at 570. The local calling area for a LEC is based on a defined list of rate centers. Calls placed from one rate center to another rate center not on the local list for the caller's rate center generally are considered toll calls. Id.; Starpower Opening Brief, Attachment A (Declaration of Rahul Dedhiya ("Dedhiya Declaration")) at 4, ¶ 11; Verizon Opening Brief, Attachment 1 (Declaration of William Munsell ("Munsell Declaration")) at 2, ¶ 5.

FN29. Developing a Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9652 n.188 (2001) ("Intercarrier Compensation Proceeding"); Starpower Opening Brief, Attachment A (Dedhiya Declaration) at 4-5, ¶ ¶ 11-12; Verizon Opening Brief, Attachment 2 (Reply Declaration of William Munsell ("Munsell Reply Declaration")) at 2-3, ¶ 5 (stating that a call may or may not be routed to the rate center associated with the NPA-NXX of the called number).

FN30. Damages Phase Joint Statement at 5, ¶ 17.

FN31. Damages Phase Joint Statement at 5, ¶ 15.

FN32. Damages Phase Joint Statement at 5, ¶ 16.

FN33. Damages Phase Joint Statement at 5, ¶ 17.

FN34. Damages Phase Joint Statement at 5, ¶ 15.

FN35. Damages Phase Joint Statement at 6, ¶ 24. Verizon South imposes a separate charge on its Foreign Exchange customers for the ability to make and receive calls in a foreign exchange without imposition of per-minute toll charges. Id. at 6, ¶ 25.

FN36. Damages Phase Joint Statement at 6, ¶ 25.

FN37. Damages Phase Joint Statement at 6, ¶ 26.

FN38. Liability Phase Joint Statement at 3, ¶¶ 11, 13; Liability Order, 17 FCC Rcd at 6892, ¶ 42.

FN39. Liability Order, 17 FCC Rcd at 6892-93, ¶¶ 44-45, 49.

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FN40. Liability Order, 17 FCC Rcd at 6892, ¶ 45 (citing Liability Phase Joint Statement at 7-8, ¶ 36).

FN41. Liability Order, 17 FCC Rcd at 6893, ¶ 46.

FN42. Liability Order, 17 FCC Rcd at 6893, ¶ 46.

FN43. Supplemental Answer at 2-3, 4-6, 12-13, ¶¶ 4-9; Verizon South Opening Brief at 2-8; Verizon South Response Brief at 3; Verizon South Reply Brief at 2-3. We note that the Agreement requires compensation for the termination of "local traffic," as defined in the Tariff, and does not refer to the term "local service."

FN44. Supplemental Answer at 2-3, 4-6, 12-13, ¶¶ 4-9; Verizon South Opening Brief at 2-8; Verizon South Reply Brief at 2-3.

FN45. Verizon South Opening Brief at 3 (quoting Attachment 1-B (Tariff), § 1 at 8 ("Local Service")).

FN46. Supplemental Answer at 2-3, 4-6, 12-13, ¶¶ 4-9; Verizon South Opening Brief at 2-8; Verizon South Reply Brief at 2-3.

FN47. Supplemental Answer at 2-3, 4-6, 12-13, ¶¶ 4-9; Verizon South Opening Brief at 2-8; Verizon South Reply Brief at 2-3.

FN48. Liability Order, 17 FCC Rcd at 6892, ¶ 45.

FN49. As discussed in paragraph 15, *infra*, we find Verizon South's interpretation of its Tariff to be unpersuasive.

FN50. Liability Order, 17 FCC Rcd at 6892-94, ¶¶ 45-46, 49.

FN51. See Starpower Opening Brief at 15-18 (arguing that under both federal law and Virginia law, a stipulation is an admission that cannot be set aside at the whim of the admitting party) (citations omitted).

FN52. Liability Order, 17 FCC Rcd at 6894, ¶ 49 ("given the ... Agreement's reference to the Tariff, whatever calls Verizon South bills to its customers as local calls under the Tariff must be compensable local calls under the ... Agreement").

FN53. Damages Phase Joint Statement at 6, ¶ 26; Verizon Opening Brief, Attachment 1 (Munsell Declaration) at 4-5, ¶ 10. See Opposing Brief of Starpower Communications, LLC, File No. EB-00-MD-19 (filed Oct. 11, 2002) ("Starpower Opposing Brief") at 8; Restatement (Second) of Contracts § 202(4) (2003) ("Restatement of Contracts") (states that, in circumstances similar to those here, course of performance evidence is given "great weight").

