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 a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF VERIZON AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

SCOTT H. ANGSTREICH
Counsel of Record
JOSHUA D. BRANSON
KYLIE C. KIM
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(sangstreich@kellogghansen.com)

November 30, 2017

IN THE
Supreme Court of the United States

No. 17-627

SPRINT COMMUNICATIONS COMPANY, L.P.,
Petitioner,

v.

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

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, Verizon moves for leave to file the accompanying brief as *amicus curiae* in support of petitioner. Petitioner provided *amicus* written consent to the filing of this brief; counsel for respondents refused to consent to the filing of this brief.

Verizon is a nationwide provider of communications services that both sells and purchases tariffed communications services. Disputes between sellers and purchasers of tariffed services are commonplace in the telecommunications industry, as the billing for those services is complex. As a carrier selling tariffed

services, Verizon often has its charges disputed by customers — including other carriers — that withhold not only currently due amounts but also additional amounts to offset the customers' past payment of charges now in dispute. Conversely, as a customer purchasing tariffed services from other carriers, when Verizon disputes the other carriers' billing practices under their tariffs, it often withholds payment of otherwise undisputed amounts to offset its past payment of amounts that it now disputes.

The Federal Communications Commission ("FCC") has held, for decades, that a customer's refusal to pay for tariffed services can give rise to an action in contract by the carrier to compel payment, but that the customer's refusal to pay does not violate the Communications Act of 1934. Therefore, a customer's actions cannot trigger the fee-shifting provision of the Act. Despite that well-settled principle, the panel below ruled that, by withholding amounts to offset past payments now in dispute, Sprint — in its capacity as a customer — violated the Communications Act and is subject to the statutory fee-shifting provision. The panel's unprecedented ruling — issued without benefit of input from the FCC through an *amicus* brief — threatens to disrupt the telecommunications industry.

In light of these interests and its perspective as a seller and purchaser of tariffed services, Verizon participated as an *amicus* before the Fifth Circuit.

Verizon should be granted leave to file the attached *amicus* brief.

Respectfully submitted,

SCOTT H. ANGSTREICH
Counsel of Record
JOSHUA D. BRANSON
KYLIE C. KIM
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(sangstreich@kellogghansen.com)

November 30, 2017

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 a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF VERIZON AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

SCOTT H. ANGSTREICH
Counsel of Record
JOSHUA D. BRANSON
KYLIE C. KIM
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(sangstreich@kellogghansen.com)

November 30, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ADMINISTRATIVE DECISIONS

STATUTES AND RULES

OTHER MATERIALS

INTEREST OF *AMICUS CURIAE*[1]

Verizon is a nationwide provider of communications services that both sells and purchases tariffed communications services. Disputes between sellers and purchasers of tariffed services are commonplace in the telecommunications industry, as the billing for those services is complex. As a carrier selling tariffed services, Verizon often has its charges disputed by customers — including other carriers — that withhold not only currently due amounts but also additional amounts to offset the customers' past payment of charges now in dispute. Conversely, as a customer purchasing tariffed services from other carriers, when Verizon disputes the other carriers' billing practices under their tariffs, it often withholds payment of otherwise undisputed amounts to offset its past payment of amounts that it now disputes.

The Federal Communications Commission ("FCC") has held, for decades, that a customer's refusal to pay for tariffed services can give rise to an action in contract by the carrier to compel payment, but that the customer's refusal to pay does not violate the Communications Act of 1934. Therefore, a customer's actions cannot trigger the fee-shifting provision of the Act. Despite that well-settled principle, the panel below ruled that, by withholding amounts to offset past payments now in dispute, Sprint — in its capacity as a customer — violated the Communications

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amicus* also represents that all parties were provided notice of *amicus*'s intention to file this brief at least 10 days before it was due.

Act and is subject to the statutory fee-shifting provision. The panel's unprecedented ruling — issued without benefit of input from the FCC through an *amicus* brief — threatens to disrupt the telecommunications industry.

SUMMARY OF ARGUMENT

The Court should call for the views of the Solicitor General so that the FCC can address — and correct — the panel's erroneous interpretation of FCC precedent and the Communications Act of 1934.

