

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

In the Matter of	)	
	)	
Protecting the Privacy of Customers of Broadband and Other Telecommunications Services	)	WC Docket No. 16-106
	)	FCC 16-39
	)	

**REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF STATE  
UTILITY CONSUMER ADVOCATES ON SECOND FURTHER NOTICE OF  
PROPOSED RULEMAKING**

The National Association of State Utility Consumer Advocates ("NASUCA")<sup>1</sup> has a longstanding interest in issues and policies that affect the privacy rights of utility customers. This interest is reflected in our resolutions, which provide the basis for these Reply Comments.<sup>2</sup>

As both the Federal Communications Commission ("FCC" or "Commission"), in its Notice of Proposed Rulemaking ("NPRM"), and the Federal Trade Commission Staff

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<sup>1</sup> NASUCA is a voluntary association of 44 consumer advocate offices in 41 states and the District of Columbia and additional associate members, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates for utility ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority. Some NASUCA member offices advocate in states whose respective state commissions do not have jurisdiction over certain telecommunications issues.

<sup>2</sup> See, e.g., NASUCA Resolution 2016-02, *Urging Federal Officials to Ensure the Privacy Rights of Customers Using 21st Century Telecommunications Services* (June 6, 2016); and NASUCA Resolution 2011-08, *Urging State and Federal Officials to Adopt Laws and Regulations Requiring Electric Utilities to Protect the Privacy Rights of Customers by Prohibiting Unauthorized Disclosure of Personal Information, Including Energy Usage Data* (November 15, 2011).

("FTC Staff") recognize , customers are deeply concerned about the risks to privacy associated with the collection and commercialization of data associated with the provision of broadband service.<sup>3</sup> As FTC Staff points out, 45 percent of households surveyed by The National Telecommunications and Information Administration ("NTIA") "reported that these concerns stopped them from some online activities, such as conducting financial transactions, buying goods or services, posting on social networks, or expressing opinions on controversial or political issues via the Internet."<sup>4</sup> Further, the unauthorized disclosure and use of the detailed customer data generated through use of Broadband Internet Access Service ("BIAS") creates safety and security risks.<sup>5</sup>

In NASUCA Resolution 2016-02 (attached to these Reply Comments), we identify privacy principles essential to successful advances in telecommunications services, protection of private customer information and public safety. Consistent with these principles, these Reply Comments focus on comments regarding the Commission's proposed customer consent framework. The NPRM proposes different categories of customer data-sharing approval requirements: 1) situations assuming a customer's consent is implied or unnecessary; 2) situations where a customer must opt-out of sharing data; and 3) situations where data cannot be shared unless a customer chooses to opt-in.<sup>6</sup>

Citing to Section 222 (d) of the Telecommunications Act of 1996, the FCC proposes that customer approval to use either Customer Proprietary Network

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<sup>3</sup> See, for example, Broadband Privacy NPRM at ¶¶ 4 and 309 and FTC Staff at pp. 1-2.

<sup>4</sup> FTC Staff at p. 2.

<sup>5</sup> NASUCA Resolution 2016-02. See, also, The American Association of Law Libraries at pp. 2 and 4; and Consumer Federation of California at p. 7.

<sup>6</sup> Broadband Privacy NPRM at ¶¶ 109-133.

Information ("CPNI") or Personal Information ("PI") - including Personally Identifiable Information ("PII") collected by BIAS providers<sup>7</sup> - be implied or unnecessary "for the purpose of providing BIAS or services necessary to, or used in, the provision of BIAS."<sup>8</sup> Public Knowledge, the Benton Foundation, Consumer Action, Consumer Federation of America, and National Consumers League ("Public Interest Commenters") note that under the NPRM's interpretation of the statute, this approach to implied consent "would open the door to their 'implied consent' being used to market products that do not meet their expectations of 'broadband services'" and providing BIAS providers "carte-blanch for in-house upselling."<sup>9</sup> The Electronic Frontier Foundation ("EFF") argues that the Commission's proposal would "eliminate all customer control over PII for a large range of activities, including marketing...."<sup>10</sup>

FTC Staff echo the concerns about use of information deemed subject to implied consent for marketing and suggest that the FCC clarify the proposed implied consent requirement to mean that "when consent is implied, BIAS providers may use customers' data *solely* for the provision of BIAS services and for no other purpose."<sup>11</sup> NASUCA supports FTC staff's suggested clarification. The FCC should further clarify that implied consent applies to the use of customer information that is technologically necessary to provide the BIAS services that a customer has subscribed to and does not apply to the marketing or up-selling of additional services. For example, if a customer subscribes to a

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<sup>7</sup> Id. at ¶ 15.

<sup>8</sup> Broadband Privacy NPRM at ¶ 113.

<sup>9</sup> Public Commenters at p. 30.

<sup>10</sup> EFF at p. 8.

<sup>11</sup> FTC Staff at p. 16, *emphasis added*.

broadband offering, only information necessary to provision that offering should be deemed implied. The implied consent should not extend to offering new services.

Similar concerns apply to the NPRM's proposed opt-out category. The Commission proposes that BIAS providers provide opt-out consent for first-party (the provider) and affiliate marketing of communication-related services, and opt-in for other first-party uses and sharing with third parties.<sup>12</sup> Verizon argues that there should be no limits, including an opt-out option, on the ability of BIAS providers to use customer data for marketing purposes.<sup>13</sup> In contrast, FTC Staff point out:

Under the FCC's proposal, BIAS providers could use content of communications for internal and affiliate marketing without obtaining consumers' opt-in consent first. This would mean, for example, that a provider could use information from a consumer's online search or shopping history to determine that the consumer can afford a more expensive product, and upsell the consumer accordingly, subject only to opt-out choice. The provider also could share that information with its affiliates, again subject only to an opt-out. FTC believes that consumers should have opt-in choices for such uses of data.<sup>14</sup>

FTC staff propose that the proposed rule be revised to "clearly require" that customers have the ability to choose whether and to whom to disclose the contents of customer information.<sup>15</sup> NASUCA supports this proposal. It is consistent with our position that, with the exception of disclosure for purposes of public safety, customer information should not be disclosed to affiliates or third-parties without the specific affirmative consent of the customer, after receipt of complete information relevant to the

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<sup>12</sup> NPRM, Proposed Rule 47 C.F.R. § 64.7002; and FTC Staff at p. 19.

<sup>13</sup> Verizon at p. 24-40; AT&T at pp. 35-38

<sup>14</sup> FTC Staff at p. 21.

<sup>15</sup> Id.

disclosure and intended uses of the information.<sup>16</sup>

NASUCA applauds the Commission for its effort to address broadband privacy issues. For the reasons discussed above, we urge the FCC to adopt the revisions suggested by FTC Staff and NASUCA.

Respectfully submitted,

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<sup>16</sup> NASUCA Resolution 2016-02, Principle No. 4.