

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

In the Matter of	)	
	)	
Establishing a 5G Fund for Rural America	)	GN Docket No. 20-32
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208 (closed)
To the Commission		

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## **Summary and Introduction**

The twenty-seven national organizations listed in the Annex (the “5G Fund Supporters”)<sup>1</sup> respectfully submit these Comments in response to *Establishing a 5G Fund for Rural America*, Notice of Proposed Rulemaking and Order, GN Docket No. 20-32, FCC 20-52, 35 FCC Rcd 3994 (released April 24, 2020) (“NPRM”).

Through the NPRM, the Commission seeks guidance on whether to undertake reverse auctions to distribute high-cost support subsidies for the provision of 5G services in rural America before, during, or after accurate mapping has been completed. The Commission also hopes to determine which rural areas to support, a question that requires the parties to recommend the best criterion for prioritization for subsidy delivery for a rural community.

Recognizing the value of 5G to deliver economic and employment opportunities, the 5G Fund Supporters recommend that the Commission prioritize expeditious distribution of high-cost support to the most impoverished rural communities, including those that primarily are home to African Americans and Hispanic Americans.<sup>2</sup> Further, to promote the Commission’s longstanding commitment to minority entrepreneurship, the 5G Fund Supporters seek the extension of the Cable Procurement Rule to wireless providers that receive high-cost support under the program<sup>3</sup> as well as guidelines for how Designated Entities (“DEs”) can qualify to participate in the 5G Fund reverse auctions and the provision of 5G service in rural areas.<sup>4</sup>

Each of the 5G Fund Supporters has members or constituents who need and may be eligible to receive 5G. The members or constituents of the 5G Fund Supporters stand to thrive

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<sup>1</sup> These Comments reflect the views of the 5G Fund Supporters, and are not intended to reflect the views of their individual officers, directors, or advisors.

<sup>2</sup> See pp. 2-13 *infra*.

<sup>3</sup> See pp. 14-16 *infra*.

<sup>4</sup> See pp. 16-19 *infra*.

economically, and have access to local job opportunities, if the 5G Fund enables 5G service to be deployed rapidly to their communities. Consequently, the 5G Fund Supporters recommend that the Commission adopt a rollout schedule under which economically depressed rural communities of color – the communities most in need of fast broadband – will be among prioritized first for high-cost support and buildout. Poverty, rather than population density (“rurality”) should be the Commission’s principal criterion for prioritizing communities. *5G is a massive antipoverty program, and thus prioritization according to poverty is entirely logical.*

To advance women and minority entrepreneurial opportunity, the 5G Fund Supporters also request the Commission to require subsidy applicants – and indeed all wireless carriers – to adopt equal procurement opportunity programs similar to those required of and embraced by MVPDs since 1993.

Finally, we ask the Commission to welcome DE bidders to the 5G Fund reverse auctions. To advance entrepreneurial opportunities for women and minority business enterprises (“WMBEs”), the Commission should clearly set out its expectations of DEs, including the qualifications necessary to participate in the reverse auctions and the service obligations of reverse auction winners.

**I. If The Commission Selects An Initial Tranche Of Fund Recipients, That Tranche Should Include The Communities Farthest Removed From Digital Equality**

Vast rural areas lack fast broadband. Looking at the country as a whole, 26.4% of the United States’ rural population does not have access to fixed terrestrial 25 Mbps/3 Mbps broadband as of 2017, which represents the most recent data reported by the FCC.<sup>5</sup>

In thinking about rural broadband, Americans far too often subconsciously equate “rural” with “White.” Yet racial and ethnic minorities, including African Americans, Hispanics, and Native

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<sup>5</sup> 2019 Broadband Deployment Report, FCC (May 29, 2019), available at <https://docs.fcc.gov/public/attachments/FCC-19-44A1.pdf> (last visited June 16, 2020).

Americans, make up twenty-two percent of America’s rural population.<sup>6</sup>

Historically, and today, rural communities of color sit at the farthest extreme side of the digital divide.<sup>7</sup> More than any other factor, systemic racial discrimination, including redlining, explains why.<sup>8</sup> Rural communities of color are underserved not because they are rural, but because for generations their residents experienced – and still experience – several badges of second-class citizenship.<sup>9</sup> It is a vicious cycle: without first-class schools and a highly paid, highly skilled labor force, these communities are unable to attract carriers to build out fast broadband. Consequently, businesses seldom invest there. That, in turn, ensures that these communities will not possess the highly skilled, well-compensated labor forces that provide a tax base capable of funding the first class schools that would have produced a first class labor force.<sup>10</sup>

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<sup>6</sup> United States Department of Agriculture, *Rural America at a Glance: 2018 Edition*, available at <https://www.ers.usda.gov/webdocs/publications/90556/eib-200.pdf> (last visited June 15, 2020).

<sup>7</sup> See Pew Research Center, *Digital gap between rural and nonrural America persists* (May 31, 2019), available at <https://www.pewresearch.org/fact-tank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists/> (last visited June 14, 2020). The Pew Research Center identified getting access to high-speed internet as a major problem in rural communities.

<sup>8</sup> Terri Friedline, Sruthi Naraharisetti & Addie Weaver, *Digital Redlining: Poor Rural Communities’ Access to Fintech and Implications for Financial Inclusion*, JOURNAL OF POVERTY, Dec. 2019, at 2–4, available at <https://doi.org/10.1080/10875549.2019.1695162> behind paywall (last visited June 15, 2020).