I. An unbroken line of FCC precedent holds that a customer's failure to pay for another carrier's tariffed services is not a violation of § 201(b) of the Communications Act — even if that customer is, itself, a carrier. The panel misinterpreted that line of precedent in holding that, by refusing to pay for tariffed services in order to recoup past payments now in dispute, a carrier-customer engages in "unjust or unreasonable" practices in violation of § 201(b) and triggers the requirement to pay attorney's fees in § 206. Contrary to the panel's contention, the FCC has never suggested that a customer's *reason* for not paying a carrier's tariffed charges could cause the customer to violate the Communications Act and require payment of the carrier's attorney's fees if the carrier prevails in the dispute. The FCC's longstanding precedent, moreover, is consistent with the text of the Communications Act, which prohibits "unjust or unreasonable" practices by a "common carrier engaged in interstate . . . communication" "in connection with such communication service." 47 U.S.C. § 201(a), (b). The practices of a customer of such a carrier cannot violate that provision.

II. Before taking the unprecedented step of finding a carrier-customer in violation of § 201(b), and subject

to fee-shifting under § 206, the panel should have sought the FCC's views through an *amicus* brief. Nearly every other court of appeals has done so in comparable cases. This Court has similarly benefited at the certiorari stage by obtaining the FCC's position through a call for the views of the Solicitor General. The Court should do so here, as the panel's decision threatens to disrupt the settled practice within the communications industry and violates the filed-rate doctrine by treating carrier-customers differently from other customers purchasing the same tariffed services. Based on the Solicitor General's brief, the Court can decide whether to grant, vacate, and remand for the panel to reconsider its decision in light of the FCC's views.[2]

ARGUMENT

I. THE FIFTH CIRCUIT'S UNPRECEDENTED DECISION CONFLICTS WITH THE COMMUNICATIONS ACT AND FCC PRECEDENT

A. A Carrier-Customer Cannot Be Liable for Attorney's Fees Under 47 U.S.C. § 206 Because It Cannot Violate the Communications Act

The Communications Act contains a fee-shifting provision that applies when a "common carrier . . . do[es] . . . any act . . . in this chapter prohibited or declared to be unlawful." 47 U.S.C. § 206. That carrier "shall be liable . . . for the full amount of damages . . . , together with a reasonable . . . attorney's fee." *Id.* Before the panel's decision, neither the FCC nor any court had ever held that a customer's refusal to pay a common carrier's tariffed charges is a violation of the Communications Act. Therefore, no court

---

[2] As it did before the Fifth Circuit, Verizon takes no position on the other issue raised in Sprint's petition.

had ever applied § 206 to require a customer to pay the attorney's fees a carrier incurred in pursuing a successful action to collect unpaid tariffed charges.[3]

The FCC, in an unbroken line of precedent dating back to 1989, has held that a customer's refusal "to pay charges specified in the carrier's tariff" is not a "violation of any provision of the [Communications] Act, including section[] 201(b) . . . — *even if the carrier's customer is another carrier*." Memorandum Opinion and Order, *All Am. Tel. Co. v. AT&T Corp.*, 26 FCC Rcd 723, ¶ 10 & n.32 (2011) ("*All American*") (emphasis added); *see also* Pet. 11-13 (citing FCC precedent). Therefore, in *All American*, the FCC dismissed a complaint that All American (the carrier) brought against AT&T (the customer) because All American "ha[d] no claim . . . that AT&T violated the [Communications] Act *in its role as a customer*." *All American* ¶ 12 (emphasis added).

