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

RESPONDENTS' OBJECTIONS TO VERIZON'S MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

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RESPONDENTS' OBJECTIONS TO VERIZON'S MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Supreme Court Rule 37.5, Respondents ("CenturyLink")[1] respectfully object to the Motion of "Verizon"[2] for Leave to File Brief as *Amicus Curiae*.

At this juncture, before the Court has even decided whether to grant certiorari, Verizon's motion for leave to file an *amicus curiae* without the consent of all parties "is not favored." Supreme Court Rule 37.2(b). Having nevertheless decided to file such a disfavored motion, Verizon should at the very least be expected to "bring[ ] to the attention of the Court relevant matter" as required by Supreme Court Rule 37.1. Unfortunately, Verizon's motion does no such thing. Instead, Verizon purports to be "a friend of a friend"—specifically, the Federal Communications Commission (the "FCC"). The FCC, Verizon suggests, should be invited (through the Solicitor General) to submit an *amicus* brief of its own. In fact, Verizon chides the Fifth Circuit for not having sought the FCC's views previously. This is curious, to say the least, since Verizon's *amicus* brief to the Fifth Circuit never raised this possibility.

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[1] A full listing of the Respondents is on file with the Court as part of CenturyLink's Opposition to Petition for Writ of Certiorari ("CenturyLink Opp.") at (ii)-(iii). The Respondents all are wholly owned subsidiaries of CenturyLink, Inc., a publicly held company.

[2] Neither Verizon's motion nor its proposed *amicus curiae* brief identifies the particular legal entity that seeks leave to file the *amicus curiae* brief. CenturyLink assumes that the entity seeking leave is controlled by Verizon Communications Inc., a publicly held company.

In view of the procedural history of this case, there is no reason to believe that the FCC would have anything to say one way or the other about this *sui generis* private dispute between two telecommunications carriers. The litigation between CenturyLink and Sprint was stayed for three-and-a-half years so that the FCC could weigh in. At no time before or since has the FCC ever done so or sought to do so.

More importantly, this is not a case in which it would be appropriate for the Court to seek an advisory opinion from the FCC even if the FCC were inclined to provide one. The proper interpretation of 47 U.S.C. § 201(b) ("Section 201(b)") is not the exclusive province of the FCC. To the contrary, before this Court decided *Global Crossing Telecommunications., Inc. v. Metrophones Telecommunications., Inc.,* 550 U.S. 45 (2007), it was by no means clear that the FCC even had the authority to determine that particular carrier practices violate the Communications Act. Since deciding *Global Crossing* ten years ago, this Court has never held that a carrier violates Section 201(b) only if it violates a regulation of the FCC. Nor has this Court ever held that particular carrier practices violate the Communications Act only if the FCC says so. In short, the entire premise of Verizon's motion is fallacious.

ARGUMENT

A. Verizon Acknowledges That There is No Circuit Split or Conflict Between the Fifth Circuit's Decision and Any Prior FCC Decision.

Verizon acknowledges that, before the Fifth Circuit's decision below, "the FCC had not previously addressed the specific fact pattern presented in this case."

(Proposed Brief of Verizon ("Verizon Br.") 7). And while Verizon repeatedly calls the Fifth Circuit's decision "unprecedented" (Verizon Br. 2, 6, 11), Verizon does not cite any prior federal, state, or administrative precedents with which the panel's decision conflicts. This is because it is the conduct of Sprint at issue in this case that is "unprecedented." The Fifth Circuit's decision was a narrow, fact-dependent case of first impression. It did not conflict with any decision of any other Circuit, any U.S. district court, any state supreme court, or any administrative agency at either the federal or the state level.

B. Verizon Ignores a Critical Factual Aspect of the Fifth Circuit's Holding That Sprint Violated Section 201(b).

The Fifth Circuit's holding that Sprint engaged in "unjust" and "unreasonable" telecommunications practices in violation of Section 201(b) was expressly tied to the particular facts at hand in this case. The Fifth Circuit did ***not*** award attorneys' fees pursuant to Section 201(b) based on "a customer's refusal to pay for tariffed services" as Verizon suggests. (Verizon Br. at 1). Nor did the Fifth Circuit find that Sprint had engaged in "unjust" and "unreasonable" practices merely "by withholding amounts to offset past payments now in dispute." (*Id.*). Rather, the Fifth Circuit's finding of a Section 201(b) violation was based in part on the fact that Sprint had "clawed back" prior payments using only an "estimate . . . based solely on its engineer's review of VoIP-originated . . . calls delivered to CenturyLink during the month of February 2009, with that amount applied each

month during the August 2007 to July 2009 disputed period." Pet. App. 22a.[3] These facts prompted the panel to conclude that "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." *Id.* at 24a. Thus, the Fifth Circuit held that Sprint had violated Section 201(b) by making a "retroactive claw-back against undisputed charges ***based on unreasonable estimates***." *Id.* (emphasis added).

Verizon ignores this key factual aspect of the Fifth Circuit's decision. Verizon does not even argue, much less present evidence, that it is common for carriers to engage in clawbacks that are based on "unreasonable estimates." There is simply no basis for Verizon's assertion that the Fifth Circuit's decision "threatens to disrupt the telecommunications industry." (Verizon Br. 2).