<sup>9</sup> *Id.*

<sup>10</sup> See Deborah Kenn, *Institutionalized, Legal Racism: Housing Segregation and Beyond*, 11 B.U. PUB. INT. L.J. 35, 48-53 (2001), available at [https://1.next.westlaw.com/Document/I2ca9d871227811dbbab99dfb880c57ae/View/FullText.html?transitionType=SearchItem&contextData=\(sc.Search\)](https://1.next.westlaw.com/Document/I2ca9d871227811dbbab99dfb880c57ae/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)) (last visited: June 14, 2020); see also Ashlee Germany, Note and Comment, “*Cause I ain’t Got No Pencil*”: A Call for Chicago Public School Funding Litigation Reform, 68 DEPAUL L. REV. 701, 701-702, 728-33 (2019), available at [https://1.next.westlaw.com/Document/I65597e3c9a2211e9adfea82903531a62/View/FullText.html?transitionType=SearchItem&contextData=\(sc.Search\)](https://1.next.westlaw.com/Document/I65597e3c9a2211e9adfea82903531a62/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)) (last visited June 14, 2020).

The Commission can break this vicious cycle by affording rural communities of color top priority for 5G Fund subsidies and the consequent network deployment.<sup>11</sup> This “virtuous cycle” would give communities of color a much-needed head start in the attracting the entrepreneurs and jobs they desperately need.

The NPRM contemplates the subsidizing of 5G service to rural communities using a prioritization criterion that sometimes would leapfrog a community directly to 5G from 2G or 3G, thereby obviating the need to build out new 4G infrastructure.<sup>12</sup> As an engineering matter, this approach appears reasonable.

With no current accurate national maps to guide deployment priorities, the Commission has proposed two options. Option A would use “current data sources that identify areas as particularly rural, and thus in the greatest need of universal service support.”<sup>13</sup> Option B would “delay the 5G Fund Phase I auction until after [the Commission] collect[s] and process[es] improved mobile broadband coverage data through the Commission’s Digital Opportunity Data Collection proceeding.”<sup>14</sup>

Two commissioners dissented to these choices. Commissioner Rosenworcel maintained that the timing of Option A and Option B “suggests we can either provide funds for more wireless service fast or we can do it accurately . . . we need to do both”;<sup>15</sup> Commissioner Starks stated that Option A “could mean that the vast majority of our high-cost support is spent chasing bad data

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<sup>11</sup> It should not be difficult for the Commission to identify the Census blocks where high-poverty rural communities are located and thus prioritize them in the manner of RDOF for tribal and below 10/1 areas. In fact, they should be prioritized for the upcoming RDOF as well as for the 5G Fund.

<sup>12</sup> NPRM at 3 ¶3.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 3 ¶4.

<sup>15</sup> *See* NPRM, Statement of Commissioner Jessica Rosenworcel, Concurring in Part and Dissenting in Part (“Rosenworcel Dissent”), at 119.

for another decade. For these reasons, Option A should not even be up for consideration.”<sup>16</sup>

As further detailed below, the 5G Fund Supporters believe that a hybrid of Option A and Option B would be the best policy choice. Specifically, the Commission should create and prioritize an Initial Tranche for immediate roll-out. It would include the communities that are most in need of closing their digital divides, applying the well-known principle that “the last shall be first.”

The Second Tranche would consist of all other communities. Hopefully, they would be identified accurately and expeditiously by a new set of mobile coverage mapping data, as Commissioner Rosenworcel suggests.

“Rurality” – the NPRM’s recommended criterion for choosing which communities to build out first<sup>17</sup> – is the wrong criterion. Using “rurality,” meaning low population density, some wealthy rancher and resort communities would qualify, but many desperately poor communities would not.<sup>18</sup>

Instead, the Commission should place, at the top of the rollout schedule, the communities most often historically to have been served last, if they were served at all. These include:

- Rural African American communities, including the Freedmen’s Towns founded by former slaves after the Civil War;
- Rural Hispanic communities; and

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<sup>16</sup> See NPRM, Statement of Commissioner Geoffrey Starks, Concurring in Part and Dissenting in Part (“Starks Dissent”), at 121 (emphasis in original).

<sup>17</sup> See NPRM at 10 ¶¶24-25; see also *id.* at 12 n. 56 (recommending population density as a metric for rurality). The Commission did point out that areas exist that “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 13 ¶33. Such areas frequently are the home to communities of color.

<sup>18</sup> In the NPRM, the Commission stated that “[a]s the deployment of 5G service has primarily been focused on urban environments to date, we expect the degree of rurality of an area can provide a reasonable estimate of the areas where 5G is unlikely to be deployed absent federal support.” *Id.* at 10 ¶24. No evidence was provided to support this conclusion. Nor did the NPRM address the issue of whether prioritizing often-wealthy ranches ahead of impoverished rural communities of color could amount to “redlining” and thus widen the digital divide.

