Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Safeguarding and Securing the Open Internet	)	WC Docket No. 23-320
	)	
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	)	

COMMENTS OF THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION (NRECA) IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING AND INITIAL REGULATORY FLEXIBILITY ANALYSIS

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SUMMARY OF ARGUMENT

NRECA supports many of the Commission's objectives and proposals in the proposed reclassification of broadband Internet access service ("BIAS") as a Title II "telecommunications service," but NRECA is concerned that reclassification may lead to overly burdensome regulations, even to the point of disincentivizing investment.

NRECA is particularly concerned that reclassification will disproportionately affect small entities, many of which lack sufficient resources to address a new set of regulatory obligations. The Notice of Proposed Rulemaking ("NPRM") acknowledges as much, seeking comment in numerous places about the potential adverse effect on small entities and what might be done to address it. NRECA urges the Commission to exempt small entities from specific Title II regulations to the extent reasonably possible.

Unfortunately, however, if the definition of "small entity" in the Initial Regulatory Flexibility Analysis ("IRFA") of the NPRM is adopted, it would significantly limit the Commission's options. The IRFA defines "small entity" as one with as many as 1,500 employees, which would classify the *majority* of BIAS providers in the United States -- including existing incumbent and competitive local exchange carriers -- as "small entities." NRECA respectfully suggests that, for purposes of Title II regulation, the Commission classify a BIAS "small entity" as one with fewer than 100,000 broadband customers.

In addition to generalized concerns about the regulatory burden on small entities, NRECA offers the following specific comments on the NPRM:

- **Network Outage Reporting:** Expanded network outage reporting rules should be addressed in a separate rulemaking, if at all.
- **Non-BIAS Data Services**: The Commission should exempt non-BIAS data services from Title II. NRECA asks that the Commission clarify that electric utility support functions, including "smart grid," are non-BIAS data services.

- **Section 222/CPNI**: The Commission should temporarily forbear from applying Section 222 CPNI rules to BIAS providers, pending a separate rulemaking to further develop the record.
- **Transparency Rules**: The Commission should not expand the transparency disclosure and broadband label requirements. Expansion would result in additional regulatory burden, with dubious marginal value over the existing rules.
- **Universal Service**: NRECA agrees with the Commission's proposition that Title II will enable more effective use of high cost programs, and will enable greater participation in the Lifeline program. The Commission should forbear from imposing any new contribution requirements on BIAS providers until the record can be more fully developed in a separate proceeding.
- **State Preemption**: The Commission should adopt a clear preemptive statement with respect to State authority over BIAS, and should specifically address State utility commission certification requirements.

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THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION (NRECA) IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING AND INITIAL REGULATORY FLEXIBILITY ANALYSIS

The National Rural Electric Cooperative Association ("NRECA") submits these Comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") and the Initial Regulatory Flexibility Analysis ("IRFA") in the above-referenced docket, in which the Commission proposes to reclassify broadband Internet access service ("BIAS") as a "telecommunication service" subject to certain regulatory obligations under Title II of the Communications Act of 1934, as amended ("Act").

NRECA agrees with the Commission that *limited* regulatory oversight of BIAS is appropriate, and NRECA supports much of the rationale and many of the proposals set forth in the NPRM. However, as explained below, NRECA has significant concerns about several of the proposed rules, particularly as they might apply to small service providers.

I. INTRODUCTION

NRECA is the national service organization for more than 900 not-for-profit rural electric cooperatives that provide electric power to 56% of the nation's landmass, approximately 42 million people in 48 states, or approximately 12 percent of electric customers. Rural electric cooperatives serve 88% of the counties of the United States, including 327 of the nation's 353 "persistent poverty counties," which is 92% of these persistent poverty counties. All of NRECA's member distribution cooperatives are small business entities as classified by the Small Business Administration.

