ORAL ARGUMENT SCHEDULED FOR OCTOBER 21, 2004

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APCC SERVICES, INC., *et al.*

Plaintiffs - Appellees,

v.

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

Defendants - Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Case Nos. 01CV00642 and 99CV00696

BRIEF OF APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rules 26.1 and 28(a), the following is a statement of the parties, amici, rulings under review, and related cases:

(A) Parties and Amici: Except for the following, all parties, intervenors, and amici appearing in this Court are listed in the Brief for Appellants:

Amicus*:* Federal Communications Commission

(B) Rulings Under Review: References to the rulings at issue appear in the Brief for Appellants.

(C) Related Cases: The cases on review have not previously been before this or any other court. There are no other related cases involving substantially the same parties and the same or similar issues.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Plaintiff-Appellees APPC Services, Inc., Data Net Systems, LLC, Jaroth, Inc. (D/b/a/ Pacific Telemanagement Services), NSC Telemanagement Corporation (n/k/a Intera Communication Corporation), Davel Communications Group, Inc., and Peoples Telephone Company, Inc., submit the following corporate disclosure statement:

APCC Services, Inc., a Virginia corporation, is a for-profit subsidiary of the American Public Communications Council, Inc, a District of Columbia not-for-profit corporation, not publicly traded.

Data Net Systems, LLC, is an Illinois Limited Liability Company affiliated with no publicly traded company.

Jaroth, Inc. (d/b/a/ Pacific Telemanagement Services), is a California corporation affiliated with no publicly traded company.

NSC Telemanagement Corporation (n/k/a Intera Communications Corporation) is a California corporation affiliated with no publicly traded company.

Davel Communications Group, Inc., is an Illinois corporation whose parent corporation Davel Communications, Inc., is a publicly traded corporation that holds a 10 percent or greater ownership in Davel Communications Group, Inc.

Peoples Telephone Company, Inc., is a Florida corporation whose parent corporation, Davel Communications, Inc., is a publicly traded corporation that holds a 10 percent or greater ownership in Peoples Telephone Company.

GLOSSARY

Pursuant to D.C. Circuit Rule 28(a)(3), the following is a glossary of abbreviations and acronyms used in this brief:

Act	The Communications Act of 1934, as amended by the Telecommunications Act of 1996
aggregator	Intermediaries between PSPs and IXCs for billing and collection. An aggregator collects billing information from a large number of IXCs or their agents, collects the IXCs' payments, and distributes those payments to its PSP clients.
aggregators	APCC Services, Inc., Davel Communications, Inc., Data Net Systems, L.L.C., Intera Communications Corp., Jaroth, Inc. d/b/a Pacific Telemanagement Service, and NSC Telemanagement Corp.
APCC Services or APCCS	Appellee APCC Services, Inc., which is an aggregator
Appellants	AT&T Corporation and Sprint Communications Company L.P.
AT&T	AT&T Corp., an interexchange carrier
AT&T	*APCC Services, Inc.* v. *AT&T Corp.,* Civ. No. 99-696 (ESH)
AT&T I	*APCC Services, Inc.* v. *AT&T Corp.*, Mem. Op. & Order (Mar. 28, 2003), reported at 254 F. Supp. 2d 135 (D.D.C. 2003)
AT&T II	*APCC Services, Inc.* v. *AT&T Corp.*, Mem. Op. & Order (Sept. 3, 2003), reported at 281 F. Supp. 2d 41 (D.D.C. 2003)
AT&T III	*APCC Services, Inc.* v. *AT&T Corp.*, Mem. Op. & Order (Dec. 17, 2003), reported at 297 F. Supp. 2d 101 (D.D.C. 2003)

C&W	*APCC Services, Inc.* v. *Cable & Wireless, Inc.*, 281 F. Supp. 2d 52 (D.D.C. 2003)
Commission (or FCC)	Federal Communications Commission
dial-around calls	Coinless calls made from payphones to access numbers to reach long-distance calling platforms or to subscriber 800 numbers, and for which the payphone owner is not otherwise compensated
FCC (or Commission)	Federal Communications Commission
First Order	*Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report & Order, 11 F.C.C.R. 20,541 (1996)
IXC	Interexchange carrier
LEC	Local exchange carrier
payphone compensation rules	47 C.F.R. Part 64, as promulgated in *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report & Order, 11 F.C.C.R. 20,541 (1996), and Order on Reconsideration, 11 F.C.C.R. 21,233 (1996), as amended in *Implementation of the Pay Telephone Reclassification and Compensation Provisions fo the Telecommunications Act of 1996*, Second Order on Reconsideration, 16 F.C.C.R. 8098 (2001), and Third Order on Reconsideration and Order on Clarification, 16 F.C.C.R. 20922 (2001), vacated *sub nom. Sprint* v. *FCC*, 315 F.3d 369 (D.C. Cir. 2003), on remand in *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report & Order, 18 F.C.C.R. 25,756 (2003)
Pay-Tel Order	*Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report & Order, 18 F.C.C.R. 19,975 (2003)

PSP	Payphone Service Provider
1992 *Second R&O*	*Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, 7 F.C.C.R. 3251 (1992)
Section ___	Except as specifically indicated otherwise, all references to "Section ___" are to the sections codified in 47 U.S.C. – for example, "Section 207" means 47 U.S.C. § 207
Sprint	Sprint Communications Company L.P., an interexchange carrier
Sprint	*APCC Services, Inc*. v. *Sprint,* Mem. Op. & Order (Dec. 17, 2003), reported at 297 F. Supp. 2d 90 (D.D.C. 2003)

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STATEMENT OF JURISDICTION

Appellees agree with appellants' statement of jurisdiction, although one of the disputes on appeal is whether the district court had Article III jurisdiction. We contend it did, and appellants contend it did not.

RELEVANT STATUTES AND REGULATIONS

Pertinent provisions appear in the Addendum to the Brief for Appellants.

STATEMENT OF THE ISSUES

1. Do appellees, as complete titleholders of dial-around compensation claims assigned to them by payphone service providers, have Article III standing to pursue those claims?

2. Do Sections 201(b), 206-207, 276, 407, and 416(c) of the Communications Act of 1934 and the implementing regulations of Section 276 confer a private right of action to sue for a common carrier's failure to pay compensation to payphone service providers for completed payphone calls?

STATEMENT OF THE CASE

Appellees agree generally with appellants' statement of the case. Appellants are wrong, however, to say (Br. 2) that only one plaintiff, Peoples Telephone Company, is a PSP. Plaintiff Jaroth, Inc., is also a PSP as well as an aggregator.

STATEMENT OF FACTS

These cases were filed to recover millions of dollars of compensation that defendants-appellants AT&T and Sprint are legally required to pay, but have not paid, to payphone service providers (PSPs). When consumers make "dial-around" calls from payphones – for example, with calling cards or to toll-free "800" numbers – the consumers pay nothing to the PSPs or the local exchange carriers for use of their services for accessing the interexchange carriers (IXCs) such as AT&T and Sprint, which market such calling-card and toll-free calls. Consumers pay only the IXC for the call. The law requires the IXCs, in turn, to compensate the PSPs, through dial-around compensation, and the local exchange carriers, through access fees, for the call origination and termination services from which the IXCs benefit. Their failure to pay what they owe to PSPs prompted these cases and others like them.[1]

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[1] Similar lawsuits have been brought by numerous plaintiffs in various jurisdictions, but the largest cases are the ones consolidated before Judge Huvelle. In addition to the cases against AT&T and Sprint, which are before this Court in this interlocutory appeal, appellees APCC et al. filed cases against WorldCom and Cable & Wireless, both of which resulted in published opinions by Judge Huvelle on preliminary matters before the defendants sought bankruptcy protection and received the benefit of bankruptcy's automatic stay. Judge Huvelle's opinion in *APCC Services, Inc.* v. *WorldCom, Inc.*, 305 F. Supp. 2d 1 (D.D.C. 2001), discusses several of the cases pending in other jurisdictions.

I. THE PAYPHONE INDUSTRY

For many years, PSPs have been required to permit callers to choose the IXC that will carry the calls they make from a payphone. See 47 U.S.C. § 226(c)(1)(B) (requiring that phones permit consumers to access provider of choice); *id.* § 226(b)(1)(E) (requiring compensation to be withheld if access is blocked). If a caller uses the IXC that the PSP has designated as the presubscribed carrier for a phone (that is, if the caller makes a 0+ call, rather than dialing around the presubscribed carrier by dialing an access code), the PSP can secure compensation for the call by contracting directly with the presubscribed carrier. Compensation through a contractual arrangement is less practicable, and will be impossible in many cases, when the caller can dial around to reach any IXC, including an IXC that has no contractual relationship with the PSP.

Thus, the rapid growth of calling-card services and other forms of dial-around calling from payphones created a dilemma. If PSPs were not assured of fair compensation when their phones were used to make these calls, they would not have adequate economic incentives to deploy payphones broadly; the public would suffer because payphones would not be widely available.

Congress addressed this problem in the Telecommunications Act of 1996. It directed the Federal Communications Commission to establish "a per call com-

pensation plan to *ensure that all payphone service providers are fairly compensated* for each and every completed intrastate and interstate call using their payphone," with limited exceptions. 47 U.S.C. § 276(b)(1)(A) (emphasis added). The Commission developed such a plan and has modified it from time to time. See *Payphone Docket*, Report & Order (*Pay-Tel Order*), 18 F.C.C.R. 19,975, 19,977-19,983 (¶¶ 5-17) (2003) (describing regulatory history). This Court has issued several rulings on the payphone compensation rules. See *AT&T* v. *FCC*, 363 F.3d 507 (D.C. Cir. 2004) (summarizing litigation history).

