Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Rulemaking of FUSE, LLC	)	MB Docket 22-209
To Establish a New Content Vendor	)	
Diversity Report	)	

Comments of TechFreedom

July 22, 2022

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SUMMARY

The Petition for Rulemaking submitted by FUSE, LLC to Establish a new Content Vendor Diversity Report (CVDR) should be dismissed. It gives insufficient information about the petitioner and its interests and does not clearly describe the rule that it proposes. Should the petition move to a proceeding, the FCC should issue a Notice of Inquiry (NOI) rather than a Notice of Proposed Rulemaking (NPRM) owing to the need for caution with such a broad and vague proposal.

There are severe legal problems with the Petition as well. It alleges that the FCC can enact an entirely new reporting regime on a huge swath of the Internet based on Section 163, which is merely a reporting statute which confers no substantive regulatory power on the FCC. In light of recent court precedent in both *West Virginia v. EPA,* and *NAB v. FCC,* the FCC is not free to bootstrap off of vague statutory authority when the number of entities to be impacted is so large. Further, there are significant constitutional problems with the CVDR as envisioned in the Petition, ranging from Fifth Amendment equal protection to its impact on the First Amendment rights of both platforms and content producers.

Finally, the regulatory burden that any such rule would impose would be substantial, it would fall disproportionately on smaller providers, and might end up actually lessening the diversity of programming that is delivered to consumers.

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COMMENTS OF TECHFREEDOM

TechFreedom[1] hereby files these Comments in the above-referenced proceeding in response to the Petition for Rulemaking filed by FUSE, LLC (the "FUSE Petition"), requesting that the Commission begin a proceeding to establish a new Convent Vendor Diversity Report (CVDR).[2] While the goal of promoting diverse programming is laudable, the FUSE Petition raises significant constitutional issues in light of established court precedent. Further, as envisioned, the CVDR would create huge burdens on smaller entities that far outweigh the data the Commission might collect through such a reporting system.

I. THE PETITION SHOULD BE DISMISSED AS DEFICIENT

The party (or parties) filing the Fuse Petition is far from clear. The Caption reads "FUSE, LLC," while the signature line on the last page identifies the attorney submitting the

[1] TechFreedom is a non-profit think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity.

[2] By Public Notice, DA 22-567, released May 23, 2022, the Commission set the comment date as July 22, 2022, and the reply comment date as August 22, 2022. These comments are timely filed.

Petition as "Counsel for FUSE Media, Inc."[3] Otherwise, "Fuse" is nowhere identified in the Petition, nor is its interest in creating the proposed CVDR disclosed. Section 1.401 of the Commission's rules specify that an "interested party" may file a petition for rulemaking,[4] but that "[t]he petition shall set forth the text or substance of the proposed rule, amendment, or rule to be repealed, together with all facts, views, arguments and data deemed to support the action requested, and shall indicate how the interests of petitioner will be affected."[5] Since Fuse neither sets forth proposed rules nor indicates how a CVDR would affect its interests (or what those interests are), the Petition should be dismissed as deficient.

II. THE PETITION IS TOO VAGUE FOR THE FCC TO PROCEED

In addition to violating Sections 1.401(a) and (c) regarding identifying the "interested party" and how the proposed rules would impact their interests, the Petition lacks the specificity necessary to fully understand what Fuse is asking. While CVDR may be a cute acronym, the Petition lacks the specificity required by Section 1.401(c) to present "all facts, views, arguments and data deemed to support the action requested."[6] It is not clear who would be required to undertake the burdens of the CVDR. The Petition talks of "licensees," but the chart on page 6 lists a number of companies that hold licenses in services far beyond Title III broadcast licenses or Title VI cable licenses, services over which the FCC has some

[3] The first page of the Petition also includes the following parties: Common Cause, National Hispanic Media Coalition, Public Knowledge, United Church Of Christ Media Justice Ministry. However, there are no signatories on the Petition indicating that they represent those organizations, nor what their interests are relative to the proceeding under 47 C.F.R. § 1.401(c).

[4] 47 C.F.R. § 1.401(a).

[5] 47 C.F.R. § 1.401(c).

[6] *Id.*

regulatory authority in terms of programming.[7] As discussed in more detail below, if the Petition seeks to impose regulatory burdens on non-broadcast or non-cable entities, the FCC must have ancillary authority over those activities, which it does not.

Next, while the Petition talks in terms of a CVDR for every service offered by "broadcast, cable, broadband and satellite" licensees,[8] exactly what services to which the reporting requirements would apply is unclear.

> 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.[9]

The universe of services thus could be vast. For example, the petition cites FireTV as a streaming subdivision of Amazon that would need to produce a CVDR.[10] Amazon would presumably need to report the diversity makeup of FireTV's "decision-making, governance level, … [and] full-time employees."[11] However, would Amazon also need to report the diversity makeup of all the channels that it hosts on FireTV, such as HBO, Starz, and

[7] Petition at 6.

