

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

Reply Comments of Audience Partners, LLC

Gregory Guice, Esq.
Jo-Ellyn Sakowitz Klein, Esq.
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4565

Counsel for Audience Partners, LLC

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

Reply Comments of Audience Partners, LLC

Audience Partners, LLC, by its attorneys, hereby submits these reply comments in response to the Federal Communications Commission’s (“Commission”) Notice of Proposed Rulemaking (“NPRM”) adopted in the above-referenced proceeding.¹

I. INTRODUCTION

Audience Partners, which maintains a unique privacy-by-design marketing platform, submits these reply comments to highlight for the Commission the broad-ranging support in the record for Audience Partners’ key positions taken in its initial comments – the Commission should (i) exclude IP addresses from any list of the types of data that are deemed PII, (ii) clarify that, consistent with the statute, aggregate customer PI should be defined to include data relating to individuals – not devices, (iii) specify that IP address alone is not reasonably linkable to a specific individual, (iv) retain the plain meaning and reasonable application of the term “aggregate customer information,” permitting use and disclosure of a conglomeration of data elements that are not linkable to individuals, and (v) adopt a policy that de-identified information

¹ *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, Notice of Proposed Rulemaking, FCC 16-39 (rel. Apr. 1, 2016) (*BIAS Privacy NPRM*).

is not PII, does not pose a significant privacy risk, and should not be regulated. Further, Audience Partners, supported by at least one other commenter, recommends that the Commission adopt an exemption or other clarification to allow for the use and disclosure of customer PI for non-commercial purposes by political campaigns and tax-exempt, non-profit organizations, to ensure the NPRM does not hinder the exercise of First Amendment rights or create other undue obstacles.

II. THE COMMISSION SHOULD ADOPT A REASONABLE DEFINITION OF “PII,” IMPLEMENT A REASONABLE CONSTRUCT FOR USE AND DISCLOSURE OF “AGGREGATE CUSTOMER INFORMATION,” AND MAKE OTHER CLARIFICATIONS RELATING TO DE-IDENTIFIED DATA, SO CUSTOMERS AND BUSINESSES CAN BENEFIT FROM THE EFFECTIVE USE AND DISCLOSURE OF NON-SENSITIVE DATA.

A. Commenters Agree That IP Addresses Should Be Excluded from the FCC’s Definition of “PII.”

In its initial comments, Audience Partners demonstrated that IP addresses are not reasonably linkable to an individual without additional identifying information.² As such, Audience Partners urged the Commission to exclude IP addresses from the definition of PII. A number of commenters similarly recommended that the Commission not include IP addresses as PII. The National Cable & Telecommunications Association (“NCTA”), for example, cited an array of federal court decisions holding that IP addresses do not identify individual users.³ The State Privacy and Security Coalition criticizes the Commission for treating “all CPNI and customer proprietary information as sensitive data,” noting that the Commission’s proposal “starts from the assumption that non-content broadband Internet access provider data should all fit into the existing CPNI framework.”⁴ Importantly, however, as the State Privacy and Security

² Audience Partners comments at 11-13.

³ NCTA comments at 23.

⁴ State Privacy and Security Coalition comments at 10.

Coalition emphasizes, “[t]his includes information such as IP addresses, MAC addresses, and browser type, that is disclosed across the Internet wherever users surf the web or communicate through other networks, *and is in no way private.*”⁵ The State Privacy and Security Coalition continues to conclude that such “information is the equivalent in the Internet context of an element of ‘subscriber list information’ which is exempt from the scope of the CPNI statute and thus should be exempt from any final rule adopted by the Commission.”⁶ Comcast, quoting Google, explains that device identifiers such as IP addresses are “simply strings of numbers that cannot be used to identify an individual unless they are linked to other information, such as a customer’s name or address.”⁷

Many commenters note that IP addresses are publicly available information. Cloudmark, Inc., AT&T, and the Internet Commerce Coalition (“ICC”) in their comments indicate that IP addresses are publicly available through databases, directories, or the ordinary functioning of the Internet. Cloudmark’s comments point out that a consumer’s IP address is “readily available” to a website operator any time that a device connects to that website’s server.⁸ It would be unreasonable for the Commission to consider information regularly provided to website operators as PII when that information does not identify an individual. Cloudmark further argues that regulating the use and disclosure of publicly available IP addresses would hold BIAS providers to an unreasonably restrictive standard in ways that a website such as Google, which receives that information directly from the user, would not be.

