No. 13-141

In The
Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY OF VIRGINIA, INC., AND SPRINT COMMUNICATIONS CO., L.P.,
Petitioners,
v.
CENTRAL TELEPHONE CO. OF VIRGINIA, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION

Michael J. Lockerby
Counsel of Record
Jennifer Keas
Benjamin R. Dryden
FOLEY & LARDNER LLP
Washington Harbour
3000 K Street, N.W.
Washington, D.C. 20007
(202) 672-5300
mlockerby@foley.com
jkeas@foley.com
bdryden@foley.com

Counsel for Respondents

Dated: August 30, 2013

THE LEX GROUP^{DC} ♦ 1825 K Street, N.W. ♦ Suite 103 ♦ Washington, D.C. 20006
(202) 955-0001 ♦ (800) 856-4419 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

QUESTIONS PRESENTED

1. Whether the Fourth Circuit correctly held—consistent with the decisions of every United States Court of Appeals that has considered the issue—that, to the extent either the text of 47 U.S.C. § 252(e)(6) or the overall structure of the Telecommunications Act of 1996 gives State public utility commissions ("State commissions") authority to resolve disputes arising under interconnection agreements, such authority is not exclusive and does not displace federal court jurisdiction.
2. Whether the Fourth Circuit correctly held that an individual retirement account qualified as a "common investment fund" within the meaning of the judicial recusal statute, 28 U.S.C. § 455(d)(4)(i), where the trial court record supported the conclusion that the judge's retirement account owned assets "along with the assets of many others who hold similar accounts."

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: Central Telephone Company of Virginia; United Telephone Southeast, LLC; Embarq Florida, Inc.; United Telephone Company of Indiana, Inc.; United Telephone Company of Kansas; United Telephone Company of Eastern Kansas; United Telephone Company of Southcentral Kansas; Embarq Missouri, Inc.; Embarq Minnesota, Inc.; United Telephone Company of the West; Central Telephone Company; United Telephone Company of New Jersey, Inc.; Carolina Telephone and Telegraph Company LLC; United Telephone Company of Ohio; United Telephone Company of the Northwest; the United Telephone Company of Pennsylvania LLC; United Telephone Company of the Carolinas LLC; United Telephone Company of Texas, Inc.; and Central Telephone Company of Texas.

The following parties were defendants in the district court and appellants in the court of appeals, and are petitioners in this Court: Sprint Communications Company of Virginia, Inc. and Sprint Communications Company L.P.

CORPORATE DISCLOSURE STATEMENT

The Petitioners 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 Petitioners.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions identified in Petitioner's brief, another key statutory subsection relevant to this petition is 28 U.S.C. § 455(f), which provides:

> Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse, or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

STATEMENT OF THE CASE

The petition for writ of certiorari arises from an action for breach of nineteen virtually identical interconnection agreements (collectively, the "Sprint ICAs"). The Sprint ICAs were negotiated and executed pursuant to the Telecommunications Act of 1996 (the "Telecom Act"). The Sprint ICAs allowed the Petitioners ("Sprint") to access, use, and otherwise benefit from the local telephone exchange networks of the Respondents (collectively, "CenturyLink") in Virginia and 17 other states. Pet. App. 75a, 79a-80a.

In the proceedings before the district court, the principal issue was whether Sprint was obligated to pay access charges pursuant to a one-sentence provision contained in each of the Sprint ICAs. This one-sentence provision, known as the "VoIP Compensation Provision," reads as follows:

> Voice calls that are transmitted, in whole or in part, via the public Internet or a private IP network (VoIP) shall be compensated in the same manner as voice traffic (e.g., reciprocal compensation, interstate access and intrastate access).

Pet. App. 7a. Although the VoIP Compensation Provision had been drafted by in-house counsel at Sprint, at trial, the linchpin of Sprint's defense was that the VoIP Compensation Provision was supposedly "ambiguous." Pet. App. 103a-106a. Over the course of a six-day bench trial, the district court heard testimony from the signatories to the Sprint ICAs and the in-house attorneys at Sprint who had drafted the VoIP Compensation Provision. The

district court also considered previous testimony from Sprint personnel explaining the significance of this contract language. Finally, the district court compared this verbiage with the language of other interconnection agreements that Sprint negotiated at the same time as the Sprint ICAs. These other agreements contained sharply different language about the treatment of VoIP-originated calls. Pet App. 80a-82a, 103a-117a.

Based on all this evidence, the trial court agreed with CenturyLink's interpretation of the Sprint ICAs. The court found that VoIP-originated traffic fell within the scope of the Sprint ICAs, and it held that Sprint breached the Sprint ICAs by failing to pay CenturyLink as required under the Sprint ICAs for VoIP-originated voice traffic that Sprint directed to CenturyLink's network. "Quite frankly," the trial court held, "Sprint's justifications for refusing to pay access on VoIP-originated traffic, and its underlying interpretation of the Sprint ICAs, defy credulity." Pet. App. 77a.

On appeal to the Fourth Circuit, Sprint abandoned its contention that the VoIP Compensation Provision was "ambiguous." Instead, Sprint challenged the district court's interpretation of contract language that the district court found to be unambiguous along with various findings of fact made by the trial judge, including his assessment of the credibility of various witnesses. Sprint also sought appellate review of two ancillary issues that, in the Fourth Circuit's words, went "to the district court's authority to decide the merits of the case." Pet. App. 25a. One of these issues was Sprint's contention that CenturyLink's claims for breach of the Sprint ICAs could not be brought in a single

federal court but instead needed to be presented to each of the 18 State commissions[1] that had previously approved the Sprint ICAs.[2] Because the Fourth Circuit affirmed the trial court's rulings, Sprint now seeks a different result from this Court. Sprint asserts two grounds for review by this Court, one based on exhaustion of remedies and the other based on recusal.