The FCC's decisions distinguishing between a company's operations as a common carrier (when it sells tariffed services) and a customer (when it purchases tariffed services) are consistent with the text of the Communications Act. Under the Act, a company is "a common carrier under [the Communications Act] *only* to the extent that it is engaged in *providing* telecommunications services." 47 U.S.C. § 153(51) (emphases added). And § 201(b) "declare[s] to be unlawful" only "unjust or unreasonable" practices by a "common carrier engaged in interstate . . . communication" that are "in connection with such

---

[3] The attorney's fee is "to be fixed by the court." 47 U.S.C. § 206. Courts and the FCC have concluded that the fee-shifting provision therefore does not apply to cases brought before the FCC. *See*, *e.g.*, *Turner v. FCC*, 514 F.2d 1354, 1355-56 (D.C. Cir. 1975).

communication service." *Id.* § 201(a), (b). Therefore, when a company acts in its capacity as a customer — rather than in its capacity as a common carrier — it cannot violate § 201(b). Because Sprint acted in its role as a customer in this case — just as AT&T did in *All American* — Sprint's refusal to pay CenturyLink's tariffed charges could not have violated § 201(b), and the panel clearly erred in holding otherwise.

B. The Fifth Circuit's Decision Finds No Support in FCC Precedent and Is Inconsistent with the Communications Act

In finding Sprint liable for attorney's fees, the panel stated that it was "accord[ing] . . . deference" to the "FCC's determination that improper 'self-help' can be a violation of" the Communications Act. Pet. App. 24a. The panel cited two decisions that it claimed set forth that FCC position. *Id.* at 22a, 23a.[4] Yet, in adopting that characterization of those decisions, the panel ignored that the FCC, in *All American*, expressly denied that those decisions stand for the proposition that "a failure to pay tariffed charges violates the Act itself." *All American* ¶ 13 & nn.36-37. The FCC also reiterated in *All American* that those decisions instead "'only mean that the use of "self-help" undercuts a claim of irreparable injury for the purpose of emergency relief.'" *Id.* ¶ 13 n.37 (quoting Memorandum Opinion and Order, *Bell Atlantic-Delaware, Inc. v. Global NAPs, Inc.*, 15 FCC Rcd 20665, ¶ 29 (2000)).

The panel also relied on *AT&T Corp. v. FCC*, 317 F.3d 227 (D.C. Cir. 2003), asserting that the D.C. Circuit there found that AT&T's conduct "fit

---

[4] *See* Memorandum Opinion and Order, *Business WATS, Inc. v. AT&T Co.*, 7 FCC Rcd 7942, ¶ 2 (1992); Memorandum Opinion and Order, *MCI Telecomms. Corp.*, 62 F.C.C.2d 703, ¶ 6 (1976).

'the seemingly narrow exception [to the prohibition against self-help] for [refusing payment to] a sham entity.'" Pet. App. 24a (quoting 317 F.3d at 234) (alterations in original). But the D.C. Circuit never described AT&T's refusal to pay tariffed charges as self-help or suggested that such conduct might violate the Communications Act. Instead, the only conduct the court described as "self-help" was AT&T's decision — in its capacity *as a carrier* — to block calls that its customers dialed. 317 F.3d at 234.[5] A separate section of the opinion addressed AT&T's refusal — in its capacity as a customer — to pay tariffed charges for calls made before AT&T began blocking, in which the D.C. Circuit never described such non-payment as "self-help" or a potential violation of the Communications Act. *See id.* at 236-37.

No FCC or court decision supports the panel's unprecedented ruling. That decision is also inconsistent with the text of the Communications Act. As the panel acknowledged, only a common carrier can violate the Act and be liable for attorney's fees under § 206. *See* Pet. App. 21a. But the panel ignored § 153(51), which provides that a company like Sprint "shall be treated as a common carrier . . . *only* to the extent that it is engaged in *providing* telecommunications services." 47 U.S.C. § 153(51) (emphases added). In this case, Sprint was purchasing — not providing — those services, and so was acting merely as a customer and not as a common carrier.

---

[5] The FCC has long held that carriers generally act unjustly and unreasonably in violation of § 201(b) when they block customers' calls. *See* Declaratory Ruling and Order, *Establishing Just and Reasonable Rates for Local Exchange Carriers; Call Blocking by Carriers*, 22 FCC Rcd 11629, ¶ 6 & nn.17-20 (2007) (citing precedent).