⁵ *Id.* (emphasis added).

⁶ *Id.*

⁷ Comcast comments at 85.

⁸ Cloudmark comments at 6.

The Commission should affirm what these commenters and many others have demonstrated – that IP addresses are not PII. Consistent with its initial comments, Audience Partners agrees with the proposal by the Competitive Carriers Association’s (“CCA”) and others urging the Commission to limit its definition of PII to include only sensitive personal information that is unavailable through public means.⁹

We note that the Staff of the Bureau of Consumer Protection of the FTC (“FTC Staff”) filed a comment in support of the inclusion of static IP addresses within the definition of PII. The FTC Staff’s comments assert that static IP addresses are persistent identifiers and therefore can be “linked or reasonably linkable to a consumer or consumer’s device.”¹⁰ As Audience Partners noted in its initial comments, BIAS providers typically offer retail consumers dynamic IP addresses.¹¹ Audience Partners went on to note that a static IP address, without being linked to other information, does not identify an individual, but only an internet endpoint device.¹² NCTA’s comments support this position, noting the distinction between the nature and use of static and dynamic IP addresses among consumers.¹³ NCTA notes that a static IP address does not change once it has been assigned to a device by an ISP, but it still only identifies a device.¹⁴ NCTA explained that static IP addresses are generally linked to multiple devices, making it even less likely that a static IP address could be linked or reasonably linkable to a distinct individual.¹⁵

⁹ CCA comments at 13.

¹⁰ FTC Staff comments at 10.

¹¹ Audience Partners comments at n. 25, 12. NCTA’s comments also note that the fleeting nature of a dynamic IP address makes it nearly impossible to identify a device, let alone an individual, from the IP address alone. *See* NCTA comments at 22-23.

¹² Audience Partners comments at n. 25, 12.

¹³ NCTA comments at 22-23.

¹⁴ *Id.*

¹⁵ *Id.*

For these reasons, Audience Partners continues to support its position from its initial comments urging the Commission to exclude both static and dynamic IP addresses from the proposed rule’s definition of PII. However, as Audience Partners noted in its initial comments, should the Commission insist on including IP addresses within the definition of PII, it should only include static, unique, and persistent IP addresses.

B. Commenters Support the Construction of the “Aggregate Customer Information” Exception to Protect the Privacy of Individuals—Not Devices.

In its initial comments, Audience Partners urged the Commission to develop its multi-prong test for the use and disclosure of aggregate customer PI to over individuals, not devices.¹⁶ Specifically, Audience Partners supports narrowing the first factor which requires that “aggregate customer PI is not reasonably linkable to specific individual or device” Audience Partners agrees with commenters that also call for limiting the first prong to only individuals and not devices. Several commenters agree with Audience Partners’ position that there is no statutory authority for the regulation of devices. As NCTA notes, the statutory definition of “aggregate customer information” makes no mention of customer “devices.”¹⁷ The statute only requires that information cannot be tied back to “individual customer identities and characteristics.”¹⁸

Audience Partners agrees with NCTA and the National Telephone Cooperative Association – The Rural Broadband Association (“NTCA”) that the privacy interests of individuals differ from privacy concerns relating to devices. NTCA also notes the difference in

¹⁶ Audience Partners comments at 14-15.

¹⁷ NCTA comments at 23-24; *see also* 47 U.S.C. § 222(h)(2) (“The term ‘aggregate customer information’ means collective data that relates to a group or category of services or customers, from which individual customer identities and characteristics have been removed.”).