1. Exhaustion of Remedies Issue

First, Sprint argues that the district court lacked the authority to hear this dispute altogether. According to Sprint, CenturyLink should have brought its breach of contract claim in the first instance to the 18 different State commissions that initially approved the Sprint ICAs.

By way of background, before becoming effective, each of the Sprint ICAs was—pursuant to 47 U.S.C. § 252—reviewed and approved by the State commission where interconnection was to be provided. The Telecom Act contains no language, however, requiring a State commission to hear disputes arising under ICAs after they have been approved. Thus, once the Sprint ICAs were approved, they became enforceable in any court of competent jurisdiction. In fact, the Sprint ICAs

---

[1] The term "State commission" is defined by 47 U.S.C. § 153(48) and includes, for example, the Virginia State Corporation Commission.

[2] The Fourth Circuit judge who authored the opinion rejecting this contention had previously served on one of the State commissions to which Sprint contended this dispute should have been referred, the North Carolina Public Utility Commission.

themselves provided as much. Each of the Sprint ICAs contained a provision (the "Dispute Resolution Provision") stating that, while a dispute arising out of or relating to the ICA "may be submitted to the [state utility] Commission for resolution . . . . [such] provision shall not preclude the Parties from seeking relief available in any other forum." *See* Pet. App. 65a. The same Dispute Resolution Provision was contained in each of the Sprint ICAs that each of the 18 State commissions had reviewed and approved.

Both the district court and the Fourth Circuit held that CenturyLink was free to pursue its breach of contract claim against Sprint in federal court without first seeking relief from each of the 18 State commissions that had initially approved the Sprint ICAs. Pet. App. 25a, 66a.

The Fourth Circuit so held only after it solicited and received submission from the FCC of an *amicus curiae* brief. The FCC explained that, in its view, any implicit authority that State commissions may have to resolve such post-formation ICA disputes is not exclusive. The FCC also stated that the Third Circuit had misconstrued a prior FCC administrative order when it characterized the order as requiring post-formation ICA disputes to be resolved by State commissions in the first instance. *See* Pet. App. 22a-23a.

2. Recusal Issue

Second, Sprint argues that the trial judge below, the Honorable Judge Robert Payne, should have recused himself from this case, because—unbeknownst to him while he presided over the trials—he owned 80 shares of CenturyLink stock in a managed retirement account. Specifically, after

ruling on dozens of motions and presiding over two separate, bifurcated trials in this case, Judge Payne discovered that his managed individual retirement account ("IRA") owned less than $3,800 worth of stock in CenturyLink. Judge Payne's ownership interest had not been flagged by the court's computerized conflict identification system due to CenturyLink's recent corporate name change from "CenturyTel" (as the computerized system had it recorded) to "CenturyLink." *See* Pet. App. 11a-13a.

Upon discovering his holdings in CenturyLink, the trial judge immediately notified the parties. One week later, he directed the IRA account manager to divest the stock. After the parties submitted briefs on the propriety of the trial judge continuing to preside over the dispute, Judge Payne ruled that his unknown interest in CenturyLink stock did not give rise to a duty to recuse himself from the case. Pet. App. 161a. Thus, he made the few remaining decisions that were left for resolution in the case and entered final judgment for CenturyLink on all counts.

A copy of Judge Payne's 2009 Financial Disclosure Report, which provided additional detail about his financial holdings, was included in the appellate record. The report included an attachment that describes the managed IRA in which the CenturyLink stock was held. In relevant part, the attachment to the disclosure stated: "The assets in it [the account] are purchased and sold, along with the assets of many others who hold similar accounts, in the discretion of the account managers at the brokerage firm." J.A. 514.

On appeal, the Fourth Circuit cited this record evidence in support of its conclusion that the trial judge's holdings were kept in a "common investment fund," for which recusal is not required under law. Pet. App. 27a-28a.

SUMMARY OF ARGUMENTS FOR DENYING CERTIORARI

The petition for certiorari should be denied because the Fourth Circuit correctly determined that neither the text nor the structure of the Telecom Act provides that State commissions have the exclusive authority to enforce ICAs in the first instance.

In reaching this conclusion, the Fourth Circuit did not create a "three-way split" among the circuits as Sprint insists. The Fourth Circuit's decision is entirely consistent and harmonious with the decisions of the Seventh and Eleventh Circuits that Sprint cites. The Fourth Circuit did decline to follow a Third Circuit decision finding that the FCC had interpreted the statute to require such exhaustion. But the FCC's *amicus* brief in this case explained that the Third Circuit had misinterpreted the FCC order at issue. The Third Circuit can thus revisit its decision with the benefit of the FCC's views. There is no circuit conflict requiring this Court to exercise its certiorari jurisdiction.

As for the question of recusal, the Fourth Circuit's conclusion that the trial judge was not required to recuse himself is supported by record evidence that the trial judge held CenturyLink stock in an account that was managed "along with the assets of many others who hold similar accounts." Pet. App. 27a. This record evidence supports the Fourth Circuit's conclusion that the trial judge's ownership of CenturyLink stock was effected via a "common investment fund" for which recusal is not required. In any event, the fact that the trial judge promptly divested the CenturyLink stock upon learning of his *de minimis* holding of it means that

the trial judge's decision not to recuse himself was correct pursuant to 28 U.S.C. § 455(f).

I. THE FOURTH CIRCUIT CORRECTLY HELD THAT NEITHER THE TEXT NOR THE STRUCTURE OF THE TELECOM ACT REQUIRES EXHAUSTION OF STATE REMEDIES.

Sprint asks this Court for certiorari on the question of whether actions to enforce ICAs must be brought before State commissions before being filed in federal court. Sprint posits that its desired result flows from a "straightforward" reading of 47 U.S.C. § 252(e)(6) ("Section 252(e)(6)"). *See* Pet. at 14.[3] Alternatively, Sprint suggests that "the overall structure" of the Telecom Act compels the same result. *See* Pet. at 15.

