

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Notice and Request for Comments on)	
Information Collection Being Reviewed by)	
The Federal Communications Commission,)	OMB 3060-0806
Universal Service – Schools and Libraries)	
Universal Service Program, FCC Forms 470)	
and 471)	
)	

COMMENTS OF THE OHIO INFORMATION TECHNOLOGY CENTERS

I. INTRODUCTION

The Ohio Information Technology Centers (the “Ohio ITCs”)¹ oppose the request of the Federal Communications Commission (“FCC” or “Commission”) to the Office of Management and Budget (“OMB”) to extend approval under the Paperwork Reduction Act of 1995, 44 U.S.C. §§3501-3520, of Forms 470 and 471 (the “Forms”), as noticed in the Notice and Request for Comment (“Notice”) published in the Federal Register on May 22, 2018.² The FCC’s request is not proper because: (i) it is not properly seeking an extension of prior authorized Forms: (ii) the changes already made by the Universal Service Administrative Company (“USAC”) to the Forms were not properly authorized and (iii) the FCC has not properly justified the changes to

¹ The Ohio ITCs consist of twenty-one information technology centers in the state of Ohio. The ITCs are members of the Ohio Education Computer Network (“OECN”), which is comprised of a collective group of ITCs authorized under Ohio Revised Code §3301.075 and each of the ITCs participating school districts and community schools. The OECN is a state government entity that purchases Internet Access in bulk on behalf of itself, i.e., a state network for schools and libraries.

² *Notice and Request for Comments on Information Collection Being Reviewed by the Federal Communications Commission*, 83 FR 23677, OMB 3060-0806 (May 22, 2018).

the Forms.³ In addition, the Ohio ITC's request that the FCC retake control of the Forms, their instructions, and their user interfaces as required by the Communications Act and the FCC's procedures.

II. THE FCC'S REQUEST IS NOT PROPERLY SEEKING AN EXTENSION OF PRIOR AUTHORIZED FORMS

According to the Notice, the Commission seeks comment on the information collection associated with FCC Forms 470 and 471 and indicates that the type of review is an "extension of a currently approved collection," referring to the version of forms approved in 2015. In point of fact, there have been substantial and consequential changes to the Form since the original submission in 2015.

The 2015 version of the Forms was submitted for review and comment by the Commission on May 7, 2015.⁴ At the time of the submission, the Commission was utilizing a version of the forms that is no longer available and, anticipating a transfer of the form to a new electronic platform, submitted information for approval that was highly limited and did not reflect the information ultimately requested on the online forms. As a result, the information submitted for review at the time bore little relation to the forms that were eventually presented online and even less relation to the current Forms. Moreover, at no time were the instructions to the forms or any accompanying guidance submitted for public comment.⁵

³ Paperwork Reduction Act of 1995, 1995 Enacted S. 244, 104 Enacted S. 244, 109 Stat. 163, 104 P.L. 13, 1995 Enacted S. 244, 104 Enacted S. 244.

⁴ 80 FR 26255 (May 7, 2015).

⁵ See 80 FR 26255 May 7, 2017 (and accompanying supporting documents); The Paperwork Reduction Act, 44 USCS §3502(2) specifically includes "reviewing instructions" and "instructions and requirements" in the definition of "burden" for purposes of evaluation under the Act.

Since the beginning of the 2017 funding year, USAC, without public comment and FCC approval, has made substantial changes to the Form 470 including: (i) changing the definition of services; (ii) changing how applicants request service; (iii) abrogating the FCC's technology neutral approach to basic conduit access to the Internet;⁶ (iv) failing to provide clear instructions on how to complete the Form 470; and (v) creating categories of services different than the services on the approved Eligible Services List.⁷

The Paperwork Reduction Act specifies that agencies "shall not conduct or sponsor the collection of information unless in advance of the adoption or revision of the collection of information the agency has" among other things, conducted a review, evaluated public comments and submitted the collection to the Director for certification.⁸ According to OMB guidance, the

⁶ See, e.g. Schools and Libraries Universal Service Support Mechanism, Eligible Services List for Funding Year 2012, DA 11-1600 at p. 8(2011) ("**Basic conduit access** to the Internet is **eligible regardless of technology platform**") (emphasis added).

