No. 13-141

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

REPLY BRIEF FOR THE PETITIONER

CHRISTOPHER J. WRIGHT
COUNSEL OF RECORD
TIMOTHY J. SIMEONE
DANIELLE J. PIÑERES
WILTSHIRE & GRANNIS LLP
1200 18th St. N.W., Ste. 1200
Washington, D.C. 20036
(202) 730-1300
cwright@wiltshiregrannis.com

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Sprint's petition demonstrated that the Fourth Circuit's decision transformed a two-way circuit split into a much deeper three-way split. In response, CenturyLink first argues that the Fourth Circuit's third of the three-way split is the "correct[]" one, Opp. 9-11, and that district courts already have "clarity" because *some* of them agree with the Fourth Circuit. *Id*. at 10-11.

These arguments are fundamentally misguided. While Sprint believes that the Fourth Circuit is

incorrect that the Telecommunications Act of 1996 ("1996 Act") allows litigants to circumvent state public utilities commissions ("PUCs") and proceed directly to federal court for interpretation of PUC-approved interconnection agreements ("ICAs"), that is not the point here—Sprint's petition for certiorari does not seek mere error correction, but rather a single, *consistent* rule regarding the process for ICA interpretation applicable in *all* the circuits. CenturyLink's argument that some district courts "routinely" address ICA issues without requiring exhaustion actually *underscores* the need for certiorari here, because *other* (and, indeed, more) district courts "routinely" *do* mandate state PUC exhaustion prior to federal court review. *See, e.g.,* Pet. 15-16.

The Opposition appears at times to claim that there really is no circuit split here. *See, e.g.,* Opp. 11 (referencing a "So-Called 'Circuit Split'"). Yet at other times CenturyLink acknowledges that there *is* a split, *see, e.g., id.* at 12 (admitting "tension" between the Third and Fourth Circuits), while suggesting that maybe there *won't* be in the future if only the Third Circuit realizes the alleged error of its ways. But the reality is that the Second and the Fourth Circuits doubt that state commissions are even *permitted* to hear ICA disputes, while the Third and Eleventh Circuits have made clear their view that the 1996 Act *requires* PUC exhaustion of such issues, and the Seventh Circuit is somewhere in between, holding that such "disagreement[s] should *normally* be" decided by the PUCs in the first instance. Pet. 21 (citing *Ill. Bell Tel. Co. v. Global NAPs Ill., Inc.*, 551 F.3d 587, 593 (7th Cir. 2008))

(emphasis added). This Court should grant certiorari to adopt a uniform rule.

Sprint's petition also argued that the decision below sets a dangerous precedent allowing a trial judge *not* to recuse himself despite owning stock in a specific company appearing before him. The Fourth Circuit ruled that stocks held in individual retirement accounts ("IRAs") fall into the statutory safe haven for "mutual or common" investment funds, 28 U.S.C. § 455(d)(4)(i), such that IRA holdings do not require recusal. This is so even when—as was the case here—the IRA holds stock in an *individual* company appearing before the judge (as opposed to holding mutual funds, as is commonly the case for IRAs).

CenturyLink's defense of the Fourth Circuit's new rule is, understandably, half-hearted. But contrary to CenturyLink's claim, the rule cannot be dismissed as merely a "misapplication of a properly stated rule of law." Opp. 30 (citing Supreme Court Rule 10(c)). It is an incorrect rule of law likely to result in appearances of impropriety in future Fourth Circuit cases.

I. THIS COURT SHOULD ADDRESS THE FUNDAMENTAL DIFFERENCES IN THE CIRCUITS' RULES REGARDING EXHAUSTION.

CenturyLink's carefully worded first argument—that "no circuit court has interpreted Section 252(e)(6) in the manner advocated by Sprint," Opp. 10—is both wrong and beside the point. The critical point here is that there are fundamental differences

in the circuits' processes for obtaining review of ICA interpretation issues—differences that are reflected in very different district court approaches. And CenturyLink's argument that the district courts have the "clarity" they require because *some* of them "routinely" take the approach to ICA interpretation that CenturyLink prefers (while many others do not), *id.* at 10-11, only underscores the need for review.