The Fourth Circuit rejected both of these arguments. "Just as Sprint cannot ground its textual argument in any text," the Fourth Circuit wrote, "neither can it point to any structural features of the 1996 Act indicating that Congress intended to mandate initial State commission consideration." Pet. App. 20a. Unable to identify any flaws in the logic of the Fourth Circuit's analysis, Sprint instead asserts a "circuit split" and "tension" that warrants review by this Court. The decisions cited by Sprint provide no support for its rhetoric, however, as set forth in the sections that follow.

---

[3] "Pet." refers to Sprint's Petition for a Writ of Certiorari.

A. No Circuit Court Has Interpreted Section 252(e)(6) In the Manner Advocated By Sprint.

Tellingly, every court of appeals that has ever considered the issue has rejected the argument that the "plain language" of Section 252(e)(6) ***requires*** State commission review of post-formation ICA disputes. *See Global NAPs, Inc. v. Verizon New England*, 603 F.3d 71, 83 (1st Cir. 2010) ("Although § 252 of the TCA details how parties, states, and federal courts can draft and approve ICAs, it is silent on how and in what form parties can enforce ICAs."); *Southern New England Tel. Co. v. Global NAPs, Inc.*, 624 F.3d 123, 134 (2d Cir. 2010) ("The only 'determinations' referred to in § 252 that are potentially relevant in this context are decisions of a state PUC approving or rejecting a final ICA . . . ."); *Premiere Network Services, Inc. v. SBC Commc'ns, Inc.*, 440 F.3d 683, 686 n.5 (5th Cir. 2006) ("Section 252(e)(6) does not expressly require exhaustion of administrative remedies . . ."). Even the Third Circuit—in the only case to have actually agreed with the conclusion Sprint asks this Court to adopt—rejected Sprint's "plain language" reading of Section 252(e)(6). *See Core Communications, Inc. v. Verizon Pennsylvania, Inc.*, 493 F.3d 333, 340 (3d Cir. 2007) ("[T]he Act is simply silent as to the procedure for post-formation disputes.").

The Fourth Circuit's decision below simply followed this resounding—and correct—line of authority. Indeed, contrary to Sprint's argument that clarity is needed for the district courts, such

courts routinely decide ICA disputes without requiring prior submission to any State commission.[4]

B. The So-Called "Circuit Split" Upon Which Sprint Bases Its Petition Does Not Exist.

Sprint asserts that the Fourth Circuit's ruling below "transformed a relatively shallow two-way split in the circuits into a much deeper three-way disagreement." Pet. at 12. According to Sprint, the Third and Eleventh Circuits have both held that claims for breach of ICAs must be decided by State commissions in the first instance before being heard in federal court. Sprint also asserts that the Seventh Circuit "does not require exhaustion in all cases, but ***does require*** disputes raising questions of telecommunications policy to be decided by state commissions in the first instance." Pet. at 17 (emphasis added). Thus, argues Sprint, the Fourth Circuit's decision "that the Telecommunications Act *never* requires state commissions to rule on ICA disputes before they may be brought to federal court substantially deepens this pre-existing division among the circuits." *Id.*

---

[4] *See*, *e.g.*, *The Southern New England Tel. Co. v. Global NAPs, Inc.*, 520 F. Supp. 2d 351, 354 (D. Conn. 2007); *AT&T Communications of Mountain States, Inc. v. Qwest Corp.*, No. 206CV00783 DS, 2007 WL 518537 at *3 (D. Utah Feb. 13, 2007); *Global NAPS North Carolina, Inc. v. BellSouth Telecomms., Inc.*, 455 F. Supp. 2d 447 (E.D.N.C. 2006); *Verizon New York Inc. v. Global NAPS, Inc.*, 463 F. Supp. 2d 330, 342 (E.D.N.Y. 2006); *Telecom Group, Inc. v. Qwest Corp.*, 375 F. Supp. 2d 1084, 1087-88 (D. Colo. 2005).

In reality, the "circuit split" about which Sprint professes to be concerned consists primarily of a "split" between what the federal appeals courts have actually held and the characterization of these holdings adopted by Sprint. The only "tension" that actually exists is between the Fourth Circuit and the Third Circuit. The Fourth Circuit expressly declined to follow the Third Circuit's prior interpretation of an FCC administrative order—but only after soliciting input from the FCC itself. In the proceedings before the Fourth Circuit, the FCC clarified that the Third Circuit's interpretation of this administrative order was incorrect. Now that the FCC has weighed in, the Third Circuit presumably would not continue to ascribe to the FCC a position that the agency has expressly disavowed. With respect to the provision of the Telecom Act upon which Sprint attempts to rely—Section 252(e)(6)—the Fourth Circuit's decision does not conflict with the statutory interpretation previously adopted by the Third Circuit or any other United States Court of Appeals.

i. The Eleventh Circuit Held Merely That State Commissions Can Hear Post-Formation ICA Disputes, Not That They Have the Exclusive Authority to Do So.

In *BellSouth Telecomm'ns, Inc. v. MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1277 (11th Cir. 2003), the Eleventh Circuit held—as

has every other circuit court to consider the issue[5]—that Congress implicitly granted State commissions the power to interpret and enforce ICAs after their formation.

Sprint reads much more into this decision than can be justified. Sprint quotes the Eleventh Circuit's conclusion that State commissions have "the ***power*** to interpret and enforce in the first instance" such disputes. Pet. at 20 (emphasis added). Although Sprint accurately describes the Eleventh Circuit's holding, that holding does not support the conclusion that Sprint would have this Court reach. CenturyLink does not dispute that State commissions have "the power" to hear ICA disputes in the first instance. The only question that matters here is whether State commissions have the ***exclusive*** power to do so. The Eleventh Circuit's decision says nothing that supports Sprint's position. Sprint has not cited (and cannot cite) any language in the Eleventh Circuit's decision in support Sprint of the argument that Sprint is advancing here.

