Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Protecting the Privacy of Customers of Broadband and Other Telecommunications Services	))	WC Docket No. 16-106

To: The Secretary

COMMENTS OF SMITHWICK & BELENDIUK, P.C.

The law firm of Smithwick & Belendiuk, P.C. files these comments on the Commission's Notice of Proposed Rulemaking in this proceeding. (NPRM). The comments address Section III. H. of the NPRM, titled Dispute Resolution. Smithwick & Belendiuk supports the Commission's proposal to prohibit Broadband Internet Access Service (BIAS) providers from compelling individual arbitration in their contracts with customers for the reasons given in the NPRM and in these comments.

Background

It has been five years since the Supreme Court handed down its 5-4 decision in *AT&T Mobility LLC v Concepcion*[1], upholding dispute resolution agreements that require customers to arbitrate claims on an individual basis and ban participation in class action litigation. Relying on the Federal Arbitration Act, the Court nullified the rulings of numerous states that such provisions were unfair to consumers and unenforceable. *Concepcion* foreclosed collective private action by consumers, effectively immunizing BIAS providers and companies in other sectors from liability for wrongful conduct.

[1] 131 S Ct 1740 (2011)

[2] http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf

[3] CFPB NPRM, at pp. 97-98.

BIAS providers have universally adopted restrictive arbitration agreements that limit dispute resolution to one-on-one arbitration. Potential customers have no choice but to accept the BIAS providers' standard form contracts without negotiation or modification if they want to obtain BIAS. BIAS providers in turn may harm large numbers of their customers through deceptive and otherwise unlawful practices, amounting to millions or hundreds of millions of dollars and widespread impairment or degradation of service. Few aggrieved customers ever avail themselves of the arbitration procedure, since the small size of an individual claim does not justify the effort involved. Even where a claimant accepts a pre-arbitration settlement offer or wins an award in arbitration, the relief is limited to that customer's individual claim. The contractual bar against class actions deprives the vast majority of customers, who likely are unaware they are harmed, of practical relief.

On May 5, 2016 the Consumer Financial Protection Bureau (CFPB) proposed rules that would prohibit certain providers of consumer financial products and services from using pre-dispute arbitration agreements to block consumer class actions in court (CFPB NPRM).[2] The CFPB gives the following rationale for its proposed rules:

> The Bureau also believes that the relatively low number of formally filed individual claims may be explained by the low monetary value of the claims that are often at issue. Claims involving products and services that would be covered by the proposed rule often involve small amounts. When claims are for small amounts, there may not be significant incentives to pursue them on an individual basis. As one prominent jurist has noted, "Only a lunatic or a

---

[2] http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf

> fanatic sues for $30." In other words, it is impractical for the typical consumer to incur the time and expense of bringing a formal claim over a relatively small amount of money, even without a lawyer. Congress and the Federal courts developed procedures for class litigation in part because "the amounts at stake for individuals may be so small that separate suits would be impracticable." Indeed, the Supreme Court has explained that:
>
> [t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her own rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.
>
> The Study's survey of consumers in the credit card market reflects this dynamic. Very few consumers said they would pursue a legal claim if they could not get what they believed were unjustified or unexplained fees reversed by contacting a company's customer service department. (footnotes omitted)[3]

The CFPB thus based its proposal on preliminary findings that pre-dispute arbitration agreements are being widely used to prevent consumers from seeking relief from legal violations on a class basis, and that consumers rarely file individual lawsuits or arbitration cases to obtain such relief. These findings are consistent with a comprehensive study on consumer arbitration agreements that Congress in the Dodd-Frank Wall Street Reform and Consumer Protection Act directed the CFPB to undertake and which it published in 2015 and delivered to Congress (CFPB Study).[4] CFPB's proposed rules would cover third party billing services provided by mobile wireless

---

[3] CFPB NPRM, at pp. 97-98.

