No. 17-627

In The Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P.,
Petitioner,

v.

CENTURYTEL OF CHATHAM, LLC, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in the absence of either Federal Communications Commission or judicial precedent to the contrary, the Fifth Circuit erred in holding that a telecommunications carrier's retroactive clawback against undisputed charges, based on estimates that were found to be unreasonable, was either "unjust" or "unreasonable" within the meaning of 47 U.S.C. § 201(b).

2. Whether Sprint waived its argument that a Missouri statute governing the rates for pre-2012 compensation for VoIP-to-TDM telephone calls was conflict-preempted by federal law by failing to mention the Missouri statute that was supposedly conflict-preempted in its appellate brief; by failing to use either of the words "conflict" or "preemption" in its appellate brief; by conceding at oral argument that it had waived a preemption argument; and then by reversing that concession but acknowledging that the only place it could have preserved an argument for conflict preemption was in the "jurisdictional statement" section of its appellate brief.

PARTIES TO THE PROCEEDING

The following parties were plaintiffs in the district court and appellees in the court of appeals, and are respondents in this Court: CenturyTel of Chatham, LLC; CenturyTel of North Louisiana, LLC; CenturyTel of East Louisiana, LLC; CenturyTel of Central Louisiana, LLC; CenturyTel of Ringgold, LLC; CenturyTel of Southeast Louisiana, LLC; CenturyTel of Southwest Louisiana, LLC; CenturyTel of Evangeline, LLC; CenturyTel of Missouri, LLC; Mebtel, Inc.; CenturyTel of Idaho, Inc.; Gallatin River Communications, LLC; CenturyTel of Northwest Louisiana, Inc.; CenturyTel of Lake Dallas, Inc.; CenturyTel of Port Aransas, Inc.;[1] CenturyTel of San Marcos, Inc.; Spectra Communications Group, LLC;[2] CenturyTel of Arkansas, Inc.; CenturyTel of Mountain Home, Inc.; CenturyTel of Redfield, Inc.; CenturyTel of Northwest Arkansas, LLC; CenturyTel of Central Arkansas, LLC; CenturyTel of South Arkansas, Inc.; CenturyTel of North Mississippi, Inc.; Gulf Telephone Co.; CenturyTel of Alabama, LLC; CenturyTel of Adamsville, Inc.; CenturyTel of Claiborne, Inc.; CenturyTel of Ooltewah-Collegedale, Inc.; CenturyTel of Ohio, Inc.; CenturyTel of Central Indiana, Inc.; CenturyTel of Odon, Inc.; CenturyTel of Michigan, Inc.; CenturyTel of Upper Michigan, Inc.; CenturyTel of Northern Michigan, Inc.; CenturyTel Midwest-Michigan, Inc.; CenturyTel of

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[1] This respondent is incorrectly identified as "CenturyTel of Port Arkansas Inc." in Sprint's Petition for a Writ of Certiorari ("Sprint Pet.").

[2] This respondent is incorrectly identified as "Spectra Communications Group LLP" in Sprint's Petition.

Wisconsin, LLC; Telephone USA of Wisconsin, LLC;[3] CenturyTel of Northern Wisconsin, LLC; CenturyTel of Northwest Wisconsin, LLC; CenturyTel of Central Wisconsin, LLC; CenturyTel of the Midwest-Kendall, LLC; CenturyTel of the Midwest-Wisconsin, LLC; CenturyTel of Fairwater-Brandon-Alto, LLC; CenturyTel of Larsen-Readfield, LLC; CenturyTel of Forestville, LLC; CenturyTel of Monroe County, LLC; CenturyTel of Southern Wisconsin, LLC; CenturyTel of Minnesota, Inc.; CenturyTel of Chester, Inc.; CenturyTel of Postville, Inc.; CenturyTel of Colorado, Inc.; CenturyTel of Eagle, Inc.; CenturyTel of the Southwest, Inc.; CenturyTel of the Gem State, Inc.;[4] CenturyTel of Montana Inc.; CenturyTel of Wyoming, Inc.; CenturyTel of Oregon, Inc.; CenturyTel of Eastern Oregon, Inc.; CenturyTel of Washington, Inc.; CenturyTel of Cowiche, Inc.; and CenturyTel of Inter-Island, Inc.

The following party was the defendant in the district court and the appellant in the court of appeals, and is the petitioner in this Court: Sprint Communications Company, L.P.

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[3] This respondent is incorrectly identified as "CenturyTel of USA Wisconsin LLC" in Sprint's Petition.

[4] This respondent is incorrectly identified as "CenturyTel of Gem State Inc." in Sprint's Petition. Additional punctuation errors in the party names have not been separately noted.

CORPORATE DISCLOSURE STATEMENT

The Respondents are wholly owned by CenturyLink, Inc., a Louisiana corporation with its principal place of business in Monroe, Louisiana. CenturyLink, Inc. is a publicly held company.

There is no other publicly held corporation or entity that has a direct financial interest in the Respondents.

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STATUTORY PROVISION INVOLVED

In addition to the statutory provisions identified in Sprint's Petition, another key statutory provision relevant to this petition is Mo. Rev. Stat. 392.550(2), which provides as follows:

> Interconnected voice over internet protocol service shall be subject to appropriate exchange access charges to the same extent that telecommunications services are subject to such charges.

