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No. 07-552

IN THE

# Supreme Court of the United States

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

*Petitioners*,

*v.*

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

*Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

## BRIEF OF *AMICUS CURIAE* QWEST COMMUNICATIONS CORPORATION IN SUPPORT OF PETITIONERS

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## QWEST'S INTEREST

Qwest Communications Corporation ("Qwest") has a direct interest in the outcome of this appeal because Qwest is a defendant in a virtually identical lawsuit brought by respondents APCC Services, Inc. and others (the "respondents"). This Court's ruling will directly affect Qwest's ability to defend respondents' lawsuit.[1]

Qwest is identically situated to petitioners AT&T Corp. ("AT&T") and Sprint Communications Company L.P. ("Sprint"). Like AT&T and Sprint, Qwest is one of the nation's largest providers of long-distance telecommunications services, including toll-free (800-number) services. Since 1996, when the Federal Communications Commission ("FCC") imposed requirements for carriers to pay compensation, Qwest (like AT&T and Sprint) has paid hundreds of millions of dollars in "dial-around compensation" to numerous payphone operators, including customers of respondents. Like AT&T and Sprint, respondents claim that Qwest has failed to pay all of the dial-around compensation required by the FCC's regulations and orders.

On the same day that respondents filed their lawsuit against petitioner Sprint, respondents filed a virtually

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1. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

identical lawsuit against Qwest, captioned *APCC Services, Inc. v. Qwest Communications Corp.*, No. 01-641 (D.D.C. filed Mar. 23, 2001) ("*APCC v. Qwest*").[2] Respondents' lawsuit against Qwest is currently pending before the same judge presiding over Sprint's case in the U.S. District Court for the District of Columbia, and both of these case are proceeding on the same schedule. The District Court ordered AT&T, Sprint, and Qwest to submit joint briefs whenever possible, and all hearings in the case before the Court (and before the Special Master appointed in all three cases) jointly include Qwest, AT&T, and Sprint.

This Court's disposition of this appeal directly affects respondents' case against Qwest. If this Court concludes that respondents lack standing, respondents' case against Qwest would be dismissed along with the respondents' respective cases against AT&T and Sprint. On the other hand, if this Court rules for respondents, the lower court will be bound to follow that ruling, and Qwest will have no realistic opportunity to challenge this Court's ruling in later appeals of the *APCC v. Qwest* case.

For these reasons, Qwest submits this brief as *amicus curiae* in support of petitioners.

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2. The respondents' lawsuit against Qwest, like the one against Sprint, does not include respondent Peoples Telephone Co., Inc. as a plaintiff.

## SUMMARY OF ARGUMENT

This Court should not extend constitutional limitations on federal jurisdiction to include the lower courts' new concept of "*place-holder*" standing. The payphone aggregator respondents and their customers, the payphone operators, together manufactured respondents' authority to file these lawsuits. By standing in the operators' shoes, respondents minimized the operators' costs, burdens and risks of litigation, but at the expense of the due process and procedural rights of Qwest and the petitioners.

The payphone operators gain obvious benefits from this arrangement. First, each operator avoids the cost of filing its own lawsuit, and instead only contributes a small share to a litigation fund that finances respondents' lawyers. Second, each operator avoids the burdens of litigation — no operator needs to monitor the lawyers, appear at depositions or trial, or respond to any interrogatories, document requests, or requests for admission. Finally, and most beneficially, the operators face no risks. Whatever monies respondents might win, the operators collect in full; but the operators face no risk of having to satisfy a judgment on the pending counterclaims. In fact, the operators conceivably could renounce adverse court decisions as non-binding.

This contrived arrangement disrupts the careful balance of rights and obligations implemented through the Federal Rules of Civil Procedure. For example, Qwest cannot take meaningful discovery from 1,400 operators scattered across the country, who are the ultimate claimants and who uniquely possess critical

information not known by respondents. Allowing the respondents to proceed with place-holder standing would potentially force Qwest to serve 1,400 Rule 45 subpoenas; even if Qwest could accomplish that feat, it would likely result in satellite litigation nationwide to resolve the inevitable discovery disputes.

Even worse, Qwest is facing a *de facto* class action lawsuit without any court ever issuing a ruling under Rule 23. If the lower courts' rulings stand, a damages case against Qwest could effectively proceed with 1,400 class members, even though there has been no certification that the class meets the mandatory requirements of Rule 23. Such a result would prejudice Qwest and petitioners enormously.

The operators and respondents will rightly argue that one lawsuit resolving all claims, if possible, is preferable to 1,400 separate lawsuits. Yet administrative convenience does not justify departing from well-entrenched Constitutional doctrines and procedural rules. If a single lawsuit is permitted, it should only proceed — if at all — consistent with the requirements and protections contained in the Federal Rules of Civil Procedure.

For these reasons, Qwest respectfully urges the Court to reverse the Court of Appeals.

