

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of

Solvable Frustrations, Inc. Petition to Amend  
Part 1 of the Commission's Rules to Specify  
Procedures for Class Action Complaints

RM-11675

**COMMENTS OF VERIZON AND VERIZON WIRELESS**

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The Commission should follow its two decades of precedent holding that administrative class actions are inconsistent with the Communications Act (“the Act”) and deny the Petition. As the Commission has held, “class action lawsuits are neither contemplated by, nor consistent with, the private remedies created under sections 206 through 209 of the Act.”<sup>2</sup> Administrative class actions are also unnecessary because, as the Commission has held, its Rules already “provide both adequate procedures to remedy specific violation of the Rules or the Communications Act and sufficient flexibility to enable the Commission to address generic questions.”<sup>3</sup> In short, the

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<sup>1</sup> In addition to Verizon Wireless, the Verizon companies participating in this filing are the regulated, wholly owned subsidiaries of Verizon Communications Inc. (collectively, “Verizon”).

<sup>2</sup> Memorandum Opinion and Order, *Halprin, Temple, Goodman and Sugrue v. MCI Telecomms. Corp.* (“*Halprin*”), 13 FCC Rcd. 22568, ¶ 29 (1998) (citing *MCI Telecomms. Corp. v. Pac. Bell Tel. Co.* (“*MCI*”), 8 FCC Rcd 1517 (1993); Memorandum Opinion and Order, *Certified Collateral Corp. v. Allnet Commc’ns Servs., Inc.* (“*Certified Collateral*”), 2 FCC Rcd 2171 (Comm. Car. Bur. 1987)). *See also, e.g.*, Memorandum Opinion and Order, *Gilmore v. Sw. Bell Mobile Sys.* (“*Gilmore*”), 20 FCC Rcd 15079 (2005); Memorandum Opinion and Order, *Orloff v. Vodafone AirTouch Licenses LLC* (“*Orloff*”), 17 FCC Rcd 8987 (2002); Memorandum Opinion and Order, *Krauss v. MCI Telecomm. Corp.* (“*Krauss*”), 14 FCC Rcd 2770, ¶ 8 (Comm. Car. Bur. 1999); Memorandum Opinion and Order, *Allnet Commc’n Servs., Inc. v. NY Tel. Co.* (“*Allnet*”), 8 FCC Rcd 3087 (1993).

<sup>3</sup> *See Certified Collateral*, 2 FCC Rcd 2171, ¶ 14.

Commission neither needs nor is able to implement the Proposed Rule, and should therefore deny the Petition.

Moreover, class actions are already available in federal court in appropriate circumstances under Rule 23 of the Federal Rules of Civil Procedure (“Rule 23”), which is the product of decades of experience and extensive litigation over the constitutional limits on class actions. There is nothing to be gained by creating an additional forum in which to bring class actions, and the complexities and demands of such actions would divert the Commission’s limited resources from more important policy goals. The courts, moreover, have long recognized the Commission’s conclusion that administrative class actions are inconsistent with the Act,<sup>4</sup> and to the extent the courts need the Commission’s expertise or guidance, they seek the Commission’s input either by a brief or by using the primary jurisdiction doctrine to suspend the class action while referring specific substantive issues to the Commission.<sup>5</sup>

Finally, the Proposed Rule raises “serious constitutional concerns,” because Petitioner is not content to duplicate Rule 23 practice before the Commission, but is instead clearly attempting an end-run around the limitations on class actions in federal court.<sup>6</sup> The Supreme Court has held repeatedly that Rule 23’s requirements are linked to constitutional requirements of due process.<sup>7</sup> Applying the Proposed Rule to claims for individual damages under Section 208 of the Act would violate due process because it would deprive absent class members of their

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<sup>4</sup> See *Boomer v. AT&T Corp.*, 309 F.3d 404, 421 (7th Cir. 2002) (citing *Krauss*, 14 FCC Red 2770, ¶ 10); *Hi-Tech Furnace Sys., Inc. v. FCC*, 224 F.3d 781, 792 n.22 (DC Cir. 2000) (same).