[4] *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)* (2015) The March 2015 CFPB report on arbitration is available at: http://www.consumerfinance.gov/reports/arbitration-study-report-to-congress-2015/

carriers.[5] Although the CFPB's power to regulate mobile wireless carriers is limited to third party billing arrangements, the CFPB Study examined the use and terms of arbitration agreements in mobile carrier contracts.

The CFPB Study found that very few consumers ever bring – or think about bringing – individual actions against their financial service providers either in court or in arbitration and that class actions provide a more effective means for consumers to challenge problematic practices by these companies. The CFPB studied eight of the largest facilities-based mobile wireless providers and found that seven used restrictive arbitration agreements in their 2014 customer contracts. CFPB Study at p. 30. The one provider that did not have a mandatory arbitration provision was relatively small, such that 99.9 percent of wireless customers were subject to forced individual arbitration and banned from class actions. Id. at p. 45. The only mobile wireless contracts without an arbitration clause limited any damages recovery to the amount of the subscriber's bill. Id. at p. 72.

Smithwick & Belendiuk reviewed the current customer agreements of the four largest wireless providers, AT&T, Verizon, T-Mobile and Sprint and confirmed that all still require individual arbitration and ban class actions.[6] The Verizon and AT&T customer agreements for BIAS provided over wire/fiber, although not a part of the CFPB

---

[5] The CFPB NPRM found at note 157 that "In mobile wireless third-party billing, a mobile wireless provider authorizes third parties to charge consumers, on their wireless bill, for services provided by the third parties. Because mobile wireless third-party billing involves the extension of credit to, and processing of payments for, consumers in connection with goods and services that the provider does not directly sell and that consumers do not purchase from the provider, the provision of mobile wireless third-party billing is a "consumer financial product or service" under the Dodd-Frank Act. 12 U.S.C. 5481(6), 15(A)(i) & (vii)."

[6] The wireless customer agreements are publicly available on the Internet:
AT&T: https://m.att.com/shopmobile/legal/terms.wirelessCustomerAgreement.html.
Verizon: http://www.verizonwireless.com/b2c/support/customer-agreement.
T-Mobile: http://www.t-mobile.com/templates/popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions.
Sprint: https://shop2.sprint.com/en/legal/os_general_terms_conditions_popup.shtml.

Study, also include virtually identical provisions.[7] T-Mobile does give customers a 30-day period in which to opt out of the arbitration agreement in its wireless contract. Since only a handful of customers nationwide likely avail themselves of this option, a class action lawsuit would have a paltry class size and not be worth pursuing.

For example, AT&T's customer agreement for wire/fiber BIAS, at 13. (6), states in bold and unequivocal language:

> **YOU AND AT&T AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING.**

Sprint's Dispute Resolution and Arbitration agreement in its mobile wireless contract uses similar language:

> Mandatory Arbitration and Waiver of Class Action Instead of suing in court, you and Sprint agree to arbitrate all Disputes (as defined below) on an individual, non-representative, basis. You agree that, by entering into this Agreement, you and Sprint are waiving the right to a trial by jury or to participate in a class action or representative action. This agreement to arbitrate is intended to be broadly interpreted.

And Sprint's definition of Disputes is all-inclusive:

> "Disputes" shall include, but are not limited to, any claims or controversies against each other related in any way to or arising out of in any way our Services or the Agreement, including, but not limited to, coverage, Devices, billing services and practices, policies, contract practices (including enforceability), service claims, privacy, or advertising, even if the claim arises after Services have terminated. Disputes also include, but are not limited to,

---

[7] Non- mobile wireless BIAS agreements are publicly available on the Internet:
AT&T: http://www.att.com/legal/terms.internetAttTermsOfService.html
Verizon: http://www.verizon.com/about/sites/default/files/Internet_ToS_01172016_v16-1_Updated%201.13.2016.pdf

