No. 07-___

In The Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY L.P. & AT&T CORP.,

Petitioners,

v.

APCC SERVICES, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal regulations require petitioner telephone companies to make certain payments to the owners of payphones ("payphone service providers" or "PSPs"). This case arises from the PSPs' assignments to other companies – respondents here – of the right to litigate their dispute with petitioners over the amount of compensation. After the PSPs assigned their claims to respondents "for purposes of collection" and agreed to finance the litigation, respondents sued petitioners "on behalf of" the PSPs. Under the assignments, respondents can gain or lose nothing from the outcome of the case because all the proceeds will go to the PSPs. A divided panel of the D.C. Circuit nonetheless held that respondents have standing to sue petitioners.

The question presented is:

Whether the assignment of a claim "for purposes of collection" confers standing on assignees which have no personal stake in the case and which avowedly litigate only "on behalf of" the assignors.

PARTIES TO THE PROCEEDING

Petitioners are Sprint Communications Company L.P. and AT&T Corp.

Respondents are APCC Services, Inc.; Data Net Systems, L.L.C.; Davel Communications Group, Inc.; Jaroth, Inc., d/b/a Pacific Telemanagement Service; NSC Telemanagement Corp., n/k/a Intera Communications Corporation; and Peoples Telephone Co.

RULE 29.6 DISCLOSURES

The shares of petitioner AT&T Corp. ("AT&T") are 100 percent owned by AT&T, Inc. AT&T, Inc. has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

Petitioner Sprint Communications Company, L.P. ("Sprint") is a wholly owned subsidiary of Sprint Nextel Corporation. Sprint Nextel Corporation has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

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The district court's order denying petitioners' motion to dismiss (App. 83-106) is reported at 281 F. Supp. 2d 41. The district court's orders denying petitioners' motions for reconsideration and granting petitioners' requests for certification of interlocutory appeals (App. 45-63 and 64-82) are reported at 297 F. Supp. 2d 90 and 297 F. Supp. 2d 101. The D.C. Circuit's initial opinion (App. 4-41) is reported at 418 F.3d 1238. The D.C. Circuit's subsequent opinion (App. 1-3) is reported at 489 F.3d 1249.

JURISDICTION

The order of the D.C. Circuit denying petitioners' timely request for rehearing and rehearing en banc (App. 111-12) was entered on August 7, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2 of the United States Constitution provides that the federal judicial power is limited to "Cases . . . [and] Controversies."

STATEMENT OF THE CASE

Payphone service providers assigned their claims against petitioner long-distance companies to respondents "for purposes of collection." The assignees have no stake in the outcome of the case because any proceeds will go to their assignors. A divided panel of the D.C. Circuit nonetheless held that respondents have Article III standing to sue petitioners "on behalf of" the assignors.

1. Petitioners AT&T and Sprint are long-distance telephone companies. App. 5. Regulations issued by the Federal Communications Commission (FCC) require petitioners to compensate payphone operators (payphone service providers or PSPs) for "dial around calls." In a dial around call, a payphone customer uses the phone to access a less expensive long-distance service than the PSP had previously established for use with that phone. To compensate PSPs for revenue they lose as a result of dial around calls, the FCC has issued a series of orders giving the PSPs a right to compensation from long-distance telephone companies. *See generally Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 127 S. Ct. 1513, 1518 (2007).

This case arises out of a dispute over the amount of money that petitioners owe the PSPs under the FCC regulations. The suit, however, was brought not by the PSPs themselves, but by third-party companies known as "aggregators." App. 7. Aggregators are intermediaries that have traditionally been hired by

the PSPs to collect the dial around compensation from long-distance companies and distribute them to the PSPs. *Id*. The PSPs pay the aggregators a fee for this service based on the number of payphone lines the PSP operates. *Id*.

In early 1999, the PSPs took the position that petitioners were substantially underpaying dial around compensation. App. 7, 122. But rather than litigate the dispute themselves, the PSPs arranged for the aggregators to do so on their behalf. App. 7. The terms of this scheme are exemplified by contracts between hundreds of PSPs and respondent APCC Services, Inc. (APCCS), which is the nation's largest aggregator. *Id*.

The PSPs assigned their dial around compensation claims to the aggregators "for purposes of collection," App. 8, 114, specifying: "This will allow APCCS to prosecute the litigation on your behalf. If at any point APCCS is no longer representing you in the litigation, you will be able to pursue your claims on your own, should you so choose." App. 127. The PSPs fund the litigation through "a quarterly assessment of their dial around compensation on a per call basis." App. 125. "If a PSP refuses to permit the [per call surcharge for the litigation] or withdraws his/her agreement to allow these deductions prior to conclusion of the suits, APCCS will drop that PSP from the plaintiff's list and will have no obligation to represent the PSP in the collection of these claims." App. 126.

The aggregators are not allowed to pursue the case as they see fit and in their own interests.

Instead, their authority is sharply limited. The PSPs named APCCS their "attorney in fact" to litigate "on behalf of" the PSPs, App. 8, 115, and, if appropriate, to enter into settlements "on behalf of" the PSPs. App. 115. *See also* App. 117 ("APCCS wishes to act as [the] PSP's exclusive agent for resolving DAC claims."). The PSPs, in turn, purport to be bound by the outcome of the litigation only to the extent the suit is "prosecuted by APCCS in the [PSPs'] interest." App. 115. APCCS is required to act "reasonabl[y]" and "on behalf of PSP[s]." App. 118. *See also* App. 117 (APCCS may take "such action as it deems reasonably necessary and appropriate * * * , which may include collective legal action"); App. 118 (PSPs bound by "reasonable determinations"); *id*. (settlement is authorized within "reasonable exercise of [APCCS's] discretion").

The aggregators themselves stand to gain or lose nothing from the lawsuit, no matter how it is resolved. They are the named plaintiffs only because "the parties recognize the efficiencies of APCCS taking collective action on behalf of [the] PSP[s]." App. 117. APCCS has no stake in the outcome: all the actual proceeds from any eventual judgment against petitioners will go to the PSPs. App. 7, 9-10. Alternatively, if the case is instead settled, "each [PSP] will receive dial around compensation settlements on a per call basis"; and "should legal fees and expenses also be awarded, they will be returned to" the PSPs. App. 124-25; *see also* App. 120.

2. APCCS and the other respondent aggregators sued petitioners to recover the dial around compensation allegedly owed to the PSPs. Their complaint explains that they seek to litigate not in their own interests but "on behalf of hundreds of entities that own and operate over 400,000 public payphones located throughout the United States." Amended Compl., No. 1:99CV00696, *APCC Servs., Inc. et al. v. AT&T Corp.* ¶ 1.

Petitioners moved to dismiss on the ground that the aggregators lack standing to pursue the PSPs' dial around claims.[1] The district court initially agreed and dismissed the aggregators' suit. App. 83, 89. But on respondents' motion for reconsideration, the court reversed itself, concluding that it was sufficient for Article III purposes that "the assignment transfers legal title to the claim [rather than] merely transfer[ing] a power of attorney." App. 94. The district court subsequently ruled that a private right of action existed to enforce the relevant FCC regulations. App. 46, 65, 107-08.

[1] The suits were brought by respondent aggregators and a single PSP (Peoples Telephone Company). App. 8. Almost all of the claims are brought by aggregators on behalf of third-party PSPs. Petitioners challenge the standing of all the respondent aggregators, including two that claim standing as well on the basis of their ownership interest in individual non-party PSPs. App. 10 n.**. Petitioners do not dispute the standing of the one respondent PSP in the case to vindicate its own interests under the FCC regulations.

The district court certified its standing and right of action rulings for interlocutory appeal under 28 U.S.C. § 1292(b). App. 63, 81. The D.C. Circuit granted the petitions for interlocutory appeal, App. 43, and reversed the district court. As further detailed *infra*, the court of appeals agreed that respondents have standing. App. 5. It also held that no right of action existed. *Id*.

This Court subsequently vacated and remanded the court of appeals' right of action ruling for reconsideration in light of *Global Crossing*, *supra*, which held that PSPs have the right to bring suit under Sections 201 and 207 of the Communications Act. *APCC Services, Inc. v. Sprint Communications Co. L.P.*, 127 S. Ct. 2094 (2007). On remand, the court of appeals held that, in light of *Global Crossing*, respondents have a private right of action to enforce the FCC's dial around compensation regulations. It accordingly remanded the case to the district court. App. 3. The court of appeals denied petitioners' request for rehearing and rehearing en banc. App. 111-12.

3. This petition concerns the ruling of the court of appeals in its initial opinion – by a divided vote – that respondents have Article III standing. The panel majority held that the assignments "give the aggregators standing to sue" if they "transfer the PSPs' compensation claims to the aggregators." App. 11. Applying that supposition, the majority deemed it sufficient as a matter of law that the assignments "transfer to the assignees the entire interest of the PSPs in their dial-around compensation claims." App. 14.

The court reasoned in two steps. First, it determined the legal effect of the assignments, which it read to embody "a complete transfer to the aggregator of the PSP's dial-around compensation claim." App. 12. The fact that all the benefits would go to the PSPs did not affect the assignments' legal consequence, but was "a mere reflection of the aggregator's promise to pass back to the PSP whatever it is able to collect." *Id*.

Second, the court of appeals addressed petitioners' argument that, even assuming that the assignments formally transfer the PSPs' legal claims and injury, "the aggregators lack standing because the assignments effectively give them only the right to sue; the aggregators will reap no direct benefit from the suit." App. 13. The majority rejected that argument because it found as a matter of law that the assignment of the legal right to bring a claim confers on the assignee a sufficient "personal stake" in the case to satisfy Article III. App. 16. The majority cited no Article III authority for that critical proposition, but reasoned that it was "not entirely without guidance" because "the identical issue has arisen under Federal Rule of Civil Procedure 17(a)," which requires that every suit be prosecuted by the "real party in interest." App. 15. Lower court decisions, the majority noted, hold under Rule 17(a) that "if an assignment properly transfers ownership of a claim, then the assignee's interest 'is not affected by the parties' additional agreement that the transferee will be obligated to account for the proceeds of a suit brought

on the claim.'" *Id.* (quoting *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 17 (2d Cir. 1997)).

4. Judge Sentelle dissented on the ground that the assignments do not confer standing to sue. App. 28-35. In his view, even if the assignments transferred to respondents the PSPs' injury in fact, "the aggregators do not have [the] concrete private interest in the outcome of this suit" required by Article III. App. 28. Judge Sentelle did not doubt that the PSPs had transferred their legal claims – both the right and the injury – to the aggregators or that "the party that actually suffered the injury in the first instance need not be the party to bring suit." App. 29. But he recognized that Article III imposes a further requirement: "Only an assignment that gives the assignee *an actual interest in the recovery* is sufficient for standing." *Id*. (emphasis added). *See also id.* ("The assignee standing doctrine recognized by the Supreme Court * * * clearly refers to an actual assignment of an interest that secures a portion of the recovery.").

Judge Sentelle found decisive that, in this case, the aggregators will take nothing – hence, "the PSPs, not the aggregators, would be the only plaintiffs with a real stake in the outcome of this controversy." App. 28-29. Indeed, "the putative plaintiffs themselves recognize that the PSPs' assignment of rights to aggregators such as APCC gives them no share in the recovery." App. 32. Moreover, the aggregators have agreed to act "on behalf of" the PSPs. App. 33. "Where the 'assignment' relationship is in substance

a mere 'agency' relationship such that the 'assignee' enjoys no right to keep a part of the recovery, the irreducible constitutional minimum of standing is left unsatisfied." App. 31-32.

REASONS FOR GRANTING THE WRIT

Article III of the Constitution enforces the "tripartite allocation of power set forth in the Constitution," confining the exercise of judicial authority to the resolution of actual "Cases" and "Controversies," U.S. Const. art. III, § 2. *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1860-61 (2006). One "essential and unchanging" component of the case-or-controversy requirement is the rule that the plaintiff invoking the jurisdiction of the federal courts must have standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The "irreducible constitutional minimum of standing" requires that (i) the plaintiff "have suffered an 'injury in fact'" to its own "legally protected interest" that is both "concrete and particularized"; (b) there be a "causal connection between the injury and the conduct complained of" such that the alleged injury to the plaintiff is "fairly * * * trace[able] to the challenged action of the defendant"; and (c) it be "likely" that the plaintiff's "injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560-61 & n.1 (citations omitted).

Before the PSPs and respondents entered into the assignments in this case, respondents plainly

lacked the individual legal interest required to sue petitioners. The legal obligation under the FCC dial around compensation regulations and the asserted damages for the alleged violations of those regulations run from petitioners only to the PSPs. Respondents are entitled to absolutely nothing under the FCC's regulations, and in litigation they would have nothing to gain. The PSPs are moreover perfectly capable of litigating on their own behalf, as is clear from the presence of one PSP in this very case, App. 8, and the fact that a PSP brought the similar suit in *Global Crossing*, *supra*.

It is likewise clear that standing would be lacking if the PSPs purported to assign respondents only their right to bring suit, without transferring legal title to the PSPs' claims. In that instance as well, respondents could not sue in federal court because they would have no claims of their own and would have suffered no injury. *See Woodside v. Beckham*, 216 U.S. 117 (1910).

The question presented by this case is whether there is a different outcome under Article III when the PSPs authorize respondents to litigate on their behalf and merely formally "assign" their claims to respondents "for purposes of collection," yet under the assignments the substance of the rights and obligations remain exactly the same – *viz.*, respondents litigate "on behalf of" the PSPs, to which all the benefits of the lawsuit still flow. The plain and obvious answer to that question before the D.C. Circuit's ruling in this case was "no." Substance controls over

form when it comes to Article III standing. Respondents no more hold the required concrete personal stake in the litigation after this nominal assignment than before it.

The court of appeals' contrary holding cannot be reconciled with this Court's decisions and conflicts with the rulings of other courts of appeals. Further, this ruling permits a sweeping lawsuit on behalf of more than a thousand companies nationwide to go forward with plaintiffs at the helm who have no individual claims to pursue or any individual stake in the outcome of the case. The ruling below is such a profound departure from established Article III standing principles that this Court's review is warranted and, indeed, summary reversal may be appropriate.

I. The Decision Below Conflicts with Basic Tenets of This Court's Standing Jurisprudence.

The D.C. Circuit held in this case that respondents possess standing as a result of the assignments they received from the individual PSPs. App. 9-16. The panel majority deemed it sufficient as a matter of law that the PSPs transferred formal legal title to their claims – including the right to assert the PSPs' injuries – to respondents. It expressly held that it was "irrelevant" whether – under those very same assignments – respondents stood to gain in any respect from the case. App. 16. That holding conflicts with

bedrock principles of this Court's Article III standing jurisprudence.

A. The D.C. Circuit Impermissibly Deemed It "Irrelevant" that the Assignees Lack Any Personal Stake in this Case.

Certiorari is warranted because the ruling below flies in the face of the very purpose of the standing inquiry set forth in this Court's Article III standing decisions. "Although [this Court] ha[s] packaged the requirements of constitutional 'case' or 'controversy' somewhat differently in the past 25 years – an era rich in three-part tests – the point has always been the same: whether [the] plaintiff '*personally would benefit in a tangible way* from the court's intervention.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 n.5 (1998) (quoting *Warth v. Seldin*, 422 U.S. 490, 508 (1974)) (emphasis added). That requirement is embodied in an uninterrupted line of this Court's decisions mandating that plaintiffs demonstrate that they have themselves suffered a redressable injury in fact that provides them with a concrete stake in the outcome of the litigation.

1. In *Sierra Club v. Morton*, 405 U.S. 727 (1972), an environmental group sued to prevent the issuance of a permit authorizing a skiing development. This Court found that the plaintiff lacked standing because it did not contend that it would be directly affected by the development. "[T]he 'injury in fact' test requires more than an injury to a cognizable

interest. It requires that the party seeking review be himself among the injured." *Id*. at 734-35. This Court rejected the plaintiff's invitation to "abandon[ ] the requirement that the party seeking review must himself have suffered an injury." *Id*. at 738.

In *Warth v. Seldin*, individual plaintiffs brought suit to challenge a town's allegedly exclusionary zoning policies. This Court found that the plaintiffs lacked standing because they could not establish that they personally had been injured by the challenged policies. The Court held:

> The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action. . . ."

422 U.S. at 499 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)). *See also id*. at 502 ("[p]etitioners must allege and show that they personally have been injured"). Under Article III, a plaintiff "must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the court's intervention." *Id*. at 508 (emphasis in original).

Likewise, in *Lujan*, *supra*, the Court held that a plaintiff which would not itself be "directly affected" by the challenged conduct may not sue to vindicate the interests of others. 504 U.S. at 563 (quoting *Morton*, 405 U.S. at 735). Accordingly, an environmental group lacked standing to challenge an administrative rule interpreting the Endangered Species Act because, while the rule would increase the rate of overseas extinction, the plaintiff did not allege that it would be directly affected as a consequence. *Id*.

Most recently, in *Steel Co. v. Citizens for a Better Env't*, *supra*, an environmental group filed a citizen suit alleging that the defendant manufacturer had violated federal law by failing to file timely reports regarding hazardous substances. This Court assumed that the "failure to provide [the] information in a timely fashion, and the lingering effects of that failure," constituted a cognizable injury in fact. 523 U.S. at 105. But it held that the plaintiff's request for statutory penalties did not confer Article III standing because the plaintiff itself lacked a personal stake in the outcome: "These penalties – the only damages authorized by [the statute] – are payable to the United States Treasury." *Id*. at 106. *See also id*. at 110 (O'Connor, J., concurring, joined by Kennedy, J.) ("I agree that our precedent supports the Court's holding that respondent lacks Article III standing because its injuries cannot be redressed by a judgment that would, in effect, require only the payment of penalties to the United States Treasury.").

2. The D.C. Circuit's ruling in this case negates the requirement that the plaintiff show an injury to its own legally protected interests. It held that standing arises merely from the fact that the PSPs assigned respondents their claims and hence the right to assert their injuries. The D.C. Circuit's view that "[w]hat the aggregators have promised to do with any recovery is irrelevant to their standing," App. 16, avowedly deems the *plaintiffs' own interest* in the outcome of their case inconsequential to the standing inquiry. The D.C. Circuit thus found standing even though respondents have suffered no harm, have no legal or equitable entitlement to the recovery in "their" case, and have no autonomy to decide how to dispose of any proceeds. Respondents have never held a legal interest in a judgment against petitioners; the PSPs held the right to that money as much after the "assignment" as before it.

Although the assignments transfer the right to collect the dial around compensation, the *same agreements* by their terms specifically withhold from respondents the right to take any of the proceeds; every penny of any judgment, attorney's fees award, or award of costs goes to the PSPs. In the analogous context of inquiring whether an assignment was impermissibly intended to defeat diversity jurisdiction, this Court has looked to the practical effect of the agreement as a whole. *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823 (1969); *see also Bernards Twp. v. Stebbins*, 109 U.S. 341 (1883) (holding that

assignment for collection to diverse plaintiff insufficient for purposes of establishing diversity jurisdiction).

Review is thus warranted because the D.C. Circuit has "abandon[ed] the requirement that the party seeking review must himself have suffered an injury." *Morton*, 405 U.S. at 738. APCCS does not "allege a distinct and palpable injury to [it]self," *Warth*, 422 U.S. at 501, and any judgment will be "worthless to respondent[s]," *Steel Co.*, 523 U.S. at 106. Under Article III, a legal claim must be presented by a party "whose interests entitle him to raise it." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 474 (1982). *Cf. Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994, 2008 n.3 (2007) (Scalia, J., concurring in relevant part) ("Because the rights to reimbursement and to the various procedural protections are accorded to parents themselves, they are 'parties aggrieved' when those rights are infringed, and may accordingly proceed *pro se* when seeking to vindicate them. * * * Of course when parents assert procedural violations, they must also allege those violations adversely affected the outcome of the proceedings. Under Article III, one does not have standing to challenge a procedural violation without having some concrete interest in the outcome of the proceeding to which the violation pertains, see *Lujan* * * * , here the parents' interest in having their child receive an appropriate education.").

3. The court of appeals' exclusive reliance on the legal right to sue that respondents received from the PSPs separately conflicts with this Court's precedents by displacing the foundational Article III requirement that there be "'concrete adverseness'" between the parties. Sufficient adversity exists only when "proceedings [are] commenced by one who has been injured in fact." *Valley Forge*, 454 U.S. at 486 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). In this case, the only concrete adverseness in interests is between petitioners and the PSPs. Respondents make no argument that petitioners violated any legal obligation as to them, nor that the court can provide respondents themselves any relief.

Equally troubling, even assuming respondents received the PSPs' claim and the right to pursue the PSPs' injury in fact, respondents clearly are not litigating in their own interests, except to the extent those interests coincidentally align with those of the PSPs. Respondents avowedly are pursuing the PSPs' legal interests rather than their own and bring this suit as a conduit into court for the PSPs' legal claims. The contracts appoint respondents as the PSPs' "attorney in fact" to litigate "on behalf of" the PSPs in the first instance, and if appropriate, to later settle the case "on behalf of" the PSPs. App. 114-21. The contracts furthermore require that this case be

"prosecut[ed]" by APCCS "in the [PSPs'] interest," not respondents. App. 115.[2]

A simple hypothetical demonstrates the point. Imagine that petitioners sought to settle with respondents through a generous cash payment exclusively for the use of the named plaintiffs. A party with genuine control over the outcome of its own case would obviously be able to resolve its own case on those terms. But respondents cannot. As a consequence, there is a distinct lack of adversity between petitioners and respondents.

In sum, if the D.C. Circuit's decision stands, the bedrock Article III requirements that the plaintiff have a personal stake in the action and demonstrate concrete adversity will in many cases be dead letters. The court of appeals' ruling does not rest in any respect upon any feature of the FCC's dial around compensation regulations. Instead, the court broadly held as a matter of law that Article III permits any person with a claim to nominally "assign" that claim to a third party to litigate a suit in which it has no interest whatsoever, and which it must pursue "on behalf of" the injured party – which will receive all of the proceeds. Such an extraordinary departure from basic jurisdictional principles requires this Court's review.

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[2] Even then, APCCS lacks plenary authority, for the PSPs can later challenge its conduct of the litigation as unreasonable, a scenario that is far from hypothetical if APCCS loses the case. App. 116-17. If that challenge succeeds, the PSPs assertedly would not be bound by the outcome of the case. App. 115.

B. This Court's Decisions Preclude the D.C. Circuit's Holding that an Assignment "for Purposes of Collection" Confers Standing Notwithstanding that the Assignee Has No Personal Stake in the Case.

1. In nonetheless holding that respondents have standing, the court of appeals cited the general proposition that assignees have the right to sue consistent with Article III. App. 10-11. But as Judge Sentelle aptly noted, "[t]here are 'assignments,' and then there are assignments." App. 29. A genuine assignment involves the transfer of not only (a) a legal claim, but also (b) the right to the proceeds. "Only an assignment that gives the assignee an actual interest in the recovery is sufficient for standing." *Id*. If such an assignment had been utilized in this case, not only would petitioners' alleged failure to comply with the FCC dial around compensation regulations have harmed respondents' assigned legal interests, but also respondents would directly benefit from a judgment in their favor.