<sup>5</sup> See, e.g., *In re Long Distance Telecomms. Litig.*, 831 F.2d 627, 630-32 (6th Cir. 1987).

<sup>6</sup> *Ortiz v. Fiberboard Corp.*, 527 U.S. 815, 845 (1999) (discussing the need for constitutional avoidance arising from due process and the Seventh Amendment concerns).

<sup>7</sup> See, e.g., *id.* at 848-49 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997)).

rights to (1) “notice plus an opportunity to be heard and participate in the litigation” and (2) the irreducible minimum of “an opportunity to remove [themselves] from the class.”<sup>8</sup> The Commission should deny the Petition rather than open itself to complaints that the federal courts have determined cannot, for due process reasons, be maintained as class actions.

## DISCUSSION

### I. THE COMMISSION LACKS STATUTORY AUTHORITY TO ADOPT CLASS ACTION PROCEDURES

The Commission’s precedent establishes that the rule the Petition seeks conflicts with the Act. In *Halprin*, “[t]he Commission . . . clearly stated that class action lawsuits are neither contemplated by, nor consistent with, the private remedies created under sections 206 through 209 of the Act.”<sup>9</sup> Petitioner concedes that the Proposed Rule defies *Halprin* and its progeny, but argues that the Commission “misread[]” its own precedent in deciding *Halprin*.<sup>10</sup> To the contrary, *Halprin* and the authorities on which the Commission relied were amply reasoned and correctly rejected administrative class action procedures as impermissible under the Act.

In *Halprin*, the Commission awarded the complainant damages pursuant to Section 208(a) of the Act, but refused to award damages to a class of similarly affected customers. The Commission held that, even if similarly situated third parties were entitled to damages, “the remedy available to these customers is to file their own . . . complaints with the Commission.”<sup>11</sup> In denying class relief, the Commission squarely rejected the suggestion that “the policy

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<sup>8</sup> *Id.*

<sup>9</sup> *Halprin*, 13 FCC Rcd 22568, ¶ 29.

<sup>10</sup> Petition at 5.

<sup>11</sup> *Halprin*, 13 FCC Rcd 22568, ¶ 29 (rejecting the argument that “the policy underpinnings of Sections 201 and 208 of the Act permit the Commission to fashion appropriate relief for all consumers harmed by the unjust and unreasonable rates of non-dominant IXCs”).

underpinnings of Section [ ] . . . 208 of the Act” support administrative class actions.<sup>12</sup> There is no ambiguity in *Halprin*; the Act prohibits administrative class actions. Moreover, *Halprin* relied on Commission precedent denying administrative class actions that is equally unequivocal and well founded.<sup>13</sup>

As early as 1993, the Commission had “clearly stated” in *MCI v. Pacific Bell* that there is no statutory authority for class action procedures.<sup>14</sup> There, the Commission rejected the defendant’s argument that MCI should be required “to flow through any damages it may receive to its end user customers,” because that theory would “transform MCI’s complaints into class action suits,” which are “neither expressly contemplated by nor consistent with the private remedy created under Sections 206-209 of the Act.”<sup>15</sup> The Commission thus flatly rejected the suggestion of a class action remedy for customers, not because MCI failed to represent the class

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<sup>12</sup> *Id.* ¶ 28 (rejecting the argument that “the policy underpinnings of Sections 201 and 208 of the Act permit the Commission to fashion appropriate relief for all consumers harmed by the unjust and unreasonable rates of non-dominant IXCs”)

<sup>13</sup> *See id.* ¶ 29.

