No.

In the
Supreme Court of the United States

SPRINT COMMUNICATIONS CO.
OF VIRGINIA, INC., and
SPRINT COMMUNICATIONS CO. L.P.,
Petitioners,

v.

CENTRAL TELEPHONE CO. OF VIRGINIA, et al.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a dispute regarding the proper interpretation of an "interconnection agreement" ("ICA") entered into pursuant to the Telecommunications Act of 1996 may be brought directly in federal court without exhausting administrative remedies in the state public utilities commission that approved the agreement.

2. Whether stock in a specific company held in an *individual* retirement account ("IRA") qualifies as a "mutual or common investment fund" within the meaning of 28 U.S.C. § 455(d)(4)(i), such that a judge holding stock in a party to a case before him need not recuse himself if the stock is held in an IRA.

PARTIES TO THE PROCEEDING

Petitioners Sprint Communications Company of Virginia, Inc. and Sprint Communications Company L.P. were the appellants in the proceeding below. Respondents 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 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 (collectively "CenturyLink") were the appellees.

CORPORATE DISCLOSURE STATEMENT

Sprint Communications Company of Virginia, Inc. (a Virginia corporation) and Sprint Communications Company L.P. (a Delaware limited partnership) provide telecommunications services to the public. Sprint Communications Company L.P.'s partners include U.S. Telecom, Inc., Utelcom, Inc., UCOM, Inc., and Sprint International Communications Corporation—all of which are direct or indirect wholly owned subsidiaries of Sprint Communications, Inc. On July 10, 2013, Sprint Nextel Corporation changed its name to "Sprint Communications, Inc." Sprint Communications, Inc. is a private company. It is a wholly owned subsidiary of Sprint Corporation, a publicly traded corporation. More than 10% of Sprint Corporation's stock is owned by SoftBank Corporation, also a publicly traded corporation.

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PETITION FOR A WRIT OF CERTIORARI

Sprint Communications Company of Virginia, Inc., and Sprint Communications Company, L.P. ("Sprint") respectfully petition for review of the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit is reported at *Central Tel. Co. of Va. v. Sprint Commc'ns Co. of Va., Inc.*, 715 F.3d 501 (4th Cir. 2013), and reprinted at Pet. App. 1a-38a. The United States District Court for the Eastern District of Virginia issued five relevant opinions: *Central Tel. Co. of Va. v. Sprint Commc'ns Co. of Va., Inc.*, 759 F. Supp. 2d 772 (E.D. Va. 2011) (jurisdiction issues); *Central Tel. Co. of Va. v. Sprint Commc'ns Co. of Va., Inc.*, 759 F. Supp. 2d 789 (E.D. Va. 2011) (scope of agreements issue); *Central Tel. Co. of Va. v. Sprint Commc'ns Co. of Va., Inc.*, Civ. A. No. 3:09cv720, 2011 WL 1226001 (E.D. Va. March 30, 2011) (damages award); *Central Tel. Co. of Va. v. Sprint Commc'ns Co. of Va., Inc.*, Civ. A. No. 3:09cv720, 2011 WL 6178652 (E.D. Va. Dec. 12, 2011) (recusal issue); *Central Tel. Co. of Va. v. Sprint Commc'ns Co. of Va., Inc.*, Civ. A. No. 3:09cv720, 2011 WL 6205975 (E.D. Va. Dec. 13, 2011) (North Carolina billing issue). The district court decisions are reprinted at Pet. App. 39a-194a.

JURISDICTION

The judgment below was entered on April 29, 2013, making the deadline for this petition July 29, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions relevant here are 47 U.S.C. § 252 and 28 U.S.C. § 455, which are reproduced in full at Pet. App. 195a-211a. The key subsections are §§ 252(e)(6) and 455(d)(4)(i), which provide:

> Section 252(e)(6)—In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. 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.
>
> Section 455(d)(4)(i)—Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund.

OVERVIEW

The Fourth Circuit's decision below transformed a two-way circuit split into a much deeper three-way split. And the issue on which the circuits are divided is fundamentally important to the administration of the Telecommunications Act of 1996: Whether a dispute regarding the proper interpretation of an "interconnection agreement" ("ICA") may be brought directly in federal court without first exhausting administrative remedies in the state public utilities commission that approved the agreement.

The Telecommunications Act of 1996, 47 U.S.C. §§ 151 *et seq.* ("1996 Act" or "Act"), creates a system of joint federal-state responsibility over telecommunications. The Act charges state commissions with responsibility to arbitrate and approve ICAs, which govern the terms on which incumbent local exchange carriers ("ILECs")—local phone companies, like respondent CenturyLink—must interconnect their local networks with those of other carriers, like petitioner Sprint.

