

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION
AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

12-1322

CENTRAL TELEPHONE COMPANY OF VIRGINIA, INC., ET AL.,

PLAINTIFFS-APPELLEES

v.

SPRINT COMMUNICATIONS CO. OF VIRGINIA, INC.,

DEFENDANTS-APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF INTEREST.....	1
STATEMENT OF ISSUES PRESENTED	2
STATEMENT OF THE CASE.....	2
A. The Communications Act’s Intercarrier Compensation Framework.	2
B. The Proceeding Below.....	5
C. The Pending Proceeding Before The Commission.	6
SUMMARY OF ARGUMENT.....	7
ARGUMENT	8
I. THE COURT’S DECISION IN THIS CASE SHOULD HAVE NO EFFECT ON THE FCC’S RESOLUTION OF SPRINT’S PETITION FOR DECLARATORY RULING.	8
II. A PARTY MAY INVOKE THE DISTRICT COURT’S JURISDICTION TO INTERPRET OR ENFORCE AN INTERCONNECTION AGREEMENT WITHOUT FIRST PRESENTING ITS CLAIM TO A STATE COMMISSION.	9
CONCLUSION.....	18

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>AT&T Corp. v. Iowa Utils. Bd.</i> , 525 U.S. 366 (1999)	12
<i>Boca Airport, Inc. v. FAA</i> , 389 F.3d 185 (D.C. Cir. 1998).....	16
<i>Cassell v. FCC</i> , 154 F.3d 478 (D.C. Cir. 1998)	16
<i>CenturyTel of Chatham, LLC et al. v. Sprint Communications Co., LP</i> , No. 09-1951 (W.D. La.)	6, 9
<i>Core Communications, Inc. v. Verizon Pennsylvania, Inc.</i> , 493 F.3d 333 (3d Cir. 2007)	8, 15, 16, 17
<i>Illinois Bell Tel. Co., Inc. v. Global NAPs Illinois, Inc.</i> , 551 F.3d 587 (7th Cir. 2008)	10
<i>In re FCC 11-1161</i> (10th Cir., filed Dec. 18, 2011).....	4
<i>Iowa Utils. Bd. v. FCC</i> , 120 F.3d 753 (8th Cir. 1997), <i>aff'd in part and rev'd in part, AT&T Corp. v. Iowa Utils. Bd.</i> , 525 U.S. 366 (1999).....	12
<i>Nat. Cable & Telecomm. Ass'n v. Brand X Internet Serv.</i> , 545 U.S. 967 (2005)	2
<i>SBC Communications, Inc. v. FCC</i> , 407 F.3d 1223 (D.C. Cir. 2005).....	12
<i>Southwestern Bell Tel. Co. v. Public Util. Comm'n</i> , 208 F.3d 475 (5th Cir. 2000)	10
<i>Talk America, Inc. v. Michigan Bell Tel. Co.</i> , 131 S.Ct. 2254 (2011).....	16
<i>Verizon Communications, Inc. v. FCC</i> , 535 U.S. 467 (2002)	4
<i>Verizon Md., Inc. v. Global NAPS, Inc.</i> , 377 F.3d 355 (4th Cir. 2004).....	4

Verizon Md., Inc. v. Pub. Serv. Comm’n of Md., 535 U.S. 635 (2002)4

Administrative Decisions

Connect America Fund, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011), *petitions for review pending sub nom. In re FCC 11-1161* (10th Cir., filed Dec. 18, 2011).....4

Core Communications, 18 FCC Rcd 7962 (2003)12

Core Communications, Inc. and Z-Tel Communications, Inc., 18 FCC Rcd 7568 (2003), *vac’d, SBC Communications, Inc. v. FCC*, 407 F.3d 1223 (D.C. Cir. 2005).....12

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 (1996), *aff’d in part and vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff’d in part and rev’d in part, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) 8, 12, 14

Section 257 Triennial Report to Congress, 19 FCC Rcd 3034 (2004)13

Starpower Communications LLC, Memorandum Opinion and Order, 15 FCC Rcd 11277 (2000) 8, 10, 14, 15, 17