STATEMENT OF THE CASE

Petitioner Sprint Communications Company, L.P. ("Sprint") is a "common carrier" within the meaning of 47 U.S.C. § 153(11) providing "telecommunications service" within the meaning of 47 U.S.C. § 153(53). For purposes of the voice calls at issue in this case, Sprint acted as an "interexchange carrier" or "IXC" within the meaning of 47 C.F.R. § 64.4001(d). Pet. App. 37a. As an IXC, Sprint was entitled pursuant to Section 251(g) of the Telecommunications Act of 1996 to receive "exchange access" to the networks of "local exchange carriers" ("LECs") such as CenturyLink. *See* 47 U.S.C. § 251(g). The "exchange access" that Section 251(g) obligated CenturyLink to provide Sprint was "access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(20). For providing such "exchange access," LECs such as CenturyLink were entitled under Section 251(g) to "receipt of compensation" pursuant to their pre-existing federal and state access tariffs unless and until the access charge regime was "explicitly superseded by regulations prescribed by the [Federal Communications] Commission after [February 8, 1996]." *See* 47 U.S.C. § 251(g).

In 2004, Sprint began using its status as a telecommunications carrier to provide wholesale telecommunications services to various cable television companies around the country. Although these cable television companies were not local exchange carriers themselves, they sought to compete with LECs by offering home telephone service to their subscribers. These voice calling

features were often packaged as part of a bundle of services including television and Internet using technology that allows voice communications to be relayed over cable wires in so-called "Internet" protocol. This "Voice over Internet Protocol" form of transmitting voice calls is known as "VoIP." VoIP differs from the traditional "time division multiplexing" ("TDM") format for transmitting voice calls that is most commonly used in the telecommunications industry.

As part of Sprint's wholesaling arrangements with cable companies, Sprint agreed to transmit calls placed by subscribers of the cable companies to the network of telecommunications companies across the country (known collectively as "the public switched telephone network" or "PSTN"). So that customers of the cable companies could call customers of traditional phone companies and vice versa, Sprint needed to establish "interconnection" between its long distance network and the local exchange networks of carriers such as CenturyLink. Because the PSTN uses TDM technology, Sprint needed to convert the calls placed by cable company subscribers from VoIP into TDM format before transmitting them to the PSTN.

Whenever a cable-company subscriber placed a voice call to a CenturyLink customer, the call would "originate" (*i.e.*, begin) in VoIP format on the cable company's network. The VoIP call would then be transmitted to Sprint, which converted the call into TDM format. Sprint would then transmit the call to CenturyLink in TDM format, and CenturyLink would "terminate" (*i.e.*, deliver) the call to the end-user in TDM format. Voice calls that take this

transmission path are referred to as "VoIP-to-TDM" calls.

When Sprint established facilities to interconnect its long distance network with CenturyLink's local exchange networks, it ordered "switched access services" under CenturyLink's access tariffs. The per-minute toll for such service, known as an "access charge," is set forth in CenturyLink's tariffs for long distance calls (known as "access tariffs"). For interstate calls, CenturyLink's access charges are set forth in access tariffs filed with the Federal Communications Commission ("the FCC"). For intrastate calls, CenturyLink's access charges are set forth in access tariffs filed with state public utility commissions.

Sprint concedes that, when it delivered VoIP-to-TDM calls to CenturyLink for termination, it received the "switched access services" described in CenturyLink's federal and state access tariffs. Sprint also concedes that at no time between 2004 and 2009 was the pre-existing access charge regime for VoIP-to-TDM traffic ever "explicitly superseded" by the FCC pursuant to 47 U.S.C. § 251(g). During this time, certain carriers were urging the FCC to explicitly supersede the access charge regime for such calls. Sprint, however, repeatedly urged federal and state regulators alike that the same tariffed access charges should apply regardless of whether the call had originated in VoIP or TDM format.[5]

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[5] For example, the June 11, 2004 prepared testimony of Sprint Corporation's Director of Regulatory Policy before the Florida Public Service Commission stated as follows:

From 2004 until July 2009, Sprint paid CenturyLink the access charges for VoIP-to-TDM calls set forth in CenturyLink's federal and state access tariffs without protest or dispute. In July 2009, however, Sprint began disputing that telecommunications tariffs applied to VoIP-to-TDM calls—at least when Sprint was delivering the calls to CenturyLink for termination.[6] In its July 2009

> VoIP is a real-time voice service that utilizes a different technology at some point along the transmission path. It is Sprint's position that the use of a different technology does not change the nature of the service being provided or the use of Sprint's network at the originating or terminating end of the call. Therefore, access charges should apply for VoIP traffic that originates or terminates on Sprint's network.

ROA.9318. Similarly, the July 14, 2004 Reply Comments of Sprint Corporation to the FCC stated:

> Irrespective of the classification of VoIP service, it is clear that VoIP providers must compensate other carriers for their use of the PSTN. Sprint urges the FCC to complete its efforts to reform the access system; however, until such reform is implemented, VoIP providers must be required to pay the same access charges its [sic] direct competitors currently pay.

ROA.3928.

[6] Even after Sprint changed its stated position, refusing to pay access to charges to CenturyLink, Sprint continued to collect access charges from CenturyLink for TDM-to-VoIP calls—calls that underwent a net protocol change—that CenturyLink's affiliates delivered to Sprint. In a related case in 2010, Sprint's witness testified that "when a CenturyLink local customer originates TDM, that's plain old telephone service, it isn't information service, and, therefore, when it comes to us, we are due compensation on the terminating side." ROA.6405. The "compensation on the terminating side" to which Sprint

notice of dispute, Sprint claimed that it was an open regulatory question whether tariffs applied to VoIP-to-TDM calls. In the absence of a clear ruling by the FCC, Sprint declared that it would no longer pay CenturyLink's tariffed access charges for either interstate or intrastate calls. Instead, Sprint would pay CenturyLink only $0.0007 per minute—roughly $1 per day, or less than one percent of CenturyLink's highest tariffed rate—for the delivery of VoIP-to-TDM calls. Pet. App. 41a-42a. After Sprint began disputing its obligation to pay CenturyLink's tariffed rates for switched access, Sprint never stopped delivering VoIP-to-TDM calls to CenturyLink for termination. ROA.5673. Nor did Sprint ever notify CenturyLink to stop providing switched access service. ROA.8122; ROA.8125. But rather than pay the tariffed rates, Sprint paid CenturyLink only $0.0007 per minute for terminating calls to CenturyLink's local exchange network. This $0.0007 per minute rate was nowhere to be found in any of CenturyLink's federal or state access tariffs.