By contrast, this Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), confirms that an assignment as emptied of legal consequence as the one in this case does not confer Article III standing. *Vermont Agency* addressed the Article III standing of *qui tam* relators under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733. This Court held that two elements of the relator's status were jointly critical to

the existence of Article III standing in that case. First, the FCA grants the relator "a share of any proceeds from the action * * * plus attorney's fees and costs." 529 U.S. at 769-70. Through this "portion of the recovery – the bounty he will receive if the suit is successful – a *qui tam* relator has a 'concrete private interest in the outcome of [the] suit.'" *Id*. at 772 (quoting *Lujan*, 504 U.S. at 573) (alteration in original). *Cf. id*. at 776-77 ("Like their English counterparts, some [early American statutes] provided both a bounty and an express cause of action; others provided a bounty only." (footnotes omitted)). Only after identifying the relator's personal stake did this Court turn to the question whether the relator had a "legally protected right" to vindicate in the case. *Id*. at 773. The Court held that "the assignee of a claim has standing to assert the injury in fact suffered by the assignor" and concluded that the FCA "can reasonably be regarded as effecting a partial assignment of the Government's damages claim." *Id*.[3]

As Judge Sentelle observed, *Vermont Agency* recognized assignee standing, but – consistent with the unbroken line of precedents discussed *supra* – only with respect to "an actual assignment of an

[3] The Court's opinion reinforces the importance of both elements. The cases and statutes cited by the Court as reflecting a history of standing to sue for assignees and relators involve instances in which the plaintiff had not only the right to assert the injury to a third party but also its *own* tangible stake in the outcome of the case. *See* 529 U.S. at 773-78; App. 31 (Sentelle, J., dissenting).

interest that secures a portion of the recovery." App. 29. He correctly recognized that, "[u]nder *Vermont Agency* (consistent with its foundation, *Lujan*), an assignee plaintiff must both (1) seek to vindicate the injury to the assignor, and (2) hold an interest 'consisting of obtaining compensation for, or preventing, the violation of a legally protected right.'" App. 31 (quoting *Vermont Agency*, 529 U.S. at 772-73). The D.C. Circuit's ruling in this case cannot be reconciled with either element of this Court's decision in *Vermont Agency*.

Most obviously, respondents lack the first element of standing identified by this Court: they have no personal stake in the suit. Unlike a *qui tam* relator – which receives a bounty – respondents have no "concrete private interest in the outcome" of their case. No matter what happens in this litigation, respondents will take nothing. They will receive no part of any judgment or settlement, which (along with any award of attorney's fees or costs) will instead pass automatically to the PSPs. The D.C. Circuit's decision thus jettisons the Article III requirement recognized in *Vermont Agency* that, like any party who invokes the powers of the federal courts, an assignee has standing only if it stands to gain from the suit.

Nor, contrary to the ruling below, does a formalistic "assignment for collection" satisfy the second requirement articulated by *Vermont Agency*, which makes clear that the practical effect of an "assignment" is determinative of standing, not its form. The FCA does not formally "assign" any rights of the

United States to the relator. Rather, this Court looked to whether the statute could "reasonably be regarded" as conferring the "injury in fact" of the government upon the private plaintiff. 529 U.S. at 773.

On any fair application of the standard articulated in *Vermont Agency*, the "assignment" in this case is not comparable to the assignment to *qui tam* relators under the FCA, such that it could fairly be said to confer on respondents standing to assert the injury in fact of the PSPs. A *qui tam* relator litigates the case at least in part for his personal benefit. By contrast, in this case, the assignment from the PSPs is limited to the "purposes of collection" for the very reason of specifying that APCCS would "prosecute the litigation *on your [i.e., the PSPs'] behalf*." App. 127 (emphasis added). Respondents do not even have plenary control over their own case, which they instead must pursue "reasonably" and only in the interests of the PSPs. App. 116-21.

In the end, respondents are not true "assignees" as any other court would understand that term, because the contracts in this case establish a "mere 'agency' relationship" (App. 32 (Sentelle, J., dissenting)), which unquestionably is insufficient to confer Article III standing. *See Vermont Agency*, 529 U.S. at 772. The contracts expressly state that "APCCS wishes to act as [the] PSP's exclusive agent for resolving DAC claims." App. 117. Indeed, the PSPs are financing the entire cost of this litigation. Respondents no more have Article III standing than would an attorney who, retained to vindicate a client's interests,

sues in the attorney's own name rather than in the client's name.

2. The court of appeals principally rested its decision that respondents have standing not on this Court's Article III precedents, but instead on lower court rulings that a plaintiff remains a "real party in interest" under FRCP 17(a) notwithstanding that it incurs an obligation to pay the proceeds of the case to a third party. App. 15. The court of appeals' reliance on Rule 17(a) was seriously misguided and its reasoning may be disposed of easily.

Rule 17 is not a substitute or proxy for Article III. *E.g.*, *Zurich Ins. Co. v. Logitrans, Inc.*, 297 F.3d 528, 532 (6th Cir. 2002) ("Several other circuit courts have acknowledged that there is a distinction between questions of Article III standing and Rule 17(a) real party in interest objections." (collecting cases)). The Rule's principal role is to protect defendants from multiple lawsuits by ensuring that the first suit is brought by the correct plaintiff. *See* Rule 17 Adv. Comm. Notes.[4] It is black letter law that "several

[4] For example, Rule 17(a) incorporates state law rules governing the proper plaintiff to bring suit. *E.g.*, *Frank v. Hadesman & Frank*, 83 F.3d 158, 159 (7th Cir. 1996) (Easterbrook, J.) ("Frank's problem is not standing (in the sense that the complaint does not allege a 'case or controversy' justiciable under Article III) but the identity of the real party in interest. * * * Fed. R. Civ. P. 17(a). Does the claim belong to Frank personally, or to Hadesman & Frank, Inc.? That is a question of state law."); *Thomas v. N.A. Chase Manhattan Bank*, 994 F.2d 236, 243 (5th Cir. 1993) ("Of course, in addition to satisfying

(Continued on following page)

other elements of the standing doctrine are clearly unrelated to the rather simple proposition set out in Rule 17(a), and plaintiff must both be the real party in interest *and* have standing." 6A Wright et al., *Federal Practice and Procedure* § 1542, at 330 (2d ed. 1995) (emphasis added) (footnotes omitted). *See, e.g.*, *Davis v. Yageo Corp.*, 481 F.3d 661, 678 (9th Cir. 2007) ("[W]hether or not [plaintiff] was the real-party-in-interest, it does not have standing, and it cannot cure its standing problem through an invocation of Fed. R. Civ. P. 17(a)." (citing *Kent v. Northern Cal. Reg'l Office of the American Friends Serv. Comm.*, 497 F.2d 1325 (9th Cir. 1974)).

C. This Court's Precedents Require Dismissal in any Event on Prudential Standing Grounds.

Even if respondents possessed Article III standing, this suit should have been dismissed on prudential grounds. *See* Pet. C.A. Br. 40-45. Beyond the minimum constitutional requirements, "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal

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Article III, Thomas must have the capacity to sue on behalf of SLT. *See* Fed. R. Civ. P. 17(a). * * * [C]ourts must look to the substantive law creating the right being sued upon to determine compliance with the real party in interest requirement * * * . (citation omitted). Because SLT is a Missouri trust, we look to Missouri law to determine Thomas's capacity to sue on its behalf.").

rights or interests of third parties." *Warth*, 422 U.S. at 499. *See also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004). "Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500.

Here, respondents are pursuing both a right and a cause of action that were created specifically for the PSPs and that the PSPs are fully capable of vindicating themselves. Not only do the governing regulations "order[ ] carriers to reimburse the *payphone operators*" (*Global Crossing*, 127 S. Ct. at 1518 (emphasis added)), but the FCC contemplated that it would be the "payphone operator [which would] bring a federal-court lawsuit * * * to collect the compensation owed." *Id*. This Court in turn sustained the FCC's position on the understanding that the FCC reasonably read the Communications Act to "authorize[ ] a payphone operator to bring a federal-court lawsuit against a recalcitrant carrier." *Id*. at 1516.[5]

[5] This Court's precedents have also recognized that, in appropriate circumstances, an associational organization may have standing to bring claims on behalf of its members. This case does not implicate that principle, however, for multiple reasons: none of the respondent aggregators is such an organization; the PSPs are not members; and the PSPs are perfectly capable of litigating the case themselves. *See generally* App. 34-35 (Sentelle, J., dissenting).

II. The Ruling Below Conflicts with Decisions of Three Other Circuits.

1. Certiorari is also warranted because the D.C. Circuit's decision cannot be reconciled with the holdings of the Second and Eleventh Circuits that an assignee lacks Article III standing, notwithstanding its legal right to assert the injury of the assignor, if it nonetheless has no personal stake in the outcome of the case. In *Connecticut v. Physicians Health Services of Connecticut, Inc.*, 287 F.3d 110 (2d Cir.), *cert. denied*, 537 U.S. 878 (2002), the plaintiffs assigned to the State their entire "cause of action" under ERISA Section 502(a)(3), which provides a right to sue ERISA plans for equitable relief. Connecticut provided no consideration in return for the assignments and could obtain no recovery for the State itself in the litigation. 287 F.3d at 112 (citations omitted). As the court explained, although the assignments "transfer to the State any right of action for equitable relief," "[t]hey do not * * * confer 'actual' rights or benefits under ERISA on the State." 287 F.3d at 113. "And the assignments do not shift the loss suffered by individual enrollees from the alleged breach of such duty from the individuals to the State." *Id.*

The court explained that the case called on it to determine when an assignee has Article III standing "to assert the injury in fact suffered by the assignor." 287 F.3d at 117 (quoting *Vermont Agency*, 529 U.S. at 773). The court identified two such circumstances. First, "[t]ypically, the assignee, obtaining the assignment in exchange for some consideration running

from it to the assignor, replaces the assignor with respect to the claim or the portion of the claim assigned and thus stands in the assignor's stead with respect to both injury *and remedy*." *Id.* (emphasis added). It gave as an example that court's prior holding in *I.V. Services of America, Inc. v. Trustees of American Consulting Engineers Council Insurance Trust Fund*, 136 F.3d 114 (1998), that "a healthcare provider that spends money on behalf of a patient for drugs and in return receives an assignment of the patient's rights to reimbursement under the healthcare plan has standing." *Physicians Health Servs.*, 287 F.3d at 117. There, the plaintiff had a personalized stake in the case because "the injury – the unreimbursed cost of drugs prescribed for the assignor – was assumed by the assignee, and in return the right to seek redress for it passed from the patient to the provider under the assignment." 287 F.3d at 117.

Second, the court recognized that standing exists even when the assignment does not include the right to the remedy in the case, so long as the plaintiff has some other personal stake in the outcome. It cited as an example *Vermont Agency*, in which the relator "recover[s] a share of the proceeds from the action." 287 F.3d at 117.

The Second Circuit then compared the case before it with those two circumstances in which assignees have standing to assert the injuries in fact of their assignors:

> None of the remedies being sought would flow to the State as assignee. As the State puts it, "this case is brought *solely for the benefit of the assignors* and those similarly situated." Even if the assignments are valid as a contractual matter, they thus merely give the State the right to act as a nominal party. The State as an assignee therefore lacks standing under Article III of the Constitution.

Id. (citations omitted) (emphasis in original). The Second Circuit accordingly explained that "[t]he case before us differs critically from *Vermont Agency* and *I.V. Services*," because "[t]he *qui tam* relator in the former and the healthcare provider in the latter each had a 'concrete private interest in the outcome of [its] suit.'" 287 F.3d at 118 (quoting *Vermont Agency*, 529 U.S. at 772)). "That is, the outcome had the potential to affect the *qui tam* relator and healthcare provider in a 'personal and individual way': They both stood, personally and individually to recover a monetary award." *Id.* (citing the holding of *Lujan*, 504 U.S. at 560 & n.1, that "an 'injury in fact' must be 'particularized' and defining 'particularized' as affecting 'the plaintiff in a personal and individual way'"). By contrast, a plaintiff such as Connecticut, lacking a stake in the outcome, is in essentially the same shoes as a party who has "no concrete interest in the suit and only has a 'public interest in proper administration of the laws.'" *Id.* at 117 n.8 (quoting *Lujan*, 504 U.S. at 576). The court accordingly held that the case must be dismissed for lack of standing. *Id.* at 118.

In *Connecticut v. Health Net, Inc.*, 383 F.3d 1258 (2004), the Eleventh Circuit subsequently endorsed and adopted the Second Circuit's analysis in *Physicians Health Services*, holding on similar facts that Connecticut lacked standing to sue based on such assignments. The Eleventh Circuit held that the State "does not have standing to pursue its claims, as an assignee, under Article III" because it "failed to demonstrate that it has suffered or will suffer an actual or imminent invasion of a legally protected interest that is concrete and particularized." *Id.* at 1259. The court thus found determinative that "Connecticut does not contend that it has suffered any specific injury to itself." *Id.* at 1261. "[N]o evidence exists in the record to suggest that this assignment was supported by any consideration or that the State of Connecticut has suffered, or will suffer, any type of injury as a result of the practices it claims violate ERISA. It simply seeks to assert these claims *on behalf of* its citizens and for *their* sole benefit." *Id.* (emphases added). The Eleventh Circuit thus distinguished "cases in which this Court has recognized the standing of certain health care provider-assignees who assert ERISA claims," because "the provider-assignees in those cases were able to assert separate injuries" in the form of the damages they would receive through a judgment in the case. *Id.* at 1261 n.2.

The court of appeals' decision in this case squarely conflicts with the holdings of the Second and Eleventh Circuits. Both of those courts confronted

cases like this one, in which an assignee of a legal claim seeks to litigate "on behalf of" a third party, rather than for its own interests. Both courts squarely held that the transfer of the assignors' injury was itself insufficient to confer standing, ruling that the assignee must have not only a legal right of action, but also a particularized, individual stake in the outcome of the case. Those courts would hold that the assignments in this case merely give respondents "the right to act as a nominal party." *Physicians Health Servs.*, 287 F.3d at 117. In stark contrast, the D.C. Circuit held here that the PSPs' transfer of their claim and injury was sufficient to satisfy Article III. App. 14-15.

The majority below attempted to distinguish *Physicians Health Services* on the ground that "[t]he assignments at issue here * * * transfer to the assignees the entire interest of the PSPs in their dial-around compensation claims." App. 14. But that is no distinction at all. To the contrary, it is precisely the argument for standing that the Second Circuit – and later the Eleventh Circuit – rejected. The plan participants in *Physicians Health Services* transferred all their rights under ERISA Section 502(a)(3), and the court assumed the assignments were fully "valid as a contractual matter." 287 F.3d at 118. Indeed, the transfer there was *more* complete than the one in this case: Connecticut had the "right to control" the litigation, *id.*, whereas respondents are required to pursue the interests of the PSPs and to do so reasonably, *see*

supra at 4. The Second Circuit held that the essential missing element of the State's claim to standing was any personal and particularized stake in the outcome of the case. 287 F.3d at 118; *accord Health Net*, 383 F.3d at 1261. The D.C. Circuit was able to find standing here only because it eliminated that requirement entirely, deeming it sufficient as a matter of law that the assignments in this case "transfer the PSPs' compensation claims to the aggregators." App. 11.

2. Nor can the D.C. Circuit's decision be reconciled with the Ninth Circuit's decision in *Glanton v. AdvancePCS*, 465 F.3d 1123 (2006) (Kozinski, J.). In *Glanton*, plan participants sued the plan's administrator for allegedly violating ERISA by improperly retaining the cost savings it received on prescription drugs. Notwithstanding that ERISA granted the plaintiffs the right to sue on the plan's behalf, the Ninth Circuit held that the plaintiffs lacked Article III standing. The court explained that the plan participants had the statutory right to sue but nonetheless lacked any particularized "stake in the outcome" of the litigation because "ERISA gives plan beneficiaries nothing; any monetary recovery goes to the plans – as would the benefits of any injunctive relief." *Id*. at 1125-1126 & n.3. In so holding, the Ninth Circuit distinguished *qui tam* actions on the ground that *qui tam* relators are impliedly assigned a personal share in the recovery. The plaintiffs in *Glanton*, by contrast, "have been assigned no right to *any portion of the recovery*." *Id*. (emphasis added).

The D.C. Circuit's holding here was exactly the opposite. While the Ninth Circuit requires that a plaintiff have an individualized injury that will be remedied or redressed by the litigation, the D.C. Circuit found standing despite the lack of any individualized recovery or any individualized injury. Thus, had respondents filed suit in the Ninth Circuit, standing would have been denied because they will not receive any benefit in the case, no matter how it is resolved. They avowedly state that they sue "on behalf of" the PSPs, and not on behalf of any individualized interest or injury.

III. Review Is Warranted in Light of the Manifest Importance of the Case.

Both the D.C. Circuit's holding and the application of that holding in this case raise issues of significant ongoing importance to the federal courts and litigants, meriting this Court's intervention. Respondents' complaint alone involves the claims of "more than one thousand PSPs that own and operate over 400,000 public payphones throughout the United States." App. 85. The court of appeals' ruling that respondents may proceed with their suit on behalf of the PSPs raises the immediate prospect of the federal courts' adjudication of a genuinely massive number of

claims in contravention of the most basic requirements of Article III of the Constitution.[6]

More broadly, the D.C. Circuit's excessively permissive standing ruling is an open invitation to evade Article III through the commencement of similar complex litigation in the District of Columbia. Lawsuits like this one are generally filed by sophisticated counsel, knowledgeable in the rules of decisions of various jurisdictions, who do not hesitate to shop for the most favorable forum. Virtually any commercial claim that rests on a federal right of action may properly be filed in the District Court for the District of Columbia, because most companies have some operation that makes them "resident" in the District. *See* 28 U.S.C. § 1391(b) (providing that, in a non-diversity case, venue is appropriate in any "judicial district where any defendant resides, if all defendants reside in the same State"); *id*. § 1391(c) (providing that a corporation resides in "any judicial district in which it is subject to personal jurisdiction at the time

[6] Under assignments to sue and collect on behalf of PSPs that are virtually identical to the assignments at issue here, APCCS and other aggregators have brought suit in the District of Columbia against another long-distance carrier, Qwest Communication Corporation ("Qwest"), seeking to recover dial around compensation allegedly owed by Qwest to PSPs. *APCC Services, Inc. v. Qwest Communications Corp.*, No. 1:01-cv-00641-ESH (D.D.C.). Under the D.C. Circuit's ruling in the actions against Sprint and AT&T, the suit against Qwest may proceed even though the aggregators have no stake in the outcome of that litigation either.

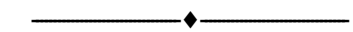
the action is commenced"). This case is a perfect example. Respondents have no particular ties to the District. They brought suit in that venue based solely on petitioners' commercial presence there. Equally important, federal law makes the D.C. District and D.C. Circuit the venue for challenges brought under a wide array of regulatory schemes. *See, e.g.*, 47 U.S.C. § 402(a) (telecommunications regulations issued by FCC); *id*. § 9613(a) (environmental regulations under CERCLA). In the wake of the D.C. Circuit's standing ruling in this case, parties are accordingly now free to adopt copycat "assignments" that interpose individual plaintiffs, with no personal stake in the outcome, at the helm of wide-ranging litigation in that forum.

The prospect of the District of Columbia becoming a magnet for lawsuits brought by assignees lacking a concrete interest in the suit's fate is heightened by the sheer fact that the use of assignments to sue is not uncommon. Until the D.C. Circuit's ruling in this case, however, no appellate court ever had equated the validity of an assignment to sue that confers *no stake in the outcome* with standing to sue: consistent with this Court's modern standing doctrine, the courts have instead demanded that the assignment furnish the assignee with more than just the barebones right to litigate. The D.C. Circuit's unprecedented decision threatens to transform the business practice of assigning the right to sue into a loophole to evade Article III strictures.

One further consequence of the court of appeals' decision is to call into question significant aspects of

federal class action practice, including particularly the utility of opt-in class actions. *See* App. 58 (district court certifying for appeal ruling that respondents have standing because, *inter alia*, petitioners "argue, with some persuasiveness, that this Court's ruling would allow parties to evade the requirements for class action certification set forth in Fed. R. Civ. P. 23"); *see also* App. 77. Indeed, this very case is in substance a class action on behalf of the PSPs, brought by a third party and without regard to Federal Rule of Civil Procedure 23. The ruling below would seemingly authorize large numbers of class members – indeed, the entire class – to nominally "assign" their claims to a single plaintiff, who would be paid for her services and obligated to return all the proceeds to all the individual class members. But all of the carefully calibrated procedural protections of the class action mechanism are absent in such a case. The nominal plaintiff need not be a class member *at all*, much less one whose claims are "typical." *Contra* Fed. R. Civ. P. 23(a). Nor would the plaintiff be required to satisfy the burden – established to protect both the court and the defendant – that the class action mechanism would be superior to the litigation of individual cases. *Contra* Fed. R. Civ. P. 23(b)(3).

In short, the broad jurisprudential and practical significance of the ruling below amplifies the significant bases for this Court's intervention in this case.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals,
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed June 8, 2007

No. 04-7034

APCC SERVICES, INC., ET AL.,
APPELLEES

v.

SPRINT COMMUNICATIONS CO.,
APPELLANT

Consolidated with
04-7035

On Remand from the United States Supreme Court

Before: GINSBURG, *Chief Judge* and SENTELLE and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed PER CURIAM.

PER CURIAM: In *APCC Services, Inc. v. Sprint Communications Co.,* 418 F.3d 1238 (2005) (*APCC*), we reversed the orders of the district court denying the defendants' motion to dismiss. The Supreme Court granted the plaintiffs' petition for a writ of certiorari to this court, vacated our judgment, and remanded the case for further consideration in light

of *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.,* 127 S.Ct. 1513 (2007). We now affirm the orders of, and remand the case to, the district court.

The facts of this case are set forth in our previous opinion. *APCC,* 418 F.3d at 1241-42. In brief, APCC et al. are a payphone service provider (PSP) and several "aggregators," intermediaries between PSPs and interexchange carriers (IXCs), that sued several IXCs to obtain compensation they claim the IXCs owe them pursuant to a regulation of the Federal Communications Commission. The IXCs moved to dismiss on the grounds that the aggregators did not have standing to sue and the Communications Act of 1934, 47 U.S.C. § 151 et seq., did not give the plaintiffs a private right of action to recover for a violation of the regulation. The district court denied the motions, concluding the aggregators had standing, *APCC Servs., Inc. v. AT & T Corp.,* 281 F. Supp. 2d 41, 45 (2003), and that § 276 of the Act created a private right of action. *APCC Servs., Inc. v. Cable & Wireless, Inc.,* 281 F. Supp. 2d 52, 54-57 (2003). The district court also permitted the plaintiffs to amend their complaint to assert that §§ 201(b), 407, and 416(c) of Title 47 provide alternate grounds for relief. *Id.* at 57-59. This court reversed. The panel determined, over the dissent of Judge Sentelle, that the aggregators had standing to sue and, over the dissent of Chief Judge Ginsburg, that none of the provisions cited gave the plaintiffs a right to sue in federal court; they were remitted to filing a

complaint for reparations before the FCC. *APCC,* 418 F.3d at 1250.

The Supreme Court, however, held in *Global Crossing* that a violation of the regulation at issue is a violation of § 201(b) of the Act, for which a private right of action is authorized by § 207 of the Act, in effect creating a right of action to remedy a violation of the regulation itself. 127 S.Ct. at 1516. It is now clear, therefore, that APCC et al. may pursue their case in district court under § 201(b). Accordingly, the orders of the district court denying the motions to dismiss are affirmed, and the case is remanded for further proceedings.

So ordered.

418 F.3d 1238

United States Court of Appeals,
District of Columbia Circuit.

APCC SERVICES, INC., et al., Appellees
v.
SPRINT COMMUNICATIONS CO., Appellant.
Nos. 04-7034, 04-7035.

Argued Oct. 21, 2004.
Decided June 28, 2005.
Rehearing Denied Nov. 10, 2005.

Appeals from the United States District Court for the District of Columbia (No. 01cv00642) (No. 99cv00696).

David P. Murray and Edward P. Lazarus argued the cause for appellants. With them on the briefs were Randy J. Branitsky and Jeffrey P. Kehne. Clifford J. Zatz entered an appearance.