Statutes and Regulations

47 C.F.R. § 51.305(a)(4).....3

47 U.S.C. § 151 *et seq.*2

47 U.S.C. § 251(b)(5)4

47 U.S.C. § 251(c)(1)3

47 U.S.C. § 251(c)(2)(D).....3

	<u>Page</u>
47 U.S.C. § 251(g).....	4
47 U.S.C. § 252(a)(1)	3
47 U.S.C. § 252(b)(1)	3
47 U.S.C. § 252(e)(1)	3
47 U.S.C. § 252(e)(5)	3, 15
47 U.S.C. § 252(e)(6)	3, 10, 11
47 U.S.C. §§ 206-09	11, 13
Telecommunications Act of 1996, Pub. L. 104-104, Title VIII, § 601(c)(1), 110 Stat. 143	13
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)	2

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION
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STATEMENT OF INTEREST

By order dated December 14, 2012, this Court invited the Federal Communications Commission (FCC) to file an amicus brief addressing (1) the effect the Court's decision might have on certain proceedings pending before the agency, and (2) the agency's position, if any, on whether disputes involving interconnection agreements between telecommunication carriers must be presented to state commissions before they are subject to review in federal district court.

The FCC is vested by Congress with the responsibility to interpret and to administer the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* (“Communications Act” or “Act”), which includes the provisions of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (“1996 Act”), at issue in this case. *See Nat. Cable & Telecomm. Ass’n v. Brand X Internet Serv.*, 545 U.S. 967, 980 (2005). The FCC has an interest in ensuring that the Act and the agency’s precedents are interpreted correctly.

STATEMENT OF ISSUES PRESENTED

1. Whether a decision in this case might have an effect on parallel proceedings currently pending before the FCC.
2. Whether a dispute involving an existing interconnection agreement between telecommunications carriers must be presented to a state commission before it is subject to review in federal district court.

STATEMENT OF THE CASE

A. The Communications Act’s Intercarrier Compensation Framework.

Telephone calls often originate over the facilities of one telecommunications carrier and terminate over the facilities of another carrier. A complex regulatory regime — known as “intercarrier compensation” — governs the compensation of such carriers for the origination, transport, and termination of such traffic.

The Communications Act requires incumbent local exchange carriers (“LECs”) — that is, local telephone companies already in existence when the 1996 Act was enacted — to “negotiate and enter into” “binding agreement[s]” with certain requesting carriers for “interconnection.” 47 U.S.C. § 252(a)(1). These agreements typically include certain intercarrier compensation obligations. Upon receiving a § 252(a)(1) request for interconnection, an incumbent LEC generally must negotiate in good faith the terms and conditions of an interconnection agreement. 47 U.S.C. §§ 251(c)(1). If an agreement is not reached, the relevant state commission has responsibility to arbitrate and resolve any disputed terms. 47 U.S.C. §§ 252(b)(1). The state commission also has the responsibility to approve or reject an interconnection agreement adopted by negotiation or arbitration. 47 U.S.C. § 252(e)(1).¹ After the state commission approves an interconnection agreement, an incumbent LEC must provide interconnection in accordance with the terms of the agreement. 47 U.S.C. § 251(c)(2)(D). *See* 47 C.F.R. § 51.305(a)(4).

A party aggrieved by a state commission determination approving or disapproving an interconnection agreement has a right to appeal the state commission’s decision in federal district court. 47 U.S.C. § 252(e)(6). *See*

¹ If the state commission fails to carry out its duties under section 252, the FCC preempts its jurisdiction and assumes the state commission’s responsibilities. 47 U.S.C. § 252(e)(5).

generally *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 638-39, 641 (2002); *Verizon Md., Inc. v. Global NAPS, Inc.*, 377 F.3d 355, 359 (4th Cir. 2004).

Long-distance telecommunications carriers traditionally have compensated LECs for their use of the local telephone network (for example, when a LEC delivers a long-distance call to the LEC's customer) through uniform, tariffed "access charges" rather than through charges established by individually negotiated interconnection agreements.² The access charges associated with interstate calls traditionally are specified in tariffs filed with the FCC; access charges associated with intrastate calls traditionally are specified in tariffs filed with the state regulatory commissions. *See generally Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 478 (2002).

² Section 251(g) of the Communications Act preserves the tariffed access charge regime until it is "explicitly superseded" by the FCC. *See* 47 U.S.C. § 251(g). In 2011, the FCC superseded the access charge regime and, subject to a transition mechanism, established a system for regulating termination of long-distance traffic in accordance with section 251(b)(5) of the Communications Act. That provision requires LECs to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). *See Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17916 (¶ 764) (2011) ("*USF/ICC Transformation Order*") (further administrative history omitted), *petitions for review pending sub nom. In re FCC 11-1161* (10th Cir., filed Dec. 18, 2011).

