

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Establishing a 5G Fund for)	GN Docket No. 20-32
Rural America)	WT Docket No. 10-208
)	
To: The Commission		

PETITION FOR PARTIAL RECONSIDERATION

The 27 national organizations comprising the 5G Fund Supporters, pursuant to 47 C.F.R. §1.429, respectfully petition for partial reconsideration of *Establishing a 5G Fund for Rural America, Notice of Proposed Rulemaking and Order*, GN Docket No. 20-32, FCC 20-150 (released October 29, 2020) (“R&O”). We laud the Commission for abandoning its reliance on “rurality” in favor of an “adjustment factor” that will prioritize historically underserved or unserved areas. However, on reconsideration, we believe the Commission should explain, prior to the pre-auction phase, 1) how the “adjustment factor” the Commission plans to use will provide adequate prioritization to ensure that historically underserved or unserved areas will receive support in the Phase I auction based on need, low wealth, persistent poverty, and the digital divide; and 2) require that applicants for 5G Fund subsidies broadly disseminate contracting opportunities to ensure that diverse contractors have an opportunity to compete for contracts awarded under the Fund.

Reconsideration on these issues is sought to give effect to the agency’s longstanding recognition of the need to promote equal access and opportunities in telecom for underserved communities and minority and women entrepreneurs. As the Commission’s Advisory Committee on Diversity and Digital Empowerment recognized in 2020, decisions on how to

achieve equal opportunity in communications take place “against the backdrop of conversations of inequity and injustice.”¹

This past spring, the Commission released *Establishing a 5G Fund for Rural America, NPRM and Report and Order*, GN Docket No. 20-52, FCC 20-52, 35 FCC Rcd 3994 (April 24, 2020) (“NPRM”), seeking guidance on whether to undertake reverse auctions to distribute high-cost subsidies for the provision of 5G services in rural America before accurate mapping will be completed (Option A) or after accurate mapping is completed (Option B). The Commission also sought recommendations on how to prioritize subsidy delivery for rural communities. In response, the 5G Fund Supporters requested that the Commission include communities with persistent poverty – which often are multicultural – in an Initial Tranche of 5G Fund recipients selected by the Commission, and require carriers seeking support from the 5G Fund to broadly disseminate contracting opportunities, much as the Commission has required of MVPDs since 1993.²

I. The Commission Should Explain The Algorithm Behind The Adjustment Factor That It Plans to Use To Prioritize Communities With Persistent Poverty.

In their Comments, the 5G Fund Supporters recommended that the Commission create and prioritize an Initial Tranche for immediate roll-out, which would include rural low wealth communities that face persistent poverty. The Second Tranche would include all other communities, which would be identified using a new set of mobile coverage data, along the lines of Option B.³

¹ See Inside Radio, FCC’s Diversity Committee Wants New Nielsen Metrics to Help Minority Owners Grow, available at http://www.insideradio.com/free/fcc-s-diversity-committee-wants-new-nielsen-metrics-to-help-minority-owners-grow/article_e7a71044-fd5a-11ea-b689-23ae81feb1c2.html (last visited November 18, 2020).

² See 5G Fund Supporters Comments (filed June 25, 2020) at 2.

³ See 5G Fund Supporters Comments at 2.

The 5G Fund Supporters also counseled against merely using “rurality” – *i.e.*, low population density areas such as ranches – as a test for choosing which communities to subsidize first.⁴ The 5G Fund Supporters highlighted hundreds of rural low wealth, broadband “desert,” multicultural communities, including Freedmen’s Towns, as well as Rural Hispanic Communities, which were recently noted as being in need of priority by LULAC President and CEO, Sindy Binavides.⁵ The 5G Fund Supporters explained the history of these economically depressed communities, and the impact lack of access to high-speed broadband continues to have on them.⁶ In the NPRM, the Commission had acknowledged that rural low wealth communities require a “higher level of support” and “additional focus.”⁷

In the R&O, the Commission laudably abandoned reliance on “rurality.” Instead, the Commission promised to use an “adjustment factor” that would consider the “business case for an area as well as the terrain.”⁸ Specifically, the Commission stated that it “believe[s] that the use of an adjustment factor that considers terrain and potential business case will provide

⁴ See NPRM, 35 FCC Rcd at 4003 ¶¶24-25 (recommending population density as a metric for rurality). The Commission did recognize that some areas “historically” lack mobile service and “therefore may require additional focus and higher levels of support in order to ensure that 5G-capable networks are deployed in a timely manner.” *Id.* at 4006 ¶33. Such areas frequently are the home to communities of color.