A. CenturyLink's Efforts to Downplay the Differences Among the Circuits Are Unavailing.

CenturyLink suggests that because the circuit court decisions cited by Sprint's petition do not align perfectly to one side or the other of a specific "interpretation" of the 1996 Act, there is not technically a circuit "split" here. As noted above, however, CenturyLink's myopic focus misses the forest for the trees: Some circuits currently *do* require PUC exhaustion in ICA interpretation cases; some courts *don't* require such exhaustion and even doubt whether PUCs have authority to address ICA interpretation issues; and some courts find an initial ruling by a PUC on ICA issues *preferable* but not always required. The path for obtaining review of an ICA interpretation issue thus varies widely depending entirely on the circuit in which a case arises.

The Fourth Circuit below unambiguously held that parties need not exhaust state commission remedies before bringing ICA interpretation issues to federal court. The court also stated that "State commissions [do not] necessarily possess superior expertise to resolve [ICA] disputes," 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-25a.

CenturyLink does not seriously dispute that the Third Circuit has adopted a conflicting rule requiring that ICA interpretation issues "must be litigated in the first instance before the relevant state commission." *Core Commc'ns, Inc. v. Verizon Pa., Inc.*, 493 F.3d 333, 344 (3d Cir. 2007). But CenturyLink maintains that the Third Circuit would "presumably" abandon its rule, given the opportunity, because the Federal Communications Commission ("FCC") filed an *amicus* brief below arguing that the *Core* court overread the Commission's decision in *Starpower Communications, LLC*, Mem. Op. & Order, 15 FCC Rcd. 11,277 (2000). *See* Opp. 12.

Significantly, however, the *Core* court—like other courts to address this issue*, see, e.g., AT&T Commc'ns of Ohio, Inc. v. Ohio Bell Tel. Co.*, 29 F. Supp. 2d 855, 856 (S.D. Ohio 1998), and *Ind. Bell Tel. Co. v. McCarty*, 30 F. Supp. 2d 1100, 1104 (S.D. Ind. 1998)—also 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), whose structure indicates that "the bodies that consider[] formation problems [relating to ICAs, the state PUCs, should] also resolve interpretation difficulties," *Core*, 493 F.3d at 343. The Third Circuit is unlikely to abandon its understanding of the statute as "symmetrical and coherent" simply because the FCC's current general

counsel disagrees with the *Core* court's reading of *Starpower*.[1]

CenturyLink argues that the Eleventh Circuit's *en banc* decision in *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1277 (11th Cir. 2003), can be harmonized with the decision below because the issue in *BellSouth* was whether State commissions *may* interpret ICAs in the first instance, not whether they *must*. Opp. 13. But that argument flatly ignores the reasoning of the *en banc* court, which—contrary to CenturyLink's claim that no court has agreed with Sprint's understanding of Section 252(e)(6)—expressly held that "Section 252(e)(6) gives federal courts jurisdiction to review 'determinations' made by state commissions." 317 F.3d at 1277. The court reasoned that the language of the Act itself therefore specifies

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[1] The Third Circuit has not directly ruled on whether to accord significance to an FCC *amicus* brief in the circumstances presented here. In *Vornado, Inc. v. Trustees of the Retail Store Employees' Union Local 1262*, 829 F.2d 416, 421 (3d Cir. 1987), however, the court declined to defer to the views expressed by the Pension Benefit Guaranty Corporation because of the court's "duty to interpret statutory provisions" that it would not "yield … to an entity outside the judicial branch."

Other circuits are split on this question. 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., Inc.*, 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, Nat'l*, 192 F.3d 417, 427 (4th Cir. 1999).

that "state commissions [will] interpret [ICAs]" in the first instance and that those interpretations will be subject to "review in the district courts." *Id.* at 1277-78. That reasoning was necessary to the Eleventh Circuit's ruling on the issue before it, and therefore is not *dicta.* Accordingly, it makes no sense to claim, as CenturyLink does, that the rule of the Eleventh Circuit may be harmonized with the Fourth Circuit's decision below.

Finally, CenturyLink dismisses the inconsistency between the Seventh Circuit's view of the proper role of PUCs in ICA interpretation and that of the court below on the ground that the Seventh Circuit case, *Ill. Bell Telephone Co.*, "was based on the doctrine of primary jurisdiction." Opp. 15-16. Again, though, CenturyLink's hair-splitting misses the point: While the Fourth and Second Circuits doubt PUCs' "authority to interpret and enforce an ICA" at all, *see* Pet. App. 17a and *S. New England Tel. Co. v. Global NAPs Inc.*, 624 F.3d 123, 137 (2d Cir. 2010), the Seventh Circuit found that "interconnection agreements are complex" and state commissions will "usually be in the best position" to resolve issues arising under them. *Ill. Bell Tel. Co.,* 551 F.3d at 593-94. Accordingly, the rules of the Seventh Circuit on the one hand and the Second and Fourth Circuits on the other cannot be reconciled.