> claims that: (a) you or an authorized or unauthorized user of the Services or Devices bring against our employees, agents, affiliates, or other representatives; (b) you bring against a third party, such as a retailer or equipment manufacturer, that are based on, relate to, or arise out of in any way our Services or the Agreement; or (c) that Sprint brings against you. Disputes also include, but are not limited to, (i) claims in any way related to or arising out of any aspect of the relationship between you and Sprint, whether based in contract, tort, statute, fraud, misrepresentation, advertising claims or any other legal theory; (ii) claims that arose before this Agreement or out of a prior Agreement with Sprint; (iii) claims that are subject to on-going litigation where you are not a party or class member; and/or (iv) claims that arise after the termination of this Agreement.

In addition to prohibiting collective private action by aggrieved customers the CFPB Study found other dispute resolution limitations that make it difficult for consumers to bring an action. For example, under the Verizon Wireless Customer Agreement customers waive their right to dispute a charge or practice if written notification is not made within 180 days.

> **… IF YOU WISH TO PRESERVE YOUR RIGHT TO BRING AN ARBITRATION OR SMALL CLAIMS CASE REGARDING SUCH DISPUTE, YOU MUST WRITE TO US AT THE CUSTOMER SERVICE ADDRESS ON YOUR BILL, OR SEND US A COMPLETED NOTICE OF DISPUTE FORM (AVAILABLE AT VERIZONWIRELESS.COM), WITHIN THE 180–DAY PERIOD MENTIONED ABOVE. IF YOU DO NOT NOTIFY US IN WRITING OF SUCH DISPUTE WITHIN THE 180–DAY PERIOD, YOU WILL HAVE WAIVED YOUR RIGHT TO DISPUTE THE BILL OR SUCH SERVICE(S) AND TO BRING AN ARBITRATION OR SMALL CLAIMS CASE REGARDING ANY SUCH DISPUTE.**

AT&T likewise imposes a notification period of 100 days.

> IF YOU DISPUTE ANY CHARGES ON YOUR BILL, YOU MUST NOTIFY US IN WRITING AT AT&T BILL

DISPUTE, 1025 LENOX PARK, ATLANTA, GA 30319
WITHIN 100 DAYS OF THE DATE OF THE BILL OR
YOU'LL HAVE WAIVED YOUR RIGHT TO DISPUTE
THE BILL AND TO PARTICIPATE IN ANY LEGAL
ACTION RAISING SUCH DISPUTE.

BIAS customers, whether wireless or wired, are required to agree to the foregoing provisions and surrender their rights to meaningful dispute resolution. They have no alternative to these contracts if they want to obtain service. Over 140 law professors so far have signed a letter explaining why these clauses requiring individual arbitration and banning class actions deprive consumers of important protections. This letter is to be filed with the CFPB in support of its proposed rules.[8]

The Mandatory Arbitration Agreements of BIAS Providers are Unreasonable and harmful to BIAS Customers

The CFPB NPRM and Study provide a wealth of evidence on the pernicious effects of consumer agreements that require individual arbitration and ban participation in class action litigation. The CFPB's findings are strong record support for the Commission's proposal to prohibit such clauses in the contracts of BIAS providers. These mandatory, non-negotiable agreements unfairly and unreasonably deprive customers of their ability to join in collective private action to rectify the wrongful actions of BIAS providers. Their purpose and effect is to suppress the legitimate claims of consumers, who may be unaware of the harm to them or are unwilling to incur the effort and expense of pursuing a claim. Individual arbitrations are not a realistic substitute for consumer class actions.