The initial compensation plan the Commission prescribed and all the modifications of that plan have required IXCs such as Sprint and AT&T to compensate PSPs for calls that the IXC "terminates." *E.g.*, *Payphone Docket*, First Order, 11 F.C.C.R. 20,541, 20,586 (¶ 86) (1996); *Payphone Docket*, Order on Reconsideration, 11 F.C.C.R. 21,233, 21,277 (¶ 92) (1996). The Commission preferred this mechanism to a plan in which callers would directly compensate the PSP "because it would result in less transaction costs because the toll-carrier could aggregate its payment to [PSPs, whereas] [u]nder a set use fee * * * these payments would be spread among a vast number of payphone callers through their individual telephone bills." *Payphone Docket*, First Order, 11 F.C.C.R. at 20,580 (¶ 77).

Those transaction cost savings exist, in large measure, because of the functions performed by "aggregators" like plaintiffs-appellees. Aggregators are intermediaries between PSPs and IXCs for billing and collection. An aggregator collects billing information from a large number of PSPs, provides that information to IXCs or their agents, collects the IXCs' payments, and distributes those payments to its PSP clients. See affidavits of Ed Kilb (JA156-159), Ruth Jaeger (JA166-171), Lin Harvey (JA177-179), Sean Venezia (JA180-182), and Thomas Keane (JA183-185).

Aggregators have existed to perform this function since at least 1992. See *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, 7 F.C.C.R. 3251, 3259 (1992) (¶ 49) (1992 *Second R&O*) (authorizing use of clearinghouses for billing and collection). The vast majority of PSPs rely on aggregators for billing and collection. Plaintiffs-appellees provide billing and collection services to approximately 1400 PSPs that own and operate more than 400,000 payphones, each of which may be entitled to compensation from hundreds of IXCs.

The aggregators' purpose is to secure full payment of dial-around compensation from the IXCs. They provide a vital service to, and have a strong financial interest in the profitability of, the PSPs. The aggregators' compensation for bill-

ing and collection services is based on the number of payphones and telephone lines operated by their PSP clients. To the extent the PSPs are not profitable because of systematic undercounting or undercompensation, the aggregators' own financial health is threatened. JA170.

Aggregators provide important benefits to IXCs as well, because IXCs' transaction costs are lower if they deal with only a few aggregators rather than thousands of PSPs. AT&T has repeatedly instructed that all demands for payment, and all questions concerning disputed bills, must come *only* from the aggregators – AT&T refuses to deal with individual PSPs. JA168-169.[2] AT&T even forbids the aggregators to disclose the telephone number of the AT&T representative who handles dial-around compensation issues. JA169.

The commercial activities of aggregators are mirrored in the policy arena, where the parent corporation of appellee APCCS has participated in the argument and briefing of every payphone-related issue before the Commission for the last ten years. Appellants have never challenged the standing of the APCC to speak for PSPs, nor have they ever challenged the right of APCCS or any other aggregator to collect payphone compensation on behalf of the PSPs.

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[2] Sprint is the only large IXC that does not require use of an aggregator. JA178.

II. PROCEEDINGS BELOW

Despite the FCC regulations, AT&T and Sprint have failed to pay the required compensation for millions of calls placed over several years. PSPs turned to the aggregators to seek to recover this unpaid compensation. When authorizing aggregators to represent them for billing and collection matters, the PSPs had granted the aggregators a power of attorney to deal with IXCs. When it became clear that litigation was necessary, each PSP executed an assignment of its claims to its aggregator. Those assignments provided that the PSP "hereby assigns, transfers and sets over to [the aggregators] 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.'" JA135 (emphasis added). The assignments were irrevocable and stated that, as complete owners of the claims, the aggregators had plenary authority to release and settle them, and any such decision would bind the PSPs. *Ibid.* A cover letter from APCC Services to its assignors noted that the aggregators would account to the PSPs for any proceeds so long as the PSPs paid the aggregators' costs; the aggregators, however, would have no obligation to account to a PSP for any proceeds obtained through litigation should that PSP cease to pay its share of those costs. JA142-143.

A. The *AT&T* case

Appellees sued AT&T in 1999, seeking recovery of damages, pursuant to 47 U.S.C. §§ 206 and 207, for AT&T's failure to pay compensation for all the pay-phone calls that AT&T had terminated. Approximately four years after the complaint was filed, AT&T moved to dismiss for lack of Article III standing. A dismissal for lack of standing would not prevent litigation altogether – the PSPs could refile in their own names, cumbersome as that procedure would be – but it would give rise to a question whether the statute of limitations was tolled during the four years the aggregators' suits were pending without any challenge to their standing, and therefore could conceivably deny the PSPs compensation for some period. (Our view, of course, is that the statute of limitations was tolled and even a dismissal would not limit the damages period, but the question is currently unresolved.)

In March 2003, the district court dismissed the aggregators' claims. JA28 (*AT&T I*). It reasoned that, because the aggregators had pledged to account to the PSPs for the litigation proceeds, they had no concrete private interest in the outcome of the suit, directly related to the injury suffered, sufficient to create the necessary injury-in-fact. JA25-26. The court relied on *Connecticut* v. *Physicians Health Services*, 287 F.3d 110, 115 (2d Cir. 2002), in which the court held that

Connecticut lacked standing to bring equitable claims assigned to it by several health plan beneficiaries. JA27. The court distinguished *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), in which the Court recognized Article III standing for a *qui tam* relator under the False Claims Act, because the aggregators would later account for the proceeds recovered. JA26. The district court also held that the aggregators lacked associational standing because the damages claims required individual PSPs to participate. *Ibid.*

The aggregators moved for reconsideration, pointing out that many cases recognized an assignee's standing despite its obligation to account for the proceeds of the suit. The district court reversed its earlier decision, recognizing that the aggregators' obligation to account for the proceeds of the suit did not deprive them of the necessary injury-in-fact. JA30-37. It explained (JA34),

> [W]hat 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 himself.

AT&T then moved for a second reconsideration, contending that the district court had failed to recognize the distinction between Article III standing and real-

party-in-interest standing. The court denied reconsideration but certified an interlocutory appeal of the standing question. JA39-46.

It also certified the question whether the Act – and FCC regulations interpreting it – create a private right of action. JA43. That issue arose in *APCC Services, Inc.* v. *Cable & Wireless, Inc. (C&W)*, 281 F. Supp. 2d 52, 56 (D.D.C. 2003). Although the court had concluded that a private right of action existed, it certified the question after the Ninth Circuit reached the opposite conclusion in *Greene* v. *Sprint Communications Co.*, 340 F.3d 1047 (2003), cert. denied, 124 S. Ct. 2026 (2004).

B. The *Sprint* case

The *Sprint* case was similar to *AT&T I*, and proceeded simultaneously. After the district courts' dismissals of *Greene* (for lack of a private cause of action) and *AT&T I* (for lack of standing), appellees moved to amend their *Sprint* complaint by substituting or joining the PSPs as plaintiffs and by alleging alternative causes of action under Sections 201(b), 407, and 416(c) of the Act. JA234-236. Sprint opposed the motion. While it was pending, Judge Huvelle held in *C&W* that appellees have a right of action under Sections 206 and 207. She also reconsidered and reversed her standing decision in *AT&T I*. She therefore granted the aggregators' motion for leave to amend their complaint against Sprint.

Contemporaneously, the Ninth Circuit issued its *Greene* decision. Relying on *Greene*, Sprint sought reconsideration of the ruling permitting appellees to amend their complaint. The court denied Sprint's motion but certified the private-right-of-action question, along with the standing question in the *AT&T* case, for interlocutory appeal. JA231-233. This Court consolidated the appeals.

SUMMARY OF ARGUMENT

The facts that frame the standing issue are not as stated by appellants. First, two of the plaintiffs, Jaroth, Inc., and Peoples Telephone Company, are PSPs, and NSC Telemanagement has its own separate 10% interest in the claims. Second, the assignments give appellees "all rights, title, and interest" – not a "nominal" interest – in the PSPs' claims. Third, the assignments are ***irrevocable***, a point particularly misrepresented in appellants' brief.

Spiller v. *Atchison, Topeka & Santa Fe Ry.*, 253 U.S. 117 (1920), and *Titus* v. *Wallick*, 306 U.S. 282 (1939), bind this Court to recognize the standing of assignees. The age of those decisions neither constitutes authority for a lower court to disregard them nor has caused modern authorities to depart from their holdings. The multitude of cases recognizing assignee standing are on point, even though some did not discuss Article III in explicit terms, in light of the obligation of courts to examine their own jurisdiction.

Vermont Agency of National Resources v. *United States*, 529 U.S. 765 (2000), supports appellee's standing, and *Connecticut* v. *Physicians Health Services*, 287 F.3d 110 (2d Cir. 2002), does not undermine it. The Second Circuit correctly held that an assignment of the right to seek *equitable* relief, without assignment of the benefits of any remedy, does not confer standing. That holding does not support a similar holding with respect to fully assigned damages claims, as to which assignee standing is squarely supported by binding Supreme Court authority.

Appellants' theory of standing indeed cannot be correct. It would overturn the line of cases recognizing the standing of assignees to bring antitrust claims. And it would overturn the statutes and cases giving trustees the right – sometimes in bankruptcy the *exclusive* right – to bring claims in which they have no monetary interest.

Appellees also have standing under the associational standing test of *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). And appellants' predictions of harm from recognizing assignee standing are without foundation.

