

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544**

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In the Matter of	)	
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Bridging the Digital Divide for Low-Income Consumers	)	WC Docket No. 17-287
	)	
	)	
Lifeline and Link Up Reform and Modernization	)	WC Docket No. 11-42
	)	
Telecommunications Carriers Eligible for Universal Service Support	)	WC Docket No. 09-197
	)	
Information Collection Being Reviewed by the Federal Communications Commission	)	OMB Control Number 3060-0819
	)	

COMMENTS OF THE NATIONAL LIFELINE ASSOCIATION

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The National Lifeline Association (NaLA) submits these brief comments in response to the Federal Communications Commission’s (FCC’s or Commission’s) request for comments on the information collection requirements set forth in the *Fourth Report and Order* of the 2017 *Lifeline Digital Divide Order* that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA).¹

¹ See Information Collection Being Reviewed by the Federal Communications Commission, Federal Communications Commission, OMB 3060–0819, 83 Fed. Reg. 61, 13484, 13484-85 (Mar. 29, 2018) (Federal Register Notice); see also *Bridging the Digital Divide for Low-Income Consumers*, *Lifeline and Link Up Reform and Modernization*, *Telecommunications Carriers Eligible for Universal Service Support*, WC Docket Nos. 17-287, 11-42, 09-197, *Fourth Report and Order*, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, FCC 17-155 (rel. Dec. 1, 2017) (*2017 Lifeline Digital Divide Order*); *id.* ¶¶ 2-31 (*Fourth Report and Order*). NaLA reserves its right to submit subsequent comments in response to the Commission’s submission to OMB.

SUMMARY

The Commission has not taken seriously its statutory obligation to minimize the burden of the new Tribal subscriber notice requirement in the *Fourth Report and Order*. Specifically, the subscriber notice requirement (1) provides inadequate time for affected eligible telecommunications carriers (ETCs) to integrate and search relevant data sources to determine which subscribers are urban or rural, (2) provides no reasonable means for affected ETCs to determine whether those subscribers will have an “option” of a facilities-based wireless Lifeline provider or any facilities-based Lifeline provider at all, and (3) presents ETCs with extreme technological, logistical, and administrative costs that are not taken into account, minimized, or justified in the *Fourth Report and Order* or in the instant request for approval.

Further, the Tribal rules underlying the subscriber notice requirement are subject to an ongoing appeal in the U.S. Court of Appeals for the D.C. Circuit and a Notice of Proposed Rulemaking (NPRM) and Notice of Inquiry (NOI) at the Commission, any of which could modify or nullify the new rules and render the subscriber notice requirement premature or unnecessary.²

For these reasons, the Commission should delay submission of the information collection request to OMB until the appeal and work on the related NPRM and NOI have been concluded. If the Commission nonetheless submits the information collection to OMB for approval, it should address the significant burdens presented herein and take steps to minimize the burdens of the subscriber notice requirement and provide substantially more time for ETCs to comply with the requirement.

² See Pet. for Review, *Nat’l Lifeline Ass’n v. FCC*, No. 18-1026, Doc. No. 1715023 (D.C. Cir. filed Jan. 25, 2018) (NaLA Petition for Review); *2017 Lifeline Digital Divide Order* ¶¶ 67, 126.

I. BACKGROUND

In 2000, the Commission adopted an enhanced Lifeline benefit of up to \$25 per month (in addition to the baseline \$9.25 benefit) to eligible residents of federally recognized Tribal lands.³ The Commission explained that the “primary goal” of the enhanced benefit was to make telecommunications services more affordable for residents of Tribal lands, recognizing that Tribal residents faced high financial barriers that contributed to low adoption of supported telecommunications services.⁴ The enhanced Tribal Lifeline benefit, which until now has not distinguished between rural and urban Tribal lands, has been a success, in large measure due to the efforts of non-facilities-based wireless Lifeline provider ETCs, whose business model permits them to tailor their offerings to the unique needs of Tribal residents and serve areas that facilities-based wireless providers either cannot, do not, or do not want to serve on a retail basis. Approximately 240,000 low-income subscribers on federally recognized Tribal lands rely on the Commission’s enhanced Lifeline benefit to afford voice and broadband service.⁵ Of these subscribers, 62 percent have chosen a non-facilities-based wireless ETC—including NaLA member companies—as their Lifeline provider.⁶ In Oklahoma, the state with the highest

³ See *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscriberhip in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208 (2000) (*2000 Tribal Lifeline Order*).

