

Before the
Federal Communications Commission
Washington, DC 20554

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

Comments of -

**National Association of Consumer Advocates
Public Citizen
Alliance for Justice
Andrews Law Group
Center for Justice & Democracy
Consumer Action
Consumer Federation of America
Consumer Federation of California
Consumer Watchdog
Consumers for Auto Reliability and Safety
CPD Action
DC Consumer Rights Coalition
Demand Progress
Homeowners Against Deficient Dwellings
Home Owners for Better Building
National Consumer Law Center (on behalf of its low income clients)
National Consumer Voice for Quality Long-Term Care
National Employment Lawyers Association
Privacy Rights Clearinghouse
Public Justice
Take Back Your Rights PAC
U.S. PIRG
Woodstock Institute
Workplace Fairness**

filed May 26, 2016

Introduction

The public interest organizations listed above submit comments in response to the Federal Communications Commission (FCC) Notice of Proposed Rulemaking to apply the traditional privacy requirements of the Communications Act to broadband Internet access service (BIAS).

These comments will not address the broader issues at stake in this rulemaking concerning privacy protections for broadband Internet customers. Instead, they are directed at Section III H of the proposed rule, titled Dispute Resolution. Specifically, our comments will address the Commission's request for feedback on whether it should prohibit broadband Internet providers from using predispute binding arbitration (or forced arbitration) clauses in their contracts with broadband consumers.

We are pleased that the Commission is including in its focus the issue of forced arbitration in BIAS contracts. Forced arbitration clauses are terms in standard-form contracts that prohibit consumers from taking future legal complaints against telecom providers to court and require them instead to resolve their disputes in private arbitration. As the FCC has acknowledged, forced arbitration is a deeply unfair practice.¹ In the marketplace, forced arbitration has resulted in a trail of consumer claims against telecom providers that simply have been wiped away, while providers have escaped scrutiny and accountability for their conduct in numerous circumstances.

Telecom contracts of adhesion containing arbitration provisions have proven to be oppressive to consumer rights. In private arbitration, hired arbitrators interpret contract and consumer protection laws and render decisions that are rarely appealable and are subject to little public scrutiny. In effect, companies have an unfair advantage when they can operate within the "home turf" of a "dispute resolution" system they selected and created, while their customers, if they decide to pursue claims, must muddle through the process in isolation.

One of the most harmful and consequential aspects of forced arbitration clauses in consumer contracts are terms that prohibit customers from banding together to seek remedies for losses caused by company misconduct. Such class-action bans are notoriously pervasive in the telecommunications sector. The widespread use of class action bans has shifted the discussion from whether forced arbitrations fairly adjudicate consumer claims to whether consumer claims, particularly for harms resulting from systemic or widespread company practices, are being heard at all.

The FCC should prohibit broadband internet service providers from using their fine-print contracts to compel their customers to resolve disputes through forced arbitration, for all telecommunications services under its jurisdiction, including for mobile services, cable and other multichannel video services, and common carriers under the Communications Act. The prohibition should broadly include all such claims, whether brought as a class action,

¹ See 2015 Open Internet Order, 30 FCC Rcd at 5718, para. 267.

individual, or group claim. Arbitration should be voluntary — and an ***option*** for telecom customers to choose only after disputes arise.

The Well-Established Record on the Harms of Forced Arbitration

It is now well-established and proven, through consumer research and advocacy,² academic study,³ award-winning investigative reporting,⁴ and comprehensive federal government examination and analysis,⁵ that forced arbitration schemes in consumer contracts prevent individuals from effectively vindicating their statutory and common law rights.

In its proposed rule, and specifically in its inquiry on dispute resolution, the FCC cites the 2016 Pulitzer-Prize finalist *New York Times* series on the use of forced arbitration. The series covered an extensive array of consumers and workers subject to forced arbitration in the fine-print of corporate contracts. Conducting its own data analysis, *The Times* provided evidence that forced arbitration clauses with class action bans simply block claims, and are rarely used as an actual means to provide alternative dispute resolution. *The Times* found that very few consumers sought to arbitrate their claims on an individual basis. In telecom disputes under \$2,500, the Times determined that “Verizon, which has more than 125 million subscribers, faced 65 consumer arbitrations over...five years [and] Time Warner Cable, which has 15 million customers, faced seven.”⁶

The Consumer Financial Protection Bureau’s 2015 study has uncovered the most extensive and revealing evidence yet on forced arbitration practices. The CFPB’s data-driven findings on the effects of forced arbitration in consumer finance contracts strongly suggest the likelihood of similarly adverse consumer experiences in the telecommunications sector.

