

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Petition for Rulemaking) RM - _____
To Establish a Content Vendor)
Diversity Report)
_____)

**PETITION FOR RULEMAKING TO
ESTABLISH A CONTENT VENDOR DIVERSITY REPORT
BY
FUSE, LLC.**

**COMMON CAUSE, NATIONAL HISPANIC MEDIA COALITION, PUBLIC
KNOWLEDGE, UNITED CHURCH OF CHRIST MEDIA JUSTICE MINISTRY**

David Goodfriend, Esq.
The Goodfriend Group
208 I Street N.E.
Washington, DC 20002

Counsel for FUSE, LLC

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction And Summary.	1
II. The Commission Should Establish an Annual Report on Regulatees' and their Commonly Owned Video Streaming Services' Content Vendor Diversity.	2
III. Monitoring content vendor source diversity would promote the Communications Act's and the FCC's policy goals of competition and viewpoint diversity.	7
A. Competition	7
B. Viewpoint Diversity	8
IV. The Commission Has Legal Authority to Establish a Programming Vendor Diversity Report.	12
A. Data collection serves a core government function.	12
B. Collecting and publishing content vendor diversity data will promote diversity and inclusion and is consistent with industry practice.	13
C. The Communications Act authorizes the Commission to collect data and produce a content vendor diversity report.	15
1. Authorization for Communications Marketplace Report including market entry barriers	15
2. MVPD procurement nondiscrimination	17
D. Reporting diversity metrics is a constitutional and well-established means of encouraging diversity and inclusion.	19
V. Conclusion.	20

**PETITION FOR RULEMAKING:
ESTABLISH A CONTENT VENDOR DIVERSITY REPORT**

I. Introduction And Summary.

The video marketplace is at an inflection point, with new technological modes of delivering content, new business models, and new consumer demands evolving at an accelerating pace. At the same time, U.S. demographics change constantly, with communities of color growing as a proportion of the overall population. The Commission is charged with promoting competition and diversity in the video marketplace yet, despite multiple information-gathering dockets, currently fails regularly to collect and report on data regarding the demographic diversity of vendors providing one of the most critical inputs to the video marketplace: content.

The Commission should establish a new, annual report regarding the diversity of content vendors used by regulatees in broadcast, cable, broadband and satellite. This should include all content vendors, whether they provide content for the regulatee's traditional, FCC-regulated services, or online streaming platforms owned or affiliated with the regulatees. Such a report would serve the twin purposes of enhancing Commission decision-making and informing the public. Collecting data on the diversity of content vendors would help the Commission to better implement its goals of promoting competition and viewpoint diversity in the video marketplace. Collecting data from all of the regulatee's services will not only provide a fuller picture of the regulatee's overall commitment to diversity, but would allow the Commission to compare viewpoint diversity and competition across different services. It also would help to inform the public regarding the practices of competing firms in the video market, allowing consumers to make decisions about which services to consume in the same way that a nutrition label helps consumers decide what food to buy, or an Environmental, Social, and Governance report helps investors decide what stocks to buy.

The Commission has ample authority to implement a content vendor diversity report. In addition to providing critical data necessary to promote competition and viewpoint diversity in the video marketplace, such a report would fall within the Commission's authority and responsibility to issue its regular Communications Marketplace Reports, including with respect to barriers to entry. Moreover, the Supreme Court has made clear that the collection of demographic data in order to further a governmental interest is constitutional, while long-standing policies implemented by the Office of Management and Budget, along with myriad other federal agencies, show that such data collection is routine. Finally, courts have established that the collection and disclosure of diversity data as a viable means of promoting diversity in multiple contexts.

II. The Commission Should Establish an Annual Report on Regulatees' and their Commonly Owned Video Streaming Services' Content Vendor Diversity.

At a moment of sweeping change in the video marketplace, including explosive growth in online, "over-the-top" ("OTT") video streaming services, cord-cutting, recent and perhaps future consolidation among traditional video platforms such as broadcasting, cable, and satellite, together with new technology platforms entering the video marketplace, the Commission should gather and report on relevant data that reflect current market realities and inform forward-looking decision-making. Particularly in light of the Commission's charge to promote competition and diversity in the video market, it should collect detailed, up-to-date information on key metrics in a transparent fashion, and make such data readily available to the public. Unfortunately, despite multiple ongoing information-gathering dockets, the Commission currently does not regularly collect and report on data regarding the diversity of vendors providing one of the most critical inputs of the video marketplace: content.

The Commission should establish a new, annual report regarding the diversity of content vendors used by licensees in broadcast, cable, broadband and satellite, including licensees' affiliated or commonly owned streaming video distribution platforms not regulated by the FCC. Alternatively, the Commission should establish a new section of an existing annual report, such as the Communications Marketplace Report, reflecting such data.