FN54. Verizon South Opening Brief at 5-8.

FN55. See, e.g., Restatement of Contracts § 202(4).

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FN56. August 2 Letter, Attachment (Tariff), § 1 at 8 ("Local Calling Area") (emphasis added).

FN57. Accordingly, Verizon South is incorrect when it asserts that, in order to receive local calls under the Tariff, customers must be physically located within the local calling area. Verizon South Opening Brief at 6. As discussed above, the definition of "local calling area" does not impose such a requirement, focusing instead on whether customers have "access" to local calls at a local rate.

FN58. August 2 Letter, Attachment A (Tariff), § 1 at 5 ("Exchange Service").

FN59. Starpower Opposing Brief at 5-6 & Attachment A (Tariff), § 9.1.3(d) ("Foreign Exchange Service").

FN60. Verizon South argues that Foreign Exchange traffic is not local traffic under the Tariff, because a customer purchases Foreign Exchange service, and pays a separate charge, in order to avoid toll charges that otherwise would apply to a call between customer stations located in different exchange areas. Verizon South Response Brief at 9-10; Verizon South Reply Brief at 3-4. This argument misses the point. Verizon South admits that it rates calls to and from its Foreign Exchange customers as local or toll based upon the telephone number assigned to the customer, not the physical location of the customer. Damages Phase Joint Statement at 6, ¶ 25. Therefore, calls placed between a Foreign Exchange customer and another customer, both of whom have phone numbers that correspond to the same local calling area, are treated as local calls under the Tariff, regardless of the separate charge.

FN61. Liability Phase Joint Statement at 5, ¶ 16.

FN62. Starpower Opposing Brief at 5-6, 17 (citing Attachment A (Dedhiya Declaration) at 5, ¶ 14 ("At the time a call is received at a local exchange switch, the only information available to that switch to determine the treatment of the call is the originating and terminating telephone numbers. To the best of my knowledge, all local exchange carriers use the NPA-NXX codes, and not the physical location of each customer, to determine whether calls are local or toll for purposes of routing, rating, and billing their end users"); Verizon Opening Brief, Attachment 1-A (Engineering and Operations in the Bell System 63 (2d ed. 1983)) (stating in reference to Foreign Exchange service that "calls to other customers in the distant exchange are then treated as local calls instead of toll calls"). Indeed, Verizon Virginia Inc. ("Verizon Virginia") acknowledged in the Commission's Virginia Arbitration Proceeding that rating a call based on the NPA-NXX code assigned to the customers is the established rating system used by all local exchange carriers, including Verizon Virginia. Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, Memorandum Opinion and Order, 17 FCC Rcd 27039, 27181, ¶ 300 (Wireline Comp. Bur. 2002) ("Virginia Arbitration Proceeding"), apps. for review and recon. pending. Although Verizon Virginia, formerly known as Bell Atlantic-Virginia, Inc., and Verizon South, formerly known as GTE South

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Incorporated ("GTE South"), were separate companies at the time the parties entered into the Agreement, nothing in the record suggests that GTE South did not follow standard industry practice in rating calls based on the NPA-NXX codes of the call's parties.

FN63. Virginia Arbitration Proceeding, 17 FCC Rcd at 27181, ¶ 300 (noting that virtual NXX traffic cannot be distinguished from other local traffic at Verizon's end office switches, and parties to an interconnection agreement would have to conduct a traffic study or develop a factor to identify the percentage of virtual NXX traffic for which Verizon would not pay reciprocal compensation). In choosing between the parties' proposals in the Virginia Arbitration Proceeding, the Wireline Competition Bureau adopted contract language one consequence of which was to subject virtual NXX calls to reciprocal compensation. The Wireline Competition Bureau did not address the legal question of whether incumbent local exchange carriers have an affirmative obligation under the Act to provide reciprocal compensation for virtual NXX traffic. Nevertheless, as the Commission has emphasized previously, parties to an interconnection agreement have been and remain free to negotiate compensation arrangements for virtual NXX traffic pursuant to sections 251 and 252 of the Act. Application by Verizon Maryland Inc., et al. to Provide In-Region, InterLATA Services In Maryland, Washington, D.C., and West Virginia, Memorandum Opinion and Order, 18 FCC Rcd 5212, 5314 n.603 (2003).