⁵ See 5G Supporters Comments at 7-12; see also Sindy Benavides, Rural Latino Communities Need Internet Access, THE HILL (Nov. 24, 2020), available at <https://thehill.com/opinion/technology/526878-rural-latino-communities-need-internet-access> (last visited November 23, 2020).

⁶ *Id.* at 2-16.

⁷ NPRM, 3 FCC Rcd at 4006 ¶33.

⁸ R&O at 24-25 ¶54. By “business case,” the Commission actually (and fortunately) meant that the *absence* of a business case would translate into a positive weighting for a target community. *Id.* The Commission confirmed that under its inclusion of “business case” in the adjustment factor, “less profitable areas would receiv[e] greater weight and therefore greater support.” *Id.* at 23-24 ¶54.

adequate prioritization to ensure historically underserved or unserved areas will receive support in the Phase I auction.”⁹

The 5G Supporters agree that the Commission’s use of an adjustment factor to account for unique attributes of potential service areas is reasonable. However, to secure this public interest commitment, the Commission should provide four critical definitional and measurement points necessary to ensure that high persistent-poverty multicultural communities will prevail in an adjustment factor contest. These four points are:

(1) What definitions and what algorithm will be used to measure an area’s digital divide-closing need?

(2) Relative to other factors, how much weight will be assigned to persistent poverty, especially for need assessments of multicultural communities with persistent poverty?

(3) Why, and when, would the Commission cap the adjustment factor?¹⁰ and

(4) How will the Commission evaluate the effectiveness, fairness, costs, and benefits of the adjustment factor?

The Commission stated that it would not address such questions until a “pre-auction process” that would occur at some unspecified time in the future.¹¹ The 5G Fund Supporters respectfully request that the Commission reconsider waiting until the pre-auction process to establish the criteria for the adjustment factor that would ensure that rural low wealth communities are prioritized. Carriers, and financially strapped rural communities’ governments, will need ample time to make plans and position themselves for subsidization. Carriers and

⁹ *Id.* at 9 n. 49.

¹⁰ The Commission stated it “may cap the adjustment factor if we believe that it would be helpful to do so in balancing our goals of providing broad and equitable support for 5G.” *Id.* at 24 n. 54.

¹¹ *Id.* at 25 n. 58 (“[w]e defer the final determination of the precise manner in which the adjustment factor will be incorporated into the auction mechanism to the pre-auction process.”)

communities need to know, early on, when specific communities are likely to be eligible for support, so that they can conduct business planning and due diligence, hire staff, engage contractors, update zoning and other local laws and regulations, and coordinate with nearby, similarly situated communities.

Resolving these questions is vital if the Commission is to ensure that the communities most in need will receive 5G service *first*. If the Commission is truly committed to “using the Universal Service Fund support to close the digital divide and make sure that parts of rural America are not left behind,”¹² it must first ensure that the communities with the greatest need will receive the highest priority.

II. Applicants For The 5G Fund Should Be Required To Adopt Equal Procurement Opportunity Programs Similar To Those Required Of MVPDs Since 1993.

In their Comments, the 5G Fund Supporters recommended that the Commission ensure that qualified minority and women entrepreneurs receive information about upcoming infrastructure buildout contracts.¹³ The agency can accomplish this by simply extending to 5G Fund recipients an existing, longstanding rule that requires MVPDs to broadly disseminate notices of contracting opportunities when issuing major contracts: the Cable Procurement Rule (the “Rule”).¹⁴ Extension of the Rule to regulatees that use other technologies besides cable and satellites is not

¹² NPRM, 35 FCC Rcd at 3995-96 at 2-3 ¶1.

¹³ See 5G Supporters Comments at 14-16.

