

**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.	)	
	)	
<hr/>	)	
STARPOWER COMMUNICATIONS, LLC,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. EB-00-MD-20
	)	
VERIZON VIRGINIA INC.,	)	
	)	
Respondent.	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 28, 2002**

**Released: April 8, 2002**

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”),<sup>1</sup> 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”).<sup>2</sup> In its complaints, Starpower seeks to recover, pursuant to three interconnection agreements with

<sup>1</sup> 47 U.S.C. §§ 208, 252(e)(5).

<sup>2</sup> 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.”

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.<sup>3</sup> Verizon Virginia and Verizon South are incumbent local exchange carriers (“ILECs”) also licensed to provide local exchange services in Virginia.<sup>4</sup>

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.<sup>5</sup> Toward this end, Starpower entered into two interconnection agreements with Verizon Virginia and an interconnection agreement with Verizon South.<sup>6</sup> 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.<sup>7</sup> The MFS-Verizon Virginia Agreement was filed with, and approved by, the

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<sup>3</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> Starpower-Verizon Virginia Joint Statement at 8, ¶ 37; Starpower-Verizon South Joint Statement at 4, ¶ 19.

<sup>6</sup> 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 19<sup>th</sup>, 1999, by and between Bell Atlantic-Virginia, Inc. and Starpower Communications, LLC [“Second Starpower-Verizon Virginia Agreement”]).

<sup>7</sup> 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).

Virginia State Corporation Commission (“Virginia SCC”) on October 11, 1996.<sup>8</sup>

5. By letter dated February 4, 1998, and pursuant to section 252(i) of the Act,<sup>9</sup> 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.<sup>10</sup> On February 19, 1998, Verizon Virginia provided Starpower with a draft interconnection agreement based upon the MFS-Verizon Virginia Agreement.<sup>11</sup> 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.”<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> The First Starpower-Verizon Virginia Agreement was filed with, and approved by, the Virginia SCC on June 17, 1998.<sup>15</sup>

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.<sup>16</sup>

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].”<sup>17</sup> “Local Traffic” is “traffic that is originated by a Customer of one Party on that Party’s network and terminates to a

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<sup>8</sup> Starpower-Verizon Virginia Joint Statement at 2, ¶ 5.

<sup>9</sup> 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.”).

<sup>10</sup> Starpower-Verizon Virginia Joint Statement at 2, ¶ 6.

<sup>11</sup> Starpower-Verizon Virginia Joint Statement at 2, ¶ 7.

<sup>12</sup> 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.

<sup>13</sup> Starpower-Verizon Virginia Joint Statement at 2, ¶ 8.

<sup>14</sup> Starpower-Verizon Virginia Joint Statement at 2, ¶ 9.

<sup>15</sup> Starpower-Verizon Virginia Joint Statement at 2, ¶ 10.

<sup>16</sup> Starpower-Verizon Virginia Joint Statement at 3, ¶ 11; Starpower-Verizon Virginia Complaint, Exhibit D (First Starpower-Verizon Virginia Agreement) at 8, ¶ 1.61.

<sup>17</sup> Starpower-Verizon Virginia Joint Statement at 3, ¶ 12; Starpower-Verizon Virginia Complaint, Exhibit D (First Starpower-Verizon Virginia Agreement) at 2, ¶ 1.7.

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 . . . ."<sup>18</sup> This language closely resembles the language that the Commission used in April 1996 to describe the type of traffic that was likely subject to reciprocal compensation under section 251(b)(5) of the Act:<sup>19</sup> "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 . . . .*"<sup>20</sup>

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.<sup>21</sup>

These provisions are the only ones in the First Starpower-Verizon Virginia Agreement governing

<sup>18</sup> Starpower-Verizon Virginia Joint Statement at 3-4, ¶ 14; Starpower-Verizon Virginia Complaint, Exhibit D (First Starpower-Verizon Virginia Agreement) at 6, ¶ 1.44.

<sup>19</sup> 47 U.S.C. § 251(b)(5).

<sup>20</sup> *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).