Under CenturyLink's access tariffs, if Sprint contended that it had previously been overcharged for switched access services by paying more than $0.0007 per minute, it could have filed a dispute and sought a refund with interest. Rather than do so, Sprint opted for self-help. Previously, Sprint had never identified what portion of the traffic delivered to CenturyLink for termination had supposedly

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claimed to be entitled consisted of tariffed access charges. *See* ROA.6409 ("Q: So if I may infer, does Sprint collect access charges for that traffic? A. In accordance with our tariffs, yes.").

originated in VoIP. ROA.5673. In fact, at no time before or after disputing its obligation to pay access charges on VoIP-to-TDM calls did Sprint ever provide CenturyLink with a monthly itemization of what portion of the traffic delivered to CenturyLink for termination from July 2007 through July 2009 had originated in VoIP. Instead, a Sprint engineer identified the volume of VoIP-to-TDM traffic that Sprint had delivered to CenturyLink in the month of February 2009 only. ROA.8127-28. Sprint then disputed previously paid invoices for the period July 2007 through July 2009 based on the assumption that the monthly volume of VoIP-to-TDM calls during each of these 24 months was the same as it had been in February 2009. Sprint made this assumption notwithstanding its own public statements that the volume of VoIP-to-TDM calls was significantly lower in previous months than it had been in February 2009.[7]

Based on its estimate of the volume of VoIP-to-TDM calls during the prior two years, Sprint calculated an "overcharge" in the amount of more than $4.8 million using the difference between the per-minute rates contained in CenturyLink's federal and state access tariffs and the $0.0007 per minute rate that Sprint had chosen. Pet. App. 42a. For the next two years, Sprint then withheld payment from subsequent invoices about which it had raised no dispute until it had "clawed back" the entire amount

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[7] For example, Sprint's annual Form 10-K filed with the Securities and Exchange Commission reported that Sprint's volume of VoIP calls had grown by 32 percent from 2007 to 2008, and by another 15 percent from 2008 to 2009. ROA.9400; *see also* ROA.8130-35.

of this alleged overcharge. Pet. App. 43a. The Fifth Circuit later characterized this conduct by Sprint as follows:

> Sprint took the extraordinary measure of acting on its own to recoup money it had already paid without any judicial or administrative intervention. The parties' stipulated facts establish that, for more than two years, Sprint withheld payments to CenturyLink for undisputed traditional-format-to-traditional-format calls until Sprint had recovered $4.8 million. Moreover, Sprint's utilization of one month's worth of calls as applicable to all months during a two-year period, without adjustment for seasonal calling trends or other extrapolation, was not reasonable.

Pet. App. 24a.

The foregoing conduct by Sprint was the subject of litigation that CenturyLink commenced against Sprint in the United States District Court for the Western District of Louisiana. Ultimately, CenturyLink brought three claims to trial: a claim for breach of CenturyLink's federal tariffs; a claim for breach of CenturyLink's state tariffs; and a claim that Sprint's retroactive clawback was an "unjust or unreasonable" telecommunications practice barred by 47 U.S.C. § 201(b) ("Section 201(b)"). Before allowing the case to proceed to trial, however, the District Court stayed the litigation for nearly three-and-a-half years and referred the dispute to the FCC under the doctrine of primary jurisdiction. *See CenturyTel of Chatham, LLC v. Sprint Communications Co. LP*, Civ. No. 09-1951, 2011 U.S.

Dist. LEXIS 7132 (W.D. La. Jan. 25, 2011). Following the referral, the FCC never addressed the parties' claims or defenses or provided any specific guidance as to how the case should be decided.

During the pendency of the stay, the FCC—while declining to address any of the issues referred to it by the District Court—did issue a groundbreaking rulemaking that addressed inter-carrier compensation for the exchange of VoIP-to-TDM traffic. Although the FCC's ruling was prospective only and thus did not control the outcome of this case for pre-2012 calls, its rationale was inconsistent with the arguments by which Sprint sought to justify its refusal to pay CenturyLink's tariffed access charges. The FCC's decision in *In the Matter of Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 4554 (2011) (the "*CAF Order*") declared that "[i]nterexchange VoIP-to-PSTN traffic [*i.e.,* VoIP-to-TDM traffic] is subject to the access regime regardless of whether the underlying communication contained information-service elements." *Id.* ¶ 957 n.1955. The FCC specifically "reject[ed] the claim that intercarrier compensation for VoIP-PSTN traffic is categorically excluded from section 251(g)," *i.e.*, from the "grandfathered" obligation to pay tariffed access charges. *Id.* ¶ 956 n.1952. The FCC explained that—regardless of whether VoIP-to-TDM calls are considered to be a "telecommunications service" or an "information service"—such calls were (or would have been had they existed at the time) subject to tariffed access charges before 1996 pursuant to Section 251(g):

> Regardless of whether particular VoIP services are telecommunications services or

> information services, there are pre-1996 Act obligations regarding LECs' compensation for the provision of exchange access to an IXC or information service provider. Indeed, the Commission has already found that toll telecommunications services transmitted (although not originated or terminated) in IP were subject to the access charge regime, and the same would be true to the extent that telecommunications services originated or terminated in IP.

