



July 17, 2014

Federal Communications Commission
445 12th St. SW.,
Room TW-A325,
Washington, DC 20554

Via: FCC Website, <http://apps.fcc.gov/ecfs/>

Re: GN Docket No. 14-28, FCC 14-61

Comments to a Notice of Proposed Rulemaking on Open Internet Protections

National nonprofit consumer advocacy organizations Public Citizen and the National Association of Consumer Advocates submit these comments regarding the Federal Communication Commission's (FCC or Commission) Notice of Proposed Rulemaking (NPRM) to address the D.C. Circuit Court of Appeals' remand of portions of the Commission's 2010 Open Internet Order.¹ At this time, our organizations do not seek to comment on the larger issues concerning access to the open Internet set forth in the NPRM. Our comments are strictly limited to the Commission's inquiries regarding an alternative dispute resolution system that it proposes to create in this rulemaking, to the extent that it could impact individual consumers and groups of consumers.

We are concerned that the Commission is considering a proposal that potentially would mandate pre-dispute arbitration between broadcast providers and individuals. We strongly urge the Commission to consider the implications of such a proposal, and to preserve consumers' ability to choose arbitration or any other alternative dispute resolution process after the disputes arise.

Background

In its NPRM, the Commission generally states that the establishment of alternative dispute resolution systems is an important element for its open Internet proposal. In multiple places throughout the document, the Commission mentions its concern for "effective

¹ 79 Fed. Reg. 37448.

access” to dispute resolutions by end users, edge providers and broadband network providers.²

As part of this discussion, in Section 174, the Commission asks whether it should “adopt measures to require or encourage disputes over the legality of broadband provider practices to be resolved through alternative dispute resolution processes, such as arbitration?...[And a]re there any legal considerations, limitations, or concerns that the Commission should consider with adopting an alternative dispute resolution procedure, including arbitration or mediation by a third party?”³

We appreciate that the Commission is prioritizing the creation of processes for individuals, small businesses and broadband providers to amicably resolve disputes under its proposal. However, the FCC should consider the likely negative impact of pre-dispute binding mandatory (or forced) arbitration on consumers, before committing to any dispute resolution process. Forced arbitration clauses are terms in corporate contracts with consumers and employees (including those of telecommunication companies and broadband providers)⁴ that compel individuals to settle their claims in private arbitration and deprive them of the ability to seek remedies through the court system.

We have long observed the many ways in which private forced arbitration has lacked the critical benefits of the public court system that have deprived consumers of adequate remedies when they are harmed. Forced arbitration is typically a one-sided endeavor where businesses use the fine print of their contracts to set the rules to govern the arbitration, select the organization that administers the arbitration, and may even dictate the location of the arbitration.

Arbitration can also be costly. A typical arbitrator may charge hourly fees and service charges, including fees to initiate the proceedings. Further, binding arbitration offers little transparency. Even if a dispute at issue could impact the public interest, the matter will likely remain hidden from the public. And there is typically little opportunity to appeal an unfavorable arbitration decision. Essentially, we have found that forced third-party arbitration benefits the more powerful party over the weaker one.

This is inconsistent with the FCC’s stated intent to include effective access to dispute resolutions, particularly for consumers and small businesses with limited resources.⁵ The FCC asks, “How can a dispute resolution system be best structured to account for individuals and small businesses that may not have the same legal resources and effective access to the Commission as broadband providers?” We believe that an FCC requirement to prematurely require consumers to resolve legal disputes in private arbitration, particularly

² See, e.g. 79 Fed. Reg. at 37470, 37474, 37450.

³ 79 Fed. Reg. at 37471.

⁴ Christine Hines, *In Post-Concepcion Era, Wireless Carriers Escape Accountability*, October 2011.

⁵ 79 Fed. Reg. at 37471.

against more powerful parties, may deprive individuals of critical rights and considerations, and may run counter to the goal of effective access to justice.

Growing Concerns and Limits on Forced Arbitration

Public attention and concern about the harms of forced arbitration has grown significantly in recent years. Some members of Congress have investigated and opposed the practice as it affects consumers and employees. For example, Senator Al Franken (D-Minn.) and Rep. Hank Johnson (D-Ga.) are the primary sponsors of the Arbitration Fairness Act which would make forced arbitration unenforceable in civil rights, employment, antitrust and consumer disputes.⁶ In 2011, Senators Richard Blumenthal (D-Conn.) and Franken introduced the Consumer Mobile Fairness Act of 2011 which would have invalidated pre-dispute arbitration clauses between individuals and providers of commercial mobile service or mobile broadband Internet access service.⁷

Further, Congress has passed laws to protect certain groups from forced arbitration, such as auto dealers in their transactions with manufacturers; livestock and poultry growers; military members with respect to payday loans, vehicle title loans, and tax refund anticipation loans; employees of government defense contractors with Title VII and sexual assault tort claims, and consumers with respect to residential mortgages.⁸ Congress also has granted the Consumer Financial Protection Bureau (CFPB) and the Securities and Exchange Commission the authority to ban forced arbitration in consumer and investor contracts under their respective jurisdictions.⁹ The CFPB is currently studying the use of forced arbitration in consumer financial services contracts, after which it may restrict the practice, if it finds that such an action “is in the public interest and for the protection of consumers.”¹⁰

Conclusion

Our organizations understand and appreciate that the FCC has a significant responsibility to ensure and promote an open Internet and in considering the various components involved with this undertaking. Our comments seek to contribute to the dialogue only with respect to certain statements the agency has made relating to alternative dispute resolution proceedings. We urge the Commission to consider our views as it finalizes a proposal on ADR and specifically as it relates to any proposal on arbitration. We ask that any final FCC rule in this area that addresses dispute resolution ensures that the proceedings are as open, transparent and fair for consumers as possible. Preserving

⁶ Arbitration Fairness Act of 2013, S. 878 and H.R.1844, 113th Cong. (2013).

⁷ Consumer Mobile Fairness Act of 2011, S.1652, 112th Cong. (2011).

⁸ Motor Vehicle Franchise Contract Arbitration Fairness Act (2002), Pub. L. 107-273; Food, Conservation, and Energy Act (2008), Pub. L. 110-234; Military Lending Act, 10 U.S.C. 987(e)(3) and (f)(4); Department of Defense Appropriations Act, 2010, Sec. 8116, Pub. L. No. 111-118; Dodd-Frank Wall Street Reform and Consumer Protection Act, Sec. 1414(e), Pub. L. 111 – 203.

⁹ Dodd-Frank Act, Pub. L. 111 – 203, §§ 921 and 1028.

¹⁰ 12 U.S.C. § 5518 (b).

consumers' choice in dispute resolution is critical to their ability to be fairly heard and to seek accountability against larger, more powerful corporate entities such as Internet broadband providers.

Respectfully submitted,

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