II. THE COURT SHOULD CALL FOR THE VIEWS OF THE SOLICITOR GENERAL

A. The Fifth Circuit, at a Minimum, Should Have Sought the FCC's Views Through an *Amicus* Brief

In requiring Sprint to pay CenturyLink's attorney's fees under § 206, the panel thought it relevant that the FCC had not previously addressed the specific fact pattern presented in this case, where one reason for the customer's non-payment of tariffed charges on current invoices was to recoup past payments now in dispute. *See* Pet. App. 23a. The application of settled law to those facts should have been straightforward — customers cannot violate § 201(b) no matter their reason for non-payment and, therefore, cannot be liable for attorney's fees under § 206. But, if there were any basis for doubt, the panel should have sought the FCC's views by requesting an *amicus* brief.

The Fourth Circuit did just that in a related case between Sprint and CenturyLink, where those companies' disputes over Sprint's non-payment to CenturyLink also raised questions about the meaning of an FCC order. *See Central Tel. Co. of Virginia v. Sprint Commc'ns Co. of Virginia, Inc.*, 715 F.3d 501, 510 & n.12 (4th Cir. 2013). With the benefit of the FCC's *amicus* brief, the Fourth Circuit reached a different result from the Third Circuit, which had interpreted that order without the benefit of the FCC's views. *See id.* at 514 ("In its amicus brief in this case, . . . the FCC disputed that it had taken such a position in [its order], describing the Third Circuit's interpretation as 'incorrect.'"). Nor is the Fourth Circuit alone in this practice. Nearly every

other court of appeals has invited the FCC to file an *amicus* brief in comparable cases.[6]

This Court has similarly sought the FCC's position at the certiorari stage through a call for the views of the Solicitor General. *See*, *e.g.*, *Farina v. Nokia, Inc.*, 563 U.S. 1020 (2011); *Level 3 Commc'ns, LLC v. City of St. Louis*, 556 U.S. 1125 (2009); *Sprint Nextel Corp. v. National Ass'n of State Util. Consumer Advocates*, 552 U.S. 1165 (2008). For example, in *Level 3 Communications*, the Court invited the views of the Solicitor General in a case in which two courts of appeals had addressed an FCC order interpreting 47 U.S.C. § 253, but neither had requested that the FCC file an *amicus* brief.[7] After the Solicitor General explained that those courts had correctly interpreted the relevant FCC order,[8] this Court denied the petitions. *See* 557 U.S. 935 (2009). Here, the Court

---

[6] *See*, *e.g.*, *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 74 (1st Cir. 2006); *Nigro v. Mercantile Adjustment Bureau, LLC*, 769 F.3d 804, 806 n.3 (2d Cir. 2014) (per curiam); *Verizon Pennsylvania Inc. v. Pennsylvania Pub. Util. Comm'n*, 484 F. App'x 735, 738 (3d Cir. 2012); *BellSouth Telecomms., Inc. v. Kentucky Pub. Serv. Comm'n*, 669 F.3d 704, 712 (6th Cir. 2012); *Time Warner Cable v. Doyle*, 66 F.3d 867, 867 n.* (7th Cir. 1995); *Nack v. Walburg*, 715 F.3d 680, 684 (8th Cir. 2013); *AT&T Commc'ns of California, Inc. v. Pac-West Telecomm, Inc.*, 651 F.3d 980, 990 (9th Cir. 2011); *Qwest Corp. v. Colorado Pub. Utils. Comm'n*, 656 F.3d 1093, 1098 (10th Cir. 2011); *LSSi Data Corp. v. Comcast Phone, LLC*, 696 F.3d 1114, 1120 (11th Cir. 2012).

[7] *See Level 3 Commc'ns, LLC v. City of St. Louis*, 477 F.3d 528, 533 (8th Cir. 2007); *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (en banc).

[8] *See* Brief for the United States as Amicus Curiae at 15-16, Nos. 08-626 & 08-759 (U.S. filed May 28, 2009), https://www.justice.gov/sites/default/files/osg/briefs/2008/01/01/2008-0626.pet.ami.inv.pdf.

can similarly look to the Solicitor General for guidance on whether to deny the petition or to grant, vacate, and remand if the Solicitor General confirms that the panel has misinterpreted the relevant FCC precedent and Communications Act provisions.