¹⁸ *Id.*

privacy concerns between information about the *type* of device and data related to the *user* of a device.¹⁹ The Commission’s rules should account for this distinction. Significantly, as NCTA notes, “[a]ggregate information that is potentially linkable to a device does not implicate the same privacy risks as aggregate information potentially linkable to an individual.”²⁰ NCTA further notes that the Commission’s proposal is not only contrary to the statute, it “renders the exception for aggregate information unduly narrow and is counterproductive.”²¹ NCTA notes that “[a]s the Commission itself recognizes, the NIST PII Guide defines linked information only as information about or related to an *individual* that is logically associated with other information about the *individual*.”²² Accordingly, device information should be excluded from the Commission’s construction of aggregate information because it is not reasonably linkable to an individual.²³

Audience Partners disagrees with the FTC Staff’s recommendation that reasonable linkability includes both individuals and devices. As Audience Partners noted in its initial comments, and NCTA and others agree, the statute the Commission is using to adopt requirements is limited to *individual customer identities and characteristics*.²⁴ As noted above, data reasonably linkable to a device does not raise the same privacy concerns as information linked to an individual.

¹⁹ NTCA – The Rural Broadband Association comments at 56.

²⁰ NCTA comments at 67.

²¹ *Id.*

²² *Id.* (emphasis in original) (internal quotations omitted).

²³ *Id.* at 70.

²⁴ Audience Partners comments at 15; NCTA comments at 67; T-Mobile comments at n. 108; CTIA comments at n. 90; *see also* 47 U.S.C. § 222(h)(2).

III. AUDIENCE PARTNERS URGES THE COMMISSION TO CLARIFY THE NPRM TO PROVIDE RELIEF FOR TAX-EXEMPT, NON-PROFIT ORGANIZATIONS AND POLITICAL CAMPAIGNS ENGAGED IN NON-COMMERCIAL ACTIVITIES.

Audience Partners believes that there should be an exemption to this proposed rule for the use and disclosure of customer PI for non-commercial purposes, including political speech. In our initial comments, we requested that the Commission construe its regulations in a manner to ensure that the opt-in consent requirement would not apply to political speech or non-profits. While this issue was not formally addressed in the NPRM, Audience Partners deems this proposed exemption essential to the preservation of the freedom of speech under the First Amendment, which draws a clear distinction between commercial speech and political speech. We agree with the CCA's comments requesting that the Commission "clearly exempt providers of any size that do not use customer PI for marketing purposes of any kind from implementing an opt-in/opt-out interface."²⁵ This suggestion is not only sensible, but essential to remaining within the bounds of the First Amendment.

We urge the Commission to include an exemption or provide some other clarification in the NPRM to permit tax-exempt, non-profit organizations and political organizations to engage in important issue advocacy efforts, solicit political and charitable donations, and facilitate political and religious discourse, without undue limitations. Grounded in the right to freedom of speech under the First Amendment, exemptions and clarifications of this nature already exist within the context of many other privacy laws, from the Telephone Consumer Protection Act ("TCPA"), to the Do-Not-Call Implementation Act ("Do-Not-Call Act"), to the Controlling the

²⁵ See CCA comments at 33.

Assault of Non-Solicited Pornography and Marketing (“CAN-SPAM”) Act.²⁶ Political organizations must preserve their right to communicate with the general public, which must not be inhibited by this proposed regulatory framework. Similarly, the important work of tax-exempt, non-profit organizations must not be hindered. The Commission’s regulatory efforts should remain clearly focused on commercial speech.

Notably, for example, the TCPA and the Commission’s implementing regulations expressly exclude calls made by tax-exempt, non-profit organizations from the definition of “telephone solicitation.”²⁷ A similar exemption exists with respect to the National Do Not Call Registry, which has enabled Americans to opt out from receiving unsolicited phone calls from telemarketers since 2003.²⁸ Importantly, certain types of callers are exempt, and are still permitted to contact telephone numbers even if a consumer registered his or her number on the Do Not Call Registry. Because of an express exemption from the Do-Not-Call rules, the Registry does not apply to political calls or to calls from non-profits or from charitable

²⁶ Do-Not-Call Act, 15 U.S.C. § 6151 (2016); CAN-SPAM Act, 15 U.S.C. § 7702 (2016); TCPA, 47 U.S.C. § 227(a)(3) (2016).