In the ten years since it was issued, the Eleventh Circuit's decision in *BellSouth* has not caused any confusion or splits among the circuit courts. Indeed, the Second Circuit has squarely rejected the very contention that Sprint makes here: that *BellSouth* means that "the interpretation of ICAs *must* be

---

[5] *See*, *e.g.*, *Sw. Bell Tel., L.P. v. Pub. Util. Comm'n*, 467 F.3d 418, 422 (5th Cir. 2006); *E.SPIRE Commc'ns, Inc. v. N.M. Pub. Regulation Comm'n*, 392 F.3d 1204, 1207 (10th Cir. 2004); *Iowa Network Servs., Inc. v. Qwest Corp.*, 363 F.3d 638, 691-92 (8th Cir. 2004); *MCI Telecomms. Corp. v. Ill. Bell. Te. Co.*, 222 F.3d 323, 337-38 (7th Cir. 2000).

presented in the first instance to state PUCs [public utility commissions]." *See Southern New England Tel. Co. v. Global NAPs, Inc.*, 624 F.3d 123, 137 (2d Cir. 2010). Rather, as the Second Circuit cogently explained, "the claims at issue [in *BellSouth*] *were* presented to a state PUC in the first instance, so the case[ ] did not even address the situation . . . in which an issue related to an ICA is first raised in a district court." *Id.*

The Fourth Circuit's decision in this case presents no conflict with the Eleventh Circuit's ruling in *BellSouth*. The Fourth Circuit was not faced with the same questions that were before the Eleventh Circuit, including whether State commissions have authority to interpret ICAs. The Fourth Circuit thus had no opportunity to depart from the Eleventh Circuit's decision even if it were so inclined. Nevertheless, in the decision that Sprint claims is contrary to the Eleventh Circuit's decision in *BellSouth*, the Fourth Circuit in fact cited this Eleventh Circuit precedent—along with decisions from the Third, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits, as well as the FCC—for the broad proposition that "every circuit to have considered the question has concluded that a State commission does have such authority." Pet. App. 17a. In other words, the Fourth Circuit tacitly ***agreed*** with the Eleventh Circuit's ruling in *BellSouth*.

Because the decision below does not in any way pose a conflict with the Eleventh Circuit's decision in *BellSouth*, there is simply no split between the Fourth and Eleventh Circuits.

ii. The Seventh Circuit Held That Federal Courts *May* Refer ICA Disputes to State Commissions, Not That Federal Courts *Must* Do So.

In *Illinois Bell Telephone Co. v. Global NAPs Illinois, Inc.*, 551 F.3d 587 (7th Cir. 2008), the Seventh Circuit recognized that some ICA disputes can be complicated. The Seventh Circuit thus held that, in appropriate cases, federal courts may stay ICA proceedings and refer them to State commissions. This decision is in no way inconsistent with the Fourth Circuit's decision below that a federal court may instead decide an ICA dispute without referring it first to a State commission. The two decisions are perfectly compatible: federal courts may (but are not required to) refer ICA disputes to State commissions, particularly when the disputes are complicated.

Sprint is simply incorrect to assert that the Seventh Circuit "read Section 252(e)(6) to require a state commission decision in *some* cases before an ICA dispute may be brought to federal court." Pet. 20-21 (emphasis Sprint's). As a preliminary matter, the Seventh Circuit's decision was not based on Section 252(e)(6) at all. Rather, it was based on the

doctrine of primary jurisdiction—a doctrine that Sprint did not raise below and thus has waived.[6] More importantly, the Seventh Circuit did not hold that federal courts ***must*** refer certain actions to State commissions; it merely held that federal courts ***may*** do so in appropriate circumstances. *See Illinois Bell*, 551 F.3d at 594 ("[R]eferral . . . is a sensible procedure; and there is nothing in the Telecommunications Act to forbid it."); *id.* at 595 ("A federal court ***can*** properly stay its proceedings to allow the state commission to interpret the terms of an interconnection agreement . . . ." (emphasis added)).

The Seventh Circuit gave an illustrative example. Under the Telecom Act, State commissions are charged with determining whether ICAs are "nondiscriminatory." Thus, the Seventh Circuit reasoned, if a particular dispute centered on whether the ICA in question was discriminatory, it would make sense for a federal court to refer the matter to a State commission, consistent with the State commission's expertise and authority in answering

---

[6] Unlike subject matter jurisdiction, the defense of primary jurisdiction is waived if not properly raised below. *See*, *e.g.*, *CSX Transp. Co. v. Novolog Bucks Cnty.*, 502 F.3d 247, 253 (3d Cir. 2007); *Gross Common Carrier, Inc. v. Baxter Healthcare Corp.*, 51 F.3d 703, 706 (7th Cir. 1995). In the proceedings before the district court, Sprint asserted that the doctrine of primary jurisdiction required referral to the FCC. The district court rejected that contention, and Sprint did not appeal that particular ruling to the Fourth Circuit. Sprint has never argued—not to the district court, not to the Fourth Circuit, and not to this Court—that referral to State commissions is required by the doctrine of primary jurisdiction. Having failed to previously assert this defense, Sprint has waived it.

such questions. Such a referral would not make sense, the Seventh Circuit observed, where an ICA dispute seems "contrived or . . . otherwise easy to resolve." 551 F.3d at 594. That characterization certainly applies here. The central issue in dispute between CenturyLink and Sprint was the interpretation of a single unambiguous sentence in the Sprint ICAs: the VOIP Compensation Provision. Under the Seventh Circuit's reasoning in *Illinois Bell*, the district court should not have referred the dispute to a State commission—much less to 18 different State commissions. Instead, the rationale of *Illinois Bell* supports the Fourth Circuit's conclusion that the district court could and should decide the case on its own.