Sections 207 and 206 of the Communications Act give appellees an explicit cause of action against common carriers such as appellants. Sprint and AT&T

themselves previously urged this Court – successfully – to recognize such a cause of action. The statute, as appellants concede, "*creates a right* of fair compensation for these payphone calls" and "leaves it to the FCC to decide who should pay for particular payphone calls under the regulatory plan." Br. 12 (emphasis added). The fact that the Commission rather than Congress identified the payors does not make those payors' failure to honor the payees' rights any less a violation of the Act, or render the Act's common carrier provisions any less applicable. Indeed, *Chevron* deference is due both to the Commission's decision to make IXCs (which are common carriers) the payors and to the Commission's explicit determination – unmentioned in appellants' brief – that a failure to pay compensation violates Sections 201(b) and 276 and is actionable in court.

Likewise, Section 416(c) gives appellees a right of action for appellants' violation of a Commission order. Appellants' argument that orders of general applicability are not Section 416(c) orders is unsound and has been rejected by five Circuits, though accepted by one Circuit 20 years ago. The relevant order was properly "served" by Federal Register publication, and Section 407 gives appellees a damages remedy for violations of Section 416(c).

Appellees' policy arguments are both mistaken and irrelevant. Furthermore, the congressional intent to compensate PSPs for "each and every" completed pay-

phone call gives rise to an implied right of action even if it does not give rise to an explicit cause of action. For purposes of implied-right-of-action jurisprudence, the point appellants stress – that the statute does not identify *IXCs* as the regulated party, but merely identifies PSPs as the intended beneficiary – cuts strongly *against* appellants' position.

This Court should not follow *Greene* v. *Sprint Communications Co.*, *supra*. The Ninth Circuit did not consider Section 201(b), 407, or 416. In addition, that court's decision is wrong, and appellants effectively so concede. The Ninth Circuit said that "if § 276 creates a right to compensation, and if it were violated, §§ 206 and 207 supply the right to sue." 340 F.3d at 1050. Appellants admit that Section 276 indeed "creates a right of fair compensation for these payphone calls." Br. 12.

ARGUMENT

I. THE AGGREGATORS HAVE STANDING

The first question presented is whether federal jurisdiction over a claim turns on the manner in which a plaintiff intends to use litigation proceeds. The district court rightly decided that the Constitution's grant of power to federal courts is conditioned on nothing so inconsequential. "In terms of Article III limitations on federal court jurisdiction, the question of standing is related only to

whether the dispute sought to be adjudicated will be presented in an adversary context." *Association of Data Processing Service Orgs., Inc.* v. *Camp*, 397 U.S. 150, 152 (1970). If one party has violated another's rights under federal law and inflicted harm, those parties are adverse as to that harm, and their adversity is unaffected by what either intends to do following litigation.

The aggregators are manifestly adverse to appellants. Following the assignments, the aggregators became complete owners of the dial-around claims and their proceeds. Appellants' sole argument against their standing is that, because they plan to account to the PSPs following litigation, the aggregators will not benefit *personally* from resolution of the controversy. If applied faithfully, that formalist interpretation of "personal benefit" would be revolutionary. For example, a bankruptcy trustee would be unable to recover property for the benefit of an estate in bankruptcy because the recovery would ultimately benefit the estate, not the trustee.

Also, contrary to the characterization by ATT and Sprint, both Jaroth, Inc., and NSC Telemanagement are not only aggregators but also PSPs, so their standing is clear regardless of the court's determination of the applicable law. JA198-199; JA202-203. When the complaints were filed, Jaroth owned a 17% interest in Pacific Coin, a California general partnership, which in turn owned and operated

several thousand payphones. Under California law, a partner in a general partnership may sue with the permission of the other partners. See California Corporations Code Title 2, Chapter 5. Those other partners gave their permission by executing assignments to Jaroth. NSC Telemanagement has a 10% direct stake in a portion of the unpaid dial-around compensation owed by AT&T to a company affiliated with NSC. This stake existed before the aggregators sued, so it is not merely a byproduct of the suit.

A. Setting The Record Straight

To understand why the aggregators' standing is straightforward, one must first understand what the assignments say. Appellants describe them as "nominal," despite their transfer of all rights to the aggregators; "revocable at will," even though they are *irrevocable* by their express terms; and "conditional," despite the absence of any condition either precedent or subsequent.

1. The Assignments Are Complete And Substantial

Each of the approximately 1400 PSPs executed an identical assignment to an aggregator providing that 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 Com-

pensation.'" JA135 (emphasis added). Those assignments further give the aggregators authority to sign

> settlement agreements, releases, or other documents relating to settlement of [dial-around compensation] claims. [PSP] hereby agrees to be bound by any settlement, compromise or release reached by [aggregator] on its behalf and that any document executed in connection with any such settlement, compromise or release by [aggregator] on behalf of the [PSP] shall be binding on the [PSP].

Ibid. In plain terms, these agreements give the aggregators complete ownership of the claims and proceeds, and free rein to pursue any litigation strategy they choose or even no strategy. There is nothing "nominal" about a party's holding "all rights, title, and interest" in a claim and any proceeds from it.

2. The Assignments Are Irrevocable And Unconditional

The assignments are irrevocable and unconditional. Each provides expressly that "[t]his Assignment * * * may not be revoked without the written consent of the attorney-in-fact," the aggregator. JA135. Appellants, however, suggest that statements in an APCC Services cover letter override this plain statement. In the letter, APCC Services explains that, if a PSP stops paying its share of the litigation costs, it "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*." JA143 (emphasis added).

Under the terms of the letter, delinquency releases APCC Services from its *obligation* to account to a PSP. Even if a PSP stops paying, APCC Services has the right to continue to pursue its claim to that point and has every right to keep the recovery to that date for itself: "*If you do agree [to contribute to litigation costs], but later withdraw that agreement, you get nothing – no back dial around collected by this litigation or any return of your funding contributions*." JA143 (emphasis in original).

Appellants, however, rely on an additional statement in the letter: "If at any point [the aggregators are] no longer representing you in the litigation, you will be able to pursue your own claims on your own, should you choose." JA143. But that statement does not mean – contradicting everything else in the letter and the assignments – that a PSP may "revoke" (Br. of Appellants 7 n.5) its assignment by refusing to pay its bills, thus causing APCC Services to return its claim.

Paragraph 9 of the Declaration of Ruth Jaeger filed July 15, 2003, in *APCC Services Inc.* v. *Cable & Wireless, Inc.*, Civ. Action No. 1:02 CV 0158 (ESH), which was before Judge Huvelle when she resolved the standing issue raised by the *APCC* cases pending before her, states the following under penalty of perjury:

> While the PSPs can terminate their funding obligation unilaterally, they cannot terminate unilaterally their assignment of claims. Paragraph 4 of the assignment requires the written consent of the plaintiff aggregators.

> * * * APCCS and the PSPs contemplated that any such termination, if allowed, would operate prospectively only, i.e., as to claims for unpaid compensation that had not yet accrued and, therefore, were not encompassed by an ongoing suit. It is these **prospective** claims as to which APCCS would not be representing the PSP that the PSP will be able to pursue on its own, should it so choose.

Opt-out rights of the sort associated with class actions under Fed. R. Civ. P. 23(b)(3) most certainly do *not* exist here once a PSP has assigned its claim.

APCC Services might, of course, *voluntarily* account for the proceeds just as it planned to account in the absence of delinquency, perhaps on the belief that it would ensure the PSP's goodwill and financial health, two factors key to an aggregator's long-term success. But retention of claims – not relinquishment – has been the aggregators' actual practice. After five years of litigation, they have not returned a single claim to a PSP.[3]

B. The Aggregators Have Individual Standing

A component of the "irreducible constitutional minimum" is that a plaintiff must have suffered an "injury in fact." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Without such an injury, there is no Article III "case" or "contro-

[3] Sprinkled through appellants' brief are other misstatements of fact, sometimes accompanied by a suggestion that appellees have never contradicted those statements so they must be true. Appellees do not respond to every misstatement of fact in appellants' brief because space limitations preclude doing so and some of the false statements – *e.g.*, that a legal team was assembled before any PSP decided to sue (Br. 6) – are irrelevant, but silence should not be taken as acquiescence in any particular factual statement in appellants' brief.

versy." Because the aggregators, despite owning the claims, plan to account to the PSPs following litigation, appellants contend that they lack standing. Appellants' theory is that it is insufficient for a plaintiff to have an unconditional right to full recovery on a valid claim – in addition, it must *retain* that recovery for some unspecified time, or use it in a way that is to its direct economic benefit. That requirement cannot be found in the Constitution or case law.

1. A Long Tradition Of Jurisprudence Supports Standing

For more than 80 years, the Supreme Court has recognized that an assignee has standing regardless of whether it must account to an assignor following litigation. In *Spiller* v. *Atchison, Topeka & Santa Fe Ry.*, 253 U.S. 117 (1920), Spiller was assigned the claims of 2000 shippers that certain railroads were charging excessive rates, in violation of the Interstate Commerce Act. The express purpose of the assignments was to allow Spiller to pursue claims for the shippers' benefit before a federal agency and in federal court. *Id.* at 133. The Eighth Circuit held that the purpose of the assignments was insufficient to give Spiller standing, but the Supreme Court disagreed:

> 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 of 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. The aggregators have standing on precisely that rationale.

The Supreme Court further embraced standing for collectors in *Titus* v. *Wallick*, 306 U.S. 282 (1939). Ohio courts refused to enforce a New York judgment in favor of an assignee for collection because it was not a real party in interest under Ohio law because of its obligation to account for proceeds. The Supreme Court disagreed, explaining that the assignment's "legal effect 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." *Id.* at 289. In other words, the assignee's planned use of the proceeds was irrelevant to its standing to recover them.