The Third Circuit and the Eleventh Circuit have concluded that questions of ICA interpretation and enforcement *must* first be heard by the state commissions that approve them—*i.e.*, that when Congress granted state commissions the authority to arbitrate and approve ICAs, it *also* gave them exclusive authority to adjudicate in the first instance any disputes arising under those ICAs. The Seventh Circuit has concluded that the 1996 Act entrusts certain ICA disputes—those raising telecommunications policy issues—to state commissions, and so courts should require state commission exhaustion in such cases. The Fourth Circuit's decision below rejects both rules, holding in no uncertain terms that the 1996 Act *never* "require[s] a State commission to interpret and enforce an ICA in the first instance"—and questioning whether state commissions even "ha[ve] the authority to interpret" ICAs at all. Pet. App. 17a, 23a. This three-way disagreement among the circuits requires this Court's intervention to avert widespread confusion and prevent inconsistent outcomes in the lower courts.

The decision below also sets a dangerous and indefensible precedent regarding the circumstances in which a trial judge's ownership of stock in a party to a case before him requires recusal. The trial judge here held stock in CenturyLink in his individual retirement account ("IRA") for years, including at the time of his decisions in this case. The Fourth Circuit held that this investment fell into the statutory safe haven for stocks held in "a mutual or common investment fund that holds securities." 28 U.S.C. § 455(d)(4)(i). But, by definition, an IRA is an "*individual*" retirement account, not a "mutual or common" fund in which one invests jointly along with many others. The Fourth Circuit's ruling is thus flatly inconsistent with the statutory text. Because 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," *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859-60 (1988), it should address and reverse the Fourth Circuit's holding that recusal is not required if a judge owns stock in a party to a case if the stock is held in an IRA.

STATEMENT

This petition arises from a dispute between Sprint and CenturyLink regarding the proper interpretation of the ICAs governing the exchange of telecommunications traffic between their networks. Although the circuit split here concerns the relatively narrow issue whether state commissions or federal district courts should interpret ICAs in the first instance, understanding that issue requires some background on the relevant statutory and

regulatory regime, as well as a basic description of the parties' disagreements on the merits. Understanding the technical complexity of the dispute on the merits illustrates why it is sensible for the state regulatory commissions to address disputes like those involved in this case as an initial matter.

1. *General Background*: The merits of this case concern the "intercarrier compensation"[1] applicable to certain calls made by customers of Sprint's cable telephony partners and delivered by CenturyLink to its customers. In particular, the parties disagree about how intercarrier compensation should be determined for "non-local VoIP-to-PSTN calls" originating on the networks of Sprint's cable partners and delivered to CenturyLink for termination.[2] Separately, the parties also dispute whether certain VoIP-originated calls that Sprint delivered to CenturyLink in North Carolina should have been billed as local or long-distance calls.

2. *The Telecommunications Act of 1996*: The ICAs at the heart of this case arose as a result of the Telecommunications Act of 1996. The Act was intended to introduce competition into local telecommunications markets previously dominated by monopoly ILECs. *See, e.g., Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 476 (2002). The Act mandates

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[1] Intercarrier compensation is the general term for payments due from one telephone company to another.

[2] "VoIP" is an acronym for "Voice over Internet Protocol," and VoIP-to-PSTN means that the call originates in Internet Protocol format and terminates in "time division multiplexing" ("TDM") format over the "public switched telephone network" ("PSTN").

that ILECs must interconnect their local networks with those of other carriers "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(2)(D).

The regulatory framework under the 1996 Act is "a deliberately constructed model of cooperative federalism." *BellSouth Telecomms., Inc. v. Sanford*, 494 F.3d 439, 449 (4th Cir. 2007). Section 252 of the 1996 Act provides that state commissions are empowered to approve ICAs negotiated to fulfill the requirements of Section 251, *see id.* § 252(a), or, if negotiations fail, to conduct binding arbitrations with respect to carriers' interconnection obligations under the Act, *id.* § 252(b). Section 252 further provides that upon a "determination" by a state commission on an ICA, any "aggrieved" party may bring an action in federal district court "to determine whether the agreement … meets the requirements" of the Act. *Id.* § 252(e)(6). In sum, the role of state commissions as "deputized federal regulators" under Section 252 includes "arbitrating, approving, and enforcing interconnection agreements." *Pacific Bell v. Pac-West Telecomm., Inc.*, 325 F.3d 1114, 1126 (9th Cir. 2003).