- Native Lands, Alaskan Native Villages, Puerto Rico, and the U.S. Virgin Islands.<sup>19</sup>

Rural communities populated almost entirely by people of color are most in need of state-of-the-art broadband. These communities have been left behind in broadband service, job creation, health care, and education. They need a head start to catch up with the rest of the nation, both in broadband service and in the wide range of opportunities that will present themselves in the wake of prompt initiation of 5G service. As the Commission declared in the NPRM, “[d]uring this transition to 5G service, we therefore reaffirm our commitment to using Universal Service Fund support to close the digital divide and to make sure that parts of rural America are not left behind.”<sup>20</sup>

The Commission estimates that if it adopts Option A, it would spend \$8 billion on the Initial Tranche and over \$1 billion on the Second Tranche.<sup>21</sup> However, under Option A as proposed in the NPRM, it is unclear what would happen if the Commission doesn’t reach all of the most underserved communities when it spends the Initial Tranche’s \$8B. To avoid this scenario, we recommend a hybrid approach, under which:

- The areas most in need would comprise most or all of the Initial Tranche, and
- All other rural areas would be handled once accurate mapping is done, preferably within one year.

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<sup>19</sup> This proceeding does not address “areas served by price cap carriers in Alaska, Puerto Rico, and the U.S. Virgin Islands, all of which declined model-based support and for which the Commission has already adopted other programs to close the digital divide.” *See Rural Digital Opportunity Fund Report and Order*, WC Docket No. 19-126, FCC 20-5, 35 FCC Rcd 686, 691 n. 23 (rel. February 7, 2020); *see also* NPRM at 11 n. 47, and FCC News Release, “FCC Authorizes \$237.9 Million to Expand, Improve, and Harden Mobile Broadband Networks in Puerto Rico and U.S. Virgin Islands; Includes First Universal Service Funding Targeted Specifically for 5G Deployment (June 15, 2020), available at <https://docs.fcc.gov/public/attachments/DOC-364921A1.pdf> (last visited June 15, 2020). The NPRM makes a fair attempt to address and prioritize 5G buildout to Native Lands. *See NPRM* at 14 ¶¶42 (regarding budget set aside for Native Lands) and 16–17 ¶¶47–54 (regarding details of the plan to support buildout on Native Lands).

<sup>20</sup> NPRM at 2-3 ¶1.

<sup>21</sup> *Id.* at 3 ¶¶2 and 5.

The areas most in need are those for which years of neglect and Jim Crow segregation left the areas without fast broadband and with a limited economic future.<sup>22</sup> These areas include rural African American communities, especially Freedmen’s Towns, and rural Hispanic communities.

**A. Rural African American Communities, Such As Shaw, MS, Weirwood, VA, And Marion, AL; And Freedmen’s Towns Such As Vernon, OK**

There are approximately 902 communities with populations less than 25,000 that are comprised primarily and often almost entirely of African Americans.<sup>23</sup> Of these, seventy-two are “Freedmen’s Towns,” founded by newly freed African Americans after the Civil War. Thirteen of the Freedmen’s Towns are in Oklahoma; several of these towns appear to have only slow, if any, broadband service.<sup>24</sup> The thirteen Freedmen’s Towns in Oklahoma struggle to survive.<sup>25</sup>

Most primarily African American rural communities experience levels of poverty comparable to that seen in many Third World countries.<sup>26</sup> Virtually the entire Mississippi Delta is impoverished,<sup>27</sup> including small towns like Shaw, MS with a history of extreme and official redlining.<sup>28</sup>

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<sup>22</sup> An unfortunate omission in the NPRM was any discussion of how to make the networks affordable. This topic should be front and center in any subsequent NPRM.

<sup>23</sup> See Wikipedia, List of U.S. communities with African-American Majority populations in 2000 (and similar Wikipedia lists for the 2000 or 2010 Census (“Wiki Lists”), available at [https://en.wikipedia.org/wiki/List\\_of\\_U.S.\\_communities\\_with\\_African-American\\_majority\\_populations\\_in\\_2000](https://en.wikipedia.org/wiki/List_of_U.S._communities_with_African-American_majority_populations_in_2000) (last visited June 10, 2020).

<sup>24</sup> Conversations of co-counsel with longtime Vernon residents (2019 and 2020).

<sup>25</sup> See Archiebald Browne, *Oklahoma’s historic all-black towns; Built of hope, survived by pride*, NONDOC.COM, (July 25, 2019), available at <https://nondoc.com/2019/07/25/oklahoma-historic-all-black-towns/> (last visited June 15, 2020).

<sup>26</sup> *Rural Poverty & Well-Being*, U. S. DEP’T OF AGRIC. (Feb. 12, 2020), available at <https://www.ers.usda.gov/topics/rural-economy-population/rural-poverty-well-being/#demographics> (last visited: June 14, 2020) (“Nonmetro Blacks/African Americans had the highest incidence of poverty in 2018 (31.6 percent).”); *Population Below Poverty Line*, INDEXMUNDI <https://www.indexmundi.com/g/r.aspx?v=69> (last visited June 15, 2020) (graph representing the property levels of 173 countries).