A content vendor diversity report (hereinafter, "CVDR") would serve the twin purposes of enhancing Commission decision-making and informing the public. As discussed in more detail below in Section III, collecting data on the diversity of content vendors would help the Commission to better implement the twin goals of promoting competition and viewpoint diversity in the video marketplace. It also would help to inform the public regarding the practices of competing firms in the video market, allowing consumers to make decisions about which services to purchase in the same way that a nutrition label helps consumers decide what food to buy, or an Environmental, Social, and Governance report helps investors decide what stocks to buy.

The CVDR should establish an objective set of quantifiable metrics that will allow the Commission and the general public to understand marketplace realities, track changes over time, and make apples-to-apples comparisons among a variety of video competitors. It should include the following elements:

1. **Define Relevant Content Vendors.** The Commission should delineate which vendors are relevant to the data collection inquiry. Content vendors should include at a minimum linear programming networks, such as programming services distributed on cable or Direct Broadcast Satellite; OTT linear content sources, such as Free Advertiser-Supported TV, or "FAST" channels; applications ("apps") made available on licensees' traditional platforms, such as cable or satellite set-top-boxes, or on relevant online platforms, as discussed below; production companies and studios providing content for distribution to consumers through advertiser-supported video-on-demand ("AVOD") or subscription ("SVOD"); and other sellers of content to relevant platforms.

2. **Define “minority” using standard federal practices.** When tracking the diversity of vendors, the Commission should define “minority” using the Office of Management and Budget Statistical Policy Directive No. 15, which provides a common framework for consistent data on race and ethnicity throughout the federal government (*see infra*, Section IV.A).
3. **Measure vendors’ diversity of ownership, leadership, and employment.** The data should emphasize diversity at the decision-making, governance level, followed by overall diversity among full-time employees. At a minimum, the Commission should measure diversity along these four parameters:
 - a. Ownership, including whether such ownership includes governance rights or limitations (e.g., voting vs. non-voting shares, partnership rights, or clawback provisions);
 - b. Board membership;
 - c. Senior leadership, meaning executives in operational decision-making roles (i.e., C-level executives or leaders of business units with profit-and-loss responsibilities, as opposed to administrative functions, such as human resources or public relations); and
 - d. Full-time employees.

In collecting relevant data, the Commission should require regulatees to survey their existing content vendors using the same methods deployed when compiling data for other reports. In publishing the results of the survey, regulatees and the Commission should report (a) which licensees failed to respond, including any reasons given by the licensee for such refusal; (b) the total number of applicable vendors for any given licensee; (c) the number of such vendors that responded; and (d) the findings in each category. By including this level of detail in its final report, the Commission can help the public to better understand the statistical baseline for drawing any conclusions and the gaps in data due to licensees’ or their vendors’ non-compliance.

The Commission should collect and present the data to the public using clear, transparent, and comprehensive methodology. This should include the following elements:

1. **Annual.** The public disclosure of information through the report and data should be made every year, at the same time each year.
2. **Transparent.** The Commission should require licensees to provide data in a transparent, machine-readable, clear and understandable format, and should make the raw data available to the public separately from the report itself.
3. **Easy to use.** The Commission should establish an online reporting portal for licensees to submit data from their vendors, a recommended standard form for licensees to send their vendors, and a page on the FCC website where raw data and aggregate reporting results are available to the public in machine-readable format.
4. **Clear.** The report should include a ranking of covered companies based on objective metrics. Consumers should be able to see how various video sources compare to one another with respect to diversity and inclusion. Assuming a competitive market, providers should have an incentive to outperform one another whenever they appear on a ranking.

The Commission should require licensees to survey content vendors providing services to both (a) regulated platforms, such as broadcast, cable, and Direct Broadcast Satellite, and (b) affiliated streaming platforms not regulated by the Commission but attributable to, or under common ownership with, the licensee. As the Commission repeatedly recognized in the Communications Marketplace Report, streaming and other unlicensed platforms represent an increasing share of the video marketplace.¹ Not only are these platforms an important way that Americans access news and entertainment, but programming tends to move between traditional licensed services, and new streaming services. Collecting data on just some services from a company, but not others, reflects neither viewer behavior nor business realities. Collecting this information therefore is relevant to any Commission inquiry regarding content vendor diversity.

¹ See *2020 Communications Marketplace Report*, GN Docket No. 20-60, Annual Report, 36 FCC Rcd 2945 (2020) at para. 152 (describing data showing an upward trend for OVDs and vMVPDs, and a downward trend for traditional MVPDs); para. 175 (referencing research by S&P Global showing a long-term consumer shift to streaming services).