FN64. Verizon South argues that the parties' inability to accurately identify virtual NXX traffic from other local traffic is irrelevant, because Starpower has acknowledged that all of the traffic at issue was virtual NXX traffic. Verizon South Opening Brief at 10 n.5; Verizon South Reply Brief at 6. We find this argument to be unpersuasive, given that the Agreement includes no procedure for distinguishing between the two types of traffic, which, again, indicates that the parties did not intend to characterize traffic according to the physical location of customers. In addition, Verizon South argues for the first time in its Reply Brief that Starpower does not maintain that, on a going-forward basis, it would be difficult to distinguish between non-local traffic and local traffic based on whether virtual NXX traffic was involved. Verizon South Reply Brief at 6. However, if Verizon South currently possessed the technical capability to distinguish traffic for reciprocal compensation purposes (and it clearly did not in 2002, see note 63, supra), we believe Verizon South would have brought this fact to our attention.

FN65. See Letter to Russell M. Blau and Michael L. Shor, Counsel for Starpower, and Aaron M. Panter, Counsel for Verizon South, from Lisa B. Griffin, Deputy Chief, Market Disputes Resolution Division, FCC Enforcement Bureau, File No. EB-00-MD-19 (dated Aug. 16, 2002) (directing the parties to file a joint addendum containing "all state commission decisions, including Virginia and Maryland state decisions, relevant to Verizon South's 'virtual' NXX defense," and that "the parties' briefs, in discussing Verizon's 'virtual' NXX defense, shall discuss all Commission orders and proceedings relevant to the defense..."); Joint Addendum (and cases contained therein). Neither party asserts that the Virginia SCC has addressed the virtual NXX issue. But cf. Letter to Marlene H. Dortch, Secretary, FCC, from Russell M. Blau, Counsel for Starpower, File No. EB-00-MD-19 (filed May 23, 2003) ("May 23 Letter"), Attachment A (Application of MFS Intelenet of

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Pennsylvania, Inc., et al., Opinion and Order-Short Form, 1996 Pa. PUC LEXIS 196 (Pa. PUC July 31, 1996) at 8) (imposing a regulatory requirement, that does not exist in the present case, on CLECs to comply with the incumbent LEC's local calling area)).

FN66. Starpower Opposing Brief at 11-12 (and cases cited therein); Verizon South Opening Brief at 10-12 (and cases cited therein). The Commission cases Verizon South cites do not directly address the virtual NXX issue, and were issued after the parties entered into the Agreement. See Verizon South Opening Brief at 8; Verizon South Reply Brief at 5 (both citing Mountain Communications, Inc. v. Qwest Communications International, Inc., Order on Review, 17 FCC Rcd 15135 (2002), affirming Mountain Communications, Inc. v. Qwest Communications International, Inc., Memorandum Opinion and Order, 17 FCC Rcd 2091 (Enf. Bur. 2002) (addressing a wide area calling arrangement between Qwest and a wireless carrier)); Verizon South Opening Brief at 9-10 (citing AT&T Corporation, MCI Telecommunications Corporation v. Bell Atlantic-Pennsylvania, Memorandum Opinion and Order, 14 FCC Rcd 556, 587, 590, ¶¶ 71- 80 (1998), recon. denied, 15 FCC Rcd 7467 (2000) (adjudicating formal complaints concerning the assessment of carrier common line charges for interstate calls involving optional calling services, including Foreign Exchange service, and not addressing intercarrier compensation for virtual NXX calls under section 251 or 252 of the Act)).

FN67. Verizon South asserts that, regardless of how it rated and billed virtual NXX traffic, it never intended to allow Starpower to collect reciprocal compensation for those calls under the Agreement, and that Starpower instead should pay Verizon originating access charges. Verizon South Response Brief at 11; Verizon South Reply Brief at 7-8. As explained at length above, however, this bald contention runs directly counter to all the record's indicia of intent, including the language of the Agreement.