Roy T. Englert, Jr. argued the cause for appellees. With him on the brief were Donald J. Russell and Michael W. Ward. Alyssa M. Campbell, Charles B. Montgomery, Jeffrey J. Ward, Sean M. Hanifin, Adam Proujansky, Albert H. Kramer, Leon B. Kellner and Leslie R. Cohen entered appearances.

Joel Marcus, Counsel, Federal Communications Commission, argued the cause as amicus curiae in support of appellees. On the brief were John A. Rogovin, General Counsel, Austin C. Schlick, Deputy General Counsel, John E. Ingle, Deputy Associate General Counsel, and Laurence N. Bourne, Counsel.

Before: *GINSBURG*, Chief Judge, and *SENTELLE* and *RANDOLPH*, Circuit Judges.

Opinion for the Court filed PER CURIAM.*

Opinion dissenting in part filed by Circuit Judge SENTELLE.

Dissenting opinion filed by Chief Judge GINSBURG. PER CURIAM.

In these consolidated appeals, we consider whether chapter 5 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-615b, creates a private right of action for an owner or operator of a payphone (hereinafter a payphone service provider, or a PSP) to recover from an interexchange carrier (IXC) the compensation for coinless payphone calls required by a regulation of the Federal Communications Commission. Before answering that question, however, we must first decide whether the plaintiffs, as the assignees of PSPs' claims against the IXCs, have standing to sue them. We conclude the plaintiffs do have standing but the Act does not provide them a right to sue in federal court.

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* *Chief Judge* GINSBURG wrote Sections I, II.A, II.B.1, and II.B.3, and *Circuit Judge* RANDOLPH wrote Section II.B.2 of the opinion for the court. *Circuit Judge* SENTELLE dissents from Section II.A with respect to the standing of the plaintiff aggregators but concurs in the judgment. *Chief Judge* GINSBURG dissents from Section II.B.2 and from the judgment.

I. Background

In 1990 the Congress enacted the Telephone Operator Consumer Services Improvement Act, Pub.L. No. 101-435, 104 Stat. 986 (codified at 47 U.S.C. § 226), which requires PSPs to allow consumers to use an access code (e.g., "10-10-220") or a subscriber 800 number to make a call from a payphone. *See* 47 U.S.C. § 226(c)(1)(B). Before then, many PSPs had blocked the use of access codes and 800 numbers because they enabled customers to "dial around" the PSP's preselected IXC, with the result that neither the IXC nor the PSP received any payment for the call.

In its initial implementation of the Act, the Commission required IXCs to compensate PSPs only for access code calls, not for calls to subscriber 800 numbers, *see Policies and Rules Concerning Operator Services Access and Pay Telephone Compensation,* 6 F.C.C.R. 4736 ¶¶ 34, 36, 1991 WL 638196 (1991), *clarified on recons.,* 7 F.C.C.R. 4355 ¶ 50, 1992 WL 690067 (1992), but we held that compensation scheme was not fully consistent with the 1934 Act, 47 U.S.C. § 226(e)(2), and had to be reconsidered. *Fla. Pub. Telecomms. Ass'n, Inc. v. FCC,* 54 F.3d 857, 859 (D.C.Cir.1995). Then, in the Telecommunications Act of 1996, the Congress instructed the Commission to devise a new plan that would "ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone[s]." 47 U.S.C. § 276(b)(1)(A). After several failed attempts, *see Ill. Pub. Telecomms. Ass'n*

v. FCC, 117 F.3d 555, 558 (D.C.Cir.1997) and *MCI Telecomms. Corp. v. FCC,* 143 F.3d 606, 607 (D.C.Cir.1998), the Commission finally crafted such a plan. *See Am. Pub. Communications Council v. FCC,* 215 F.3d 51, 52 (D.C.Cir.2000) (upholding the plan). Getting the Commission to enact a regulation requiring IXCs to compensate them for dial-around calls was only half the battle for the PSPs, however; their challenge now is to collect.

Most PSPs rely upon "aggregators" to act as intermediaries between themselves and the several IXCs; an aggregator acting on behalf of a PSP submits billing information to the IXCs and pays over to the PSP the monies it receives from the IXCs. The aggregator charges the PSP a fee based upon the number of telephone lines that PSP operates. Plaintiff American Public Communications Council Services (APCCS) is the largest aggregator, representing more than 1400 PSPs, which in turn own and operate more than 400,000 payphones nationwide.

APCCS and several other plaintiff aggregators represent that certain IXCs "have failed to pay the required [dial-around] compensation for millions of calls placed over several years." They sought authorization from their client PSPs to sue IXCs on the PSPs' behalf, and agreed to pass back to the PSPs any amounts they recovered thereby. Each PSP then signed an "Assignment and Power of Attorney" providing, in relevant part, that the PSP

> assigns, transfers, and sets over to [the aggregator] for purposes of collection all rights, title and interest of the [PSP] in the [PSP's] claims, demands or causes of action for "Dial-Around Compensation" ("DAC") due the [PSP] for periods since October 1, 1997, pursuant to Federal Communications Commission rules, regulations and orders.

The aggregators, purporting to act "as assignee[s] of the claims of and attorney[s]-in-fact" for the PSPs, then jointly filed lawsuits against Sprint, AT & T, and other IXCs, claiming each IXC had violated the Commission's dial-around compensation regulation. One PSP, Peoples Telephone Company, also participated in the lawsuits as a co-plaintiff.

AT & T moved to dismiss the cases on the ground the aggregators lacked standing to sue. The district court initially agreed and dismissed all the claims of the aggregators, *APCCS v. AT & T Corp.,* 254 F.Supp.2d 135, 137 (D.D.C.2003), but upon the aggregators' motion for reconsideration, vacated its earlier ruling and denied AT & T's motion. 281 F.Supp.2d 41, 45 (D.D.C.2003).

Another IXC, Cable & Wireless, moved to dismiss the single complaint against it on the grounds that the aggregators lacked not only standing but also a right of action for dial-around compensation under § 276 of the Act and the implementing regulation promulgated by the Commission. The district court denied that motion and permitted the plaintiffs to amend their complaints to assert that §§ 201(b), 407,

and 416(c) of Title 47 provide alternative grounds for relief. *APCCS v. Cable & Wireless, Inc.,* 281 F.Supp.2d 52, 57 (D.D.C.2003). (Cable & Wireless thereafter filed for bankruptcy and the case against it was stayed.) At the instance of Sprint and AT & T, the district court then certified its orders for interlocutory appeal, *APCCS v. Sprint Communications Co.,* 297 F.Supp.2d 90, 101 (D.D.C.2003); *APCCS v. AT & T Corp.,* 297 F.Supp.2d 101, 110 (D.D.C.2003), and we consolidated their appeals.

II. Analysis

Our review is *de novo.* We assume the factual allegations in the complaints are true. *See Greene v. Dalton,* 164 F.3d 671, 674 (D.C.Cir.1999). Because Article III standing is a jurisdictional requirement, we begin our analysis there. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94-102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

A. The Aggregators' Standing

Sprint and AT & T argue the aggregators lack standing to sue because they do not have "a concrete personal stake in the litigation." As these IXCs see things, the aggregators' "skeletal and conditional" assignments from the PSPs are insufficient to confer standing because they transfer only "bare legal title" to the claims of the PSPs, that is, the right to sue "for purposes of collection" but not the right to the recovery. Here the IXCs point out that the aggregators

have promised to return to the PSPs all the proceeds from the litigation.** Further, they contend the assignments, notwithstanding their terms, are in fact "completely revocable" by the PSPs.

In terms of the "irreducible constitutional minimum" requirements for standing-injury-in-fact, causation, and redressability, *see Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) – the IXCs first argue the aggregators have not suffered any injury of their own, and the assignments do not confer upon the aggregators the right to assert the injury of the PSPs. The IXCs also argue the relief the aggregators seek would not redress their purported injury because the aggregators would not keep any portion of such damages as may be awarded.

There are some circumstances in which a plaintiff has standing to sue based upon an injury to someone else. Indeed, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 773, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000), the Supreme Court stated in no uncertain terms that "the

** Even if the IXCs are correct that the aggregators do not have standing as assignees, we note that Peoples Telephone Company, a PSP, and two aggregators, Jaroth, Inc. and NSC Telemanagement, would still have standing. Jaroth contends it owned a 17% interest in a PSP at the time the lawsuit was filed, and NSC contends it will receive 10% of any compensation it collects on behalf of an affiliated PSP. Part II.A, therefore, deals with the standing only of those aggregators whose interest in the lawsuit stems solely from an assignment.

assignee of a claim has standing to assert the injury in fact suffered by the assignor." At the same time, however, the Court said that the assignee must have a "concrete private interest in the outcome of the suit" that is related to the injury asserted. *Id.* at 772, 120 S.Ct. 1858.

Therefore, in order to determine whether the aggregators have standing, we must first determine the effect of the assignments, which purport to transfer to them "all rights, title and interest" in the PSPs' dial-around compensation claims. We must then determine whether the aggregators have a stake in the outcome of the suit, notwithstanding their contractual obligation to account to the PSPs for any award of damages.

1. The assignments

Sprint and AT & T offer two reasons to believe the assignments did not transfer the PSPs' compensation claims to the aggregators so as to give the aggregators standing to sue. First, the transferred ownership interest was only "for purposes of collection." Second, the assignments were "completely revocable" by the PSPs.

We need not dwell upon the IXCs' first argument The quoted phrase appears in the following context: "[The PSP] hereby assigns, transfers and sets over to [the aggregator] for purposes of collection all rights, title and interest of [the PSP] in [the PSP's] claims, demands or causes of action" for dial-around compensation. The

phrase "for purposes of collection," which the IXCs portray as a fatal limitation, we think a mere reflection of the aggregator's promise to pass back to the PSP whatever it is able to collect. Whether that obligation affects the aggregator's standing is a distinct question, which we consider in Part II.A.2 below, but it certainly does not affect the validity of the assignment of the PSP's dial-around compensation claim. The IXCs, therefore, give us no reason to believe the assignment is anything less than a complete transfer to the aggregator of the PSP's dial-around compensation claim.

Equally unavailing is the IXCs' contention that the assignments are "completely revocable." By their terms, the assignments "may not be revoked without the written consent of [the aggregator]." Sprint and AT & T suggest the court should treat this provision as a mere "formality," because APCCS sent to each of its client PSPs a letter stating: "If at any point APCCS is no longer representing you in the litigation, you will be able to pursue your claims on your own, should you so choose." The possibility that APCCS would no longer represent a PSP in litigation does nothing, however, to suggest the PSP could revoke the assignment as long as APCCS continues to represent the PSP in the litigation. Of course, APCCS itself could repudiate the assignment and presumably would do so if it no longer wanted to represent the PSP in the litigation. In any event, the assignment itself is plain: the PSP may not revoke it without the consent of the aggregator.

Having rejected both the IXCs' arguments challenging the effect of the assignments, we turn to the question whether the aggregators' promise to pass along the proceeds of litigation affects their standing to sue.

2. Pass back of the proceeds

Sprint and AT & T also argue the aggregators lack standing because the assignments effectively give them only the right to sue; the aggregators will reap no direct financial benefit from the suit. In that respect, Sprint and AT & T argue, the interest of the aggregators in this case is unlike that of a *qui tam* relator, whose standing the Supreme Court upheld in *Vermont Agency,* 529 U.S. 765, 120 S.Ct. 1858, 146 L.Ed.2d 836. Here, the IXCs argue, the aggregators retain "no genuine economic interest" in the dial-around compensation claims as a result of their promises to pay the proceeds to the PSPs, whereas a *qui tam* relator benefits from the bounty he receives if his claim is successful. *Id.* at 772, 120 S.Ct. 1858.

According to the IXCs, this case is better compared to *Connecticut v. Physicians Health Services of Connecticut, Inc.,* 287 F.3d 110 (2002), in which the Second Circuit held that the State of Connecticut lacked standing to assert claims against an insurance company offering managed care plans to Connecticut residents. The State claimed standing on the ground that several plan participants had assigned to the State their right to seek "appropriate equitable relief

with respect to any cause of action they may have as plan participants or beneficiaries." *Id.* at 112. The Second Circuit concluded that Connecticut did not have a "concrete private interest in the outcome of the suit" because "[n]one of the remedies being sought would flow to the State as assignee." *Id.* at 118. The assignments at issue did not "confer 'actual' rights or benefits . . . on the State. The right to recover benefits or to seek money damages remain[ed] with the assignor." *Id.* at 115. Therefore, the court held that, "[e]ven if the assignments are valid as a contractual matter, they . . . merely give the State the right to act as a nominal party." *Id.* at 118.

The assignments at issue here, in contrast, transfer to the assignees the entire interest of the PSPs in their dial-around compensation claims, and, as explained in Part II.A.1 above, there is nothing to suggest the assignments were invalid. As for the question that remains – whether the aggregators' promise to hand over any recovery to the PSPs means the aggregators have no stake in the case – *Physicians Health* is not helpful; it did not address the question whether an assignee that would otherwise have standing to sue loses its standing when it obligates itself to give the proceeds of the suit to another.

Still, we are not entirely without guidance. As the district court observed, the identical issue has arisen under Federal Rule of Civil Procedure 17(a): "Every action shall be prosecuted in the name of the real party in interest." Courts and commentators agree that, if an assignment properly transfers ownership of a claim,

then the assignee's interest "is not affected by the parties' additional agreement that the transferee will be obligated to account for the proceeds of a suit brought on the claim." *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.,* 106 F.3d 11, 17 (2d Cir.1997); *see also Titus v. Wallick,* 306 U.S. 282, 289, 59 S.Ct. 557, 83 L.Ed. 653 (1939) (legal effect of assignment "was not curtailed by the recital that the assignment was for purposes of suit and that its proceeds were to be turned over or accounted for to another"); James Wm. Moore, Et Al., Moore's Federal Practice § 17.11[1][c] (3d ed. 1997) ("The assignee is real party in interest even though assignee must account to the assignor"); 6A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. § 1545 at 348 (1990) ("[F]ederal courts have held that an assignee for purposes of collection who holds legal title to the debt . . . is a real party in interest even though the assignee must account to the assignor for whatever is recovered in the action").

Sprint and AT & T counter with the observation that Rule 17(a) and the requirement of standing "are governed by different standards and serve distinct purposes." That is true enough, as far as it goes: Standing depends in part upon elements "clearly unrelated to the rather simple proposition set out in Rule 17(a)," Fed. Prac. & Proc. § 1542 at 330. But standing also depends in part, as does a plaintiff's status as the real party in interest, upon having "a personal interest in the controversy," *Whelan v. Abell,* 953 F.2d 663, 672 (D.C.Cir.1992), and that is the only

requirement at issue in the IXCs' challenge to the aggregators' standing in this case.

We see no basis for distinguishing the personal stake required under Rule 17(a) from the interest required for standing. What the aggregators have promised to do with any recovery is irrelevant to their standing – as it would be to their status as real parties in interest. We need only be satisfied that the aggregators received a valid assignment of the claims, so that any damage award will be payable to them in the first instance. Upon that score the IXCs have cast no doubt.***

B. Private Right of Action

Sprint and AT & T contend that nothing in chapter 5 of the Communications Act authorizes a PSP to sue an IXC for failure to pay the dial-around compensation required by the regulation the Commission promulgated to implement § 276. In determining whether the Act creates a private right of action, the court's task is straightforward: We must "interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy," for "private

*** Because we conclude the aggregators have standing as assignees, we need not consider their alternative claim, which is that they have associational standing. *See Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 344, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977); *Fund Democracy, LLC v. SEC,* 278 F.3d 21, 25 (D.C.Cir.2002).

rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval,* 532 U.S. 275, 286, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001).

1. Section 276

Section 276(b)(1) provides in relevant part:

> In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public . . . the Commission shall . . . prescribe regulations that –
>
> (A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone.

As the plaintiffs acknowledge, § 276 itself does not create a private right of action; nor does it hold a common carrier liable for failing to comply with the requirements of the Act. According to the plaintiffs, however, those gaps are filed by §§ 206 and 207, respectively.

Section 206 provides in relevant part:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in [chapter 5] prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in [chapter 5] required to be done, such common carrier shall be liable to

> the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of [chapter 5].

And § 207 provides in relevant part: Any person claiming to be damaged by any common carrier subject to the provisions of [chapter 5] . . . may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of [chapter 5], in any district court of the United States of competent jurisdiction.

The question, then, is this: According to the allegations of the complaint, did Sprint and AT & T, which are common carriers, do something made unlawful by, or fail to do something required by, § 276? If so, then § 206 makes them liable to any person injured as a result, and § 207 permits "any person claiming to be damaged" to sue them in federal court.

The district court reasoned that § 276(b)(1)(A)"confers upon PSPs a right to be 'fairly compensated,'" while the Commission's regulation "provides the details necessary to implement" that statutory right – namely, who must compensate the PSPs, and by how much. 281 F.Supp.2d at 56. According to the district court, the regulation "implements the Congressional mandate . . . by specifying what it means to be 'fairly compensated'; as such, when a common carrier violates the regulation, it is effectively doing something 'declared to be unlawful'

within the meaning of section 206 and is therefore subject to suit under section 207." *Id.*

In *Greene v. Sprint Communications Co.,* 340 F.3d 1047 (2003), another case brought by aggregators against IXCs on behalf of PSPs, the Ninth Circuit read the same statute quite differently. That court first observed that § 276 "does not establish a *right* to compensation, or to compensation by *IXCs*. The statute does not say 'PSPs shall be entitled to fair compensation,' or 'IXCs shall pay PSPs.' " Viewing the "lack of rights – creating language in § 276 [as] crucial," the court held that, when an IXC fails to pay a PSP the compensation prescribed by the Commission, "there is no violation of the Act to be remedied through the private right of action afforded by §§ 206 and 207." *Id.* at 1050-52.

We join the Ninth Circuit in holding that § 276 does not create a right of action for a PSP (or its assignee) to recover dial-around compensation from an IXC. As our sister circuit observed, the Supreme Court in *Sandoval* held that § 602 of Title VI of the Civil Rights Act, 42 U.S.C. § 2000d-1, did not reflect an intent on the part of the Congress to create a private right of action specifically because there was no "rights-creating language" in the statute. 532 U.S. at 288, 121 S.Ct. 1511. The same is true of § 276 of the Communications Act. That section is by its terms addressed neither to the rights of PSPs nor to the obligations of IXCs. Rather, it is "yet a step further removed: It focuses . . . on the agenc[y] that will do the regulating." *Id.* Section 276 is addressed only to

"the Commission," which it directs to "take all actions necessary . . . to ensure that all [PSPs] are fairly compensated" for the calls they originate.

Nothing in the statute requires the Commission to designate the IXC as the party responsible for dial-around payment. Indeed, as the IXCs note, the Commission identified the caller and the recipient as possible payors, and in fact it considered a "caller pays" scheme before eventually concluding that a "carrier pays" scheme was more practical. *See* Notice of Proposed Rulemaking, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* 11 F.C.C.R. 6716 ¶ 24, 1996 WL 436930 (1996); *see also Greene* 340 F.3d at 1051 n. 3 (discussing alternative schemes the Commission considered).

Because the IXCs are not regulated by § 276, there is no way in which they could have violated that provision. They may have violated a regulation implementing § 276, but § 206 makes a common carrier liable only for violating chapter 5 itself – not for a violating a regulation issued by the Commission pursuant to chapter 5. Because it is not a violation of § 276 for an IXC to fail to pay dial-around compensation to a PSP, the plaintiffs do not have a right of action, based upon that section, against the IXCs.

2. Section 201(b)

Plaintiffs contend that even if they cannot rely on § 276, a common carrier's failure to comply with the

Commission's regulations violates § 201(b) of the Act, which in turn triggers the provisions (§§ 206 and 207) allowing suit in federal court. Section 201(b) provides that any "charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful." A common carrier's failure to compensate PSPs for dial-around calls, plaintiffs argue, is a "practice" that is "unjust or unreasonable," and therefore "unlawful" under the Act.

At the heart of plaintiffs' argument is the notion that it is inherently an unreasonable practice, within the meaning of § 201(b), to violate a Commission regulation. That reading would transform § 201(b) into a catchall provision, converting any common carrier's violation of a Commission order or regulation into a violation of the Act actionable in federal court. This result is not plainly evident from the text of the Act, and nothing suggests that Congress intended its words to have such a sweeping effect.

It is important to keep in mind that the question here is not so much whether there is a private right of action, but where – directly in district court, or in the Commission. This is different from *Sandoval,* in which the alternative to a right of action in court was no action anywhere. Still *Sandoval* has something to say about the issue facing us, if only in dicta: "[W]hen a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable." 532 U.S. at 291, 121 S.Ct. 1511.

Here, the body of the FCC's 1999 "Order" said not a word about § 201(b). All we see is boilerplate in the ordering clause, and in the clause identifying the authority for Part 64 of the rules, citing a list of sections including "201." (This is in marked contrast to the treatment of § 276, which the Commission mentioned throughout as the source of its authority.) It cannot be that the mere citation of § 201 displays – in *Sandoval*'s words – an intent that the regulation setting the compensation level should be privately enforceable in court. Still less can it be that the mere citation of § 201 is entitled to *Chevron* deference as the agency's authoritative interpretation of § 201(b). The dissent's quotation of the following statement from *Sandoval* is therefore inapposite: a "Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." 532 U.S. at 284, 121 S.Ct. 1511. There was no authoritative interpretation of § 201(b) in this case. For all we know, the Commission in 1999 never even thought about suits directly in district court. Certainly the body of the Order itself gave no clue that it did so. In fact, in some of the paragraphs talking about the PSPs compensating the carriers for overpayments, the assumption appears to be that collection actions will be before the Commission (as indeed they must be in an any action by a carrier against a PSP for not making a refund). *See, e.g., In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications*

Act of 1996, 14 F.C.C.R. 2545 ¶¶ 195-99, 1999 WL 49817 (1999).

A court should be reluctant to put words in the Commission's mouth – here, the words "unjust and unreasonable." The Commission never, in its 1999 Order, specified that a carrier's failure to pay was of this magnitude. Given the potential consequences to judicial dockets of the Commission's making that finding, we should require a clear statement (and analysis) by the agency. What the Commission meant by citing § 201 at the end of its Order is anyone's guess. If the Order itself indicated that the Commission expected payphone providers to be able to collect in judicial actions that would be another matter. But nothing in the Order so indicates and as stated above, there is at least a suggestion that the Commission expected collection actions to be administrative. *See, e.g., Ascom Communications, Inc. v. Sprint Communications, Inc.,* 15 F.C.C.R. 3223, 3237, 2000 WL 135252 (2000) (adjudicating a claim against Sprint for a violation of § 201(b)).

The dissent also invokes our decision in *MCI Telecommunications Corp. v. FCC,* 59 F.3d 1407 (D.C.Cir.1995), but the holding of that case is too narrow to be of any help in this case. *MCI,* as well as the line of precedent on which it relied, did not involve Commission prescriptions in general, but rather referred specifically to ratemaking under § 205. *Id.* at 1414. The Commission's ratemaking power is expressly defined as the authority "to determine and prescribe what will be the *just and reasonable*

charge." 47 U.S.C. § 205(a) (emphasis added). It is one thing to hold that when Congress instructs the Commission to set a "just and reasonable" rate for common carriers, their noncompliance with the rate will be considered "unjust and unreasonable"; it is quite another to extend that reasoning to encompass all Commission regulations governing common carriers. In addition, *MCI* involved claims brought before the Commission – not in a federal district court. When *MCI* is viewed in the new light of *Sandoval,* its value as a precedent in this case is diminished still further.

We do not say that the Commission has no power to interpret § 201(b) to encompass violations of its rules, and thereby to create private rights of action in courts when previously there were none. We do say the Commission did not attempt to exercise any such power here. Plaintiffs therefore cannot proceed under § 201(b).

