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

PETITIONER'S REPLY BRIEF

CHRISTOPHER J. WRIGHT
Counsel of Record
JARED P. MARX
TIMOTHY J. SIMEONE
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, NW
Eighth Floor
Washington, D.C. 20036
(202) 730-1300
cwright@hwglaw.com

Counsel for Petitioner

December 19, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutory Materials

Regulatory Materials

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

PETITIONER'S REPLY BRIEF

OVERVIEW

Contrary to CenturyLink's contentions, the FCC has made abundantly clear that failure to pay a tariff charge does *not* violate Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). If it did, the FCC would become a "collection agent" for telecommunications companies—a role it has repeatedly rejected. In addition, such a result would create an unjustified disparity because carriers that failed to pay tariff charges would be required to pay attorneys' fees under Section 201(b), while non-carriers would not because Section 201(b) applies only to "telecommunications carriers" and not to the many non-carrier companies that purchase services from tariffs. CenturyLink does not attempt to defend this unwarranted disparity.

CenturyLink instead defends the opinion on the lukewarm basis that "[i]n 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)." Opp. 17. But CenturyLink's premise is fundamentally flawed. As Sprint demonstrated, Pet. 11–14, the FCC has made clear at least eight times that failure to pay a tariff charge does not violate Section 201(b). If the Court nonetheless has doubts about the FCC's position, it should call for the Solicitor General to provide the Commission's views.

With respect to the second question presented, CenturyLink principally argues that "Sprint waived its argument that VoIP-to-TDM calls are governed exclusively by federal law." Opp. 20 (title). That argument boils down to a claim that Sprint failed to use the magic word "preemption." But Sprint's entire argument was that federal law displaced state law with respect to intercarrier compensation for the calls at issue. In its Summary of Argument below, Sprint stated in plain English that "if VoIP is an information service, then Section 251(b)(5)'s reciprocal compensation regime applies *instead of the state access charge regime*." *See* Pet. 18 (emphasis added). Sprint alternatively argued that "even if Section 251(g) applies, then the state access charge regime would *still* not apply here" because the federal statute pointed to a different compensation regime. *Id.* (emphasis in original). In sum, saying that federal law *displaces* state law *is* arguing preemption, plain and simple. Summary reversal would be appropriate for this aspect of the court of appeals' decision.

Finally, as noted before, Sprint's simultaneously-filed petition arising out of the Eighth Circuit presents this issue as well, and is likely a better vehicle for resolving the underlying concern about the FCC's exclusive jurisdiction over information services. Thus, to the extent there is any concern with the appropriateness of this case as a means to address that issue, the Court can hold the second question presented here, and remand if the Court reverses the Eighth Circuit decision.

DISCUSSION

I. The Fifth Circuit's Holding Harms the Telecommunications Industry, and the Court Should at a Minimum Call for the Views of the Solicitor General.

CenturyLink primarily opposes certiorari here on grounds that the Fifth Circuit properly interpreted Section 201 of the Communications Act. CenturyLink then does little to contradict the fact that, if it is mistaken, the Fifth Circuit's decision will have significant negative effects on national telecommunications policy. Instead, it simply asserts, with little support, that "[t]his case has no impact whatsoever on the FCC's jurisdiction or ability to set telecommunications policy." Opp. at 19. But that is wrong, and the Court should at a minimum call for the views of the Solicitor General to address both whether the Fifth Circuit properly interpreted Section 201 and the extent to which the decision below will harm national telecommunications policy.

CenturyLink only briefly touches on the issues Sprint and *amicus* Verizon raised about the importance of this case. Sprint pointed out that the Fifth

Circuit's decision places an additional burden on parties who provide ordinary telephone service and pay tariffs, but exempts from that burden identical customers who *don't* provide ordinary phone service. Pet. at 15–16 (Section 201, by its terms, applies only to common carriers); Verizon Amicus Br. at 4–5. CenturyLink doesn't dispute this premise, responding only that "the FCC . . . 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." Opp. at 19. But both the FCC and this Court have *already* made clear that disparate treatment of providers of the same services violates the law, and the Fifth Circuit declined to recognize that. *See AT&T Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998).

Similarly, Sprint and *amicus* Verizon (both among the largest carriers in the country) have explained that withholding payment to recoup prior disputed payments is common, and that the Fifth Circuit's decision has caused significant disruption in the industry. In response, CenturyLink doesn't challenge the argument or claim that the FCC need not be involved in that determination. Instead, it simply contradicts the premise that the practice is common, and disputes whether Sprint had sufficiently proven that point "[a]t trial." Opp. at 18. But the practice is in fact common, *see* Verizon Amicus Br. at 1–2, and the disruption is significant.

Likewise, Sprint noted in its petition that because a party may remedy a violation of Section 201 at the FCC, the Fifth Circuit's decision incentivizes parties

to use the FCC as a forum to complain about non-payment of tariffed charges. Pet. at 14–15. CenturyLink responds that the FCC is still empowered to interpret Section 201 as necessary, and that the Court therefore need not intervene. Opp. at 19. But the policy issue is broader than CenturyLink acknowledges. The FCC has for decades *already* fielded complaints of tariff non-payment, and repeatedly expended resources rebuffing those complainants. *See* Pet. at 11–14. The Fifth Circuit's decision will make this problem worse.