Appellants assert, incorrectly, that "the question of the assignee's standing under Article III was irrelevant" to the Supreme Court's jurisdiction in *Titus* "[b]ecause Article III does not apply to state courts." Br. 39. The assignee did not need to satisfy Article III to invoke the jurisdiction of the *Ohio* courts, but he *did* need to satisfy Article III when he successfully invoked the jurisdiction of the Supreme Court of the United States. STERN, GRESSMAN, SHAPIRO & GELLER, SUPREME COURT PRACTICE § 18.1(b), at 814 (8th ed. 2002) ("[A] party who seeks entry into the federal court system for the first time must be able to satisfy the Article III

standing requirements at that point. This is true even if the initial entry occurs at the Supreme Court level, as when a party seeks to invoke the Court's certiorari jurisdiction" – as Titus did – "to review a state court judgment."). The Court thus necessarily determined Article III jurisdiction.

Appellants attempt to dismiss *Spiller* and *Titus* as historical relics, arguing that they "were decided long before modern standing analysis" (Br. 39), and that the Supreme Court has not cited *Spiller* since 1966 or *Titus* since 1951 (Br. 40 n.18). But the Supreme Court has warned lower courts to "leav[e] to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989). *Spiller* and *Titus* are binding unless and until the Supreme Court *explicitly* says otherwise.

Furthermore, *Spiller* and *Titus* continue to exert influence on modern law. In 1997, the Second Circuit held that a corporation lacked standing to sue on assignments conferring only "the power to commence and prosecute" the claims of its shareholders. *Advanced Magnetics, Inc.* v. *Bayfront Partners, Inc.*, 106 F.3d 11, 14 (2d Cir. 1997). To make a valid assignment, it reasoned, the assignor must manifest "an intention to make the assignee the owner of [the] claim." *Id.* at 17. The corporation argued that *Titus* permits standing even for plaintiffs lacking ownership of claims, but the Second Circuit disagreed, explaining: "*Titus* stands for

the proposition" – which is dispositive of the case now before this Court – "that the addition of an accounting provision does not negate the owner's manifestation of his intent to transfer ownership of a claim, not that such a manifestation is unnecessary." *Id.* at 18. Authoritative treatises also continue to reflect applications of *Titus*'s reasoning. See 6A WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1545 (2d ed. 1990) ("[F]ederal courts have held that an assignee for purposes of collection who holds legal title to the debt * * * is the real party in interest even though the assignee must account to the assignor for whatever is collected in the action."); 6 Am. Jur. 2d *Assignments* § 184.

2. The Distinction Between Standing Under Article III And Rule 17(a) Does Not Assist Appellants

Faced with the multitude of cases holding that a plaintiff's standing is unaffected by its obligation to account for proceeds, appellants dismiss all pre-2000 precedent on the theory that it addresses only prudential limitations on standing, not Article III standing. Because it is the aggregators' personal stake in the controversy that appellants question, they contend that the collection cases "simply do not address the [relevant] issue." Br. 37. That contention is incorrect.

In every case cited above, the issue before the court was whether the assignee had standing to pursue its claim. Yet appellants suggest that, until *Vermont Agency* in 2000 (discussed below), the Supreme Court, courts of appeals, and com-

mentators uniformly failed to consider the constitutional component of standing – and also neglected to examine federal jurisdiction – in *every case* in which an assignee had an obligation to account for its proceeds. Yet "[e]very federal appellate court has a special obligation to satisfy itself of its own jurisdiction" in each case, "even though the parties are prepared to concede it." *Mitchell* v. *Maurer*, 293 U.S. 237 (1944); *Common Cause* v. *FEC*, 108 F.3d 413, 416 (D.C. Cir. 1997).

True, courts have, on rare occasions, reconsidered standing in areas where they previously assumed it present. *E.g.*, *Allen* v. *Wright*, 468 U.S. 737, 764 (1984). Unlike those very few instances, however, every case assessing a collector's standing to sue has been *about standing*, not some unrelated subject – such as the effect of racial discrimination on a school's tax-exempt status in *Allen* – that might divert focus from questions of standing.

Article III standing 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), and the aggregators' personal interest is precisely the issue here. The collection cases are therefore apt *even if* they discuss only prudential limitations on standing, especially because the two standing inquiries almost always produce the same result. See 4 MOORE'S FEDERAL PRACTICE § 17.10[1] (3d ed. 1997) (although not every party who meets stand-

ing requirements is a real party in interest, real parties in interest generally have standing); 6A WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1542 (both require that plaintiffs "possess[] a sufficient interest in the action to entitle * * * [them] to be heard on the merits").

To be sure, in isolated instances courts have held that a real party in interest lacked Article III standing. See, *e.g.*, *Apter* v. *Richardson*, 510 F.2d 351 (7th Cir. 1975) (holding that a professor lacked standing to contest the denial of a grant because he was not the one who applied for it). But those situations are rare, and this is not one of them. The aggregators are the present owners of the contractual right to dial-around compensation, and, by failing to pay the claims when they were in the PSPs' hands, appellants inflicted an injury that now rests with the aggregators, as the district court correctly understood. JA34. *Apter* itself is plainly distinguishable insofar as the aggregators have a direct interest in compensation for claims they own. Appellants, however, rely on *Honey* v. *George Hyman Construction Co.*, 63 F.R.D. 443 (D.D.C. 1974) – which in turn relied on *Association of Data Processing Service Orgs.* v. *Camp*, *supra* – for the proposition that the aggregators' ownership of those claims and proceeds is irrelevant to their standing. Not so.

In *Data Processing*, an association of data processors sought review of an administrative ruling that national banks could offer data processing services. The Eighth Circuit held that the association had no legal right at stake and therefore lacked standing. The Supreme Court reversed, explaining that "the existence or non-existence of a 'legal interest' is a matter quite distinct from the problem of standing." 397 U.S. at 153 n.1 (citing *Barlow* v. *Collins*, 397 U.S. 159 (1970)). "[A]part from [the] 'case' or 'controversy' test," it continued, "the question [is] whether the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153. It held that the association was within the zone of interests the Administrative Procedure Act was intended to protect, so it had standing despite its lack of "legal interest."

The *Honey* court employed equally expansive reasoning. Several Lloyd's underwriters assigned their claims to one of their number to economize on litigation costs. The defendant argued that, although the chosen underwriter had standing to sue on his own claim, he lacked standing to sue on those assigned to him because his duty to account for proceeds betrayed a lack of ownership. The court disagreed, explaining: "The days of *Tennessee Electric Power Co.* v. *TVA* and kindred cases which spoke of a plaintiff's 'legal' interest as an element of standing

are now gone. * * * The existence or non-existence of a 'legal interest' * * * is simply not relevant to and a matter quite distinct from the problem of standing." *Honey*, 63 F.R.D. at 446-447 (citing *Barlow* v. *Collins*).

These cases do not support appellants' position. Although the cases divorce "legal interest" from standing, each *expands* the scope of standing beyond what a strict focus on legal interest would yield. That liberal view of standing is unsurprising given that both cases rely on *Barlow* v. *Collins*, *supra*, a distinctly pro-plaintiff case. Nothing about these cases implies that ownership of a claim and its proceeds is insufficient to confer standing, or that a later obligation to account somehow negates it.

It would be senseless to deny it to the aggregators based on a perceived distinction between two dovetailing doctrines that – as this Court recognized in *Whelan* – require the same personal interest. Since 1914, when the District of Washington approved standing for a collector in *The Rupert City*, 213 F. 263, every court and commentator faced with the issue has followed suit, even in light of courts' "special obligation" to ensure their own jurisdiction. The natural conclusion is that these courts simply used the term "real party in interest" as shorthand for a party with the interest necessary to sue, in light of both jurisdictional and prudential considerations. It is also possible that they recognized they had

jurisdiction over the controversies, and therefore concerned themselves with the nettlesome prudential question whether the assignee was a real party in interest in the Rule 17(a) sense. As between these explanations and appellants' – that no court, litigant, or commentator considered subject-matter jurisdiction in a collection case for nearly a century – the choice is clear.

3. The Recent Assignee Standing Cases: *Physicians Health* and *Vermont Agency*

Although *Spiller*, *Titus*, and the other collection cases are entirely on point, it is useful to examine two recent decisions discussing assignee standing in explicit Article III terms. In *Vermont Agency of National Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), the issue was whether an individual had Article III standing to pursue a *qui tam* action under the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733. The FCA provided that such a private litigant (relator) could bring suit "for the person and for the United States" and, if successful, receive a share of the proceeds. 529 U.S. at 769. The defendant argued the relator lacked standing because "he [was] suing to remedy an injury in fact suffered by the United States," whereas "Article III judicial power exists only to redress or otherwise protect against injury *to the complaining party*." *Id.* at 772 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975)).

The Court first considered the possibility that the relator had standing merely because the FCA authorized him to receive proceeds, but it rejected that theory as proving too much, for "the same might be said of someone who has placed a wager upon the [suit's] outcome." 529 U.S. at 772; cf. *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 107 (1998) ("[A]n interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes."). Nevertheless, the Court concluded that the relator had standing based 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 773-774. In other words, "[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim," *id.* at 773, and assignment of that claim simultaneously transfers the injury in fact. The Court "confirmed" its conclusion by noting the long tradition of standing for relators in *qui tam* actions. *Ibid.*

Vermont Agency weighs heavily in favor of standing for the aggregators. The district court recognized that – just as the Government in *Vermont Agency* assigned a portion of its injury to the *qui tam* relator – the PSPs assigned their injuries to the aggregators. Moreover, although the FCA effected only a "partial assignment" of the Government's claim, the PSPs' assignments to the aggregators are complete, presenting an even stronger case for standing. Finally, there is a

robust tradition of standing for assignees comparable to that for *qui tam* relators. The Judiciary Act of 1789 confers jurisdiction over actions by assignees if the assignors themselves could have brought suit: "[N]or shall any district or circuit court have cognizance of any suit to recover the contents of any * * * chose in action, in favor of an assignee, *unless* a suit might have been prosecuted in such court, to recover the said contents, if no assignment had been made." 1 Stat. 79 (emphasis added).