⁴ See *id.* ¶ 44.

⁵ According to the USAC Lifeline Disbursement Tool, available at <http://www.usac.org/li/tools/disbursements/default.aspx> (as of March 2018 disbursement data).

⁶ *Id.*

concentration of Tribal Lifeline subscribers, 94 percent of Tribal Lifeline subscribers have chosen a non-facilities-based provider.⁷

In the *Fourth Report and Order*, the Commission arbitrarily, capriciously, without adequate notice, and otherwise unlawfully restructures the enhanced Tribal Lifeline benefit by (1) prohibiting non-facilities-based providers from receiving enhanced Tribal benefits and establishing a restrictive definition of “facilities” (the Tribal Facilities Requirement); and (2) restricting enhanced Lifeline subsidies to residents of “rural” Tribal lands using an unexamined definition of such lands from a separate Universal Service Fund (USF) Program (the Tribal Rural Limitation).⁸ As relevant here, the *Fourth Report and Order* also directs the Universal Service Administrative Company (USAC) to develop a mapping tool to enable ETCs to determine which of their customers are eligible for enhanced benefits under the new rules, and sets a deadline of 60 days before the effective date of the *Fourth Report and Order* to release the mapping tool.⁹ The effective date of the *Fourth Report and Order* will be 90 days after the Commission announces that OMB has granted PRA approval.¹⁰

The information collection on which NaLA provides comment today involves the Commission’s requirement that, “no more than 30 days after the announcement of PRA approval,” ETCs must “notify, in writing, any customers who are currently receiving enhanced support who will no longer be eligible for enhanced support as a result of the changes in [the

⁷ See *Bridging the Digital Divide for Low-Income Consumers et al.*, WC Docket Nos. 17-287 et al., Comments of the Public Utility Division of the Oklahoma Corporation Commission, 4 (filed Feb. 21, 2018).

⁸ See *Fourth Report and Order* ¶¶ 2-31.

⁹ See *id.* ¶¶ 10-16.

¹⁰ See *id.* ¶ 31.

Fourth Report and Order].”¹¹ The notice “must inform any impacted customers that they will not receive the enhanced Lifeline discount beginning 90 days after the announcement of PRA approval . . . and that customers residing on rural Tribal lands who are currently receiving service from a non-facilities-based provider have the option of switching their Lifeline benefit to a facilities-based provider to continue receiving enhanced rural Tribal support.”¹² The notice “must also detail the ETC’s offerings for Lifeline subscribers who are not eligible for enhanced support.”¹³

II. THE COMMISSION FAILS TO TAKE SERIOUSLY ITS OBLIGATION TO MINIMIZE THE BURDEN OF THE SUBSCRIBER NOTICE REQUIREMENT AS REQUIRED UNDER THE PRA

The PRA requires the Commission to minimize the paperwork burdens resulting from information collections it requires.¹⁴ Under PRA rules, to obtain OMB approval, an information collection must be “the least burdensome necessary for the proper performance of the agency’s functions to comply with legal requirements and achieve program objectives.”¹⁵ To that end, an agency “shall not conduct or sponsor a collection of information” before it has, among other things, conducted a review of the burden of the collection, sought and evaluated public comments, and sought and received approval from OMB.¹⁶

¹¹ *See id.*

¹² *Id.*

¹³ *Id.*

¹⁴ 44 U.S.C. §§ 3501(1), 3506(c)(2).