3. *Nature of the ICA Disputes*: While this petition does not directly present any issues relating to the merits of the parties' disputes, the nature of those disputes *is* relevant to the question presented here—whether Congress intended to require exhaustion of state commission remedies before parties may seek review in federal district court. Specifically, resolving disputes arising under ICAs often requires substantial knowledge of telecommunications networks. State commissions—

which, again, routinely arbitrate and approve ICAs—have the specialized knowledge necessary to make, in the first instance, the findings of fact and conclusions of law needed for subsequent, well-informed judicial review.

a. The Scope of the ICAs: The parties disagree as to whether the ICAs cover VoIP-to-PSTN traffic delivered over a specific kind of facility known as "Feature Group D" ("FGD") trunks.[3] Sprint maintains that the exchange of interexchange carrier ("IXC") traffic over FGD trunks does not fall within the scope of the parties' ICAs, which address only traffic exchanged between *local* exchange networks.

Before the 1996 Act authorized competitors to enter local markets in which ILECs had historically enjoyed monopolies, Sprint was a long-distance carrier—an IXC. During that pre-1996 Act time frame, Sprint delivered long-distance calls to CenturyLink's predecessors over FGD trunks that were purchased under filed tariffs. This plainly did not involve the interconnection of any Sprint CLEC network—that is, a network used by Sprint acting as a "competitive local exchange carrier" under the 1996 Act to provide local service—pursuant to an ICA because Sprint did not have any CLEC networks at that time, and there was no such thing as an ICA. During the post-Act time frame relevant to this case, FGD trunks continued to serve the same function—they connected IXC networks (including Sprint's) to local exchange carriers' networks (including

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[3] Traffic on FGD trunks represented approximately $14.6 million of the $21.4 million in dispute at the time of trial.

CenturyLink's). And because, again, the whole point of ICAs under the 1996 Act is to govern the interconnection of *local* exchange networks (*i.e.,* connections between CenturyLink as an ILEC and Sprint as a CLEC), the ICAs' scope does not extend to traffic delivered over FGD trunks.

Notably, CenturyLink has never suggested that the parties' ICAs apply to *non*-VoIP traffic delivered to it over FGD trunks. To the contrary, the parties agree that wireless traffic, for example—which constitutes most of the traffic on these same FGD trunks—is *not* subject to the ICAs at issue here. It is likely that a state regulatory commission would understand, contrary to CenturyLink's assertions, that ICAs like those at issue here do not extend to traffic delivered over FGD trunks.

b. CenturyLink's North Carolina Billing Practices: Sprint maintains that the ICAs expressly mandate classification of calls as local or non-local for purposes of intercarrier compensation based on the originating and terminating points of the calls. But instead of using the "calling party number"—which actually corresponds to the originating point of a call—CenturyLink used a "billing telephone number" assigned to the trunk on which Sprint delivered traffic to CenturyLink as a *proxy* for the originating point of the call. CenturyLink's proxy approach resulted in $3.6 million of extra charges being billed to Sprint because more calls were billed by CenturyLink as non-local calls using intrastate access charges than would have been the case had the actual originating points of the calls (as indicated by the calling party numbers) been used. Again, it is likely that a state regulatory commission would have

found CenturyLink's proxy method to be unreasonable, because *billing* telephone numbers—unlike *calling party* numbers—simply do not correspond to call origination points.

4. ***Jurisdiction/Exhaustion Issue***: Before the Fourth Circuit, Sprint argued—relying on the rule of the Third and Eleventh Circuits, *see infra* at 17–20, that when Congress granted state commissions the authority to arbitrate and approve ICAs, it *also* gave them exclusive authority to adjudicate disputes arising under ICAs in the first instance. More specifically, Sprint maintained that (1) the 1996 Act contains a *statutory* exhaustion requirement—synonymous with a jurisdictional requirement—requiring that ICA disputes must first be heard by the state commissions before the district courts may take jurisdiction; and (2) the non-jurisdictional, *prudential* doctrine of exhaustion also mandates that state commissions hear ICA disputes in the first instance.

The court below rejected both arguments. With respect to the first, the court "decline[d] Sprint's invitation to follow the Third Circuit," and concluded that "the 1996 Act does not require a State commission to interpret and enforce an ICA in the first instance." Pet. App. 23a. With respect to the second, the Fourth Circuit found that "State commissions [do not] necessarily possess superior expertise to resolve [ICA] disputes," and concluded that "prudential considerations" do not "compel federal deference to State commissions in the first instance." *Id.* at 24a-25a.

5. ***Recusal Issue***: Sprint argued that the trial judge should have recused himself under 28 U.S.C.

§ 455 for two reasons. First, Section 455(b)(4) requires that a judge disqualify himself when he "knows that he … has a financial interest in … a party to the proceeding." 28 U.S.C. § 455(b)(4). Because it is undisputed here that the trial judge repeatedly disclosed that he held common shares of CenturyLink in his IRA at the time of his decisions in this case,[4] Sprint maintained that he necessarily *knew* of his interest and was required to recuse himself. Second, under Section 455(a), a judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Id.* § 455(a). Sprint argued below that even if the trial judge were not charged with knowledge of his financial interest in CenturyLink as a result of his public disclosure, members of the public would "reasonably … question" his partiality in light of the disclosure. Sprint relied on this Court's decision in *Liljeberg*, which held that a lack of actual knowledge could not justify the failure to recuse under Section 455(a). 486 U.S. at 859-60.