3. Sections 407 and 416(c)

The plaintiffs next look to 47 U.S.C. §§ 407 and 416(c) to supply the right to sue the IXCs in federal court. Section 407 authorizes a "complainant" to petition the district court for damages based upon a carrier's failure "to comply with an order for the payment of money within the time limit in such order." The plaintiffs contend the regulation providing for dial-around compensation is such an "order."

In the alternative, the plaintiffs contend § 416(c), read in conjunction with §§ 206 and 207, gives them a right of action. That provision states, "It shall be the duty of every person . . . to observe and comply with [every order of the Commission] so long as the same shall remain in effect." According to the plaintiffs, the compensation regulation is also an "order" within the meaning of § 416(c), and §§ 206 and 207 make the failure to comply therewith actionable in federal court.

The IXCs argue in response that the regulation at issue is not an "order" within the meaning of either § 407 or § 416(c) because that term, as used in those sections, includes only Commission decisions arising out of an adjudicatory, as opposed to a rulemaking, proceeding. They argue that to interpret "order" to include rulemaking decisions makes no sense in light of § 416(a), which requires that every order be served upon the carrier's designated agent, and of § 416(b), which authorizes the Commission "to suspend or modify its orders upon such notice and in such manner as it shall deem proper."

We agree with the IXCs that "order" in §§ 407 and 416(c) refers only to adjudicatory and not to rulemaking decisions. Although the Communications Act does not define the term "order," the Administrative Procedure Act does: "'order' means the whole or part of a final disposition . . . of an agency in a matter other than a rule making." 5 U.S.C. § 551(6). We recognize that the circuits are divided over the question whether "order" as used in § 401(b), a companion

provision to those at issue here, includes a decision promulgated through rulemaking. The Ninth Circuit has held that it does, reasoning that "[w]hen Congress intended the APA's definition of a term to be incorporated into the Communications Act, it said so." *Hawaiian Tel. Co. v. Pub. Utilities Comm'n of Hawaii,* 827 F.2d 1264, 1271 (9th Cir.1987); *see also Alltel Tennessee, Inc. v. Tennessee Pub. Serv. Comm'n,* 913 F.2d 305, 308 (6th Cir.1990) (following *Hawaiian Tel. Co.* and citing cases from 4th, 5th, 7th, and 8th Circuits).

We are persuaded otherwise for the reasons laid out at length by then – Judge Breyer in *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine,* 742 F.2d 1, 4-9 (1st Cir.1984) (relying in part upon APA definition of "order" in concluding § 401(b) is limited to "adjudicatory orders"). We are particularly convinced that, as the First Circuit said of that provision, making §§ 407 and 416(c) applicable to Commission regulations would "interfere seriously with the well established principle that the 'enforcement' of the Communications Act is entrusted primarily to" the FCC, *id.* at 5, rather than to the district courts.

Further, the plaintiffs' reading of §§ 407 and 416(c) would render § 201(b) superfluous: any failure to comply with a regulation, not only unjust and unreasonable practices, would be a violation of the Act and therefore actionable under §§ 206 and 207. *See Alaska Dep't of Envtl. Conservation v. EPA,* 540 U.S. 461, 489 n. 13, 124 S.Ct. 983, 157 L.Ed.2d 967

("It is . . . a cardinal principle of statutory construction that a statute ought, upon the whole, be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant"). And, to those provisions of § 416 that the IXCs correctly identify as inconsistent with the plaintiffs' broad interpretation of "order," we add § 415(f), the one year statute of limitations for filing a petition to enforce a Commission order for the payment of money. If orders included regulations, then a complainant would be able to seek enforcement of a regulation only for the first year after it is promulgated. That simply cannot be.

For these reasons, and because we agree entirely with the First Circuit's analysis in *New England Telephone and Telegraph,* we reject the plaintiffs' contention they can sue the IXCs pursuant to §§ 407 and 416(c).

III. Conclusion

We hold that, as a result of the PSPs' valid assignment of their claims to the plaintiff aggregators, the aggregators have standing to sue the defendant IXCs for failing to pay the PSPs dial-around compensation as required by the regulation; that the aggregators have promised to pass back to the PSPs any recovery from the lawsuit is immaterial for the purpose of determining their standing. We also hold that none of the provisions of the Act upon which the plaintiffs rely grants them the right to sue in federal court to recover dial-around compensation the IXCs

are required by regulation to pay. The orders of the district court denying the IXCs' motion to dismiss are therefore

Reversed.

SENTELLE, Circuit Judge, concurring in part and dissenting in part.

In considering whether the plaintiff aggregators have standing to sue, I, like the Court, begin with the same basic question: "We must . . . determine whether the aggregators have a stake in the outcome of the suit[.]" Maj. Op. at 1243. Because I conclude that most of the aggregators do not have a concrete private interest in the outcome of this suit, I must respectfully dissent from Part II.A of the Court's opinion.*

The PSPs' assignment of rights to APCC is materially limited: "'[The PSP] hereby assigns, transfers, and sets over to [the aggregator] *for purposes of collection* all rights, title, and interest of [the PSP] in [the PSP's] claims, demands or causes of action' for dial-around compensation." What the Court sees as "a mere reflection" of a technical detail not affecting the substance of the relationship, I see as the first clue that the PSPs, not the aggregators, would be the only

* As noted by the Court, Maj. Op. at 1242 n. **, this discussion only applies to those plaintiff aggregators that do not own, wholly or in part, PSPs.

plaintiffs with a real stake in the outcome of this controversy.

The Supreme Court's statements on the "irreducible constitutional minimum" of standing, under Article III, are straightforward: first and foremost, the plaintiff "must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[.]" *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (quotation marks, footnote, and internal citation omitted). Of course, as this Court recognizes, the party that actually suffered the injury in the first instance need not be the party to bring suit; under *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* an assignee of the injured party's claim may have standing to sue. 529 U.S. 765, 771-74, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000).

The doctrine of assignee standing does not wholly erase the basic requirements of standing, however. There are "assignments," and then there are assignments. Only an assignment that gives the assignee an actual interest in the recovery is sufficient for standing.

The assignee standing doctrine recognized by the Supreme Court (and cited by this Court, Maj. Op. at 1243) clearly refers to an actual assignment of an interest that secures a portion of the recovery. *See Vermont Agency,* 529 U.S. at 773, 120 S.Ct. 1858 ("The

FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim."). The cases cited in *Vermont Agency* as exemplifying "assignee standing" reflect this fact. *See Poller v. Columbia Broadcasting System, Inc.,* 284 F.2d 599, 602 (D.C.Cir.1960), *rev'd*, 368 U.S. 464, 465, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962) (plaintiff in antitrust suit was assignee of all of the assets of the dissolved corporation (of which he was previously the sole shareholder)); *Hazeltine Research, Inc. v. Automatic Radio Mfg. Co.,* 77 F.Supp. 493, 495 (D.Mass.1948) (plaintiff in patent license suit was assignee of parent corporation's right to grant licenses under certain patents), *aff'd,* 176 F.2d 799 (1st Cir.1949), *aff'd,* 339 U.S. 827, 70 S.Ct. 894, 94 L.Ed. 1312 (1950); *Manhattan Trust Co. v. Sioux City & N.R. Co.,* 65 F. 559, 568 (N.D.Iowa 1895) (intervenor assignee in suit at equity was entitled to redeem securities pledged by assignor to third party, upon assignee's payment of the loan proceeds to that third party), *aff'd sub nom. Hubbard v. Tod,* 76 F. 905 (8th Cir.1896), *aff'd,* 171 U.S. 474, 19 S.Ct. 14, 43 L.Ed. 246 (1898); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer,* 515 U.S. 528, 531, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995) (plaintiff in contract dispute was subrogated *pro tanto* because, as injured party's insurer, it had paid injured party compensation that it would recover in contract parties' arbitration); *Musick, Peeler & Garrett v. Employers Ins.,* 508 U.S. 286, 288, 113 S.Ct. 2085, 124 L.Ed.2d 194 (1993) (plaintiff in stock fraud suit was subrogated because, as injured party's insurer, it had paid injured party compensation that it would recover

in civil suit). *See also Titus v. Wallick,* 306 U.S. 282, 286, 59 S.Ct. 557, 83 L.Ed. 653 (1939), *quoted in* Maj. Op. at 1244 (plaintiff assignee did have to account for the proceeds of the recovery and turn over the proceeds to the assignor, but assignor was obligated, under the terms of the assignment, "after paying the expenses of collection, to pay over one-half of the net recovery to [assignee's] wife, to discharge certain indebtedness of [assignee], and to pay the balance to [assignee].").

The cases cited in *Vermont Agency* as exemplifying the accepted doctrine of "assignee standing" share a common characteristic noticeably absent from the case before us: in each of those cases the "assignment" gave the putative plaintiff a direct share in the recovery. This necessary characteristic renders those cases consistent with *Vermont Agency's* requirement that the putative plaintiff have "a concrete private interest in the outcome of the suit" in order to attain standing. 529 U.S. at 772, 120 S.Ct. 1858 (quoting *Lujan,* 504 U.S. at 573, 112 S.Ct. 2130) (quotation marks & brackets omitted).

Under *Vermont Agency* (consistent with its foundation, *Lujan*), an assignee plaintiff must both (1) seek to vindicate the injury to the assignor, and (2) hold an interest "consist[ing] of obtaining compensation for, or preventing, the violation of a legally protected right." *Vermont Agency,* 529 U.S. at 772-73, 120 S.Ct. 1858. An assignment suffices for such an interest when the assignee actually receives the benefit of the compensation he receives. Where the

"assignment" relationship is in substance a mere "agency" relationship such that the "assignee" enjoys no right to keep a part of the recovery, the irreducible constitutional minimum of standing is left unsatisfied.

In this case, the putative plaintiffs themselves recognize that the PSPs' assignment of rights to aggregators such as APCC gives them no share in the recovery. "The aggregators' compensation for billing and collection services is based on the number of payphones and telephone lines operated by their PSP clients." Br. for Plaintiffs-Appellees at 5-6. The aggregators are a pass-through entity: "Aggregators are intermediaries between PSPs and IXCs for billing and collection. An aggregator . . . collects the IXCs' payments, and distributes those payments to its PSP clients." *Id.* at 5.

The contract cited by the Court reflects the pass-through nature of the "assignee-assignor" relationship. True, according to one part of the Agreement, the PSPs "assign[ ] . . . for purposes of collection" the interest in Company's claims. But we do not interpret the contract's individual phrases apart from the rest of the contract; rather, we interpret the agreement "as a whole," along with "all writings that are part of the same transaction." *See* Restatement (Second) of Contracts § 202(2) (1979). Doubts raised by the "for purposes of collection" language of that portion of the contract are confirmed by the Amendment to APCC Services Agency Compensation Agreement, which notes that, far from taking on the rights and responsibilities

of the PSPs *en toto,* APCC merely acts as the "PSP's exclusive *agent for billing and collection*." Amendment at 1 (emphasis added). APCC does nothing more than "tak[e] collective action *on behalf of PSP* and other[s] . . . with similar claims." *Id.* (emphasis added). APCC's obligations to each PSP in this additional agreement stretch far beyond mere "obligat[ion] to account for the proceeds of a suit brought on the claim." Maj. Op. at 1244.

As noted above, APCC has no actual financial interest in the recovery. The Amendment confirms this. APCC's compensation is determined by a schedule of variable fees determined by *current* PSP call volume, not the historical PSP call volume at issue in the case before us. APCC Services Agency Compensation Agreement, Schedule A. *See also* Sandusky Memo ("To fund the suits, all plaintiffs are being required to agree to a quarterly assessment of their dial around compensation on a per call basis."). True, if APCC's collection efforts require APCC to provide "additional services . . . over and above the services provided pursuant to the Agreement," APCC could deduct costs (again, based on current call volume) from the PSPs' recoveries, Amendment to APCC Services Agency Compensation Agreement at 2. But APCC has not alleged that such deductions are required in the present case, and we therefore have no occasion to determine whether such hypothetical deductions would be sufficient for standing.

The aggregators whose standing I find lacking advance an alternative theory that they have "associational standing." Associational standing requires three elements: first, the association's members must otherwise have standing to sue in their own right; second, the interest the association seeks to protect must be germane to its purpose; third, neither the claim asserted nor the relief requested must require the individual members to participate in the suit. *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). The aggregators assert that they meet each requirement and therefore have associational standing. I disagree.

An aggregator cannot have "associational standing," because an aggregator is not an "association." The assignors of rights to the aggregators do not thereby become members of the aggregators. Indeed, the aggregators have no members at all. "In determining whether an organization that has no members in the traditional sense may nonetheless assert associational standing, the question is whether the organization is the functional equivalent of a traditional membership organization." *Fund Democracy, LLC v. SEC,* 278 F.3d 21, 25 (D.C.Cir.2002). The aggregators are no such thing. APCC Services, Inc., Davel Communications Group, Inc., Data Net Systems, L.L.C., Intera Communications Corp., Jaroth, Inc., and NSC Telemanagement Corp. are all for-profit companies with contractual relationships with a number of other companies. One corporation does not become a member of another corporation by

reason of entering into contracts with it. The aggregators are in no sense "membership organizations." They are not even "organizations." They are incorporated entities – legal persons – and their clients are no more their "members" than a law firm's clients are the firm's "members."

In sum, I would respond to the District Court's certified question for interlocutory appeal with instructions to dismiss the complaint with respect to the aggregators that do not own PSPs either in whole or in part. I therefore dissent, respectfully, from Part II.A of the opinion of the Court.

GINSBURG, Chief Judge, dissenting with respect to Section II.B.2 and to the judgment.

Because I believe the plaintiffs have a right to pursue their claims for dial-around compensation under 47 U.S.C. § 201(b), I would affirm the order of the district court on that ground.

Section 201(b) provides in relevant part:

> All charges, practices, classifications, and regulations for and in connection with [a] communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful. . . . The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

Sections 206 and 207 afford a private right of action based upon conduct made unlawful by chapter 5 of the Act. Section 201(b), which is in chapter 5, makes unlawful any "unjust or unreasonable" practice in connection with a communication service. It is undisputed that both IXCs and PSPs provide a "communication service," and that the Commission is charged with prescribing rules and regulations interpreting what is just and reasonable. *See* 47 U.S.C. § 201(b); *AT & T Corp. v. Iowa Utilities Bd.,* 525 U.S. 366, 378-79, 397, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). I agree with the plaintiffs that the IXCs' failure to pay dial-around compensation constitutes an "unjust and unreasonable practice" as the agency has interpreted that phrase.

In rejecting the plaintiffs' argument on that score, the court frames the question not as whether there is a private right of action under § 201(b), in conjunction with §§ 206 and 207, but where such an action is to be heard – in district court or before the Commission. According to the court, there is no indication "the Commission in 1999 . . . even thought about suits directly in district court" to recover for a violation of the regulation, op. at 1247, and had the Commission made its intention known, "that would be another matter." *Id.* at 1247-1248. I disagree. It is not for the Commission to decide whether the plaintiffs may sue in federal court for a violation of the statute; the Congress has already made that determination. Section 207 provides that "any person claiming to be damaged by a common carrier['s]"

violation of Chapter 5 "may either make complaint to the Commission . . . or may bring suit . . . in any district court of the United States of competent jurisdiction."

The PSPs allege the IXCs have violated § 201(b) by failing to pay the sums required by the dial-around compensation regulation. In promulgating that regulation the Commission invoked, in addition to § 276(b)(1)(A), its authority under §§ 201-205, *see In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* 14 F.C.C.R. 2545 ¶ 232, 1999 WL 49817 (1999). In its 2003 Report and Order on the regulation, the agency made express what had previously been implied, namely, that "failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act." *Pay Telephone Reclassification and Compensation Provisions,* Report & Order, 18 F.C.C.R. 19975 ¶ 32, 2003 WL 22283556 (2003). That is clearly an authoritative interpretation of § 201(b). The court can say "[t]here was no authoritative interpretation of § 201(b) in this case" only because it makes no mention of the 2003 Report and Order and fails to note that the Commission filed an amicus brief in this case advancing the same position. I disagree that the Commission has not exercised its interpretive authority in this case; the question, as I see it, I whether its interpretation is correct.

The IXCs and the court claim that, if § 201(b) applies here, then a common carrier's violation of any regulation of the Commission could be said to constitute an unjust and unreasonable practice. I see no need to go so far, however, in order to uphold the agency's interpretation of § 201(b) with respect to this regulation. Indeed, I would simply reiterate what this court said a decade ago, namely, that when the Commission reasonably deems the failure of a common carrier to act in a specified way to be an unjust and unreasonable practice, a carrier that fails to comply with the Commission's prescription violates the Act. *See MCI Telecomms. Corp. v. FCC,* 59 F.3d 1407, 1414 (1995) ("We have repeatedly held that a rate-of-return prescription has the force of law and that the Commission may therefore treat a violation of the prescription as a *per se* violation of the requirement of the Communications Act that a common carrier maintain 'just and reasonable' rates"). Contrary to the suggestion of the IXCs, *Sandoval* does not instruct otherwise. As the Court there explained, it is "meaningless to talk about a separate cause of action to enforce" a regulation that authoritatively construes a statute. 532 U.S. at 284, 121 S.Ct. 1511. "A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." *Id.*

I find the IXCs' other arguments for rejecting the Commission's interpretation of § 201(b) equally unpersuasive. The IXCs maintain that § 201(b) does not apply here because it "relates [only] to the common

carriers' provision of communication services to their customers," but they do not even purport to ground that limitation in the text. Nor is there any precedent supporting such a limitation. On the contrary, both the Commission and this court have previously applied § 201(b) to one carrier's provision of a communication service to another carrier. *See MCI,* 59 F.3d at 1414 (§ 201(b) makes unlawful carrier's violation of agency regulation setting maximum rate-of-return for interstate access); *Ascom Communications, Inc. v. Sprint Communications Co.,* 15 F.C.C.R. 3223, 2000 WL 135252 (2000) (§ 201(b) makes unlawful carrier's attempt to collect from PSP for unauthorized and fraudulent calls placed from PSP's phones over carrier's network).

Sprint and AT & T next argue that § 201(b) applies only to the violation of a regulation, like the one at issue in *MCI,* promulgated exclusively pursuant to § 205 of the Act, which authorizes the Commission to set just and reasonable rates for services. I disagree – as does the Commission, which has invoked § 201(b) in several contexts to which § 205 does not pertain. *See, e.g., Ascom,* 15 F.C.C.R. at 3227 ("we conclude that Sprint violated section 201(b) when it charged Ascom for certain calls for which Ascom was not a customer"); *In re Telephone Number Portability,* 18 F.C.C.R. 23697 n. 76, 2003 WL 22658207 (2003) ("we note that a violation of our number portability rules would constitute an unjust and unreasonable practice under § 201(b) of the Act"); *Core Communications, Inc. v. SBC Communications Inc.,* 18 F.C.C.R.

7568 ¶ 25, 2003 WL 1884294 (2003) (failure to comply with merger conditions held an unjust an unreasonable practice). The IXCs offer no reason to believe the Commission may determine what constitutes an unjust or unreasonable practice only if, in doing so, it relies exclusively upon its authority under § 205. That limitation cannot be found in either § 201(b) or in § 205.

Having rejected each of the arguments raised by the IXCs, I see no reason to deem unreasonable the Commission's determination that it is an unjust and unreasonable practice for a common carrier to fail to pay PSPs as required by the regulation. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The Congress delegated to the Commission the responsibility of prescribing "such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Act, 47 U.S.C. § 201(b), and then specifically directed the Commission to establish a compensation plan that "fairly compensates" PSPs for dial-around calls. 47 U.S.C. § 276(b)(1)(A). The agency in turn set a rate for dial-around compensation that it believed to be "fair to both payphone owners and the beneficiaries of those calls" and to serve the public interest by ensuring "the widespread deployment of payphones." 14 F.C.C.R. 2545 ¶ 59. This court upheld the Commission's reasoning, so the justness and reasonableness of the rates is no longer open to challenge. *See APCC v. FCC,* 215 F.3d at 52. One would therefore be hard-pressed to say the

Commission acted unreasonably when it deemed a common carrier's failure to pay just and reasonable compensation an unjust and unreasonable practice. *See Capital Network Sys., Inc. v. FCC,* 28 F.3d 201, 204 (D.C.Cir.1994) ("Congress entrusted the administration of the Communications Act to the FCC. . . . Because 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them").

Accordingly, I would hold the plaintiffs may sue the defendant IXCs under § 201(b) for failure to comply with the Commission's regulation governing dial-around compensation, and would affirm the district court's order on that basis.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-8001, 04-8002.

AT&T Corp.,

Petitioner,

v.

APCC SERVICES, INC., et al.

Respondents.

SPRING COMMUNICATIONS CO., L.P.,

Petitioner,

v.

APCC SERVICE, INC., et al.,

Respondents.

March 1, 2004

BEFORE: ROGERS, TATEL, and ROBERTS, Circuit Judges.

ORDER

PER CURIAM.

Upon consideration of the petitions for permission to appeal pursuant to 28 U.S.C. § 1292(b), the responses thereto, and the replies, it is

ORDERED, on the court's own motion, that these cases be consolidated. It is

FURTHER ORDERED that the petitions be granted. *See* 28 U.S.C. § 1292(b). This court has jurisdiction to consider all issues presented in the district court's September 3, 2003 order, *APCC Servs., Inc. v. AT & T Corp.*, 281 F.Supp.2d 41 (D.D.C. 2003), and December 17, 2003 order in *APCC Servs., Inc. v. Sprint*, Civ. No. 01-642. *See Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 204-05, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996) (appellate jurisdiction under § 1292(b) applies to the entire district court order, and is not tied to the particular question formulated by the district court). Approval of the petitions is without prejudice to reconsideration by the merits panel.

The Clerk is directed to transmit a certified copy of this order to the district court. The district court will file the order as a notice of appeal pursuant to Fed. R.App. P. 5 and collect the mandatory docketing fee from appellants. Upon payment of the fee, the district court is to certify and transmit the preliminary record to this court, after which the case will be

assigned a general docket number and proceed in the normal course.

United States District Court
FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	*	
Plaintiffs,	*	No. CIV.A. 010642 ESH.
v.	*	
SPRINT COMM'N CO. L.P.	*	Dec. 17, 2003
Defendant.	*	

MEMORANDUM OPINION

HUVELLE, District Judge.

Plaintiffs in this case, as well as in several others before the Court, seek payment from common carriers of "dial-around compensation" on behalf of payphone service providers ("PSPs") for certain long distance phone calls originating from their payphones.[1] They claim that the carriers have violated section 276(b)(1)(A) of the Communications Act of 1934, as amended, 47 U.S.C. § 276, and its implementing

[1] Pending before this Court are four additional cases that raise nearly identical issues: *APCC Servs., Inc. v. AT & T Corp.,* Civ. No. 99-0696 (D.D.C.); *CFL v. AT & T Corp.,* Civ. No. 01-1531 (D.D.C.); *APCC Servs., Inc. v. WorldCom,* Civ. No. 01-0638 (D.D.C.) (stayed pending bankruptcy); and *APCC Servs., Inc. v. Cable and Wireless, Inc.,* Civ. No. 02-0158 (D.D.C.) (stayed pursuant to Cable & Wireless's suggestion of bankruptcy filed on December 10, 2003).

regulations, codified at 47 C.F.R. § 64.1300. Plaintiffs base their claims on sections 206 and 207 that provide for the recovery of damages for violations of the Act.