<sup>14</sup> *Id.* ¶ 29 (citing *MCI*, 8 FCC Rcd 1517, 1526). Even earlier, in 1987, the Commission had rejected administrative class actions on policy grounds as unnecessary to the administrative enforcement regime in *Certified Collateral*. *See id.* (citing *Certified Collateral*, 2 FCC Rcd 2171, 2173 (Comm. Car. Bur. 1987)). The Commission dismissed a purported class action suit because the Commission’s Rules did not provide for it and the Commission “d[id] not propose to accept such complaints for filing.” The Commission explained that administrative class actions are unnecessary because “[o]nce a complaint identifies a wrongful act, the Rules provide both adequate procedures to remedy specific violation of the Rules or the Communications Act and sufficient flexibility to enable the Commission to address generic questions” without reliance on a class action. *See Certified Collateral*, 2 FCC Rcd 2171, ¶ 14. In an earlier procedural order, the Commission had left open the issue of class action process pending development of the factual record, but after concluding that the complaint was meritless, the Commission went out of its way to reject any suggestion in its procedural order that class action complaints might be entertained. *See id.* ¶¶ 2, 8 (citing Order, *Certified Collateral Corp. v. Allnet Commc’ns Servs. Inc.*, Mimeo No. 3217, 1986 FCC LEXIS 3823, ¶ 6 & n.5 (Comm. Car. Bur. Mar. 19, 1986)).

<sup>15</sup> *MCI*, 8 FCC Rcd 1517, ¶ 32.

of parties injured by Pacific Bell's overcharges, but because the very notion of a class action was inconsistent with the Act.

As the Commission has explained in a number of cases applying *MCI*, a claimant bears “the burden of establishing violations of the Act or Commission rule or order and the amount or extent of damage suffered as a consequence of such violations,” but a class action would relieve individual claimants of their statutory duty to prove their individual right to relief.<sup>16</sup> The Act simply does not permit claims by a class “agent” under Section 208, even if such a thing would be possible in federal court pursuant to Section 207. Accordingly, the Commission relied on *MCI* in *Krauss* to rule that “[w]e do not find it appropriate . . . to determine MCI's liability for alleged unauthorized conversions of other subscribers in the context of this complaint proceeding” because “[s]uch action would, in effect, transform this section 208 complaint proceeding into a class action suit, a result neither contemplated by, nor consistent with, the private remedies created under sections 206 through 209 of the Act.”<sup>17</sup> Thus, even before *Halprin*, the

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<sup>16</sup> See, e.g., *Allnet*, 8 FCC Rcd 3087, ¶ 28 (explaining that *MCI* prohibited effective class action because “complainants . . . are charged . . . with the burden of establishing violations of the Act or Commission rule or order and the amount or extent of damage suffered as a consequence of such violations,” and bypassing that obligation would, “in effect, transform complainants’ complaints into class action suits on behalf of their customers, a result neither expressly contemplated by nor consistent with the private remedy created under Sections 206-209 of the Act”); Memorandum Opinion and Order, *US Sprint Commc’ns v. Pac. Nw. Bell*, 8 FCC Rcd 1288, ¶ 36 (1993) (same); *MidAm. Long Distance Co. v. Pac. Bell Tel. Co.*, 8 FCC Rcd 1201, ¶ 34 (1993) (same).

<sup>17</sup> *Krauss*, 14 FCC Rcd 2770, ¶ 8 (“We do not find it appropriate, however, to determine MCI's liability for alleged unauthorized conversions of other subscribers in the context of this complaint proceeding. Such action would, in effect, transform this section 208 complaint proceeding into a class action suit, a result neither contemplated by, nor consistent with, the private remedies created under sections 206 through 209 of the Act.”); *id.* ¶ 10 (“The Commission has clearly stated that class action lawsuits are neither contemplated by, nor consistent with, the private remedies created under sections 206 through 209 of the Act. Although it is true that other subscribers who may have been converted to MCI without authorization might be entitled to damages pursuant to section 208(a) of the Act, the remedy

Commission had clearly considered and rejected the very type of class action proposed by Petitioner here, and it relied on *MCI*'s statutory interpretation to do so.