As reflected in Table 1, below, Commission licensees share common ownership with some of the largest video streaming platforms in the U.S., while a subset of streaming services would not be included in the CVDR.

Table 1
Commission Licensees with Major Streaming Services

Video Distributor	FCC License/Jurisdiction	Streaming Service
Disney	Broadcast	Disney+, Hulu, Hulu+Live TV
Comcast	Broadcast, Cable, Broadband, Wireless	Peacock
CBS/Viacom	Broadcast	Paramount+; Pluto
Amazon	Satellite, Broadband	Amazon Prime, FireTV; IMBD TV
DISH Network	Satellite, Wireless	SlingTV
AT&T	Wireless, Broadband, Satellite, Telecommunications Service	DIRECTV Stream
21st Cent. Fox	Broadcast	Tubi
Alphabet/Google	Broadband (Google Fiber)	YouTubeTV

III. Monitoring content vendor source diversity would promote the Communications Act’s and the FCC’s policy goals of competition and viewpoint diversity.

Collecting and reporting data in a CVDR would promote the Commission’s goals.

Congress and the Commission have taken action far more dramatic to promote these goals than the modest data collection and reporting proposed here.

A. Competition

The Communications Act directs the Commission to promote competition in the video marketplace and doing so requires accurate, timely data regarding market participants, including the diversity of content vendors. There is ample precedent for Commission action to promote competition in the video market. The Commission has adopted policies favoring new entrants and small business entrepreneurs in broadcasting with the hope that it would improve competition. For example, in considering non-discrimination rules in broadcast advertising and transactions, the Commission said:

taking steps to facilitate the entry of new participants into the broadcasting industry may promote innovation in the field. “[T]he most potent sources of innovation often arise not from incumbents but from new entrants.” We believe that this may be particularly true with respect to small businesses, including those owned by minorities and women. “[E]xpanding the pool of potential competitors in media markets” to include such businesses “should bring new competitive strategies and approaches by broadcast station owners in ways that benefit consumers in those markets.”²

Diversity and competition are inter-related with a lack of diversity often indicates inadequate competition and harm to consumers. According to the Small Business Administration (SBA), more minority business owners in an industry³ tends to correlate with a more competitive market.⁴ In addition, a recent McKinsey report estimated that the film and TV industries are leaving behind \$10 billion in annual revenues—about 7 percent more than the

² *Promoting Diversification of Ownership in the Broadcast Services*, Report and Order and Third Further Notice of Proposed Rule Making, MB 07-295, 23 FCC Rcd. 5922, 5924 (2008) (citations omitted).

³ Jonathan Orszag, “MMTA Report Receives National Coverage.” <https://www.ebaymainstreet.com/de/node/128694>.

⁴ Brian Headd, U.S. Small Business Administration Office of Advocacy, *Small Business Facts Business Ownership Demographics*. <https://cdn.advocacy.sba.gov/wp-content/uploads/2021/03/16095912/Business-Ownership-Demographics-Fact-Sheet.pdf>

assessed \$148 billion baseline for the whole industry—because of “persistent racial inequities” in that industry.⁵ Members of Congress have also recognized the intersection of competition and diversity in our media ecosystem, noting that a less competitive marketplace can reduce the competitive pressure of media outlets to provide consumers with diverse and inclusive programming.⁶ Collecting data that would allow members of the industry, the public and the Commission to evaluate the extent of competition in the video production marketplace would permit all actors to take steps to augment competition where it is found lacking.

B. Viewpoint Diversity

In regulating media that transmits both video and audio content, the Commission and the Communications Act both have adopted and pursued goals that promote First Amendment values. The Supreme Court has affirmed that:

assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment. Indeed, it has long been a basic tenet of national communications policy that “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”⁷

The Communications Act stresses that point repeatedly. The opening section of the Act sets forth the obligation of the Commission “to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national

⁵ Jonathan Dunn, Sheldon Lyn, Nony Onyeador, and Ammanuel Zegeye, McKinsey & Company, Black representation in film and TV: The challenges and impact of increasing diversity, at 2 (March 2021), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/black-representation-in-film-and-tv-the-challenges-and-impact-of-increasing-diversity>.

⁶ Representative Castro, *et al.* letter to The Honorable Merrick B. Garland, U.S. Attorney General (Dec. 4, 2021) found at [https://castro.house.gov/imo/media/doc/Letter%20to%20DOJ%20\(Press\).pdf](https://castro.house.gov/imo/media/doc/Letter%20to%20DOJ%20(Press).pdf).