<sup>27</sup> See Alex Rozier, *Delta Poverty, Food Insecurity Still Worse than State, U.S. Averages*, MISSISSIPPI TODAY (July, 14, 2017), <https://mississippitoday.org/2017/07/14/delta-poverty-and->

In 2009, the Commission acknowledged this scenario as to Weirwood in Northampton County on the Virginia Eastern Shore.<sup>29</sup> It is a 100% African American, bitterly poor unincorporated town, just five hours from Washington, D.C. The town sits atop the ruins of a former cotton plantation whose proprietor owned the ancestors of today's generation of Weirwood residents. Most of Weirwood's homes are shacks with no indoor plumbing or safe drinking water; many lack glass windows, and almost none have three-prong electrical sockets. The only substantial business in town is a blues club and community center. The club would like to offer an after-school computer learning facility for the town's children, but it cannot do that because Weirwood, as well as other small towns in Northampton County, has 3G but generally not 4G broadband.<sup>30</sup> Weirwood is exactly the kind of town that needs 5G broadband to rescue itself from three centuries of brutal poverty and to achieve, for its people, some measure of human dignity, hope, and first class citizenship in the digital age.

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[food-insecurity-still-worse-than-state-u-s-averages/](#) (last visited June 14, 2020); *see also* Emily Wagster Pettus, *Entrenched Proverty Though to Shake in the Mississippi Delta*, Clarion Ledger (Aug. 8, 2017), <https://www.clarionledger.com/story/news/2017/08/07/mississippi-delta-poverty/544601001/> (last visited June 14, 2020) (“The national poverty rate is about 15 percent; it's 22 percent for Mississippi. In most Delta counties, it's 30 to 40 percent.”)

<sup>28</sup> *See Hawkins v. Town of Shaw Mississippi*, 437 F. 2d 1286 (5<sup>th</sup> Cir. 1971) (finding that the town of Shaw, Mississippi had provided various municipal services, including street paving, street lighting, sanitary sewers, surface water drainage, water mains, and fire hydrants in a discriminatory manner based on race).

<sup>29</sup> *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 09-137, Sixth Broadband Deployment Report, 24 FCC Rcd 10505, 10519 n.98 (2009) (citing Weirwood, VA as an example of a depressed community, near the nation's capital, lacking in broadband service.)

<sup>30</sup> Interviews by David Honig with Jane Cabarrus, President of the Northampton County, VA Branch of the NAACP, and Spencer Murray, former Chair of the Northampton County Board of Supervisors, June 15, 2020.

The bone-chilling poverty in Weirwood and dozens of communities like it is no accident: it is the structural result of generations of still-unremedied disparities in government services based on race. Rural communities of color have been redlined with such discriminatory practices as being denied credit, insurance, and other services that contribute to the creation of a viable financial base for any community.<sup>31</sup> As a result of this systematic and unremedied discrimination, these communities lack the access to capital needed to draw broadband services into their communities.

Marion, AL presents an additional heart-rending example. Francis Marion Elementary, a school in Marion, has a student population that is ninety-nine percent African American. More than seventy percent of the students at Francis Marion are economically disadvantaged.<sup>32</sup> The school, which is located in Perry County, a highly rural community, was part of a digital learning case study and was chosen due to its history of pushback on racial segregation. As of 2018, Perry County had an all-time low broadband access of only thirty-nine percent of households having access to the internet.<sup>33</sup> The Pew Research Center also reported that African Americans, as well as Latinos, are “smartphone dependent” where they have a heavy reliance on

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<sup>31</sup> See generally Christian E. Weller, *Access Denied: Low-Income and Minority Families Face More Credit Constraints and Higher Borrowing Cost*, Center for American Progress (2007), available at [https://cdn.americanprogress.org/wp-content/uploads/issues/2007/08/pdf/credit\\_access.pdf](https://cdn.americanprogress.org/wp-content/uploads/issues/2007/08/pdf/credit_access.pdf) (last visited June 12, 2020); see also Gregory D. Squires and Ruthanne DeWolfe, *Insurance Redlining in Minority Communities*, *The Review of Black Political Economy*, at 347-364 (2007); see generally Institute of Medicine, *Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care*, Brian Smedley *et al.*, eds. (2003), available at [http://www.nap.edu/openbook.php?record\\_id=10260&page](http://www.nap.edu/openbook.php?record_id=10260&page) (last visited June 12, 2020).

<sup>32</sup> *Id.*

<sup>33</sup> Coper, Tyler, US States With the Worst and Best Internet Coverage 2018, BROADBANDNOW, Aug. 14, 2018, <https://broadbandnow.com/report/us-states-internet-coverage-speed-2018/> (last visited May 5, 2020).

smartphones or mobile devices as a gateway to the internet.<sup>34</sup> Not only do they lack computers to do their work, many students at Francis Marion Elementary must use fast food parking lots to get the Wi-Fi they need to complete work or assignments while the school was closed.<sup>35</sup>

Many rural American schools operate in a similar nature to that of Francis Marion. However, the school was given recognition and an opportunity that most rural schools do not have. The case study conducted on Francis Marion Elementary involved a program where iPads were distributed to students so they could experience digital learning.<sup>36</sup> But despite this digital learning concept, students still could not connect the devices to Wi-Fi at home, where many did not have broadband access.<sup>37</sup> Their families simply could not afford it.

Francis Marion illustrates how students of color often fall behind academically. Regardless of technology devices being distributed to students, many rural American students are still unable to access the internet, and worse, certain neighborhoods where students live may not be on the Commission's map altogether. Without the Commission arranging for expeditious buildout of fast broadband, children who live in underserved communities may never catch up to their peers.