In the nearly 15 years since *Halprin*, the Commission has been equally steadfast in reaffirming the unequivocal statutory ban on administrative class actions.<sup>18</sup> For example, in 2002, the Commission “note[d] that [it] cannot adjudicate complaints under [S]ection 208 on a class action basis.”<sup>19</sup> In 2005, the Commission, “[f]or purposes of clarity,” again “note[d] that it is not permitted to adjudicate complaints under section 208 on a class action basis.”<sup>20</sup> In short, the Commission has repeatedly and consistently reaffirmed that the Act does not permit administrative class actions.

Further, the Commission’s consistent rejection of administrative class actions has also been recognized by the federal courts. The Seventh Circuit has relied on the Commission’s “conclu[sion] that class actions are ‘neither contemplated by, nor consistent with’ the Communications Act’s complaint remedies,”<sup>21</sup> and the D.C. Circuit has cited the Commission’s decision that “a class action suit . . . [is] neither contemplated by, nor consistent with the remedies created under Sections 206 through 209 of the Act.”<sup>22</sup> Both Circuits found that the Commission unambiguously rejected administrative class actions in *Krauss*, a decision that

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available to these subscribers is to file their own section 208 complaints with the Commission.”); *id.* ¶ 14 (“[C]lass action relief is not available . . . under the Act.”).

<sup>18</sup> Petitioner criticizes the Commission for reaffirming *Halprin* “without any analysis,” Petition at 4 n.6, but no analysis was necessary where *Halprin*’s holding is crystal clear, itself repetitive of prior precedent and there is no cognizable argument to the contrary.

<sup>19</sup> *Orloff*, 17 FCC Rcd 8987, ¶ 11 n.33 (citing *Halprin*, 13 FCC Rcd 22568, ¶ 29).

<sup>20</sup> *Gilmore*, 20 FCC Rcd 15079, ¶ 9 n.25 (citing *Halprin*, 13 FCC Rcd 22568, ¶ 29).

<sup>21</sup> *Boomer*, 309 F.3d at 421 (quoting *Krauss*, 14 FCC Rcd 2770, ¶ 10).

<sup>22</sup> *Hi-Tech Furnace Sys.*, 224 F.3d at 792 n.22 (quoting *Krauss*, 14 FCC Rcd 2770, ¶ 10).

preceded *Halprin* in rejecting a putative class claim on behalf of customers, but that Petitioner fails to mention, let alone reconcile with the Petition.

Petitioner's reliance on Sections 154(i) & (j) is misplaced. At a minimum, those provisions apply only where Commission action is "not inconsistent" with the Act<sup>23</sup> and where it would promote the "ends of justice."<sup>24</sup> As the Commission has emphasized repeatedly, administrative class actions *are* inconsistent with Section 208 of the Act, meaning that Section 154(i) supports *denial* of the Petition.<sup>25</sup> And the "ends of justice" demand that the Commission adhere to the limitations imposed by the Act, so Section 154(j) supports *denial* of the Petition as well.<sup>26</sup>

In sum, the petition should be denied because it flies in the face of the fact that the Act does not permit administrative class actions, as the Commission itself has consistently held.

## **II. THE COMMISSION SHOULD NOT IMPOSE THE UNNECESSARY BURDEN OF CLASS ACTIONS ON THE ADMINISTRATIVE PROCESS**

The Federal Rules of Civil Procedure already permit class actions in federal court. Consequently, there is nothing to be gained and much to be lost by creating administrative class actions, even aside from the lack of any statutory authority. There are at least two overwhelming

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<sup>23</sup> 47 USC 154(i).

<sup>24</sup> 47 USC 154(j).