Id. ¶ 957 (citations and quotations omitted). The FCC thus concluded: "Interexchange VoIP-PSTN traffic is subject to the access regime regardless of whether the underlying communication contained information-service elements." *Id.* n.1955.

Before the release of the *CAF Order*, two federal district court decisions had held that VoIP-to-TDM calls are information services and therefore exempt from access tariffs. *Southwestern Bell Tel. L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055 (E.D. Mo. 2006); *PAETEC Communications, Inc. v. CommPartners, LLC*, No. 08-0397, 2010 WL 1767193 (D.D.C. Feb. 18, 2010). Sprint relied on these decisions as justification for its refusal to pay CenturyLink's tariffed access charges. Indeed, Sprint continues to cite these cases in its Petition. The FCC's *CAF Order*, however, specifically considered—and rejected—both of these district court opinions. Noting that both *Southwestern Bell* and *PAETEC* "reached a different conclusion than our statutory analysis," the FCC stated that "we are not bound by those prior decisions, and find our statutory analysis above to be most appropriate." *CAF Order* ¶ 956 n.1953.

The *CAF Order* did not address any VoIP-to-TDM compensation issues retroactively, and the FCC never did reach the merits of CenturyLink's claims. The District Court eventually lifted the stay, tried the case, and ruled for CenturyLink in a decision that was affirmed, 2 to 1, by a panel of the United States Court of Appeals for the Fifth Circuit. The District Court and Fifth Circuit both held that Sprint was not entitled to obtain exchange access from CenturyLink without paying the same tariffed access charges paid by other IXCs, and the fact that certain calls may have originated in VoIP did not relieve Sprint of its payment obligations. The District Court awarded CenturyLink nearly $13 million in damages and tariff-based late payment charges, plus nearly $800,000 in attorneys' fees. Pet. App. 96a. The award of attorneys' fees reflected the District Court's determination that Sprint's use of self-help to recover its retroactive claims was unjust and unreasonable under Section 201(b). The District Court explained that while "CenturyLink may not recover double damages" on both its tariff claim and its Section 201(b) claim, CenturyLink was entitled to "recover reasonable attorneys' fees [for the Section 201(b) violation] under 47 U.S.C. § 206." Pet. App. 60a.

SUMMARY OF ARGUMENTS FOR DENYING CERTIORARI

The petition for certiorari should be denied because the Fifth Circuit's determination that Sprint's use of a "retroactive claw-back against undisputed charges based on unreasonable estimates constitutes unlawful self help" under Section 201(b) (Pet App. 24a-25a) is not only correct and consistent with FCC precedent, but also does not conflict with any decision from any state, federal, or administrative court in the country.

Additionally, as every member of the Fifth Circuit panel agreed, Sprint failed to brief—and therefore waived—its argument that state laws and tariffs governing VoIP-to-TDM calls are preempted because the calls are exclusively within the FCC's jurisdiction. In any event, as the FCC has repeatedly stated and as the only federal court of appeals to consider the issue has held, state laws and tariffs governing VoIP-to-TDM calls are not preempted in any way, shape, or form. Quite to the contrary, the FCC's watershed *CAF Order* specifically determined that state tariffs can and should be used to prescribe access charge rates for intrastate VoIP-to-TDM calls.

I. THE FIFTH CIRCUIT'S DECISION THAT SPRINT VIOLATED SECTION 201(b) WAS CORRECT AND CONSISTENT WITH FCC PRECEDENT.

As telecommunications carriers, Sprint and CenturyLink alike are subject to Section 201(b)'s requirement that their charges, practices, classifications, and regulations "be just and reasonable." 47 U.S.C. § 201(b). To violate Section

201(b)'s prohibition against "unjust" or "unreasonable" practices, a carrier must either violate the Communications Act itself or engage in conduct that the FCC has determined to be an "unjust and unreasonable practice." *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 53-54 (2007). Sprint's Petition is premised on the assertion that particular conduct violates the Communications Act only if the FCC has previously determined that such conduct violates the Communications Act. This assertion does great violence to *Global Crossing*, in which the Court held that violation of an FCC regulation implementing the statute was just as actionable as a violation of the statute itself. By so holding, the Court did not deprive the federal courts of their jurisdiction to determine in private litigation whether particular conduct by carriers is "unjust" or "unreasonable" in violation of Section 201(b). Sprint's contention that the FCC is the sole arbiter of whether a carrier has violated the statute finds no support in Section 201(b) or prior decisions construing it, including *Global Crossing*.

Equally fallacious is Sprint's suggestion that reversal of the Fifth Circuit's finding of a Section 201(b) violation is somehow necessary to avoid a potential conflict with decisions of the FCC relating to carriers' use of self-help. Even Sprint concedes that the FCC does "not 'endorse' non-payment of tariffs 'outside the context of any applicable tariffed dispute resolution provisions.'" Sprint Pet. at 13, quoting *All American Tel. Co. v. AT&T Corp.*, 26 FCC Rcd. 723, 728 ¶ 13 (2011). This concession is an understatement, to say the least. In fact, the FCC has been very critical of carriers that engage in "self-

help" by refusing to pay tariffed charges as they become due, even when they have a bona fide dispute about the applicability of the tariff. *See In the Matter of MCI Telecommunications Corp.*, 62 F.C.C.2d 703, 706 (1976). ("We cannot condone MCI's refusal to pay the tariffed rate for voluntarily ordered services. . . . [S]elf-help is not an acceptable remedy."). Rather than engage in self-help, the FCC has made clear, a customer that disputes the applicability of a tariff "should first pay, under protest, the amount allegedly due and seek redress" after the fact. *In the Matter of Business WATS, Inc.*, 7 FCC Rcd. 7942 (1992).