¹⁵ 5 C.F.R. § 1320.5(d)(1)(i).

¹⁶ *See* 5 C.F.R. §§ 1320.3(b)(1); 1320.5, 1320.8. The PRA defines “burden” as “the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency,” and includes tasks such as (1) “reviewing instructions”; (2) “developing, acquiring, installing, and utilizing technology and systems for the purpose of” “collecting, validating, and verifying information,” “processing and maintaining

In the Federal Register Notice, the Commission estimates that the information collection requirements of the *Fourth Report and Order*—including the subscriber notice requirement and revisions to several existing FCC forms—will impose a total annual burden of 10,972,641 hours, costing \$937,500.¹⁷ However, the Commission provides no detailed analysis of the burdens imposed by the subscriber notice requirement itself nor does it meaningfully consider its obligation to minimize the burden on ETCs. As explained below, even a cursory review of the facts demonstrates that compliance with the subscriber notice requirement is likely to be virtually impossible and presents significant additional burdens that the Commission fails to seriously consider, minimize, or justify. The Commission’s failure to minimize the burdens of its information collection violates the PRA and, absent modification, warrants disapproval.

A. The Subscriber Notice Requirement Presents a Nearly Impossible Task

The Commission’s PRA assessment does not account for two impossibilities embedded within the subscriber notice requirement. Specifically, the Commission (1) provides inadequate time for affected ETCs to integrate and search relevant data sources to determine which subscribers are urban or rural to provide appropriate notices, and (2) provides no reasonable means for affected ETCs to determine whether those subscribers will have an “option” of a facilities-based wireless Lifeline provider or any facilities-based Lifeline provider at all. By creating impossible-to-meet information collection obligations for ETCs, the Commission runs

information,” or “disclosing and providing information”; (3) adjusting existing compliance processes; (4) training personnel to comply; (5) searching data sources; (6) completing and reviewing the information collection; and (7) “transmitting, or otherwise disclosing the information.” 5 C.F.R. § 1320.3(b)(1).

¹⁷ See Federal Register Notice at 13484-85. Because the Commission in its PRA calculations does not provide a breakout of the time required for the subscriber notice requirement alone, NaLA cannot know how the requirement contributed to the Commission’s aggregate estimate.

afoul of its duty under the PRA rules to “ensure that the information collection . . . is the least burdensome necessary.”¹⁸

First, the notice deadline presents ETCs with an unrealistic same-day turnaround time to identify rural and urban Tribal Lifeline subscribers and provide them with the required notices. Specifically, the subscriber notice must be sent 30 days after the announcement of PRA approval, while the mapping tool is due to go online 60 days before the effective date of the *Fourth Report and Order* (90 days after the PRA approval announcement)—in other words, on the same day. Generously assuming that mapping tool will go live early on the due date, ETCs will be required to access, learn, and utilize USAC’s mapping tool to determine which subscribers must be notified of the new rural Lifeline rules, prepare the written notices to the Commission’s specifications, then send the notices all within the same day. The obvious virtual impossibility of all ETCs being able to complete this same day turnaround underscores how little care, if any, the Commission put into assuring PRA compliance in this instance. The Commission’s infraction is even more pronounced when consideration is given to the undeniable fact that USAC and the Commission historically have had difficulty delivering technological tools—particularly databases—on time, if at all.¹⁹ If the Commission or USAC falls behind on

¹⁸ See 5 C.F.R. 1320.5(d)(1)(i).