The Fourth Circuit's decision here does not conflict with the Seventh Circuit's decision in *Illinois Bell*. In the decision to which Sprint takes exception, the Fourth Circuit did interpret a prior FCC Order differently than the Third Circuit previously had. That difference in interpretation has since been addressed by the FCC, however, so presumably it would not be the subject of any future "split."

iii. Any "Tension" Between the Third and Fourth Circuits Has Already Been Resolved by the FCC in Favor of the Fourth Circuit.

In *Core Communications, Inc. v. Verizon Pennsylvania, Inc.*, 493 F.3d 333, 340 (3d Cir. 2007), the Third Circuit was faced with the same issue that confronted the Fourth Circuit here: whether State commissions have the exclusive authority to resolve

ICA disputes in the first instance. Notably, the Third Circuit rejected the very argument upon which Sprint bases its petition, that Section 252(e)(6) controls the question. *See id.* at 340 (". . . the Act is simply silent as to the procedure for post-formation disputes."). Instead, the Third Circuit based its decision on its interpretation of an FCC decision, *In re Starpower*, 15 FCC Rcd. 11277, 2000 WL 767701 (2000).

In *Starpower*, the FCC was faced with a refusal by the Virginia State Corporation Commission (the "SCC") to issue a declaratory ruling in a dispute over an ICA that the SCC had previously approved. Starpower petitioned the FCC pursuant to Section 252(e)(5) to act on the ICA dispute in place of the SCC. In granting Starpower's petition, the FCC noted that a State commission's failure to carry out its responsibility under Section 252—thereby allowing the FCC to act in the place of the State commission—"can ***in some circumstances*** include the failure to interpret and enforce existing interconnection agreements." *Id.* at 11280, *2 (emphasis added). In *dicta*, the FCC observed that—to the extent the FCC ***does*** displace a State commission and assume responsibility over a matter pursuant to Section 252(e)(5)—the FCC's jurisdiction over the matter is exclusive. Otherwise, there would be a risk of inconsistent rulings. *Id.* at 11281, 2000 WL 767701, at *3.

In *Core Communications*, the Third Circuit considered the implications of the FCC's *Starpower* decision. The Third Circuit acknowleged that "[u]nder the narrowest interpretation, *Starpower* stands for the proposition that State commissions have, at a minimum, the ***non-exclusive authority***

to hear post-formation disputes involving approved interconnection agreements, despite the Act's silence on the issue." 493 F.3d at 342 (emphasis added). But notwithstanding this recognition, the Third Circuit instead adopted a "broader reading of *Starpower*" that purported to grant State commissions the exclusive authority to decide post-formation ICA disputes. *Id.* The Third Circuit then concluded that it was compelled by *Chevron* to defer to this broader reading of the agency's decision.

With all due respect to the Third Circuit, it construed the FCC's *Starpower* decision far too broadly. Here, by contrast, the Fourth Circuit rightly "decline[d] Sprint's invitation to follow the Third Circuit and accord *Chevron* deference to a position the FCC did not take." Pet. App. 23a. The Fourth Circuit did not reject the Third Circuit's reading of *Starpower* out of hand. Instead, the Fourth Circuit solicited the FCC to submit an *amicus* brief in the proceedings below. Specifically, the Fourth Circuit invited the FCC to weigh in on whether the Third Circuit's interpretation of *Starpower* was correct. The Fourth Circuit also asked the FCC to opine generally on the ultimate issue of whether State commissions have exclusive jurisdiction to hear ICA disputes in the first instance.

The FCC's *amicus* brief stated in no uncertain terms that the Third Circuit's "understanding of *Starpower* is incorrect, and should not be followed by this Court." FCC Amicus Br. [Dkt. 60-1] at 15; *see generally* Pet. App. 22a-23a. As a result, it is highly doubtful that the Third Circuit, if faced with similar facts in the future, would continue to uphold *Core Communications* as good law. Moreover, on the

merits, the FCC agreed with CenturyLink. Based on past FCC precedents, the FCC opined that "a party invoking the jurisdiction of a district court to interpret or enforce an existing interconnection agreement is not required, as a precondition to seeking judicial relief, to first seek redress from the state commission that approved the agreement." FCC Amicus Br. [Dkt. 60-1] at 18.

To summarize, the Third Circuit's holding in *Core Communications* was based on deference to a mistaken reading of an FCC order. The FCC has corrected this mistake by clarifying that the Third Circuit's reading of the FCC's order was incorrect. Thus, there remains no dispute as to the true meaning of the FCC's *Starpower* decision. Accordingly, there remains no bona fide circuit split between the Fourth and Third Circuits. Therefore, this Court should not grant certiorari to resolve a circuit split that does not truly remain.

C. Sprint Has Offered No Evidence that This Admittedly "Narrow" Issue Is Prevalent or Significant.

The Sprint ICAs at issue in this breach of contract case had their genesis in the Telecom Act, a regulatory regime that has been in place for over sixteen years. Notably, however, Sprint offers no evidence of "widespread confusion" concerning the issue of whether State commissions must hear post-formation ICA disputes in the first instance—an issue that Sprint itself concedes is "relatively narrow." *See* Pet. at 5. Indeed, other than the disagreement about the meaning of the FCC's 2000 *Starpower* order, Sprint does not identify any conflict or confusion within the courts of appeals on this

precise issue, which the FCC has now clarified. Many district courts have routinely decided such ICA disputes without requiring prior submission to a State commission. *See supra* n.4. That Sprint cannot specify the prevalence or significance of this issue, other than by self-reference, further counsels against a grant of certiorari here. The lack of any such conflict is hardly surprising in view of the plain language of the statutory provision upon which Sprint attempts to rely.