⁷ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication...”⁸

Among the goals of the Cable Act, which amended the Communications Act, are to “assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public.”⁹ Even an area such as common carrier obligations, which require service to be offered indifferently to the general public and also that content is transmitted without change, ensures that customers and the public have access to multiple points of view.¹⁰

Specific Congressional directives have opened space for non-vertically integrated content creators to find space on communications platforms like satellite television and cable networks. Congress created multiple spaces for independent programmers on cable. In order to “promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems,”¹¹ Congress required the FCC to adopt rules which enabled independent content-creators to lease capacity on cable systems in the leased access regime. Congress specifically prohibited any content or editorial control by the cable operator for leased access programming.¹² The FCC regulated the

⁸ 47 U.S.C. § 151.

⁹ 47 U.S.C. § 521(4).

¹⁰ *E.g.*, Eugene Volokh, Treating Social Media Platforms Like Common Carriers? 1 Journal of Free Speech Law 377 (2021), <https://ssrn.com/abstract=3913792>; *Biden v. Knight First Amendment Institute at Columbia University*, 141 S.Ct. 1220, 1224 (2021) (Thomas, J. concurring).

¹¹ 47 U.S.C. § 532(a).

¹² *Id.* at § 532(c)(2) (“A cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming....”).

cost and means of access in order to promote use by any content provider that sought to use it.¹³ Congress also permitted local government franchise authorities to require cable operators to create public, educational and governmental channels on local systems as a condition for receiving a local cable franchise.¹⁴ These channels permit students, public access centers and local governments to have a direct connection with their local communities, creating and transmitting their own content.¹⁵ In 1992, Congress added a similar obligation to Direct Broadcast Satellite providers, requiring them to set aside channel capacity for non-commercial, educational and informational programming and prohibiting editorial control by the DBS provider as well as limiting the costs that could be imposed on content creators that are placed on the set-aside.¹⁶

In the area of broadcasting, the FCC has long interpreted the public interest standard to incorporate the goals of competition, localism and diversity. In considering diversity the FCC has looked at multiple kinds of diversity, including source diversity. The FCC defined source diversity as “the variety of program or information producers and owners.”¹⁷ The FCC’s broadcast ownership rules to prohibit common ownership of different kinds of media — newspapers and broadcast outlets or different kinds of broadcast outlets (radio and TV) — were intended to “encourage ‘outlet’ and ‘source’ diversity as an indirect means to achieve viewpoint

¹³ 47 C.F.R. §§ 76.970-76.975.

¹⁴ 47 U.S.C. § 531.

¹⁵ See, e.g., Patricia Aufderheide, Antoine Haywood, Mariana Sánchez Santos, PEG Access Media: Local Communications Hubs in a Pandemic, Center for Media and Social Impact (August 2020), <https://cmsimpact.org/report/peg/>.

¹⁶ 47 U.S.C. § 335.

¹⁷ 1998 Biennial Regulatory Review-review of Commission's Broadcast Ownership Rules, Biennial Review Report, MM Docket No. 98-35, 15 FCC Rcd. 11058, 11062 (2000) (“2000 Biennial Review Report”).

diversity.”¹⁸ The FCC has also relied upon the importance of “ensuring a diversity of information sources and services to the public” in its review of transactions.¹⁹

Most directly relevant to the enhancement of source diversity, the FCC adopted the financial interest and syndication rules and the prime-time access rules in 1970 to limit network control over television programming and thereby encourage the development of a diversity of programs.²⁰ The PTAR rule prohibited network-affiliated television stations from broadcasting more than three hours of network-produced programs during the four prime time viewing hours between 7 pm and 11 pm. The Commission explained PTAR “is an indirect effort to promote program diversity by seeking to increase the variety of program sources (*i.e.*, source diversity), and, as some parties argue, program distributors (*i.e.*, outlet diversity).” The rule was intended “to increase the variety of non-network speakers.”²¹ As one court described it, the FCC “hoped the rules would strengthen an alternative source” of program producers for television.²² While the newspaper-broadcast cross-ownership and PTAR rules have been eliminated, the statutory authority permitting the Commission to implement them, along with the overarching policy objective of maintaining viewpoint diversity, remain in effect.

¹⁸ *Id.* at 11107.

¹⁹ *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Time Warner Inc., and Its Subsidiaries, Assignor/transferor To Time Warner Cable Inc., and Its Subsidiaries, Assignee/transferee*, Memorandum Opinion and Order, MB Docket No. 08-120, 24 FCC Rcd. 879, 885 (2009).

²⁰ *Network Television Broadcasting*, 23 FCC 2d 382 (1970), *aff'd sub nom. Mt. Mansfield Television v. FCC*, 442 F.2d 470 (2d Cir. 1971).