<sup>25</sup> Petitioner's reliance on ancillary jurisdiction to justify administrative class actions fails, among other reasons, because ancillary authority cannot justify action that is inconsistent with the Act. Petitioner's reference to joinder of claims is inapposite because an individual claimant brings each claim to be joined under 47 CFR 1.723(a), as required by Section 208. It is also notable that the Commission's rules provide only for permissive joinder, not the involuntary joinder that is analogous to the Petitioner's proposed class action procedures.

<sup>26</sup> Petitioner relies on *FCC v. Schreiber*, 381 US 279 (1965), but there the Court affirmed that the Commission's authority to adopt procedures conducive to the "ends of justice" is limited by "consistency with governing statutes and the demands of the Constitution." *Id.* at 291. Section 154(j) does not change the fundamental incompatibility of class action procedure with the statutory requirements of Section 208, and therefore cannot support the Petition.

reasons to deny the petition: (1) claimants enjoy all the benefits of class actions already through suit in federal court, so administrative class actions would add nothing but complication; (2) the Proposed Rule raises serious due process concerns by departing from requirements of Rule 23 that the Supreme Court has held respond to serious constitutional concerns raised by class actions.

**A. Claimants May Already Bring Class Actions In Federal Court, So Administrative Class Actions Are Unnecessary**

The Act gives customers the choice of “mak[ing] a complaint to the Commission” or “bring[ing] suit for the recovery of damages . . . in any district court of the United States of competent jurisdiction.”<sup>27</sup> Federal courts manage class actions pursuant to Rule 23, which is the product of decades of experience with class actions and which has been augmented with a substantial body of case law interpreting and applying the Rule to respond to myriad practical, equitable and constitutional concerns with the class action mechanism.<sup>28</sup> Customers thus may bring class action suits against carriers in federal courts assuming they can satisfy the

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<sup>27</sup> 47 USC § 207. Although Section 207 of the Communications Act predated the modern class action under Rule 23, Congress has declined repeated opportunities to modify Section 207 in light of the developments in both Rule 23 and the Commission’s procedures. *See* 48 Stat. 1073 (Jun. 19, 1934) (enacting ch. 652, title II, § 207 of the Communications Act of 1934); Federal Rules of Civil Procedure, Historical Note, at VII-XII (GPO 2011) (explaining the history of the Rules, beginning in 1937); *Amchem*, 521 U.S. at 613 (explaining that “Rule 23 . . . gained its current shape in an innovative 1966 revision”). There is no basis to infer congressional intent against the status quo, and in fact “the Supreme Court has inferred congressional ratification of administrative action from ‘nothing more than silence in the face of administrative policy.’” Second Report and Order and Third Notice of Proposed Rulemaking, *In re Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 17 FCC Rcd 24018, ¶ 39 (citing *Haig v. Agee*, 453 U.S. 280, 300 (1981)).

<sup>28</sup> *See infra*, Part II.B, discussing some of the critical features of Rule 23 missing from Petitioner’s proposed class action procedures.

requirements of Rule 23 and have not agreed, by contract, not to bring such actions.<sup>29</sup> There is no reason for the Commission to adopt class action procedures when the federal courts already provide such procedures and have expertise administering them.<sup>30</sup>

To the extent that the Commission's substantive expertise would be necessary or helpful to the resolution of a class action, mechanisms already exist to facilitate the Commission's input into the case. The court might request an amicus brief from the Commission. Or, under the primary jurisdiction doctrine, the court can refer the case to the Commission for the filing of a petition for a declaratory ruling on the legal issue referred by the court. These methods allow the

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<sup>29</sup> The Supreme Court has held that the Federal Arbitration Act ("FAA") gives customers and carriers the right to contract for bilateral (i.e., individual) arbitration of disputes under the Act, and that courts must enforce such arbitration agreements notwithstanding state laws that might otherwise limit arbitration agreements. *See AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1748-51 (2011) (interpreting 9 U.S.C. §§ 2-4). The FAA would similarly require enforcement of individual arbitration agreements to preclude administrative class actions, so the Proposed Rule would have limited applicability, vastly increasing the Enforcement Bureau's procedural machinery without concomitant benefits. *See NextWave Personal Commc'ns, Inc. v. FCC*, 254 F.3d 130, 149 (D.C. Cir. 2001), *aff'd*, *FCC v. NextWave Personal Commc'ns, Inc.*, 537 U.S. 293, 300 (2003) (applying the Administrative Procedure Act, 5 U.S.C. § 706(2)).