## I. Allowing Respondents To Exercise "Place-Holder" Standing Would Deprive Qwest And Other Defendants Of Significant Procedural Guarantees

Petitioners' Brief ably demonstrates that the law does not recognize respondents' attempted place-holder standing on behalf of their customers, the payphone operators. However, practical considerations should also lead the Court to reject respondents' expansion of legal standing. Respondents will assuredly tout the virtues of their "efficient" lawsuit, but that is an illusion — the universe of disputes between the operators and Qwest cannot be resolved in respondents' suit. First, only the operators, not the respondents, possess critical information without which the claims against Qwest and the petitioners cannot be litigated. Second, the nature of the operators' assignments to respondents prevents Qwest and the petitioners from enforcing judgments on their counterclaims. Litigation nationwide between Qwest and the operators will still be required to resolve all of the issues in the case.

A. Proof of the operators' claims for dial-around compensation turns on threshold issues that the respondents simply do not know and cannot effectively litigate. Qwest is situated identically to petitioners AT&T and Sprint — it is a defendant in one of respondents' dial-around compensation lawsuits subject to the very

same assignments at issue here.[3] Proof of liability (for both the *prima facie* claims as well as Qwest's affirmative defenses) and calculation of damages depend on evidence that is possessed by neither the respondents nor Qwest, but only by the non-party operators. Qwest's ability to defend the respondents' lawsuit would be severely compromised if the respondents are deemed to have standing.

The Court is already familiar with dial-around compensation claims as a result of its consideration of last year's case, *Global Crossing Telecommunications., Inc. v. Metrophones Telecommunications, Inc.*, 127 S. Ct. 1513 (2007). The FCC requires long-distance carriers, such as Qwest and petitioners ("interexchange carriers" or "IXCs"), to pay a default charge for each "completed" toll-free call dialed from each of the operators' payphones. *Id.* at 1518. Although this rule is easily stated, the specifics are exceedingly complex — as reflected by the fact that from 1997 through 2004, the

3. The respondents' lawsuit against Qwest is not part of this appeal because, for a time, it proceeded on a different path from the respondents' cases against AT&T and Sprint. In 2002, the Judicial Panel on Multidistrict Litigation transferred the *APCC v. Qwest* case to the U.S. District Court for the Central District of California. *In re Qwest Commc'ns Corp. Payphone Serv. Providers Comp. Litig.*, No. 02-ML-1483 (J.P.M.L. Aug. 30, 2002) (order transferring case). In 2006, the case was transferred back to the U.S. District Court for the District of Columbia, but only after AT&T and Sprint had already begun prosecuting the appeal *sub judice*. *In re Qwest Commc'ns Corp. Payphone Serv. Providers Comp. Litig.*, No. 02-ML-1483, 02-CV-7059 (TJH/JWJ) (C.D. Cal. Mar. 6, 2006) (order transferring case). Consequently, Qwest is not a party to this appeal.

FCC issued more than a dozen orders that changed the compensation regime from time to time.[4] Compensation is generally owed by the IXC only if:

- The phone line from which a call is made is actually connected to a payphone;[5]

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4. *In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128 ("Payphone Docket"), Report & Order, 11 F.C.C.R. 20541 (1996) ("First Report & Order"); Payphone Docket, Order on Reconsideration, 11 F.C.C.R. 21233 (1996); Payphone Docket, Order, 12 F.C.C.R. 16387 (1997) ("Bureau Waiver Order"); Payphone Docket, Second Report & Order, 13 F.C.C.R. 1778 (1997); Payphone Docket, Mem. Op. & Order, 13 F.C.C.R. 4998 (1998) ("Bureau Coding Digit Waiver Order"); Payphone Docket, Mem. Op. & Order, 13 F.C.C.R. 10893 (1998) ("Per-Phone Compensation Waiver Order"); Payphone Docket, Order, 13 F.C.C.R. 7303 (1998) ("Clarification of Per-Phone Compensation Waiver Order"); Payphone Docket, Third Report & Order, 14 F.C.C.R. 2545 (1999); *Bell Atl.-Del., Inc. v. Frontier Commc'ns Servs., Inc.*, File No. E-98-48, Mem. Op. & Order, 16 F.C.C.R. 8112 (2001) ("Bell Atl.-Del. Order I"); Payphone Docket, Second Order on Reconsideration, 16 F.C.C.R. 8098 (2001); Payphone Docket, Third Order on Reconsideration, 16 F.C.C.R. 20922 (2001); Payphone Docket, Fourth Order on Reconsideration, 17 F.C.C.R. 2020 (2002); *Bell Atl.-Del., Inc. v. MCI Telecomms. Corp.*, File No. E-98-49, 17 F.C.C.R. 15918 (2002) ("Granted Joint Request"); Payphone Docket, Fifth Order on Reconsideration, 17 F.C.C.R. 21274 (2002); Payphone Docket, Further Notice of Proposed Rulemaking, 18 F.C.C.R. 11003 (2003); Payphone Docket, Report & Order, 18 F.C.C.R. 19975 (2003); Payphone Docket, Order on Reconsideration, 19 F.C.C.R. 21457 (2004).