#### **B. Rural Hispanic Communities, Such As Chimayo, NM, Roma, TX, and Immokalee, FL**

There are approximately 991 rural, primarily Hispanic communities with populations of less than 25,000.<sup>38</sup> These communities are primarily comprised of farm laborers,<sup>39</sup> who often are

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<sup>34</sup> Mobile Fact Sheet, PEW RESEARCH CENTER: INTERNET & TECHNOLOGY, Jun. 12, 2019, <https://www.pewresearch.org/internet/fact-sheet/mobile/> (last visited June 16, 2020).

<sup>35</sup> See Paul Gattis, Why are kids doing their homework in McDonald's Parking Lot?" Alabama.com (January 29, 2019), available at [https://www.al.com/news/huntsville/2018/09/why\\_are\\_kids\\_doing\\_their\\_homew.html](https://www.al.com/news/huntsville/2018/09/why_are_kids_doing_their_homew.html) (last visited June 13, 2020).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See Wiki Lists, *supra*.

recent immigrants trying to survive in a new country despite high barriers to success.<sup>40</sup> Most of these communities are in California, Arizona, New Mexico, and Texas;<sup>41</sup> other states with several of these communities are located in Florida, Illinois, Oregon, and Washington.<sup>42</sup> Most rural Hispanic communities are desperately poor<sup>43</sup> and urgently in need of the economic opportunities derived from high speed broadband.

In Chimayo, located in north-central New Mexico, Hispanics make up more than 90% of the population.<sup>44</sup> As of 2018, only 41.8% of the people in Chimayo had broadband access.<sup>45</sup>

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<sup>39</sup> See Marcel Honoré, *Proud, Self-reliant Mecca 'A Very United Community,'* THE DESERT SUN (Mar. 25, 2012), <https://web.archive.org/web/20150215082903/http://archive.desertsun.com/article/20120325/NEWS07/203240350/Mecca-proud-self-reliant-united-community-Desert-Sun-investigation-iSun> (last visited June 15, 2020); see also Gus Bova & Christopher Collins, *These Rural Panhandle Towns Should be Shrinking. But Thanks to Immigrants, They're Booming,* TEXAS OBSERVER (Jan. 3, 2019), available at <https://www.texasobserver.org/these-rural-panhandle-towns-should-be-shrinking-but-thanks-to-immigrants-theyre-booming/> (last visited June 14, 2020).

<sup>40</sup> See Farmworkers in the United States, MHPSALUD.ORG, available at <https://mhpsalud.org/who-we-serve/farmworkers-in-the-united-states/> (last visited: June 14, 2020); see also Matthew Webster, "Jobs Americans Won't Do": Our Farming Heritage, Hazardous Harvests, and a Legislative Fix, 29 LAW & INEQ. 249, 249-63 (2011), available at <https://advance.lexis.com/document/?pdmfid=1000516&crd=0c24d988-862e-483b-bd80-655eec6d8096&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5299-M440-00CV-70K0-00000-00&pdcontentcomponentid=146215&pdteaserkey=sr8&pditab=allpods&ecomp=kxdsk&earg=sr8&prid=3e90eeb0-7dd5-4516-9c52-daeaf288b86b#> (last visited June 14, 2020).

<sup>41</sup> See Wiki Lists, *supra*.

<sup>42</sup> *Id.*

<sup>43</sup> See Teresa Wiltz, *Hispanic Poverty in Rural Areas Challenges States*, THE PEW CHARITABLE TRUSTS, <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/08/14/hispanic-poverty-in-rural-areas-challenges-states> (last visited June 14, 2020) ("Forty-seven percent of rural Hispanic babies are born poor"); see also William Kandel, *RURAL HISPANICS AT A GLANCE* (2005), available at [https://www.ers.usda.gov/webdocs/publications/44570/29566\\_eib8\\_002.pdf?v=1622](https://www.ers.usda.gov/webdocs/publications/44570/29566_eib8_002.pdf?v=1622) (last visited June 14, 2020).

<sup>44</sup> *Chimayo, NM*, DATA USA, available at <https://datausa.io/profile/geo/chimayo-nm> (last visited June 15, 2020).

The people of Chimayo suffer from a median income barely half that of New Mexico as a whole (\$27,060 for Chimayo, compared to \$46,718 for the state as of 2017).<sup>46</sup>

A similarly sad situation exists in Roma, Texas, a small city near the southern tip of the Mexican border. The population of Roma is more than 99% Hispanic, but only 44% of the people enjoy broadband internet access.<sup>47</sup> The people of Roma have a median household income of only \$22,886, compared to \$59,570 for the state as of 2018.<sup>48</sup>

Immokalee, Florida, located in the sugar cane fields adjacent to Lake Okeechobee, suffers from having less than half of population (49.5%) with access to broadband internet.<sup>49</sup> The people of Immokalee are desperately poor, having a median household income of only \$30,426, compared to \$53,267 for the state of Florida.<sup>50</sup>

### **C. The Initial Tranche Can Be Filled On A Race-Neutral Basis**

Finally, we address whether the Commission can prioritize communities by taking their race of most of their residents into consideration. We believe the answer is “yes” because the damage done to these communities by redlining and other practices occurred *because of race*.<sup>51</sup>

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<sup>45</sup> *Chimayo CDP, NM*, US Census Bureau, available at <https://www.census.gov/search-results.html?searchType=web&cssp=SERP&q=Chimayo%20CDP,%20NM> (last visited June 15, 2020).