As for the merits, CenturyLink adds nothing in its defense of the Fifth Circuit's decision that the Fifth Circuit did not say itself. Instead, CenturyLink re-emphasizes the error that the Fifth Circuit made in concluding that *why* a party declines to pay tariffed charges (and also *how* a party calculated the amount not to pay) can affect whether non-payment violates Section 201. *See, generally*, Opp. at 12–17. But the FCC has said just the opposite, that non-payment of tariffed access charges simply does not violate Section 201. *See* Pet. at 11–14.

CenturyLink also suggests that, because the district court had referred this case to the FCC and the FCC had not resolved it, the Court should conclude that the FCC has acquiesced to the decision below. *See* Opp. at 20. But the FCC's inaction there indicated no such thing. The Court in fact did *not* refer the specific Section 201 question here to the FCC at all, and CenturyLink in turn told the FCC that "[o]nce the Commission has confirmed that federal tariffed accessed charges applied, *the court* can readily determine whether Sprint's conduct violated section 201...." *See Petition of Sprint for Declaratory Ruling*, *CenturyLink's Comments in Opposition*, WC Docket No. 12-

105 (June 14, 2012) (*available online at* https://ecfsapi.fcc.gov/file/7021922973.pdf) (emphasis added). As for the question of classifying VoIP, the FCC has at every turn over the past twenty years declined to determine whether VoIP calling is an information service or a telecommunications service. *See, e.g.*, *In re Universal Serv. Contribution Methodology*, 21 FCC Rcd. 7518, 7537 ¶ 35 (2006) ("The Commission has not yet classified interconnected VoIP services as 'telecommunications services' or 'information services' under the definitions of the Act. Again here, we do not classify these services." (internal citations omitted)); *In re Connect America Fund*, 26 FCC Rcd. 17,663, 18,015–16, ¶ 957 (2011) ("*CAF Order*"). This case proved no exception. But that in no way indicates that the FCC agrees with the Fifth Circuit's interpretation of Section 201.

II. The Court Should Hold the Second Question Presented Pending Review of Sprint's Petition Arising from the Eighth Circuit.

As we noted in the petition, the decision below also implicated an important question of law related to the FCC's exclusive jurisdiction over information services. That same issue is also presented in the petition that Sprint filed simultaneously in a similar case from the Eighth Circuit. As set forth in that companion petition, the Court should address the issue both here and in the Eighth Circuit case. Because the Fifth Circuit ultimately declined to rule on the merits of the "information services" issue, however, it may be appropriate to hold the second question presented here, and then remand after the Court has addressed the Eighth Circuit petition.

CenturyLink argues that, in this case, Sprint waived its argument that federal law supersedes state law with regard to information services. *See* Opp. at 20–24. Although that is what the court below held, it is simply wrong. Sprint did not use the word "preemption" in its argument below, but instead argued in simple terms that the federal statute displaces state law with respect to the calls at issue here: "[I]f VoIP is an information service [as Sprint maintained], then Section 251(b)(5)'s reciprocal compensation regime applies *instead of the state access charge regime*." *See* Pet. 18 (emphasis added). There can be no doubt that Sprint did *not* waive this claim; rather, Sprint made it expressly and repeatedly.

On this point, CenturyLink erroneously focuses on an exchange at oral argument. In the district court, Sprint made *two* preemption arguments—the first argument was the argument described above, and the second invoked the "impossibility" rule, under which preemption occurs when it is impossible to separate intrastate service from interstate service. CenturyLink accurately notes that Sprint did *not* appeal the impossibility issue to the Fifth Circuit. But that is not the issue on which Sprint seeks review here. Like the Fifth Circuit, CenturyLink improperly conflates the impossibility argument that Sprint did not make with the preemption argument that Sprint *did* make: Congress preempted state regulation of intrastate as well as interstate access charges for information services. *See* Opp. at 22–23. Sprint was clear about this at oral argument—which accordingly presents no bar to reversal here. *See* Oral Argument at 18:37–18:59 (explaining that the argument that Sprint abandoned was *not* "[o]ur primary argument—and the argument we've always made—[which] is that no tariffs apply,

because federal law, which is superior to state law, says they don't.").

CONCLUSION

The Court should grant the first question presented and hold that the court erred by concluding, contrary to the FCC's position, that failing to pay tariffed access charges violates Section 201(b) of the Communications Act.

As to the second question presented, it should hold the petition pending resolution of the issues presented in *Sprint* v. *Lozier*, and grant, vacate, and remand for reconsideration of the second question presented if warranted by the Court's judgment in that case.

Respectfully submitted,

CHRISTOPHER J. WRIGHT
Counsel of Record
TIMOTHY J. SIMEONE
JARED PAUL MARX
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, NW
Eighth Floor
Washington, D.C. 20036
(202) 730-1325
cwright@hwglaw.com

Counsel for Petitioner

DECEMBER 19, 2017