Appellants look to *Connecticut* v. *Physicians Health Services*, 287 F.3d 110 (2d Cir. 2002), without support. Eight individuals sought to enjoin Physicians Health Services (PHS), a health plan provider, from denying them access to certain prescription medications. Rather than sue individually, the participants assigned to the State of Connecticut their right to "any cause of action" for "appropriate equitable relief" they might have had under ERISA § 502(a), 29 U.S.C. § 1132(a). 287 F.3d at 112. They retained, however, their right to seek monetary relief. *Id*. at 115 n.6. PHS challenged the State's standing under Article III, arguing that the State had suffered no injury in fact. The Second Circuit agreed, holding that the State lacked standing because the assignments

> d[id] not * * * confer "actual" rights or benefits under ERISA to the State. The right to recover benefits or to seek money damages remain[ed] with the assignors. Moreover, the assignments divorce the equitable cause of action aimed at an alleged breach of fiduciary duty from the breach itself because

> they do not create a fiduciary duty running from PHS to the State. 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. at 115 (footnote omitted). As the Second Circuit noted, its own precedents would have required it to recognize assignee standing if the right to reimbursement had been assigned. *Id.* at 117 (discussing *I.V. Servs. of Am.* v. *Trustees*, 136 F.3d 114 (2d Cir. 1998)). Under the "assignment," the State did not receive the rights of the injured parties, only the power to sue on their behalf. Connecticut could not receive a remedy for any injury the State claimed to represent. It could not seek damages, because that right remained with the individual participants. Connecticut sought equitable relief for breach of a fiduciary duty, but PHS did not owe any fiduciary duty to Connecticut, either directly or by "assignment." Therefore, the only remedy sought did not relate to any injury suffered by, or assigned to, the State.

The Second Circuit specifically noted that there are situations "where, even though an assignee incurs no injury, expense, or loss in exchange for the assignment, a valid and binding assignment of a *claim* (or portion thereof) – not only the right or ability to bring suit – may confer standing on an assignee." 287 F.3d at 117 (emphasis in original). The court was reiterating the distinction it enunciated in *Advanced Magnetics*, 106 F.3d at 17-18, between the standing of a plaintiff

assigned complete ownership of the *claim* (as in this case) and the lack of standing of a plaintiff merely granted a power of attorney to bring suit (as in *Physicians Health*). The standing of a plaintiff assigned ownership of the claim "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*, 106 F.3d at 17. As the district court understood, these decisions support appellees' standing.

C. Appellants' Theory Of Standing Would Have Disturbing Consequences

Appellants' narrow theory is that an assignee lacks standing to sue for damages unless it will keep any proceeds resulting from the action. Br. 31. The broader implication is that no party may bring a lawsuit unless it will *personally* retain the proceeds. This is not the law, as two examples show.

1. Antitrust Associations

"[I]t is commonplace for individual persons claiming antitrust injury to assign their claims to an association formed for the specific purpose of pursuing litigation." *Gulfstream III Associates, Inc.* v. *Gulfstream Aerospace Corp.*, 995 F.2d 425, 437 (3d Cir. 1993) (Greenberg, J., concurring). See also *Jefferson County Pharmaceutical Ass'n*, *Inc*. v. *Abbott Lab*, 460 U.S. 150 (1983) (trade association of retail pharmacists pursued Robinson-Patman Act claims as assignee

of claims of its individual members); *Chiropractic Coop Ass'n* v. *American Medical Ass'n*, 867 F.2d 270 (6th Cir. 1989) (association brought monopolization claims assigned to it by individual chiropractors); *Hahn* v. *Oregon Physicians' Service*, 786 F.2d 1353 (9th Cir. 1985) (podiatrists formed corporation to which they assigned antitrust claims); *In re Fine Paper Litig.*, 632 F.2d 1081, 1090 (3d Cir. 1980) (citing cases). If appellants are correct, every one of these courts lacked jurisdiction, for in each case the association accounted to its assignors for anything it gained.

Two cases from the Ninth Circuit are especially informative. In *Klamath-Lake Pharmaceutical Assoc.* v. *Klamath Medical Service Bureau*, 701 F.2d 1276 (9th Cir. 1983), seven pharmacies assigned to the association their antitrust claims against a healthcare provider. The Ninth Circuit held that the association was a real party in interest even though the pharmacies "retained their interest in the outcome of this litigation." *Id.* at 1282. Similarly, in *Pacific Coast Agricultural Export Assoc.* v. *Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), seven citrus exporters assigned their antitrust claims to an association, which charged Sunkist with violating Section 1 of the Sherman Act by conspiring to restrain trade. The Ninth Circuit recognized the association's right to sue, explaining that, "[w]hile an association may not sue on its own to assert the rights of its members

under the antitrust laws, it may sue as assignee of the legal rights of others." *Id.* at 1207-1208.

2. Bankruptcy Trustees

A trustee's purpose is to safeguard trust property through any reasonable means, including legal action. Yet any recovery a trustee makes inures to the benefit of the trust directly, and the beneficiary indirectly: the trustee himself does not benefit at all. (If he did benefit, it would usually violate his fiduciary duty of loyalty.) Thus, in appellants' view, Article III standing requires precisely the "personal stake" a trustee cannot possess, and it follows that no trustee could *ever* bring an action in federal court for the benefit of a trust.

It is black-letter law that a trustee "is under a duty to the beneficiary to take reasonable steps to realize on claims which he holds in trust." RESTATEMENT (SECOND) OF TRUSTS § 177. In other words, if the trust owns a valid claim, the trustee is duty-bound to pursue it, and failure to do so subjects the trustee to fiduciary liability. A formalist adherence to the need for a "personal stake" in every controversy, however, would deny trustees standing to bring the required actions, for they would not directly benefit from the proceeds.

The broader implications for bankruptcy law are even more troubling, for "the trustee has a unique role in bankruptcy proceedings." *Hartford Underwriters*

Ins. Co. v. *Union Planters Bank, N.A.*, 530 U.S. 1, 7 (2000). For example, in Chapter 11 reorganizations, the trustee may bring suit to recover property fraudulently transferred by the debtor in anticipation of bankruptcy. 11 U.S.C. § 544(b). In Chapter 7 liquidations, the trustee is even more central, for he or she displaces the debtor's management and bears responsibility for conducting the proceeding in an organized fashion. "After appointment of a trustee, a debtor no longer has standing to pursue a cause of action which existed at the time the order for relief was entered. *Only the trustee* has the authority and discretion to prosecute, defend and settle, if appropriate in its judgment, such a cause of action." KING, ET AL., COLLIER ON BANKRUPTCY ¶ 323.03[1] (3d ed. 2002) (emphasis added).

If appellants' view of the "personal stake" requirement is correct, trustees will be unable to serve their unique role in the bankruptcy system (as well as ERISA, the law of estates, or any other trust-based field). This concern is neither exaggerated nor easily dismissed. *First*, if appellants' theory is correct, Congress cannot give trustees standing through the Bankruptcy Code, for it "cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would otherwise not have standing." *Raines* v. *Byrd*, 521 U.S. 811, 820 n.3 (1997). *Second*, under appellants' arguments in this case, trustees do not gain standing merely because courts have always assumed that they have it.

This Court should not accept appellants' invitation to disrupt fields of law ranging from to antitrust to bankruptcy. Instead, it need only decide that, when an assignee enjoys complete ownership of a claim, including both the injury and its remedy, the assignee has standing: its intended use of the proceeds recovered is immaterial.

D. The Aggregators Have Associational Standing

The Supreme Court has recognized that, "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members." *Warth* v. *Seldin*, 422 U.S. at 511. Such standing requires three things. *First*, the association's members must otherwise have standing to sue in their own right. *Second*, the interests 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 (1977). The aggregators meet each requirement.

The first criterion is clearly met, for the PSPs would have standing in the absence of any assignment. Likewise, recovering money on PSPs' behalf is entirely germane to the aggregators' purpose, despite appellants' insistence that their sole purpose is to make money. No court has limited associational standing to

nonprofit organizations, and for good reason: pursuit of profit in no way conflicts with effective advocacy. The aggregators' primary function is to recover money from IXCs on behalf of individual PSPs; indeed, AT&T itself *insists* that they serve that function, instructing that all demands for payphone compensation must come from aggregators, not PSPs. JA169. In light of AT&T's decision to make aggregators indispensable parties in the compensation process, it is disingenuous to suggest that pursuit of compensation is "not germane" to their purpose.

Finally, there is no sense in which this action will require participation by individual PSPs. Old cases held that associational standing was unavailable for damage claims because they required individualized proof. See, *e.g.*, *Telecommunications Research & Action Center* v. *Allnet Communication Services, Inc.*, 806 F.2d 1093, 1095 (D.C. Cir. 1986). Those cases depended on the assumption that all three *Hunt* factors were of constitutional moment, but the Supreme Court decided otherwise in *United Food & Commercial Workers Union Local 751* v. *Brown Group*, 517 U.S. 545 (1996). It reasoned that, "once an association has satisfied *Hunt*'s first and second prongs assuring adversarial vigor in pursuing a claim for which member Article III standing exists, it is difficult to see a constitutional necessity for anything more," and concluded that *Hunt*'s third factor is merely prudential. *Id.* at 556.

Because prudential doctrines are judicially self-imposed, the Court should allow the aggregators to proceed as long as it makes good sense to do so – which it does. They possess records – more detailed than the records the vast majority of the PSPs themselves possess – on the claims for which they seek compensation, and they have proven adept at representing PSPs in collection matters since the inception of dial-around compensation in 1992. The FCC encouraged the industry to devise its own procedures for the collection of dial-around compensation and viewed favorably the aggregator process that developed. See *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, 6 F.C.C.R. 4736 (1991) (¶¶ 41-42); 1992 *Second R&O,* 7 F.C.C.R. at 3259 (¶ 49) .