Rural electric cooperatives were formed to provide safe, reliable electric service to their member-owners at the lowest reasonable cost. They are dedicated to improving the communities in which they serve, and the management and staff of rural electric cooperatives are active in rural economic development efforts. Electric cooperatives are private, not-for-profit entities that are owned and governed by the members to whom they deliver electricity. Electric cooperatives are democratically governed and operate according to the seven Cooperative Principles.[1]

The nation's rural electric cooperatives are deeply committed to promoting the deployment of advanced telecommunications capabilities within the rural communities and areas in which they serve, and are expected to play a crucial role in the development of broadband infrastructure to serve rural unserved and underserved locations. Over 200 rural electric cooperative broadband projects are already underway across the country, and NRECA estimates that another 100 or so are currently exploring the feasibility of providing broadband. NRECA

[1] The seven Cooperative Principles are: Voluntary and Open Membership, Democratic Member Control, Members' Economic Participation, Autonomy and Independence, Education, Training, and Information, Cooperation Among Cooperatives, and Concern for Community.

members are providing (or will provide) these broadband services either by themselves or through partnerships of some kind with affiliated or unaffiliated ISPs.

The NPRM posits that BIAS is "not unlike other essential utilities, such as electricity and water."[2] From their inception over 100 years ago, rural electric cooperatives have operated on the premise that their utility services will be provided universally, to all members within the cooperative footprint. Rural electric cooperatives are not driven by profit, but by the obligation to provide necessary services to all cooperative members no matter where they are located at a reasonable cost. Cooperatives are governed by boards of directors elected by member customers, who themselves can directly participate in decisions relating to the service, providing an important means of recourse and local control over the utility services.

In short, NRECA members that provide BIAS generally do so as a utility already, and the cooperative model and cooperative governance structure themselves protect against many of the concerns raised in the NPRM. For those who are served by rural electric cooperatives, extensive regulation of BIAS is simply unnecessary.

That said, as a matter of national policy, NRECA recognizes the need for Commission authority over certain aspects of BIAS. For example, while NRECA members themselves have no need or incentive to engage in blocking, throttling or paid prioritization, NRECA agrees that the Commission's proposed Open Internet rules are necessary to protect against unreasonable disadvantage to consumers or edge providers. NRECA also supports the Commission's objectives relating to the Universal Service program, and agrees that Title II authority is needed to ensure ongoing, fair, and predictable support for High Cost Fund programs and to ensure broader participation in the Lifeline program. Title II authority will also enhance the

[2] NPRM, ¶ 17.

Commission's ability to address crucial cybersecurity and public safety issues, which are matters of great importance to rural electric cooperatives and the rural communities they serve.

At the same time, NRECA members are seriously concerned that the Commission's implementation of Title II authority over BIAS will lead to overly burdensome regulations, even to the point of disincentivizing investment. As further explained in the Comments below, several of the Commission's proposals appear to be unnecessary, particularly as they relate to small providers.

II. COMMENTS

A. NRECA Urges the Commission to Adopt Targeted Exemptions for Small BIAS Providers.

1. Many small providers lack sufficient resources to address a raft of new regulations.

Throughout the NPRM, the Commission invites comment on ways that the proposed rules might disproportionately affect small providers.[3] NRECA appreciates the Commission's recognition that small providers may be unduly burdened by the proposed regulations, and NRECA urges the Commission to exempt small providers from all but the most essential BIAS regulatory obligations.

Historically, providers of regulated "telecommunication service" have tended to be relatively large – often very large – companies. They entered the market with full knowledge of

[3] *See* NPRM, ¶¶ 16, 21 (generally); ¶ 24 (impact of disparate state open Internet requirements); ¶ 39 (network resiliency and reliability rules); ¶ 45 (robocall and robotext rules); ¶ 47 (reinstatement of pole attachment rights); ¶ 50 (High Cost and low-income support); ¶ 58 (investment incentives); ¶ 99 (forbearance framework); ¶¶ 126, 128-30, 158 (incentives to engage in practices that threaten open Internet); ¶ 144 (edge provider protections); ¶ 161 (compliance costs of paid prioritization ban); ¶ 167 (general conduct standard); ¶ 171 (broadband label and transparency disclosures); ¶ 183 (transparency rule implementation); ¶ 191-92 (advisory opinions and enforcement); IRFA Appendix B (generally).

the regulatory burdens associated with providing a fully regulated service, and have installed dedicated staff, if not entire departments, to monitor and manage the regulatory tasks.