The Fourth Circuit rejected Sprint's argument on a basis neither advanced by CenturyLink nor ever adopted by any other court. The court acknowledged that the judge held shares of CenturyLink at the time of his decisions, but found that shares held in an IRA managed by a third party were held in a "mutual or common investment fund" for purposes of

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[4] The judge actually disclosed an interest in *CenturyTel* but explained at the time of his first opinion on the merits in this case that "CenturyTel" was "operating under the moniker 'CenturyLink'"; he thus was clearly aware at the time of his decisions below that *CenturyTel* and *CenturyLink* were the same company. Pet. App. 85a.

the safe harbor exception created in Section 455(d)(4)(i). The court further found that "[g]iven the small number of shares the district court judge held," and the fact that he was subjectively unaware of his holdings despite his repeated disclosures, "a reasonable observer would have no cause to question his impartiality." Pet. App. 28a.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit's decision "that the 1996 Act does not require a State commission to interpret and enforce an ICA in the first instance," Pet. App. 23a, fails to make sense of the relevant provisions of the 1996 Act. In addition, the court's ruling transformed a relatively shallow two-way split in the circuits into a much deeper three-way disagreement. This Court should grant certiorari to address that split and prevent further confusion and inconsistent outcomes among the lower courts.

The Fourth Circuit's ruling that shares held by a judge in an *individual* retirement account do not require recusal because they fall into the safe harbor exception for shares held in a "*mutual* or *common* investment fund," 28 U.S.C. § 455(d)(4)(i) (emphasis added), does not merely fail to make sense of the statute—it flies in the face of both the statutory language and common sense. This is an important federal question meriting this Court's attention.

I. THE HOLDING THAT THE 1996 ACT DOES NOT REQUIRE EXHAUSTION OF STATE COMMISSION REMEDIES IS INCONSISTENT WITH THE STATUTE AND BROADENS THE CONFLICT IN THE CIRCUITS.

Contrary to the decision below, the 1996 Act requires disputes concerning the meaning of ICAs to be presented as an initial matter to the state commission that negotiated or approved the ICA. Review is warranted here because the decision below conflicts with decisions of other circuits. Those circuits have not agreed with each other, but have held that exhaustion is either required or permissible, while the Fourth Circuit held that there is never a need for exhaustion of state commission remedies.

A. The Statutory Language and Structure Mandate an Initial State Commission Determination.

Section 252(e)(6) of the 1996 Act expressly requires state commissions to rule on ICA interpretation issues in the first instance. That section provides:

> 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.

47 U.S.C. § 252(e)(6). Sprint's construction of this language is straightforward—in stating that an aggrieved party may go to federal court in a case in which "a State commission makes a determination," Congress meant that a party may go to federal court *only* after a determination is made by a state commission. This is the plain meaning of the provision consistent with ordinary English usage. For example, when 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.

A number of federal circuit and district courts have agreed with this straightforward reading of Section 252(e)(6). Sitting *en banc* in *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1277 (11th Cir. 2003), the Eleventh Circuit wrote that "the language of § 252 persuades us that in granting to the [state] commissions the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce in the first instance and to subject their determination to challenges in the federal courts." The court noted that "Section 252(e)(6) gives federal courts jurisdiction to review 'determinations' made by state commissions." *Id*. "In contrast," the court stated, "§ 252(e)(4) abrogates state court jurisdiction 'to

review the action of a State commission in approving or rejecting an agreement under this section.'" *Id.*

In short, the Eleventh Circuit concluded, "[t]he use of the word 'determination' in § 252(e)(6) rather than a specific reference to the approval or rejection of agreements leads us to believe that Congress did not intend to limit state commissions' authority to the mere approval and rejection of agreements." *Id.* The court therefore held that the language of the Act itself specifies that "state commissions [will] interpret [ICAs]" and those interpretations will be subject "to federal review in the district courts." *Id.* at 1278.[5] *See also Sw. Bell Tel. Co. v. Brooks Fiber Commc'ns. of Okla., Inc.*, 235 F.3d 493, 497 (10th Cir. 2000) (finding that a state commission "determination" is subject to district court review under § 252(e)(6)); *Intermedia Commc'ns, Inc. v. BellSouth Telecomms., Inc.*, 173 F. Supp. 2d 1282, 1286-87 (M.D. Fla. 2000) (finding that "a federal court only has jurisdiction to review a PSC's *determination*" under § 252(e)(6)) (emphasis added).