⁷ See Ohio Information Technology Centers' Ex Parte Notice in Docket Nos. 13-184, 02-6 (filed March 16, 2018) <https://ecfsapi.fcc.gov/file/103162630911319/Ex%20Parte%20-%203-16-18.PDF>;
State E-rate Coordinators' Alliance Ex Parte Notice in Docket Nos. 13-184, 02-6 (filed March 19, 2018) <https://ecfsapi.fcc.gov/file/1031987457367/SECA%20Ex%20Parte%203-19-18.pdf>;
Funds for Learning LLC Ex Parte Notice in Docket Nos. 13-184, 02-6 (filed March 19, 2018) <https://ecfsapi.fcc.gov/file/1032025814833/SECA-470-Dropdown-2018-03-18.pdf>;
CSM Consulting, Inc. Ex Parte Notice in Docket Nos. 13-184, 02-6 (March 20, 2018) <https://ecfsapi.fcc.gov/file/10320206503699/CSM%20Support%20for%20SECA%20March%2019%20%20Ex%20Parte%20Filing%2003202018.pdf>;
Kellogg and Sovereign Consulting Ex Parte Notice in Docket Nos. 13-184, 02-6 (March 20, 2018) <https://ecfsapi.fcc.gov/file/10320318512083/KelloggSovereign%20support%20for%20SECA%20Mar19ExParteFiling.pdf>;
EducationSuperHighway Ex Parte Notice in Docket Nos. 13-184, 02-6 (March 23, 2018) <https://ecfsapi.fcc.gov/file/10323724310523/ESH%20Ex%20Parte%203-23-18.pdf>;
Infinity Communications and Consulting Ex Parte Notice in Docket Nos. 13-184, 02-6 (filed April 18, 2018) <https://ecfsapi.fcc.gov/file/10418152648161/FCC%20Form%20470%20Drop%20Down%20Ex%20Parte.pdf>;
E-rate Central Ex Parte Notice in Docket Nos. 13-184, 02-6 (filed April 11, 2018) <https://ecfsapi.fcc.gov/file/104112237208403/Form%20470%20Menu%20Options%20Ex%20Parte.pdf>;
AdTec, Inc. Ex Parte Notice in Docket Nos. 13-184, 02-6 (filed in April 9, 2018) <https://ecfsapi.fcc.gov/file/10409352828637/Support%20of%20SHLB%20ex%20parte%20letter.pdf>;
Schools, Health & Libraries Broadband Coalition Ex Parte Notice in Docket Nos. 13-184, 02-6 (filed April 9, 2018) <https://ecfsapi.fcc.gov/file/10409352828637/Support%20of%20SHLB%20ex%20parte%20letter.pdf>;
American Library Association Ex Parte Notice in Docket Nos. 13-184, 02-6 (filed in March 29, 2018) <https://ecfsapi.fcc.gov/file/10329944216140/ALA-2018Mar29-Letter-Form471Extension.pdf>.

⁸ 44 USCS §3507(a)(1).

review and public comment must include any additional forms, documents, or pamphlets issued with the information collection” and in the case of electronic forms “must provide screenshots of the entire online form.”⁹ The submission and approval of the Forms sought by the Commission in 2015 directly conflicted with this guidance, as it failed to provide accompanying instructions, guidance or screenshots of the electronic forms.

While approval is not required for “de minimus” changes, the changes made to the Forms have been far from “de minimus”. According to a 2015 Behavioral Science Insights and Federal Forms guidance,¹⁰ “De minimis changes” are “changes of a cosmetic nature” which “do not increase the burden of collection, though they might reduce its burden” and do not require an agency to seek public comment prior to implementation.¹¹ Although “Non-substantive changes” do not require public comment, they do require the agency to submit the changes for OMB review prior to implementation.¹²

The changes made to the Forms 470 and 471 do not qualify as either “de minimis changes” or “non-substantive changes.” When the Forms were moved online, modifications made to the Forms changed the collection burden for filers. By way of example, a significant change was made to the collection of information regarding the type of service sought by applicants in the Form 470. Whereas prior to the online form, applicants could describe a request for the type of basic conduit access to the Internet sought consistent with the FCC’s Eligible Service List, the online form required applicants to select from a specified list of services through a new drop-down menu. The collection burden further changed for FY2018

⁹ OMB Paperwork Reduction Act Guide, Version 2.0 (April 27, 2011) at Section 3.6.

¹⁰ *Memorandum for the Heads of Executive Departments and Agencies, and of the Independent Regulatory Agencies*, Behavioral Science Insights and Federal Forms (September 15, 2015).

¹¹ *Id.* at 3-4.

¹² *Id.*

when USAC, without prior notice or request for comment, instructed applicants that they had to specify certain service selections when seeking fiber-based bundled Internet access and transport or face a denial of funding.¹³

Since the 2015 Forms were never presented for public comment consistent with OMB guidance, and since there have been substantial impactful changes since 2016 the currently existing Forms cannot be considered OMB-approved Forms. Pursuant to the Paperwork Reductions Act, the FCC is required to seek approval of the Forms and their instructions.

