

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

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

ORDER

Adopted: April 16, 2004

Released: April 21, 2004

By the Commission:

I. INTRODUCTION

1. In this Order, we deny the parties’ joint motion to vacate¹ the Commission’s November 7, 2003 Memorandum Opinion and Order granting a supplemental complaint for damages filed by Starpower Communications, LLC (“Starpower”) against Verizon South Inc. (“Verizon South”).² According to the Motion, we should grant the parties’ request because vacatur of the *Damages Order* is an “integral part of a global settlement of the parties’ long running disputes” at the Commission and in other fora.³ As discussed below, although we strongly support efforts by parties to settle disputes, we deny the Motion because the parties have not satisfied their heavy burden of demonstrating that there are special circumstances beyond the mere fact of settlement that warrant vacatur of the Commission’s decision.

II. BACKGROUND

2. In the *Damages Order*, the Commission awarded damages to Starpower in the amount of \$12,059,149 for reciprocal compensation that Verizon South owed for Starpower’s

¹ Joint Motion for Vacatur, File No. EB-00-MD-19 (filed Nov. 25, 2003) (“Motion”).

² *Starpower Communications, LLC v. Verizon South Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 23625 (2003) (“*Damages Order*”).

³ Motion at 1-2.

delivery of traffic to Starpower's Internet Service Provider ("ISP") customers, including customers served by Starpower through "virtual NXX" arrangements.⁴ The Commission concluded that Starpower was entitled to damages because Verizon South had stipulated in the liability phase of the proceeding that it rated and billed the ISP-bound calls in dispute as local traffic under its applicable state tariff, and because the interconnection agreement between the parties required Verizon South to pay reciprocal compensation for the termination of local traffic as defined in that tariff.⁵

3. On November 25, 2003, Starpower and Verizon South filed the Motion, which explains that the parties reached an agreement to settle not only the dispute associated with the *Damages Order*, but also other disputes (pending and future) between Starpower and various Verizon entities.⁶ According to the Motion, most of the disputes involve the parties' obligations to pay reciprocal compensation, including a matter before this Commission,⁷ a matter before the United States Court of Appeals for the Fourth Circuit,⁸ and a matter before the District of Columbia Public Service Commission,⁹ all of which were pending when the Motion was filed.¹⁰ Since the filing of the Motion, however, the parties have sought and obtained dismissal of these three proceedings.¹¹ As part of the settlement, the parties purportedly have reached agreement on how compensation for ISP-bound traffic will be addressed on a going-forward basis in their

⁴ *Damages Order* at ¶¶ 7-17, 22. Virtual NXX arrangements refer to telephone traffic that is routed from Verizon South to a Starpower ISP customer that has a telephone number that corresponds to a particular Verizon South rate center, even though the Starpower customer is physically located in a different rate center. *Id.* at ¶¶ 7-9.

⁵ *Damages Order* at ¶¶ 7-17. Prior to issuing the *Damages Order*, the Commission adjudicated the liability issues in Starpower's initial complaint against Verizon South. *Starpower Communications, LLC v. Verizon South Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 6873 (2002) ("*Liability Order*"). Previously, Starpower had filed a petition with the Virginia State Corporation Commission ("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' interconnection agreement. The Virginia SCC declined jurisdiction. Starpower then filed a petition with this Commission requesting that, pursuant to section 252(e)(5) of the Communications Act of 1934, as amended ("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 interconnection 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 and Verizon South have not sought to vacate the *Liability Order*.

⁶ Motion at 1-2.

⁷ *Starpower Communications, LLC v. Verizon Virginia Inc.*, File No. EB-00-MD-20 (FCC filed Nov. 28, 2000).

⁸ *Verizon Md., Inc. v. MCI Metro Access Transmission Servs., LLC*, Nos. 03-11448, 03-1449 (4th Cir.).

⁹ *Starpower Communications, LLC v. Verizon Washington, D.C. Inc.*, TAC 16 (D.C. PSC).

¹⁰ Motion at 2.

¹¹ Letter dated January 23, 2004, to Marlene Dortch, Secretary, FCC, from Aaron M. Panner, Counsel for Verizon Virginia, File No. EB-00-MD-19 (filed Jan. 23, 2004) at 1 ("January 23 Letter"). See *Starpower Communications, LLC v. Verizon Virginia Inc.*, Order, DA 03-3787 (Enf. Bur. MDRD rel. Nov. 25, 2003) ("*Starpower Dismissal Order*") (granting parties' joint motion to dismiss complaint with prejudice based on their settlement of the dispute).

interconnection agreements.¹²

III. DISCUSSION

4. The parties argue that we should vacate the Damages Order because such vacatur, like the vacatur in *Cavalier v. VEPCO*,¹³ “is an integral part of the parties’ global settlement of numerous pending and future disputes in a variety of fora, including before the Commission”¹⁴ For the following reasons, we disagree.