The funds recovered will "find their way into the pockets of the members on whose behalf the injury is claimed" – indeed, that fact, which cuts *in favor of* prudential recognition of standing, is the basis for appellants' *attack* on standing – and there is evident "administrative convenience and administrative efficiency" in allowing the aggregators to pursue the claims in consolidated fashion. *UFCW* v. *Brown Group*, 517 U.S. at 556. This Court should therefore permit them to do so on the basis of associational standing even if it determines that they have no independent standing.

E. The Sky Is Not Falling

Since *The Rupert City* in 1914, many courts have permitted assignees for collection to sue despite their obligation to account for proceeds. Individual antitrust claimants have often assigned their claims to associations for collection purposes only, and no court has denied those associations standing. Trustees, guardians *ad litem*, and executors of estates have had standing to recover money and property that will never benefit them personally. Nevertheless – appellants assert – if the aggregators are allowed to proceed in this case, the judicial system will be burdened by unmanageable cases, Rule 23 will become a dead letter, and individuals who assign their claims will be victimized. That is nonsense.

Appellants first lament that, because the aggregators' claims "implicate more than one billion telephone calls," they "cannot realistically or fairly be tried together." Br. 44. But the litigation would hardly be simpler if appellants were forced to search the same database of 1 billion calls in 1400 separate lawsuits. It is far more efficient to try the claims together so the parties can use sampling techniques to reduce the discovery burden, an approach commonplace in securities litigation and elsewhere.

Appellants' second concern is that the aggregators' approach would allow plaintiffs to "avoid the strictures of Rule 23." Br. 43. That argument is strange,

because there is nothing compulsory about Rule 23. It states: "An action *may* be maintained if the prerequisites * * * are satisfied." Fed. R. Civ. P. 23(b) (emphasis added). As the leading treatise puts it, "[a]nyone with individual standing who satisfies Rule 23 criteria *may* bring a class action." NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS § 2.01 (3d ed. 1992) (emphasis added). To be sure, it is often more efficient to bring claims as a class instead of a group of individuals, but the decision to seek class certification is left to the plaintiff, and there is no cap on the number of claims a plaintiff can bring without it. Moreover, to the extent appellants worry about the death of class actions – insincerely, one suspects – they need not. Courts first recognized standing for collectors nearly a century ago, and antitrust associations have sued on assigned claims for nearly thirty years, yet class actions are alive and well. Finally, appellants' Rule 23 argument embodies the odd notion that a Federal Rule of Civil Procedure (promulgated in 1937) is relevant to the standing requirements of Article III of the Constitution (ratified in 1788).

II. CONGRESS CREATED A PRIVATE RIGHT OF ACTION THAT AUTHORIZES THESE SUITS

"[P]rivate rights of action to enforce federal law must be created by Congress." *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001) (citing *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979)). Congress has expressly created a

private right of action that authorizes these cases, as explained below. And, even if Congress had not explicitly done so, "the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available. Such an intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 18 (1979).

Two provisions of the Communications Act expressly create a private right of action to bring these cases. First, under Section 207:

> Any person claiming to be damaged by any common carrier subject to the provision of this Act may either make complaint to the Commission * * * or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.[4]

Second, under Section 407:

> If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United

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[4] A companion provision, Section 206, provides:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act 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 this Act * * *.

States * * * a petition setting forth briefly the causes for which he claims damages * * *.

A. Section 207 Creates A Private Right Of Action For PSPs To Recover Unpaid Compensation For Dial-Around Calls

Appellants concede that Section 207 and its companion provision, Section 206, "provide a private right of action for damages resulting from a common carrier's alleged violation of the Act." Br. 13. They do not dispute that they are common carriers within the meaning of those sections. Their only argument is that they have not violated "the Act" even if they have violated Commission orders issued under the Act.

This Court has recognized that PSPs may seek damages for unpaid compensation under Section 207, and did so at the urging of Sprint and AT&T. Contradicting their arguments here, Sprint and AT&T told this Court in a prior case that a carrier's "*[f]ailure to pay the required compensation is a violation of FCC rules for which the carrier is subject to damages* as well as fines and penalties. See 47 U.S.C. §§ *206-08*, 501-03." Final Joint Brief of Long Distance, Paging, and Consumer Intervenors in Support of Respondents, *APCC* v. *FCC*, No. 99-1114 (filed Sept. 7, 1999) (emphasis added). This Court relied on their assertion – to the point of directly quoting these words in its opinion – in *APCC* v. *FCC*, 215 F.3d 51, 56 (2000).

Sprint and AT&T were right then and are wrong now. Their failure to pay the required compensation violates "the Act," specifically Section 276(b)(1)(A) and Section 201(b), and in any event violation of an FCC order is itself a violation of the Act under Section 416(c). And Section 207, as appellants concede, creates a private right of action for a carrier's violation of the Act.

1. Appellants' Failure To Pay Dial-Around Compensation Violates Section 276(b)(1)(A)

Congress commanded:

> 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 take all actions necessary * * * to 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 * * *.

47 U.S.C. § 276(b)(1). This language leaves no doubt that Congress sought certainty that PSPs would be compensated; it wanted to "ensure" compensation for "each and every" call. Congress *required* the Commission to "take all actions necessary" to accomplish that objective. And, subject to its unambiguous mandate of the result that was required, Congress delegated to the Commission the responsibility of devising the details of a plan that would accomplish the required result.

The statute, as appellants concede, "*creates a right* of fair compensation for these payphone calls" and "leaves it to the FCC to decide who should pay for particular payphone calls under the regulatory plan." Br. 12 (emphasis added). PSPs constitute a "'class for whose especial benefit the statute was enacted'" and the statute "create[s] a federal right in favor of the plaintiff." *Cort* v. *Ash*, 422 U.S. 66, 78 (1975) (quoting *Texas & Pacific R.R.* v. *Rigsby*, 241 U.S. 33, 39 (1916)). Appellants' contention that Section 276 was intended to benefit the public, not PSPs, Br. 21, is utterly inconsistent with the text. As the language of Section 276 explains, protection of PSPs' right to compensation is an essential instrument – indeed, the *only* instrument identified in the statute – by which the public benefits could be achieved. PSPs will have the proper incentives to accomplish "widespread deployment of payphone services to the benefit of the general public" *only* if they are fairly compensated for "each and every" completed call.

In light of the plain language of Section 276(b)(1)(A), it would be *unlawful* for payphone providers to be denied fair compensation for each and every call; Congress *required* payment of such compensation. And Section 206 states, equally plainly, that a common carrier is liable for damages when it does anything "declared to be unlawful" or fails to do things "required to be done" by the Act.

Appellants' only answer is that the Act itself does not specify *who* must pay compensation, but merely directs the Commission to prescribe a compensation plan. That is no answer at all. "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 844 (1984). Because of this fundamental principle, the distinction that appellants try to draw between enforcement of the Commission's rules and enforcement of the Act is an illusion. "[I]t is * * * meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. 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." *Sandoval*, 532 U.S. at 284. That is why, in *Sandoval*, the Supreme Court recognized a private right of action to enforce *regulations* dealing with intentional discrimination – because those regulations, promulgated pursuant to an express delegation of authority to the agency, "authoritatively construe the statute itself." *Ibid*.

Chevron deference is due not only to the Commission's decision that appellants must pay compensation, but also to the Commission's separate determina-

tion, unmentioned in appellants' brief, that a "failure to pay [dial-around compensation] in accordance with the Commission's payphone rules * * * constitutes both *a violation of section 276* and an unjust and unreasonable practice in violation of section 201(b) of the Act." *Pay-Tel Order*, 18 F.C.C.R. at 19,990 (¶ 32) (emphasis added). That conclusion, as explained above, logically follows from the plain language of the statute; at the very least, the conclusion is a "permissible construction of the statute" that must be accepted "if the statute is silent or ambiguous with respect to the specific issue" whether a failure to pay compensation violates Section 276. *Chevron*, 467 U.S. at 843.

2. Appellants' Failure To Pay Dial-Around Compensation Violates Section 201(b)

Appellants' failure to pay dial-around compensation also violates Section 201(b), which declares unlawful any "charge, practice, classification, or regulation that is unjust or unreasonable." Section 201(b) deals with any unjust or unreasonable "practice" that is used "in connection with" a "communication service." "Communication service" is described in Section 201(a) as a service offered by a "common carrier."

The application of Section 201(b) to the present situation is straightforward. Appellants are "common carriers." When they carry dial-around calls from payphones, they are providing long-distance and calling-card services that constitute a

"communication service" described in Section 201(a). Their refusal to compensate PSPs for such calls, as required by law, is an "unjust and unreasonable" "practice" "in connection with" their offering of that "communication service."

Appellants barely attempt to refute this reading of the plain language of Section 201. They assert that Section 201(b) relates to common carriers' provision of communications services "to their customers." Br. 22. That is true enough, but the relevant question is whether Section 201 relates *only* to a carrier's provision of services to its customers. Nothing in the language of the statute suggests, let alone requires, such a limitation, and appellants cite absolutely no authority supporting such a limitation. Instead, the words "practice" "in connection with" a service suggest, if they do not compel, a broader scope, to encompass a carrier's practices when it deals with other parties such as PSPs (dealings that Congress explicitly told the Commission to regulate) whose services are an integral component of the service the carrier provides to its customers.