5. Bureau Coding Digit Waiver Order, 13 F.C.C.R. at 5017 n.109.

- The payphone owner requests that its local phone company, which provides the phone line, identify the phone line as a payphone line to the IXC;[6]

- No other carrier has a contract with the payphone owner to pay compensation for the call;[7] and

- The payphone owner has not agreed by contract to waive the compensation from a particular IXC.[8]

Respondents do not possess first-hand information about each of these issues. The respondents have about 1,400 customers behind this lawsuit, who in turn collectively operate about a half million payphones. At most, respondents know the phone numbers of these payphones. Respondents do not know what kind of phone is actually connected at the end of each phone line; only the operators know.[9] Respondents do not know what

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6. The FCC requires local phone companies to use certain software that sends codes to the IXCs indicating that the phone lines have payphones. Per-Phone Compensation Waiver Order, 13 F.C.C.R. at 10906 ¶ 22, n.62. Some local phone companies, in turn, have required the operators to ask that the phone lines send these codes.

7. Order on Reconsideration, 19 F.C.C.R. at 21461 ¶ 7.

8. First Report & Order, 11 F.C.C.R. at 20577-78 ¶ 71.

9. Unscrupulous operators have been known to attach regular phones or even computer devices to payphone lines and to use the phones to dial toll-free calls merely to generate false

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information the operators send to their local phone companies when ordering the phone lines. Respondents often are not parties to the contracts that operators enter into with carriers governing compensation from those particular carriers.[10] Respondents also are not parties

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(Cont'd)

claims for dial-around compensation. To the IXCs such as Qwest, these calls would otherwise look like payphone calls. *See* Payphone Docket, Order on Reconsideration, 11 F.C.C.R. at 21241 ¶ 12 ("The Commission has recognized, since it first addressed the issue of compensation for subscriber 800 calls in 1991, that a PSP could attach an autodialer to a payphone and have it place repeated 800 calls . . . to increase the amount of compensation [it] receives.") (internal quotation omitted); *see also* Henry K. Lee, *San Francisco Celebrity Chef's Son Guilty In Phone Scam*, S.F. Chron., Mar. 11, 2004, at B4 (describing criminal conviction of a customer of respondent APCC who used an autodialer to make more than two million phone calls to 800-numbers from leased payphones, resulting in nearly $500,000 in fraudulent dial-around compensation). Respondents simply do not have first-hand knowledge of what kinds of phones are actually at the end of the phone lines.

10. Qwest became aware of precisely this kind of arrangement between respondent APCC's largest operator-customer, called ETS, and one of Qwest's carrier-customers of Qwest's toll-free services, WCS. ETS agreed that WCS would pay dial-around compensation for certain 800-number calls made from ETS's payphones, even though those calls went through Qwest to get to WCS. Qwest had no knowledge of this agreement for some time and ended up paying $500,000 in compensation to ETS for these calls. Respondent APCC, the aggregator servicing ETS, did not know about this contract either. If no discovery is taken from operators such as ETS, and contracts such as these are not discovered by Qwest, the respondents might obtain compensation from Qwest for these calls even though the operators already have received compensation from other carriers for the same calls — a double-recovery.

to contracts in which the operators agree to waive their rights to compensation, such as in exchange for other services.[11]

Consequently, Qwest cannot take discovery on these central facts without going directly to the operators. However, because the operators are not parties, the normal discovery mechanisms contained in Federal Rules of Civil Procedure 26 through 37 are not available.[12]

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11. Besides toll-free calls, Qwest offers "0+ services" (the service of answering the calls dialed to "0") for payphones. In these contracts, the operators who own the payphones have often waived their right to collect dial-around compensation from Qwest, in exchange for Qwest waiving certain other charges. The issue for the lawsuit is that Qwest's "0+ services" are sold by Qwest through intermediaries, called "agents," who in turn have contractual relationships with the operators of the payphones. Qwest has no doubt that many of respondents' operator-customers have obtained Qwest's "0+ services" from agents who waived Qwest's dial-around compensation. However, Qwest does not have a direct relationship with these operators, so Qwest does not have evidence from the operators that they waived their claims. Respondents have no involvement in these contracts, and thus respondents have no way of providing direct information either.