III. THE FCC HAS NOT PROPERLY JUSTIFIED THE CHANGES TO THE FORMS

It is not appropriate at this time for the Commission to merely request an extension of an OMB-approved information collection and the Ohio ITC's formally object to such request.¹⁴ In order to receive OMB approval, the Commission should submit a new notice for comment on the Forms accompanied by screen shots of the electronic forms and any accompanying instructions and/or guidance consistent with Sections 3506-3508 of the Paperwork Reduction Act.

Section 3506(c)(2) of the Paperwork Reductions Act, requires the Commission to evaluate:

- (i) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility;
- (ii) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;
- (iii) enhance the quality, utility, and clarity of the information to be collected; and

¹³ See Universal Service Administrative Co., Schools and Libraries Program News Brief, Special Edition, Simplified Drop-Down Options for Eligible Services on FY 2018 FCC Form 470 (August 22, 2017) *available at* <https://www.usac.org/sl/tools/news-briefs/preview.aspx?id=786>.

¹⁴ The Commission's website describes extension requests as "an extension of OMB approval for an information collection [that] does not involve any change other than an extension of its expiration date." *See* Paperwork Reduction Act (PRA) and FCC Information Collections *available at* <https://www.fcc.gov/general/paperwork-reduction-act-pra-and-fcc-information-collections>.

(iv) minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.¹⁵

Section 3506(c)(3) of the Paperwork Reduction Act, further requires the FCC to certify that (*inter alia*):

- The information is necessary for the proper performance of the functions of the agency
- Reduces the extent practicable the burden on person who have to submit information to the agency
- Use plain, **coherent and unambiguous terminology** and is understandable to those who are to respond.¹⁶

The Forms as USAC currently employs them:

- Do not reduce the information burden. By requiring applicants to substantially change the manner in which they solicit requests for bids, the current Forms greatly increase the burden on applicants;
- Have greatly increased inefficiencies. The Commission advised applicants that if their applications were denied because the instructions were not clear, an applicant could always appeal the denial.¹⁷ Requiring applicants to file appeals because of unclear and un-vetted instructions is extremely inefficient and costly, especially for the schools and libraries that need the funding the most;
- The changes made by USAC have caused an immense amount of confusion;¹⁸
- The changes made, rather than being necessary for proper performance of the FCC's duties, have not been consistent with the Eligible Services List; and
- Given the extreme confusion caused by modifications made to the form, instructions and guidance,¹⁹ the resulting product is incoherent and ambiguous.

¹⁵ 44 USCS §3506(c)(2).

¹⁶ 44 USCS §3506(c)(3).

¹⁷ See *Notification of Ex Parte Presentation, Ohio Information Technology Centers, Modernizing the E-rate Program for Schools and Libraries*, WC-Docket No. 13-184, Schools and Libraries Universal Service Support Mechanism – CC Docket No. 02-6 (March 16, 2017) (“*Ohio ITC Ex Parte*”).

¹⁸ See *Ohio ITC Ex Parte* at 3.

¹⁹ See *Ohio ITC Ex Parte* (discussing concerns raised by the Ohio ITCs are over changes made to the instructions, filing guideline and definitions of permitted eligible services and conveying that the changes have caused extensive confusion among E-rate applicants and service providers and could likely result in costly funding denials).

Accordingly, the FCC has failed to meet its obligations under the Paperwork Reduction Act. Furthermore, the FCC cannot meet those obligations absent a review of the changes after the public has had an opportunity to review and comment on the changes.

IV. THE FCC MUST RE-ASSERT ITS OBLIGATION TO CONTROL ADMINISTRATION OF THE E-RATE PROGRAM

When Congress created the E-rate program it provided that the single entity proposed by the Commission to administer the universal service support mechanisms must be “limited to implementation of the FCC rules for applications for discounts and processing the applications necessary to determine eligibility for discounts under section 254(h)” and “may not administer the programs in any manner that requires that entity to interpret the intent of Congress in establishing the programs or interpret any rule promulgated by the Commission in carrying out the programs, without appropriate consultation and guidance from the Commission.”²⁰ When the FCC created USAC,²¹ the FCC established very clear limitations on USAC’s authority when it stated affirmatively “USAC would apply its expertise to interpreting and applying existing decisional principles, **but would not make policy or create the equivalent of new guidelines,** or interpret the intent of Congress.”²² The FCC further emphasized that:

USAC's function under the revised structure will be exclusively administrative. USAC may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. ...Where the Communications Act or the Commission's rules are unclear, or do not address a particular situation, USAC must seek guidance from the Commission on how to proceed. ... The Commission retains ultimate control over the operation of the federal universal service support mechanisms through its authority to establish the rules governing

²⁰ Section 2005(b)(2)(A).