¹⁹ For example, in the *2012 Lifeline Reform Order*, the Commission initially directed the Wireline Competition Bureau and USAC to “take all necessary actions so that, as soon as possible and no later than the end of 2013, there will be an automated means to determine Lifeline eligibility for, at a minimum, the three most common programs through which consumers qualify for Lifeline.” See *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 et al., Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11 ¶ 97 (2012) (*2012 Lifeline Reform Order*). The eligibility database was never completed. The *2012 Lifeline Reform Order* also instructed USAC to create a National Lifeline Accountability Database (NLAD) and “set a target date to have the database operational as soon as possible and no later than a year from release of the Order.” *Id.* ¶ 185. However, the NLAD was not “live” nationwide until March 2014, more than a year past the Commission’s initial deadline. See USAC, “NLAD Migration,” available at <https://www.usac.org/li/tools/nlad/nlad->

its due date, there's a risk that ETCs will be forced into noncompliance by the Commission's failure to meet the deadlines it has set for itself and USAC. The Commission easily could have avoided creating such a burdensome requirement and its failure to have done so violates the PRA.

Second, the deadline is not the only impossibility in the Commission's subscriber notice requirement. The Commission also requires non-facilities-based ETCs to notify affected subscribers on rural lands about their options to receive enhanced Lifeline service from facilities-based providers. However, the Commission provides no mechanism to identify whether there are other Lifeline providers available and, if so, who they are or what services they provide. In many cases there will not be a facilities-based wireless ETC available, or any facilities-based Lifeline provider at all.²⁰ Consequently, the *Fourth Report and Order* may require non-

migration.aspx (last viewed May 24, 2018). In 2016, the Commission delayed the effective date until June 8, 2016 for the changes to Tribal lands in Oklahoma in part because the electronic mapping resources needed for ETCs to identify affected subscribers were not made available until one week prior to the planned effective date of February 9, 2016. *See Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, Order, DA 16-117 (rel. Feb. 2, 2016). Most recently, the Commission has now twice delayed the National Verifier adopted in the *2016 Lifeline Modernization Order*. *See Wireline Competition Bureau Announces Postponement of Initial Launch Date of The National Lifeline Eligibility Verifier*, WC Docket No. 11-42, Public Notice, DA 17-1167 (Dec. 1, 2017). Although the National Verifier was due to be launched in December 2017, Chairman Pai recently testified that he expected for it to be "up and running" in six states by the end of 2018 (a year late), and then "in 2019 hopefully ... add more states to that tally." *See Review of the FY2019 Budget Request for the FCC and the FTC, Hearing Before the Subcomm. On Financial Services and General Government of the S. Comm. On Appropriations*, 115th Cong. (2018).

²⁰ *See* Letter from John J. Heitmann, Counsel to Assist Wireless, LLC, Boomerang Wireless, LLC, and Easy Telephone Services Company d/b/a Easy Wireless, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 17-287 et al., 5-6 (filed Nov. 9, 2017) ("The lack of availability of alternative wireless and wireline services for low-income consumers residing on Tribal lands is not a hypothetical concern. For example, eliminating resellers would essentially eliminate the availability of enhanced Lifeline wireless service for approximately 2,275 subscribers on the Colville Indian Reservation in Washington and the Wind River Reservation in Wyoming currently being served by Boomerang. Additionally, on wide swaths of the Colville Indian Reservation in Washington, for nearly 200 subscribers currently served by

facilities-based Lifeline providers to state in a formal notice that the customers “have the option of switching their Lifeline benefit to a facilities-based provider to continue receiving enhanced rural Tribal support” when in fact, no such options exist, or the customer must sacrifice her or his mobile voice and broadband plan for fixed voice and broadband, which is not a substitute service in terms of price or functionality. In either case, the subscriber notice requirement is bound to draw significant subscriber questions, comments, and complaints, all of which will increase the burdens of the subscriber notice requirement. Here, too, many of the burdens associated with this ill-conceived requirement could have been—and therefore need to have been—avoided. The Commission is uniquely positioned to determine the impact on Lifeline-eligible Tribal residents of its decision to eliminate resellers from the Tribal Lifeline program. This decision will leave some residents of Tribal lands who are eligible for Lifeline with no Lifeline service provider from which to get that enhanced benefit. The Commission—and not resellers—should be responsible for identifying those people. By “shifting disproportionate costs [and] burdens” on ETCs by requiring them to determine whether and what options are available for subscribers, instead of providing them with that information, the Commission violates its duty under the PRA rules.²¹