B. CenturyLink's Own Argument Underscores the Confusion Among the District Courts.

CenturyLink makes the peculiar claim that "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." Opp. 10-11. In support, CenturyLink cites five district court cases permitting parties to bring ICA interpretation issues directly to district court. *See id.* & n.4.

This argument is peculiar because there are *more* district court decisions that *have* required parties to exhaust PUC remedies. In *Ohio Bell Telephone Co. v. Global NAPs Ohio, Inc.*, 540 F. Supp. 2d 914, 920 (S.D. Ohio 2008), for example, the court found that "[t]he interpretation of the Act … most consistent with Congress's broad grant of responsibility to state commissions … requires litigants … to first raise their breach-of-ICA claims before the state commissions." Similarly, in *Contact Communications v. Qwest Corp.*, 246 F. Supp. 2d 1184, 1189 (D. Wyo. 2003), the court found that "absent a prior determination of the issue by the state PSC, no federal court jurisdiction exists." In *AT&T Communications of Ohio*, the court found that the "statutory scheme does not permit [district courts] to review [ICA] disputes … not previously subject to action by a state commission." 29 F. Supp. 2d at 856. And in *Ind. Bell Telephone Co.*, the court concluded that the "Telecommunications Act was designed to allow the state commission to make the first determination" on ICA issues. 30 F. Supp. 2d at 1104; *see also Ill. Bell Tel. Co. v. Global NAPs Ill., Inc.*, 2007 WL 4531790, at *5-*6 (N.D. Ill. Dec. 17, 2007) (unpublished) (stating that "this Court cannot review a decision or determination" not yet to made to the PUC); *AT&T Commc'ns of Ill., Inc. v. Ill. Bell Tel. Co.*, 1998 WL 525437, at *5 (N.D. Ill. Aug. 18, 1998) (unpublished) (finding subject matter jurisdiction lacking because "the plaintiff's request would require this court to review issues" not

addressed by the PUC); *cf. Intermedia Commc'ns, Inc. v. BellSouth Telecomms., Inc.*, 173 F. Supp. 2d 1282, 1287 (M.D. Fl. 2000) ("[P]hone companies must first bring their claims of violations of § 251 to the state PSC before a federal court has jurisdiction.").

In short, as the First Circuit recently found, "courts remain uncertain whether state commissions can enforce ICAs, whether state commissions ever must or should first interpret and enforce ICAs, and when federal courts have jurisdiction over ICA-enforcement actions." *Global NAPs, Inc. v. Verizon New England Inc.*, 603 F.3d 71, 83-84 (1st Cir. 2010) (footnotes omitted). Moreover, the plethora of inconsistent cases illustrates that this issue is "prevalent" and "significant." *See* Opp. 20. Disputes about the meaning of ICAs are commonplace, and the process for obtaining review of ICA interpretation issues should not vary based entirely on the circuit in which the dispute arises.

C. ICA Interpretation Issues are Complex, and State Commissions are Best Situated to Resolve them in the First Instance.

As noted above, the Seventh Circuit's *Illinois Bell* decision pointed out that "interconnection agreements are complex," and state commissions will "usually be in the best position" to resolve issues arising under them. 551 F.3d at 593. CenturyLink fails to respond to Sprint's point that the issues in this case plainly illustrate that fact. Pet. 21 & n.7.

There are two primary merits issues underlying this petition. First, 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. CenturyLink argues that this issue is governed by the ICA provision stating that VoIP traffic is to be compensated in the same manner as other voice traffic. Opp. 2-3. Sprint maintains that the exchange of interexchange carrier ("IXC") traffic over FGD trunks does not fall within the scope of the parties' ICAs, which by their terms cover only traffic exchanged between *local* exchange networks. Pet. App. 31a-32a. Members of a state commission would know that compensation for local interconnection is typically governed by ICAs, that compensation for IXC traffic is typically governed by tariffs, and that FGD trunks are used for IXC traffic—and therefore would not expect ICAs to cover traffic on FGD trunks.