This is not a case in which CenturyLink has sought to make the FCC a "collection agent" for unpaid tariff charges. To the contrary, CenturyLink sought relief for Sprint's unpaid tariff charges in federal court, precisely as Sprint says is proper. Moreover, CenturyLink did not seek attorneys' fees for "unjust and unreasonable" telecommunications practices in violation of Section 201(b) based upon Sprint's mere failure to pay tariffed charges. The premise of Sprint's petition—that "the Fifth Circuit erred in determining that failure to pay a tariffed charge is a violation of the Communications Act"—is demonstrably incorrect. The conduct that the Fifth Circuit found to be both "unjust" and "unreasonable" under Section 201(b) was limited to a fact pattern that was without precedent in two critical respects. First, Sprint helped itself to a retroactive clawback by withholding payment of tariffed charges that were undisputed. Second, Sprint based the amount of its clawback on an unreasonable estimate of the volume of VoIP-to-TDM calls.

To be sure, neither the FCC nor the federal courts have ever confronted conduct quite like that in which Sprint engaged here. By leaving the Fifth Circuit's decision undisturbed, this Court can hopefully ensure that this case is both the first and the last time that the federal courts have to address this issue.

A. The Fifth Circuit Correctly Found That Sprint's "Retroactive Claw-Back Against Undisputed Charges Based on Unreasonable Estimates" Violated Section 201(b).

In the summer of 2009, Sprint stopped paying CenturyLink's tariffed charges for VoIP-to-TDM calls going forward. Instead, Sprint decided to engage in "self-help" by paying its self-imposed, $0.0007 per minute rate prospectively for VoIP-to-TDM calls. Such prospective self-help, although it has previously been condemned by the FCC, was not the basis for CenturyLink's successful claim that Sprint had violated Section 201(b). Rather, the conduct of Sprint that CenturyLink challenged as "unjust" and "unreasonable" under Section 201(b) went far beyond the self-help at issue in *All-American Telephone v. AT&T Corp.*, 26 FCC Rcd. 723 (2011) or any other reported decision of the FCC.

Specifically, in addition to reducing its payments to CenturyLink for disputed VoIP-to-TDM calls to $0.0007 per minute, Sprint also stopped paying CenturyLink for undisputed, TDM-to-TDM calls**.** In other words, Sprint took the law into its own hands by engaging in a unilateral, retroactive clawback

against undisputed charges.[8] As the Fifth Circuit emphasized, Sprint based the retroactive clawback on a single month's volume of VoIP-to-TDM calls, which it then used as a proxy for the monthly volume over a two-year period—even though Sprint's own documents suggested that this estimate substantially overstated the actual volume of such traffic during the two-year period. Pet. App. 22a, 24a.

Based on these facts, the Fifth Circuit rightly (and reasonably) held that "Sprint's retroactive claw-back against undisputed charges based on unreasonable estimates constitutes unlawful self help, in violation of 47 U.S.C. § 201(b)." Pet App. 24a-25a. Accordingly, the Fifth Circuit upheld the District Court's award of nearly $800,000 in attorneys' fees to CenturyLink. This was a narrow, fact-dependent question. It is one that neither the FCC nor any federal court in the country has ever confronted before. Sprint has not cited (and CenturyLink is not aware of) a single federal case

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[8] At trial, Sprint coined a new term to describe this practice—"accounts payable debit balance"—a phrase that is not among the 26,283 terms defined in a leading telecommunications industry publication. ROA.8149-50. Before trial, CenturyLink's witnesses had never heard the term. ROA.7974. As it turns out, however, the Iowa Utilities Board had heard of the term and had previously condemned it—finding that "Sprint acted inappropriately by establishing its A[ccounts] P[ayable] Debit Balance which, in effect, withheld amounts Sprint had not disputed." *In re: Sprint Commc'ns Co. L.P. v. Iowa Telecomms. Services, Inc.,* 2011 Iowa PUC LEXIS 44, Docket No. FCU-2010-0001 (State of Iowa Dept. of Commerce Util. Bd. Feb. 4, 2011), *aff'd*, 2011 Iowa PUC LEXIS 90 (March 25, 2011).

concerning retroactive clawbacks against undisputed charges—let alone a clawback based on an estimate that was expressly found to be "unreasonable." In this regard, the Fifth Circuit specifically observed that "the FCC has not squarely addressed Sprint's claw-back practice." Pet. App. 24a. In fact, the only appellate precedent that is even remotely on point, a decision of the D.C. Circuit, supports the conclusion that the Fifth Circuit reached here: "Any carrier that engaged in self-help . . . runs the risk that the Commission will find against it—even if its underlying position is vindicated—and hold it liable solely for engaging in self-help." *AT&T Corp. v. FCC*, 317 F.3d 227, 233 (D.C. Cir. 2003).

In the absence of definitive FCC or judicial guidance, the Fifth Circuit did its best to determine whether Sprint's particular conduct here was "unjust" or "unreasonable" within the meaning of Section 201(b). The Fifth Circuit's decision reflects the unremarkable application of black-letter law to very specific, undisputed, and unique facts. Under the circumstances, it should not be disturbed.

B. The Only Record Evidence in this Case Shows That Retroactive Clawbacks Are *Not* "Standard Operating Procedure" in the Telecommunications Industry.