All of the cases before this Court present an initial question as to whether section 276 and its implementing regulations confer a private right of action to sue for a common carrier's alleged failure to pay adequate dial-around compensation. On September 4, 2003, the Court, upon motion to dismiss by Cable & Wireless, found that plaintiffs have a right of action and can base their claims on section 276. *APCC Servs., Inc. v. Cable & Wireless, Inc.,* 281 F.Supp.2d 52 (D.D.C. 2003) ("*C & W*"). Consistent with that ruling, the Court also allowed plaintiffs to amend their complaint to add additional grounds under sections 201(b), 416(c) and 407 of the Communications Act.[2] *Id.* at 57-59. Sprint has requested that the Court reconsider its rulings and dismiss the amended complaint, or alternatively, certify the question for interlocutory appeal, basing its motion in large part upon the Ninth Circuit's recent holding in *Greene v. Sprint Communications Co.,* 340 F.3d 1047 (9th Cir. 2003).[3]

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[2] Applying its ruling in *C & W*, the Court also denied Sprint's motion to dismiss, and granted plaintiff's motion to amend in *APCC Services, Inc. v. Sprint Communications Co.,* Civ. No. 02-0642 (D.D.C.) (Order issued September 3, 2002).

[3] Raising many of the same arguments against plaintiffs' right to sue that Sprint presents, C & W, prior to filing for

(Continued on following page)

Four of these actions also present a question as to whether plaintiffs have Article III standing as assignees of the claims of numerous PSPs.[4] The Court initially dismissed one of these cases on March 28, 2003, finding that plaintiffs lacked standing (*see APCC Servs., Inc. v. AT & T Corp.,* 254 F.Supp.2d 135 (D.D.C. 2003) ("*AT & T I*")), but upon reconsideration, it concluded that the assignments executed by the PSPs bestowed upon the aggregator-plaintiffs standing sufficient to survive an Article III challenge. *See APCC Servs., Inc. v. AT & T Corp.,* 281 F.Supp.2d 41 (D.D.C. 2003) ("*AT & T II*"). AT & T has moved for reconsideration of the Court's second decision on the standing issue, or in the alternative, for certification of an interlocutory appeal.[5]

Whether the Act confers a private right of action to collect dial-around compensation from carriers is a controlling question of law, for it is dispositive as to

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bankruptcy, also filed a motion for reconsideration, or in the alternative, for certification of an interlocutory appeal, arguing that there is no private right of action under the Act. Curiously, AT & T, as defendant in two of the cases before the Court, has never challenged the proposition that plaintiffs may sue under the Communications Act for the alleged failure to pay dial-around compensation.

[4] This issue is not presented by *CFL v. AT & T Corp.,* Civ. No. 01-1531 (D.D.C.).

[5] Prior to filing for bankruptcy, C & W also moved for reconsideration of the Court's decision on standing, or in the alternative, for certification of an interlocutory appeal.

all cases before the Court.[6] To the extent that a private right of action is found to exist, the issue of whether the assignees have standing to sue is also controlling, and is dispositive as to three of the five pending actions.[7] An immediate appeal to the Circuit Court of these issues will prevent potentially unnecessary and protracted litigation while definitively resolving these disputed jurisdictional issues. Thus, although the Court is unwilling to reconsider its prior opinions in *C & W* and *AT & T II*, it will grant the carriers' motions for certification of an interlocutory appeal of both decisions.

Each of the cases is based upon the rights arguably conferred by § 276 and its implementing regulations. One plaintiff (Peoples Telephone Company) in *APCC Servs., Inc. v. AT & T Corp.*, Civ. No. 99-0696, has brought a breach of contract claim as well, but the Court has no diversity jurisdiction over that claim, so without a private right of action under the

[6] Each of the cases is based upon the rights arguably conferred by § 276 and its implementing regulations. One plaintiff (Peoples Telephone Company) in *APCC Servs., Inc. v. AT & T Corp.,* Civ. No. 99-0696, has brought a breach of contract claim as well, but the Court has no diversity jurisdiction over that claim, so without a private right of action under the Communications Act, the Court would have no basis to exercise jurisdiction over the contract claim.

[7] There are a limited number of non-assignee plaintiffs named in *APCC Servs., Inc. v. AT & T Corp.,* Civ. No. 99-0696 (D.D.C.), and *CFL v. AT & T Corp.,* Civ. No. 01-1531 (D.D.C.), that would be unaffected by a decision that the assignee-plaintiffs lack standing.

Communications Act, the Court would have no basis to exercise jurisdiction over the contract claim.

LEGAL ANALYSIS

Whether to allow an interlocutory appeal of a non-final order is left to the discretion of the district court. *Swint v. Chambers County Comm'n,* 514 U.S. 35, 47, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). The court may certify such an appeal if (1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion concerning the ruling exists; and (3) an immediate appeal would materially advance the litigation. *See* 28 U.S.C. § 1292(b); *Walsh v. Ford Motor Co.,* 807 F.2d 1000, 1002 n. 2 (D.C. Cir. 1986); *In re Korean Air Lines Disaster,* 935 F.Supp. 10, 16 (D.D.C. 1996). The party seeking interlocutory review has the burden of persuading the Court that the "circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *In re Vitamins Antitrust Litig.,* No. 99-197, 2000 WL 33142129, at *1 (D.D.C. 2000) (citing *First Am. Corp. v. Al-Nahyan,* 948 F.Supp. 1107, 1116 (D.D.C. 1996)).

In deciding whether to grant interlocutory appeal, the Court of Appeals in this Circuit follows the collateral order doctrine, *see Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan,* 115 F.3d 1020, 1026 (D.C. Cir. 1997), which allows for appeal if it "(1) conclusively determines the disputed question, (2) resolves an important issue completely separate from

the merits of the action, and (3) would be effectively unreviewable on appeal from a final judgment." *United States v. Rostenkowski,* 59 F.3d 1291, 1296 (D.C. Cir. 1995) (quoting *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978)).

I. Controlling Question of Law

Under § 1292(b), a "controlling question of law is one that would require reversal if decided incorrectly or that could materially affect the course of litigation with resulting savings of the court's or the parties' resources." *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group,* 233 F.Supp.2d 16, 19 (D.D.C. 2002). Controlling questions of law include issues that would terminate an action if the district court's order were reversed. *See Klinghoffer v. S.N.C. Achille Lauro,* 921 F.2d 21, 24 (2d Cir. 1990) (a question of law is controlling if it involves issues of personal or subject matter jurisdiction); *United States ex rel. Wis. v. Dean,* 729 F.2d 1100, 1103 (7th Cir. 1984) (decision finding subject matter jurisdiction involves a controlling question of law); *Katz v. Carte Blanche Corp.,* 496 F.2d 747, 755 (3d Cir. 1974) (a question is "controlling" if error in its resolution would warrant dismissal).

The resolution of an issue need not necessarily terminate an action in order to be "controlling," *Klinghoffer,* 921 F.2d at 24, but instead may involve a procedural determination that may significantly

impact the action. *See In re The Duplan Corp.,* 591 F.2d 139, 148 n. 11 (2d Cir. 1978) (a "controlling question of law" includes procedural determination affecting the conduct of an action); *Judicial Watch,* 233 F.Supp.2d at 19 (citing *Johnson v. Burken,* 930 F.2d 1202, 1206 (7th Cir. 1991) (a question of law can be controlling if it determines the outcome "or even the future course of the litigation")); *see also* 16 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure, § 3930 at 426 (1996) ("A steadily growing number of decisions * * * have accepted the better view that a question is controlling * * * if interlocutory reversal might save time for the district court, and time and expense for the litigants."). The impact that the appeal will have on other cases is also a factor supporting a conclusion that the question is controlling. *See Klinghoffer,* 921 F.2d at 24 (citing *Brown v. Bullock,* 294 F.2d 415, 417 (2d Cir. 1961) (leave to appeal granted in part because the "determination was likely to have precedential value for a large number of other suits")); *Genentech, Inc. v. Novo Nordisk A/S,* 907 F.Supp. 97, 99 (S.D.N.Y. 1995) (a question is "controlling" if it affects a large number of cases).

Whether the Communications Act provides a private right of action to collect dial-around compensation is a controlling and dispositive question in each of the five cases, as reversal of the Court's finding would definitively terminate these actions. *See Masri v. Wakefield,* 602 F.Supp. 404, 406 (D. Colo. 1983) (certifying question as to statutory private

right of action). Similarly, if a private right of action is found to exist, the second jurisdictional issue of whether the assignee-plaintiffs have standing is also a controlling question of law. *See Klapper v. Commonwealth Realty Trust,* 662 F.Supp. 235, 236 (D. Del. 1987).[8] Although claims by individual PSPs, which are limited in number, may survive the assignees' dismissal for lack of standing, assignee standing is a procedural determination that will significantly impact the form and conduct of these actions. Moreover, because the Court should not speak to any matter over which it lacks jurisdiction, the issue is controlling. *See In re Sealed Case,* 131 F.3d 208, 210 (D.C. Cir. 1997) ("If we are without subject-matter jurisdiction over the case ostensibly before us, then any pronouncement on any issue * * * becomes a violation of our Article III limitations.").

It is also significant that in addition to the five cases here, PSPs and aggregators have filed numerous suits throughout the country against common carriers based on a claim of a private right of action

[8] Plaintiffs incorrectly argue that because a determination of standing presents a mixed question of law and fact, certification would not be appropriate under section 1292(b). (*See* Pls.' Opp. to AT & T's Mot. at 21.) There is no dispute regarding the contents of the assignments at issue here, and thus, there is no factual dispute that would convert the legal question of standing into a mixed question of law and fact. Rather, the problem is how the jurisprudence involving Article III standing should be applied to the undisputed facts.

under the Communications Act, as well as an assertion of standing based on assignments executed by the PSPs.[9] Despite the rash of these cases countrywide, the parties in the cases in this jurisdiction are the major players in almost all the litigation countrywide, and the assignee-plaintiffs represent more than 400,000 of the 500,000 to 600,000 payphone lines in the United States. Moreover, the FCC, a frequent party before the D.C. Circuit, has dealt with cases similar to these[10] and has litigated issues

[9] The Court discussed many of these cases in its Memorandum Opinion issued in *APCC Servs., Inc. v. WorldCom, Inc.,* Civ. No. 01-638, 2001 U.S. Dist. LEXIS 23988, *18-22, 2001 WL 34383565 (D.D.C. Dec. 21, 2001). For instance, suits have been filed in federal courts in Utah (*Flying J, Inc. v. Sprint Communications Co.,* Civ. No. 99-111-ST (D.Utah)), Virginia (*APCC v. VoCall Communications, Corp.* (E.D.Va.)), Pennsylvania (*see Phone-Tel Communications, Inc. v. AT & T Corp.,* 100 F. Supp 2d 313, 322 (E.D. Pa. 2000)), Arizona (*GCB Communications, Inc. v. WorldCom, Inc.,* Civ. No. 00-1216 (D.Ariz.)), Texas (*see Phonetel Techs., Inc. v. Network Enhanced Telecomm.,* 197 F.Supp.2d 720 (E.D. Tex. 2002)), California (*see, e.g., In re Qwest Communications Corp. Payphone Servs. Providers Compensation Litig.,* No. 02-ML-1483 (C.D. Cal.) (TJH) and cases collected in *C & W,* 281 F.Supp.2d at 54). Although some of these actions have been settled or dismissed, definitive resolution of the issues before the Court could have an impact on those cases that are still pending.

[10] *See, e.g., Bell Atlantic-Delaware, Inc. v. MCI Telecomms. Corp.,* 17 F.C.C.R. 15, 918, 15, 919 (¶ 3) (2002); *Flying J. Inc. and TON Services, Inc.,* Petition for Expedited Declaratory Ruling Regarding a Primary Jurisdiction Referral from the United States District Court for the District of Utah, Northern Division, Memorandum Opinion and Order, CCB/CPD No. 00-04, FCC 03-108 (May 9, 2003); *In the Matter of the Pay Tel. Reclassification and Comp. Provisions of the Telecomm. Act of*

(Continued on following page)

relevant to this matter before the D.C. Circuit.[11] Therefore, it too would presumably have a significant interest in the resolution of these jurisdictional issues. The industry as a whole would thus benefit from a ruling from the Court of Appeals, for not only will the resolution of these issues be dispositive of the cases before this Court, but it will provide persuasive authority for courts in other jurisdictions, as well as for the FCC.

II. Substantial Ground for Difference of Opinion

A substantial ground for difference of opinion is often established by a dearth of precedent within the controlling jurisdiction and conflicting decisions in other circuits. *See City Stores Co. v. Lerner Shops,* 410 F.2d 1010, 1011 (D.C. Cir. 1969); *see also In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.,* 212 F.Supp.2d 903, 909-10 (S.D. Ind. 2002) (certification is appropriate where other courts have adopted

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1996, CC Docket No. 96-128, 2003 FCC LEXIS 5370 (Oct. 3, 2003). In fact, APCC currently has a dial-around compensation claim pending before the FCC. *See APCC v. Verizon Communications, Inc.,* FCC File No. EB-02-MDIC-0082.

[11] *See, e.g., Sprint Corp. v. FCC,* 315 F.3d 369 (D.C. Cir. 2003); *Verizon Tel. Cos. v. FCC,* 269 F.3d 1098 (D.C. Cir. 2001); *Global Crossing Telecomm., Inc. v. FCC,* 259 F.3d 740 (D.C. Cir. 2001); *APCC v. FCC,* 215 F.3d 51 (D.C. Cir. 2000); *MCI Telecomm. Corp. v. FCC,* 143 F.3d 606 (D.C. Cir. 1998); and *MCI Telecomm. Corp v. FCC,* 59 F.3d 1407 (D.C. Cir. 1995).

conflicting positions regarding the issue of law proposed for certification). A substantial ground for dispute also exists where a court's challenged decision conflicts with decisions of several other courts. *See Pub. Interest Research Group v. Hercules, Inc.,* 830 F.Supp. 1549, 1556 (D.N.J. 1993).

"The mere fact that a substantially greater number of judges have resolved the issue one way rather than another does not, of itself, tend to show that there is no ground for difference of opinion." *Vitamins,* 2000 WL 33142129, at *2 (citing *Daetwyler Corp. v. Meyer,* 575 F.Supp. 280, 283 (E.D. Pa. 1983)). Instead, a court faced with a motion for certification must analyze the strength of the arguments in opposition to the challenged ruling to decide whether the issue is truly one on which there is a substantial ground for dispute. *Id.* Where "proceedings that threaten to endure for several years depend on an initial question of jurisdiction * * * or the like," certification may be justified even if there is a relatively low level of uncertainty. 16 Wright & Miller, Federal Practice & Procedure, § 3930 at 422 (1996); *see also Atl. City Elec. Co. v. Gen. Elec. Co.,* 207 F.Supp. 613, 620 (S.D.N.Y. 1962) (when there are reasons to conclusively and expeditiously determine an issue, a narrow approach is unjustified in determining whether there is a substantial ground for difference of opinion).

Although this Court believes that its prior decisions relating to the existence of a private right of

action under the Communications Act and the standing of the plaintiffs-assignees are correct,[12] it also recognizes the arguments in support of contrary conclusions are not insubstantial. With respect to the private right of action, the Ninth Circuit in *Greene* found that since § 276 does not establish a right to compensation from common carriers, the complaint must be dismissed. 340 F.3d at 1052.[13] In so holding, the Ninth Circuit found that there was no basis for finding either an explicit or implied private right of action under sections 206, 207 or 276. In rendering its decision, the Court relied on the Supreme Court's decision in *Alexander v. Sandoval,* 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001), as did this Court (*see* 281 F.Supp.2d at 55), but its more restrictive analysis of *Sandoval* led it to find no private right of action. Moreover, its ruling explicitly rejected the reasoning of the one case upon which this Court relied (*see C & W,* 281 F.Supp.2d at 56) – *Precision*

[12] In this regard, it is noteworthy that after *Greene,* the FCC issued an Order that recognized that "[a] failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act." *In the Matter of the Pay Tel. Reclassification and Comp. Provisions of the Telecomm. Act of 1996,* CC Docket No. 96-128, 2003 FCC LEXIS 5370, ¶ 32 (Oct. 3, 2003).

[13] While *Greene* was issued a week before this Court's decision in *C & W*, this Court was unaware of the *Greene* decision as the parties here, who were also involved in *Greene,* failed to bring it to the Court's attention.

Pay Phones v. Qwest Communications Corp., 210 F.Supp.2d 1106, 1115 (N.D. Cal.2002) – on the grounds that the California district court had incorrectly found a statutory right to fair compensation. *See Greene,* 340 F.3d at 1051 n. 4. Given the absence of any authority in this jurisdiction regarding this issue,[14] and an unanimous decision from an appellate court in another circuit on the same issue, a finding of a substantial difference of opinion as to whether the Communications Act provides for a private right of action is warranted.[15]

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[14] As this Court noted in *C & W*, this Circuit's decision in *MCI,* while relevant and instructive, does not resolve the issue here, since *MCI* involved a challenge to an FCC order, not a suit between private parties. *C & W,* 281 F.Supp.2d at 55.

[15] Arguably, the Ninth Circuit's analysis in *Greene* also provides persuasive authority to deny plaintiffs' request to amend their complaints to add claims under §§ 201(b), 407 and 416(c). As this Court noted, these claims "appear not to add anything to plaintiffs' case beyond what is already covered by the claims expressly based on section 276" (*C & W,* 281 F.Supp.2d at 58), and thus, Sprint may be correct in arguing that these additional counts constitute nothing more than an attempt to recast plaintiffs' § 276 claim under other provisions of the Act. (Sprint's Mot. at 14.) Moreover, these proposed amendments would contravene *Greene's* observation that:

> a private right of action runs counter to this centralization of function [in the FCC] and to the development of a coherent national communications policy. It would also put interpretation of a finely-tuned regulatory scheme squarely in the hands of private parties and some 700 federal judges, instead of in the hands of the Commission * * * . The result would be to deprive the

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Similarly, with respect to the issue of Article III standing, there is substantial ground for difference of opinion as reflected by this Court's conflicting rulings in *AT & T I* and *AT & T II*, a recent decision by the Central District of California that found, without opinion, that plaintiffs lacked standing (*In re Qwest Communications Corp. Payphone Servs. Providers Compensation Litig,* No. 02-ML-1483 (TJH) (C.D. Cal. August 15, 2003)), and the lack of any case law squarely on point.[16] To the extent that there is a private right of action under the Act, the issue of standing based on an assignment of rights presents a novel issue of whether the assignees can satisfy Article III's requirement of injury-in-fact. (*See* AT & T Mot. at 8) (citing *Raines v. Byrd,* 521 U.S. 811, 819, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (the injury must affect the plaintiff in a personal and individual way).) Defendants also argue, with some persuasiveness, that this Court's ruling would allow parties to evade the requirements for class action certification set forth in Fed.R.Civ.P. 23 and for associational

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> FCC of necessary flexibility and authority in creating, interpreting, and modifying communications policy.

340 F.3d at 1053 (internal quotations and citations omitted).

[16] Even the Supreme Court has acknowledged that its rulings on standing have been less than clear. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.,* 454 U.S. 464, 475, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) ("We need not mince words when we say that the concept of 'Article III standing' has not been defined with complete consistency in all the various cases decided by this Court which have discussed it * * * .").

standing established in *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). (*See* AT & T's Mot. at 14-15.)

Given these arguments, as well as the lack of any binding precedent, the Court must agree that, to the extent that a private right of action is found to exist, certification of the issue of standing is also warranted.

III. Material Advancement of the Disposition of the Litigation

Plaintiffs filed the first of these cases against AT & T in early 1999. On May 18, 2001, the Court appointed a special master to assist in overseeing the complicated discovery issues that were presented by that case. To date, the docket in the AT & T case contains more than 110 entries, representing a course of protracted litigation that is currently bogged down in discovery and will no doubt consume a significant amount of the parties' resources in the months and years to come. While the four related matters were not filed until 2001 and 2002, they too will undoubtedly present similarly daunting discovery issues.

For instance, as argued by AT & T, the cost of discovery related to the telephone calls alone will exceed any possible damages award, because "there are likely over one billion separate calls to argue

about here."[17] (AT & T's Mot. at 15.) In fact, the parties have already expended a substantial amount of resources attempting to design acceptable protocols to analyze a selected 2000 phone calls and have spent more than $1 million relating to document discovery. (*See* AT & T's Mot. at 19; AT & T's Reply at 11 n. 5.) And, although significant efforts have been made to gather discovery, AT & T claims that because of the sheer volume of information involved, neither plaintiffs nor the carriers have any rational basis upon which to evaluate possible settlement – more than four years after the filing of the suit. (*See* AT & T's Mot. at 16.)

An immediate appeal would conserve judicial resources and spare the parties from possibly needless expense if it should turn out that this Court's rulings are reversed. *See Lemery v. Ford Motor Co.,* 244 F.Supp.2d 720, 728 (S.D. Tex. 2002) ("It would pain the Court to see both attorneys * * * [and parties] proceed to judgment after considerable expense and delay, only to discover that the judgment must be overturned on appeal because the federal judiciary

[17] AT & T represents that in each case in which the aggregators are named as plaintiffs, each of the 1400 PSPs must demonstrate "that each call for which compensation is sought: (a) was made from their phone; (b) at a time when the local exchange carrier had Flex ANI available [and] operational on that particular line and that [the carrier defendant] received the signal; (c) was carried by [defendant]; (d) was answered by the recipient; and (e) was not paid for by [the carrier]." (AT & T's Mot. at 15.)

lacks subject matter jurisdiction."). Resolution of this question would also assist many other courts in resolving similar disputes. *See Vitamins,* 2000 WL 33142129, at *2. Moreover, although plaintiffs argue correctly that they will be prejudiced by further delays, in the event that it is ultimately found that this Court lacks jurisdiction to litigate these cases, it would be far better for all concerned, including plaintiffs, to have these matters resolved now, as opposed to sometime in the distant future.

Finally, the Court is confident that appellate review of the jurisdictional issues presented satisfies the collateral order doctrine, as it would conclusively resolve important legal issues that are completely separate from the merits of the actions, and these issues will, as a practical matter, be effectively unreviewable following trial because of the enormous expense and time involved.[18] *See GTE New Media Servs. Inc. v. Ameritech Corp.,* 44 F.Supp.2d 313, 316 (D.D.C.1999) ("All indications thus far indicate that to reach final judgment the parties will probably undergo voluminous and burdensome discovery and

[18] Plaintiffs claim there is a "long line of unambiguous precedent" establishing that the issue of standing is not effectively unreviewable on appeal from a final judgment, and thus fails to satisfy the collateral order doctrine. (Pls.' Opp. to AT & T's Mot. at 25.) This authority, however, establishes only that a party may not, as of right, take immediate interlocutory appeal on the standing issue absent a Rule 54(b) certification from the district court, and thus, is not relevant here. *See Carringer v. Tessmer,* 253 F.3d 1322, 1323 (11th Cir. 2001).

possibly months of trial. To learn after that point, on appeal, that the parties should not have proceeded so far, and at such expense, would make the issue effectively unreviewable on appeal from final judgment.")

CONCLUSION

Interlocutory review is warranted here because the interest in avoiding excessively burdensome and expensive litigation is "significant relative to the efficiency interests sought to be advanced by adherence to the final judgment rule." *United States v. Philip Morris Inc.,* 314 F.3d 612, 617 (D.C. Cir. 2003). Although the Court recognizes that the collateral order doctrine should be sparingly invoked, these cases more than qualify for certification under 28 U.S.C. § 1292(b). Moreover, given the need for certification, the Court will grant defendants' request to stay discovery pending appeal, but it expects the parties to seek expedited review in the Court of Appeals.

The Court therefore grants the defendants' request for certification and a stay of discovery pending resolution of the appeal. A separate Order accompanies this Memorandum Opinion.