D. Section 252(e)(6) Expressly Addresses Only the Formation of ICAs, Not Post-Formation ICA Disputes.

Sprint's petition argues that "Section 252(e)(6) of the 1996 Act expressly requires state commissions to rule on ICA interpretation issues in the first instance." Pet. at 13. The text of that section says no such thing, however. What Section 252(e)(6) actually says is as follows:

> In any case in which a State commission makes a determination ***under this section***, any party aggrieved by such determination may bring an action in an appropriate Federal district court ***to determine whether the agreement or statement meets the requirements of section 251*** of this title and this section.

(emphasis added). "[T]his section" to which the foregoing language refers is 47 U.S.C. § 252.

Section 252 authorizes a State commission to do one of two things when it reviews a voluntarily negotiated ICA. First, the State commission can

approve the agreement. 47 U.S.C. § 252(e)(1). Second, the State commission can "reject the agreement, with written findings as to any deficiencies." *Id*. The permissible grounds for rejection are expressly limited by statute. *See* 47 U.S.C. § 252(e)(2).

If the State commission ***approves*** the agreement, then Section 252(e)(6) authorizes "any party aggrieved by ***such determination***" to "bring an action in an appropriate Federal district court to determine whether ***the agreement*** … meets the requirements of section 251 of this title and this section." *Id.* (emphasis added). If the State commission ***rejects*** the agreement, then Section 252(e)(6) authorizes "any party aggrieved by such determination" to "bring an action in an appropriate Federal district court to determine whether ***the*** … ***statement*** [of written findings as to any deficiencies] meets the requirements of section 251 of this title and this section." *Id.* (emphasis added).

In short, Section 252(e)(6) expressly provides for judicial review of two specific categories of ICA disputes. These two categories of disputes can arise only ***before*** the ICA is formed or executed. As written, Section 252(e)6) has no application whatsoever to ***post-formation*** ICA disputes such as CenturyLink's claim for breach of the Sprint ICAs. In this regard, it is telling that CenturyLink did not even assert any claims pursuant to Section 252(e)(6). CenturyLink certainly was ***not*** a "party aggrieved" by a determination of a State commission within the meaning of Section 252(e)(6). To the contrary, each of the 18 State commissions that had previously reviewed the Sprint ICAs had approved their terms

and conditions. The terms and conditions that the State commissions approved include the Dispute Resolution Provision. The Dispute Resolution Provision did ***not*** require CenturyLink to submit claims for breach of the Sprint ICAs to each of the 18 State commissions that had previously approved them. Nor did the text of Section 252(e)(6), as the Fourth Circuit correctly held: "The plain import of this language [Section 252(e)(6)]," the Fourth Circuit held, "is to provide for federal court review of a State commission's decision to approve or reject a proposed ICA." Pet App. 18a-19a. This decision follows logically from the plain language of the statute, and certiorari is not needed to confirm that the Fourth Circuit's reading of the plain language of the statute was correct.

Section 252(e)(6) is clear that it governs only the formation of ICAs, not disputes that arise after an ICA has been reviewed and approved by a State commission. More importantly, Section 252(e)(6) simply says nothing to support Sprint's contention that State commissions have the ***exclusive*** authority to hear post-formation ICA disputes in the first instance. In arguing to the contrary, Sprint offers an analogy:

> [W]hen a father tells his child "when you eat your dinner, then you may have dessert," that means the child *must* have dinner and only then may have dessert. It does not mean that the child may skip dinner and have dessert if the child chooses. The statutory condition precedent of state commission exhaustion is likewise non-negotiable here.

Pet. at 14. The analogy is inapt. Sprint contrives a phrase that simply bears no resemblance to the letter or spirit of Section 252(e)(6). A more apt analogy to Section 252(e)(6) would be: "For any meal in which a father serves his child Brussels sprouts, a child aggrieved by such meal may ask Grandma to order a pizza." Under such a rule, the child's prerogative to ask Grandma to order a pizza is by no means ***limited*** to contexts where the father has served his child Brussels sprouts. To the contrary, the rule simply clarifies that such an appeal to the sensibilities of Grandma is available in the Brussels sprouts context. The child plainly would not be foreclosed from invoking Grandma's authority for separate, ***post-meal*** disputes, such as determining what should be served for dessert after the main course (whether pizza or Brussels sprouts) has been eaten.

By the same token, Section 252(e)(6) is limited to disputes about the ***formation*** of ICAs. As a result, it simply has no application to ***post-formation*** disputes, such as the action here, to enforce ICAs that have already been approved by State commissions and ratified by the parties.

E. Sprint's "Structural" Argument Is Not Based on the Structure of the Telecom Act.

Implicitly conceding the infirmity of its textual argument, Sprint argues in the alternative that something in the "structure" of the Telecom Act compels the conclusion that State commissions have exclusive authority to enforce ICAs in the first instance. The problem with this argument is that Sprint has not cited any actual supporting structure.

Rather, the Fourth Circuit got it exactly right: Sprint has failed to "point to any structural features of the 1996 Act indicating that Congress intended to mandate initial State commission consideration." Pet. App. 20a.

Absent any indication in either the text or structure of the Telecom Act that Congress intended to limit the scope of federal court jurisdiction over post-formation ICA disputes, the Fourth Circuit was correct not to wantonly infer such a limitation. Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 818 (1976). Thus, absent a strong basis in the text or structure of the Telecom Act, it would be improper to accept Sprint's invitation to impose a limitation on the authority of district courts to decide post-formation ICA disputes.