That broader reading of Section 201(b) is both natural and necessary to effectuate the second clause of Section 201(a), which authorizes the Commission to require physical connections between carriers and through routes, the "charges applicable thereto and the divisions of such charges." If appellants' reading of Section 201(b) were correct, limiting that subsection's reach to a carrier's dealings

with its customers, Section 201(b) could *not* be invoked to enforce the Commission's orders or to regulate carriers' "practices in connection with" the division of charges among carriers referenced in Section 201(a). Nothing suggests that Section 201(b) was meant to effectuate the first clause of Section 201(a) but not the second clause. And both clauses of Section 201(a) must be given effect. That is why this Court held that the Commission could not rely on the first clause in Section 201(a) to impose an obligation on AT&T to accept access services; such an obligation must arise from the second clause in that section, which can be invoked only after an opportunity for a hearing. *AT&T* v. *FCC*, 292 F.3d 808, 812 (D.C. Cir. 2002).

Appellants' implausible construction of Section 201(b) could wreak havoc far beyond the context of payphone disputes and undermine Congress's fundamental objective of promoting competition in the telecommunications industry. In contrast to the bygone world of Ma Bell, when a single carrier handled most communications from one end to the other, a competitive telecommunications market requires myriad interconnections among different carriers, as well as efficient inter-carrier compensation arrangements so that each carrier will be properly compensated when communications traverse the networks of multiple carriers. Appellants' implausible statutory interpretation would place such matters – includ-

ing the obligation of IXCs like Sprint and AT&T to pay access charges to local exchange carriers – beyond the reach of Section 201(b).

Not surprisingly, the Commission has concluded that Section 201(b) governs inter-carrier practices, in addition to carrier-customer practices, in exactly the context at issue here. Though appellants surprisingly do not mention it at all, the Commission has concluded that "failure to pay [dial-around compensation] in accordance with the Commission's payphone rules * * * constitutes both a violation of section 276 *and an unjust and unreasonable practice in violation of section 201(b)* of the Act." *Pay-Tel Order*, 18 F.C.C.R. at 19,990 (¶ 32) (emphasis added). At a minimum, this is a permissible construction of the statute and therefore dispositive of the issue. *Chevron*, 467 U.S. at 843.

3. Appellants' Failure To Pay Dial-Around Compensation Violates Section 416(c)

Sections 206 and 207, which create a private right of action when a carrier does things "declared to be unlawful" or fails to do things "required to be done" under the Act, apply here for another reason. A violation of a Commission order is also a violation of the duty imposed by Section 416(c) on "every person" "to observe and comply with [the Commission's] orders so long as the same shall remain in effect." Thus, the violation of a Commission order is also a violation of the Act itself. *South Cent. Bell Tel. Co.* v. *Louisiana Pub. Service Commission*,

744 F.2d 1107, 1117 (5th Cir. 1984) ("Violating rules and regulations of the FCC * * * is violative of the Act.") (citing 47 U.S.C. § 416(c)), vacated on other grounds, 476 U.S. 1166 (1986). That violation, in turn, provides the basis for an action under Section 207 even if appellants' artificial distinction between "the Act" and orders issued by the Commission pursuant to the Act has force.

Appellants advance three unpersuasive arguments to try to escape from this plain language. *First*, they assert that this Court, in *Sprint* v. *FCC*, 315 F.3d 369 (D.C. Cir. 2003), "implicitly" held that the Commission's payphone compensation orders are not "orders" within the meaning of Section 416(c). Br. 23. That was not the holding of *Sprint*. At issue was whether the particular order in question had been properly promulgated. This Court agreed with the IXC petitioners that the Commission had failed to abide by the notice requirement of Section 4(b) of the Administrative Procedure Act, 5 U.S.C. § 553(b). *Sprint* does not even mention whether the payphone compensation order was an "order." Rather, the decision turned on the fact that the Commission effected a substantive change to its prior rule, necessitating a new round of notice and comment under the APA. 315 F.3d at 377.

Although this Court has not endorsed the distinction that appellants seek to draw, other courts of appeals have rejected that distinction in holding that the term

"orders" in Section 401(b), a sister provision to Section 416(c), encompasses orders of general applicability promulgated through the Commission's rulemaking authority. The Fourth, Sixth, Seventh, Eighth, and Ninth Circuits have reached that conclusion.[5] Only the First Circuit has held otherwise. *New England Telephone & Telegraph Co.* v. *Public Utilities Comm'n*, 742 F.2d 1 (1st Cir. 1984). That court based its interpretation in significant part on the distinction between "rules" and "orders" in the Administrative Procedure Act. *Id*. at 5. The other Circuits that have addressed this issue, however, have held that there is "no authority supporting the proposition that the APA's rule-order distinction should be imported into the Communications Act." *Hawaiian Tel.*, 827 F.2d at 1271. "When Congress intended the APA's definition of a given term to be incorporated into the Communications Act, it said so. E.g., 47 U.S.C. §§ 409(a)-(c) (incorporating APA's definition of adjudication)." *Ibid*.

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[5] *Alltel Tennessee, Inc.* v. *Tennessee Pub. Serv. Comm'n*, 913 F.2d 305, 308 (6th Cir. 1990); *Hawaiian Tel. Co.* v. *Public Util. Comm'n*, 827 F.2d 1264, 1271-1272 (9th Cir. 1987); *Chesapeake & Potomac Tel. Co.* v. *Public Serv. Comm'n*, 748 F.2d 879, 880-881 (4th Cir. 1984), vacated on other grounds, 476 U.S. 445 (1986); *Illinois Bell Tel. Co.* v. *Illinois Commerce Comm'n*, 740 F.2d 566, 571 (7th Cir. 1984); *Southwestern Bell Tel. Co.* v. *Arkansas Pub. Serv. Comm'n*, 738 F.2d 901 (8th Cir. 1984), vacated on other grounds, 476 U.S. 1167 (1986); see also *MGC Communications, Inc.* v. *BellSouth Telecom., Inc.*, 146 F. Supp. 2d 1344, 1353 (S.D. Fla. 2001).

There is no reason to construe the term "order" in Section 416(c) differently than in Section 401(b). Sections 401 and 416 are sister provisions; both pertain to civil actions for enforcement of the Act and orders adopted pursuant to the Act. Identical words in these related sections, accordingly, should be interpreted in the same way. *United States Nat'l Bank of Or.* v. *Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 460 (1993) ("Presumptively, '"identical words used in different parts of the same act are intended to have the same meaning,"' *Commissioner* v. *Keystone Consol. Industries, Inc.*, [508 U.S. 152,] 159 [(1993)] (quoting *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932)), and * * * nothing rebuts that presumption here * * *.").

Appellants' *second* attempt to avoid Section 416(c) focuses on the requirement in Section 416(a) that orders must be served. Whether an order has been properly served has no bearing on whether it is an "order." In any case, the payphone compensation order was properly "served" on appellants. Section 416(a) refers to service in any "manner as may be provided by law," and rulemaking orders of general applicability are properly served through publication in the Federal Register. 5 U.S.C. § 552(a)(1)(D). The Commission's relevant payphone compensation order was so served. See 64 Fed. Reg. 13,701.

Third, appellants contend that the remedy for a violation of Section 416(c) is limited to injunctive relief, under Section 401(b), and thus a suit for damages is unauthorized. Br. 24. But the remedies described in Section 401(b) are for violations of orders "other than for the payment of money" and are thus irrelevant to the remedies available for violation of the payphone orders. Remedies for violations of orders "for the payment of money" are addressed in Section 407, to which we now turn.

B. Section 407 Creates A Private Right Of Action For PSPs To Recover Unpaid Compensation For Dial-Around Calls

Section 407 authorizes a "complainant, or any person for whose benefit such order was made" to file a petition for damages in federal district court "[i]f a carrier does not comply with an order for the payment of money." PSPs are persons for whose benefit the payphone compensation orders were made, and they complain that Sprint and AT&T have not complied with those orders, which of course require the payment of money. By its terms, Section 407 creates a private right of action to bring those complaints in district court.

Appellants' only response is that Section 407 refers to "a particular type of FCC 'order'" and does not apply to "general FCC regulations." Br. 25. For the reasons explained in the discussion of Section 416(c) above, however, an "order"

is an "order." Section 407 creates a private right of action to enforce the payphone orders, just as a violation of those orders is a violation of Section 416(c).

C. Congressional Intent To Create A Private Right Of Action Should Not Be Subverted Because Of Appellants' Policy Arguments

Appellants make several arguments that, as a matter of policy, it would be preferable for the Commission to resolve disputes over unpaid payphone compensation. See Br. 13-14, 19-21. Those arguments are wrong for many reasons.

First, although appellants suggest that PSPs' complaints about unpaid compensation should be handled by the Commission, not the courts, they fail to explain how, under their construction of the statute, such complaints could be entertained even by the Commission.[6] Section 207 authorizes injured parties to bring a "complaint to the Commission" or a "suit * * * in any district court" but draws no distinction between the basis on which a complaint may be filed at the Commission and the basis on which a complaint may be filed in district court. Appellants contend that Section 207 provides no basis for federal court jurisdiction because there has been no violation of "the Act" but they fail to explain how, if they are right about that, a PSP could complain to the Commission under Section 207 or the parallel 47 U.S.C. § 208.

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[6] The Ninth Circuit's *Greene* decision likewise sheds no light on this subject.

Appellants also fail to identify any other statutory basis under which PSPs could recover unpaid compensation through a Commission proceeding. Appellants contend that, for violations of Section 416(c), the only permissible remedy is injunctive relief, not damages. Br. 24.

Section 501, using language comparable to the language of Sections 206 and 207, permits the assessment of penalties, but if appellants are correct that Section 207 cannot be invoked because there has been no violation of "the Act" they would undoubtedly argue that Section 501 cannot be invoked either, for the same reason.