Boomerang, no local exchange carrier offers service. Because no facilities-based wireless provider offers retail Lifeline service in these areas, these households would have no options for obtaining voice or broadband service.”); *see also Lifeline and Link Up Reform and Modernization, et al.*, WC Docket No. 11-42, et al., Reply Comments of Boomerang Wireless, LLC on the Second Further Notice of Proposed Rulemaking to Modernize and Restructure the Lifeline Program, 4-6 (Sept. 30, 2015) (citing *Lifeline and Link Up Reform and Modernization, et al.*, WC Docket No. 11-42, et al., Comments of the Navajo Nation Telecommunications Regulatory Commission, 10 (Aug. 28, 2015)).

²¹ See 5 C.F.R. ¶ 1320.5(d)(1)(iii).

B. The Subscriber Notice Requirement Is Otherwise Extremely Burdensome

The Commission's burden analysis also fails to meaningfully consider other aspects of the burden that the subscriber notice requirement will impose, including technology development, the possible need for repeated notices to effectively inform subscribers, and the substantial customer service burden that the notice will impose on providers.

First, the Commission fails to account fully for the technological burden of providing the notice. As an initial matter, because the notice requirement applies to two different categories of subscribers—urban residents of Tribal lands who will no longer be eligible for any enhanced subsidy and rural residents of Tribal lands who will no longer be eligible for an enhanced subsidy from a non-facilities-based provider—an ETC must necessarily identify the category into which a given subscriber falls in order to provide the appropriate notice. As such, an ETC must first access and integrate the not-yet-created USAC mapping tool, then divide its subscriber base accordingly based on the subscriber's address (a unique and well-documented challenge on Tribal lands²²), and only then can the ETC send the appropriate notices to subscribers.

Sending the notice presents a separate technological challenge. As a general matter, to more effectively reach their subscribers, ETCs often send important messages by SMS text message, including recertification and de-enrollment messages. Based on SMS character limits, an effective message may require a single notice to be separated over multiple text messages, multiplying the burden of a single notice. Further, to provide additional context, ETCs often conclude text message notices with instructions to call customer service with additional

²² See *Fourth Report and Order* ¶ 20 (“We are also sensitive to Tribal residences that have not been assigned conventional addresses and instead use descriptive addresses that are not recognized by the U.S. Postal Service. For those residences, a Lifeline subscriber may provide a descriptive address when enrolling in the program.”).

questions, and may provide an interactive voice response (IVR) system to walk the subscriber through the required elements of a given notice. Developing effective IVR systems requires ETCs to incur substantial development and implementation costs. The Commission must account for these costs in its submission to OMB for an accurate assessment of the burden here.

Second, in some cases—while not explicitly required in the rules—ETCs may provide multiple reminders to affected subscribers to minimize subscriber surprise. For example, ETCs may provide a primary notice 60 days in advance of a deadline, a follow-up reminder 15 days before a deadline, and a final notice five days before a deadline. As such, while the notification requirement assumes a single notice, effective notice may require multiple notices to subscribers to minimize customer confusion in some circumstances. The Commission’s burden analysis should take into account the possibility of reminder messages.

Third, the Commission’s requirement that the subscriber notice “detail the ETC’s offerings for Lifeline subscribers who are not eligible for enhanced support” fails to consider differences among basic plans in different states.²³ For example, states such as California have state-level Lifeline programs with additional subsidies that enable more generous basic-level offerings. As a result, an ETC serving multiple states with different plans will need to customize notices and related information in each state.