<sup>21</sup> 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.

compensation for Local Traffic,<sup>22</sup> and the word “termination” is undefined.<sup>23</sup>

8. After the First Starpower-Verizon Virginia Agreement took effect, the parties exchanged traffic.<sup>24</sup> 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.<sup>25</sup> Starpower asserts that such ISP-bound calls from Verizon Virginia customers constitute “Local Traffic” within the meaning of the First Starpower-Verizon Virginia Agreement.<sup>26</sup> Verizon Virginia disagrees, and has paid only a portion of the amounts billed by Starpower.<sup>27</sup>

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.<sup>28</sup> 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.<sup>29</sup>

#### **b. The Second Starpower-Verizon Virginia Agreement**

10. On June 16, 1997, Verizon Virginia entered into an interconnection agreement (“MCI metro-Verizon Virginia Agreement”) with MCI metro Access Transmission Services of Virginia, Inc. pursuant to section 252(a) of the Act.<sup>30</sup> The MCI metro-Verizon Virginia Agreement was filed with, and approved by, the Virginia SCC on July 16, 1997.<sup>31</sup>

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 MCI metro-Verizon Virginia Agreement pursuant to section 252(i) of the Act.<sup>32</sup> 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 MCI metro-Verizon Virginia Agreement.<sup>33</sup> The Virginia SCC approved the resulting interconnection

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<sup>22</sup> Starpower-Verizon Virginia Joint Statement at 4, ¶ 18.

<sup>23</sup> Starpower-Verizon Virginia Joint Statement at 4, ¶ 17.

<sup>24</sup> Starpower-Verizon Virginia Joint Statement at 9, ¶ 42.

<sup>25</sup> Starpower-Verizon Virginia Joint Statement at 9, ¶ 41.

<sup>26</sup> Starpower-Verizon Virginia Joint Statement at 9, ¶ 42.

<sup>27</sup> Starpower-Verizon Virginia Joint Statement at 9, ¶ 43.

<sup>28</sup> Starpower-Verizon Virginia Joint Statement at 5, ¶ 22.

<sup>29</sup> 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.

<sup>30</sup> Starpower-Verizon Virginia Joint Statement at 5, ¶ 24; Starpower-Verizon Virginia Complaint, Exhibit F (MCI metro/Bell Atlantic Interconnection Agreement 1997).

<sup>31</sup> Starpower-Verizon Virginia Joint Statement at 6, ¶ 25.

<sup>32</sup> Starpower-Verizon Virginia Joint Statement at 6, ¶ 26.

<sup>33</sup> Starpower-Verizon Virginia Joint Statement at 6, ¶ 27.

agreement (“Second Starpower-Verizon Virginia Agreement”) on April 25, 2000.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup>

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.<sup>37</sup>

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.<sup>38</sup>

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:

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 . . . .<sup>39</sup>

13. Section 4 of Attachment I to the Second Starpower-Verizon Virginia Agreement

<sup>34</sup> Starpower-Verizon Virginia Joint Statement at 6, ¶ 27.

<sup>35</sup> Starpower-Verizon Virginia Joint Statement at 6, ¶ 28.

<sup>36</sup> Starpower-Verizon Virginia Complaint, Exhibit I (Second Starpower-Verizon Virginia Agreement) at 5, ¶ 2.1.

<sup>37</sup> 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.

<sup>38</sup> Starpower-Verizon Virginia Joint Statement at 7, ¶ 31.

<sup>39</sup> 47 C.F.R. § 51.701(b) (amended 2001).

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 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.<sup>40</sup>

14. The above reciprocal compensation provisions are the only ones in the Second Starpower-Verizon Virginia Agreement governing compensation for Local Traffic,<sup>41</sup> and the word "termination" is undefined.<sup>42</sup>

15. The parties exchanged traffic under the Second Starpower-Verizon Virginia Agreement as they did under the First Starpower-Verizon Virginia Agreement,<sup>43</sup> and Starpower submitted invoices to Verizon Virginia seeking, among other things, compensation for transporting and terminating ISP-bound traffic.<sup>44</sup> Verizon Virginia denies that such traffic constitutes "Local Traffic" and has refused to pay reciprocal compensation.<sup>45</sup> The Second Starpower-Verizon Virginia Agreement currently governs the exchange of traffic between Starpower and Verizon Virginia.<sup>46</sup>

## **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,<sup>47</sup> which the Virginia SCC approved on July 9, 1997.<sup>48</sup> By letter dated

<sup>40</sup> Starpower-Verizon Virginia Joint Statement at 6-7, ¶ 30.

<sup>41</sup> Starpower-Verizon Virginia Joint Statement at 8, ¶ 34.

<sup>42</sup> Starpower-Verizon Virginia Joint Statement at 7, ¶ 32.

<sup>43</sup> Starpower-Verizon Virginia Joint Statement at 9, ¶ 42.