<sup>46</sup> *Chimayo, NM*, *supra* note 44.

<sup>47</sup> US Census Bureau, available at <https://www.census.gov/quickfacts/fact/table/TX,romacitytexas,US/INT100218> (last visited June 16, 2020).

<sup>48</sup> *Id.*

<sup>49</sup> US Census Bureau, available at <https://www.census.gov/quickfacts/fact/table/FL,immokaleecdpflorida,US/INT100218> (last visited June 16, 2020).

<sup>50</sup> *Id.*

<sup>51</sup> *See* Statement of the Federal Communications Commission Advisory Committee on Diversity and Digital Empowerment, Public Notice, DA 20-615 (released June 11, 2020), available at <https://docs.fcc.gov/public/attachments/DA-20-615A1.pdf> (last visited June 11, 2020)

But the Commission need not reach that question because, as it happens, the reason for placing a community in the Initial Tranche is to help the community combat systemic poverty: *5G is a massive antipoverty program, and thus prioritization according to poverty is entirely logical.*

Classification by degree of poverty – a race-neutral methodology – will result in the inclusion of virtually all rural communities of color. Almost no rural communities of color are thriving economically. While a handful of fairly prosperous communities are comprised disproportionately of people of color (*e.g.* Forestville, MD), for the most part such communities are not rural: instead, they are suburbs of wealthy cities.

Additionally, the Commission may – and should – place Freedmen’s Towns in the Initial Tranche – not only because of these communities’ high degree of poverty, but also because these towns are defined by their historic mission of “creat[ing] community, self-reliance, and prosperity”, rather than by the race of most of their inhabitants.<sup>52</sup> For equal protection purposes, Freedmen’s Towns closely resemble Historically Black Colleges and Universities (“HBCU’s”), which are recognized by their mission and not by the race of many of their students.<sup>53</sup>

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(“Recurring racial violence and hostility against the Black community, compounded by the disparate impact of the COVID-19 pandemic on communities of color, have lain bare the ages-old social, health, and economic inequities and systemic racism that continue throughout the country.”) Remediation of past and present discrimination can be undertaken using race-conscious remedies upon a record that must include a comprehensive disparity and causation study (known as an “*Adarand* Study” after *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (applying strict scrutiny to remedial affirmative action contracting programs). The FCC has not performed an *Adarand* study since 2000. *See, inter alia*, Ivy Planning Group, “Whose Spectrum Is It Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing – 1950 to Present” (2000); *see also* Staff Executive Summary (December 10, 2000) (available from counsel).

<sup>52</sup> *See* Darold Cuba, *The Importance of Preserving the Histories of Freedmen’s Towns*, Houston Center For Photography (2019), available at <https://hconline.org/spot/the-importance-of-preserving-the-histories-of-freedmens-towns/> (last visited June 14, 2020).

<sup>53</sup> *See United States v. Fordice*, 505 U.S. 717, 745-49 (1992) (Thomas, J.) (stating that the court did not “foreclose the possibility there exists ‘sound educational justification’ for maintaining historically black colleges as such.”)

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

Since 1993, when the Commission adopted the Cable Procurement Rule, cable companies have been required to provide equal procurement opportunity when they let major contracts.<sup>54</sup> In 2008, the Commission’s Advisory Committee on Diversity for Communications in the Digital Age recommended that the Commission consider “adopting procurement requirements . . . for other FCC-regulated industries, including broadcasting, wireline, wireless and satellite.”<sup>55</sup> MMTC made a similar request in 2010.<sup>56</sup> Yet despite the Commission’s long and successful experience enforcing the Cable Procurement Rule, the Commission did not act on this proposal.

In 2018, the Commission sought comment on whether to extend the Cable Procurement 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.<sup>57</sup> In *Prometheus IV*, the Court found the speed of the Commission’s review of the procurement proposal to be sufficient.<sup>58</sup> However, three years later, nothing has been done to consider extending the Cable

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<sup>54</sup> 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”). The rules (with the same language) are found at 47 C.F.R. §76.75(e).

<sup>55</sup> 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> (last visited June 15, 2020) (recommending that the Commission examine extending the procurement requirements to all platforms).

<sup>56</sup> 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 June 13, 2020).

<sup>57</sup> 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 Telecomms. 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.”

<sup>58</sup> See *Prometheus IV*, 933 F.3d at 589 (holding that the FCC had not “unreasonably delayed action on the proposal to adopt procurement rules for the broadcasting industry.”)

Procurement Rule to other industries. The time for a decision is long overdue.<sup>59</sup>

Fortunately, the Commission has nearly 30 years of entirely positive experience with the Cable Procurement Rule. The Rule eliminated cable systems' exclusive reliance on the "old boy network" that fed information about potential opportunities only to select companies. Under the Rule, cable companies post contracting opportunities broadly – primarily online – and notify organizations specializing in developing WMBEs, such as universities and Urban League chapters. There is no requirement to engage any particular contractor, but providing equal opportunity to apply removes a barrier to entry for WMBEs. Indeed, broad procurement is standard practice throughout most of the federal government.<sup>60</sup> Broad recruitment not only helps small business, it also enables the carriers to enjoy better contract prices when more qualified companies bid for work.

