No. 17-628

In the Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P.,
Petitioner,
v.
RICHARD W. LOZIER, JR., ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth 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.

RICHARD W. LOZIER, JR., ET AL.,
Respondents.

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

---

PETITIONER'S REPLY BRIEF

OVERVIEW

Windstream's Brief in Opposition largely fails to engage with the core point of Sprint's Petition: The decision below directly conflicts with the FCC's longstanding federal policy of nonregulation of information services.

From the earliest days of "information services"—then called "enhanced services"—the FCC has clearly and consistently stated that it has exclusive regulatory jurisdiction over such services. Indeed, the FCC recently reiterated in an *amicus* brief to the Eighth Circuit that "[u]nder the longstanding federal policy of nonregulation for information services," the States are "prohibited from subjecting information services to any form of state economic regulation." FCC Ami-

cus Br. 10. As a practical matter, this prohibition applies only to state efforts to regulate *intrastate* information services, since the States have no authority at all over *interstate* communications services. *See id.* at 7.

Notwithstanding this clear and unambiguous FCC policy, the Eighth Circuit below held exactly the opposite—that the States *do* have authority to regulate intrastate information services. Specifically, the Eighth Circuit ruled, relying on the Ninth Circuit decision in *People* v. *State of Cal.* v. *FCC*, 905 F.2d 1217 (9th Cir. 1990), that state economic regulation applies to the VoIP calls at issue here "*regardless* of the classification of the calls as information services or telecommunications services"—simply because the calls were intrastate. Pet. App. 13a (emphasis added). Particularly given the Fifth Circuit's similar, almost-simultaneous decision as to which Sprint also now seeks certiorari, *see* Pet. for Cert., *Sprint Commc'ns Co.* v. *CenturyTel of Chatham*, No. 17-627 (Oct. 30, 2017), state legislatures and regulatory commissions may now believe there is a sound basis for state regulation of information services notwithstanding the FCC's contrary view.

As Sprint's Petition argued, the decision below is not merely wrong, but has the potential to fundamentally destabilize information services markets. *See* Pet. 25. As Sprint pointed out—and Windstream does not deny—if the States may apply economic regulation to the calls at issue here, they may also, for example, impose fees on intrastate emails or tax Internet service providers on their intrastate services. Indeed, the Iowa Utilities Board likely declined to file an opposition before this Court because it believes that it

does have authority to impose these economic regulations and more on intrastate information services—but knows that articulating that position to this Court would highlight the critical importance of this case.

Although the FCC's past pronouncements and its recent brief to the Eighth Circuit leave no doubt about its position, if this Court has any question as to whether the decision below conflicts with established federal policy, the Court should call for the views of the Solicitor General. Even without a CVSG, however, the square conflict between the decision below and decades of authoritative FCC determinations justifies granting Sprint's Petition.

DISCUSSION

I. Windstream's Attempt to Cabin the Effect of the Decision Below to Intercarrier Compensation Ignores What the Court Held.

Rather than attempt to justify what the Eighth Circuit actually held, Windstream portrays the decision below as focusing narrowly on issues of intercarrier compensation for calls using Voice over Internet Protocol ("VoIP"). But neither the decision below nor the question presented by the Petition can be circumscribed in that way.

Windstream's Opposition claims that "[t]his case turns on the meaning of an FCC regulation that was superseded six years ago." Opp. 1. According to Windstream, "[t]he panel below simply added" to precedents holding that the FCC's "long-defunct regulations" only barred "*inter*state access charges." *Id.*

But that is not what the Eighth Circuit held. Throughout this case, Sprint has argued that the FCC has exclusive jurisdiction over "information services" under federal law—as the Commission itself has consistently maintained since 1981. *See* Pet. 13–18. Sprint's central claim below was that because the VoIP calls at issue in this case are information services, the IUB is "prohibited from subjecting [them] to any form of state economic regulation," just as the FCC itself recently told the Eighth Circuit. FCC Amicus Br. 10.