<sup>44</sup> Starpower-Verizon Virginia Joint Statement at 9, ¶ 41.

<sup>45</sup> Starpower-Verizon Virginia Joint Statement at 9, ¶ 43.

<sup>46</sup> Supplemental Joint Statement, File No. EB-00-MD-20 (filed Oct. 26, 2001) ("Starpower-Verizon Virginia Supplemental Joint Statement") at 2.

<sup>47</sup> Starpower-Verizon South Joint Statement at 2, ¶ 4.

<sup>48</sup> Starpower-Verizon South Joint Statement at 2, ¶ 5.

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.<sup>49</sup> Verizon South subsequently advised the Virginia SCC of Starpower's adoption of the MFS-Verizon South Agreement.<sup>50</sup> 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.<sup>51</sup> 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. . . ."<sup>52</sup>

17. Section VI.A of the Starpower-Verizon South Agreement provides that the parties "shall reciprocally terminate POTS calls originating on each others' networks."<sup>53</sup> "POTS" stands for "Plain Old Telephone Service" traffic, which "includes local traffic (including EAS) as defined in [Verizon South's] tariff."<sup>54</sup> 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."<sup>55</sup> The Starpower-Verizon South Agreement obligates the parties to pay reciprocal compensation "[f]or the termination of local traffic."<sup>56</sup> The agreement, however, does not separately define the word "termination,"<sup>57</sup> and no other provisions of the agreement govern compensation of local traffic.<sup>58</sup> The Starpower-Verizon South Agreement remains in effect today.<sup>59</sup>

## 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.<sup>60</sup> The Virginia SCC declined jurisdiction over Starpower's petitions and

<sup>49</sup> Starpower-Verizon South Joint Statement at 2, ¶ 6.

<sup>50</sup> Starpower-Verizon South Joint Statement at 2, ¶¶ 6-7.

<sup>51</sup> Starpower-Verizon South Joint Statement at 2, ¶ 8.

<sup>52</sup> Starpower-Verizon South Joint Statement at 2, ¶ 9.

<sup>53</sup> Starpower-Verizon South Joint Statement at 3, ¶ 10.

<sup>54</sup> Starpower-Verizon South Joint Statement at 3, ¶ 11.

<sup>55</sup> Starpower-Verizon South Joint Statement at 3, ¶ 12.

<sup>56</sup> Starpower-Verizon South Joint Statement at 3, ¶ 13.

<sup>57</sup> Starpower-Verizon South Joint Statement at 4, ¶ 17.

<sup>58</sup> Starpower-Verizon South Joint Statement at 4, ¶ 18.

<sup>59</sup> Supplemental Joint Statement, File No. EB-00-MD-19 (filed Oct. 26, 2001) ("Starpower-Verizon South Supplemental Joint Statement") at 2.

<sup>60</sup> *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").



encouraged Starpower to seek relief from this Commission.<sup>61</sup>

19. In March 2000, Starpower filed a petition with the Commission requesting that, pursuant to section 252(e)(5) of the Act,<sup>62</sup> the Commission preempt the jurisdiction of the Virginia SCC over the Starpower/Verizon South and Starpower/Verizon Virginia contract disputes.<sup>63</sup> 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."<sup>64</sup>

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."<sup>65</sup> 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]."<sup>66</sup>

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.<sup>67</sup> 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.<sup>68</sup>

22. On December 27, 2000, Verizon filed answers to Starpower's complaints. The

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<sup>61</sup> *Preemption Order*, 15 FCC Rcd at 11278, ¶ 4.

<sup>62</sup> 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.").

<sup>63</sup> *Preemption Order*, 15 FCC Rcd at 11278, ¶ 4.

<sup>64</sup> *Preemption Order*, 15 FCC Rcd at 11281, ¶ 9.

<sup>65</sup> See Starpower-Verizon Virginia Complaint at 1; Starpower-Verizon South Complaint at 1.

<sup>66</sup> Starpower-Verizon Virginia Complaint at 41; Starpower-Verizon South Complaint at 33.

<sup>67</sup> Supplemental Submission, File Nos. EB-00-MD-19, -20 (filed Dec. 8, 2000) ("Supplemental Submission") at 2.

<sup>68</sup> 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.

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.<sup>69</sup>

### III. DISCUSSION

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

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.<sup>70</sup> The parties appear to agree that their interconnection agreements do, in fact, address and conclusively govern this compensation issue.<sup>71</sup> 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.<sup>72</sup> We agree with the parties that Virginia law supplies the applicable rules of contract interpretation.<sup>73</sup> Virginia adheres to the “plain meaning” rule: “where the terms

<sup>69</sup> See, e.g., Starpower-Verizon Virginia Answer at 1-2; Starpower-Verizon South Answer at 1-2.