The Cable Procurement Rule is a model civil rights regulation, widely appreciated by minority entrepreneurs and universally observed and embraced by the industry. The Cable Procurement Rule has delivered extensive economic opportunity to WMBEs. Extending the Cable Procurement Rule to wireless would be especially straightforward since the needs and opportunities presented by the deployment of wireless are similar to the needs and opportunities

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<sup>59</sup> See *Multicultural Media, Telecom and Internet Council v. FCC*, 873 F.3d 932, 940 (D.C. Cir. 2017) (Kavanaugh, J.) (holding that in light of the agency's twelve-year delay in considering a proposal for multilingual emergency broadcasting, the agency "should move expeditiously in finally deciding whether to impose a multi-lingual requirement on broadcasters . . . . At some point, the FCC must fish or cut bait with this question.")

<sup>60</sup> 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 June 14, 2020). Contractors can comply with this by posting "[a] broad agency announcement that is general in nature identifying areas of research interest, including criteria for selecting proposals, and soliciting the participation of all offerors capable of satisfying the Government's needs." *Id.*, Subpart 6.102.

presented by cable, including the deployment and maintenance of towers and transmitters and the laying of miles of fiber.

Finally, the concept of broad, race-neutral recruitment is settled law and policy. The Cable Procurement Rule ensures that all qualified applicants, including those owned by minorities and women, can learn about and apply for procurement opportunities. That is eminently fair and entirely unobjectionable.<sup>61</sup>

Consequently, the Commission should extend the Cable Procurement Rule to wireless, thereby ensuring that WMBEs will learn about, and can apply for, the many procurement opportunities that will owe their creation to the 5G Fund.<sup>62</sup>

### **III. The Commission Should Welcome Designated Entity (“DE”) Participation In The Reverse Auction And Clearly Set Out Its Expectations Of DEs**

When Congress directed the Commission to assign spectrum licenses via auctions, it directed the FCC to create the Designated Entity (“DE”) program to ensure that spectrum

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<sup>61</sup> See *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 17 FCC Rcd 24018, 24020 (2002) (holding that race-conscious recruitment of minorities on the then-current record would be subject to strict scrutiny, but encouraging broad outreach inclusive of minorities would be analyzed under rational basis review and would be permissible).

<sup>62</sup> We believe the NPRM contains sufficient notice that the Commission might apply procurement regulations to wireless. See NPRM at 4148 ¶160 (referring to the “5G Fund public interest obligations and performance requirements”); *id.* at 4150-51 ¶173 (again referring to “the public interest obligations and performance requirements” and seeking comment on “whether there are *any other program related certifications we should require*” (emphasis supplied)). Similar language of the broad scope of a notice of proposed rulemaking can be found in, *e.g.*, the rulemaking notice opening the incubator program for comment. *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*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802, 9859 (2017) (“With this NPRM, we seek comment on how to design and implement our incubator program to support the entry of new and diverse voices in the broadcast industry. Specifically, we seek comment on the structure, review, and oversight of a comprehensive incubator program that will help create new sources of financial, technical, operational, and managerial support for eligible broadcasters.”). If the Commission did not intend to entertain comments on procurement, it should amend the NPRM now to avoid a scenario in which the agency adopts 5G Fund rules but has to conduct yet another rulemaking aimed just at procurement.

licenses were disseminated among a wide variety of applicants, including WMBEs.<sup>63</sup> Initially the DE program was successful, with more than 1,400 DEs winning licenses via auction in the first ten years of the program.<sup>64</sup> In recent years, however, the DE program has been woefully inadequate in fostering spectrum auction participation (and thus the provision of communications services) by WMBEs.

One bright spot in an otherwise disappointing recent state of affairs is Auction 97, which occurred in 2014-15.<sup>65</sup> DEs in that auction materially contributed to net auction proceeds in Auction 97 in excess of \$40 billion, raising significant funds for FirstNet, the Spectrum Relocation Fund, and the U.S. Treasury.<sup>66</sup> Without DEs, that auction would have merely raised a fraction of these revenues and the potential for increased competition in the provision of mobile broadband services would have been practically nil.<sup>67</sup>

It is important for consumers and competition that the Commission maintain a robust and meaningful commitment to WMBE participation in the future 5G Fund reverse auctions. The Minority Business Development Agency has found that WMBEs generate \$1.4 trillion in gross

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<sup>63</sup> See S. Jenell Trigg & Jeneba Jalloh Ghatt for the Minority Media and Telecommunications Council, *Digital Déjà Vu: A Road Map for Promoting Minority Ownership in the Wireless Industry*, GN Docket No. 12-268, at iv (filed Feb. 27, 2014) (“Digital Déjà Vu”).

<sup>64</sup> See FCC Report to Congress on Spectrum Auctions, Federal Communications Commission, Wireless Telecommunications Bureau, FCC 97-353, at 34 (1997) (citing the large number and value of licenses won by DEs over the first 14 auctions conducted by the FCC). See also Gregory Rose and Mark Lloyd, *The Failure of FCC Spectrum Auctions*, Center for American Progress, 19-20 (2006).

<sup>65</sup> See, e.g., Marguerite Reardon, FCC Rakes in \$45 Billion from Wireless Spectrum Auction, CNET (Jan. 29, 2015), <http://www.cnet.com/news/fcc-rakes-in-45-billion-from-wireless-spectrum-auction/>.