²¹ *Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules*, 11 FCC Rcd. 546, 551–52 (1995).

²² *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1045 (1992).

IV. The Commission Has Legal Authority to Establish a Programming Vendor Diversity Report.

A. Data collection serves a core government function.

As the Office of Management and Budget explained in 2017, race and ethnic data and reports perform a core governmental function: “To operate efficiently and effectively, the Nation relies on the flow of objective, credible statistics to support the decisions of individuals, households, governments, businesses, and other organizations.”²³ Such data collection is not unusual or surprising. “The United States government has long collected statistics on race and ethnicity. Such data have been used to study changes in the social, demographic, health, and economic characteristics of various groups in our population. Federal data collections, through censuses, surveys, and administrative records, have provided an historical record of the Nation's population diversity and its changing social attitudes and policy concerns.”²⁴ Many government agencies collect and publish demographic data as part of their analysis of markets, trends and other factors.²⁵

The FCC will not need to create its own standards with regard to this data collection because the Office of Management and Budget Statistical Policy Directive No. 15 provides a

²³ *Office of Management and Budget, Revision of Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity*, 82 Fed. Reg. 12242, 12243 (2017).

²⁴ *U.S. Department of Justice and Office of Management and Budget, Standards for the Classification of Federal Data on Race and Ethnicity*, 60 Fed. Reg. 44674, 44674-75 (1995).

²⁵ *E.g.*, U.S. Bureau of Labor Statistics, Labor force characteristics by race and ethnicity, 2020 (Nov. 2021), <https://www.bls.gov/opub/reports/race-and-ethnicity/2020/home.htm>; National Institute of Health, Inclusion of Women and Minorities in Clinical Research, NIH RCDC Inclusion Statistics Report, <https://report.nih.gov/RISR/#/>; U.S. Department of Education, Civil Rights Data Collection, Wide-Ranging Education Data Collected from our Nation's Public Schools, <https://ocrdata.ed.gov/>; U.S. Department of Commerce, National Telecommunications and Information Administration, Digital Nation Data Explorer, <https://www.ntia.doc.gov/data/digital-nation-data-explorer> (includes race, ethnicity, gender among other data); U.S. Equal Employment Opportunity Commission, Job Patterns For Minorities And Women In Private Industry, EEOC Explore, <https://www.eeoc.gov/statistics/employment/jobpatterns/eeo1>.

common framework to provide consistent data on race and ethnicity throughout the Federal Government.²⁶ The FCC must comply with those guidelines.²⁷

B. Collecting and publishing content vendor diversity data will promote diversity and inclusion and is consistent with industry practice.

Public reporting of demographic data is used in many areas as a means to improve change without resorting to other more burdensome regulatory or legal requirements. For example, employment data is often used as a means for companies to hold themselves accountable. Many companies voluntarily release their employment statistics, particularly in the technology sector, but many more continue to submit employment data to the EEOC but not release it publicly. For example, a study by Just Capital, found that 68 percent of the companies in the Russell 1000 Index (which represents the top 1000 companies by market capitalization in the United States) do not publicly release employment data.²⁸ A number of companies in the communications sector voluntarily release their EEO-1 reports, including: Alphabet, Amazon, American Tower, AT&T, Comcast, Disney, eBay, Facebook, Microsoft, Netflix, Twitter, and Verizon.²⁹ Many of the companies that would be covered by this reporting requirement already voluntarily release some demographic workforce data, including in some cases their EEO-1

²⁶ *Office of Management and Budget, Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58782 (1997).

²⁷ *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, MM Docket No. 98-204, Second Report and Order and Third Notice of Proposed Rulemaking, 17 FCC Rcd. 24018, 24024-45 (2002) (citing 3060-0390 OMB Notice of Action dated February 24, 2000 from OMB to FCC).

²⁸ Kavya Vaghul, "A Small Fraction of Corporations Share Diversity Data, but Disclosure is Rapidly on the Rise," Just Capital (January 19, 2021), <https://justcapital.com/news/a-small-fraction-of-corporations-share-diversity-data-but-disclosure-is-rapidly-on-the-rise/>.