Section 502 provides for penalties for violations of Commission rules, and appellants might concede that such penalties could be imposed for violations of the payphone compensation rules. Even so, the penalties authorized in Section 502, like the penalties authorized in Section 501, are penalties that would be paid to the Treasury, not to PSPs. Appellants fail to explain how these provisions of the statute, or any others, could be invoked to ensure compensation to PSPs, as Congress clearly intended when it wrote Section 276. Thus, while expressing a policy preference that compensation disputes be handled by the Commission rather than the courts, appellants urge statutory interpretations that would prevent the recovery of damages in either forum.

Second, there is no merit to appellants' suggestion that adjudication of these claims in federal courts would intrude on the Commission's responsibilities or prerogatives. Br. 19-20. No one in these cases is asking the court to modify the Commission's orders or to interfere with the Commission's ability to do so; these cases seek enforcement of orders the Commission has *already* adopted, not prospective rulemaking. And the suggestion that the Commission *could have* placed compensation obligations on some party that is not a common carrier, rather than on the appellants, Br. 13-14, proves too much. Even if appellants are correct that there would be no private right of action to sue non-common carriers, that fact, at most, means that Section 276 ultimately did require the Commission to impose compensation obligations on common carriers such as appellants despite the absence of express mention of common carriers in Section 276; otherwise, the compensation plan, lacking any enforcement mechanism, would not satisfy the congressional mandate to "ensure" compensation for "each and every" call.

Nor is there any reason to preclude enforcement through the courts because such cases may require interpretation of the Commission's orders. These cases are fundamentally factual disputes of the kind that district courts routinely handle. If the cases require interpretation of a Commission order that is unclear or that would implicate questions of policy, the district court may draw on the Commission's ex-

pertise through a primary jurisdiction referral. See *Phone-Tel Communications, Inc*. v. *AT&T Corp*., 100 F. Supp. 2d 313, 322 (E.D. Pa. 2000). AT&T and Sprint requested such referrals, but the district court denied their requests. *APCC Services, Inc.* v. *WorldCom, Inc.*, 305 F. Supp. 2d at 14-15.

Third, appellants' policy arguments are irrelevant. The question is whether Congress intended to create a private right of action, not whether this Court, as a matter of policy, would have made the same decision. There is simply no reason to believe that Congress shared appellants' view that judicial enforcement of payphone compensation requirements would intrude on matters best left to the Commission – a Commission that does *not* believe that private enforcement intrudes on its prerogatives.

D. There Is An Implied Private Right Of Action To Enforce Section 276

Congress can create a private right of action by implication. "[T]he failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available. Such an intent may appear implicitly in the language of the statute, or in the circumstances of its enactment." *Transamerica Mortgage Advisors*, 444 U.S. at 18 (1979). Section 276 creates an implied right of action.

"Statutory intent * * * is determinative" in recognizing an implied right of action. *Sandoval*, 532 U.S. at 286. The legal context in which a statute was enacted should be considered if the context "clarifies [the] text" of the statute. *Id*. at 288. That principle is illustrated, in *Sandoval,* by the Court's reaffirmation of an implied right of action to enforce the prohibition against intentional discrimination in Title IX of the Civil Rights Act. *Ibid*. As the Court explained in *Sandoval*, that implied right of action was recognized in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), because Title IX "was patterned after Title VI of the Civil Rights Act of 1964," *id*., at 694, at a time when "the [parallel] language in Title VI had already been construed as creating a private remedy," *id.* at 696. In *Transamerica Mortgage Advisors*, a private right of action was inferred from a statutory declaration that certain contracts were void, because such a declaration "necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere." 444 U.S. at 18.

Similarly, Section 276's text demonstrates a congressional judgment that PSPs *must* be compensated for "each and every" completed payphone call. That objective cannot be achieved unless some mechanism exists to enforce the obligation. Appellants' preferred construction of the statutory provisions that authorize lawsuits, if adopted, would mean that there is no expressly stated enforcement

mechanism at all, even at the Commission. See pp. 54-55, *supra*. Congress can choose to create a right without also creating a private right to sue to enforce that right. *E.g.*, *Gonzaga University* v. *Doe*, 536 U.S. 273, 289 (2002) (explicit enforcement mechanisms in a statute suggest that no other enforcement mechanisms are implied). But there is no reason to suppose that Congress chose to create a right without providing *any* means to enforce it. In this context, if the express rights of action discussed above do not reach payphone compensation disputes, an implied right of action is necessary to achieve the objective Congress identified.

There is a key distinction between statutes that focus on the *regulated entity* and statutes – like Section 276 and Title IX – that focus on the *persons and entities protected*. "Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" *Sandoval*, 532 U.S. at 289 (quoting *California* v. *Sierra Club*, 451 U.S. 287, 294 (1981)); accord *Gonzaga*, 536 U.S. at 287. Thus, at least for purposes of implied-right-of-action jurisprudence, the point appellants stress – that the statute does not identify *IXCs* as the regulated party, but merely identifies PSPs as the intended beneficiary – cuts strongly *against* appellants' position.[7]

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[7] At the same time, the fact that the defendants are common carriers cuts *in favor of* recognition of an implied private right of action, at least under the

Under *Cort* v. *Ash*, 422 U.S. 66 (1975) – the case that "abandoned * * * the *ancien regime*," *Sandoval*, 532 U.S. at 287 – PSPs constitute a "class for whose especial benefit" Section 276 was enacted. 422 U.S. at 78. Likewise, the other factors that *Cort* described as relevant when inferring a cause of action[8] are present. *Ibid*.

Congress said that PSPs must be compensated for every payphone call. The result that Congress wanted requires, and thus creates by implication, a private right of action to enforce PSPs' rights.

E. The Ninth Circuit's Decision In *Greene* v. *Sprint* Should Not Be Followed

In *Greene* v. *Sprint Communications Co.*, *supra*, the Ninth Circuit held that Sections 206, 207, and 276 of the Act do not give rise to a private right of action for payphone compensation. The court did not decide whether Section 201(b), 407, or 416(c) gives rise to a private right of action, and lower courts bound by *Greene* consider themselves free to recognize such rights of action. See *Metro-*

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logic of *Maydak* v. *Bonded Credit Co.*, 96 F.3d 1332, 1334 (9th Cir. 1996), which appellants cite (Br. 18).

[8] *Cort* asks whether (1) the plaintiff is one of the class for whose especial benefit the statute was enacted, (2) there is an explicit or implicit indication of legislative intent to create a private right of action, (3) such a right of action is consistent with the underlying purposes of the legislative scheme, and (4) whether the cause of action was traditionally relegated to state law.

phones Telecommunications, Inc. v. *Global Crossing Telecommunications, Inc.*, No. C03-0694P (W.D. Wash. Dec. 16, 2003) (attached Addendum) (dismissing Section 276 claim under binding authority of *Greene* but separately analyzing Sections 201(b), 407, and 416(c) and recognizing cause of action under two of those three sections), appeal pending, No. 04-80015 (9th Cir.).

In any event, the Ninth Circuit's decision in *Greene* is wrong. The court thought itself bound by *Alexander* v. *Sandoval*, *supra*, to draw a sharp distinction between enforcement of the *Act* and enforcement of the *regulations* implementing the Act. The court then said:

> [T]here is no language in § 276 expressly conferring upon PSPs a right to fair compensation from IXCs. For this reason, there is no violation of the Act to be remedied through the private right of action afforded by §§ 206 and 207.

340 F.3d at 1052. Not even appellants defend that reasoning here. Section 276, they concede, "*creates a right* of fair compensation for these payphone calls" and "leaves it to the FCC to decide who should pay for particular payphone calls under the regulatory plan." Br. 12 (emphasis added). That concession disposes of this case. Indeed, it disposes of this case *even under the Ninth Circuit's reasoning*: "if § 276 creates a right to compensation, and if it were violated, §§ 206 and 207 supply the right to sue." 340 F.3d at 1050; see also *id*. at 1051 ("[t]he lack of rights-creating language in § 276 is crucial here as well").

The very case on which the Ninth Circuit relied says that 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." *Sandoval*, 532 U.S. at 284; see also Brief for the United States as Amicus Curiae at 11, *Jackson* v. *Birmingham Board of Educ.*, No. 02-1672 (U.S. cert. granted June 14, 2004), *available at* http://www.usdoj.gov/osg/briefs/2003/2pet/6invit/2002-1672.pet.ami.inv.pdf. The Commission's authoritative interpretation of *this* statute is that the *right* to compensation under Section 276 is best (if not exclusively) effectuated through regulations and orders requiring payment by common carriers, and Sections 206 and 207 create an *express* cause of action against common carriers. The Ninth Circuit's reliance on the proposition that Section 276 "does not establish a *right* to compensation," 340 F.3d at 1050, is indefensible, and the distinction that it does not in so many words establish a right "to compensation by *IXCs*," *ibid.*, is irrelevant given that the identification of IXCs as payors was done validly under an express delegation from Congress This Court should not follow *Greene*.

CONCLUSION

The orders the district court has certified for interlocutory appeal should be affirmed.

Respectfully submitted,

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August 18, 2004

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B): it is proportionally spaced, has a typeface of 11 points or more, and contains 13,928 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2).

Dated: August 18, 2004

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Damon W. Taaffe

ADDENDUM REQUIRED BY CIRCUIT RULE 28(c)(3):

Metrophones Telecommunications, Inc. v. *Global Crossing Telecommunications, Inc.*, No. C03-0694P (W.D. Wash. Dec. 16, 2003), appeal pending, No. 04-80015 (9th Cir.).

CERTIFICATE OF SERVICE

I, Damon W. Taaffe, hereby certify that two copies of the Brief for Appellees were mailed by first-class mail, postage prepaid, this 18th day of August, 2004, to:

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