The modern ecosystem of BIAS providers includes not only incumbent and competitive telecommunications carriers, but also a large and growing number of small, entrepreneurial, competitive, and innovative BIAS providers. Subjecting these small BIAS providers to extensive new regulatory obligations will cause inordinate hardship as compared to larger BIAS providers and telecommunications companies that already are subject to regulation.

A recent poll of NRECA members that provide BIAS (or that are considering it) revealed that most have fewer than one (1) full-time equivalent employee assigned to manage regulatory compliance issues. Many small BIAS providers do not have sufficient staff or in-house expertise to manage an extensive new set of regulatory obligations. While a larger company may be able to absorb such new regulatory commitments as a familiar, incremental cost of doing business, the costs and burden of compliance with the Commission's proposed rules present a more daunting prospect for small entities, and newer entrants.

2. The Commission should establish a "small" entity size exemption for entities with fewer than 100,000 broadband customers, rather than the much larger size threshold set forth in the IRFA.

The Initial Regulatory Flexibility Analysis (IRFA) at Appendix B of the NPRM references current Small Business Administration size thresholds applicable to the "Wired Telecommunications Carriers" industry which, if adopted by the Commission, would qualify BIAS providers with *as many as 1,500 employees* as "small" providers.[4] Based on this threshold, the IRFA concludes that the term "small entities" would include "the majority" of all

[4] IRFA, NPRM Appendix B, ¶ 10.

wireline Internet access providers,"[5] "most" wired telecommunications carriers,[6] "most" incumbent LECs,[7] "most" competitive LECs,[8] and the "majority" of interexchange carriers.[9] Such a 1,500-employee "small" entity threshold would thus create a situation where a small-entity exception would swallow the general rule, and would limit the Commission's ability to implement small-entity exceptions that would be meaningful for truly small entities.

NRECA instead urges the Commission to adopt a more appropriate size threshold applicable to affected BIAS providers, including electric cooperative BIAS providers. NRECA respectfully suggests that the Commission should adopt a size threshold of 100,000 broadband customers (all broadband affiliates included) for a BIAS provider to be a considered a "small entity" for purposes of the rules proposed in the NPRM, and for subsequent Title II regulations.

B. Expanded Network Outage Reporting Rules Should be Addressed in a Separate Rulemaking, If At All.

The NPRM asks whether the Commission should "expand the scope of [the Commission's Network Outage Reporting System (NORS)] to require ISPs to submit outage reports in response to service incidents that cause outages or the degradation of communications services…"[10] It also asks what impact such expansion might have on small entities.[11]

The NPRM does not adequately articulate why BIAS providers – especially small entities – should be subject to the Commission's network outage reporting obligations, let alone an expansion of them. Small, locally-focused ISPs in particular have a very strong incentive to provide reliable, responsive service. Indeed, for many smaller ISPs the provision of reliable and

[5] *Id.*, ¶ 11.
[6] *Id.*, ¶ 13.
[7] *Id.*, ¶ 14.
[8] *Id.*, ¶ 15.
[9] *Id*, ¶ 16.
[10] NPRM, ¶ 39.
[11] *Id.*

responsive service is a factor differentiating them from incumbent providers. Small ISPs tend to be much more accountable to, and responsive to, the communities that they serve.

NRECA member companies, for example, are accountable to a board of directors composed of their own member-owners (customers). The not-for-profit, democratically controlled nature of cooperatives has for decades resulted in superior provision of essential services in terms of safety, rates, and reliability, all in an unregulated environment.

For such providers, an obligation to report outages to the Commission creates zero additional incentive to offer reliable service, because they have sufficient incentive to do so already. It only adds bureaucracy and more burdens for a staff-constrained provider, especially smaller providers, including at the worst possible time when they are working to restore any outages that do occur quickly while continuing to devote resources to extending service into unserved areas.

NRECA respectfully submits that if network outage reporting must be expanded to BIAS, the Commission should adopt a clear exemption for qualifying small entities.

C. The Commission Should Exempt Non-BIAS Data Services, Including Smart Grid Services.

The NPRM asks whether the Commission should exclude "non-BIAS Data Services" from the scope of BIAS, as the Commission did in the 2015 *Open Internet Order*.[12] NRECA strongly supports this proposal. While it may seem self-evident that specialized services that are not used to reach the Internet in general are not "BIAS," the Commission should clarify the treatment of such services.