12. *E.g.*, Fed. R. Civ. P. 26(a)(1)(A) ("a party must, without awaiting a discovery request, provide to the other parties . . ."); Fed. R. Civ. P. 26(a)(1)(C) ("A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference . . ."); Fed. R. Civ. P. 26(a)(2)(A) ("a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705"); Fed. R. Civ. P. 26(a)(3)(A) ("a party must provide to the other parties and promptly file the following information about

(Cont'd)

While discovery pursuant to Rule 45 subpoenas is available, service of subpoenas is hardly realistic on 1,400 operators scattered throughout the country because:

- Qwest would need to obtain service of process information for 1,400 entities;

- Qwest would need to hire process servers to serve 1,400 subpoenas; and

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(Cont'd)
the evidence that it may present at trial other than solely for impeachment"); Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . ."); Fed. R. Civ. P. 26(e) (party has continuing duty to supplement or correct disclosures and responses); Fed. R. Civ. P. 26(f)(1)-(2) ("parties must confer as soon as practicable" to discuss initial disclosures and to develop discovery plan); Fed. R. Civ. P. 27(a)(1) (person who expects to become party may file petition to preserve testimony in any "district where any expected adverse party resides"); Fed. R. Civ. P. 29 (parties may stipulate manner of taking depositions or limiting discovery); Fed. R. Civ. P. 30(b)(1) (deposition of party requires notice, not subpoena); Fed. R. Civ. P. 32(a) (permitting introduction of party's deposition transcript at trial without showing of party's unavailability); Fed. R. Civ. P. 33(a)(1) (permitting service of interrogatories upon party); Fed. R. Civ. P. 35 (permitting physical or mental examination of party whose mental or physical condition is in controversy); Fed. R. Civ. P. 36(a) (permitting service of requests for admissions on another party and providing for admission unless response is served within 30 days); Fed. R. Civ. P. 37(b)(2)(A) (providing for sanctions for party's disobedience of discovery order, including default judgment); Fed. R. Civ. P. 37(c)(1) (party that fails to produce documents or identify witnesses may not rely on those documents or witnesses at trial).

- Qwest would need to set up sites in every judicial district in the country to collect responses from the operators.

These subpoenas become entirely unworkable if the operators raise objections. The operators are typically small companies, doing business in limited localities — meaning that only one or, at most, a few judicial districts would have personal jurisdiction over each operator. Consequently, if hundreds of discovery disputes erupted, Qwest would need to file miscellaneous enforcement actions in federal courts throughout the country. District court and magistrate judges around the country would hear the same disputes over and over. Besides the sheer magnitude of the effort, inconsistent results are inevitable.

Creative, informal solutions have not succeeded. Petitioner AT&T attempted to take discovery from respondents about information the payphone operators possessed. Respondents' initial response was that they did not possess much of the information AT&T sought, and had no intention of contacting the operators to obtain it. *See* Plaintiffs' Response to AT&T's Motion to Compel at 7-10, *APCC Servs., Inc. v. AT&T Corp.*, No. 1:99cv00696 (D.D.C. July 8, 2002) ("Plaintiffs should not and cannot be compelled to collect additional information they do not and would not normally possess from the PSPs in the course of acting as an aggregator."). The Special Master presiding over the case ordered respondents to produce the information; the respondents responded by sending informal questionnaires to the operators. *See APCC Servs., Inc. v. AT&T Corp.*, No. 1:99cv00696 (D.D.C. July 31, 2002) (Memorandum and

Order No. 5 granting motion to compel). That effort was a complete failure. More than half the operators failed to respond. Those that did seemed uninterested in or incapable of providing full and complete responses. AT&T received comments such as "I am at a complete loss as to what to do with these 'request documents' so I obviously have nothing to add!;" "I will be reviewing the packet if I find the time, otherwise use this as your authority to replicate your response in our name;" and "does not wish to respond further to the AT&T Interrogatories."[13] AT&T Corp.'s Memorandum in Support of Its Motion to Compel Compliance with Order No. 5 at 6, *APCC Servs., Inc. v. AT&T Corp.*, No. 1:99cv00696 (D.D.C. Nov. 27, 2007).

Respondents stand in the shoes of their operator-customers in name only. Respondents are not the functional equivalents of their customers; they lack the first-hand knowledge necessary to litigate all of the issues that arise from these claims.

B. In addition to the prospect of pursuing multiple nationwide enforcement actions, Qwest would also face nationwide lawsuits to enforce judgments on its counterclaims.

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13. Other operators clearly misunderstood the intent of the informal discovery and responded only with comments directed to the respondents such as "agree with APCC's stance," "I approve of the way you are handling the litigation," and "please count me in." AT&T Corp.'s Memorandum in Support of Its Motion to Compel Compliance with Order No. 5 at 6, *APCC Servs., Inc. v. AT&T Corp.*, No. 1:99cv00696 (D.D.C. Nov. 27, 2007).