C. Verizon Contradicts the Factual Record in this Case.

The record is completely devoid of any evidence that retroactive clawbacks are at all "commonplace" in the telecommunications industry as Verizon asserts. (Verizon Br. 1).[4] To the contrary, the only evidence at trial on this issue was the testimony of a three-decade veteran of the telecommunications industry who

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[3] At trial, CenturyLink presented evidence that Sprint's use of a single month to determine the call volume for two years had resulted in a gross overstatement of Sprint's actual dispute amounts. For example, according to a Form 10-K filed with the Securities and Exchange Commission, Sprint's volume of VoIP calls increased by 32 percent from 2007 to 2008, and then by another 15 percent from 2008 to 2009. ROA.9400; ROA.8133-85. Thus, by extrapolating the amount of VoIP-to-TDM traffic that Sprint delivered in February 2009 back to 2007 without adjusting for this growth over time, Sprint significantly overstated the volume of VoIP-originated traffic that it had actually delivered to CenturyLink over the 24-month period.

[4] *See generally* CenturyLink Opp. at pp. 17-18.

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.

Nor does the record support Verizon's assertion that "tariffs typically imposed late-payment charges of about 18 percent per year." The evidence presented at trial was that CenturyLink's tariffs typically impose late payment charges of between 5 and 12 percent per year. ROA.8065. Equally unsupported by the record is Verizon's policy argument that such late payment charges provide sufficient disincentive to engage in retroactive clawbacks. That certainly was not true of Sprint in this case.

D. Verizon's Argument Under 47 U.S.C. § 153(51) Was Not Raised Below.

Verizon also argues that the Fifth Circuit "panel ignored [47 U.S.C.] § 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.'" (Verizon Br. 6 (emphasis removed)). If the panel "ignored" this statute, it is because neither Sprint, CenturyLink, nor Verizon acting as *amicus curiae* at the Fifth Circuit ever argued to either the Fifth Circuit or to the District Court that 47 U.S.C. § 153(51) has any bearing on Section 201(b).[5] Accordingly, that argument

[5] In fact, Sprint's reply brief to the Fifth Circuit ***did*** cite 47 U.S.C. § 153(51), but for a wholly different proposition, unrelated to Section 201(b). *See* Reply Br. of Sprint, Oct. 28, 2016, at 16 (citing 47 U.S.C. § 153(51) in its arguments on CenturyLink's tariff claims).

has not been preserved and should not be considered here.[6] *Wood v. Milyard*, 566 U.S. 463, 473 (2012); *Knetsch v. United States*, 364 U.S. 361, 370 (1960).

E. The Court Should Not Burden the Solicitor General and FCC With Preparing an *Amicus* Brief That Will Serve No Function.

If there is anything "unprecedented" about this case, it is Verizon's suggestion that this Court—before deciding Sprint's petition for certiorari—should "call for the views of the Solicitor General, so that the FCC can address the Fifth Circuit's conclusion." (Verizon Br. 11). In other words, Verizon moves this Court for leave to file an *amicus* brief that encourages the Court to seek out another *amicus* brief before the Court even rules on whether to grant certiorari.

There are two reasons that the Court should decline Verizon's request to solicit an *amicus* brief from the FCC. The first is that any *amicus* brief would require the FCC—in a non-adjudicative capacity—to opine on the application of a federal law to facts. This is not the proper role of an *amicus* brief from an administrative agency. Rather, it is the role of the federal courts. In fact, an *amicus* brief by the FCC on the application of law to facts likely would not be subject to administrative deference and likely would raise complex issues about retroactivity. *See generally Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155-56 (2012) (declining to apply a regulatory interpretation advanced in an

[6] In any event, Sprint did not challenge the District Court's finding of fact that Sprint was acting as a telecommunications carrier, and in particular an interexchange carrier, when it delivered calls in TDM format to CenturyLink for termination. Pet. App. 37a.

amicus brief to "conduct that occurred well before that interpretation was announced").

More importantly, an *amicus* brief from the Solicitor General is simply not called for in this case. The District Court below stayed this case for nearly three-and-a-half years pending a referral to the FCC, and despite this long wait the FCC declined to take any action to resolve the dispute. (*See* CenturyLink Opp. at p. 8). The Solicitor General and FCC have had every chance to submit an *amicus* brief on their own initiative, either to this Court or to the Fifth Circuit below. Sup. Ct. R. 35.4; Fed. R. App. P. 29(a)(2). Both have declined to do so. Perhaps this is because, as Verizon acknowledges, all that is truly at stake in Sprint's petition for a writ of certiorari on the Fifth Circuit's Section 201(b) ruling is some $900,000 in attorneys' fees. (Verizon Br. at p. 10).

The FCC has already had every chance to weigh in on the case, and the Court should not disturb the FCC's declination to do so.

CONCLUSION

Verizon's motion for leave to file an *amicus* brief should be denied. Alternatively, should Verizon's motion be granted, the Court should lend no weight to Verizon's factual statements that contradict the record below; the Court should not consider any legal argument that was not raised below; the Court should decline to request the Solicitor General's opinion about whether certiorari should be granted; and in any event, the Court should deny Sprint's petition for a writ of certiorari.

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Respectfully submitted,

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