¹⁴ See 5G Fund Supporters Comments at 14. The Cable Procurement Rule requires MVPDs to broadly disseminate notices of contracting opportunities when issuing major contracts. It was adopted pursuant to 47 U.S.C. §554(d)(2)(E) (FCC must develop rules to ensure that an MVPD shall “encourage minority and female entrepreneurs to conduct business with all parts of its operation”) and can be found at 47 C.F.R. §76.75(e). Under the Rule, MVPDs post contracting opportunities broadly – primarily online on websites or in e-mail lists – that reach broadly enough to include qualified WMBEs. See 5G Fund Supporters Comments at 15. This modest, targeted regulation helps qualified but historically excluded companies overcome the lack of social networks that has often resulted from a legacy of past discrimination.

a new recommendation.¹⁵ Most recently, in 2018, the Commission sought comment on whether to extend the Rule to broadcasting, the industry whose diversity and competition policies were then under review in *Prometheus IV* in the Third Circuit of the U.S. Court of Appeals.¹⁶

In response to the 5G Fund Supporters’ recommendation to support equal opportunities for minority- and women-owned businesses by ensuring that these businesses are made aware of opportunities created by the 5G expansion, the Commission in the R&O “declined to adopt the suggestion . . . [to] add an extension of the Cable Procurement Rule to the 5G public interest obligation to ensure that minority- and women-owned business apply for the many procurement opportunities that will owe their creation to the 5G Fund.”¹⁷ By way of explanation, the Commission stated that “our experience using reverse auctions to distribute support successfully in the Mobility Fund Phase I and CAF Phase II auctions supports our decision that competitive bidding without specific preferences provides the most efficient and effective mechanism to

¹⁵ The Commission’s Advisory Committee on Diversity for Communication in the Digital Age recommended this step in 2008, Recommendation on Procurement Issues, Emerging Technologies Subcommittee, Advisory Committee on Diversity for Communications in the Digital Age (adopted by the full Committee) (June 10, 2008), available at <http://transition.fcc.gov/DiversityFAC/061008/procurement-061008.pdf> (November 18, 2020) (recommending that the Commission examine extending the procurement requirements to all platforms). MMTC advocated for the rule extension in 2010. Letter to Marlene Dortch from David Honig, Executive Director, MMTC (Proposal #10), (March 18, 2010), available at <https://ecfsapi.fcc.gov/file/7020396472.pdf> (last visited November 18, 2020).

¹⁶ See 5G Fund Supporters Comments at 14; see *Prometheus Radio Project v. FCC*, 939 F.3d 567, 588 (3d Cir. 2019) (“*Prometheus IV*”). In 2014 *Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Second Report and Order*, 31 FCC Rcd 9864, 9906 ¶330 (2016), the Commission said it had found merit in “exploring whether, and if so, how, to extend the cable procurement requirements to the broadcasting industry. Therefore, the Commission will evaluate the feasibility of adopting similar procurement rules for the broadcasting industry.” However, no action has been taken on extending the Rule to other technologies for at least 12 years. Cf. *Multicultural Media, Telecom and Internet Council v. FCC*, 873 F.3d 932, 935 (D.C. Cir. 2017) (Kavanaugh, J., characterizing interminably long FCC delays in considering rulemaking proposals as “bureaucracy standard time”).

¹⁷ R&O at 31 ¶72.

award universal service support.”¹⁸ However, this analysis must be reconsidered for several reasons:

First, reverse auction operational methodology is irrelevant to whether the agency should require Fund recipients to broadly disseminate notices of contracting opportunities, because broad dissemination relates to contracting procedures, not selection of communities where 5G Fund support will first be available.

Second, the FCC has never had a sub-optimal “experience” with “preferences” in a reverse auction, because the FCC has never performed a reverse auction with “preferences.”¹⁹

And *third*, the 5G Fund Supporters *never sought* “preferences,” but instead sought the use of highly successful but constitutionally non-controversial broad recruitment of qualified contractors, which MVPDs have complied with, without objection, since 1993.²⁰ The 5G Fund Supporters explained that “[t]here is no requirement to engage any particular contractor, but providing equal opportunity to apply removes a barrier to entry to WMBEs.”²¹ By extending the Rule to 5G Fund recipients, the Commission would simply deploy its own successful, well-established, race-neutral mechanism to ensure that women- and minority-owned businesses will *learn* about and have a *chance* to apply for opportunities.