<sup>30</sup> *See Certified Collateral*, 2 FCC Rcd 2171, ¶ 14 (finding the Commission's procedures sufficiently flexible to enforce the Act without resort to administrative class actions); *cf. In re Tel-Central of Jefferson City, Missouri*, 4 FCC Rcd 8338, ¶ 16 (finding no authority to award relief for unpaid tariffed charges where such a claim normally is brought in court). The federal courts enjoy several means to efficiently conduct class actions. For example, federal courts can use special masters and court-appointed experts to assist with the complexities imposed by class litigation. *See* Rothstein & Willging, *Managing Class Action Litigation: A Pocket Guide for Judges*, at 39 (3d ed. Federal Judicial Center 2010) (citing *Manuel for Complex Litigation* §§ 11.424, 21.141, 21.644, 22.87 (4th ed.)). Courts can also use an expert in assessing the reasonableness of class counsel's requested fees. *See* Fed. R. Civ. P. 23(h)(4). And under Rule 23(b)(3), courts can deny class certification in suits for money damages that would be unmanageable. *See King v. Kansas City S. Indus., Inc.*, 519 F.2d 20, 25 (7th Cir. 1975). None of those devices would be available to the Commission under the Proposed Rule.

Commission to offer its expertise on the substantive law, while the federal courts continue to apply their expertise on the procedural law surrounding class actions.<sup>31</sup>

**B. The Proposed Class Action Procedures Raise Serious Constitutional Concerns By Omitting Numerous, Critical Features Of Rule 23**

The Supreme Court has identified “serious constitutional concerns” raised by the fact that most of the class members are necessarily absent from class action litigation, and the federal courts have developed a substantial body of case law shaping class actions to protect the constitutional rights of absent class members. Chief among the protections for absent class members are the requirements of Rule 23 that ensure adequate representation by named plaintiffs and class counsel, notice to the class, the ability to opt out of most classes, oversight of settlements for fairness and oversight of attorney’s fees for fairness. The Proposed Rule not only ignores the model of Rule 23, but offers inadequate substitute protections for unnamed class members. Instead, Petitioner modeled the Proposed Rule on the EEOC’s class action regulation, but employment discrimination suits for class-wide injunctive relief are subject to different constitutional analysis and inapposite to the enforcement of the Act.<sup>32</sup> Consequently, the Proposed Rule is unconstitutional.

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<sup>31</sup> See, e.g., *In re Long Distance Telecomm. Litig.*, 831 F.2d at 630-32 (explaining that substantive questions of communications policy would be referred to the FCC while the remaining claims were retained by the court and stayed, especially in light of the FCC’s lack of class action procedures) (citing *Certified Collateral*, 2 FCC Rcd 2171).

<sup>32</sup> Petitioner’s reliance on the EEOC as a model is mistaken because the EEOC deals with fundamentally different kinds of claims under a distinct statutory regime. EEOC class actions are traditionally limited to classes alleging a “policy or practice that discriminates against the group on the basis of their race, color religion, sex, national origin, age, disability, or genetic information.” 29 CFR § 1614.204(a)(1). As the EEOC recognized in promulgating its rule, such suits for class-wide injury fall under Rule 23(b)(2), which is limited to suits where the defendant “acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” 57 Fed. Reg. 12634, 12639 (Apr. 10, 1992). The Supreme Court has confirmed that such suits