[8] http://lawprofessors.typepad.com/contractsprof_blog/2016/05/law-professors-letter-in-support-of-cfpb-proposed-arbitration-regulation.html

Nor are the Commission's complaint processes, informal and formal, adequate to replace the currently unavailable avenue of consumer class action litigation. The priority of the Commission and service providers is to resolve informal complaints quickly and with little fuss, bother and follow up. Like formal complaints, these are handled on an individual basis and may only have broader effect if the Enforcement Bureau initiates an investigation and upon finding unlawful conduct, issues a notice of apparent liability or negotiates a settlement with the company. The Commission has never asserted that the Enforcement Bureau has the resources or otherwise is able to pick up the slack created by *Concepcion*, which permitted BIAS providers to ditch consumer class action litigation in favor of a customer-by-customer crapshoot in the arbitral forum. The Commission's complaint processes and Enforcement Bureau investigations are properly seen as complementary to class action litigation, working together to protect consumers.

Indeed, the complaint provisions of the Communications Act 47 U.S. Code §§ 206-208, explicitly empower complainants to bring actions in federal court, which statutory right purportedly is overridden by the mandatory arbitration requirement of BIAS customer agreements:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies. 47 U.S. Code § 207

Furthermore, the FCC's jurisdiction is limited to that conferred by the Communications Act. A consumer class action may allege violations of state consumer

protection statutes or state regulatory requirements or breach of contract. Many state statutes empower consumers to bring representative actions in court as private attorneys general for the benefit of similarly situated customers. The arbitration clauses in BIAS customer agreements foreclose such private actions for which there is no resort to the Commission.

The Commission recognizes the vital importance of BIAS in American life. Along with its many initiatives to foster universal and affordable BIAS of high quality and speed throughout the country, the Commission has a responsibility to ensure the availability of effective consumer protections and recourse to traditional forums for redress. Unless the Commission adopts its proposed prohibition, consumers risk overcharging and deprivation and degradation of service at the hands of BIAS providers who are able to commit unlawful acts with relative impunity.

The Commission's proposal to prohibit the use of these clauses in BIAS contracts includes mobile wireless providers of BIAS. Mobile wireless providers typically have a single customer agreement for all of the products and services they provide in connection with a consumer's cell phone use. The mobile wireless service contracts and the dispute resolution agreements therein cover all of the equipment and services provided and billed, including both BIAS and third party services. Therefore, adoption by the CFPB of its proposal would require mobile wireless providers either to make an exception in their arbitration agreements for third party billed services, or to remove the arbitration clauses from their customer agreements outright. The same is true if the Commission prohibits these clauses in the provision of BIAS. The provision of mobile wireless BIAS is inextricable from the equipment, voice, text and any other products and services related

to the consumer's cell phone use. A prohibition applied to BIAS is effectively a ban on these offensive dispute resolution clauses generally in the customer agreements required by mobile wireless services providers as a condition of service. A blanket prohibition on clauses forcing individual arbitration and banning class actions is well-supported by the findings of the CFPB, which tailored the coverage of its proposed rules to mobile wireless third party services only because of jurisdictional considerations.

Conclusion

The Commission's proposal to prohibit clauses in BIAS contracts that force consumers to arbitrate disputes on an individual basis and ban participation in class action litigation promises long-awaited relief from these harsh, anti-consumer practices. The CFPB essentially has done the Commission's work for it through years of study and documentation of the prevalence and evils of these noxious provisions. Rather than give customers the option of arbitration, the principal objective of these mandatory, non-negotiable clauses is to deprive consumers of their right to take part in class or other collective actions, which are the only practicable means of seeking redress for the unlawful acts of BIAS providers affecting thousands or millions of customers in small dollar amounts. Such practices are unjust and unreasonable and contrary to the public interest from a consumer protection standpoint and unreasonably inhibit achievement of the Commission's policy goals for BIAS deployment.

Wherefore, Smithwick & Belendiuk supports the Commission's proposal and requests its speedy adoption.

Respectfully submitted

By: /s/ Arthur V. Belendiuk
Arthur V. Belendiuk

Smithwick & Belendiuk, P.C.
5028 Wisconsin Avenue, N.W., # 301
Washington, D.C. 20016
(202) 363-4050
May 27, 2016