FN68. In this complaint proceeding, we need not and do not address the legal and policy question of whether incumbent LECs have an affirmative obligation under sections 251(b)(5) and 252(d)(2) of the Act (47 U.S.C. §§ 251(b)(5), 252(d)(2)) to pay reciprocal compensation for virtual NXX traffic. This issue has been raised and ultimately may be resolved in a pending rulemaking proceeding. See Intercarrier Compensation Proceeding, 16 FCC Rcd at 9652, ¶ 115. Verizon South argues that, for several reasons, requiring the payment of reciprocal compensation to Starpower for virtual NXX traffic is contrary to sound regulatory policy. Verizon South Opening Brief at 12-15, 17- 18; Verizon South Reply Brief at 6-9. None of these arguments, which Verizon South has already raised in the Intercarrier Compensation Proceeding, is relevant to the parties' obligations under the current Agreement, which is all that is before us here. See, e.g., Intercarrier Compensation Proceeding, Comments of Verizon (filed Aug. 21, 2001) at 4-11.

FN69. Damages Phase Joint Statement at 8, ¶ 6; Starpower Opening Brief at 22- 23; Verizon South Response Brief at 29.

FN70. Starpower Opening Brief at 24-25.

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FN71. Starpower Opening Brief at 24-25; Starpower Reply Brief at 11-12. Section 6.1-330.53 of the Virginia Code states:

The judgment rate of interest shall be an annual rate of nine percent, except that a money judgment entered in an action arising from a contract shall carry interest at the rate lawfully charged on such contract, or at nine percent annually, whichever is higher. Interest at the judgment rate, where no rate is fixed by contract, shall apply to both prejudgment interest pursuant to § 8.01-382 and to post-judgment interest.

Va. Code Ann. § 6.1-330.54. The Starpower Opening Brief also cites section 8.01-382 of the Virginia Code, which provides, in pertinent part:

In any action at law or suit in equity, the verdict of the jury, or if no jury the judgment or decree of the court, may provide for interest on any principal sum awarded, or any part thereof, and fix the period at which the interest shall commence. The judgment or decree entered shall provide for such interest until such principal sum be paid. If a judgment or decree be rendered which does not provide for interest, the judgment or decree awarded shall bear interest from its date of entry, at the rate as provided in § 6.1-330.54, and judgment or decree entered accordingly;....

Va. Code Ann. § 8.01-382.

FN72. Verizon South Response Brief at 29 (citing Rainbow Programming Holdings, Inc. v. Bell Atlantic-New Jersey, Inc., Memorandum Opinion and Order, 15 FCC Rcd 11754, 11763 n.58 (Enf. Bur. 2000)). The IRS rate is set pursuant to section 6621 of the Internal Revenue Code. 26 U.S.C. § 6621; see also 26 C.F.R. §§ 301.6621-1. Current IRS interest rates are listed at Rev. Rul. 2003-25 I.R.B. 1037 (2003).

FN73. Verizon South Response Brief at 28-29 (citing Va. Code Ann. § 8.01- 382).

FN74. See, e.g., General Communications, Inc. v. Alaska Communications Systems Holdings, Inc., Memorandum Opinion and Order, 16 FCC Rcd 2834, 2862, ¶ 73 (2001) (and cases cited therein), aff'd in substantial part, remanded in part sub. nom. ACS of Anchorage, Inc. v. FCC, 290 F.3d 403 (D.C. Cir. 2002) (ordering the Commission to explain why it calculated prejudgment interest based on the IRS rate for corporate overpayments rather than the rate for "large" corporate overpayments), dismissed, 18 FCC Rcd 6331 (Enf. Bur. 2003).

FN75. Liability Order, 17 FCC Rcd at 6882-83, ¶ 24.

FN76. Liability Order, 17 FCC Rcd at 6882 n.73 (citing Complaint, Exhibit A (Agreement) at 27, ¶ XIX.J ("This Agreement shall be governed by and construed in accordance with the domestic laws of the state of Virginia..."))).

FN77. Verizon South Response Brief at 28-29.

FN78. Starpower Reply Brief at 11-12.

FN79. Va. Code Ann. § 6.1-330.54.

FN80. Verizon South Response Brief at 29.

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FN81. Post-judgment interest is mandatory under both state and federal law. See, e.g., Dairyland Ins. Co. v. Douthat, 248 Va. 627, 631 (1994); 28 U.S.C. § 1961.

FN82. Starpower Opening Brief at 24.

FN83. Supplemental Joint Statement, File No. EB-00-MD-19 (filed July 31, 2003) ("Supplemental Damages Phase Joint Statement") at 2, ¶ 3.

FN84. Supplemental Damages Phase Joint Statement at 1, ¶ 2.

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