Qwest has alleged that it *overpaid* compensation to many, if not all, of the operators, and has asserted counterclaims to recoup these overpayments. Qwest has identified several reasons for this overcompensation. For example, until late 2001, Qwest was paying compensation for calls that were "incomplete" under the FCC's definitions, and for which no compensation was owed.[14] Qwest believes this caused overpayments of millions of dollars. In 2002 through 2004, Qwest paid compensation for certain calls that turned out not even to be toll-free, resulting in a $6.1 million overpayment. In addition to these examples, it is also possible that Qwest overpaid compensation for lines that did not have payphones, or where the operators agreed with third-party

14. This problem arises in the context of what are called "platform" calls, which constitute a significant percentage of Qwest's toll-free traffic. When a toll-free call is made using a prepaid calling card or a credit card, the call passes through a device called a "platform" in which typically a computer-activated voice asks the caller to type in a PIN or credit card number and then enter the phone number of the person that the caller is attempting to reach. *See* Payphone Docket, Report and Order, 18 F.C.C.R. at 19988-89 ¶ 29. The FCC does not define this call as "complete" until the person being called actually answers the phone, even though in a sense the platform has "answered" the call first. *See id.* at 19984-85 ¶ 21. Qwest's computer systems were counting many of the calls as completed because the platforms answered the calls, which ultimately proved to be an insufficient basis to deem the calls completed. The problem arose because Qwest did not know which calls were going to platforms, where the toll-free numbers were used by Qwest's carrier-customers and resold by these customers to calling card services. Qwest's inability to discern which platform calls were actually completed presents a significant problem. Call-completion rates of calls through platforms vary from 70% to as low as 5% for certain international destinations such as India.

carriers that the carriers, not Qwest, would pay the compensation. These are all issues that would have to be identified through the discovery outlined above.

It is reasonably likely that Qwest will prevail on some portion of its counterclaims because it overpaid the operators. In this event, Qwest will be entitled to enforce a judgment for the overpayment. However, the named plaintiffs — the respondents — would not satisfy these judgments, and have no money to do so, since the dial-around compensation Qwest pays is passed through to the operators each quarter.

Nor have the operators agreed to pay the liability of any counterclaims in the lawsuit. The operators assigned to respondents the right to file claims, with the promise that the respondents would pass through all amounts *collected* in the lawsuits. Pet. App. 117-118. The assignments do not recognize the possibility that the operators would have liability, and the assignments make no provision for an outcome in which counterclaims result in a judgment. Indeed, the assignments do not even state that the operators agree to be bound by the results of any trial. Moreover, if any of the operators believe that the case is not going well for them, they could simply cease funding the respondents' litigation effort, in which case those operators would be released from the lawsuit entirely. Pet. App. 119-120.

If so, Qwest would have to institute actions in virtually every federal judicial district against the operators to enforce the judgments on the counterclaims. The operators might well disavow the results of the

respondents' trial and might argue that neither issue preclusion nor claim preclusion applies because they were not parties to the respondents' lawsuit. This would give operators, in essence, a "free ride" in the instant case. Indeed, there is already precedent for this in the litigation, as explained below. Depending on how multiple judges resolve those issues, Qwest might have the unfortunate choice of relitigating the claims entirely, or simply abandoning its counterclaims for lack of collectibility.

This is a no-win situation for Qwest, brought about by the unnatural place-holder standing that respondents and their operator-customers have crafted. While the administrative convenience of the respondents' consolidated suit works to the operators' benefit, it requires Qwest either to (1) forgo discovery on critical issues and forgo collection of its counterclaims, or (2) manage multiple actions all across the country. The respondents' place-holder standing is simply not beneficial to the courts nor the defendants.

## II. Respondents And Operators' Concerns About The Inconvenience Of Multiple Lawsuits Are Best Resolved Through Existing Civil Procedures

Unquestionably, a single lawsuit — *if federal law permits one to be maintained at all* — is superior to 1,400 actions around the country. However, the lower courts' creation of place-holder standing is not the solution, for all the reasons described above. Fortunately, the civil rules *do* contemplate the aggregation of hundreds of claims into a single lawsuit — through class action procedures contained in Rule 23. If the operators'

claims can be collected into a single lawsuit, it should be done through the procedural protections and guarantees of Rule 23, but respondents and the operators have chosen to avoid Rule 23.

A. This lawsuit is a *de facto* class action, bearing all of its hallmarks. A small number of named plaintiffs are pursuing claims on behalf of a class of 1,400 separate claimants. Respondents argue that Qwest's internal procedures and computer programs systematically failed to track all of the calls for which compensation allegedly was owed. Respondents have even argued, in their effort to seek "associational" standing under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), that their claims do not require the participation of the operators. Brief of Appellees at 36, *APCC Servs., Inc. v. Sprint Commc'ns Co.*, No. 04-7034 (D.C. Cir. Aug. 18, 2004). Any class representative seeking certification under Rule 23(b)(3) would make this same argument.