B. The Proceeding Below.

Between 2004 and 2006 CenturyLink (and its predecessors) and Sprint entered into 18 interconnection agreements that required Sprint to pay CenturyLink, an incumbent LEC, for terminating Sprint's traffic on CenturyLink's local telephone facilities. J.A. 22 (Docket Entry ("D.E.") 169, at 3). Each of these agreements was approved by the appropriate state commission. J.A. 23 (D.E. 169, at 4).

For some time after the agreements were executed, Sprint paid access charges for Voice over Internet Protocol ("VoIP")-to-Public Telephone Switched Network ("PTSN") traffic in response to monthly bills sent by CenturyLink.³ In June 2009, however, Sprint stopped paying those charges, claiming that they were not authorized under the agreements. J.A. 60-61 (D.E. 180, at 2-3).

CenturyLink subsequently sued Sprint in federal district court. Sprint moved to dismiss, contending, *inter alia*, that CenturyLink had failed to exhaust its administrative remedies: according to Sprint, before seeking judicial review, CenturyLink was first required to bring its dispute to the state commissions that had originally approved the agreements. J.A. 36 (D.E. 169, at 17). The district court denied Sprint's motion, holding that CenturyLink was not required to

³ This involves calls made to the Public Switched Network using Voice over Internet Protocol.

initially seek relief from the state commissions before filing suit in federal court. J.A. 25-34, 36-50 (D.E. 169, at 6-15, 17-31).

On the merits, the district court later ruled that Sprint had breached its contractual obligations under the interconnection agreements by not paying access charges for VoIP-to-PSTN traffic. J.A. 61 (D.E. 180, at 3).

C. The Pending Proceeding Before The Commission.

Since 2009, in a separate case pending in federal district court in Louisiana, Sprint and CenturyLink have been litigating issues concerning intercarrier compensation for VoIP-to-PSTN traffic. *CenturyTel of Chatham, LLC et al. v. Sprint Communications Co., LP*, No. 09-1951 (W.D. La.). Unlike the case at hand, the Louisiana litigation is an action for damages “resulting from Sprint’s refusal to pay . . . fees required by federal and state telecommunications *tariffs*.” Complaint, ¶ 1 (emphasis added). As noted above, in contrast with individually negotiated contracts, tariffs are schedules setting forth uniform charges, and they are regulated by federal and state law.

The Louisiana district court referred the dispute to the FCC under the primary jurisdiction doctrine. *CenturyTel of Chatham v. Sprint*, No. 09-1951 (order filed Jan. 25, 2011). Pursuant to that referral, Sprint has petitioned the FCC to rule that access charge tariffs did not impose compensation obligations on VoIP-to-PSTN traffic, at least in the period before the effective date of the rules adopted

in the *USF/ICC Transformation Order*. Petition for Declaratory Ruling, WC Docket No. 12-105 (filed April 5, 2012). The FCC has not acted on that request for declaratory ruling.

SUMMARY OF ARGUMENT

1. The Court's decision in this case should not affect the FCC's resolution of the issues raised in Sprint's pending petition for declaratory ruling. The underlying merits issue here turns on questions of contract law arising under specific interconnection agreements between Sprint and CenturyLink. By contrast, the pending declaratory ruling proceeding before the FCC involves the parties' obligations under access charge tariffs, raising issues that should not be affected by the Court's decision in this case.

2. The FCC disagrees with Sprint's contention that state commissions have exclusive jurisdiction to interpret and enforce interconnection agreements in the first instance. Although the Communications Act provides that state commission determinations may be appealed to federal district courts, nothing in the Communications Act specifies that parties must bring such a dispute to the state commission in the first instance. On the contrary, the FCC has long specified that its jurisdiction to adjudicate such disputes under section 208 of the Act is concurrent with that of the state commissions, and on at least two occasions, has accepted complaints involving disputes over existing interconnection agreements.