Citing an *amicus* brief filed by Verizon in the Fifth Circuit, Sprint suggests that retroactive clawbacks are "standard operating procedure" in the telecommunications industry. (Sprint Pet. 4). Procedurally, this "factual" assertion is improper. Even if it were proper to somehow "supplement" the trial record on appeal, the *amicus* brief that Sprint cites did not include any affidavits or other evidence

to support the proposition that retroactive clawbacks are at all common—let alone "standard"—in the industry.

At trial, Sprint presented no evidence whatsoever to support the assertion that it now makes that retroactive clawbacks are in any respect common in the telecommunications industry. To the contrary, the only evidence that was adduced at trial on this point was the testimony of a three-decade veteran of the telecommunications industry who testified that Sprint's actions in this case were the first time he had ***ever*** seen a carrier engage in a retroactive clawback. ROA.8035. Accordingly, the Court should not credit the unsupported factual assertions of an *amicus*, when Sprint itself failed to present evidence at trial to support these factual assertions.

C. This Case Does Not Open the Door for the FCC to Become a "Collection Agent" for Unpaid Tariff Obligations.

Citing some half-dozen FCC cases for the undisputed proposition that the FCC is not a collection agent, Sprint argues that the Fifth Circuit's decision has placed the FCC on a slippery slope that "will effectively make the Commission a collection agent, contrary to its understanding of its proper role." (Sprint Pet. 15). This concern is unfounded for several reasons. First and foremost, the Fifth Circuit did not hold that a carrier's failure to pay tariffed charges is actionable under Section 201(b). To the contrary, the District Court awarded damages—and the Fifth Circuit affirmed—based on the very claims for breach of federal and state access tariffs that Sprint argues should be heard only in

federal court. The Fifth Circuit's finding of a Section 201(b) violation was based on unique facts: Sprint's withholding payment from undisputed invoices to retroactively claw back an amount that was based on a demonstrably unreasonable estimate. The Fifth Circuit was careful to frame its Section 201(b) analysis in terms of "the guidance provided by the FCC to the facts at hand." Pet App. 24a. As a result, the FCC will not be bound by the Fifth Circuit's decision in future cases. *See generally National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

In the unlikely event that a future litigant tried to use a carrier's retroactive clawback as a vehicle to turn the FCC into a collection agency for unpaid tariff obligations, the FCC would thus remain free to decide for itself whether it agrees with the Fifth Circuit's interpretation of Section 201(b). The FCC similarly can decide for itself whether the Fifth Circuit's decision somehow provides precedent for defeating the "fundamental policy of nondiscriminatory rates" at the heart of the telecommunications tariff regime. This case has no impact whatsoever on the FCC's jurisdiction or ability to set telecommunications policy. This case is simply not that important. The only thing that is really at stake here is whether Sprint had to pay a portion of CenturyLink's attorneys' fees in this particular case.

Tellingly, the case below was stayed for nearly three-and-a-half-years while the parties and the District Court awaited guidance from the FCC. The FCC never acted on the referral. Nor has the FCC sought leave to intervene or file any *amicus* briefs in this matter. It therefore is simply incorrect to suggest that this case poses any significant precedent for the FCC, let alone to assert that this case "is vitally important to the FCC." (Sprint Pet. at 3). Rather, this case simply raised a narrow, fact-dependent issue of first impression. The conclusion that the Fifth Circuit reached under the facts presented was reasonable, consistent with FCC precedent, and not contradicted by any other opinion from any court in the country.

Accordingly, this Court should not disturb the Fifth Circuit's proper decision that Sprint's retroactive clawback against undisputed amounts and based on unreasonable estimates was "unjust" and "unreasonable" in violation of Section 201(b).

II. SPRINT WAIVED ITS ARGUMENT THAT VOIP-TO-TDM CALLS ARE GOVERNED EXCLUSIVELY BY FEDERAL LAW.

The Fifth Circuit panel below was divided, 2 to 1, on the issues of the regulatory classification of interstate VoIP-to-TDM calls and of CenturyLink's claim under Section 201(b). However, the panel was unanimous about one thing: Sprint had not raised in its appellate brief—and therefore had waived—the argument that federal law preempts state laws and tariffs requiring the payment of access charges on intrastate VoIP calls. *Compare* Pet. App. 13a-15a (Part II.A.1 of the majority opinion holding that Sprint had waived its argument for preemption) *with*

Pet. App. 25a ("dissent[ing] from Part II.A.2 and II.B of the majority opinion").

The vast majority of the access charges at stake in this case arose under intrastate tariffs filed with state public utility commissions ($7.6 million) as opposed to interstate access charges under tariffs filed with the FCC ($1.1 million). Pet. App. 13a. Of the intrastate charges, the single largest component by far ($3.1 million) reflected charges for intrastate calls in Missouri. Pet. App. 54a. As it happens, Missouri has a law that directly governs the outcome of this case:

> Interconnected voice over internet protocol service shall be subject to appropriate exchange access charges to the same extent that telecommunications services are subject to such charges.

Mo. Rev. Stat. § 392.550(2). As the District Court put it, this Missouri statute "unambiguously makes VoIP-originated traffic subject to state access charges." Pet. App. 54a. This Missouri statute meant that at least $3.1 million of Sprint's dispute was plainly unlawful—unless there were grounds for setting the Missouri statute aside.

In light of the unambiguous Missouri statute, Sprint argued before the District Court that the Missouri statute was preempted by federal law. Sprint's argument for preemption was based on a dictum from a 2004 FCC administrative ruling. However, as the District Court explained, the FCC itself had reversed this dictum two years later in 2006 and then, in 2007, formally abandoned it

altogether in an appeal to the Eighth Circuit.[9] As a result, the District Court actually took Sprint to task for making such a frivolous argument for preemption. *See* Pet. App. 57a ("Sprint did not distinguish the FCC's reversal of the 2004 *Vonage* dictum . . ., the FCC's abandonment of the dictum in briefing before the Eighth Circuit, or the Eighth Circuit's acceptance of the abandonment of the dictum.").

