

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
STARPOWER COMMUNICATIONS, LLC,)	
)	
Complainant,)	
)	
v.)	File No. EB-00-MD-19
)	
VERIZON SOUTH INC.,)	
)	
Respondent.)	

MEMORANDUM OPINION AND ORDER

Adopted: November 5, 2003

Released: November 7, 2003

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”)¹ pursuant to section 252(e)(5) of the Communications Act of 1934, as amended (“Act”) and section 1.722 of the Commission’s rules.² 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.³ Consistent with that finding, we

¹ 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.

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

³ *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).

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.⁴ 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.⁵ Verizon South is an incumbent local exchange carrier also licensed to provide local exchange services in Virginia.⁶

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.⁷ The Agreement provides that the parties "shall reciprocally terminate POTS calls originating on each others' networks."⁸ "POTS" stands for "Plain Old Telephone Service" traffic, which "includes local traffic (including EAS) as defined in [Verizon South's] tariff."⁹ 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."¹⁰ The Agreement obligates the parties to pay reciprocal compensation "[f]or the termination of local traffic."¹¹ No other provisions of the Agreement govern compensation for

⁴ See ¶ 8, *infra*, for a description of virtual NXX arrangements.

⁵ Report and Revised Joint Statement, File No. EB-00-MD-19 (filed Aug. 14, 2002) ("Damages Phase Joint Statement") at 2, ¶ 1.

⁶ Damages Phase Joint Statement at 2, ¶ 1.

⁷ Joint Statement, File No. EB-00-MD-19 (filed Jan. 12, 2001) ("Liability Phase 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.

⁸ Liability Phase Joint Statement at 3, ¶ 10.

⁹ Liability Phase Joint Statement at 3, ¶ 11.

¹⁰ Liability Phase Joint Statement at 3, ¶ 12.

¹¹ Liability Phase Joint Statement at 3, ¶ 13.

the delivery of local traffic.¹² The Agreement currently is in effect and will remain in effect until it is superceded by a new agreement.¹³

B. The *Liability Order*

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.¹⁴ Starpower, in turn, delivered these calls to its ISP customers and billed Verizon South for reciprocal compensation for each call.¹⁵ 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.¹⁶ Verizon South disputed and refused to pay Starpower's reciprocal compensation charges for delivering the ISP-bound traffic,¹⁷ claiming that such traffic is not subject to reciprocal compensation under the Agreement because such traffic is jurisdictionally interstate, not local.¹⁸ Hence, Starpower initiated legal processes to recover reciprocal compensation payments from Verizon South, which ultimately resulted in the Commission's *Liability Order*.¹⁹

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.²⁰ The *Liability Order* so held because the Agreement expressly links compensability for reciprocal compensation purposes to Verizon South's own customer billing determinations.²¹ 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

¹² Liability Phase Joint Statement at 4, ¶ 18.

¹³ 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.

¹⁴ Damages Phase Joint Statement at 4, ¶¶ 9-10.

¹⁵ Damages Phase Joint Statement at 4, ¶¶ 10-11.

¹⁶ Supplemental Complaint at 6-7, ¶¶ 18-21; Damages Phase Joint Statement at 4, ¶ 11.

¹⁷ Verizon South did not dispute any reciprocal compensation charges billed by Starpower for non-ISP-bound traffic. Supplemental Complaint at 7-8, ¶¶ 22-23.

¹⁸ Damages Phase Joint Statement at 4, ¶ 12.

¹⁹ 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. 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*.

²⁰ *Liability Order*, 17 FCC Rcd at 6892-93, ¶¶ 44-46, 49.

²¹ *Liability Order*, 17 FCC Rcd at 6892-93, ¶¶ 44-46, 49.

calls.²² 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]."²³

6. Pursuant to Commission rules,²⁴ 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 accrues, for delivering traffic identified as local traffic under the terms of the Agreement, including ISP-bound traffic.²⁵ 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.²⁶

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.²⁷ 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").²⁸ By contrast, "virtual NXX" codes are central office codes that correspond to a

²² *Liability Order*, 17 FCC Rcd at 6892-93, ¶¶ 44-46, 49.

²³ *Liability Phase Joint Statement* at 7-8, ¶ 36. See *Liability Order*, 17 FCC Rcd at 6892, ¶ 45.

²⁴ 47 C.F.R. §§ 1.721, 1.722.

²⁵ 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).

²⁶ 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* 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).

²⁷ See 47 C.F.R. §§ 52.7(a), (c)

²⁸ 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

particular rate center but are assigned to a customer located in a different rate center.²⁹ 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.

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.³⁰ 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.³¹ 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.³² 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.³³ 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.³⁴

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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.

²⁹ *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).

³⁰ Damages Phase Joint Statement at 5, ¶ 17.

³¹ Damages Phase Joint Statement at 5, ¶ 15.

³² Damages Phase Joint Statement at 5, ¶ 16.

³³ Damages Phase Joint Statement at 5, ¶ 17.

³⁴ Damages Phase Joint Statement at 5, ¶ 15.

10. Verizon South provides a service to its own customers that is 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.³⁵ 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),³⁶ and it bills and collects reciprocal compensation for calls that it rates as local.³⁷

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."³⁸ 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.³⁹ 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.⁴⁰ 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,⁴¹ 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.⁴²

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.⁴³ Verizon South further argues

³⁵ 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.