In its operation, the Rule prevents carriers from providing opportunities only to select companies, and instead requires that contracting opportunities be disseminated broadly,²² such as

¹⁸ *Id.*

¹⁹ Nor could it without conducting *Adarand* studies first to satisfy strict scrutiny. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995).

²⁰ *See* 5G Fund Supporters’ Comments at 14-16.

²¹ *Id.* at 15.

²² *See* EEO Supporters Response Letter, May 29, 2018 (explaining the risks of word-of-mouth recruitment and detailing the constitutionality of requiring broad recruitment), available at

online or through an e-mail list, at zero or negligible cost to the carrier.²³ As shown in the 5G Fund Supporters' Comments, broad recruitment for procurement is standard throughout most of the federal government,²⁴ and it has been endorsed by four former FCC Chairs.²⁵

Thus, the Commission should take this opportunity to extend the Rule to applicants for 5G Fund support.

Conclusion

In light of the critical nature and impact the 5G Fund could have on multicultural communities and on business opportunities in broadband deployment, the 5G Fund Supporters respectfully request the Commission to (1) promptly set out the definitional and operational

<https://www.mmtconline.org/wp-content/uploads/2018/05/EEO-Supporters-Response-Ltr-052918.pdf> (last visited November 18, 2020).

²³ *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13 (D.C. Cir. 2001) is inapposite. It applied strict scrutiny to the FCC's (former) requirement that minority-focused EEO recruitment would have to be performed, zero-sum, by companies that had "necessarily finite recruiting resources." *Id.* at 21. The Court was concerned that recruitment of non-minorities would necessarily decline as a consequence of minority recruitment being expanded. In the internet age, however, broad outreach can be accomplished at essentially zero marginal cost through free web postings, an e-mail list, or both. Consequently, broadening recruitment so that it is broad enough to reach qualified minorities and women would not lead to reduced recruitment of others, and thus does not trigger strict scrutiny because it does not treat qualified applicants differently because of race.

²⁴ Multiple government agencies have taken steps to encourage open competition for contract bidding. The Federal Acquisition Regulation ("FAR") was jointly created by the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration. Multiple executive agencies use these rules to govern how they recruit for government contracts. According to Section 6.101, contracting officers shall promote and provide "full and open competition in soliciting and awarding Government Contracts." *See* Federal Acquisition Regulation (FAR) Subpart 6.101, available at <https://www.acquisition.gov/content/6101-policy> (last visited November 18, 2020). Contractors can comply with this by posting "[a] broad agency announcement that is general in nature identifying areas of research interest, include criteria for selecting proposals, and soliciting the participation of all offerors capable of satisfying the Government's needs." *Id.*

²⁵ *See* Former Chairs Procurement Letter, available at <https://www.mmtconline.org/wp-content/uploads/2016/08/FmrChairs-Procurement-Ltr-signed-080516.pdf> (last visited November 18, 2020) (detailing support from for four former FCC Chairs for extending the Cable Procurement Rule to all communications technologies).

parameters of its proposed deployment subsidy adjustment factor,²⁶ and (2) require applicants for and recipients of 5G Fund support to adopt equal procurement opportunity programs that would ensure broad dissemination of contracting opportunities.²⁷

Respectfully submitted,

Maurita Coley

Maurita Coley
President and CEO

David Honig

David Honig
President Emeritus and Senior Advisor

Multicultural Media, Telecom and Internet Council
Convenors, 5G Fund Supporters (*see* Annex
to Comments filed June 25, 2020)
1250 Connecticut Ave. N.W., 7th Floor
Washington, DC 20036
(202) 261-6543
mcoley@mmtconline.org
dhonig@mmtconline.org

Of Counsel:

Dawn Doughty, Florida International University College of Law
DeVaughn Jones, American University Washington College of Law
MMTC Cathy Hughes Fellows
Danielle A. Davis, Esq., Tech and Telecom Fellow, National Urban League Washington Bureau
November 30, 2020

²⁶ *See* pp. 2-3 *supra*.

²⁷ This pleading reflects the institutional views of the 5G Fund Supporters and not necessarily the individual views of their officers, directors, or staffs.