Other courts have relied less on the specific language of Section 252(e)(6) and more on the overall structure of the statute in reaching the same conclusion that the Act confers exclusive authority

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[5] The Eleventh Circuit noted that its "common sense reading of the statute" finds "further support" in this Court's *Verizon Maryland* decision. Specifically, the court pointed out that *Verizon Maryland* had "assumed that the state utility commission had the authority to interpret the interconnection agreements *in the first instance*." *BellSouth Telecomms.,* 317 F.3d at 1274-75 (emphasis added).

on state commissions to interpret ICAs in the first instance. In *Core Commc'ns, Inc. v. Verizon Pennsylvania, Inc.*, 493 F.3d 333 (3d Cir. 2007), the Third Circuit "interpret[ed] the statute as a symmetrical and coherent regulatory scheme" in which "the bodies that consider[] formation problems also resolve interpretation difficulties." The Third Circuit concluded that "federal court jurisdiction over state commission interpretation and enforcement decisions should be limited to appellate review." *Id.* at 342-43.

A number of district court decisions have elaborated on *why* it is most consistent with the overall structure of the 1996 Act for state commissions to hear disputes arising under ICAs in the first instance. In *AT&T Commc'ns of Ohio, Inc. v. Ohio Bell Tel. Co.*, 29 F. Supp. 2d 855, 856 (S.D. Ohio 1998), the court wrote that there is "no ambiguity in the statutory scheme set forth in 47 U.S.C. § 252":

> The procedures for negotiations, arbitration and approval of agreements are clearly designed *to preserve the authority of state commissions* …. The statutory scheme [therefore] does not permit [the federal district courts] to review disputes arising out of interconnection agreements not previously subject to action by a state commission.

Id. In *Indiana Bell Tel. Co., Inc. v. McCarty*, 30 F. Supp. 2d 1100, 1104 (S.D. Ind. 1998), the court similarly wrote that the "Act was designed to allow the state commission to make the first determination on issues [arising under an ICA] prior to judicial review." Indeed, "circumventing the commission

would jeopardize the entire system of review established by the Act." *Id.*

In sum, the language and structure of the 1996 Act indicate that Congress intended to give the state commissions "plenary authority" over ICA issues *in the first instance*, with *review* of commission determinations available in the federal district courts under Section 1331, as was the case in *Verizon Maryland*.

B. The Fourth Circuit's Decision Below Transforms a Two-Way Circuit Split into a Deeper Three-Way Split.

As set forth above, Sprint believes that the 1996 Act expressly requires exhaustion of state commission remedies before parties may bring ICA interpretation issues to federal court, and the Third and Eleventh Circuits agree. But the courts of appeals have long diverged on this issue. Prior to the Fourth Circuit's decision here, the Seventh Circuit had held that the 1996 Act 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. The Fourth Circuit's decision below that the 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.

The Third Circuit's decision in *Core Communications* involved Core's claim that Verizon's refusal to interconnect its network at technically feasible points in a timely manner "constituted a material breach of the[ir] interconnection

agreement." The district court had dismissed this claim, holding that "the statutory scheme under the Telecommunications Act requires that Core first present [it] … to the state commission before proceeding in a federal district court." *Id.* at 338.

The Third Circuit affirmed. Contrary to Sprint's understanding of Section 252(e)(6), the court found the statute did *not* expressly address the question whether exhaustion was required. *Core Communications,* 493 F.3d at 341. Rather, the court emphasized that the 1996 Act is a "symmetrical and coherent regulatory scheme," *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal citation omitted), whose structure supports the conclusion that "the bodies that considered formation problems [relating to ICAs] also resolve interpretation difficulties." *Core Commc'ns*, 493 F.3d at 343. The court also found support for that conclusion in the FCC's decision in *Starpower Communications*, 15 FCC Rcd. 11,277 (2000), which had described ICA interpretation and enforcement disputes to be the "'responsibility'" of the FCC. 493 F.3d at 342.[6] The *Core Communications* court held:

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[6] The FCC filed an *amicus* brief in the Fourth Circuit describing the Third Circuit's understanding of the *Starpower* decision as "incorrect." But *Core* remains the law of the Third Circuit and is adequately supported by the court's conclusion that the 1996 Act is a "symmetrical and coherent regulatory scheme" that is properly interpreted to require that "the bodies that considered formation problems [relating to ICAs] also resolve interpretation difficulties." *Core Commc'ns*, 493 F.3d at 343.

> [I]nterpretation and enforcement actions that arise after a state commission has approved an interconnection agreement must be litigated in the first instance before the relevant state commission. A party may then proceed to federal court to seek review of the commission's decision or move on to the appropriate trial court to seek damages for a breach, if the commission finds one.

Id. at 344. That holding squarely conflicts with the decision below.