Accordingly, because Sprint's argument about the reading of the Telecom Act is based on neither a sound reading of the text of the Act nor a coherent vision of the "structure" of the Act, Sprint's arguments are unavailing. The Fourth Circuit was correct to reject Sprint's arguments on appeal, and this Court should not disturb that decision.

II. THE TRIAL JUDGE'S UNKNOWN OWNERSHIP OF CENTURYLINK STOCK, IN AN IRA ACCOUNT MANAGED WITH THE ASSETS OF OTHERS, DID NOT REQUIRE RECUSAL.

Additionally, Sprint argues that the Fourth Circuit erred by declining to hold that the trial judge was obligated to recuse himself because—unbeknownst to him at the time—CenturyLink stock

was part of the portfolio in his managed IRA account during the pendency of much of the case. Recusal questions are factually intensive and, for good cause, are reviewed merely for an abuse of discretion. Based on this standard of review, the Fourth Circuit correctly concluded that the trial judge had no duty to recuse himself. The factual record supports this decision.

Sprint argues that the Fourth Circuit erroneously held that an IRA qualifies as a "common investment fund" within the meaning of the judicial recusal statute, 28 U.S.C. § 455(d)(4)(i). This argument oversimplifies the Fourth Circuit's decision. The Fourth Circuit's ruling was based on citations to the district court record establishing that the trial judge owned CenturyLink stock in an account "along with the assets of many others who hold similar accounts." Pet. App. 27a. Thus, the Fourth Circuit's decision was well supported by the trial record and is inappropriate for certiorari.

A. Because Recusal Decisions Are Factually Intensive, They Are Reviewed for a Mere Abuse of Discretion.

Recusal decisions are factually intensive, as they turn on the interplay of many different facts and factors. Therefore, it is widely recognized that—absent a suggestion of actual bias (which is not the case here)—a trial court's refusal to recuse itself is reviewed merely for an abuse of discretion. *United States v. Ciavarella*, 716 F.3d 705, 717 n. 4 (3d Cir. 2013); *Garcia v. City of Laredo*, 702 F.3d 788, 793-94 (5th Cir. 2012); *Nachsin v. AOL, LLC*, 663 F.3d 1034, 1041 (9th Cir. 2011); *Newport News Holdings*

Corp. v. Virtual City Vision, Inc., 650 F.3d 423, 432 (4th Cir. 2011).

B. The Fourth Circuit's Ruling Is Factually Supported by the District Court Record.

On May 10, 2011, the trial judge in this case discovered that his managed IRA owned less than $3,800 worth of stock in CenturyLink. At that point, the case had been pending for nearly eighteen months. The trial judge had already heard and decided multiple motions and presided over two separate trials, having previously bifurcated the case to allow Sprint to assert additional counterclaims. Upon learning of this stock ownership, the trial judge immediately notified the parties of this discovery. One week later, he directed the account manager to divest the stock. Pet. App. 11a-13a.

At the time he informed the parties of this discovery, the trial judge expressed the intention to recuse himself and to vacate his prior decisions. CenturyLink sought and obtained the right to brief the issue before he did so. In its subsequent submissions to the district court, CenturyLink cited authority establishing that the trial judge had no obligation to recuse himself for at least two reasons. First, he owned the stock unknowingly. Second, upon discovering the ownership, he had complied with the divestiture procedure specified in 28 U.S.C.

§ 455(f).[7] Sprint disputed the applicability of this provision on the grounds that the trial judge should have known about his financial interest in CenturyLink. The trial judge ultimately concluded that recusal was not required under the circumstances. Pet. App. 161a.

Rather than resolve whether the trial judge should have known about his financial interest in CenturyLink, the Fourth Circuit instead ruled that the trial judge did not own a "financial interest" in CenturyLink at all. Under 28 U.S.C. § 455(d)(4)(i), the ownership of stock through a "common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund."[8] Interpreting the statutorily undefined term "common investment fund," the Fourth Circuit reasoned that such a fund involves "assets held together in trust." Pet. App. 27a.

---

[7] *See* Part II.C, *infra*. In relevant part, 28 U.S.C. § 455(f) provides: "Notwithstanding the preceding provisions of this section, if any . . . judge . . . to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually . . . has a financial interest in a party (other than an interest that could be substantially affected by the outcome) disqualification is not required if the . . . judge . . . divests himself or herself of the interest that provides the grounds for the disqualification."

[8] Canon 3C(3)(c)(i) of the Code of Conduct for United States Judges similarly provides that "ownership in a . . . common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund."

Applying this articulation of law to the facts at hand, the Fourth Circuit held that the trial judge's interest here was not a "financial interest" that gave rise to any recusal obligation. The Fourth Circuit cited an attachment to the trial judge's 2009 Financial Disclosure Report, included in the trial record, which describes the IRA account in which the CenturyLink stock was held. Quoting this attachment to the disclosure report, the Fourth Circuit concluded that "the district court judge held the CenturyLink shares in an IRA 'along with the assets of many others who hold similar accounts.'" Pet. App. 27a. Based on this record, the Fourth Circuit determined that the trial judge held the CenturyLink shares in a "common investment fund" within the meaning of 28 U.S.C. § 455(d)(4)(i).

Additionally, the Fourth Circuit noted that the trial judge had not participated in the management of the fund. "The record also indicates that '[d]ecisions to buy and sell stocks in the IRA were made by the fund managers without input from the presiding judge." Pet. App. 27a. On this record, the Fourth Circuit held that both elements of 28 U.S.C. § 455(d)(4)(i) were satisfied. First, the trial judge owned CenturyLink stock through an account held with others. Second, the trial judge did not participate in the decisions to buy or sell stocks. Thus, the trial judge did not own a "financial interest" in CenturyLink, as the term is defined.