ORDER

This matter is before the Court on defendant Sprint's Motion to Dismiss Plaintiffs' Second Amended Complaint [], or in the alternative, to certify an

interlocutory appeal. Based on the pleadings, the record, and relevant case law, and for the reasons discussed in the Court's accompanying Memorandum Opinion, it is hereby

ORDERED that defendant's motion to dismiss is **DENIED**; it is

FURTHER ORDERED that defendant's motion for certification of interlocutory appeal is **GRANTED**; and it is

FURTHER ORDERED that *APCC Servs., Inc. v. Cable & Wireless, Inc.,* 281 F.Supp.2d 52 (D.D.C. 2003) and *APCC Servs., Inc. v. AT & T Corp.,* 281 F.Supp.2d 41 (D.D.C. 2003) are certified for immediate appeal pursuant to 28 U.S.C. § 1292(b) as they involve controlling questions of law as to which there is a substantial ground for difference of opinion, and an immediate appeal therefrom may materially advance the ultimate termination of this litigation; and it is

FURTHER ORDERED that discovery in the case is stayed pending action by the Court of Appeals.

SO ORDERED.

United States District Court,
FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	*	
Plaintiffs,	*	No. CIV.A.99-0696 ESH.
v.	*	Dec. 17, 2003
AT&T CORPORATION,	*	
Defendant.	*	

MEMORANDUM OPINION

HUVELLE, District Judge.

Plaintiffs in this case, as well as in several others before the Court, seek payment from common carriers of "dial-around compensation" on behalf of payphone service providers ("PSPs") for certain long distance phone calls originating from their payphones.[1] They claim that the carriers have violated section 276(b)(1)(A) of the Communications Act of 1934, as amended, 47 U.S.C. § 276, and its implementing regulations, codified at 47 C.F.R. § 64.1300. Plaintiffs

[1] Pending before this Court are four additional cases that raise nearly identical issues: *APCC Servs., Inc. v. Sprint Communications Co.,* Civ. No. 01-0642 (D.D.C.); *CFL v. AT & T Corp.,* Civ. No. 01-1531 (D.D.C.); *APCC Servs., Inc. v. WorldCom,* Civ. No. 01-0638 (D.D.C.) (stayed pending bankruptcy); and *APCC Servs., Inc. v. Cable and Wireless, Inc.,* Civ. No. 02-0158 (D.D.C.) (stayed pursuant to Cable & Wireless's suggestion of bankruptcy filed on December 10, 2003).

base their claims on sections 206 and 207 that provide for the recovery of damages for violations of the Act.

All of the cases before this Court present an initial question as to whether section 276 and its implementing regulations confer a private right of action to sue for a common carrier's alleged failure to pay adequate dial-around compensation. On September 4, 2003, the Court, upon motion to dismiss by Cable & Wireless, found that plaintiffs have a right of action and can base their claims on section 276. *APCC Servs., Inc. v. Cable & Wireless, Inc.,* 281 F.Supp.2d 52 (D.D.C.2003) (*"C & W"*). Consistent with that ruling, the Court also allowed plaintiffs to amend their complaint to add additional grounds under sections 201(b), 416(c) and 407 of the Communications Act.[2] *Id.* at 57-59. Sprint has requested that the Court reconsider its rulings and dismiss the amended complaint, or alternatively, certify the question for interlocutory appeal, basing its motion in large part upon the Ninth Circuit's recent holding in *Greene v. Sprint Communications Co.,* 340 F.3d 1047 (9th Cir. 2003).[3]

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[2] Applying its ruling in *C & W,* the Court also denied Sprint's motion to dismiss, and granted plaintiff's motion to amend in *APCC Services, Inc. v. Sprint Communications Co.,* Civ. No. 02-0642 (D.D.C.) (Order issued September 3, 2002).

[3] Raising many of the same arguments against plaintiffs' right to sue that Sprint presents, C & W, prior to filing for bankruptcy, also filed a motion for reconsideration, or in the

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Four of these actions also present a question as to whether plaintiffs have Article III standing as assignees of the claims of numerous PSPs.[4] The Court initially dismissed one of these cases on March 28, 2003, finding that plaintiffs lacked standing (*see APCC Servs., Inc. v. AT & T Corp.,* 254 F.Supp.2d 135 (D.D.C.2003) ("*AT & T I*")), but upon reconsideration, it concluded that the assignments executed by the PSPs bestowed upon the aggregator-plaintiffs standing sufficient to survive an Article III challenge. *See APCC Servs., Inc. v. AT & T Corp.,* 281 F.Supp.2d 41 (D.D.C.2003) ("*AT & T II*"). AT & T has moved for reconsideration of the Court's second decision on the standing issue, or in the alternative, for certification of an interlocutory appeal.[5]

Whether the Act confers a private right of action to collect dial-around compensation from carriers is a controlling question of law, for it is dispositive as to all cases before the Court.[6] To the extent that a private

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alternative, for certification of an interlocutory appeal, arguing that there is no private right of action under the Act. Curiously, AT & T, as defendant in two of the cases before the Court, has never challenged the proposition that plaintiffs may sue under the Communications Act for the alleged failure to pay dial-around compensation.

[4] This issue is not presented by *CFL v. AT & T Corp.,* Civ. No. 01-1531 (D.D.C.).

[5] Prior to filing for bankruptcy, C & W also moved for reconsideration of the Court's decision on standing, or in the alternative, for certification of an interlocutory appeal.

[6] Each of the cases is based upon the rights arguably conferred by § 276 and its implementing regulations. One

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right of action is found to exist, the issue of whether the assignees have standing to sue is also controlling, and is dispositive as to three of the five pending actions.[7] An immediate appeal to the Circuit Court of these issues will prevent potentially unnecessary and protracted litigation while definitively resolving these disputed jurisdictional issues. Thus, although the Court is unwilling to reconsider its prior opinions in *C & W* and *AT & T II,* it will grant the carriers' motions for certification of an interlocutory appeal of both decisions.

LEGAL ANAYLSIS

Whether to allow an interlocutory appeal of a non-final order is left to the discretion of the district court. *Swint v. Chambers County Comm'n,* 514 U.S. 35, 47, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). The court may certify such an appeal if (1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion concerning the

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plaintiff (Peoples Telephone Company) in *APCC Servs., Inc. v. AT & T Corp.,* Civ. No. 99-0696, has brought a breach of contract claim as well, but the Court has no diversity jurisdiction over that claim, so without a private right of action under the Communications Act, the Court would have no basis to exercise jurisdiction over the contract claim.

[7] There are a limited number of non-assignee plaintiffs named in *APCC Servs., Inc. v. AT & T Corp.,* Civ. No. 99-0696 (D.D.C.), and *CFL v. AT & T Corp.,* Civ. No. 01-1531 (D.D.C.), that would be unaffected by a decision that the assignee-plaintiffs lack standing.

ruling exists; and (3) an immediate appeal would materially advance the litigation. *See* 28 U.S.C. § 1292(b); *Walsh v. Ford Motor Co.,* 807 F.2d 1000, 1002 n. 2 (D.C. Cir. 1986); *In re Korean Air Lines Disaster,* 935 F.Supp. 10, 16 (D.D.C.1996). The party seeking interlocutory review has the burden of persuading the Court that the "circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *In re Vitamins Antitrust Litig.,* No. 99-197, 2000 WL 33142129, at *1 (D.D.C.2000) (citing *First Am. Corp. v. Al-Nahyan,* 948 F.Supp. 1107, 1116 (D.D.C.1996)).

In deciding whether to grant interlocutory appeal, the Court of Appeals in this Circuit follows the collateral order doctrine, *see Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan,* 115 F.3d 1020, 1026 (D.C. Cir. 1997), which allows for appeal if it "(1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) would be effectively unreviewable on appeal from a final judgment." *United States v. Rostenkowski,* 59 F.3d 1291, 1296 (D.C. Cir. 1995) (quoting *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978)).

I. Controlling Question of Law

Under § 1292(b), a "controlling question of law is one that would require reversal if decided incorrectly or that could materially affect the course of litigation

with resulting savings of the court's or the parties' resources." *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group,* 233 F.Supp.2d 16, 19 (D.D.C.2002). Controlling questions of law include issues that would terminate an action if the district court's order were reversed. *See Klinghoffer v. S.N.C. Achille Lauro,* 921 F.2d 21, 24 (2d Cir. 1990) (a question of law is controlling if it involves issues of personal or subject matter jurisdiction); *United States ex rel. Wis. v. Dean,* 729 F.2d 1100, 1103 (7th Cir. 1984) (decision finding subject matter jurisdiction involves a controlling question of law); *Katz v. Carte Blanche Corp.,* 496 F.2d 747, 755 (3d Cir. 1974) (a question is "controlling" if error in its resolution would warrant dismissal).

The resolution of an issue need not necessarily terminate an action in order to be "controlling," *Klinghoffer,* 921 F.2d at 24, but instead may involve a procedural determination that may significantly impact the action. *See In re The Duplan Corp.,* 591 F.2d 139, 148 n. 11 (2d Cir. 1978) (a "controlling question of law" includes procedural determination affecting the conduct of an action); *Judicial Watch,* 233 F.Supp.2d at 19 (citing *Johnson v. Burken,* 930 F.2d 1202, 1206 (7th Cir. 1991) (a question of law can be controlling if it determines the outcome "or even the future course of the litigation")); *see also* 16 Wright, Miller & Cooper, Federal Practice & Procedure, § 3930 at 426 (1996) ("A steadily growing number of decisions * * * have accepted the better view that a question is controlling * * * if interlocutory

reversal might save time for the district court, and time and expense for the litigants."). The impact that the appeal will have on other cases is also a factor supporting a conclusion that the question is controlling. *See Klinghoffer,* 921 F.2d at 24 (citing *Brown v. Bullock,* 294 F.2d 415, 417 (2d Cir. 1961) (leave to appeal granted in part because the "determination was likely to have precedential value for a large number of other suits")); *Genentech, Inc. v. Novo Nordisk A/S,* 907 F.Supp. 97, 99 (S.D.N.Y.1995) (a question is "controlling" if it affects a large number of cases).

Whether the Communications Act provides a private right of action to collect dial-around compensation is a controlling and dispositive question in each of the five cases, as reversal of the Court's finding would definitively terminate these actions. *See Masri v. Wakefield,* 602 F.Supp. 404, 406 (D.Colo.1983) (certifying question as to statutory private right of action). Similarly, if a private right of action is found to exist, the second jurisdictional issue of whether the assignee-plaintiffs have standing is also a controlling question of law. *See Klapper v. Commonwealth Realty Trust,* 662 F.Supp. 235, 236 (D.Del.1987).[8] Although claims by individual PSPs,

[8] Plaintiffs incorrectly argue that because a determination of standing presents a mixed question of law and fact, certification would not be appropriate under section 1292(b). (*See* Pls.' Opp. to AT & T's Mot. at 21.) There is no dispute regarding the contents of the assignments at issue here, and thus, there is no factual dispute that would convert the legal question of standing

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which are limited in number, may survive the assignees' dismissal for lack of standing, assignee standing is a procedural determination that will significantly impact the form and conduct of these actions. Moreover, because the Court should not speak to any matter over which it lacks jurisdiction, the issue is controlling. *See In re Sealed Case,* 131 F.3d 208, 210 (D.C. Cir. 1997) ("If we are without subject-matter jurisdiction over the case ostensibly before us, then any pronouncement on any issue * * * becomes a violation of our Article III limitations.").

It is also significant that in addition to the five cases here, PSPs and aggregators have filed numerous suits throughout the country against common carriers based on a claim of a private right of action under the Communications Act, as well as an assertion of standing based on assignments executed by the PSPs.[9] Despite the rash of these cases countrywide, the

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into a mixed question of law and fact. Rather, the problem is how the jurisprudence involving Article III standing should be applied to the undisputed facts.

[9] The Court discussed many of these cases in its Memorandum Opinion issued in *APCC Servs., Inc. v. WorldCom, Inc.,* Civ. No. 01-638, 2001 U.S. Dist. LEXIS 23988, -22 (D.D.C. Dec. 21, 2001). For instance, suits have been filed in federal courts in Utah (*Flying J, Inc. v. Sprint Communications Co.,* Civ. No. 99-111-ST (D. Utah)), Virginia (*APCC v. VoCall Communications, Corp.* (E.D. Va.)), Pennsylvania (*see Phone-Tel Communications, Inc. v. AT & T Corp.,* 100 F. Supp 2d 313, 322 (E.D. Pa.2000)), Arizona (*GCB Communications, Inc. v. WorldCom, Inc.,* Civ. No. 00-1216 (D. Ariz.)), Texas (*see Phonetel Techs., Inc. v. Network Enhanced Telecom,* 197 F.Supp.2d 720 (E.D. Tex.2002)), Cali-

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parties in the cases in this jurisdiction are the major players in almost all the litigation countrywide, and the assignee-plaintiffs represent more than 400,000 of the 500,000 to 600,000 payphone lines in the United States. Moreover, the FCC, a frequent party before the D.C. Circuit, has dealt with cases similar to these[10] and has litigated issues relevant to this matter before the D.C. Circuit.[11] Therefore, it too would presumably have a significant interest in the resolution of these jurisdictional issues. The industry

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fornia (*see, e.g., In re Qwest Communications Corp. Payphone Servs. Providers Compensation Litig.,* No. 02-ML-1483 (C.D. Cal.) (TJH) and cases collected in *C & W,* 281 F.Supp.2d at 54). Although some of these actions have been settled or dismissed, definitive resolution of the issues before the Court could have an impact on those cases that are still pending.

[10] *See, e.g., Bell Atlantic-Delaware, Inc. v. MCI Telecomms. Corp.,* 17 F.C.C.R. 15, 918, 15, 919 (¶ 3), 2002 WL 1842441 (2002); *Flying J. Inc. and TON Services, Inc.,* Petition for Expedited Declaratory Ruling Regarding a Primary Jurisdiction Referral from the United States District Court for the District of Utah, Northern Division, Memorandum Opinion and Order, CCB/CPD No. 00-04, FCC 03-108, 2003 WL 21057292 (May 9, 2003); *In the Matter of the Pay Tel. Reclassification and Comp. Provisions of the Telecomm. Act of 1996,* CC Docket No. 96-128, 2003 FCC LEXIS 5370, 2003 WL 22283556 (Oct. 3, 2003). In fact, APCC currently has a dial-around compensation claim pending before the FCC. *See APCC v. Verizon Communications, Inc.,* FCC File No. EB-02-MDIC-0082.

[11] *See, e.g., Sprint Corp. v. FCC,* 315 F.3d 369 (D.C. Cir. 2003); *Verizon Tel. Cos. v. FCC,* 269 F.3d 1098 (D.C. Cir. 2001); *Global Crossing Telecomm., Inc. v. FCC,* 259 F.3d 740 (D.C. Cir. 2001); *APCC v. FCC,* 215 F.3d 51 (D.C. Cir. 2000); *MCI Telecomm. Corp. v. FCC,* 143 F.3d 606 (D.C. Cir. 1998); and *MCI Telecomm. Corp v. FCC,* 59 F.3d 1407 (D.C. Cir. 1995).

as a whole would thus benefit from a ruling from the Court of Appeals, for not only will the resolution of these issues be dispositive of the cases before this Court, but it will provide persuasive authority for courts in other jurisdictions, as well as for the FCC.

II. Substantial Ground for Difference of Opinion

A substantial ground for difference of opinion is often established by a dearth of precedent within the controlling jurisdiction and conflicting decisions in other circuits. *See City Stores Co. v. Lerner Shops,* 410 F.2d 1010, 1011 (D.C. Cir. 1969); *see also In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.,* 212 F.Supp.2d 903, 909-10 (S.D.Ind.2002) (certification is appropriate where other courts have adopted conflicting positions regarding the issue of law proposed for certification). A substantial ground for dispute also exists where a court's challenged decision conflicts with decisions of several other courts. *See Pub. Interest Research Group v. Hercules, Inc.,* 830 F.Supp. 1549, 1556 (D.N.J.1993).

"The mere fact that a substantially greater number of judges have resolved the issue one way rather than another does not, of itself, tend to show that there is no ground for difference of opinion." *Vitamins,* 2000 WL 33142129, at *2 (citing *Daetwyler Corp. v. R. Meyer,* 575 F.Supp. 280, 283 (E.D. Pa.1983)). Instead, a court faced with a motion for certification must analyze the strength of the arguments in opposition to the

challenged ruling to decide whether the issue is truly one on which there is a substantial ground for dispute. *Id.* Where "proceedings that threaten to endure for several years depend on an initial question of jurisdiction * * * or the like," certification may be justified even if there is a relatively low level of uncertainty. 16 Wright, Miller & Cooper, Federal Practice & Procedure, § 3930 at 422 (1996); *see also Atl. City Elec. Co. v. Gen. Elec. Co.,* 207 F.Supp. 613, 620 (S.D.N.Y.1962) (when there are reasons to conclusively and expeditiously determine an issue, a narrow approach is unjustified in determining whether there is a substantial ground for difference of opinion).

Although this Court believes that its prior decisions relating to the existence of a private right of action under the Communications Act and the standing of the plaintiffs-assignees are correct,[12] it also recognizes the arguments in support of contrary conclusions are not insubstantial. With respect to the private right of action, the Ninth Circuit in *Greene* found that since § 276 does not establish a right to

[12] In this regard, it is noteworthy that after *Greene,* the FCC issued an Order that recognized that "[a] failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act." *In the Matter of the Pay Tel. Reclassification and Comp. Provisions of the Telecomm. Act of 1996,* CC Docket No. 96-128, 2003 FCC LEXIS 5370, ¶ 32, 2003 WL 22283556 (Oct. 3, 2003).

compensation from common carriers, the complaint must be dismissed. 340 F.3d at 1052.[13] In so holding, the Ninth Circuit found that there was no basis for finding either an explicit or implied private right of action under sections 206, 207 or 276. In rendering its decision, the Court relied on the Supreme Court's decision in *Alexander v. Sandoval,* 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001), as did this Court (*see* 281 F.Supp.2d at 55), but its more restrictive analysis of *Sandoval* led it to find no private right of action. Moreover, its ruling explicitly rejected the reasoning of the one case upon which this Court relied (*see C & W,* 281 F.Supp.2d at 56) – *Precision Pay Phones v. Qwest Communications Corp.,* 210 F.Supp.2d 1106, 1115 (N.D.Cal.2002) – on the grounds that the California district court had incorrectly found a statutory right to fair compensation. *See Greene,* 340 F.3d at 1051 n. 4. Given the absence of any authority in this jurisdiction regarding this issue,[14] and an unanimous decision from an appellate court in another circuit on the same issue, a finding of a substantial difference of opinion as to whether

[13] While *Greene* was issued a week before this Court's decision in *C & W,* this Court was unaware of the *Greene* decision as the parties here, who were also involved in *Greene,* failed to bring it to the Court's attention.

[14] As this Court noted in *C & W,* this Circuit's decision in *MCI,* while relevant and instructive, does not resolve the issue here, since *MCI* involved a challenge to an FCC order, not a suit between private parties. *C & W,* 281 F.Supp.2d at 55.

the Communications Act provides for a private right of action is warranted.[15]

Similarly, with respect to the issue of Article III standing, there is substantial ground for difference of opinion as reflected by this Court's conflicting rulings in *AT & T I* and *AT & T II,* a recent decision by the Central District of California that found, without opinion, that plaintiffs lacked standing (*In re Qwest Communications Corp. Payphone Servs. Providers Compensation Litig,* No. 02-ML-1483 (TJH) (C.D. Cal. August 15, 2003)), and the lack of any case law

[15] Arguably, the Ninth Circuit's analysis in *Greene* also provides persuasive authority to deny plaintiffs' request to amend their complaints to add claims under §§ 201(b), 407 and 416(c). As this Court noted, these claims "appear not to add anything to plaintiffs' case beyond what is already covered by the claims expressly based on section 276" (*C & W,* 281 F.Supp.2d at 58), and thus, Sprint may be correct in arguing that these additional counts constitute nothing more than an attempt to recast plaintiffs' § 276 claim under other provisions of the Act. (Sprint's Mot. at 14.) Moreover, these proposed amendments would contravene *Greene's* observation that:

> a private right of action runs counter to this centralization of function [in the FCC] and to the development of a coherent national communications policy. It would also put interpretation of a finely-tuned regulatory scheme squarely in the hands of private parties and some 700 federal judges, instead of in the hands of the Commission * * * . The result would be to deprive the FCC of necessary flexibility and authority in creating, interpreting, and modifying communications policy.

340 F.3d at 1053 (internal quotations and citations omitted).

squarely on point.[16] To the extent that there is a private right of action under the Act, the issue of standing based on an assignment of rights presents a novel issue of whether the assignees can satisfy Article III's requirement of injury-in-fact. (*See* AT & T Mot. at 8) (citing *Raines v. Byrd,* 521 U.S. 811, 819, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997)) (the injury must affect the plaintiff in a personal and individual way). Defendants also argue, with some persuasiveness, that this Court's ruling would allow parties to evade the requirements for class action certification set forth in Fed.R.Civ.P. 23 and for associational standing established in *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). (*See* AT & T's Mot. at 14-15.)

Given these arguments, as well as the lack of any binding precedent, the Court must agree that, to the extent that a private right of action is found to exist, certification of the issue of standing is also warranted.

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[16] Even the Supreme Court has acknowledged that its rulings on standing have been less than clear. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.,* 454 U.S. 464, 475, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) ("We need not mince words when we say that the concept of 'Article III standing' has not been defined with complete consistency in all the various cases decided by this Court which have discussed it * * * ").

III. Material Advancement of the Disposition of the Litigation

Plaintiffs filed the first of these cases against AT & T in early 1999. On May 18, 2001, the Court appointed a special master to assist in overseeing the complicated discovery issues that were presented by that case. To date, the docket in the AT & T case contains more than 110 entries, representing a course of protracted litigation that is currently bogged down in discovery and will no doubt consume a significant amount of the parties' resources in the months and years to come. While the four related matters were not filed until 2001 and 2002, they too will undoubtedly present similarly daunting discovery issues.

For instance, as argued by AT & T, the cost of discovery related to the telephone calls alone will exceed any possible damages award, because "there are likely over *one billion* separate calls to argue about here."[17] (AT & T's Mot. at 15.) In fact, the parties have already expended a substantial amount of resources attempting to design acceptable protocols to analyze a selected 2000 phone calls and have spent

[17] AT & T represents that in each case in which the aggregators are named as plaintiffs, each of the 1400 PSPs must demonstrate "that each call for which compensation is sought: (a) was made from their phone; (b) at a time when the local exchange carrier had Flex ANI available [and] operational on that particular line and that [the carrier defendant] received the signal; (c) was carried by [defendant]; (d) was answered by the recipient; and (e) was not paid for by [the carrier]." (AT & T's Mot. at 15.)

more than $1 million relating to document discovery. (*See* AT & T's Mot. at 19; AT & T's Reply at 11 n. 5.) And, although significant efforts have been made to gather discovery, AT & T claims that because of the sheer volume of information involved, neither plaintiffs nor the carriers have any rational basis upon which to evaluate possible settlement – more than four years after the filing of the suit. (*See* AT & T's Mot. at 16.)

An immediate appeal would conserve judicial resources and spare the parties from possibly needless expense if it should turn out that this Court's rulings are reversed. *See Lemery v. Ford Motor Co.,* 244 F.Supp.2d 720, 728 (S.D.Tex.2002) ("It would pain the Court to see both attorneys * * * [and parties] proceed to judgment after considerable expense and delay, only to discover that the judgment must be overturned on appeal because the federal judiciary lacks subject matter jurisdiction."). Resolution of this question would also assist many other courts in resolving similar disputes. *See Vitamins,* 2000 WL 33142129, at *2. Moreover, although plaintiffs argue correctly that they will be prejudiced by further delays, in the event that it is ultimately found that this Court lacks jurisdiction to litigate these cases, it would be far better for all concerned, including plaintiffs, to have these matters resolved now, as opposed to sometime in the distant future.

