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

REPLY COMMENTS OF SMITHWICK & BELENDIUK, P.C.

The law firm of Smithwick & Belendiuk, P.C. files these reply comments on the Commission's Notice of Proposed Rulemaking in this proceeding. (NPRM). On May 27, 2016 Smithwick & Belendiuk filed comments in this proceeding. These reply 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, in this firm's comments and in these reply comments. Herein, we explain why the comments opposing the Commission's proposal lack merit.

Several commenters oppose the Commission's proposal to prohibit provisions in consumer contracts that require individual arbitration and ban customers from participating in class action litigation.[1] The opposing commenters make two arguments: 1) the Commission lacks legal authority to prohibit these clauses, and 2) individual arbitration reasonably protects consumer interests, and actually favors consumers. Although the first argument finds some colorable support in language of the Supreme Court of the United States (SCOTUS) involving other statutes, such an assertion of legal

[1] See comments of Verizon, Sprint, ITTA and Consumer's Research.

authority by the Commission is unprecedented, and therefore is untested in a judicial forum. Moreover, there is sound support for the Commission's authority to prohibit outright the practice, or to achieve the same end by other means. The second argument is plainly wrong and is shown to be so by the Consumer Financial Protection Bureau's (CFPB) study of forced arbitration in consumer contracts (CFPB Study) and by that agency's findings in its recent proposal to ban such clauses within its jurisdiction (CFPB NPRM).[2]

Smithwick & Belendiuk addresses Verizon's comments herein as they make these arguments extensively and cover the arguments of the other opposing commenters. Verizon first argues that the Communications Act does not give the Commission the legal authority to dictate methods of dispute resolution between common carriers and their customers. Section 201(b), however, provides that all practices and regulations for and in connection with common carrier communication service must be just and reasonable, and the Commission has exercised its authority in the past to declare a range of practices and regulations to be unjust and unreasonable. Clearly, BIAS providers' contractual restriction of dispute resolution procedures is a practice for or in connection with the provision of communication service and is fair game for Commission evaluation of its lawfulness. Verizon cites no authority for its position that the Commission's Section 201(b) authority is so limited as to preclude the proposed prohibition.

Next Verizon draws from several SCOTUS decisions for the proposition that an agency may not override the congressional mandate of another federal statute, in this case

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[2] *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/
[need cite for NPRM]

the Federal Arbitration Act's (FAA) text and policy in favor of private arbitration agreements, unless authorized by Congress to do so in the agency's enabling statute. The *Concepcion* decision, relied on by Verizon, has limited relevance here since the Court struck down a state rule that would have allowed class arbitration, which had not been agreed to by the parties and was said by the Court to be incompatible with the purposes of arbitration.[3] Neither circumstance is present in the Commission's proposed exercise of its authority under the Communications Act. While circuit court decisions are mixed on whether the National Labor Relations Act authorization of "collective" action is sufficient to override the FAA policy, the Commission has the unquestioned authority to declare a practice unjust and unreasonable and therefore unlawful. The only decision Verizon references in which SCOTUS overrode an agency ruling is *FDA v. Brown & Williamson*, holding that the Food and Drug Administration did not have the authority to regulate tobacco as a drug because Congress had expressly created a dual regulatory scheme.[4] This decision, based on a unique and different statutory scheme and various actions by Congress over many years, has nothing to do with the legitimacy of an FCC finding that BIAS providers' practice of forcing individual arbitration on consumers via adhesion contracts is unreasonable.[5]

These pernicious clauses are found in virtually all BIAS contracts, wired and wireless. Adopting the proposed prohibition doubtless would provoke a court appeal, one well worth defending. At the same time the Commission could condition license transfer approvals by BIAS providers on the removal of the offending clauses from their customer

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[3] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346-47 (2011)

[4] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)

[5] The D.C. Circuit's discussion of the case in its net neutrality decision, at pages 37-38 confirms the uniqueness of its facts and the case's irrelevance to the Commission's proposal. *U.S. Telecom Association v F.C.C.* (June 14, 2016)

agreements. Another initiative the Commission could take would be to fashion collective or class action-like procedures for use in complaint proceedings. In order to ensure adequate representation of consumer interests the Commission could provide for the payment of plaintiffs' attorneys' fees, at least when a complaint is resolved by settlement of the parties.

The CFPB NPRM and CFPB Study roundly rebut Verizon's claim that forced individual arbitration is good for consumers. Smithwick & Belendiuk's comments describe the CFPB's rationale for its proposed ban on these clauses, based on the results of its comprehensive study that included wireless contracts. It is worth reproducing a core statement of its reasoning here:

> Collectively, as set out in the Study, the number of all individual claims filed by consumers in individual arbitration, individual litigation in Federal court, or small claims court is relatively low in the markets analyzed in the Study compared to the hundreds of millions of consumers of various types of financial products and services. The Bureau believes that the relatively low numbers of formal individual claims may be explained, at least in part, by the fact that legal harms are often difficult for consumers to detect without the assistance of an attorney. For example, some harms, by their nature, such as discrimination or non-disclosure of fees, can only be discovered and proved by reference to how a company treats many individuals or by reference to information possessed only by the company, not the consumer. Individual dispute resolution requires a consumer to recognize his or her own right to seek redress for any harm the consumer has suffered or otherwise to seek a dispensation from the company.
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> 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 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:
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>> [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.
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> 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)[6]

Verizon provides a laundry list of assertions that individual arbitration is fair to consumers and produces favorable results for consumers compared to other forms of dispute resolution. Verizon, however, fails to even mention the comprehensive CFPB Study and NPRM, let alone reckon with the CFPB's findings to the contrary.

If arbitration is so good for consumers, why not let consumers choose it voluntarily, rather than force it down their throats? Verizon creates a smokescreen and will not own up to the real answer to this question. Verizon and its ilk frankly don't care very much whether an aggrieved customer prefers to sue in court or initiate arbitration, as long as the claimant proceeds individually. What they do care about is foreclosing consumer class actions, which is the true purpose of the mandatory individual arbitration clauses. Class actions are the only practicable means of seeking relief for large numbers of customers whose individual monetary claims are small. Denying consumers the right to participate

[6] CFPB NPRM, at pp. 96-98.

in class procedures allows BIAS providers to injure customers with impunity and is the true unfairness of the mandatory arbitration provisions, which is not lost on the CFPB.

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

Respectfully submitted

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