Because federal district courts have parallel jurisdiction to accept complaints under section 207 of the Act, this agency's precedent strongly suggests that there is likewise no exhaustion requirement where relief is sought in federal district court in the first instance. Confirming this view, the FCC has observed that a party is not limited to seeking either (a) FCC review of an interconnection agreement in the first instance or (b) appellate review of a state commission decision in federal district court; rather, it may directly "file a complaint against a common carrier . . . in federal district court for the recovery of damages." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15564 ¶ 128 (1996) (subsequent history omitted). The Third Circuit's decision to the contrary in *Core Communications, Inc. v. Verizon Pennsylvania, Inc.*, 493 F.3d 333 (3d Cir. 2007), is based on a misunderstanding of the FCC's decision in *Starpower Communications LLC*, Memorandum Opinion and Order, 15 FCC Rcd 11277 (2000), and should not be followed by this Court.

ARGUMENT

I. THE COURT'S DECISION IN THIS CASE SHOULD HAVE NO EFFECT ON THE FCC'S RESOLUTION OF SPRINT'S PETITION FOR DECLARATORY RULING.

The Court's adjudication of the contractual dispute in this case should have no effect on the FCC's resolution of Sprint's pending petition for declaratory ruling. The case before the Court is a contract dispute. As both Sprint and

CenturyLink recognize, the substantive issue raised in this case revolves around the proper construction of specific interconnection agreements. *See* Sprint Brief at 1; CenturyLink Brief at 3.

CenturyLink's claims against Sprint in the Louisiana litigation are not based on interconnection agreements. Instead, as stated in Sprint's Petition for Declaratory Ruling, "CenturyLink's complaint in the Louisiana action contained four counts, each of which was predicated on Sprint's alleged failure to pay tariffed switched access charges." Petition for Declaratory Ruling, WC Docket No. 12-105 (filed April 5, 2012), at 1. *See* Complaint in *CenturyTel of Chatham, LLC et al. Sprint Communications Co.*, No. 09-1951 (W.D. La.), at ¶ 1. The Court's interpretation of the interconnection agreements in this case thus should have no bearing on the tariff-related issues before the FCC in the declaratory ruling proceeding. For that reason, the Court need not (and should not) opine on any of the tariff-related issues before the FCC.

II. A PARTY MAY INVOKE THE DISTRICT COURT'S JURISDICTION TO INTERPRET OR ENFORCE AN INTERCONNECTION AGREEMENT WITHOUT FIRST PRESENTING ITS CLAIM TO A STATE COMMISSION.

Sprint contends that the court below should not have entertained CenturyLink's claim for the enforcement of the interconnection agreements because CenturyLink did not first seek redress from each of the 18 state

commissions that had approved them. Sprint Br. 16-30. As we explain, a party may — but need not — apply to a state commission to enforce an existing interconnection agreement before invoking the jurisdiction of a federal district court.

Section 252(e)(6) of the Communications Act provides that “[i]n 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). The statute thus makes clear that when an enforcement determination is made by a state commission, an aggrieved party may then appeal to federal district court. But neither that section, nor any other, specifies that an action to enforce an interconnection agreement must be brought to the state commission in the first place.⁴

⁴ Although section 252 speaks only to the authority of a state commission to arbitrate, approve, and disapprove interconnection agreements, such power “necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved.” *Southwestern Bell Tel. Co. v. Public Util. Comm’n*, 208 F.3d 475, 479-80 (5th Cir. 2000). *Accord Illinois Bell Tel. Co., Inc. v. Global NAPs Illinois, Inc.*, 551 F.3d 587, 594 (7th Cir. 2008); *Starpower*, 15 FCC Rcd at 11279-80 (¶ 6).

The absence of such a requirement is significant, for when Congress intended a remedy in section 252 to be exclusive, it used explicit language to that effect. Thus, the first sentence of 47 U.S.C. § 252(e)(6) specifies the “*exclusive remedies* for a State commission’s failure to” carry out its responsibilities under section 252 (emphasis added). By contrast, nothing in the language of section 252 indicates that the state commissions’ authority to make a “determination” interpreting or enforcing an interconnection agreement in the first instance is exclusive.

Moreover, any requirement that parties exhaust their remedies by seeking relief in the first instance from a state commission is inconsistent with the broad adjudicatory authority that sections 206-209 of the Act confer on the FCC and federal district courts. *See* 47 U.S.C. §§ 206-09. Those provisions allow aggrieved parties to file a petition with the FCC, 47 U.S.C. § 208, or bring suit in federal district court, 47 U.S.C. § 207, for damages against a telecommunications common carrier that commits “any act, matter or thing” that the Communications Act “prohibit[s] or declare[s] to be unlawful” or “omit[s] to do any act, matter, or thing” the Act “require[s] to be done,” 47 U.S.C. § 206.