The Fourth Circuit did not squarely address the question whether to defer to the construction of the Act that the FCC advanced in its brief below. However, Sprint notes that, should this Court grant certiorari, and should the FCC also file an amicus brief with this court (as it almost surely will), this case would present the Court with an opportunity to address a second area of considerable confusion among the circuits. In *Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254 (2011), this Court decided that an agency's interpretation of its regulations, even when set forth in a legal brief, is entitled to deference. The circuits are divided as to whether *Talk America* should also apply in the context of statutory interpretations advanced by an agency in a legal brief. The Ninth Circuit, for example, has held that an agency's interpretation of a federal statute set forth in an amicus brief is not entitled to deference, *see Price v. Stevedoring Servs. of Am.*, 697 F.3d 820, 825-26 (9th Cir. 2012), while in the Fourth Circuit such an interpretation is entitled to deference, *see Jones v. Am. Postal Workers Union, Local No. 4755*, 192 F.3d 417, 427 (4th Cir. 1999).

The decision below also conflicts with the *en banc* Eleventh Circuit's decision in *BellSouth*, discussed above. *BellSouth* involved a dispute regarding the meaning of ICA provisions establishing reciprocal compensation rates for local traffic. A panel of the Eleventh Circuit had found that the state commission lacked authority to interpret interconnection agreements, *id.*, 317 F.3d at 1273, but the *en banc* court reversed. The *en banc* court reasoned that the language of Section 252(e)(6) not only *authorizes* review by state commissions, but *mandates* a "determination" by a state commission before an issue of ICA interpretation may be brought to federal court. The Eleventh Circuit further reasoned that state commissions are "deputized federal regulators" under the 1996 Act, 317 F.3d at 1277, and that by giving the commissions "the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce *in the first instance* and to subject their determination to challenges in the federal courts." *Id.* at 1277 (emphasis added). Thus, although the narrow question before the court in *BellSouth* was limited to whether state commissions have *authority* to address issues of ICA interpretation, the Eleventh Circuit's reasoning—finding that Section 252(e)(6) requires a state commission "determination" in the first instance—makes clear its view that the statute requires exhaustion.

The Seventh Circuit has not gone as far as the Third and Eleventh Circuits—which, again, mandate exhaustion of state commission remedies in ICA interpretation cases generally—but does read Section 252(e)(6) to require a state commission decision in *some* cases before an ICA dispute may be

brought to federal court. In *Illinois Bell Telephone Co. v. Global NAPs Illinois, Inc.*, Verizon alleged that Global NAPs had failed to pay "interconnection charge[s] specified in the approved interconnection agreement[s]." 551 F.3d 587, 591 (7th Cir. 2008). Global NAPs "argue[d] that the plaintiff's claim [was] based on a misinterpretation of the agreement." *Id.* at 593. Writing for a unanimous panel, Judge Posner wrote:

> Such a disagreement should normally be referred to the state regulatory agency … before the federal court decides the case. The agency had to approve the parties' agreement and had the authority to impose a different agreement on them …. If a dispute over the meaning of the agreement arises, the agency will usually be in the best position to resolve it.

551 F.3d at 593.

Judge Posner explained that "interconnection agreements are complex and have to be approved by a state commission and disputes over their meaning are very likely to present issues related to the commission's federal statutory authority" under Section 252.[7] *Id.* at 594. The court went on to state,

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[7] As explained above, this case illustrates Judge Posner's points regarding the complexity of ICA interpretation issues, and the state commissions "usually be[ing] in the best position to resolve [them]." As discussed *supra* at 7-9, the interpretive issues in this case involve (1) whether "Feature Group D" trunks should be considered part of the interconnection network covered by ICAs, or should have been viewed as long distance facilities; and (2) whether the ICAs' requirement that

however, that a "court need [not] refer all disputes over an interconnection agreement to the state commission, only those where the dispute raises a genuine policy issue the resolution of which has been confided by the Telecommunications Act to the state commissions." *Id.* at 596.

The Second Circuit's 2010 decision in *S. New England Tel. Co. v. Global NAPs, Inc.*, 624 F.3d 123 (2d Cir. 2010), does not bear directly on the circuit split here, but does further illustrate the extent of lower-court confusion on the question whether issues of ICA interpretation should be presented to the state commissions in the first instance. In that case, the narrow issue was whether the court "should have dismissed this action until the [state commission] had a chance to rule" on "a question of ICA interpretation" raised by defendant as a defense to a claim under federal tariffs. *Id.* at 136, 138. The Second Circuit acknowledged the Seventh Circuit's rule that "in some cases involving the meaning of [ICAs'] the most 'sensible procedure' will be for a

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calls be "jurisdictionalized" based on where they originated and terminated mandates the use of a "calling party number"—corresponding to calling party's location—as one endpoint, rather than a "billing telephone number" identifying the interconnection trunk on which the call was delivered to CenturyLink. Resolving these issues requires a technical knowledge of network architecture with which state commissions are intimately familiar, but to which generalist district court judges have little or no exposure.