Fourth, the Commission fails to consider the enormous customer service burden that the subscriber notice requirement will cause. The *Fourth Report and Order* requires non-facilities-based ETCs to tell their customers that they will lose their enhanced benefit—representing seventy-three (73) percent of the value of their service—or they will need to switch Lifeline providers to keep their full benefit (if such a provider exists in their area). For subscribers who

²³ See *Fourth Report and Order* ¶ 31.

have relied on enhanced service plans, this notice is one of the most important that they will receive from their provider, affecting their ability to afford service and connect to essential services. Consequently, ETCs can expect a deluge of confused and angry calls to customer service. In order to accommodate these calls, ETCs will need to incur substantial costs, including but not limited to costs to: (1) develop training and train customer service representatives on the changes so they can respond to complaints; (2) develop scripts and IVR prompts in order to streamline the customer service process; and (3) potentially hire temporary staff in order to accommodate increased call volume. The Commission does not take these burdens into account in its PRA analysis.

Even in the best-case scenario and with the most effective notices and customer service staff, customer confusion and anger about these changes—which, as NaLA argued in its appeal, are arbitrary and capricious, unlawful, and were adopted without adequate notice—are highly likely to result in complaints to state and federal regulators, to which affected ETCs must respond. However, the Commission fails to consider, or attempt to minimize, the customer service and customer complaint burdens associated with the subscriber notice requirement, as the PRA requires.

III. THE RULES UNDERLYING THE SUBSCRIBER NOTICE REQUIREMENT ARE SUBJECT TO ONGOING PROCEEDINGS AND MAY SOON BE MODIFIED OR NULLIFIED

Not only is the subscriber notice requirement burdensome to the point of impossibility, it may soon be rendered premature or unnecessary. Specifically, at the same time the Commission adopted the *Fourth Report and Order*, it adopted an NPRM asking whether it should revise the definition of “facilities” it adopted in the *Fourth Report and Order* and an NOI seeking comment

on whether its definition of “rural” adopted in the *Fourth Report and Order* was appropriate.²⁴

The Commission also sought comment on whether to eliminate non-facilities-based providers from the Lifeline program entirely, among many other proposed changes to the program which could affect Tribal Lifeline subscribers.²⁵ Moreover, the *Fourth Report and Order* is subject to an ongoing appeal before the U.S. Court of Appeals for the D.C. Circuit challenging the lawfulness of the order.²⁶

If the Commission or the D.C. Circuit were to substantially revise or nullify the requirements adopted in the *Fourth Report and Order*, which could happen in a matter of months, it would cause regulatory whiplash for ETCs and their Tribal Lifeline subscribers, requiring subsequent subscriber notices, re-engineered mapping systems, and additional customer service costs. A far less burdensome alternative would be to delay submission of the information collection to OMB until the appeal and work on the related NPRM and NOI have been concluded in order to provide subscribers with a single notice addressing the final rules.

CONCLUSION

The subscriber notice requirement in the *Fourth Report and Order* presents ETCs with extraordinary burdens, including impossible tasks and significant costs. The Commission fails to take seriously its obligation to meaningfully consider and minimize these burdens as required

²⁴ See *2017 Lifeline Digital Divide Order* ¶ 67 (“Should the Commission adopt the same definition of facilities that the Fourth Report and Order uses for enhanced support on rural Tribal lands? If the Commission adopts different facilities-based criteria for Lifeline generally, should we also use that definition of ‘facilities’ for purposes of enhanced Tribal support?”); *id.* ¶ 126 (“Is the E-rate program’s definition of ‘rural’ the best option for identifying rural areas in the Lifeline program, or should the Commission consider some other definition to identify rural areas?”).

²⁵ See *id.* ¶ 65.

²⁶ See *NaLA Petition for Review*.

under the PRA. Because the impossible-to-meet subscriber notice requirement is tied to other regulations that are otherwise unlawful under the Administrative Procedure Act and subject to an ongoing rulemaking proceeding, the Commission should delay submission of this information collection request to OMB until work on the NPRM and NOI in the *2017 Lifeline Digital Divide Order* and the ongoing appeal of the *Fourth Report and Order* have concluded. If the Commission nonetheless submits the information collection to OMB for approval, it should address the significant burdens presented herein, take steps to minimize them, and provide substantially more time for ETCs to comply with the subscriber notification requirement.

Respectfully submitted,



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