³⁶ Damages Phase Joint Statement at 6, ¶ 25.

³⁷ Damages Phase Joint Statement at 6, ¶ 26.

³⁸ Liability Phase Joint Statement at 3, ¶¶ 11, 13; *Liability Order*, 17 FCC Rcd at 6892, ¶ 42.

³⁹ *Liability Order*, 17 FCC Rcd at 6892-93, ¶¶ 44-45, 49.

⁴⁰ *Liability Order*, 17 FCC Rcd at 6892, ¶ 45 (citing Liability Phase Joint Statement at 7-8, ¶ 36).

⁴¹ *Liability Order*, 17 FCC Rcd at 6893, ¶ 46.

⁴² *Liability Order*, 17 FCC Rcd at 6893, ¶ 46.

⁴³ 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."

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.⁴⁴ 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."⁴⁵ 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.⁴⁶ 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.⁴⁷ 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.

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.⁴⁸ Regardless of Verizon South's present construction of its Tariff,⁴⁹ Verizon South previously stipulated that, for rating and billing purposes, it considers the traffic at issue to be local under the Tariff.⁵⁰ 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.⁵¹ 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.⁵²

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

⁴⁴ 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.

⁴⁵ Verizon South Opening Brief at 3 (quoting Attachment 1-B (Tariff), § 1 at 8 ("Local Service")).

⁴⁶ 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.

⁴⁷ 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.

⁴⁸ *Liability Order*, 17 FCC Rcd at 6892, ¶ 45.

⁴⁹ As discussed in paragraph 15, *infra*, we find Verizon South's interpretation of its Tariff to be unpersuasive.

⁵⁰ *Liability Order*, 17 FCC Rcd at 6892-94, ¶¶ 45-46, 49.

⁵¹ 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).

⁵² *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").

parties physically located in different local calling areas.⁵³ 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,⁵⁴ 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.⁵⁵ 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."⁵⁶ The definition does not refer to a geographical area in which a customer is physically located.⁵⁷ 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."⁵⁸ 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.⁵⁹ 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.⁶⁰

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

⁵³ 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").

⁵⁴ Verizon South Opening Brief at 5-8.

⁵⁵ See, e.g., *Restatement of Contracts* § 202(4).

⁵⁶ August 2 Letter, Attachment (Tariff), § 1 at 8 ("Local Calling Area") (emphasis added).

⁵⁷ 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.

⁵⁸ August 2 Letter, Attachment A (Tariff), § 1 at 5 ("Exchange Service").

⁵⁹ Starpower Opposing Brief at 5-6 & Attachment A (Tariff), § 9.1.3(d) ("Foreign Exchange Service").

⁶⁰ 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.

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.⁶¹ 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.⁶² 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.⁶³ 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.⁶⁴ Finally, at the time the parties entered into the Agreement, no court

⁶¹ Liability Phase Joint Statement at 5, ¶ 16.

⁶² 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 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.

⁶³ *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).

⁶⁴ 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

(continued....)

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;⁶⁵ 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.⁶⁶ In sum, neither the legal context in which the parties entered the Agreement, nor any other evidence in this record,⁶⁷ provides any basis to conclude that the parties intended to link reciprocal compensation obligations to the physical location of the parties' customers.⁶⁸

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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.

⁶⁵ *See* Letter to Russell M. Blau and Michael L. Shor, Counsel for Starpower, and Aaron M. Panner, 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 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)).

⁶⁶ 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)).

⁶⁷ 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.

⁶⁸ 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.

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.⁶⁹ 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.⁷⁰ 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.⁷¹ 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.⁷² 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.⁷³

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.⁷⁴ In awarding prejudgment interest in this proceeding,

⁶⁹ Damages Phase Joint Statement at 8, ¶ 6; Starpower Opening Brief at 22-23; Verizon South Response Brief at 29.

⁷⁰ Starpower Opening Brief at 24-25.

⁷¹ 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.

⁷² 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).

⁷³ Verizon South Response Brief at 28-29 (citing Va. Code Ann. § 8.01-382).

⁷⁴ *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

(continued....)

we look primarily to the Commission's finding in the *Liability Order* that Virginia law supplies the applicable rules of contract interpretation.⁷⁵ Indeed, the parties agreed that the Agreement would be governed and construed in accordance with Virginia law.⁷⁶ 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.⁷⁷ 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.⁷⁸ 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.⁷⁹ The only alternative Verizon South offers is for us to apply the IRS rate,⁸⁰ 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.⁸¹ 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.⁸² 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.

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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).

⁷⁵ *Liability Order*, 17 FCC Rcd at 6882-83, ¶ 24.

⁷⁶ *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. . . .”).

⁷⁷ Verizon South Response Brief at 28-29.

⁷⁸ Starpower Reply Brief at 11-12.

⁷⁹ Va. Code Ann. § 6.1-330.54.

⁸⁰ Verizon South Response Brief at 29.

⁸¹ 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.

⁸² Starpower Opening Brief at 24.

C. Damages Calculation

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 \$12,059,149.⁸³ 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.⁸⁴ 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 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

⁸³ Supplemental Joint Statement, File No. EB-00-MD-19 (filed July 31, 2003) (“Supplemental Damages Phase Joint Statement”) at 2, ¶ 3.

⁸⁴ Supplemental Damages Phase Joint Statement at 1, ¶ 2.