²⁹ *Id.* Of Interest, in the 1980s, the FCC required any company that submits an EEO-1 report to submit that report to the FCC as well to streamline EEO data reporting. *Amendment To Implement the Equal Employment Opportunity Provisions*, 50 Fed. Reg. 40836, 40848 (Oct. 7, 1985).

reports,³⁰ and they also proclaim their diversity initiatives for vendors and content-creators, but there are no standardized statistics measuring participation.³¹

Reliable federal data would support existing efforts to document diversity in the video and entertainment industries and fill in gaps because many of these reports focus on the number of directors or actors involved in various shows or productions but do not evaluate ownership of programming producers and content vendors. The breadth of institutions that have studied this issue demonstrates its importance. The U.S. Government Accountability Office just released an evaluation of Hispanic participation in the media industry,³² UCLA produces an annual media

³⁰ Disney EEO-1 Report, <https://impact.disney.com/app/uploads/2022/02/EEO-1-Report-2020.pdf>; Comcast EEO-1 Report, <https://cmcsa.gcs-web.com/static-files/1d6d3ef6-d2d4-4c13-b452-7917b90e0032>; AT&T EEO-1 Report, https://about.att.com/ecms/dam/pages/Diversity/Annual_Report/AT&T-2020-EEO1-Consolidated-Report.pdf.

³¹ See, e.g., AT&T, “Loud and Clear,” AT&T Diversity Equity, & Inclusion Annual Report 2020 at 13, <https://about.att.com/pages/diversity> and https://about.att.com/ecms/dam/pages/Diversity/Annual_Report/ATT-2020-DEI-Annual-Report.pdf; The Walt Disney Company 2020 Corporate Social Responsibility Report, <https://thewaltdisneycompany.com/app/uploads/2021/02/2020-CSR-Report.pdf> (Advancing Social Equity, Diversity In Content, Workforce) at 11, 15, 31, Disney hosts an entire website dedicated to supplier diversity, <https://supplierdiversity.disney.com/>.

³² U.S. Government Accountability Office, Workforce Diversity: Analysis of Federal Data Shows Hispanics Are Underrepresented in the Media Industry, GAO-21-105322 (Sept. 2021), <https://www.gao.gov/assets/gao-21-105322.pdf>.

diversity report,³³ as does the Women’s Media Center³⁴ and Columbia produces regular evaluations of Latinos in the media.³⁵

C. The Communications Act authorizes the Commission to collect data and produce a content vendor diversity report.

1. Authorization for Communications Marketplace Report including market entry barriers

It is beyond question that the proposed data collection falls within the Commission’s authority and responsibility to issue its regular Communications Marketplace Reports. Congress requires the Commission to issue biennial reports to assess “the state of competition in the communications marketplace” including competition to deliver video among providers of multichannel video programming distributors and “other providers of communications services.”³⁶ Congress further requires the Commission to “assess whether laws, regulations, regulatory practices ... *demonstrated marketplace practices pose a barrier to competitive entry* into the communications marketplace or to the competitive expansion of existing providers of communications services.”³⁷ The law also does not limit the data in these reports to regulated entities: it requires the Commission to “consider all forms of competition, including the effect of intermodal competition ... and competition *from new and emergent communications services*,

³³ *E.g.*, UCLA College Division of Social Sciences, UCLA Hollywood Diversity Report, Part 2: Television, <https://socialsciences.ucla.edu/wp-content/uploads/2021/10/UCLA-Hollywood-Diversity-Report-2021-Television-10-26-2021.pdf>.

³⁴ *E.g.*, Women’s Media Center, The Status of Women in the U.S. Media 2021, <https://womensmediacenter.com/reports/the-status-of-women-in-the-u-s-media-2021-1>.

³⁵ *E.g.*, Frances Negrón-Muntaner, Columbia Center for the Study of Ethnicity and Race (2016), <https://asit-prod-web1.cc.columbia.edu/cser/wp-content/uploads/sites/70/2020/03/The-Latino-Di-sconnect.pdf>.

³⁶ 47 U.S.C. §163(b)(1).

³⁷ *Id.*, §163(b)(3) (emphasis added).

including the provision of content and communications using the Internet.”³⁸ The Commission must “consider market entry barriers for entrepreneurs and other small businesses in the communications marketplace in accordance with the national policy under section 257(b). . . .”³⁹ Section 257(b), in turn, sets forth a national policy and directs the Commission to pursue policies “favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.”⁴⁰ In addition, Section 257(a) references “the provision of parts or services to providers of telecommunications services and *information services*,”⁴¹ which encompasses content creators who supply services to online streaming services.

The Commission has relied upon this authority to mandate that regulatees disclose information when they are not directly regulated by the Commission, and information about their non-regulated services, if doing so is in the public interest. For example, the FCC has found authority for its requirement that providers of broadband internet access service comply with its transparency rules.⁴² The D.C. Circuit upheld the Commission’s conclusions that Section 257’s requirement to issue reports with respect to barriers to entry included within it, “direct authority

³⁸ *Id.*, §163(d)(1) (emphasis added).

³⁹ *Id.*, §163(d)(3).

⁴⁰ *Id.*, §257(b).