Finally, the Court is confident that appellate review of the jurisdictional issues presented satisfies the collateral order doctrine, as it would conclusively

resolve important legal issues that are completely separate from the merits of the actions, and these issues will, as a practical matter, be effectively unreviewable following trial because of the enormous expense and time involved.[18] *See GTE New Media Servs. Inc. v. Ameritech Corp.,* 44 F.Supp.2d 313, 316 (D.D.C.1999) ("All indications thus far indicate that to reach final judgment the parties will probably undergo voluminous and burdensome discovery and possibly months of trial. To learn after that point, on appeal, that the parties should not have proceeded so far, and at such expense, would make the issue effectively unreviewable on appeal from final judgment.")

CONCLUSION

Interlocutory review is warranted here because the interest in avoiding excessively burdensome and expensive litigation is "significant relative to the efficiency interests sought to be advanced by adherence to the final judgment rule." *United States v. Philip Morris Inc.,* 314 F.3d 612, 617 (D.C. Cir. 2003). Although the Court recognizes that the collateral

[18] Plaintiffs claim there is a "long line of unambiguous precedent" establishing that the issue of standing is not effectively unreviewable on appeal from a final judgment, and thus fails to satisfy the collateral order doctrine. (Pls.' Opp. to AT & T's Mot. at 25.) This authority, however, establishes only that a party may not, as of right, take immediate interlocutory appeal on the standing issue absent a Rule 54(b) certification from the district court, and thus, is not relevant here. *See Carringer v. Tessmer,* 253 F.3d 1322, 1323 (11th Cir. 2001).

order doctrine should be sparingly invoked, these cases more than qualify for certification under 28 U.S.C. § 1292(b). Moreover, given the need for certification, the Court will grant defendants' request to stay discovery pending appeal, but it expects the parties to seek expedited review in the Court of Appeals.

The Court therefore grants the defendants' request for certification and a stay of discovery pending resolution of the appeal. A separate Order accompanies this Memorandum Opinion.

ORDER

This matter is before the Court on defendant AT & T's Motion for Reconsideration or, in the Alternative, for Certification of an Interlocutory Appeal. Based on the pleadings, the record, and relevant case law, and for the reasons discussed in the Court's accompanying Memorandum Opinion, it is hereby

ORDERED that defendant's motion for reconsideration is **DENIED**; it is

FURTHER ORDERED that defendant's motion for certification of interlocutory appeal is **GRANTED**; and it is

FURTHER ORDERED that *APCC Servs., Inc. v. Cable & Wireless, Inc.,* 281 F.Supp.2d 52 (D.D.C.2003) and *APCC Servs., Inc. v. AT & T Corp.,* 281 F.Supp.2d 41 (D.D.C.2003) are certified for immediate appeal

pursuant to 28 U.S.C. § 1292(b) as they involve controlling questions of law as to which there is a substantial ground for difference of opinion, and an immediate appeal therefrom may materially advance the ultimate termination of this litigation; and it is

FURTHER ORDERED that discovery in the case is stayed pending action by the Court of Appeals, and the Clerk shall administratively close this case pending appeal.

SO ORDERED.

United States District Court,
FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	*	
Plaintiffs,	*	No. CIV.A.99-0696 ESH
v.	*	Sept. 3, 2003
AT& T CORPORATION,	*	
Defendant.	*	

MEMORANDUM OPINION

HUVELLE, District Judge.

On March 28, 2003, this Court dismissed claims brought by five of six plaintiffs against AT & T for payment of dial-around compensation allegedly owed to the payphone service providers ("PSPs") that plaintiffs represent.[1] The Court concluded that it lacked subject matter jurisdiction, finding that plaintiffs lacked Article III standing based on either the assignments executed by the PSPs or the doctrine of associational standing.[2] *See APCC Services, Inc. v.*

[1] This issue has spawned two other suits currently pending in this Court. *APCC Services, Inc. v. Cable & Wireless, Inc.,* Civ. No. 02-158; *APCC Services, Inc. v. Sprint Communications Co.,* Civ. No. 01-642.

[2] The Court's Memorandum Opinion and Order in *APCC I* was directed only to the aggregator plaintiffs and not plaintiff Peoples Telephone Company, which is the only plaintiff in this matter that has brought an action on its own behalf. Thus, for

(Continued on following page)

AT & T Corp., 254 F.Supp.2d 135 (D.D.C. 2003) [hereinafter "*APCC I*"]. In response to this decision, the aggregator plaintiffs have now filed a Motion for Reconsideration ["Mot. for Recons."] and a Motion for Leave to Amend Complaint. Plaintiff Peoples Telephone Company has also filed a Motion for Leave to Amend.

In their Motion for Reconsideration, plaintiffs cite, for the first time, a host of authorities that recognize the validity of an assignment for collection and that offer a principled basis for differentiating an assignment of title to a claim, which vests assignees with legally enforceable rights, from an assignment merely of the right to bring suit, which does not. These authorities persuasively distinguish the instant matter from *Connecticut v. Physicians Health Services of Connecticut. Inc.,* 287 F.3d 110 (2d Cir.2002) – the primary case on which the Court relied in its prior Memorandum Opinion. The Court therefore no longer believes that this case can be decided based on *Physicians Health,* and instead will hold that the aggregator plaintiffs have standing based on the assignments from the PSPs they represent. Because the Court is vacating its March 28, 2003 Memorandum Opinion, it need not reach plaintiffs' motions to amend. It must, however, address defendant's challenge to the validity of plaintiff APCC

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the purposes of this Memorandum Opinion, the term "plaintiffs" excludes Peoples Telephone Company except where it is explicitly referenced.

Services' assignments under Virginia law. The Court finds this challenge to be unavailing. Accordingly, defendant's Motion to Dismiss Assignee Plaintiffs' Claims will be denied.

BACKGROUND

Plaintiffs APCC Services, Inc., Data Net Systems, LLC, Jaroth, Inc. d/b/a Pacific Telemanagement Services, NSC Telemanagement Corp., Davel Communications Group, Inc., and Peoples Telephone Company, Inc. filed this action pursuant to sections 206 and 207 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 206, 207, on behalf of more than one thousand PSPs that own and operate over 400,000 public payphones throughout the United States.[3] (First Amended Complaint ["Am. Compl."] ¶¶ 1, 11.) Five of the six plaintiffs are "aggregators," or clearinghouses, created to streamline the billing and collection of dial-around compensation from common carriers of telephone calls, like defendant, who are subject to the compensation payment obligations mandated by section 276 of the Act. (*Id.* ¶ 10.) Pursuant to section 276, defendant is required to compensate PSPs for completed access code and toll

[3] PSPs own, install, operate, manage, or maintain payphone services and facilities which enable callers to access the telephone network when away from their home or office. They recover the cost of the payphone services and facilities by receiving payment for their use from callers or from carriers. (Am. Compl.¶ 14.)

free calls that are made using PSPs' payphones and carried over defendant's telephone network facilities. (*Id.* ¶ 1.) PSPs contract with aggregators to facilitate the billing and payment process.

Plaintiffs bring this suit as assignees of the claims of the PSPs they represent. The assignments provide that each PSP "assigns, transfers and sets over to [plaintiff] for purposes of collection all rights, title and interest of the [PSP] in the [PSP]'s claims, demands or causes of action for 'Dial-Around Compensation.'" (AT & T's Motion to Dismiss Assignee Plaintiffs' Claims ["AT & T Mot. to Dismiss"] Ex. A at 1.)[4] The assignments do not give plaintiffs the right to retain or share in any proceeds of the litigation. (*Id.*)

In January 2003, defendant filed a motion to dismiss for lack of subject matter jurisdiction, which challenged plaintiffs' standing to bring suit. Defendant argued that as assignees of the PSPs, plaintiffs did not suffer an injury-in-fact of their own and did not have a personal stake in the outcome of the litigation. Defendant further argued that even if plaintiffs have standing, APCC Services' claims cannot be assigned under applicable state law, and therefore, the assignments are invalid. Because the Court concluded that plaintiffs did not have standing

[4] During discovery, plaintiffs produced nearly 1,300 identical assignments from the PSPs they represent. (AT & T's Memorandum in Support of its Motion to Dismiss Assignee Plaintiffs' Claims at 2 n. 2.)

to sue, it did not reach the validity of APCC Services' assignments. *See APCC I,* 254 F.Supp.2d at 138. Defendant's motion was granted and the claims asserted by the aggregator plaintiffs were dismissed. *Id.* at 144.

Plaintiffs have now moved the Court to reconsider its decision or, alternatively, for leave to amend their complaint to substitute several independent payphone service providers to act as class representatives or to name all independent payphone service providers on whose behalf suit was initially brought. Plaintiff Peoples Telephone Company has also filed a similar motion for leave to amend. Defendant opposes these motions, arguing that plaintiffs are procedurally barred from moving for reconsideration; that the Court's prior finding of lack of standing is correct; and that leave to amend may not be granted given the lack of subject matter jurisdiction.

LEGAL ANALYSIS

I. Rule 54(b) Standard

Plaintiffs request the Court to reconsider its March 28, 2003 Memorandum Opinion and Order pursuant to Fed. R. Civ. P. 54(b). Under Rule 54(b), when multiple parties are involved in a case and an order adjudicating fewer than all the claims is issued, the order "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties" unless the court has directed the entry of final judgment as to

the particular claims addressed by the order. Fed. R. Civ. P. 54(b). Thus, Rule 54(b) "addresses interlocutory judgments." *Campbell v. United States Dep't of Justice,* 231 F.Supp.2d 1, 6 n. 8 (D.D.C. 2002). "Reconsideration of an interlocutory decision is available under the standard, 'as justice requires.'" *Id.* at 7 (quoting *Childers v. Slater,* 197 F.R.D. 185, 190 (D.D.C. 2000)). That standard "differs from the standards applied to final judgments under Federal Rules of Civil Procedure 59(e) and 60(b)," where the Court must find "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Id.* In arguing that the stricter standard of Rule 60(b) should be applied, defendant disregards this important distinction.[5]

The Court's March 28, 2003 ruling did not dispose of the entire matter as it did not involve one of the plaintiffs – Peoples Telephone Company. Nor did the Court expressly direct the entry of final judgment with respect to the claims addressed. Consequently, the order is interlocutory, and it may be revised where "justice requires." *See* Fed.R.Civ.P. 60(b) Advisory

[5] Defendant relies on two cases that apply the stricter standard but do not specify the rules under which the moving party requested reconsideration. *See Regency Communications, Inc. v. Cleartel Communications, Inc.,* 212 F.Supp.2d 1, 3 (D.D.C. 2002); *Cobell v. Norton,* 263 F.Supp.2d 58, 64 (D.D.C. 2003). Both cases were decided after *Campbell,* and neither challenges the view that a court may grant a motion to reconsider pursuant to Rule 54(b) "as justice requires."

Comm. Notes ("[I]nterlocutory judgments are not brought within the restrictions of [Rule 60(b)], but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires."); *see also Childers,* 197 F.R.D. at 190.

II. Plaintiffs' Standing as Assignees

In *APCC I,* the Court was persuaded by defendant's argument that plaintiffs lacked standing because they were required to remit any damages to the PSPs, and thus, did not have a concrete stake in the outcome of the litigation. In opposition, plaintiffs relied almost exclusively on *Vermont Agency of Natural Resources v. United States,* 529 U.S. 765, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000), arguing that the Supreme Court's decision in that case enshrines the principle that all assignments confer standing. Rejecting plaintiffs' overly expansive reading of *Vermont Agency,* the Court granted defendant's motion. While the Court remains of the view that *Vermont Agency* alone does not decide this case, plaintiffs have now presented more convincing authority for their position and have persuaded the Court that it was in error when it concluded that plaintiffs lacked standing. In particular, and as discussed below, plaintiffs have successfully differentiated the assignments at issue here, which convey legal title in the dial-around compensation claims, from those in *Physicians Health,* which conveyed merely the power of attorney to bring suit. Moreover, plaintiffs have established

that the requirement that assignees ultimately account to assignors for any relief awarded is irrelevant in determining whether plaintiffs have a sufficient personal interest in the controversy to acquire standing. Accordingly, the Court concludes that it is in the interest of justice to reconsider and to vacate its March 28, 2003 Memorandum Opinion and Order.

A. Assignments for Collection

In their motion for reconsideration, plaintiffs present cogent arguments in support of their standing that go well beyond their initial reliance on *Vermont Agency.* Most importantly, they have for the first time now cited a long line of cases and legal treatises that recognize a well-established principle that assignees for collection purposes are entitled to bring suit where the assignments transfer absolute title to the claims. (Mot. for Recons. at 11, 14.)

This right was explicitly recognized by the Supreme Court when it upheld the right of an assignee for collection to bring suit – even where the remedy awarded was obtained for the benefit of the assignors. *Spiller v. Atchison,* 253 U.S. 117, 40 S.Ct. 466, 64 L.Ed. 810 (1920). *Spiller* involved a suit brought by the assignee of 2,000 shippers complaining that certain railroads were charging excessive rates on the interstate shipment of cattle in violation of the requirements of the Interstate

Commerce Act.[6] The Supreme Court upheld Spiller's right to bring suit to recover damages awarded to cattle shippers under a reparation order made by the Interstate Commerce Commission for unlawful freight overcharges on cattle shipments based on assignments from those cattle shippers.

> The assignments were absolute in form and plainly their effect * * * was to vest the legal title in Spiller. What they did not pass to him was the beneficial or equitable title. But this was not necessary to support the right of the assignee to claim an award or reparation and enable him to recover it by action at law brought in his own name but for the benefit of the equitable owners of the claims; especially since it appeared that such was the real purpose of the assignments.

Id. at 134, 40 S.Ct. 466. The Supreme Court thus found that the assignments conferred upon Spiller a sufficient interest in the claims to entitle him to bring suit even though he was obligated to remit the proceeds of the suit to the shippers that had assigned their claims.

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[6] It is worth pointing out that the illegal charge provisions in the ICA under which Spiller recovered became the model for the comparable provisions in the Communications Act under which the present plaintiffs seek to recover. *See AT & T v. Cent. Office Tel., Inc.,* 524 U.S. 214, 221-22, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998).

Similarly, in *Titus v. Wallick,* 306 U.S. 282, 59 S.Ct. 557, 83 L.Ed. 653 (1939), the Supreme Court ruled that assignments transferring "all right, title and interest" in a claim gave petitioner the right to bring suit even though a separate agreement between the assignor and petitioner required that petitioner turn over the proceeds of the claim to the assignor. *Id.* at 286, 59 S.Ct. 557. In reaching this conclusion, the Supreme Court observed:

> [A]ny form of assignment which purports to assign or transfer a chose in action confers upon the transferee such title or ownership as will enable him to sue upon it. This is true even though the assignment is for the purpose of suit only and the transferee is obligated to account for the proceeds of suit to his assignor.

Id. at 289, 59 S.Ct. 557. It is thus well settled that the validity of an assignment (and therefore the status of the assignee as the real party in interest under Fed. R. Civ. P. 17)[7] is not affected by the "parties' additional agreement that the transferee will be

[7] Rule 17(a) requires that "[e]very action . . . be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a). The rule ensures that an action will be brought by the person who is entitled to enforce the right under the governing substantive law. *See* 6A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1543 (2d ed.1990). Rule 17(a) does not, however, require that suit "be brought in the name of the person who ultimately will benefit from the recovery." *Id.*

obligated to account for the proceeds of a suit brought on the claim." *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.,* 106 F.3d 11, 17 (2d Cir.1997); *see also United States ex rel. Wolther v. N.H. Fire Ins.,* 173 F.Supp. 529, 537 (E.D.N.Y.1959) ("[A]n assignee is the real party in interest * * * if he has some title, legal or equitable, to the thing assigned. The consideration paid, the purpose of the assignment, the use to be made of any proceeds collected, is immaterial.") (quotation omitted); *cf. Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau,* 701 F.2d 1276, 1282 (9th Cir.1983) ("An assignment of claims does not prevent the assignors from receiving the benefits of litigation.").

The critical distinction differentiating between valid and invalid assignments is thus not whether the assignor will ultimately obtain the proceeds of the suit, but rather whether the assignment manifests "an intent to divest the assignor of all control and right to his claim, thereby empowering the assignee to control the cause of action and to receive its fruits." *Advanced Magnetics,* 106 F.3d at 15 (citation and quotation omitted). "An assignee for the purposes of collection holds legal title to the debt and is a real party in interest, even though the assignee must account to the assignor for whatever is recovered in this action." *Airlines Reporting Corp. v. S and N Travel, Inc.,* 857 F.Supp. 1043, 1047 (E.D.N.Y.1994); *see also* 4 JAMES W. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 17.11[a], [c] (3d ed. 1997) ("Under a valid assignment, the assignee of a claim becomes the real

party in interest for that claim * * * . The assignee is real party in interest even though assignee must account to the assignor.").

Such a valid assignment must be contrasted with a "provision by which one person grants another the power to sue on and collect on a claim [which] confers on the grantee a power of attorney with respect to that claim." *Advanced Magnetics,* 106 F.3d at 17. Such an assignment – for example one that conveys merely "the power to commence and prosecute * * * any suits, actions or proceedings at law or in equity in any court of competent jurisdiction" – does not demonstrate an intent to transfer ownership or title to a claim, and therefore does not entitle the assignee to bring suit in his own name. *Id.* at 14, 18; *see also Titus,* 306 U.S. at 289, 59 S.Ct. 557 ("[A] power of attorney to sue, standing alone, does not * * * operate as an assignment to vest the [assignee] with such title or interest as will enable him to maintain the suit in his own name."); *Airlines Reporting,* 857 F.Supp. at 1046-47 (observing that a "person authorized to bring suit solely on the basis of a power of attorney is not a real party in interest.")

With these principles in mind, the test for determining whether an assignee may bring suit as a real party in interest is whether the assignment transfers legal title to the claim or instead merely transfers a power of attorney. There can be little question that the assignments currently before the Court, which purport to transfer *ownership* of the right to collect, give plaintiffs legal title to the dial-around-compensation claims.

As such, they convey an interest in these claims sufficient to entitle plaintiffs to initiate legal action. Neither the fact that the assignments are for collection purposes nor the fact that plaintiffs are obligated under a separate agreement to remit the proceeds of any legal action to the PSPs negates plaintiffs' present interest in the claims or their right to bring suit. Defendant does not seriously contend otherwise. Instead, while acknowledging the case law described above, defendant argues that plaintiffs have erroneously conflated real party in interest status under Fed. R. Civ. P. 17 with Article III standing, and that even if the holder of a valid assignment may be entitled to bring suit as the real party in interest, "the real issue before the Court is subject matter jurisdiction." (AT & T Opp. at 5.)

Defendant is correct in pointing out that "Rule 17 does not provide an independent basis for jurisdiction" (AT & T Opp. at 5), and that a plaintiff must be both the real party in interest and have standing to bring suit. WRIGHT, *supra* § 1542. This argument, however, is something of a red herring. As the D.C. Circuit has recognized, "[s]tanding and real-party-in interest questions * * * overlap to the extent that both ask whether the plaintiff has a personal interest in the controversy." *Whelan v. Abell,* 953 F.2d 663, 672 (D.C.Cir.1992). Indeed, "[g]enerally real parties in interest have standing," MOORE, *supra* § 17.10[1]. For both statuses require that plaintiffs "possess[ ] a sufficient interest in the action to entitle * * * [them] to be heard on the merits." WRIGHT, *supra* § 1542.

Thus, if a valid assignment transfers an interest sufficient to make the assignee a real party in interest, it logically follows that the assignee will then have the "concrete interest" in the litigation required by the standing doctrine. This is so because what has been assigned in such cases is, in effect, the legal "injury" that generates Article III standing. In other words, the assignment in such cases conveys to the assignee not merely the power to assert a claim on another's behalf, but also the right to vindicate a legal wrong done to the assignor as if that wrong had been done to the assignee itself. Any other conclusion would mean that a real party in interest who has been assigned a claim for collection purposes would never have standing to sue (because the underlying legal injury would have never been done to the assignee itself), which-as we have just seen – is certainly not the law. *See also* MOORE, *supra* § 17.11[1][c] (citing cases in the Second, Ninth, Tenth, and Eleventh Circuits).

And indeed, the cases cited by defendant do not suggest otherwise. Defendant relies on *Whelan* to distinguish between Article III jurisdiction and real party in interest status under Rule 17. (AT&T Opp. at 6-7.) In that case, defendants' challenge to plaintiffs' real party in interest status was barred because defendants did not raise the issue until the first day of trial – thus prejudicing the real party by undue delay. On appeal, defendants attempted to recast their real party in interest challenge into a jurisdictional challenge under Article III, which, unlike Rule

17(a), can be raised at any time.[8] *Whelan,* 953 F.2d at 671. The Court rejected this effort, noting that plaintiffs had clearly suffered an injury and thus had standing to sue. *Id.* at 672. Defendant suggests that since the D.C. Circuit rejected the *Whelan* defendants' effort to recast a Rule 17 challenge into a standing issue, plaintiffs should similarly be precluded here from converting a standing challenge into a Rule 17 issue.

This argument, however, misconstrues both the facts of this case and the holding in *Whelan.* Plaintiffs here are not attempting to recast a standing issue as a Rule 17 issue. They merely highlight the fact, recognized in *Whelan,* that the two standards share a common element. *See id.* (observing that both standards require that "plaintiff has a personal interest in the controversy"). It is true that the D.C. Circuit recognized that a party with standing may not always be the real party in interest (i.e. the party with the right to bring suit under substantive law). For example, where a closely-held corporation is injured, a

[8] Rule 17(a) provides that "[n]o action shall be dismissed on real-party-in-interest grounds until a reasonable time has been allowed after objection for ratification of commencement of the action by * * * the real party in interest * * * . This implies that the defense may not be raised at any time, for the real party must have the opportunity to step into the 'unreal' party's shoes and should not be prejudiced by undue delay." *Whelan,* 953 F.2d at 672. Thus, the Court held that it was an abuse of discretion to allow a Rule 17(a) defense "as late as the start of the trial if the real party has been prejudiced by the defendant's laxness." *Id.*

shareholder has standing to sue (as an injured party), but that shareholder must also possess the right under governing substantive law to bring suit as the real party in interest; the injury alone is not sufficient. This rule, however, does not imply its converse. And, indeed, as a leading treatise has recognized, although "not every party who meets standing requirements is a real party in interest," real parties in interest generally have standing. MOORE, *supra* § 17.10. The injury that has generated the suit is theirs to vindicate. Nothing in *Whelan* suggests otherwise. Here, the Court has now been persuaded that the assignment has given plaintiffs the requisite interest in the controversy to make them real parties in interest. And nothing has been presented that would tend to cast doubt upon their standing to sue in light of that status.

Defendant fails to cite any cases in which an assignee for collection was found to lack standing. Instead, it relies only on cases that question whether assignments for collection were made collusively in order to create federal diversity jurisdiction in violation of 28 U.S.C. § 1359.[9] (AT&T Opp. at 8-10.) These cases hold that an assignee of title solely for collection purposes may bring suit in federal court based on diversity jurisdiction only if there is complete diversity

[9] Under section 1359, "[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." 28 U.S.C. § 1359.

based on the assignor's citizenship. They do not address Article III standing. *E.g., Airlines Reporting Corp. v. S and N Travel,* 58 F.3d 857, 862-64 n. 4 (2d Cir.1995) (holding that though an assignee was the real party in interest under Rule 17(a), the assignments were collusively made for the purpose of manufacturing federal jurisdiction and therefore there was no true diversity of citizenship); *Attorneys Trust v. Videotape Computer Prods.,* 93 F.3d 593 (9th Cir.1996) (assignee of title for collection only may bring suit in federal court where court has diversity jurisdiction based on assignor's citizenship.[10] In the present case, of course, diversity is not in dispute, as the Court's subject-matter jurisdiction is based on the existence of a federal question. As such, the cases relied upon by defendant, which having nothing to say about whether an assignee for collection has standing to sue, are simply inapposite.