[12] NPRM, ¶ 64.

NRECA generally supports the NPRM's re-articulation of such services from the *2015 Open Internet Order*, but asks the Commission to recognize in addition that such excluded "non-BIAS Data Services" may not always be "application level" services.[13] For example, many NRECA member electric cooperatives own and operate fiber-optic networks to provide supervisory data and control (SCADA) and "smart grid" functions in support of their delivery of electric service, which may or may not be "application level" services. While these data services may in some respects operate alongside BIAS service, they clearly should not be subject to regulation under Title II.

NRECA encourages the Commission to continue excluding "non-BIAS Data Services" from the scope of Title II, and asks the Commission to specify that SCADA and other utility "smart grid" functions qualify as such "non-BIAS Data Services."

D. Section 222 / CPNI Rules Should be Addressed in a Separate Rulemaking.

NRECA respectfully suggests that the Commission should temporarily forbear from applying Section 222 CPNI rules to BIAS providers. In light of the significance and complexity of BIAS privacy and data protection matters, and the potential burden that compliance with CPNI rules might entail (especially for small entities), the Commission should consider a separate rulemaking initiative in order to further develop the record.

The NPRM states, "[w]e believe that ISPs are situated to collect vast swaths of information about their customers, including personal information, financial information, and information regarding subscriber online activity," and that "absent statutory and regulatory requirements to do so, ISPs may not adopt adequate administrative, technical, physical, and procedural safeguards to protect their customers' data."[14] In just these two short quotes, the

[13] *Id.*
[14] NPRM, ¶ 42.

Commission has raised multiple issues of considerable complexity, some of which might already be addressed as part of state-level privacy legislation or may in the near future be addressed in federal privacy legislation.

Rather than rush to impose on BIAS providers a set of obligations that had been designed for telephone companies, the Commission should more deliberately develop the record specific to BIAS providers in a separate proceeding, and then use the record in that proceeding to develop a more tailored approach. For now, the Commission should temporarily forbear from applying Section 222 to BIAS providers.[15]

E. The Commission Should Not Expand the Current Transparency and Broadband Label Requirements.

The NPRM discusses at some length the transparency disclosure and broadband label requirements. The Commission "seek[s] comment on possible modifications or additions to update the transparency rule to ensure that end users, edge providers, the broader Internet community, and the Commission have the information they need to assess ISPs' terms and conditions for BIAS in a timely and effective manner."[16] The Commission states that the current transparency rule is "an appropriate baseline," but suggests that the Commission intends to expand the requirement, by establishing new rules regarding content required,[17] means of disclosure,[18] degree of technical specificity,[19] and underlying recordkeeping requirements.[20]

NRECA supports the overall objectives of the transparency rule, but is concerned that the Commission seems primed to create significant additional, overlapping if not duplicative

[15] In the alternative, the Commission should exempt small entities from any immediate Section 222 compliance obligation.
[16] NPRM, ¶ 168.
[17] NPRM, ¶¶ 175, 176.
[18] NPRM, ¶ 177.
[19] NPRM, ¶ 175, 178.
[20] NPRM, ¶ 185.

paperwork and compliance burdens for BIAS providers, with perhaps no real additional benefit for consumers. A lengthy, detailed transparency statement risks becoming little more than fine print, to be predictably ignored in most cases by consumers. While consumer knowledge is good, the Commission should be wary of overestimating the value of compelled disclosure statements.

NRECA suggests that the existing broadband label requirement should be the primary means for educating consumers about the BIAS provider's offerings and network practices, with a more detailed transparency statement playing a secondary role (if required at all, going forward).

The Commission should also consider the impact on small entities of such expanded transparency disclosure requirements. An overelaborate transparency disclosure framework might be managed by larger ISPs without significant additional impact, but it would create a considerable additional burden (and compliance minefield) for small ISPs with limited administrative and regulatory compliance personnel. And as mentioned above, small, locally-focused ISPs already have a strong incentive to provide reliable, responsive service, and not-for-profit, democratically controlled NRECA member companies in particular already are accountable to a member-elected board of directors to ensure the quality and value of such service.