⁴¹ 47 U.S.C. § 257(a) (emphasis added). While Section 163 references Section 257(b), not Section 257(a), it is nonetheless relevant. When Section 257 was originally adopted, Congress directed the Commission to conduct a study on market entry barriers in subsection (a) and then to repeat the study every three years in subsection (c). In 2018, Congress consolidated a variety of Commission reports into a single biennial Communications Marketplace Report and incorporated the triennial Section 257 report into that report. Repack Airwaves Yielding Better Access for Users of Modern Services Act of 2018 (RAY BAUM Act), 164 Cong. Rec. H1398. Therefore, the language of Section 257(a) is probative of Congress’ intent with respect to the Communications Marketplace Report.

⁴² 47 C.F.R. § 8.1.

to collect evidence to prove that such barriers exist⁴³ and its authority to require such disclosures. The FCC adopted the transparency obligations in 2018 even though it chose to deregulate broadband internet access service by classifying it as an information service regulated under Title I of the Communications Act.⁴⁴

2. *MVPD procurement nondiscrimination*

The FCC can also draw on Cable Act authority to collect data regarding the demographics of programming and content vendors. Congress directed the Commission in 1984 to establish rules that specify the terms under which multichannel video programming distributors “shall, to the extent possible ... encourage minority and female entrepreneurs to conduct business with all parts of its operation....”⁴⁵ The law also required the FCC to adopt rules to require MVPDs to “analyze the results of its efforts to recruit, hire, promote, and *use the services of* minorities and women and explain any difficulties encountered in implementing its equal employment opportunity program.”⁴⁶ The FCC’s rule implementing Section 554 provides

⁴³ *Mozilla Corporation v. Federal Communications Commission*, 940 F.3d 1, 47 (D.C. Cir. 2019) (citing Restoring Internet Freedom, ¶ 232 n.847). The D.C. Circuit confirmed this remained true when Congress relocated the reporting requirement from Section 257 to Section 163 when it consolidated FCC reporting into a single Communications Marketplace Report. *Id.*

⁴⁴ *Mozilla*, 940 F.3d at 17.

⁴⁵ 47 U.S.C. § 554(d)(2)(E). The statute adopts a broad definition of who must comply with this provision, expanding it to all MVPDs, which is defined in the statute as “a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.” 47 U.S.C. § 522(13). Video programming, in turn, is defined “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.” *Id.*, § 522(20). The Commission has not limited video programming to cable or broadcast video. Transmission of video programming via Internet Protocol, does not by itself change the regulatory character of the content. Promoting Innovation and Competition In the Provision of Multichannel Video Programming Distribution Services, NPRM, 29 FCC Rcd. 15995, 16026 (2014).

⁴⁶ 47 U.S.C. § 544(d)(2)(F) (emphasis added).

one example of how the obligation can be met: “recruit[e] as wide as possible a pool of qualified entrepreneurs from sources such as employee referrals, community groups, contractors, associations, and other sources likely to be representative of minority and female interests.”⁴⁷

The FCC originally proposed it could require annual reports by all MVPDs to “provide a list of the total number of contracts that were open for bid during the preceding twelve months, the total number of minority and female entrepreneurs that bid on each contract and the total number of contracts that were awarded to minority and female entrepreneurs.”⁴⁸ The FCC could also draw upon its authority under Section 554 to institute a mandatory annual report of content vendor demographic data.

MVPDs with six or more full-time employees are required to file FCC Form 396-C and annually certify they comply with the FCC’s rules.⁴⁹ It would be relatively simple to convert Form 396-C into a streamlined data submission as requested in this petition.⁵⁰ The Commission should not, however, as discussed herein, continue to use the CDBS system for collecting the data because it does not support aggregation, search and other functionalities.

Collecting such data would also be consistent with the Commission’s Advisory Committee on Diversity for Communications in the Digital Age 2008 proposal, which urged the

⁴⁷ 47 C.F.R. § 76.75(e)(1).

⁴⁸ Amendment To Implement the Equal Employment Opportunity Provisions, 50 Fed. Reg. 40836, 40808 (Oct. 7, 1985). The FCC elected not to collect that data, because at the time, it chose to collect only the data mandated by the law in order to minimize paperwork burdens. *Id.* at 40809.

⁴⁹ *E.g.*, Enforcement Bureau Reminds MVPDs of 2021 FCC Form 396-C Deadline and Identifies Those Subject to Supplemental Investigation, Public Notice, DA 21-776, 36 FCC Rcd. 10182 (July 1, 2021), <https://www.fcc.gov/document/2021-FCC-Form-396-C>. FCC Form 396-C is available on the Commission’s web site, <https://transition.fcc.gov/Forms/Form396C/396c.pdf>, and is required to be filed electronically in the CDBS system.