<sup>66</sup> *Id.*

<sup>67</sup> See Letter from John Muleta, CEO, Atelum LLC, to Marlene Dortch, Secretary, FCC, WT Docket No. 14-170, GN Docket No. 12-268, RM-11395, WT Docket No. 05-211, at 5 (filed June 25, 2015).

receipts annually to the U.S. economy.<sup>68</sup> WMBEs address needs that are often ignored by large incumbent carriers and offer new and meaningful avenues for boosting service quality and competition by recruiting, hiring, and developing talented minority and women employees.<sup>69</sup> Results like these should fuel, not deter, the Commission's efforts to strengthen WMBE participation because the need for WMBE participation in the communications industry today is as great or greater than it was in 1993.

Recognizing this, the Commission should welcome DEs to the 5G Fund reverse auction. In doing so, the Commission should avoid the confusion that often results from esoteric or vague requirements and policies by clearly setting out its expectations of reverse auction participants and winners, including DEs. For example, the ongoing saga of SNR Wireless and Northstar Wireless and the associated years of legal entanglements and costs demonstrate what happens when FCC guidance is unclear.<sup>70</sup> Such ambiguities in the Commission's interpretation of its requirements for reverse auction winners could similarly lead to years of legal entanglements and costs, with the resulting harm falling squarely on the residents of rural areas in need of service.

The Commission's Office of Communications and Business Opportunities ("OCBO") could play a constructive role in educating DEs on the opportunities presented by the 5G Fund and the Commission's expectations of reverse auction participants and winners. As the Commission has sometimes done in the context of the more traditional forward spectrum auctions,<sup>71</sup> use of OCBO to disseminate information about the reverse auctions could result in more DE participation and a much more educated base of DEs that are prepared to provide

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<sup>68</sup> See Fact Sheet, Impact of Minority Businesses on the U.S. Economy, Minority Business Development Agency (last visited June, 18, 2020), <https://www.mbda.gov/page/infographic-impact-minority-businesses-us-economy>.

<sup>69</sup> Digital Déjà Vu at 25.

<sup>70</sup> See *SNR Wireless LicenseeCo, LLC v. FCC*, 868 F.3d 1021 (D.C. Cir. 2017).

<sup>71</sup> See, e.g., *Rural Digital Opportunity Fund Phase I Auction*, Notice and Filing Requirement and Other Procedures for Auction 904, FCC-20-77, ¶ 341 (“[A]s proposed, the Commission's Office of Communications Business Opportunities will engage with small providers interested in the auction process.”)

robust and meaningful service in the areas targeted by the 5G Fund.

Lastly, in the reverse auctions, the Commission should continue its longstanding policy of conferring with DEs to help them address any *de facto* control concerns stemming from their relationships with large companies.<sup>72</sup> The Commission has long recognized the benefits of allowing WMBEs to partner with larger, more established companies.<sup>73</sup> Such benefits extend to the provision of 5G service in unserved and underserved areas. Providing clear guidance regarding the permissible scope of such relationships would help alleviate much of the uncertainty that otherwise plagues the auction process generally for DEs.<sup>74</sup>

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<sup>72</sup> See National Association of Black-Owned Broadcasters, Inc., and Multicultural Media, Telecom and Internet Council, Comments in Support of Grant of Bidding Credits, File Nos. 0006670667, 0006670613, 0008243669 and 0008243409, at 1 (May 15, 2018) (“NABOB-MMTC Letter”).

<sup>73</sup> See *Updating Part 1 Competitive Bidding Rules*, Report and Order, 30 FCC Rcd 7493, ¶ 19 (2015). (“[B]y allowing relationships between DEs and ‘large, successful entities, including mobile wireless incumbents,’ DEs will be able to acquire the capital needed to win licenses and ‘participate in the provision of spectrum-based services.’”)

<sup>74</sup> See NABOB-MMTC Letter at 3 (“Applicants simply can’t afford to sink costs into a program that is implemented . . . based on who guesses the right answers to technical questions.”)

Respectfully submitted,

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June 25, 2020

## ANNEX

### 5G Fund Supporters

1. Black Female Founders
2. Blacks in Government
3. Dialogue on Diversity, Inc.
4. Hispanic Federation
5. International Black Broadcasters Association (IBBA)
6. MANA, A National Latina Organization
7. League of United Latin American Citizens (LULAC)
8. Multicultural Media, Telecom and Internet Council (MMTC)
9. National A. Philip Randolph Institute
10. National Action Network
11. National Association for the Advancement of Colored People (NAACP)
12. National Association of Black County Officials (NABCO)
13. National Association of Black Owned Broadcasters (NABOB)
14. National Association of Multicultural Digital Entrepreneurs (NAMDE)
15. National Bankers Association
16. National Black Caucus of State Legislators (NBCSL)
17. National Coalition on Black Civic Participation
18. National Congress of Black Women
19. National Diversity Coalition
20. National Newspaper Publishers Association (NNPA)
21. National Organization of Black County Officials (NOBCO)
22. National Organization of Black Elected Legislative Women (NOBEL Women)
23. National Puerto Rican Chamber of Commerce
24. National Urban League
25. Rainbow-PUSH Coalition
26. Transformative Justice Coalition
27. U.S. Black Chambers