Congress and the federal courts have constructed important procedural safeguards to ensure that class actions proceed only if mandatory requirements are met. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure 'shall not abridge . . . any substantive right.'") (quoting 28 U.S.C. § 2072(b)); Fed. R. Civ. P. 23 advisory committee's notes (Rule 23 amended into modern form because "the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness"). Even though a single lawsuit might be more efficient, in many cases it

is inappropriate because the nature of claims and defenses necessitates that individual suits be filed — even if that requires thousands of lawsuits. *See Amchem Prods.*, 521 U.S. at 597, 626 (denying certification of class of "hundreds of thousands, perhaps millions" for settlement purposes because "[i]n significant respects, the interests of those within the single class are not aligned"); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1079, 1090 (6th Cir. 1996) (class of 12,000 to 15,000 alleged members decertified where plaintiff established numerosity requirement of Rule 23 but no other requirements).

None of the procedural protections inherent in Rule 23 has been addressed here. The District Court has never decided any motions under Rule 23 in respondents' lawsuit; respondents have never been forced to demonstrate that the mandatory requirements of Rule 23 are present. *See General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982) (class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied"); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 40 (2d Cir. 2006) ("It would seem to be beyond dispute that a district court may not grant class certification without making a determination that all of the Rule 23 requirements are met.").

Respondents have avoided this approach because it is doubtful that this case could ever be certified as a class action. First, the mandatory requirement of "typicality" in Rule 23(a)(3) is not met because respondents do not possess a "claim" of their own and thus are not "typical" of the class. *East Tex. Motor Freight Sys. Inc. v.*

*Rodriguez*, 431 U.S. 395, 403 (1977) ("As this court has repeatedly held, a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members.") (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)). Second, class certification under Rule 23(b)(3) is far from assured given the individualized issues for particular operators described in Part I.A above. *See* Fed. R. Civ. P. 23(b)(3); *Amchem Prods.*, 521 U.S. at 622.

But this Court need not decide if a district court would have certified a class. The existence of competing arguments under Rule 23 demonstrates that a district court should hear operators' claims in a putative class action and then decide whether a class action is appropriate. Respondents and their operator-customers chose to forgo a class action and instead to pursue these claims through place-holder standing. This unilateral choice short-circuits the protections of Rule 23. If the Court affirms the lower courts, a new hole will have been created in Rule 23. Class-action advocates could obtain assignments from putative class members and avoid a court's scrutiny of Rule 23 requirements.

B. The respondents and operators are no strangers to the concept that they might have pursued these claims in a putative class action. They tried to do so, but abandoned the effort when it became tactically undesirable for them.

In June 2003, six of the respondents' operator-customers filed their own lawsuit against Qwest for the very same dial-around compensation claims at issue in

the respondents' case. *D&B Tel. Co. v. Qwest Commc'ns Corp.*, No. 03-01443 (D.D.C. filed June 30, 2003). The lawsuit was styled as a putative class action on behalf of a class of all operators whose claims were at the time at issue in the respondents' lawsuit. These six operator-plaintiffs characterized their lawsuit as "protective," in the event that respondents here were ultimately found to lack standing. The filing of the operators' putative class action lawsuit was no coincidence or independent prosecution of the claims; the very same counsel for respondents represented the operator-plaintiffs in the class action lawsuit. It was a coordinated strategy.

The operator-plaintiffs attempted to certify a class consisting of all of the operators whose claims are at issue in respondents' case against Qwest. In 2003 and 2004, shortly after the operators' lawsuit was filed, the six operator-plaintiffs moved for class certification. Qwest opposed the motion, and the matter was fully briefed and submitted for the District Court's ruling. However, the motion was never decided because procedural developments interrupted its consideration. The case was effectively stayed by the appellate court's opinion that no private right of action existed for dial-around compensation claims.[15] The operators' claims against

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15. The operators' case, like the respondents' case against Qwest, was transferred back to the original District Court in the District of Columbia in 2006. *In re Qwest Commc'ns Corp. Payphone Serv. Providers Comp. Litig.*, No. 02-ML-1483, 02-CV-7059 (TJH/JWJ) (C.D. Cal. Mar. 6, 2006) (order transferring case). At the time of the transfer back to Washington, D.C., the D.C. Circuit had already ruled that no private right of action

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Qwest were revived by this Court's opinion last year in *Global Crossing*, which held that the Communications Act provides a private right of action to operators of payphones for "dial-around compensation." 127 S. Ct. at 1518.

Instead of promptly litigating their case, the operator-plaintiffs — acting together with the respondents — reversed course and abandoned the class action lawsuit. Even further, the operators and respondents told the District Court that it had lacked subject-matter jurisdiction over the operators' lawsuit *from the outset*. In a brief to the D.C. District Court filed four months ago, counsel for respondents (who also represent the operators) argued that the "exclusive" and "irrevocable" assignments of the operators' claims to the respondent-aggregators deprived the operators of authority to file their own lawsuit. Operators and respondents concluded that federal court lacked subject-matter authority over the operators' lawsuit because they lacked their own right to pursue the claims when the case was filed. Plaintiffs' Opposition to Motion to Dismiss at 23-24, 24 n.17, *APCC v. Qwest* (Oct. 9, 2007) ("Pls.' Opp.").