The FCC has long held a party that claims that a common carrier has violated the Communications Act can “file a section 208 complaint” with the FCC “alleging that [the] carrier is violating the terms of a negotiated or arbitrated

agreement.” *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15564 ¶ 127 (1996) (“*Local Competition Order*”), *aff’d in part and vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff’d in part and rev’d in part, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).⁵

Thus, in *Core Communications*, 18 FCC Rcd 7962 (2003) (*Core-Verizon*), the Commission granted in substantial part a section 208 complaint that Core had filed against Verizon. In doing so, the Commission expressly concluded that it had “jurisdiction under section 208,” 18 FCC Rcd at 7971 ¶ 22, to adjudicate Core’s claim “that Verizon violated the parties’ interconnection agreement, and thus the reasonableness standard of section 251(c)(2)(D) of the Act, by failing to interconnect with Core on just and reasonable terms,” *id.* at 7962 ¶ 1.

Likewise, in *Core Communications, Inc. and Z-Tel Communications, Inc.*, 18 FCC Rcd 7568 (2003) (*Core/Z-Tel*), *vac’d on other grounds, SBC Communications, Inc. v. FCC*, 407 F.3d 1223 (D.C. Cir. 2005), the FCC

⁵ The Eighth Circuit overturned the FCC’s determination that section 208 gives the agency jurisdiction to interpret and enforce interconnection agreements. 120 F.3d at 803. The Supreme Court, however, reversed the Eighth Circuit’s ruling. 525 U.S. at 386 (finding the issue unripe).

entertained a section 208 complaint alleging that the defendant had violated the Communications Act by breaching the terms of existing interconnection agreements. *See* 18 FCC Rcd at 7571 ¶ 9. In doing so, the agency emphasized that its “jurisdiction” was, “of course, *concurrent* with state jurisdiction to interpret and enforce interconnection agreements.” *Id.* at 7574 ¶ 13 (emphasis added). *See also Section 257 Triennial Report to Congress*, 19 FCC Rcd 3034, 3055 (2004) (FCC’s section 208 jurisdiction “to resolve disputes arising from interconnection agreements” is “shared with states.”).⁶

The FCC’s jurisdiction to entertain complaints under section 208 of the Act rests on an equal footing with the jurisdiction of the federal district courts under section 207 of the Act: the Act provides that an aggrieved party “may either” file a complaint with the FCC or sue in federal district court, “but such person shall not have the right to pursue both such remedies.” 47 U.S.C. § 207. Accordingly, the FCC’s precedents establishing that the agency has jurisdiction under section 208 to

⁶ This understanding is buttressed by a savings clause in section 601 of the 1996 Act. That provision makes clear that the 1996 Act “shall not be construed to modify, impair, or supersede” existing federal law “unless expressly so provided.” Pub. L. 104-104, Title VIII, § 601(c)(1), 110 Stat. 143 (reproduced in the notes following 47 U.S.C. § 152). Section 601 thus ensures that the 1996 Act — which includes section 252 of the Communications Act, as amended — does not “modify, impair, or supersede” anything in sections 206-209 of the Communications Act. Accordingly, section 252(e)(6) should not be read to displace the authority of the FCC or federal district courts under sections 206-09 to adjudicate in the first instance disputes concerning the interpretation or enforcement of interconnection agreements.

entertain complaints regarding interconnection agreements in the first instance strongly suggest that the federal district courts likewise may be called upon to adjudicate such complaints under section 207 of the Act without first seeking relief from a state commission. Indeed, the Commission said as much in its *Local Competition Order*. See 11 FCC Rcd at 15564, ¶ 128 (“a person aggrieved by a state determination under sections 251 and 252 of the Act may elect to either bring an action for federal district court review or a section 208 complaint to the Commission against a common carrier. Such a person could, *as a further alternative*, pursuant to section 207, *file a complaint against a common carrier with the Commission or in federal district court for the recovery of damages.*”) (emphasis added; footnotes omitted).⁷

The FCC’s decision in *Starpower*, 15 FCC Rcd 11277, is not to the contrary. In that case, a state commission expressly declined to consider a request to enforce an interconnection agreement and encouraged the parties to seek relief from the FCC. *Id.* at 11278 (¶ 4). In light of that refusal, *Starpower* asked the FCC to exercise its authority under section 252(e)(5) of the Act, which authorizes the FCC