district court to refer the question to the state PUC before proceeding with the case." *Id.* at 136 & n.4, quoting *Ill. Bell Tel. Co.*, 551 F.3d at 594. The court also noted that the Third Circuit's *Core* decision had held that "'actions' seeking the 'interpretation and enforcement' of an ICA itself must be brought before state commissions." 624 F.3d at 138. But the Second Circuit expressed skepticism regarding "our sister circuits[']" holdings that state PUCs even "have the authority to interpret ICAs in post-approval disputes over the meaning of those agreements," *id.* at 137, and found that "a district court, presented with a case involving a federal claim properly within its jurisdiction" certainly does not "*lose[]* federal jurisdiction because the ICA issue was not presented to a state PUC." *Id.* at 138.

Against this backdrop, it is clear that before the Fourth Circuit's decision below, there was considerable confusion among the circuits regarding the extent to which state commissions should hear ICA interpretation issues in the first instance. Again, the Second Circuit appeared to doubt that state commissions should ever hear such disputes. The Seventh Circuit had found that state commissions should hear issues of ICA interpretation when they present complex issues related to their federal statutory authority under the 1996 Act. And the Third and Eleventh Circuits had made clear their view that the 1996 Act *requires* a determination by a state commission on ICA interpretation issues before the federal courts may hear such issues.

The Fourth Circuit's decision below shares the Second Circuit's skepticism regarding the state commissions' "authority to interpret and enforce an

ICA," stating that "nothing in the 1996 Act's text so provides." Pet. App. 17a. On the other hand, the Fourth Circuit appears flatly to reject the Seventh Circuit's view that state commissions will "usually be in the best position" to resolve disputes regarding the meaning of ICAs. *Ill. Bell Tel. Co.*, 551 F.3d at 593. The court below stated—without explanation—that it was not "persuaded that State commissions necessarily possess superior expertise to resolve such disputes." Pet. App. 24a. And, of course, the Fourth Circuit—unlike the Seventh or Second Circuits—also squarely rejected the views of the Third and Eleventh Circuits in holding that the 1996 Act *never* requires state commission review of ICA interpretive issues in the first instance.

The current state of play, then, is one of utter confusion among the lower courts. *No* district court other than the one in this case has *ever* held that issues of ICA interpretation may go directly to federal district court without state commission exhaustion. And the circuits, as described directly above, are divided several ways, with no agreement as to whether state commissions even have *authority* to hear ICA disputes, let alone whether they *must* hear such disputes before district court review is proper. Yet these are questions of fundamental importance to telecommunications companies—disputes about the meaning of ICAs are commonplace, and companies must know where to go to resolve them. This Court should grant certiorari to address this issue and dispel the confusion among the federal circuit and district courts.

II. WHETHER AN IRA IS A "MUTUAL OR COMMON INVESTMENT FUND" IS AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE RESOLVED BY THIS COURT.

The Fourth Circuit held that the trial judge was not required to recuse himself despite his undisputed "ownership of shares in CenturyLink" in an IRA. Pet. App. 27a. More specifically, the court found that the judge's IRA was a "'common investment fund'" within the meaning of "the safe harbor exception created in § 455(d)(4)(i)," and therefore did "not constitute a 'financial interest' in CenturyLink for purposes of § 455(b)." *Id.* at 27a-28a. That ruling sets a dangerous precedent, and this Court should review and reject it.

Although many investors own mutual funds or other "common investment funds" in an IRA, that is not the case here. The judge's investment advisor who managed the account made a specific decision to own CenturyLink stock in the IRA, and the judge had the power to veto that decision and to direct the sale of that stock, as he eventually did. The difference between owning shares in an IRA and regular stock ownership is solely the tax treatment. The IRA investor has the right to buy or sell individual stocks, and can also exercise his right to vote those shares.

Sprint is not aware of any other court ever holding—or even suggesting—that where a judge owns shares in a party before him through a managed IRA, those shares are part of a common investment fund such that the judge has no financial

interest in the party for purposes of 28 U.S.C. § 455.[8] To the contrary, other courts routinely treat stocks held through IRAs as a financial interest requiring recusal. *See, e.g., Key Pharms., Inc. v. Mylan Labs. Inc.*, 24 F. Supp. 2d 480, 481-82 (W.D. Pa. 1998) (treating shares in plaintiff's parent company held in an IRA overseen by a professional investment management service as a financial interest requiring divestment); *U.S. v. Pappert*, No. Crim. A. 942001601KHV, 1998 WL 596707, at *3 (D. Kan. July 29, 1998) (noting treatment of shares in a party to a civil suit held in an IRA overseen by a professional investment management service as a financial interest requiring recusal and divestment), *aff'd on other grounds*, *U.S. v. Pappert,* 1 F. App'x 767 (10th Cir. 2001); *In re Indus. Gas Antitrust Litig.*, No. 80 C 3479, 1985 WL 2869, at *1-2 (N.D. Ill. Sept. 24, 1985) (treating stocks in an absent class member held by judge's spouse in a self-managed retirement account as a financial interest requiring divestment), *appeal dismissed, Union Carbide Corp. v. U.S. Cutting Serv., Inc.*, 782 F.2d 710 (7th Cir. 1986).