The operators' decision to abandon their putative class action lawsuit was purely tactical. Qwest had prevailed on a motion which greatly reduced the

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existed for dial-around compensation claims. *See APCC Servs., Inc. v. Sprint Commc'ns Co.*, 418 F.3d 1238 (D.C. Cir. 2005), *vacated and remanded*, 127 S. Ct. 2094 (2007). Respondents had already petitioned this Court for a writ of *certiorari* concerning the D.C. Circuit's opinion. Consequently, with no cause of action then in existence, the operators' lawsuit was effectively stayed pending the outcome of the respondents' appeal.

operators' claims to a shorter time period than the claims pending in respondent's case against Qwest. *D&B Tels., Inc. v. Qwest Commc'ns Corp.*, No. 03-CV-05942 (TJH/JWJ) (C.D. Cal. Apr. 6, 2004) (order granting motion to dismiss).[16] Because this reduced operators' potential damages by *tens of millions of dollars*, the operators and respondents disavowed the case and declared it void from the outset (despite operator-plaintiffs' earlier statements that they possessed claims "typical" of other class members). Pls.' Opp. at 23-25. This sequence of events demonstrates that respondents and operators repeatedly shift arguments as they attempt to lodge their claims in the most tactically favorable forum.

The operators should not be rewarded for their efforts to obtain a *de facto* class action without ever having a court rule on a Rule 23 motion. The respondents' manufactured place-holder standing is an inappropriate end-run of Rule 23, and this Court should reject it.

C. The respondents often confuse administrative and business convenience with Constitutional and prudential limits on federal court standing. Before the lower courts, respondents asserted that their operator-customers are small businesses that cannot individually afford to battle behemoths such as petitioner AT&T. Respondents also noted that the FCC has long recognized respondent-aggregators' valued role in providing billing and collection services for payphone

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16. The respondents' claims against Qwest extend to dial-around compensation paid for calls from October 1, 1998 to the present. As a result of the district court's ruling, the operators' claims against Qwest only extend to calls from January 1, 2001 to the present.

operators. Each of these points is misleading, however. That respondents provide a valuable service to their customers, or that the FCC's orders have blessed the respondents' role in their industry, does not alter the standing analysis. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000) ("An interest unrelated to injury in fact is insufficient to give a plaintiff standing."). Nor does the smaller size of individual operators give license to avoid well-established limitations on standing. *See Raines v. Byrd*, 521 U.S. 811, 820 (1997) (Constitution requires this Court to "put aside the natural urge to proceed directly to the merits of this important dispute and to 'settle' it for the sake of convenience and efficiency. Instead, we must carefully inquire as to whether appellees have met their burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable."); *see also Miller v. Albright*, 523 U.S. 420, 448 (1998) (O'Connor, concurring) ("Those [standing] requirements were adopted to serve the institutional interests of the federal courts, not the convenience of the litigants."). Indeed, the operators are not always the smallest parties in their lawsuits. By aggregating their 1,400 claims in one case, the operators and respondents have pursued claims against very small defendants, such as small carriers. *See, e.g.*, *APCC Servs., Inc. v. NetworkIP, LLC*, 22 F.C.C.R. 4286 (2007).

Qwest's experience directly refutes the notion that respondents are the only entities capable of maintaining dial-around compensation lawsuits. A small operator in Utah pursued approximately twenty lawsuits against all of the major long-distance carriers, including AT&T,

Sprint, and Qwest.[17] Another group of approximately twenty operators on the West Coast, many of them very small entities or one-person companies, filed individual lawsuits against Qwest, often in state court.[18] The court

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17. *Flying J Inc. v. Comdata Network*, No. 96-0066 (D. Utah filed July 1, 1996); *Flying J Inc. v. AT&T Commc'ns*, No. 98-0096 (D. Utah filed Aug. 18, 1998); *Flying J Inc. v. MCI Worldcom Commc'ns*, No. 99-0110 (D. Utah filed Oct. 1, 1999); *Flying J Inc. v. Sprint Commc'ns*, No. 99-0111 (D. Utah filed Oct. 1, 1999); *Flying J Inc. v. Global Crossing*, No. 99-0125 (D. Utah filed Nov. 10, 1999); *Flying J Inc. v. Cable & Wireless USA*, No. 99-0128 (D. Utah filed Nov. 15, 1999); *Flying J Inc. v. Bus Telecom*, No. 99-0130 (D. Utah filed Nov. 16, 1999); *Flying J Inc. v. Qwest Commc'ns*, No. 00-0023 (D. Utah filed Mar. 16, 2000); *Flying J Inc. v. Westel Inc.*, No. 00-0029 (D. Utah filed Mar. 27, 2000); *Flying J Inc. v. Birch Telecom*, No. 00-0032 (D. Utah filed Mar. 31, 2000); *Flying J Inc. v. Excel Teleco*, No. 00-0033 (D. Utah filed Mar. 31, 2000); *Flying J Inc. v. Advanced Commc'ns Group*, No. 00-0044 (D. Utah filed Apr. 17, 2000); *Flying J Inc. v. Logix Commc'ns Entm't.*, No. 00-0054 (D. Utah filed May 17, 2000); *Flying J Inc. v. Ceridian*, No. 00-0135 (D. Utah filed Nov. 15, 2000); *Flying J Inc. v. Eclipse Teleco*, No. 03-0090 (D. Utah filed Aug. 6, 2003); *Flying J Inc. v. TA Operating*, No. 04-0177 (D. Utah filed Dec. 20, 2004); *Flying J Inc. v. TA Operating.*, No. 06-0030 (D. Utah filed Feb. 27, 2006).

