

August 3, 2016

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re:** Protecting the Privacy of Customers of Broadband and Other  
Telecommunications Services, WC Docket No. 16-106

Dear Ms. Dortch:

On August 1, 2016, Harold Feld and Dallas Harris of Public Knowledge met with Daniel Kahn, Heather Hendrickson, Lisa Hone, and Brian Hurley of the Wireless Competition Bureau, with regard to the above captioned proceeding. Public Knowledge discussed mandatory arbitration, anonymization of data, and Section 222(b).

#### Mandatory Arbitration

Public Knowledge argued that there are no grounds for foreclosing an appeal to the Commission through an arbitration clause. Consumers should not be required to go through an arbitration process before being able to file a complaint with the Commission under section 222. The ability for a consumer to access the courts is becoming increasingly important given the attempts in Congress to prohibit the FCC from going forward with this rulemaking. The Commission could adjudicate this issue when it arises, but it is better for the Commission to address mandatory arbitration proactively to avoid an interpretation of an arbitration clause that would prohibit consumers from seeking redress from the Commission under Section 222.<sup>1</sup> Expressly prohibiting these arbitration clauses is particularly important given the impact the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*<sup>2</sup> has had on consumer's ability to seek redress outside of the arbitration system.

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<sup>1</sup> Without clear rules, it is possible for courts to interpret arbitration clauses as preempting a consumer's right to adjudicate disputes through an administrative agency. *See Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 188 (Cal. 2013), cert. denied, 134 S. Ct. 2724 (2014) (holding that the Federal Arbitration Act preempts a state-law rule requiring a Berman hearing prior to arbitration.)

<sup>2</sup> 131 S. Ct. 1740 (2011).

## Set Top Box Docket

The Commission should examine comments made by carriers in the Commission's on going set top box proceeding.<sup>3</sup> There, providers have argued that they cannot share certain information with a third party without the consumers consent, yet claim that they do not need consumer consent to collect similar information in this proceeding.<sup>4</sup> The Commission must be aware of these conflicting positions and should base its determinations on a consistent interpretation of the Commission's privacy rules.

### Anonymization

If the Commission decides that there is a category of information that is "de-identified information", there has to be a limiting principle that doesn't circumvent the statute. Public Knowledge is also concerned with whether the "de-identified information" would apply to 222(b).<sup>5</sup> It is important that De-identified needs to apply across all categories, 222(a) and 222(b).

Further, the Commission must determine whether tools would be considered "de-identified information" and what extent of de-identification is required. There have been data breaches of information, such as sim card keys, that does not establish a direct link to the consumer, but do allow nefarious actors, once the information is out, to take stolen equipment and identify the customers. If "de-identified information" like a sim card key is not required to be protected under the data breach rules, then in the event of a breach there is a break in the responsibility chain.

Essentially, the exception should not follow the rule, where a carrier can release a telephone number, because its technically de-identified, but in reality could easily be identified by a check in the LNPA database. At the same time, Public Knowledge recognizes there is some level of de-identification that is sufficient, but the difficulty in balancing interests exemplifies why a category of "de-identification information," may not be feasible.

### Section 222(b) and Competition

Public Knowledge also encouraged the Commission to consider how a consumer's right to share certain information interacts with section 222(b). This issue is

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<sup>3</sup> See Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 31 FCC Red. 1544 (2016).

<sup>4</sup> See e.g. Comments of National Cable and Telecommunications Association, Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 31 FCC Red. 1544, n.12 (2016) ("Under Section 631, cable companies can only use data with customer notice and consent");

<sup>5</sup> 47 C.F.R. § 222(b).

exemplified in the Verizon retention case, where the Commission determined that unique disconnection information from carrier-initiated port requests was 222(b) information. The Commission found that there is a competition element to section 222 that Congress decided was important.

In addition, the Commission should clarify what information is 222(a) information, 222(b) information, and 222(c) information. Based on what the Commission is trying to accomplish, it ought to be clear what the outcome is. The Commission could also forbear from 222(b), since competitive carriers can and do protect their proprietary information through contracts. It is preferable to forbear from 222(b) and have strong protections to equalize the bargaining power between consumers and their provider than to have weak protections for consumers and strong protections for providers that want to insert themselves into the process when convenient.

In accordance with Section 1.1206(b) of the Commission's rules, this letter is being filed with your office. If you have any further questions, please contact me at (202) 861-0020.

Respectfully submitted,

/s/ Dallas Harris

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