The CFPB study demonstrated that tens of millions of consumers are subject to forced arbitration clauses and class action bans in consumer finance contracts. Almost all of the arbitration clauses studied by the CFPB forbid consumers from participating in class actions. The Bureau noted that very few consumers can go to arbitration on an individual basis, especially for small-dollar claims, such as for illegal charges and fees. There were only about 25 cases per year involving an affirmative consumer claim of \$1,000 or less brought in arbitration. By contrast, the CFPB found that roughly 32 million consumers were eligible for relief through class action settlements in federal court each year.⁷

Meanwhile, the Bureau’s data demonstrates that systemic, widespread misconduct is more effectively addressed when consumers can band together. The Bureau found that over a

² See, e.g. www.fairarbitrationnow.org and Letter to the U.S. States Senate from public interest organizations, re: Justice for Telecommunications Consumers Act, April 28, 2016, <http://bit.ly/1qGu4Si>.

³ See, e.g. Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, (2012), <http://scholars.law.unlv.edu/facpub/744>.

⁴ Jessica Silver-Greenberg and Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, THE NEW YORK TIMES, Oct. 31, 2015, <http://nyti.ms/1RjOpoz>. (Beware the Fine Print: “the first installment in a three-part series examining how clauses buried in tens of millions of contracts have deprived Americans of one of their most fundamental constitutional rights: their day in court.”)

⁵ Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress 2015*, <http://1.usa.gov/1scU6hJ>.

⁶ Greenberg and Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, THE NEW YORK TIMES, Oct. 31, 2015.

⁷ CFPB Study, Section 8.

five-year period, 160 million class members were eligible for remedies in 419 class settlements worth \$2.2 billion in net relief, not including attorneys' fees and costs.⁸ Although injunctive relief was not directly evaluated in the study, it is important to note that many of these actions included "behavioral relief," where corporate defendants committed to changing their behavior, for example "by promising to change business practices in the future or implementing new compliance programs."⁹ It's clear that when consumers pursued their claims together, they often secured important changes in conduct that had harmed large numbers of victims.

In addition to the particular problems for consumers relating to class action bans, the Bureau found that consumers are not aware of and do not understand the impact of arbitration clauses.¹⁰ Despite these contract provisions that restrict their rights, most consumers believe that they can sue in court for wrongdoing.¹¹ Even bolded and underlined language describing forced arbitration terms does not adequately inform consumers about the meaning and consequences of forced arbitration.¹²

Arbitration is unfair and anti-consumer whether brought on an individual basis, or as a group claim or class action. It's a rigged system where the rules of evidence or discovery do not apply, so claimants do not have a full opportunity to prove their case as they would have in a court of law. Not only can the service provider that wrote the contract unilaterally set the terms of arbitration, it can decide on the arbitrator as well. There is no requirement that arbitrators be trained in the law, and no requirement that they follow the law. There are no juries, and limited or no opportunities to depose witnesses or take interrogatories. Arbitration decisions are not made public, and the ability to appeal a bad decision is near impossible. Moreover, the arbitration business model relies on repeat player corporations, so there is a built-in incentive for arbitrators to rule for the business. Arbitration greatly diminishes claimants' ability to recover against a service provider and, for this reason, is an extremely self-serving forum for providers to force their customers into.

Forced Arbitration in Broadband Provider and Telecom Contracts, Generally

The corporate use of forced arbitration and class action bans has skyrocketed because of the U.S. Supreme Court's increasingly over-broad interpretation of the Federal Arbitration Act (FAA) of 1925. It was in a case involving telecom provider AT&T Mobility that the Court interpreted the FAA to permit class action bans in arbitration clauses and to preempt contrary state consumer protection rules.¹³ AT&T customers in that case challenged the legality of questionable \$30 surcharges on their bills, on behalf of themselves and other customers. AT&T customer form contracts stated that consumer class actions were barred and required individual arbitration for any complaints against the company. After the Court held that the class bans were enforceable, AT&T customers were prohibited from banding together to challenge the charges.

⁸ CFPB Study, Section 8, at 3-4.

⁹ CFPB Study, Section 8, at 4, FN 7.

¹⁰ CFPB Study, Section 3.

¹¹ CFPB Study, Section 3, at 20-23.

¹² CFPB Study, Section 2, at 22, FN 144.

¹³ *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011).

Indeed, forced arbitration clauses are prevalent among broadband and telecom providers, as well as other FCC-regulated entities, including cellular service providers, and cable and satellite providers.¹⁴ As a practical matter, customers have few or no options to obtain services free of these restrictive terms.

In 2009, one of the organizations submitting this comment, Public Citizen, issued a report on the prevalence of forced arbitration clauses and class action bans in consumer contracts, including a section on cable and internet providers.¹⁵ The report identified six providers that did not use forced arbitration clauses. Since that time, every provider listed in the paper is now using these clauses, requiring customers to resolve all disputes in arbitration on an individual basis.