²⁷ TCPA, 47 U.S.C. § 227(a)(3) (2016); 47 C.F.R. § 64.1200(a)(2) (providing that “no person or entity may initiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing . . . to any of the lines or telephone numbers . . . other than a call made by or on behalf of a tax-exempt nonprofit organization”); § 64.1200(a)(3)(iv) (providing that “no person or entity may initiate any telephone call to any residential line . . . to deliver a message without the prior express written consent of the called party, unless the call is made by or on behalf of a tax-exempt nonprofit organization”); § 64.1200(a)(7)(iv) (providing that “[c]alls made by or on behalf of tax-exempt nonprofit organizations are not covered by this paragraph (a)(7)”; § 64.1200(d)(7) (providing that “[t]ax exempt nonprofit organizations are not required to comply with 64.1200(d)”; and § 64.1200(f)(14) (providing that “[t]he term *telephone solicitation* means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message by or on behalf of a tax-exempt nonprofit organization”) (emphasis in original).

²⁸ See 15 U.S.C. § 6151 (2016).

organizations.²⁹ Audience Partners believes a similar exemption should be applied within the context of the NPRM.

Likewise, the CAN-SPAM Act provides consumers with an opportunity to opt out from receiving commercial electronic mail messages,³⁰ but the scope of the regime is limited to prohibiting messages that are “commercial.”³¹ The fact that the CAN-SPAM Act only restricts commercial email messages, taken together with the First Amendment, yields a material exemption from restrictions on email communications that permits many email messages sent by political organizations, charitable organizations, and non-profit organizations. Further, the FCC made an accommodation for text messages to ease restrictions on political and nonprofit messages.³²

Audience Partners urges the Commission to limit applicability of the NPRM to uses and disclosures of customer PI that are intended to serve commercial purposes. This can be achieved by creating an exemption for tax-exempt, non-profit organizations and political campaigns (and others engaging in political speech), or by clarifying that the application of the NPRM is limited to disclosures for marketing and other commercial purposes.

²⁹ *Id.*; see also FTC Telemarketing Sales Rule, 16 C.F.R. § 310.6 (creating an exemption for charitable solicitations); FTC, *The Do Not Call Registry* (available at <https://www.ftc.gov/news-events/media-resources/do-not-call-registry>) (noting that “the Registry does not apply to political calls or calls from non-profits and charities”).

³⁰ CAN-SPAM Act, 15 U.S.C. § 7702 (2016); 47 C.F.R. § 64.3100 (FCC Regulations) (defining a commercial electronic mail message as “an electronic message for which the primary purpose is commercial advertisement or promotion of a commercial product or service (including content on an Internet Web site operated for a commercial purpose)”; 16 C.F.R. § 316.5 (FTC Regulations).

³¹ *Id.*

³² See FCC, *Stop Unwanted Calls, Texts, and Faxes* (available at <https://www.fcc.gov/stop-unwanted-calls>) (applying to “non-commercial, informational texts (such as those sent by or on behalf of tax-exempt non-profit organizations, those for political purposes, and other noncommercial purposes, such as school closings”).

IV. CONCLUSION

Audience Partners appreciates the opportunity to elaborate on and add to the positions set forth in its initial comments. As explained previously, Audience Partners has developed a unique privacy-by-design platform and doubleblind privacy® technique, and we seek clarifications to the NPRM to ensure that our innovative and balanced approach, which was carefully designed to protect consumer privacy while enabling commerce, is clearly preserved. Audience Partners urges the Commission to heed the weight of commenters that call for excluding IP addresses from the list of data elements considered PII and press the Commission to clarify that IP addresses alone are not linkable to any individual for the purposes of this NPRM. Further, the record supports clarifying that the first prong of the multi-factor test for permissible use and disclosure of aggregate customer PI should only apply to individuals, not to devices. Similarly, Audience Partners and fellow commenters urge the Commission to retain the plain meaning and reasonable application of the term “aggregate customer information,” and to give real meaning to the exemption expressly provided by Congress. Audience Partners and many other commenters urge the Commission to adopt a policy that de-identified information is not PII, does not pose a significant privacy risk, and should not be regulated. Finally, along with at least one other commenter, Audience Partners respectfully requests that the Commission adopt an exemption for the use and disclosure of customer PII for non-commercial purposes or other clarifying language, to avoid chilling political speech and hindering the important work of tax-exempt, non-profit organizations.