F. Universal Service

The NPRM asserts that "classifying BIAS as a telecommunications service will strengthen our policy initiatives to support the availability and affordability of BIAS through

USF programs,"[21] and that "[Title II] will bolster the Commission's ability to provide High-Cost and low-income support."[22] NRECA supports these conclusions.

It has become increasingly evident in recent years that the statutory linkage of High-Cost support to "telecommunication service" makes little sense if BIAS is not also "telecommunication service." For example, the RDOF program was intended primarily to support broadband infrastructure development – not voice service. Yet RDOF program participants were required to offer voice service (typically as a VoIP add-on to BIAS service) and, more problematically, were required to obtain designation as an "Eligible Telecommunications Carrier" ("ETC"). In many states, the ETC designation process can be expensive and time-consuming, creating a barrier to program participants. At the same time, some states effectively utilized the ETC designation process to thoroughly vet and weed out unqualified initial RDOF Phase I auction awardees, saving millions for the USF program. Reclassifying BIAS as a Title II service should, hopefully, streamline the ETC requirement for High Cost Fund programs, and the ETC designation may need to be re-evaluated. This is a question that might be ripe for referral to the Federal-State Joint Board on Universal Service.

Similarly, Title II classification of BIAS will enable BIAS-only providers to more readily participate in the Lifeline program, for which ETC designation has proven to be a substantial hurdle and disincentive to provider participation.

On the contribution side, NRECA supports the Commission's proposal to forbear from requiring immediate Universal Service contributions from Title II BIAS providers.[23] In light of the significant and ongoing policy debate surrounding Universal Service contribution

[21] NPRM, ¶ 49.
[22] NPRM, ¶ 50.
[23] NPRM, ¶ 104.

methodologies, the Commission should forbear from imposing any new contribution requirements on BIAS providers until the record can be more fully developed in a separate proceeding.

G. The Commission Should Clarify the Preemptive Effect on State Regulation.

NRECA encourages the Commission to adopt as clear a statement as possible on preemption of state and local regulation of BIAS. In the absence of such a clear statement, state utility commission and BIAS providers will be operating in a fundamentally unpredictable environment.

The Commission should pay particular attention to the question of state certification of BIAS providers. As the Commission is aware, many states have a roughly analogous regulatory framework, comparable to the current federal bifurcation between "telecommunication service" and "information service." The terminology varies, but state public utility commissions generally have regulatory authority over "telecommunication service," or "telephone corporations," or "telecommunications companies," or another similar term. The operative definition of these state-level terms is often very similar to the federal definition of "telecommunication service." Like the Commission currently, state utility commission generally do not possess authority to regulate BIAS.

But what happens after the Commission opts to reclassify BIAS as "telecommunications service"? Can a state utility commission logically refuse an argument that it should do so as well? Could the state utility commission then require each ISP operating within the state to obtain a Certificate of Public Convenience and Necessity? Such outcomes seem undesirable, for myriad reasons, but are entirely possible in the absence of clear direction from the Commission.

The NPRM suggests that the interstate nature of BIAS would "largely resolve possible arguments premised on the limitation on FCC authority over state communication services…."[24] It is nevertheless unclear from the NPRM whether the Commission would rely solely on the interstate nature of BIAS in order to preempt state regulation of BIAS, and how such preemption might work in different scenarios.

The NPRM also asks whether the Commission should adopt "a broad preemption decision," or instead "proceed more incrementally… deferring to future case-by-case adjudications of preemption." While NRECA recognizes the potential value of case-by-case adjudications, NRECA believes a broad preemption decision by the Commission would provide the necessary regulatory stability and predictability for the market.

III. CONCLUSION

NRECA is particularly sensitive to the challenges faced by rural communities lacking high speed Internet access, and believes such challenges can be met by many smaller providers like electric cooperatives that have a vested interest in those communities. Excessive or unnecessary regulation could divert investment resources away from efforts to reach these communities. Our Comments urge the Commission to adopt sensible regulations to ensure that reclassification of BIAS as a telecommunications service will maximize participation for smaller broadband service providers operating throughout the country.

Respectfully submitted,

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[24] NPRM, ¶ 95.

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