⁵⁰ The FCC recently sought comment on the efficacy of its EEO program. Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries, NPRM, MB Docket No. 19-177, 34 FCC Rcd. 5358 (2019).

Commission to revitalize and expand the application of Section 554 and urged the FCC to collect demographic data on procurement. Specifically, the Advisory Committee urged the FCC to issue a Notice of Proposed Rulemaking that would examine:

1. Statutory authority (*see, e.g.*, 47 U.S.C. §§151, 257 and 309(j)) for adopting procurement requirements similar to that in 47 C.F.R. §76.76(e) for other FCC-regulated industries, including broadcasting, wireline, wireless and satellite
2. The extent and nature of potential contracting opportunities in FCC-regulated industries
3. Barriers to entry and inclusion faced by minority and women contractors
4. How the agency can encourage and ensure compliance with its procurement rules
5. Implementation of the “analyze the results of its efforts” clause of 47 U.S.C. §554(d)(2)(F) and, particularly, *whether to require regulatees to report publicly on the extent and nature of their minority and female procurement contracts.*⁵¹

Regular data collection and reporting would also promote the goals of advocates who have requested the Commission expand application of the cable procurement rule to all FCC-regulated industries.⁵²

D. Reporting diversity metrics is a constitutional and well-established means of encouraging diversity and inclusion.

The proposed vendor diversity collection would be used to develop and issue reports, either a new report or a new section of an existing one, such as the Communications Marketplace Report. While collection and publication of demographic data is so commonplace as to be routine, the Commission’s use of demographic employment data was called into question when they were used in broadcast license renewals in the past. It is important to note that the present

⁵¹ Emerging Technologies Subcommittee Recommendation to the Federal Communications Commission’s Advisory Committee on Diversity for Communications in the Digital Age: Recommendation on Procurement Issues, Adopted by the full Committee, June 10, 2008, <https://transition.fcc.gov/DiversityFAC/adopted-recommendations/procurement-061008.pdf> (emphasis added).

⁵² Media Bureau Seeks to Update the Record in the 2018 Quadrennial Regulatory Review, MB Docket 18-349, at 2 and n. 9 (June 4, 2021), <https://ecfsapi.fcc.gov/file/0604160549493/DA-21-657A1.pdf>.

proposal does not include use of the data in license renewals. The constitutionality of demographic data collection is clear, as has been demonstrated in the Commission’s docket considering the collection of broadcast EEO data. As the Leadership Conference explained to the Commission, “No court has seriously questioned the constitutionality of demographic employment data collection.”⁵³ For example, the U.S. Court of Appeals for the Second Circuit summarily dismissed constitutional challenges to such data collection in *Caulfield v. Bd. of Ed. of City of New York*, writing that “the Constitution itself does not condemn the collection of [demographic] data.”⁵⁴ Demographic data collection has been approved when requiring states to comply with EEOC rules,⁵⁵ when implementing diversity and inclusion efforts in federal employment,⁵⁶ in collecting data in the U.S. Census.⁵⁷ The First Circuit concluded collecting demographic employment data “is both reasonable and fully consistent” with the goal of “achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past.”⁵⁸

V. Conclusion.

The Commission should establish a new, annual report regarding the diversity of content vendors used by licensees in broadcast, cable, broadband and satellite, including regulatees’ affiliated or commonly owned streaming video distribution platforms not directly regulated by

⁵³ Comments of the Leadership Conference on Civil and Human Rights, Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries, MB Docket 19-177; Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies, MB Docket 98-204, at 2 (Nov. 4, 2019).

⁵⁴ *Caulfield*, 583 F.2d at 611-12.

⁵⁵ *U.S. v. New Hampshire*, 539 F.2d 277 (1st Cir. 1976).

⁵⁶ *Sussman v. Tanoue*, 39 F.Supp. 2d 13 (D.D.C. 1999).

⁵⁷ *Department of Commerce v. New York*, 139 S.Ct. 2551, 2567 (2019).

⁵⁸ *Id.* at 280 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)).

the FCC. Such a report would serve the twin purposes of enhancing Commission decision-making in promoting competition and diversity in the video market, while educating the public and allowing consumers to make informed choices about the video services they use. The Commission has ample authority to do so, and it should.

Pursuant to the Commission's rules, 47 C.F.R. § 1.401, the Commission should initiate a rulemaking to establish a content vendor diversity report and information collection to support such a report.

Respectfully submitted,

/s/
David Goodfriend
The Goodfriend Group
208 I Street N.E.
Washington, DC 20002

Counsel for FUSE Media, Inc.

May 5, 2022

51368.00001\35008058.2