<sup>70</sup> 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 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*.

<sup>71</sup> 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.

<sup>72</sup> See 47 U.S.C. § 252(e)(5); *Preemption Order*, 15 FCC Rcd 11277, 11278, ¶ 5.

<sup>73</sup> 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 (MCI Metro-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

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of the contract are clear and unambiguous, we will construe those terms according to their plain meaning.”<sup>74</sup> Although the cornerstone of a “plain meaning” analysis is a contract’s language,<sup>75</sup> in ascertaining the parties’ intent “as expressed by them in the words they have used,”<sup>76</sup> a court also may examine the “surrounding circumstances, the occasion, and [the] apparent object of the parties.”<sup>77</sup> 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.”<sup>78</sup> 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.<sup>79</sup> Furthermore, course-of-performance evidence can be considered to ascertain a contract’s meaning rather than to “create a new, additional contract right.”<sup>80</sup>

25. All parties invoke the “plain meaning” rule in support of their case.<sup>81</sup> According to Starpower, “as interpreted under the ‘plain meaning’ rule . . . the Agreement’s unambiguously comprehend ISP-bound traffic within the ambit of the term ‘local traffic,’” which renders the delivery of such traffic compensable.<sup>82</sup> Verizon similarly relies upon the “plain meaning” rule to argue that the interconnection agreements unambiguously do not require payment of reciprocal

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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 (5<sup>th</sup> Cir. 2000) (applying Texas law in construing reciprocal compensation provisions of interconnection agreements) (“*Southwestern Bell*”).

<sup>74</sup> *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).

<sup>75</sup> 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”).

<sup>76</sup> *Ames v. American Nat’l Bank*, 163 Va. 1, 38, 176 S.E. 204, 216 (1932).

<sup>77</sup> *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)).

<sup>78</sup> *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.

<sup>79</sup> *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.”).

<sup>80</sup> *Chas. H. Tompkins Co.*, 732 F. Supp. at 1375.

<sup>81</sup> 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)).

<sup>82</sup> Starpower-Verizon Virginia Complaint at 22-25; Starpower-Verizon South Complaint at 14-17; Starpower Supplemental Brief at 11.

compensation for the delivery of ISP-bound traffic.<sup>83</sup> 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 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."<sup>84</sup> 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.<sup>85</sup> 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."<sup>86</sup> 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."<sup>87</sup>

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.<sup>88</sup> In

<sup>83</sup> Verizon Virginia Answer at 34-37; Verizon South Answer at 21-25; Verizon Brief at 13.

<sup>84</sup> 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.

<sup>85</sup> 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.

<sup>86</sup> 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).

<sup>87</sup> Starpower-Verizon Virginia Joint Statement at 7, ¶ 30 (emphasis added).

<sup>88</sup> 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 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 (continued....)

*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.”<sup>89</sup> 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.”<sup>90</sup> 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.”<sup>91</sup> 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.”<sup>92</sup>

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.<sup>93</sup> 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 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.’”<sup>94</sup> Although the declarant further states that ISP-bound traffic nonetheless is subject to reciprocal compensation, “given the parties’ understanding and stated

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FCC Rcd 1 (1988) (“*ONA Plans Order*”), *aff’d sub nom. California v. FCC*, 4 F.3d 1505 (9<sup>th</sup> Cir. 1993); *In the Matter of Southwestern Bell Telephone Company*, Order Designating Issues for Investigation, 3 FCC Rcd 2339 (1988) (“*SWBT Order*”).

<sup>89</sup> *Teleconnect*, 10 FCC Rcd at 1629, ¶ 12 (emphasis added).

<sup>90</sup> *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).

<sup>91</sup> *Bell Atlantic Remand Order*, 206 F.3d at 3.

<sup>92</sup> *Bell Atlantic Remand Order*, 206 F.3d at 5.

<sup>93</sup> 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.”).

<sup>94</sup> 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.

belief that calls to ISPs were Local Traffic,”<sup>95</sup> his admission regarding the importance of the jurisdictional nature of traffic is clear.<sup>96</sup>

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.<sup>97</sup> 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.”<sup>98</sup> 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. Butressing 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.<sup>99</sup> 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.<sup>100</sup> 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.<sup>101</sup> 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

<sup>95</sup> Starpower Supplemental Brief, Attachment 1 (Ball Decl. at 6, ¶ 16).