Class actions “implicate the due process ‘principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process, . . . it being ‘our deep-rooted historic tradition that everyone should have his own day in court.’”<sup>33</sup> Because of that principle, “before an absent class member’s right of action [is] extinguishable[,] due process require[s] that the member ‘receive notice plus an opportunity to be heard and participate in the litigation,’ and . . . ‘at a minimum an absent plaintiff must be provided with an opportunity to remove himself from the class.’”<sup>34</sup> The paradigm cases demanding full due process protection are “actions for money damages.”<sup>35</sup> In special circumstances the court has held that due process requires less in balance with other fairness considerations,<sup>36</sup> but those

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for class-wide injury are limited to injunctive relief, and that if individual money damages are sought, then the class deserves greater due process protection. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011) (“The key to the [Rule 23](b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.”); *Ortiz*, 527 U.S. at 846 (requiring notice and the right to opt-out of suits for money damages). In fact, the Supreme Court suggested that even suits for class-wide injunctive relief require notice and a right to opt out. *See Wal-Mart*, 131 s. Ct. at 2557 (“[Rule 23](b)(2) does not require that class members be given notice and opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause. In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. [at 812]. . . . While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here.”).

<sup>33</sup> *Ortiz*, 527 U.S. at 846 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *Martin v. Wilks*, 490 U.S. 755, 762 (1989)).

<sup>34</sup> *Id.* (quoting *Phillips Petroleum*, 472 U.S. at 813).

<sup>35</sup> *Jefferson v. Ingersoll Intern. Inc.*, 195 F.3d 894, 897 (7th Cir. 1999) (citing *Ortiz*, 527 U.S. 815).

<sup>36</sup> *See Amchem*, 521 U.S. at 613-14 (explaining Rule 23(b)) (citing Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81

exceptions are narrowly construed.<sup>37</sup> And under no circumstances can a party be bound by a representative unless “the named parties adequately represented the absent class and the prosecution of the litigation was within the common interests.”<sup>38</sup>

The Proposed Rule departs from Rule 23 in a variety of ways that raise due process concerns. For example, the Proposed Rule requires either the class representative (“agent”) or class counsel, but not both, to represent the class adequately;<sup>39</sup> indeed, the agent does not even need to verify the complaint if she has an attorney file it.<sup>40</sup> But the Supreme Court has held repeatedly that due process requires *both* the class representatives and class counsel to represent the class adequately.<sup>41</sup>

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Harv. L. Rev. 356, 388 (1967)). Opt-out can be waived and notice reduced where individual litigation “would risk establishing incompatible standards for the party opposing the class,” “substantially impair or impede” the ability of others to protect their interests, or where the suit seeks injunctive relief “on grounds generally applicable to the class.” *Id.* (quoting Rule 23(b)(1) and (2)). The final exception is the one that justifies the EEOC’s elimination of opt-out. *See* 57 Fed. Reg. 12634, 12639 (Apr. 10, 1992) (explaining why the limitations on EEOC class actions are consistent with Rule 23).

<sup>37</sup> *See* *Jefferson*, 195 F.3d at 897 (holding that standard due process “entitlement may be overcome only when individual suit would confound the interest of other plaintiffs – when, for example, there is a limited fund that must be distributed ratably, . . . or when an injunction affects everyone alike.”); *id.* at 899 (“[T]he controlling authority today is *Ortiz*, which says in no uncertain terms that class members’ right to notice and an opportunity to opt out should be preserved whenever possible.”); *see also* *Ortiz*, 527 U.S. at 842-47 (interpreting Fed. R. Civ. P. 23(b)(1)(B)).

<sup>38</sup> *Phillips Petroleum*, 472 U.S. at 808 (citing *Hansberry*, 311 U.S. at 40-41); *see also* *Richards v. Jefferson County*, 517 U.S. 793, 801 (1996).

<sup>39</sup> *See* Proposed Rule § 1.737(a)(2)(iv).

<sup>40</sup> *See* Proposed Rule § 1.737(c)(1).