18. *Bischoff v. Qwest Commc'ns Corp.*, Nos. 02-0934, 02-7670 (C.D. Cal. removed Sept. 6, 2002); *Bischoff v. Qwest Commc'ns Corp.*, No. 02-0698 (C.D. Cal. removed July 11, 2002); *Greene v. Qwest Commc'ns Corp.*, No. 02-0646 (C.D. Cal. removed July 11, 2002); *Precision Pay Phones v. Qwest Commc'ns Corp.*, No 02-3243 (N.D. Cal. removed July 8, 2002) *Parsons v. Qwest Commc'ns Corp.*, 02-5171 (C.D. Cal. removed June 28, 2002); *Schweikert v. Qwest Commc'ns Corp.*, Nos. 02-3123, 02-3124 (N.D. Cal. removed June 28, 2002); *Brooks v. Qwest Commc'ns Corp.*, No. 02-8272 (C.D. Cal. removed May 31, 2002); *General Comm'n Servs. v. Qwest Commc'ns*

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system provided an appropriate vehicle for litigating these claims, and the operators were hardly disadvantaged against Qwest. Qwest removed all of the cases to federal court because they asserted claims under the FCC's regulations, and then the Judicial Panel on Multidistrict Litigation transferred all of the cases to a single court for coordinated pretrial activities.[19] The parties began discovery on the merits of the claims, without having to deal with thorny questions of place-holder standing or even Rule 23 issues. The lawsuits settled on mutually acceptable terms.

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*Corp.*, Nos. 02-4304, 02-4306 (C.D. Cal. removed May 31, 2002); *Parsons v. Qwest Commc'ns Corp.*, Nos. 02-4312, 02-4316, 02-4318 (C.D. Cal. removed May 31, 2002); *Nevada Tel., Inc. v. Qwest Commc'ns Corp.*, No. 02-0742 (D. Nev. removed May 24, 2002); *Pimentel v. Qwest Commc'ns Corp.*, No. 02-1540 (N.D. Cal. filed Mar. 29, 2002); *Greene v. Qwest Commc'ns Corp.*, No. 02-0501 (C.D. Cal. removed May 23, 2002); *Tawney v. Qwest Commc'ns Corp.*, No. 02-0827 (C.D. Cal. removed Jan. 28, 2002); *Precision Pay Phones v. Qwest Commc'ns Corp.*, Nos. 02-0201, 02-0213, 02-0215 (N.D. Cal. removed Jan. 11, 2002); *Metrophones Telecomms., Inc. v. Qwest Commc'ns Corp.*, No. 01-1850 (W.D. Wash. filed Nov. 15, 2001); *Greene v. Qwest Commc'ns Corp.*, Nos. 01-0952, 01-0953 (C.D. Cal. removed Oct. 12, 2001); *Bay Distrib. Serv., Inc. v. Qwest Commc'ns Corp.*, Nos. 01-20937, 01-20942 (N.D. Cal. removed Oct. 2, 2001); *PBS Telecom, Inc. v. Qwest Commc'ns Corp.*, No. 01-7285 (C.D. Cal. removed Aug. 21, 2001); *Lee v. Qwest Commc'ns Corp.*, No. 01-1578 (E.D. Cal. removed Aug. 14, 2001); *Littlejohn v. Qwest Commc'ns Corp.*, No. 01-6033 (C.D. Cal. removed July 11, 2001); *Wolfe v. Qwest Commc'ns Corp.*, Nos. 01-5554, 01-5557 (C.D. Cal. removed June 22, 2001); *Flying J, Inc. v. Qwest Commc'ns Corp.*, No. 00-0023 (D. Utah filed Feb. 7, 2000).

19. *In re Qwest Commc'ns Corp. Payphone Serv. Providers Comp. Litig.*, No. 02-ML-1483 (J.P.M.L. Aug. 30, 2002) (transfer order).

Therefore, reversal of the Court of Appeals will not doom the ability of operators to sue for future dial-around compensation, if they believe they have claims. But the respondents' and operators' convoluted experiment with place-holder standing should draw to a close.

## CONCLUSION

For these reasons, Qwest joins petitioners and respectfully submits that the Court should reverse the Court of Appeals.

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