But the Eighth Circuit declined to even address whether VoIP is an "information service" or a "telecommunications service." It instead held that intrastate VoIP service is subject to state regulation *even if it is an information service*—thereby rejecting Sprint's argument that federal law prohibits state regulation of information services regardless of whether they are interstate or intrastate. Pet. App. 7a–9a. Contrary to Windstream's Opposition, the holding below is therefore not in any way limited to construing "defunct" regulations addressing narrow issues of intercarrier compensation: The holding below was that, contrary to the FCC's clear and repeated statements, the States *can* apply economic regulation to information services so long as those services are intrastate. Although the particular state regulations here were later replaced, there is nothing about the Eighth Circuit's decision that limits the underlying principle that a state may regulate information services.

The Court should grant certiorari because that holding undermines the fundamental federal policy of nonregulation of information services.

II. Windstream Concedes that the FCC Preempted State Regulation of Information Services "Across-the-Board" in the 1980s, but Fails to Recognize that Policy Remains in Force.

Windstream accuses Sprint of wanting to "go back to the 1980s and revive the FCC's across-the-board preemption of State enhanced-services [now 'information services'] regulation." Opp. 18. Windstream thus appears to acknowledge the FCC's repeated determinations in the 1980s that applying traditional telecommunications regulation to enhanced service providers ("ESPs") would "unduly burden their operations and cause disruptions in providing service to the public." *In re Amendment of Part 69 of the Commission's Rules Relating to Enhanced Servs.*, 3 FCC Rcd. 2631, 2631 (1988).

What Windstream fails to acknowledge, however, is that both Congress and the FCC have repeatedly *reaffirmed* that policy in the decades *since* the 1980s. The Commission's recent *amicus* brief in the Eighth Circuit points out that this "overarching federal policy of nonregulation for information service" is not merely an FCC creation, but "takes root in several provisions" enacted by Congress and "administered by the FCC." FCC Amicus Br. 11–13. Those provisions include the Communications Act's instruction that only communications service providers "engaged in providing telecommunications services"—as *opposed* to "information services"—may be treated as "common carriers," 47 U.S.C. § 153(51); Congress's adoption of a federal policy leaving "interactive computer services"—including "any information service"—"unfettered by Federal or State regulation," 47 U.S.C. § 230(b)(2),

(f)(2); and the Telecommunications Act's direction that the FCC must "encourage the deployment * * * of advanced telecommunications capability" by "remov[ing] barriers to infrastructure investment," 47 U.S.C. § 1302(a).

Significantly, Windstream does not point to any intervening event since the FCC preempted regulation of enhanced services in the 1980s that has even arguably *decreased* the FCC's authority over information services since then. In short, then, Sprint is not attempting to "*revive* the FCC's across-the-board preemption," as Windstream claims, Opp. 18; the FCC has never deviated from its position that it has exclusive jurisdiction over what were initially called enhanced services and are now called information services.

III. Windstream Does Not Dispute That the States Can Regulate Intrastate Information Services Generally Under the Decision Below.

Perhaps the most significant aspect of Windstream's Opposition is what it does *not* do. While Windstream claims that "Sprint's Petition inflates the Eighth Circuit's holding beyond recognition," Opp. 1, Windstream does *not* deny that under the Eighth Circuit's decision—as well as those of the Fifth and Ninth Circuits—the States may now impose economic regulation on intrastate information services generally, in direct contravention of federal policy.

Windstream is correct, then, that the core significance of this case is not whether intrastate access charges were preempted at the time of the calls at issue here—as Windstream acknowledges, there is no

question that such charges *are* preempted going forward. Opp. 1. Rather, the critical issue presented by this case is whether the FCC has, as it has *always* maintained, exclusive authority over the "information services" at the heart of today's economy.

The Eighth Circuit has ruled that it does not. And that opens the door to a wide variety of revenue-raising efforts by the States, including imposing fees or taxes on the intrastate components of all information services. This Court should grant certiorari to clarify that such actions would be inconsistent with federal law, or at a minimum should ask the Solicitor General to clarify the position of the federal government regarding the imposition of economic regulations by the States on intrastate information services.

CONCLUSION

The petition for writ of certiorari should be granted.

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