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[8] Notably, although the Fourth Circuit claimed that the trial judge "exercise[d] no management responsibilities" over his IRA, it does not appear to have considered the undisputed fact that the judge did have authority to veto any particular purchase and direct the sale of individual stocks. In any event, whether an *individual* retirement account is *managed* by a third party would not appear to have any bearing on the statutory question whether such an account is a "mutual or common" investment fund under Section 455(d)(4)(i).

This Court has a powerful interest in ensuring that members of the federal judiciary abide by the highest standards of conduct, including compliance with the statute governing disqualification. Congress enacted 28 U.S.C. § 455 "to promote public confidence in the integrity of the judicial process." *Liljeberg*, 486 U.S. at 859-60. The public confidence is undermined by situations like in this case, where although the district judge held stock in one of the parties, and although the judge knew of the interest before issuing a decision, the Fourth Circuit concluded that the judge may hear a case involving the party.

Although Section 455 does contain a safe harbor for judges to invest in "a mutual or common investment fund that holds securities," 28 U.S.C. § 455(d)(4)(i), an IRA is by definition an "individual" retirement account, not a fund in which the individual invests jointly along with many others. Consequently, the Fourth Circuit's conclusion that an individual retirement account is a "common" fund is not easily squared either with the statutory text or with a common-sense understanding of financial products and investment services. An IRA is a type of account belonging to an individual through which that individual may hold an interest in particular companies (as here) or in other financial products. A mutual or common investment fund, in contrast, is a type of investment in which a fund manager pools many individuals' resources in order to invest in a variety of different assets. There can be no question that the district judge held individual shares in a party to this case as part of his individual retirement account, including having the power to direct the sale of those shares. It is therefore difficult to see

how the Fourth Circuit arrived at its conclusion that the shares were held as part of a *common* investment fund.

The Fourth Circuit's analysis relied on an Internal Revenue Service regulation, 26 C.F.R. § 1.408-2(b)(5)(ii), although the court failed to say what that regulation addresses or provide more than carefully selected, out-of-context snippets of it. Considered as a whole, however, the regulation thoroughly undermines the lower court's view that an IRA is a *common* investment fund. Taken as a whole, § 1.408 sets forth what qualifies as an IRA for tax purposes. Most importantly, an IRA "must be a trust created or organized … for the exclusive benefit of an *individual* or his beneficiaries." *Id.* § 1.408-2(b) (emphasis added). There is, in other words, nothing "common" or "mutual" about assets held in an IRA. The subsection quoted by the Fourth Circuit sets forth a "[p]rohibition against commingling" IRA assets "with other property," *except* when "individual participating trusts" are combined into a "group trust"—a "common investment fund"—for purposes of diversification or reduction of administrative costs. 26 C.F.R. § 1.408-2(b)(5)(ii).

Plainly, however, the fact that multiple IRAs may, under IRS rules, be combined into a group trust without sacrificing the tax advantages of an IRA has nothing whatsoever to do with when recusal is appropriate. The "safe harbor" of Section 455(d)(4)(i) exists for entirely different reasons. First, in the case of a typical mutual fund, investors have no control at all over what stocks are held in the fund, so it would make little sense to essentially hold judges responsible for mutual fund holdings by requiring

recusal. But that was not the case here or for IRAs generally—individuals (like the judge in this case) typically *can* control the holdings of their *individual* retirement accounts, including managed accounts. Second, mutual funds—think, for example, of an S&P 500 index fund—generally hold many stocks. That so attenuates any specific fund holder's interest in a particular company that, again, requiring recusal would make little sense. But there is nothing attenuated about a judge directly holding stock in party before him in his IRA—as the IRS regulation cited by the Fourth Circuit indicates, an IRA holds stock "for the *exclusive* benefit of an individual." *Id.* § 1.408-2(b) (emphasis added).

In sum, the Fourth Circuit's ruling that a judge may rule on a case in which the judge holds stock in a party before him in an IRA is flatly inconsistent with the statutory text permitting judges not to recuse themselves on account of investments held in a "mutual or common investment fund." Because 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," *Liljeberg,* 486 U.S. at 859-60, the Court should address and reverse the Fourth Circuit's recusal holding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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