[10] Defendant's reliance on *Compton v. Atwell,* 207 F.2d 139 (D.C.Cir.1953), is equally unconvincing given that the Court there held that the plaintiff, an assignee for collection only, could bring suit for the benefit of other creditors of the defendant. The assignee's standing was not challenged – only his status as a real party in interest. In any event, the Court concluded that it did not need to determine whether the assignee was the real party in interest because plaintiff was authorized to bring suit pursuant to an exception to the real party in interest requirement enumerated in Rule 17(a). *Id.* at 141.

B. Physicians Health

In *APCC I,* this Court relied on a Second Circuit decision which held that where an assignment does not convey a concrete stake in the outcome of the litigation, the assignee/plaintiff (there, the State of Connecticut) does not "suffer an injury of a nature that would confer standing upon it under Article III of the Constitution." *Physicians Health,* 287 F.3d at 115. Invoking this approach, this Court observed:

> Plaintiffs' situation is precisely the same as that of the State of Connecticut. The assignments on which plaintiffs rely for standing do not shift the loss suffered by the PSPs to the aggregators that represent them * * * . And while the Second Circuit recognized that there are some situations where the assignment of a claim may confer standing on an assignee who has not incurred an injury, expense or loss in exchange for the assignment, the Court made clear that such a "'claim' cannot simply refer to a right to bring suit." Since plaintiffs' assignments in this case grant only the right to sue and not a right to a remedy, plaintiffs have failed to establish standing.

APCC I, 254 F.Supp.2d at 139 (citations omitted). The Court now believes that it erred in viewing these two situations as indistinguishable.

In *Physicians Health,* the State of Connecticut brought suit under ERISA against an insurance company that offered managed care plans to Connecticut

residents. The State asserted standing to sue as the assignee of participants in the managed care plans who had been injured by the plans' actions and who had assigned their right to seek injunctive or other equitable relief to the State. However, the plan participants had assigned to the State only "their right to seek 'appropriate equitable relief' with respect to any 'cause of action' they may have as plan participants or beneficiaries." 287 F.3d at 112. As such, the assignments did not reflect an intent to transfer title or ownership of the assignors' claims, but instead merely conferred a power of attorney with respect to that claim, that is, "the right to control the equitable portion of a lawsuit seeking redress of the assignor-participants' rights under ERISA." *Id.* at 118. Because only the right to sue was assigned and the State had no personal interest in the outcome of the suit, the Second Circuit concluded that the assignment did not convey a concrete stake in the litigation, and therefore that the State lacked standing to sue. *Id.* at 118-19.

For purposes of the standing inquiry, however, the Second Circuit contrasted such an assignment with a different type that would generate a different result: "even though an assignee incurs no injury, expense, or loss in exchange for the assignment, a valid and binding assignment of a claim (or a portion thereof) – not only the right or ability to bring suit – may confer standing on the assignee." *Id.* at 117 (emphasis added). Thus, in *Vermont Agency,* the Supreme Court held a relator in a qui tam action

brought under the False Claims Act had constitutional standing notwithstanding the fact that such a party suffers no direct injury from the defendant's alleged wrongdoing. The Court based its conclusion on the "doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor." 529 U.S. at 774, 120 S.Ct. 1858. While this doctrine may not always apply (as *Physicians Health* makes clear), it does in the present case.

That is so because the assignments at issue, which provide that each PSP "assigns, transfers and sets over * * * for purposes of collection, all rights, title and interest of the Company in the Company's claims, demands or causes of action for Dial-Around Compensation due the Company," clearly manifest the PSPs' intention to transfer legal title of the claims to plaintiffs. As a result, plaintiffs here actually own the claims at issue (a power the State of Connecticut lacked), and therefore are entitled to bring this suit in their own name. *See* 287 F.3d at 118-19 (emphasizing the fact that the assignments merely gave the State "the right to act as a nominal party"). Moreover, as described above, this transfer of ownership also transfers the legal injury that is the basis for the Article III standing.[11] In this sense, it is significant that the assignments in *Physicians Health* did not

[11] Or, to put the same concept in different terms, the assignment may be said to confer on the assignee a kind of "representational standing." *Vermont Agency,* 529 U.S. at 774, 120 S.Ct. 1858.

provide for a remedy on which the State itself could collect, but were solely for injunctive relief, which could have benefitted only the punitive assignors and not the nominal plaintiff. Such an assignment left the underlying injury with the plan beneficiaries, and meant that a favorable judicial ruling would not have alleviated any harm suffered by the State, or redounded to its direct benefit. Accordingly, the State did not "stand[ ] in the assignor's stead with respect to both injury and remedy," and thus was without standing to sue. *Id.* at 117.

Here, in contrast, the assignments allow plaintiffs to seek a remedy (money damages) that, if awarded, would run to plaintiffs directly and satisfy their claims – even though they are ultimately obligated to remit any damages awarded to the PSPs. Accordingly, by virtue of the assignments, plaintiffs have come to stand in the place of the PSPs with respect to both injury and remedy. Unlike the State of Connecticut, they are the legal owners of the claims they assert and have the exclusive right to collect on those claims; they thus have a concrete stake in the outcome of the litigation sufficient to satisfy the injury-in-fact requirements of Article III. And, a decision ordering defendant to compensate plaintiffs would redress this injury. Under the framework set forth in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), plaintiffs therefore have standing to bring this suit.

III. Assignability of Claims under Applicable Law

In their initial motion to dismiss, defendant argued that even if plaintiffs have standing, the claims made by plaintiff APCC Services on behalf of its assignors must be dismissed because those claims are not assignable under Virginia law. As the Court has determined that plaintiffs have standing to sue, it must now address this issue.

Defendant argues that the claims asserted by plaintiffs are not assignable under Virginia law, which limits the types of claims that may be assigned to "causes of action for damage to real or personal property." Va. Code Ann. § 8.01-26 (West 2003). It is, however, irrelevant whether this state statute would actually bar the assignment of the claims asserted. Defendant's argument fails because plaintiffs' claims are based on violations of federal law, and it is well settled that "[w]here a claim for relief is created by federal statute, federal law governs the assignability of the claim." *In re Nat'l Mortgage Equity Corp. Mortgage Pool Certificates Sec. Lit.,* 636 F.Supp. 1138, 1152 (C.D.Cal.1986) (assignability of RICO treble claim is one of federal law); *see also Bluebird Partners, L.P. v. First Fidelity Bank, N.A.,* 85 F.3d 970, 973 (2d Cir.1996) ("The federal courts have consistently determined that federal law governs the assignability of claims under the federal securities laws."); *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.,* 995 F.2d 425, 437 (3d Cir.1993)

(Greenberg, J., concurring) ("the validity of the assignment of an antitrust claim is a matter of federal common law").

CONCLUSION

For the reasons discussed above, the Court concludes that plaintiffs have standing to bring this suit based on the assignments from the PSPs and that these assignments are legally permissible. The Court therefore grants plaintiffs' motion for reconsideration, and vacates its March 28, 2003 Memorandum Opinion and Order. Given these rulings, the remaining motions to amend have been rendered moot. A separate Order accompanies this Memorandum Opinion.

ORDER

This matter is before the Court on plaintiffs' motions for reconsideration and for leave to amend its complaint and plaintiff Peoples Telephone Company's motion for leave to amend. Based on the pleadings, the record, and relevant case law, it is hereby

ORDERED that plaintiffs Motion for Reconsideration is **GRANTED**; it is

FURTHER ORDERED that the Court's March 28, 2003 Memorandum Opinion in *APCC Servs. v. AT & T,* 254 F.Supp.2d 135 (D.D.C. 2003), and corresponding Order are **VACATED**; it is

FURTHER ORDERED that AT & T's Motion to Dismiss Assignee Plaintiffs' Claims is **DENIED**; it is

FURTHER ORDERED that the Aggregators' Motion for Leave to Amend is **DENIED AS MOOT**; it is

FURTHER ORDERED that Peoples Telephone Company's Motion for Leave to Amend is **DENIED AS MOOT**; and it is

FURTHER ORDERED that Defendant AT & T's Motion to Seal [78-1] is **GRANTED**.

SO ORDERED.

United States District Court
FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC., et al.,	*	
Plaintiffs,	*	
v.	*	No. CIV.A. 01-642 ESH
SPRINT COMM'N CO., L.P.	*	Sept. 3, 2003.
Defendant.	*	

ORDER

This matter is before the Court on plaintiffs' motion for leave to amend and defendant's cross-motion to dismiss for lack of subject matter jurisdiction. This case is substantially identical to those presented in *APCC Services, Inc. v. AT&T*, Civ No. 99-696, and the issues raised by the parties are addressed in the Court's Memorandum Opinion and Order in the *AT&T* case issued on this date. Based on the pleadings, the record, and relevant case law, and for the reasons discussed in the Court's concurrently-issued opinion in the *AT&T* case, it is hereby

ORDERED that plaintiffs' Motion for Leave to Amend is **GRANTED IN PART** with respect to additional grounds for relief and **DENIED AS MOOT** with respect to joinder of plaintiffs; and it is

FURTHER ORDERED that defendant's Cross-Motion to Dismiss for Lack of Subject Matter Jurisdiction is **DENIED**.

SO ORDERED.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7034 **September Term, 2006**

01cv00642
99cv00696

(Filed On: Aug. 7, 2007)

APCC Services, Inc., as assignee of the claims of and attorney-in-fact for the entities listed in Exhibit A, et al.,

Appellees

v.

Sprint Communications Co.,

Appellant

Consolidated with 04-7035

BEFORE: Ginsburg, Chief Judge, and Sentelle and Randolph, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed June 8, 2007, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7034 **September Term, 2006**

01cv00642
99cv00696

(Filed On: Aug. 7, 2007)

APCC Services, Inc., as assignee of the claims of and attorney-in-fact for the entities listed in Exhibit A, et al.,

Appellees

v.

Sprint Communications Co.,

Appellant

Consolidated with 04-7035

BEFORE: Ginsburg, Chief Judge, and Sentelle Henderson* Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

* Circuit Judge Henderson did not participate in this matter.

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

ORAL ARGUMENT SCHEDULED
OCTOBER 21, 2004

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 04-7034
(and consolidated with Case No. 04-7035)

APCC SERVICES, INC., *et al.,*

Appellees,

- *v.* -

SPRINT COMMUNICATIONS COMPANY L.P., *et al.,*

Appellants.

On Appeal From
The United States District Court
For The District Of Columbia
Case Nos. 01CV00642 and 99CV00696

JOINT APPENDIX
VOLUME I

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Attorneys for Appellant AT&T Corporation

* * *

ASSIGNMENT AND POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS that Coyote Call, Inc., a Kansas [corporation/partnership/proprietorship], hereinafter referred to as the "Company", hereby assigns, transfers and sets over to APCC Services, Inc. ("APCCS") (or APCCS' assignee) for purposes of collection all rights, title and interest of the Company in the Company's claims, demands or causes of action for "Dial-Around Compensation" ("DAC") due the Company for periods since October 1, 1997, pursuant to Federal Communications Commission rules, regulations and orders. Further, the Company hereby appoints APPCS as its true and lawful attorney-in-fact for the purpose of exercising the following powers:

1. To do all acts necessary for the purpose of collecting DAC due the Company for periods since October 1, 1997.

2. To enter into any discussions or other activities on behalf of the Company in connection with attempting to resolve such DAC claims, including, without limitation, selecting and retaining legal counsel, and filing and prosecuting court or regulatory proceedings in the Company's interest. The Company agrees to be bound by final determinations in court or regulatory proceedings prosecuted by APCCS in the Company's interest.

3. To sign, on behalf of the Company, settlement agreements, releases, or other documents relating to the settlement of DAC claims. Company hereby agrees to be bound by any settlement, compromise or release reached by APCCS on its behalf and that any document executed in connection with any such settlement, compromise or release by APCCS on behalf of the Company shall be binding on the company.

4. Company specifically acknowledges and confirms that no person or entity who shall pay to APCCS (or its assignee) amounts relating in any way to DAC owed to the Company shall be liable to Company to the extent of any amounts so paid, unless the person or entity making such payment has actual knowledge that the authority granted to APCCS by this Assignment and Power of Attorney has been properly revoked. This Assignment and Power of Attorney (which is coupled with an interest) may not be revoked without the written consent of the attorney-in-fact.

IN WITNESS WHEREOF, Company has caused this Assignment and Power of Attorney to be executed and delivered by a duly authorized officer of the Company, to be effective this 11 day of February,1999.

/s/ Coyote Call, Inc.
Company

ATTEST:

By: /s/ Vicki H. Lindgren By: /s/ David Lindgren

Its: Vice-President Its: President

AMENDMENT TO
APCC SERVICES AGENCY
COMPENSATION AGREEMENT

PSP: _____ Federal Tax ID: _____

Address: _____ Authorized Contact: _____

_____

Telephone: _____ Fax: _____

WHEREAS, APCC Services, Inc. ("APCCS") and PSP have entered into an APCC Services Agency Compensation Agreement ("Agreement"), under which APCCS is PSP's exclusive agent for billing and collection of "Dial-Around Compensation" ("DAC"); and

WHEREAS, there are DAC payments owed by telecommunications carriers as a result of the miscounting and undercounting of calls or simply a

failure or refusal to pay, which APCCS has not been able to resolve by routine dispute resolution processing and PSP wishes APCCS to take further action to collect the unpaid DAC (hereinafter referred to as "DAC Claims"); and

WHEREAS, APCCS wishes to act as PSP's exclusive agent for resolving DAC Claims and the parties recognize the efficiencies of APCCS taking collective action on behalf of PSP and other independent payphone service providers with similar claims; and

WHEREAS, in order to take quick, effective, and efficient collection action, APCCS will be required to exercise broad reasonable discretion in making collective decisions on behalf of PSP and other payphone service providers.

NOW, THEREFORE, be it agreed that the Agreement is amended as follows:

1. All capitalized terms and abbreviations not defined in this Amendment shall have the meanings set forth in the Agreement.

2. PSP appoints APCCS as its exclusive agent for collection of PSP's DAC Claims which relate to periods since October 1, 1997 and which have not been paid.

3. APCCS will take such action as it deems reasonably necessary and appropriate to collect payment of PSP's DAC Claims, which may include collective legal action such as filing complaints at the

FCC or in court on behalf of PSP and other payphone service providers.

4. APCCS is authorized to take any reasonable step on PSP's behalf to collect payment for the DAC Claims, including, without limitation, selecting and retaining legal counsel, filing and prosecuting legal complaints in PSP's name against any or all carriers withholding payments and/or other parties, and entering settlements of some or all DAC Claims with one or more parties, without obtaining further oral or written authorization from PSP. PSP will accept APCCS's reasonable determinations as to what actions are necessary and appropriate to cost-effectively collect payment of the DAC Claims.

5. APCCS will provide general information to PSP from time to time as to the progress of APCCS's overall collection effort for DAC Claims. However, APCCS is not required to inform PSP in advance of any particular measure taken on PSP's behalf or to provide information on legal strategy.

6. PSP will promptly provide APCCS with all documentation that APCCS or its counsel reasonably believes to be necessary in order to pursue collection of PSP's DAC Claims.

7. APCCS is authorized, in the reasonable exercise of its discretion, to agree to a settlement of some or all of PSP's DAC Claims, which may include one or more lump sum settlements that will be apportioned among PSP and other payphone service providers on whose behalf APCCS enters into such

settlements. PSP understands that such settlements may preclude any further claim by PSP for the amounts in dispute.

8. For the additional services to be provided by APCCS over and above the services provided pursuant to the Agreement, PSP agrees to and specifically authorizes APCCS to make a deduction from PSP's DAC payments in an amount necessary to fund PSP's share of the activities described above to collect DAC Claims on behalf of PSP. The initial amount of the deduction will be:

> $.007 on the first 50,000 dial around calls paid in the quarterly remittance, plus
> $.006 on the next 900,000 dial around calls paid in the quarterly remittance, plus
> $.005 on the next 550,000 dial around calls paid in the quarterly remittance, plus
> $.004 on the next 1,000,000 dial around calls paid in the quarterly remittance, plus $.003 on any remaining calls.

Quarterly deductions will be capped at $20,000, except in the case of subsequent business combinations for which special conditions may apply requiring additional contributions in excess of the stated cap.

PSP understands that funding requirements will be reevaluated quarterly and agrees that the above level of deduction may be increased or decreased as necessary to provide funding adequate to carry out the above-described activities. In the event that PSP

chooses not to meet the funding requirements or PSP terminates the Agreement, APCCS will be relieved of any further obligation to represent PSP in the collection of PSP's DAC Claims and APCCS will have no obligation to remit to PSP any amounts previously deducted from PSP's DAC payments.

APCCS agrees that if it recovers attorneys fees and/or costs in connection with any lawsuit APCCS may bring to collect PSP's DAC Claims, it will remit such recoveries to PSP in amounts reflecting PSP's proportionate share of the funding for such lawsuit provided by all payphone service providers.

9. Except as amended, the Agreement remains in effect. This Amendment is subject to the "Terms and Conditions" attached to the Agreement, each of which is incorporated herein by reference, except to the extent that such "Terms and Conditions" are amended herein. If the Agreement is not renewed, this Amendment remains in effect.

IN WITNESS WHEREOF, and of the "Terms and Conditions" hereof, the undersigned have entered into this Amendment to the APCC Services Compensation Agreement effective this ___ day of ___, 1999.

PSP	APCC Services, Inc.: _____
Company Name: _____	
By: _____	By: _____
Title: _____	Title: _____

The Assignment and Power of Attorney and the Dial Around Compensation Billing Data Sheet attached to this Amendment must be signed and returned with this Amendment. Please return executed documents to:

APCC Services, Inc.
10306 Eaton Place
Suite 520
Fairfax, VA 22030
(703) 385-5301 – fax

* * *

DIAL AROUND COMPENSATION
BILLING DATA SHEET

PSP Company Name: _____

Address: _____

_____

Authorized Contact: _____

Federal Tax ID: _____

Please indicate the number of phones for which you billed and which aggregator you used to bill and collect your dial around compensation or whether you did it yourself for the time periods in question.

	4Q97	**1Q98**	**2Q98**	**3Q98**
Approximate # of phones	_____	_____	_____	_____
Did it Myself	_____	_____	_____	_____
APCC Services	_____	_____	_____	_____

DataNet Systems	_____	_____	_____	_____
IPANY	_____	_____	_____	_____
Pacific Telemanagement	_____	_____	_____	_____
NSC Telemanagement	_____	_____	_____	_____
Other: _____	_____	_____	_____	_____

Thank you!

APCC
SERVICES

To: All APCC Services' Customers
From: Vincent R Sandusky, President
Date: February 5, 1999
Subject: **APCC Services Dial Around Litigation**

Attached are the documents that you ***must execute and return*** if you wish to be a part of APCC Services' (APCCS) litigation efforts to collect unpaid dial around compensation since 4Q97.

These documents include:

1. Amendment to APCC Services Agency Compensation Agreement
2. Assignment and Power of Attorney
3. Billing Data Sheet

You must execute and return these documents immediately to assure inclusion in the suits to collect unpaid dial around compensation.

More detailed information on this effort to collect unpaid dial around payments follows.

On behalf of its clients who wish to participate and help finance the litigation, APCCS is moving forward to collect unpaid dial around compensation. APCCS will be joined in this effort by certain other aggregators and PSPs.

Underpayment and/or non-payment of dial around compensation are clearly the greatest threats to the financial viability of many PSPs. Based upon the lack of cooperation by many obligated carriers, litigation appears to be the best and quickest way to resolve the outstanding issues.

It is our intention to file suits ***immediately*** on behalf of those customers providing authorization. Initially, those suits target AT&T for underpayment and a group of carriers which have made no payments at all.

Please read and execute the enclosed documents in order to join in this important litigation to collect unpaid dial around. We want to move forward as quickly as possible to compel carrier compliance with payphone compensation obligations. Most importantly, a show of strength through litigation will serve to immediately encourage increased payment levels and future compliance. Just the threat of this litigation has already generated positive response from certain carriers. Others need to get the message that we are serious.

The effort is expected to be massive, complicated and costly. However, enforcement of payment requirements should yield considerable benefits for PSPs.

Based upon current payment experiences, it appears non-LEC PSPs are being underpaid by over $80 million annually. *Collection on past payments is important, but correcting the situation going forward is critical.* The legal team has provided us with estimates of between $2 million and $2.5 million annually to prosecute these suits if carriers put up a vigorous defense. We expect the first ones will do so. However, if we are successful, a $2.5 million investment to collect unpaid dial around since October of 1997 and to improve future collections by up to $80 million annually makes good sense. *As we cover later in this memo, the most we expect anyone to kick in to help fund this important effort is just seven-tenths of a penny per dial around call.* Further too, we may be entitled to a substantial portion of our attorney's fees and expenses to be paid back by defendants, assuming we are successful with our claims.

At the legal team's suggestion, a management committee representing the initial named plaintiffs will oversee the suits. The management committee will work with the legal team to identify defendants, agree on legal strategy, set budgets and funding requirements and, when appropriate, settle suits.

With regard to potential settlements, the management committee has agreed that to the extent possible, each plaintiff will receive dial around compensation settlements on a per call basis based upon that company's actual traffic associated with its payphones. In other words, we will try to avoid settlements that return a flat rate per phone as that

does not provide fair return to those with higher traffic locations. Further, should legal fees and expenses also be awarded, they will be returned to the individual plaintiffs in the same proportion as their individual contribution to the suit.

In addition to being a major part of the management committee, APCC Services will provide substantial administrative support and data collection services and will serve as an information clearinghouse providing formal updates for participating customers – all at no extra charge or expense to participants, Additionally, APCC Services is providing $100,000 seed money to launch this effort.

The legal team is composed of the most experienced and successful attorneys and litigators in the industry. Each of the members of this multi-firm effort have successfully represented payphone providers and payphone associations in numerous battles at the state and federal levels against LECs and major IXCs. We know we have assembled the best qualified legal and regulatory minds that can guide us through this complicated process.

As mentioned above, the legal team has given us a "worst case" budget of approximately $2.5 million annually to pursue these suits, assuming carriers vigorously defend against them. To fund the suits, all plaintiffs are being required to agree to a quarterly assessment of their dial around compensation on a per call basis. *The most we anticipate having to ask plaintiffs to contribute is just seven-tenths of a penny*

per call. As indicated in the enclosed amendment to the APCC Services Agency Compensation Agreement, the initial quarterly contribution will be:

$.007 on each of the first 50,000 calls,
$.006 on each of the next 900,000 calls,
$.005 on each of the next 550,000 calls,
$.004 on each of the next 1,000,000 calls, and
$.003 on each call above 2,500,000 calls.

The management committee will evaluate cash needs quarterly to determine whether these rates will need to be adjusted up or down. Remember, should we recover attorney's fees and/or costs during the litigation, such recovery will be returned to plaintiffs proportionate to their contributions.

If a PSP refuses to permit the above deductions or withdraws his/her agreement to allow these deductions prior to conclusion of the suits, APCCS will drop that PSP from the plaintiff's list and will have no obligation to represent the PSP in the collection of these claims nor will APCCS remit any recovery of legal fees or expenses. *Let me repeat this in something other than legalese – you have to agree to contribute to get any benefit from the suits*. *If you don't agree to contribute, you will not be named as a plaintiff. If you do agree, but later withdraw that agreement, you get nothing – no back dial around collected by this litigation or any return of your funding contributions.* **You've got to pay to play and once you're in, you've got to stay in to reap the benefits**.

I also want to point out that the enclosed Assignment and Power of Attorney which you must sign and return, assigns your DAC claims since October 1, 1997 to APCCS "for purposes of collection." This will allow APCCS to prosecute the litigation on your behalf. If at any point APCCS is no longer representing you in the litigation, you will be able to pursue your claims on your own, should you so choose.

If you have specific questions about the goals of the suits or want additional clarification about anything in this memo, please contact me or Greg Haledjian at APCC Services.

I look forward to adding you to the list of plaintiff PSPs willing to support these efforts to enforce carrier payment obligations.