The Fourth Circuit's decision is supported by citations to the trial record and should not be disturbed, especially under an "abuse of discretion" standard of review. Contrary to Sprint's characterization, this case does not present the broad issue of whether all IRAs qualify as "common

investment funds." Rather, it presents a narrow question of whether the trial judge's particular IRA described here—based on the record before the court—qualified as such a common investment fund. At the very worst, the Fourth Circuit's decision reflects "erroneous factual findings or the misapplication of a properly stated rule of law," for which the writ of certiorari is rarely granted. *See* Supreme Court Rule 10(c). This is a narrow and case-specific issue. It is certainly not one that warrants use of this Court's extraordinary certiorari jurisdiction.

C. In Any Event, the Trial Judge's Decision Not to Recuse Himself Was Consistent With 28 U.S.C. § 455(f).

Even if the Fourth Circuit's interpretation of the term "common investment fund" was arguably erroneous, certiorari still should not be granted because the alleged error was harmless. In other words, even if the trial judge had a "financial interest" in CenturyLink stock, the trial judge had no obligation to recuse himself because he faithfully followed the divestiture procedure that Congress specifically prescribed for cases such as this when it enacted 28 U.S.C. § 455(f) ("Section 455(f)").

Section 455(f) allows judges who discover while litigation is already well underway that they own stock in a party to cure any appearance of impropriety simply by divesting the stock:

> Notwithstanding the preceding provisions of this section, if any . . . judge . . . to whom a matter has been assigned would be disqualified, after substantial judicial

> time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually . . . has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the . . . judge . . . divests himself or herself of the interest that provides the grounds for the disqualification.

28 U.S.C. § 455(f).[9] There are three simple prerequisites for satisfying the Section 455(f) procedure. First, a trial judge must invest "substantial judicial time" in a matter before discovering the financial interest. Second, the interest must not be one "that could be substantially affected by the outcome" of the litigation. Third, the trial judge must actually divest the interest. *Id.* In this case, each of the foregoing requirements of Section 455(f) was clearly satisfied.

First, the trial judge invested "substantial judicial time" in the matter before he discovered his interest in CenturyLink. Before learning of his ownership of CenturyLink stock, the trial judge had already resolved a complex motion to dismiss and a

---

[9] Canon 3C(4)(c) of the Code of Conduct for United States Judges similarly provides: "Notwithstanding the preceding provisions of this Canon, if a judge would be disqualified because of a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the judge (or the judge's spouse or minor child) divests the interest that provides the grounds for disqualification."

motion for summary judgment. He had presided over two lengthy bench trials. Pet. App. 136a-137a. Last but not least, he had already entered a 50-page memorandum opinion containing detailed findings of fact and conclusions of law as to the merits of Phase I (Pet App. 75a) (along with a 15-page memorandum opinion as to CenturyLink's requests for interest and attorneys' fees in connection with the Phase I judgment (Pet. App. 120a)) and had authored—but not yet entered—a decision resolving Phase II of the litigation (Pet. App. 137a). Plainly, the trial judge had invested "substantial judicial time" in this matter before learning that his managed IRA contained CenturyLink stock.

Second, the interest that the trial judge discovered was ***not*** an "interest that could be substantially affected by the outcome" of the litigation. The record showed that the trial judge's IRA held 80 shares of CenturyLink stock during the litigation. These shares were worth no more than $3,800, or 0.81% of the judge's IRA holdings. Pet. App. 138a. At the time of the $23,376,213.76 amended partial final judgment, CenturyLink had roughly 300,000,000 shares outstanding. Pet. App. 153a. The trial judge's equity interest in the judgment therefore amounted to all of ***$6.00***. *Id.* Thus, the trial judge's interest plainly could not have been "substantially affected" by the outcome of the litigation.

Finally, upon discovering his ownership of CenturyLink stock, the trial judge promptly divested his shares. Pet. App. 140a.

In sum, the trial judge did not "know" about his ownership of CenturyLink stock until May 10, 2011

and, upon discovering his ownership of such stock, he promptly divested it in accordance with the very procedure that Congress and the canons of ethics specifically established for such situations. "[T]here is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is." *Nakell v. Att'y General of North Carolina*, 15 F.3d 319, 325 (4th Cir. 1994) (quotation omitted). Therefore, the trial judge was entirely correct not to recuse himself under these facts, and this Court should not grant certiorari to review this proper result.

D. This Court's Interest in Promoting Public Confidence in the Judiciary Does Not Support Granting Certiorari.

Finally, Sprint argues that "this Court has a special interest in ensuring that members of the federal judiciary abide by the highest standards of conduct 'to promote public confidence in the integrity of the judicial process." Pet. at 29, quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859-60 (1988). While this statement is true, it cuts against a grant of certiorari here. The facts of this case involve a judge's managed IRA containing a *de minimis* amount of stock in a party. This ownership interest was promptly disclosed and divested as soon as the judge discovered it. These are not facts that warrant the Court to exercise its extraordinary certiorari jurisdiction. Unnecessary litigation over disqualification only undermines the public's faith in the judicial system. *See Parker v. Connors Steel Co.*, 855 F.2d 1510, 1525 (11th Cir. 1988) ("Judicial decisions based on such technical arguments not relevant to the merits contribute to the public's

distrust in our system of justice."). Accordingly, justice would not be served by granting certiorari to review a decision that is supported by both the law and by the evidentiary record, which has no bearing whatsoever on the merits of the underlying dispute, and which unnecessarily calls into question the impartiality of the federal judiciary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

August 30, 2013

MICHAEL J. LOCKERBY
COUNSEL OF RECORD
JENNIFER KEAS
BENJAMIN R. DRYDEN
FOLEY & LARDNER LLP
Washington Harbour
3000 K Street, N.W.
Washington, D.C. 20007
202.672.5300
mlockerby@foley.com
jkeas@foley.com
bdryden@foley.com