<sup>96</sup> 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.

<sup>97</sup> See, e.g., *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCCd 682, 711, ¶ 78 (1983) (“[a]mong 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 (8<sup>th</sup> Cir. 1998) (affirming the jurisdictionally-mixed nature of ISP-bound traffic).

<sup>98</sup> *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.

<sup>99</sup> Starpower-Verizon Virginia Joint Statement at 3-4, ¶ 14; Starpower-Verizon Virginia Complaint, Exhibit D (First Starpower-Verizon Virginia Agreement) at 6, ¶ 1.44.

<sup>100</sup> *Local Competition Order NPRM*, 11 FCC Rcd at 14249, ¶ 230.

<sup>101</sup> Starpower-Verizon Virginia Joint Statement at 7, ¶ 31.

originates and terminates within a local service area as defined by a state commission.<sup>102</sup> 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).

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."<sup>103</sup> We find no tension between this decision and the D.C. Circuit's ruling in the *Bell Atlantic Remand Order*.<sup>104</sup> 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."<sup>105</sup> 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.<sup>106</sup> Starpower argues that, in light of these circumstances, the parties must have intended compensable "Local Traffic" to include ISP-bound traffic.<sup>107</sup>

34. We disagree with Starpower's argument. As an initial matter, even assuming that

<sup>102</sup> 47 C.F.R. § 51.701(b) (amended 2001).

<sup>103</sup> *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)).

<sup>104</sup> 206 F.3d at 5-6.

<sup>105</sup> Starpower-Verizon Virginia Complaint at 21-22; Starpower Supplemental Brief at 18.

<sup>106</sup> 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.

<sup>107</sup> Starpower Supplemental Brief at 19.

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.”<sup>108</sup> 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),<sup>109</sup> 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.

35. As stated above, Starpower asserts correctly<sup>110</sup> (and Verizon Virginia concurs)<sup>111</sup> that, in construing the agreements, the Commission may take account of the regulatory context in which the parties negotiated the agreements. Starpower further asserts correctly<sup>112</sup> (and Verizon Virginia concurs)<sup>113</sup> 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.<sup>114</sup> For example, ISPs may purchase their links to the public switched telephone network through local business tariffs rather than through interstate access tariffs;<sup>115</sup> moreover, for separations purposes, ILECs must characterize expenses and revenues associated with ISP-bound traffic as intrastate.<sup>116</sup> 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.<sup>117</sup>

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<sup>108</sup> 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.

<sup>109</sup> *See* Verizon Brief at 11-13.

<sup>110</sup> *See* Starpower Supplemental Brief at 22-24.

<sup>111</sup> *See* Verizon Brief at 14.

<sup>112</sup> Starpower-Verizon Virginia Complaint at 33-34; Starpower-Verizon South Complaint at 21-23; Starpower Supplemental Brief at 24-25.

<sup>113</sup> Verizon Brief at 16-17.

<sup>114</sup> *See, e.g., Order on Remand*, 16 FCC Rcd at 9158, ¶ 11; at 9176-77, ¶ 55; *Declaratory Ruling*, 14 FCC Rcd at 3703, ¶ 23.

<sup>115</sup> *See, e.g., Order on Remand*, 16 FCC Rcd at 9158, ¶ 11; *Declaratory Ruling*, 14 FCC Rcd at 3703, ¶ 23.

<sup>116</sup> *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.

<sup>117</sup> Starpower-Verizon Virginia Complaint at 34-35; Starpower-Verizon South Complaint at 23-27; Starpower Supplemental Brief at 24-26.



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.<sup>118</sup> 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."<sup>119</sup> Accordingly, we identified several "illustrative" factors that it "may be appropriate for state commissions to consider," including:

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.<sup>120</sup>

38. Starpower argues that application of these factors requires a ruling in its favor.<sup>121</sup> Starpower observes, *inter alia*, that Verizon serves ISPs out of intrastate tariffs and counts

<sup>118</sup> *Preemption Order*, 15 FCC Rcd at 11281, ¶ 9.

<sup>119</sup> *Declaratory Ruling*, 14 FCC Rcd at 3704, ¶ 24.

<sup>120</sup> *Declaratory Ruling*, 14 FCC Rcd at 3704, ¶ 24.