⁷ In focusing on the second question posed by the Court (*i.e.*, whether a party invoking a district court’s jurisdiction to interpret or enforce an interconnection agreement is required first to seek redress from the state commission that approved the agreement), we take no position on whether CenturyLink adequately invoked the district court’s subject-matter jurisdiction under section 207 by alleging a violation of the Communications Act.

to “issue an order preempting the State commission’s jurisdiction of [a] proceeding” whenever “a State commission fails to carry out its responsibility under” section 252. 47 U.S.C. § 252(e)(5). Finding that a state commission’s failure to exercise its responsibility under section 252 “can in some circumstances include the failure to interpret and enforce existing interconnection agreements,” 15 FCC Rcd at 11280 ¶ 6, the FCC granted the request, *id.* at 11280 ¶ 7.

Starpower holds that state commissions, when asked to do so, have a responsibility to interpret and enforce interconnection agreements. But it does not hold that state commissions are the *only* entities with that responsibility. In *Starpower*, the FCC was confronted with a case in which a party had sought redress from a state commission and been refused. The agency had no occasion to — and did not — address the circumstances under which a party might be required to apply in the first instance to a state commission to resolve an interconnection agreement dispute.

In *Core Commc’ns, Inc. v. Verizon Pennsylvania*, 493 F.3d 333 (3d Cir. 2007), the Third Circuit construed *Starpower* as holding that “interpretation 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.” *Id.* at 344. That understanding of *Starpower* is incorrect, and should not be followed by this Court. *See Boca Airport, Inc. v. FAA*, 389 F.3d 185,

190 (brackets in original) (quoting *Cassell v. FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998) (holding that “[a]n agency’s interpretation of its own precedent is entitled to deference.”)) *See also Talk America, Inc. v. Michigan Bell Tel. Co.*, 131 S.Ct. 2254, 2261 (2011) (rule of deference applies to FCC’s interpretation of its own regulations, even if set forth in an amicus brief).

The Third Circuit recognized that *Starpower* could be read simply to “stand[] for the proposition that state commissions have, at a minimum, the non-exclusive authority to hear post-formation disputes involving approved interconnections agreements.” *Core Communications*, 493 F.3d at 342. Instead, however, the court of appeals gave the FCC’s decision a “broader reading,” emphasizing the FCC’s observation that state commissions have “responsibility” under section 252 of the Act to interpret and enforce interconnection agreements. *Ibid.* In the Third Circuit’s view, the term “responsibility” “suggest[ed] that there is not a shared role for the federal courts in the first instance.” *Ibid.*

This reads too much into the FCC’s use of that term. In referring to the “responsibility” of state commissions, the FCC was simply “echoing the language” of the statute, as the Third Circuit recognized. *Ibid.* Moreover, the fact that, under *Starpower*, a *state commission* may have a responsibility to interpret and enforce an interconnection agreement says nothing about whether *any party* has a

corresponding obligation to bring an interconnection agreement dispute to a state commission in the first instance.

The Third Circuit also reasoned that it could find no “indication in other FCC decisions that the state commissions’ jurisdiction over post-formation disputes is shared with the federal courts.” *Ibid.* But as we have shown, *see* pp. 11-14, *supra*, the FCC’s acceptance of jurisdiction in prior cases over interconnection agreement disputes under section 208 strongly suggests that the federal district courts likewise have such jurisdiction (under section 207). And language in the FCC’s *Local Competition Order* directly supports that conclusion. *See* p. 14, *supra*.

To be sure, “due to its role in the approval process, a state commission is well-suited to address disputes arising from interconnection agreements.” *Starpower*, 15 FCC Rcd 11280 ¶ 6. Thus, it is perfectly appropriate for “bodies that consider[] formation problems also [to] resolve interpretation difficulties.” *Core Communications*, 493 F.3d at 343. But nothing in the Communications Act directs that state commissions enjoy *exclusive* authority over disputes concerning existing interconnection agreements. Conversely, the FCC’s orders demonstrate that parties may seek relief under sections 206-208 of the Act from either the FCC or the district courts in the first instance.

CONCLUSION

The Court's adjudication of this case should not affect the FCC's disposition of Sprint's petition for declaratory ruling, currently pending before the agency.

As the FCC's orders show, 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.

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