Given how frivolous Sprint's argument for preemption at the District Court had been, it was no surprise when Sprint declined to raise its preemption argument again on appeal. Sprint's appellate brief did not use the word "preemption" at all. Nor did it so much as cite the Missouri statute that, without a preemption defense, would have been controlling. However, when CenturyLink pointed out in its response brief that Sprint had abandoned its only defense to some $3.1 million of the claims at stake in the case, Sprint asserted for the first time in its reply brief that it had meant to raise its preemption argument on appeal after all.

At oral argument, Sprint's counsel was asked to clarify whether Sprint was seeking reversal based on federal preemption. Sprint waffled. The Fifth Circuit characterized the exchange as follows:

> Pressed for clarification during its opening oral argument here, Sprint conceded it did not raise the issue, stating "it's not an argument we've made here" in response to

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[9] *See* Pet. App. 55a-57a; *see generally Minn. Public Util. Comm'n v. FCC*, 483 F.3d 570, 582-83 (8th Cir. 2007).

> being asked it if waived preemption . . . . [O]n rebuttal, Sprint reversed course from its earlier concession and claimed it was not raising on appeal a field-occupation preemption theory, but rather its preemption contention is based on conflict preemption. In that regard, however, Sprint conceded the reference to the Supremacy Clause in its opening brief's statement of jurisdiction is the only manner in which it could be deemed to have raised conflict preemption on appeal.

Pet. App. 14a-15a. In other words, after initially conceding that it was not arguing for preemption, Sprint reversed course again and claimed in rebuttal that it was arguing for preemption, but that its only preservation of that argument had been a cursory reference to the Supremacy Clause in the jurisdictional statement of its opening brief. Under the circumstances, the Fifth Circuit panel unanimously held that Sprint waived any argument for preemption. "At best," the court held, "the issue was insufficiently briefed; at worst, abandoned." Pet. App. 15a.

Given this background, Sprint's contentions that the Fifth Circuit's holding of waiver was "perplexing" and "plain error" are specious. Sprint failed to use the word "preemption" (or any derivation thereof) in its brief. It failed to use the word "conflict" (or any derivation thereof) in its brief. Its brief completely ignored the otherwise-controlling Missouri law that was supposedly conflict-preempted. At oral argument, Sprint initially conceded that it had abandoned any argument for preemption. When it later sought to retract that concession, Sprint admitted that the only place it could have preserved

any argument for preemption was in a mere jurisdictional statement. Even in its petition for writ of certiorari before this Court, Sprint still neglects to mention the Missouri statute that, without preemption, would control a plurality of the dollars at issue in this case.

Sprint has likely waived its preemption argument several times over, but once is enough. Accordingly, the Court should deny the petition for writ of certiorari.

A. Even if Sprint Had Not Waived its Argument for Preemption, Sprint's Position is Contrary to Decisions of the FCC and the Only Court of Appeals to Have Addressed the Issue.

Because Sprint has waived its argument for preemption, it is not necessary for the Court to reach the merits of Sprint's position that state laws regulating VoIP-to-TDM calls are preempted. On the merits, Sprint's preemption argument is incorrect for a number of reasons. These include the fact, as the District Court cogently explained, that Sprint's argument for preemption was based solely on dictum in an FCC decision that the FCC formally abandoned more than a decade ago. Pet. App. 55a-57a. This defect alone suffices to show the error in Sprint's argument for preemption.

Moreover, in the watershed FCC rulemaking that determined the compensation for VoIP-to-TDM calls from January 1, 2012 forward, the FCC specifically rejected the argument that Sprint now makes that state laws and tariffs governing VoIP-to-TDM calls are preempted. *Compare* Sprint Pet. at 19 ("federal law preempts the application of state

tariffs to VoIP calls") *with CAF Order*, 26 FCC Rcd. at 18,002, ¶ 934 (2011) ("[W]e are not persuaded on this record that all [VoIP-to-TDM] traffic must be subject exclusively to federal regulation."); *see also id.* at 18,017, ¶ 959 ("[W]e do not rely on the contention that the Commission has legal authority to adopt this regime because all [VoIP-to-TDM] traffic should be treated as interstate.").

Contrary to Sprint's argument, the *CAF Order* specifically held that the "tariffing of charges for toll [VoIP-to-TDM] traffic can occur through both federal and state tariffs." *CAF Order* at 18,002, ¶ 934. Sprint, however, argues that, under federal law, "state tariffs may not be applied" to VoIP-to-TDM calls. (Sprint Pet. at 18). In other words, Sprint is asking this Court to rule that state tariffs cannot regulate VoIP-to-TDM calls, even though the FCC has unambiguously determined that state tariffs ***can*** regulate such calls and, in fact, the FCC has specifically directed states to engage in such tariffing of VoIP-to-TDM calls.

Simply put, Sprint is arguing that the FCC has administratively preempted any state law or tariff that governs VoIP-to-TDM calls. The FCC disagrees with this characterization of its own orders. In fact, the FCC has repeatedly stated that state laws and tariffs that govern VoIP-to-TDM calls are ***not*** preempted. Accordingly, even if Sprint had not waived its argument for preemption, Sprint would still be wrong to argue that, despite its best efforts not to do so, the FCC has effectively preempted state laws and tariffs by mistake. Such an argument runs contrary to this Court's longstanding precedents that federal regulations preempt state laws only when the regulator means for the regulations to have

preemptive effect. *See generally Williamson v. Mazda Motor of America, Inc.*, 562 U.S. 323, 335 (2011); *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 154 (1982).