<sup>121</sup> Starpower-Verizon Virginia Complaint at 31-35; Starpower-Verizon South Complaint at 23-27; Starpower Supplemental Brief at 24-26.

revenues associated with calls to ISPs as intrastate revenue.<sup>122</sup> These facts are true,<sup>123</sup> 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.<sup>124</sup> The converse, however, is equally true.<sup>125</sup>

### 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.<sup>126</sup> As Starpower’s own brief highlights,<sup>127</sup> 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.”<sup>128</sup>

40. One decision merits additional discussion. Starpower contends that the Virginia SCC’s decision in *Cox Virginia Telcom*<sup>129</sup> is dispositive, because, as to Verizon Virginia, it is

<sup>122</sup> 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.

<sup>123</sup> Verizon Virginia Answer at 58.

<sup>124</sup> See *Declaratory Ruling*, 14 FCC Red at 3704, ¶ 24.

<sup>125</sup> 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.

<sup>126</sup> 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.

<sup>127</sup> See Starpower Supplemental Brief at 23-24.

<sup>128</sup> 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.

<sup>129</sup> *Petition of Cox Virginia Telcom, Inc.*, Case No. PUC970069, Final Order (Va. S.C.C. Oct. 27, 1997) (“*Cox Virginia Telcom*”) 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”).

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.<sup>130</sup> 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.”<sup>131</sup> 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*.”<sup>132</sup> 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.

\* \* \*

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 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.

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<sup>130</sup> 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.

<sup>131</sup> 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)).

<sup>132</sup> *Preemption Order*, 15 FCC Rcd at 11281, ¶ 9 (emphasis added).

**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,”<sup>133</sup> including “local traffic . . . as defined in [Verizon South’s] tariff.”<sup>134</sup> According to Verizon South’s General Customer Services Tariff (“Tariff”),<sup>135</sup> “Local Service” is “[t]elephone service furnished between customer’s stations [*sic*] located within the same exchange area.”<sup>136</sup> The parties agreed to compensate each other at an “equal, identical and reciprocal rate” for the “termination of local traffic.”<sup>137</sup> 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;<sup>138</sup> Verizon maintains that the agreement clearly does not.<sup>139</sup> 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.<sup>140</sup> Thus, whatever traffic is “local” under the Tariff is compensable traffic under the Starpower-Verizon South Agreement.

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.<sup>141</sup> 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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<sup>133</sup> Starpower-Verizon South Joint Statement at 3, ¶ 10.

<sup>134</sup> Starpower-Verizon South Joint Statement at 3, ¶ 11.

<sup>135</sup> 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).

<sup>136</sup> Starpower-Verizon South Joint Statement at 3, ¶ 12.

<sup>137</sup> Starpower-Verizon South Joint Statement at 3, ¶ 13.

<sup>138</sup> Starpower-Verizon South Complaint at 14-17; Starpower Supplemental Brief at 16-27.

<sup>139</sup> Starpower-Verizon South Answer at 20-32; Verizon Brief at 4-13.

<sup>140</sup> Starpower-Verizon South Joint Statement at 3, ¶ 11.

<sup>141</sup> Starpower-Verizon South Joint Statement at 7-8, ¶ 36.

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.”<sup>142</sup> 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.<sup>143</sup> According to Verizon South, this difference “tracks precisely the distinction that the Commission drew in [paragraph 1034] of the *Local Interconnection Order*,”<sup>144</sup> where the Commission concluded that “reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area . . . .”<sup>145</sup> 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.<sup>146</sup> Moreover, unlike the Starpower-Verizon Virginia Agreements,<sup>147</sup> 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.”<sup>148</sup> *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.”<sup>149</sup> 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.<sup>150</sup> In this case, there was no controlling federal law mandating

<sup>142</sup> Verizon South Answer at 35; Verizon Brief at 31-32.

<sup>143</sup> Verizon South Answer at 24; Verizon Brief at 8-10.

<sup>144</sup> 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*”)).

<sup>145</sup> *Local Competition Order*, 11 FCC Rcd at 16013, ¶ 1034.

<sup>146</sup> See discussion, *supra*, section III.C.

<sup>147</sup> See discussion, *supra*, section III.C.

<sup>148</sup> *AT&T Communications of S. States, Inc. v. BellSouth Telecommunications*, 223 F.3d 457, 465 (4<sup>th</sup> 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.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

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.<sup>151</sup>

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.

#### 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

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<sup>151</sup> See *Declaratory Ruling*, 14 FCC Rcd at 3703, ¶ 24.

**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 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.