Further, the CFPB study, which examined consumer contracts for wireless services, revealed that seven of the eight largest facilities-based mobile wireless providers, covering 99.9% of subscribers, used forced arbitration clauses in their 2014 customer contracts, and 99.7% of those contracts prohibited customers from banding together in joint actions or class actions to seek remedies.¹⁶

Before the widespread use of forced arbitration clauses and class action bans in broadband and telecom contracts, consumers could secure meaningful remedies and systemic changes in company conduct if there were serious violations of the law. For example, in 2001, Oklahoma consumers charged that their telecommunications provider fraudulently and in breach of contract charged a city sales tax despite the fact that they lived outside the city limits. Oklahoma residents brought suit on behalf of all customers (residential and commercial) in Oklahoma and 27 other states that have local sales taxes. The class was certified for all customers nationwide.¹⁷ The settlement provided tiered refunds for overcharges to class members. This important case simply could not have been litigated on an individual basis. Another example is a class action out of Washington State where consumers challenged illegal charges for taxes and ultimately succeeded in obtaining a settlement that distributed 20 million dollars of full refunds, plus interest, directly to consumers.¹⁸ Had Sprint succeeded in forcing the named plaintiffs to resolve their claims on an individual basis in arbitration, the case would not have been viable.

Some Telecom Claims That Cannot Be Joined Together Go Unheard

In other recent cases, telecom providers effectively escaped accountability for alleged widespread wrongdoing by successfully preventing customers from banding together to challenge the providers' practices in court.

¹⁴ See, e.g. Appendix A, *Letter to U.S. Senate re: Justice for Telecommunications Consumers Act*.

¹⁵ Public Citizen, *Forced Arbitration: Unfair and Everywhere*, at 16 (2009), <http://bit.ly/1dnu9fP>.

¹⁶ CFPB Arbitration Study, Section 2, at 45.

¹⁷ *Allen v. AT&T*, Case No. CJ-99-2168, (Muskogee County District Court, Oklahoma, May 31, 2002).

¹⁸ See *Hesse, et al. v. Sprint*, Case No. 2:06-CV-00592 (W.D. Wash. 2010). See also Settlement Summary and Background in *Hesse, et al. v. Sprint* by Stritmatter Kessler Whelan Koehler Moore Kahler, <http://www.stritmatter.com/case/hesse-et-al-v-sprint-spectrum/>.

A) After an upgrade of a broadband provider's internet service, customers experienced service outages.¹⁹ Customers sought a class action for themselves and others to seek remedies for their losses. The consumers alleged that the company was the only local broadband cable internet provider available to them.²⁰ The forced arbitration clause in the provider's terms and conditions also included a ban on class actions. The court, in enforcing the arbitration clause and class ban, acknowledged that groups of consumers that suffer low-dollar losses cannot effectively pursue their claims on an individual basis. Seemingly reluctantly, the court held: "Because of the important purpose served by class actions, we would be inclined to join the jurisdictions...that have invalidated provisions of consumer adhesion contracts that bar class action resolution of disputes. ... However, upon application of *Concepcion*, we are now constrained to conclude that...the federal policy favoring arbitration preempts any state law or policy invalidating the class action waiver..."²¹

B) In mid-2013, telecommunications company CenturyLink Corp. began charging many of its broadband service customers a \$0.99 fee separate from its advertised service rates.²² CenturyLink said that the charge, which it called an "Internet Cost Recovery Fee," would help to defray costs for building, maintaining, and expanding the network. The company admitted that the \$0.99 fee was not a government tax or a required charge. Meanwhile, customers and industry observers contended that the fee was a "sneaky" way to tack on additional charges to increase revenue without raising the advertised and set price of the service. CenturyLink Corp.'s customer contracts prohibited legal actions in court and banned class actions.

Attorneys who consulted with a prospective client over the circumstances declined to represent the customer against CenturyLink, because it was not economically feasible to pursue potential claims on an individual basis. "(W)e have seen a dramatic increase in small illegal fees that are routinely charged to consumers that never were charged before," said the attorney who consulted on the case.²³

C) Consumers sought to represent themselves and others in a class action against their internet service provider, Qwest Communications, in a challenge to the imposition of a \$200 early termination fee. The consumers alleged they were wrongfully charged the termination fee for canceling their Internet service before the end of the contract despite their lack of consent to agree to such terms.²⁴ Citing the Supreme Court's decision in *Concepcion*, the U.S. District Court for the District of Colorado held that the arbitration clause in the subscriber agreement was enforceable and directed the case to individual arbitration.²⁵

¹⁹ *Schnuerle v. Insight Comm. Co.*, 376 S.W.3d 561 (Ky. 2012).

²⁰ *Id.* at 566.

²¹ *Id.* at 569.

²² National Association of Consumer Advocates and Public Citizen, *Cases That Would Have Been*, at 10, April 2014, <http://bit.ly/22nurPG>.

²³ *Id.* at 11.