B. The Court's Involvement Is Needed To Prevent the Fifth Circuit's Decision from Disrupting Settled Practices in the Communications Industry

Verizon's experience as both a carrier selling and a customer purchasing tariffed services is that, when customers dispute tariffed charges, they routinely withhold both newly disputed amounts and otherwise undisputed amounts in order to recoup the past payment of amounts now in dispute. This practice is far from "extraordinary." Pet. App. 24a. The panel's decision threatens to disrupt this settled practice, by tipping the scales unduly in favor of carriers and creating a disparity between carrier-customers and other customers that buy tariffed services, in violation of the filed-rate doctrine. To prevent those potential consequences, the Court should give the FCC the opportunity to address these issues by calling for the views of the Solicitor General.

Customers already face significant disincentives to withholding payment of tariffed charges without a sound basis for dispute. If the dispute is ultimately resolved in favor of the carrier selling the tariffed services, the customer will owe not only all withheld amounts but also late-payment charges. Because tariffs typically impose late-payment charges of about 18 percent per year, the cost of withholding payment based on a non-meritorious dispute is substantial. Indeed, the judgment in this case awarded CenturyLink $4.17 million in late-payment charges — nearly

half of the $8.76 million in withheld tariffed charges Sprint was ordered to pay. *See* Pet. App. 96a. There is no need to add the threat of attorney's fees — already nearly $900,000 here[9] — to provide customers with the proper incentives when deciding whether to withhold payment to recoup previously paid amounts that are now in dispute.

Increasing the disincentives to withholding all disputed amounts, moreover, rewards carriers that have actually violated the Communications Act. A carrier that bills its tariffed charges for services other than those described in its tariff "violate[s] sections 203(c) and 201(b) of the [Communications] Act." Memorandum Opinion and Order, *AT&T Corp. v. YMax Commc'ns Corp.*, 26 FCC Rcd 5742, ¶ 34 (2011) ("*YMax*").[10] A carrier also "violate[s] the [Communications] Act" when it "retain[s]" tariffed charges that it improperly billed. *MCI WorldCom Network Servs., Inc. v. PAETEC Commc'ns, Inc.*, No. Civ. A. 04-1479, 2005 WL 2145499, at *5 (E.D. Va. Aug. 31, 2005), *aff'd*, 204 F. App'x 271 (4th Cir. 2006) (per curiam).

The panel's decision also undermines the filed-rate doctrine's "policy of nondiscriminatory rates," which "is violated when similarly situated customers pay different rates for the same services." *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998); *see also id.* at 223-24 (applying that principle to non-rate tariff terms). Federal tariffs offer services to both

---

[9] *See* Pet. App. 96a (awarding $794,037 in fees); Order, No. 16-30634 (5th Cir. Aug. 1, 2017) (awarding $97,649 in fees).

[10] "Section 203(c) of the Act bars a carrier from 'enforc[ing] any classifications, regulations, or practices affecting' its tariffed charges, 'except as specified' in the tariff." *YMax* ¶ 12 (quoting 47 U.S.C. § 203(c)) (alteration in original).

carrier-customers and non-carrier-customers, such as large businesses. When a business customer withholds payment to offset previously paid amounts now in dispute, that customer plainly cannot be liable for attorney's fees under the Communications Act. *See* 47 U.S.C. § 206 (making only "common carrier[s]" liable for attorney's fees). The panel's decision thus flouts the non-discrimination principle by making carrier-customers worse off than non-carriers that purchase the same tariffed services. *See* Pet. 15-16. The violation of that principle heightens the need for this Court to call for the views of the Solicitor General, so that the FCC can confirm the flaws in the panel's unprecedented ruling.

CONCLUSION

The Court should call for the views of the Solicitor General, so that the FCC can address the Fifth Circuit's conclusion that a carrier-customer can violate the Communications Act and be required to pay attorney's fees under 47 U.S.C. § 206.

Respectfully submitted,

SCOTT H. ANGSTREICH
Counsel of Record
JOSHUA D. BRANSON
KYLIE C. KIM
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(sangstreich@kellogghansen.com)

November 30, 2017