²¹ *Universal Service (Appointment of Universal Service Administrative Co. as Permanent Administrator)*, 14 CR 232 (FCC 1998) (“Appointment of USAC”).

²² *Appointment of USAC* at ¶15 (emphasis added).

the support mechanisms and through its review of administrative decisions that are appealed to the Commission.²³

USAC's changes to the Form 470, all created without an opportunity for the public to review and comment and without explicit FCC authority, clearly violated the FCC and Congressional authority that made USAC responsible for administering the E-Rate program.

Since at least FY2013, applicants seeking bids for service for basic conduit access to the Internet would seek such bids, on a platform neutral basis, utilizing the category of "Bundled Internet Access and Transport" on their Form 470. However, in August of 2017, without any formal guidance or notice and comment period from the Commission, USAC advised applicants that they could no longer select "Bundled Internet Access and Transport" if the applicant desired to seek bids for basic conduit access to the Internet provided over fiber. Rather, the applicant was required to use "Lit Fiber Transport" if they were seeking a fiber option for their transport. As shown above, USAC had no authority to make this change, and the advice it was enforcing legally cannot be relied upon by applicants or service providers.²⁴

USAC's unauthorized change in guidance has led to confusion among applicants about which categories of service to select on the Form 470 and confusion among service providers about how to respond to the bid requests. Applicants have been informally directed by USAC to seek bids for three types of service: "Bundled Internet Access and Transport"; "Lit Fiber Transport" and "Internet Access/ISP Only" to ensure that they received bids to cover the desired services. The selection of three separate categories of service, likewise caused confusion for

²³ *Id* at ¶16.

²⁴ See *Modernizing the E-rate Program for Schools and Libraries (FCC 2017)* which categorically states at Appendix B: "Additional guidance from USAC about the E-rate application process and about Eligible Services, including a glossary of terms, is available at USAC's website at <http://www.usac.org/sl/>. The documents on USAC's website are not incorporated by reference into the ESL and do not bind the Commission. **Thus, they will not be used to determine whether a service or product is eligible.** Applicants and service providers are free to refer to those documents, but just for informal guidance. This ESL applies to funding requests for Funding Year 2018" (**emphasis added**).

service providers, who were not instructed on how to respond to the bids and whether their responding bids must breakdown costs between transport and Internet access. In some instances, confused applicants required service providers to break down costs for transport and Internet access fearing funding denial by USAC should the applicant accept a bid that bundled costs for Internet access and fiber transport.

If the changes had been made under the FCC's auspices, and subject to notice and comment from stake holders, as required by the Communications Act, the FCC's procedures, and the Paperwork Reduction Act, many of these problems could have been avoided. USAC continues to make unilateral, poorly understood changes to the Forms' instructions despite a clear mandate from the FCC to resolve the problems with the drop down menu.²⁵

Therefore, it is respectfully requested that the FCC re-assert control over the creation of the Forms, their instructions, and the user interface and that no changes be made to the Forms, their instructions, and the user interface until those changes have been the subject of Notice and Comment. This can easily be done at the same time and in conjunction with the Notice and Comment period for the Eligible Services List.²⁶

V. CONCLUSION

The significant changes made to the Forms since their approval in 2015, including changes to service requests inconsistent with the Commission's Eligible Services List, necessitate a full review and comment period based on the currently existing Forms, instructions

²⁵ See *Joint Comments* at page 9 which concluded that: "Despite the FCC's directive to change the Form 470 drop down options to be clearer and user-friendly, the FY 2019 Form 470 menu options, released on July 1, 2018, were only changed slightly and did not provide improvements as the applicant community had requested."

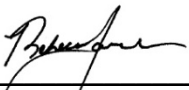
²⁶ Perhaps by taking comment on both the forms and the eligible services list at the same time, the two can once again be more closely related.

and any associated guidance -- not simply an “extension of a currently approved collection.” Modifications made to the Forms since their approval in 2015, which did not afford the public and stakeholders a notice and comment period, have caused extensive confusion among E-rate stakeholders and have led to significantly increased burdens upon applicants and service providers in completing the Forms.

The Ohio ITCs, therefore, respectfully request that the FCC retake control of the Forms, their instructions, and any associated guidance as required by the Communications Act and the FCC’s procedures and implement any changes to the Forms consistent and contemporaneously with the eligible services list for relevant funding years.

Respectfully submitted,

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Dated: July 23, 2018