Had the Fifth Circuit rejected Sprint's preemption argument on the merits, its ruling would have been consistent with the only other appellate court ruling to decide the issue. Just four days before the Fifth Circuit's ruling below, the Eighth Circuit "reject[ed] Sprint's argument that federal law exempted Sprint from having to pay intrastate access charges" on VoIP-to-TDM calls. *Sprint v. Lozier*, 860 F.3d 1052, 1058 (8th Cir. 2017). The Eighth Circuit correctly cited the *CAF Order* for the proposition that "[r]egardless of the classification of the calls as information services or telecommunications services, state law determined the . . . obligation relating to compensation for the intrastate traffic exchanged between [appellee] and Sprint." *Id.* *See generally CAF Order*, 26 FCC Rcd. at 18,015-16, ¶ 957 ("Regardless of whether particular VoIP services are telecommunications services or information services, there are pre-1996 Act obligations regarding [local exchange carriers'] compensation for the provision of exchange access to an [interexchange carrier] or information service provider. Indeed, the Commission has already found that toll telecommunications services transmitted (although not originated or terminated) in IP were subject to the access charge regime, and the same would be true to the extent that telecommunications services originated or terminated in IP."). The *CAF Order* thus directly answers Sprint's argument that a "net protocol conversion" between VoIP and TDM formats makes VoIP-to-TDM calls exempt from

tariffs. Sprint Pet. at 17. The FCC has specifically examined this question, and determined that tariffs apply even for calls that "originated . . . in [Vo]IP." *CAF Order*, 26 FCC Rcd. at 18,015-16, ¶ 957.[10]

B. The Court Should Not Indulge Sprint's Suggestion That This Case Be Held in Abeyance Pending a Potential Review of Sprint's Loss in the Eighth Circuit.

In the alternative to asking this Court to reverse the Fifth Circuit's determination that Sprint waived its argument for preemption, Sprint suggests instead that "the Court may wish to hold the second question presented and grant, vacate, and remand on that issue if the Court reverses the Eighth Circuit's decision." (Sprint Pet. at 5). This suggestion stands Supreme Court Rule 10 on its head. Sprint cites no obvious conflict with federal law. No statute or

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[10] Additionally, the *CAF Order* rejected the two district-court cases cited by Sprint (Sprint Pet. at 17) for the somewhat different proposition that VoIP-to-TDM calls are not subject to either federal or state tariffs. *See Comprehensive Reform Order*, 26 FCC Rcd. at 18,015, ¶ 956 n.1953 (noting that both *PAETEC Communications, Inc. v. CommPartners, LLC*, No. 08-0397, 2010 WL 1767193 (D.D.C. Feb. 18, 2010) and *Southwestern Bell Telephone, L.P. v. Missouri Public Service Commission*, 461 F. Supp. 2d 1055 (E.D. Mo. 2006) "reached a different conclusion than our statutory analysis . . . . [W]e are not bound by those prior decisions, and find our statutory analysis above to be most appropriate."). As the District Court explained, the FCC's rejection of these two judicial cases is controlling, because "both the prior decisions were based on the courts' educated guesses about how the FCC might regulate VoIP if given the opportunity. . . . The FCC has [subsequently] spoken on this issue, its decision is entitled to deference, and the Court finds that decision to be consistent with the statute." Pet. App. 58a-59a.

regulation preempts the application of intrastate access tariffs to VoIP-to-TDM traffic. The FCC has not found such preemption. To the contrary, the FCC has expressly held that "tariffing of charges for toll [VoIP-to-TDM] traffic can occur through both federal and state tariffs." *CAF Order* at 18,002, ¶ 934.

Nor does Sprint's Petition cite any Circuit split that might warrant this Court's discretionary review. Instead, Sprint asks this Court to create a Circuit split (and then resolve it in favor of Sprint) by means of procedural machinations that would make Rube Goldberg proud. For Sprint's "magic-bullet" scenario to succeed, this Court, the Fifth Circuit, and the District Court would have to do the following things while this Court holds Sprint's petition for certiorari in abeyance. First, in the Eighth Circuit case, this Court would have to grant the requested writ of certiorari and rule in Sprint's favor on the merits of its preemption argument. Then, without ruling on whether Sprint waived its preemption argument below, the Court would have to vacate the Fifth Circuit decision from which Sprint appeals and remand this case back to that court. Following remand, the Fifth Circuit would have to (inexplicably) reverse its unanimous holding of waiver and ultimately rule for Sprint. In all probability, this would require a further remand to the District Court for a factual determination of whether the calls at issue in this case were information services or telecommunications services. *See* Pet. App. 31a.

Besides requiring a flight of fancy, this suggestion is neither principled nor lawful. The Fifth Circuit squarely determined that Sprint

waived its argument for preemption, and the Fifth Circuit will have no basis for revisiting this determination unless this Court specifically reverses the finding of waiver. The record provides no basis for this Court to do so. To the contrary, the transcript of the oral argument is consistent with the characterization of it by the Fifth Circuit panel: Sprint's counsel admitted—at least until he later thought better of it—that Sprint had abandoned its preemption argument. More importantly, the record below shows that Sprint failed to preserve this argument for appeal in its opening brief to the Fifth Circuit. Justice will not be served by holding this case in abeyance without a ruling on whether Sprint waived its preemption argument. CenturyLink therefore respectfully requests that this Court proceed to decide Sprint's Petition on the merits, or lack thereof.

CONCLUSION

Sprint's petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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