²⁴ *Vernon v. Qwest Communications Int'l, Inc.*, No. 09-CV-01840-RBJ-CBS, 2013 WL 752155 (D. Colo. Feb. 27, 2013)

²⁵ *Id.*

D) In a 2013 case against a broadband internet service provider, consumers brought a class action alleging violations of the Electronic Communications Privacy Act, the Computer Fraud and Abuse Act, and Montana state law for invasion of privacy.²⁶ These claims arose from the provider's alleged targeted advertising to customers while they were using the internet service. In that case, the appellate court held that Montana law voiding involuntary waivers of fundamental constitutional rights as outside a consumer's "reasonable expectations" ran contrary to the Federal Arbitration Act. Consequently, the state law was preempted due to the arbitration clause in the provider's contract.

In these and other cases, each claim was too low for consumers to realistically pursue on an individual basis. Without the ability to participate in class actions, consumers cannot seek and ensure changes to address systemic poor services that individual customer service cannot cure, such as for privacy violations, identity theft, predatory fees and charges, fraudulent sales tactics and other problems that impact all or groups of customers. Further, the costs of an individual arbitration in these kinds of cases typically exceed recovery for each person. Thus, class action bans block these claims and shield companies from liability even in cases where they have clearly broken the law.

Recent, Ongoing Government Efforts to Protect Consumers, Workers

Should it decide to take affirmative steps to restore the rights of telecom and particularly broadband customers, not only would the FCC be acting in the public interest and for the benefit of millions of telecom customers, but its actions would also be consistent with actions of other federal agencies to protect American communities under their respective jurisdictions from forced arbitration.

A) *Financial Consumers*. After it produced its comprehensive study, the CFPB determined that it would serve the protection of consumers and be in the public interest to limit forced arbitration clauses in consumer finance contracts by eliminating their worst element, class action bans.²⁷ Public interest groups had urged the Bureau to eliminate forced arbitration clauses across the board, but have nonetheless commended it for taking a huge step forward to restore access to remedies for millions of consumers in the financial marketplace. Because the CFPB found that so few consumer finance disputes were adjudicated in individual arbitration, it has decided to further collect and examine data for these individual cases to determine whether further steps may be warranted to regulate forced arbitration clauses that do not ban class actions.

B) *Students*. The Department of Education has put forth proposals to protect college students from abuses of forced arbitration clauses, and is considering a full ban on forced arbitration.²⁸

²⁶ *Mortensen v. Bresnan Communs., LLC*, 722 F.3d 1151, 1153, (9th Cir. 2013).

²⁷ *Arbitration Agreements*, 81 Fed Reg. 32830, May 24, 2016.

²⁸ *U.S. Department of Education Takes Further Steps to Protect Students from Predatory Higher Education Institutions*, March 11, 2016, <http://1.usa.gov/1WfKxYc>

C) *Elderly Americans*. In October 2015, the Center for Medicare and Medicaid Services (CMS) issued a proposed rule to revise the requirements that Long-Term Care facilities must meet to participate in the Medicare and Medicaid programs. As part of that rulemaking, CMS is considering curbing long-term care facilities' use of forced arbitration by prohibiting them from conditioning admission on a patients' agreement to arbitration.²⁹

D) *Workers*. In 2014, President Obama issued an executive order containing protections for employees of federal contractors. Included in those protections was a direction for federal contractors to stop using forced arbitration against their workers for certain claims, including sexual harassment and Title VII claims.³⁰

E) *Servicemembers*. In 2015, the Department of Defense issued a rule to expand coverage of the Military Lending Act, a law that provides protections for servicemembers against abusive lending practices regarding certain credit products. The law also prohibits lenders from forcing servicemembers to go to arbitration to resolve disputes arising from those products.³¹

Conclusion

In a relatively abbreviated section of its proposed rule, the FCC asked a crucial question about the ability of broadband customers to protect their rights in court. Should broadband providers be able to unilaterally deprive their customers of the right to go to court and seek remedies when harmed? We commend the FCC for seeking to directly address the issue of forced arbitration. We urge it to take action now to protect customers of broadband services, and, if it finds it feasible, all telecom services, from this predatory practice.

Respectfully submitted by:

Christine Hines
Legislative Director
National Association of Consumer Advocates
Christine@consumeradvocates.org

Sonia Gill
Counsel for Civil Justice and Consumer Protection
Public Citizen
Sgill@citizen.org

²⁹ *Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities*, 80 Fed. Reg. 42168, July 2015.

³⁰ *Executive Order --Fair Pay and Safe Workplaces*, July 31, 2014, <http://1.usa.gov/1SP2ytl>; *Federal Acquisition Regulations: Fair Pay and Safe Workplaces*, 80 Fed. Reg. 30548, May 28, 2015.

³¹ 32 CFR Part 232.