5. The Commission previously has articulated the legal standard that it follows for granting a motion to vacate one of its orders. Specifically, consistent with the Supreme Court’s decision in *U.S. Bancorp Mortgage v. Bonner Mall Partnership*,¹⁵ the Commission has concluded that it should deny requests to vacate unless the parties meet the significant burden of demonstrating “some special circumstances beyond the mere fact that the case has been settled.”¹⁶ In other words, the Commission presumes that its orders should remain intact, and may hold otherwise only if the parties make an exceptional demonstration of good cause. The Commission also may consider whether vacatur will eliminate substantial and numerous disputes other than the one in which the order at issue was released.¹⁷ In making this determination, the Commission considers the public interest in maintaining any precedential effect of the order in question.¹⁸

6. In our view, the parties have not made a compelling showing of any special circumstances that warrant vacating the *Damages Order*. First, the parties have not demonstrated that, but for vacatur of the *Damages Order*, the parties’ disputes will continue and grow. Indeed, the parties already have sought and obtained dismissal of the three proceedings mentioned in their Motion as a part of their global settlement of reciprocal compensation disputes.¹⁹ Therefore, although seeking vacatur of the *Damages Order* may have been integral to the global settlement, actually obtaining such vacatur was not integral.²⁰ Moreover, the parties have not explained how vacating the *Damages Order* will eliminate future litigation more effectively than their own agreement governing reciprocal compensation arrangements in the

¹² Motion at 2.

¹³ *Cavalier Telephone, LLC v. Virginia Electric and Power Company d/b/a Virginia Power*, Order, 17 FCC Rcd 24414 (Enf. Bur. 2002) (“*Cavalier v. VEPCO*”) (vacating a Bureau-level Order in light of circumstances attendant to the parties’ global settlement, particularly the resolution of myriad legal actions resulting from vacatur).

¹⁴ Motion at 3.

¹⁵ 513 U.S. 18, 29 (1994) (“*U.S. Bancorp Mortgage*”) (requiring “exceptional circumstances” to justify vacatur of a judgment under review due to settlement).

¹⁶ *Cavalier v. VEPCO*, 17 FCC Rcd at 24419-20, ¶ 16 (citing *Applications of Crystal Communications, et al.*, Order, 12 FCC Rcd 2149, 2151, ¶ 6 (1997)).

¹⁷ *Cavalier v. VEPCO*, 17 FCC Rcd at 24420, ¶¶ 17-18.

¹⁸ *Cavalier v. VEPCO*, 17 FCC Rcd at 24419-20, ¶ 16 (citing *Aetna Casualty and Surety Co. v. Home Insurance Co.*, 882 F. Supp. 1355 (S.D.N.Y. 1995)).

¹⁹ January 23 Letter at 1.

²⁰ Further evidence of this fact is the parties’ decision to allow the *Damages Order* to become final while the Motion was pending, rather than seeking reconsideration of, or appealing, the *Damages Order*.

future.²¹ Accordingly, vacatur of the *Damages Order* is not necessary to eliminate other disputes between the parties.

7. Second, unlike the order vacated by *Cavalier v. VEPCO*, the *Damages Order* did not itself spawn any of the other disputes between the parties. The parties in *Cavalier v. VEPCO* demonstrated that the relevant Order failed to clarify their rights and obligations and was subject to competing interpretations that were hindering settlement.²² Starpower and Verizon South have not made a similar showing here and, indeed, do not assert that the *Damages Order* is unclear in any respect. Rather, the parties argue that they could dispute the applicability of the *Damages Order* to their other interconnection agreements, thereby engendering further litigation, but then admit that the other agreements contain terms different from those construed in the *Damages Order*.²³ We are reluctant to eliminate any precedential effect that the *Damages Order* may provide on the issue of reciprocal compensation when the parties only can state, at best, that the *Damages Order* potentially could generate unspecified litigation between the parties in the future. In particular, the *Damages Order* is the first time that the Commission has adjudicated an interconnection agreement dispute concerning reciprocal compensation obligations associated with the delivery of virtual NXX traffic. Finally, we note that we strongly encourage parties to settle disputes when they can. However, parties should endeavor to settle such disputes before the Commission spends time and resources to decide them, not after.²⁴

8. In light of the above, vacatur of the *Damages Order* is not in the public interest. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), and 252(e)(5) of the Act, 47 U.S.C. §§ 151, 154(i), 154(j), and 252(e)(5), that the Joint Motion for Vacatur filed by Starpower and Verizon South is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²¹ Motion at 2.

²² *Cavalier v. VEPCO*, 17 FCC Rcd at 24419, ¶ 15; *Cavalier Telephone, LLC v. Virginia Electric and Power Co.*, PA 99-005, Joint Motion to Vacate (filed Nov. 6, 2002) at 10-11.

²³ Motion at 3.

²⁴ See *U.S. Bancorp Mortgage*, 513 U.S. at 27-28 (“...while the availability of vacatur may facilitate settlement after the judgment under review has been rendered and certiorari granted (or appeal filed), it may deter settlement at an earlier stage. Some litigants, at least, may think it worthwhile to roll the dice rather than settle in the district court, or in the court of appeals, if, but only if, an unfavorable outcome can be washed away by a settlement-related vacatur.”) (emphasis in original).