<sup>41</sup> *See* *Ortiz*, 527 U.S. at 856 (requiring class counsel to adequately represent the interests of the class free from conflicts of interest) (citing *Amchem*, 521 U.S. at 627 (holding that unrepresentative parties cannot bind a class)); *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (holding that Rule 23(a)’s requirement that class representatives be members of the class is based on the due process requirement that to represent a class an agent

Or, as another example, the Proposed Rule requires only “reasonable” notice “such as publication,” and offers no option for class members to opt-out of the suit. But due process only tolerates such weak protection for absent class members in special circumstances like a limited fund for recovery or class-wide injunctive relief.<sup>42</sup> In the context of enforcing the Act, suits for individual money damages require notice in the form most likely to apprise the class (which cannot be publication where direct mailing is possible),<sup>43</sup> and class members must have a right to opt out or the judgment cannot bind them.<sup>44</sup>

Relatedly, the Proposed Rule omits any safeguards against unfair settlements, but the safeguards in Rule 23(e) are designed to ensure that absent class members were adequately represented in settlement negotiations and will be bound by the settlement.<sup>45</sup> Even the EEOC’s regulations provide for fairness review of settlements, but Petitioner omitted that section from

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must “‘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)).

<sup>42</sup> As noted earlier, the EEOC rules lack an opt-out provision because suits for employment discrimination are a classic example of a Rule 23(b)(2) suit that justifies mandatory participation.

<sup>43</sup> See *Eisen v. Carlisle*, 417 U.S. 156, 175 (1974) (“[P]ublication notice could not satisfy due process where the names and addresses of the beneficiaries were known.”). Contrast Proposed Rule § 1.737(e), with Fed. R. Civ. P. 23(c).

<sup>44</sup> *Ortiz*, 527 U.S. at 846 (citing *Phillips Petroleum*, 472 U.S. at 813).

<sup>45</sup> *Amchem*, 521 U.S. at 621 (holding that Rule 23 “focus[es] court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives,” and “[t]hat dominant concern persists when settlement, rather than trial, is proposed”); *id.* at 623 (Rule 23(e) “protects unnamed class members from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise.”).

the Proposed Rule.<sup>46</sup> A settlement under the Proposed Rule, without any guarantee of fairness, could not be binding.<sup>47</sup>

For these and other reasons the Proposed Rule raises serious constitutional concerns for which the Petition should be denied. The Proposed Rule's departures from Rule 23 would benefit no one but plaintiffs' attorneys who could more easily bring cases to bind absent and unaware class members and collect attorney's fees even for unfair settlements.

### CONCLUSION

The Petition neither seriously attempts to justify the addition of an administrative class action remedy to the statutory framework, which already includes a judicial class action remedy, nor seriously attempts to offer a Proposed Rule that responds to the nature of claims brought before the Commission and provides adequate due process protection for absent class members. The only conceivable purpose of the Petition is to expand class action litigation beyond the nature of classes accepted in federal court or without the fairness guarantees of Rule 23. Because there is no reason to believe that the Federal Rules of Civil Procedure have not optimized the benefits of class actions to injured parties, the only logical reason to support an expansion of class litigation is to increase the income of plaintiffs' lawyers. Even if the Communications Act did not affirmatively preclude administrative class actions, the Commission should deny the petition because it would impose on the agency the burden of managing class actions that would merely benefit class counsel.

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<sup>46</sup> See 29 CFR § 1614.204(g)(4) (requiring settlement to be vacated "if the administrative judge finds that the proposed resolution is not fair, adequate and reasonable to the class as a whole").

<sup>47</sup> See *Sagers v. Yellow Freight Sys., Inc.*, 68 F.R.D. 686 (D. Ga. 1975), *affirmed on other grounds*, 529 F.2d 721 (5th Cir. 1976); Wright & Miller, *Federal Practice and Procedure* vol. 7B, § 1797 (3d. ed. 2012).

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