Second, the parties disagree about the application of the ICAs' mandate that classification of calls as local or non-local for purposes of intercarrier compensation must be based on the originating and terminating points of the calls. In this case, instead of using the "calling party number"—which actually corresponds to the originating point of a call—to classify calls, CenturyLink used a "billing telephone number" assigned to the trunk on which Sprint delivered traffic to CenturyLink as a *proxy* (and not a very good one) for the originating point of the call. A state regulatory commission would have found CenturyLink's proxy method to be unreasonable, because PUCs are well aware that *billing* telephone numbers—unlike *calling party* numbers—simply do not correspond to call origination points.

In short, as Sprint argued in its petition, there are good reasons *why* many courts have found that

state commissions should hear disputes arising under ICAs in the first instance. Pet. 16. Most importantly, PUCs have more exposure than generalist judges to the technical knowledge of network architecture necessary to decide ICA interpretation issues.

II. THE FOURTH CIRCUIT'S NEW RULE THAT INDIVIDUAL RETIREMENT ACCOUNTS ARE "MUTUAL OR COMMON" INVESTMENT FUNDS SETS A DANGEROUS PRECEDENT IN RECUSAL CASES.

CenturyLink's defense of the Fourth Circuit's recusal holding is half-hearted. The Fourth Circuit held that IRAs are "'common investment funds'" within the meaning of "the safe harbor exception created in § 455(d)(4)(i)." It based that holding almost entirely on Internal Revenue Service regulation 26 C.F.R. § 1.408-2(b)(5)(ii). In its Petition, however, Sprint pointed out that the provision upon which the Fourth Circuit relied merely specifies that multiple IRAs may, under IRS rules, be combined into a group trust without sacrificing the tax advantages of an IRA.

CenturyLink's Opposition does not even attempt to defend the Fourth Circuit's reasoning, but instead portrays the Fourth Circuit's holding as merely a fact-bound "misapplication of a properly stated rule of law." Opp. 30 (internal citation omitted). But the "facts" that CenturyLink emphasizes do not suggest that there is anything fact-bound about the Fourth Circuit's application of its rule to this case. First, CenturyLink points out that the judge's IRA here

was managed "along with the assets of many others who own similar accounts." *Id.* at 29 (internal citation omitted). But, of course, that is generally true of IRAs—they are managed by companies that manage many such accounts. The Fourth Circuit's rule would thus apply to the run of IRAs, not just the one at issue here.

Second, CenturyLink emphasizes that "the trial judge did not participate in the decisions to buy or sell stocks here." *See, e.g., id.* This point is irrelevant to the question whether an IRA is a "mutual or common" fund rather than an individual one, and in any event makes no sense here. It was undisputed below that the judge had authority to veto any particular purchase or direct the sale of any individual stock—and, in fact, the judge *did* ultimately "instruct[]" the IRA manager to sell his CenturyLink shares, and the manager complied. Pet. App. 140a. Acccordingly, this point also fails to limit the Fourth Circuit's new rule that IRAs are "'common investment funds'" within the meaning of the safe harbor exception of § 455(d)(4)(i).

Finally, CenturyLink argues that any error in the Fourth Circuit's analysis, Opp. 30-34, was "harmless" in this case. But CenturyLink again misses the point. The point is that the Fourth Circuit's decision established a broad new *rule* that judges' IRAs—even IRAs holding stock in an individual company appearing before a judge, as here—fall into a safe harbor from the recusal rules for "mutual or common" funds. And the only limit on the Fourth Circuit's rule—that an IRA must be managed together with other IRAs to be a "mutual or common" fund—is no limit at all, because essentially

all IRAs are managed by entities that manage multiple such accounts. As a result, under the Fourth Circuit's rule, a judge's IRA could hold much more stock in a company before him than did the judge below—indeed, the judge could hold *only* stock in the company before him—and the IRA would still fall into the safe harbor. The result is a potential for great mischief in the run of cases. Accordingly, this Court should grant certiorari and reverse the Fourth Circuit's rule, notwithstanding CenturyLink's claim that the rule results in only minor mischief in *this* case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHRISTOPHER J. WRIGHT
COUNSEL OF RECORD
TIMOTHY J. SIMEONE
DANIELLE J. PIÑERES
WILTSHIRE & GRANNIS LLP
1200 18th Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 730-1300
cwright@wiltshiregrannis.com

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