[8] Petition at 3.

[9] *Id.*

[10] Petition at 6.

[11] Petition at 4.

Showtime?[12] Would Amazon even further need to report the diversity data of the production companies that create the shows that are provided on their channels? It is unclear how far the services reporting requirement could reach on each platform and where exactly the line would be drawn. Although the petition leaves it up to the Commission to determine what would be the most relevant,[13] the petition, as is, leaves this delineation undeniably vague.

Next, how far up and down the distribution chain "licensees" would have to report is not clear. Would Google, cited at page 6 of the petition, have to report on the diversity of employment on all 51 million YouTube channels, since they are all "content vendors" for YouTube?[14] It also appears that the reporting chain would be very different depending on the type of service being offered. If we look again at the chart on page 6 of the Petition, Disney would presumably have to report on all of the content vendors for its broadcast stations (thus requiring hundreds to thousands of reports), while its streaming service Hulu would only be required to request a single report from each of the channels it carries. Or does the Petition contemplate each of those content vendors must climb back up the chain to report on the racial makeup of each of *its* content vendors? The universe is so ill-defined as to be unquantifiable and not subject to a rational analysis.

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[12] Amy Shotwell, *Discovering Live TV is Easier Than Ever on Fire TV*, AMAZONFIRETV (July 8, 2020), https://amazonfiretv.blog/discovering-live-tv-is-easier-than-ever-on-fire-tv-8415e417bab4.

[13] Petition at 3.

[14] *How Many YouTube Channels Are There?*, TUBICS, https://www.tubics.com/blog/number-of-youtube-channels#:~:text=As%20of%202022%2C%20there%20are,million%20YouTube%20channels%20out%20there (last visited July 19, 2022).

Finally, the level of detail as to the racial makeup of each of the content vendors is not well defined. The Petition talks of measuring the "diversity at the decision-making, governance level, followed by overall diversity among full-time employees." Does that mean that each content vendor would be required to report on the racial makeup of its accounting staff, its security guards, and even its janitorial staff? We cannot possibly analyze the burden the CVDR program would have on licensees, or whether such employees have any ultimate impact on diversity of programming, without knowing the universe of employees that would have to be reported. Ultimately, the Petition appears to be little more than an end-run around clear court precedent striking down at least two attempts of the FCC to enforce EEO mandates requiring disclosure of the ethnic makeup of broadcast stations.[15]

III. IF THE COMMISSION MOVES FORWARD WITH A PROCEEDING, IT SHOULD ISSUE A BROAD NOI, AND NOT AN NPRM

If the Commission moves forward at all, it should begin a proceeding by issuing a broad Notice of Inquiry (NOI) rather than an NPRM, as we have urged the Commission in other proceedings.[16] Whatever discretion the Commission enjoys under the Administrative

[15] *See* Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998) (striking down the Commission's EEO parity percentage law as the Commission's interest in viewpoint diversity was not a compelling government interest, nor was its parity percentage application that applied to all employees narrowly tailored enough to survive strict scrutiny); MD/DC/DE Broadcasters Ass'n v. FCC, 236 F.3d 13 (D.C. Cir. 2001) (striking down the Commission's EEO Option B because it was not narrowly tailored enough under a strict scrutiny application as it placed pressure upon each broadcaster to recruit minorities without a discriminatory record and enabled "raised eyebrow" regulations).

[16] *See* TechFreedom, Comments on Expanding Flexible Use of the 12.2-12.7 GHz Band, (July 7, 2021), http://techfreedom.org/wp-content/uploads/2021/05/TF-Comments-12-GHz-NPRM-4-7-

Procedure Act[17] to configure its rulemaking process, the longstanding pattern—under chairs of both parties—of jumping directly to an NPRM without an NOI often leads to a situation of "ready, fire, aim!"[18] The Commission cannot understand complex issues without basic comments generated by an NOI. Especially on such an important issue as this, which implicates so many constitutional concerns, the FCC must lay the predicate for proceeding with an NOI.

IV. THE FCC MUST BE CAREFUL NOT TO EXCEED ITS STATUTORY MANDATE

The FUSE Petition claims the FCC has clear authority to implement the CVDR that is "beyond question."[19] Yet the only real authority the Petition points to is Section 163(b). Section 163(b) is strictly a reporting statute, however; it grants the FCC no new substantive powers to regulate, and certainly not the power to implement such a far-reaching and highly burdensome new regime as envisioned in the Petition. This case is remarkably similar to

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21.pdf; TechFreedom & The International Center for Law & Economics, Reply Comments on Modernizing the E-rate Program for Schools and Libraries, at 4 n.8 (Nov. 7, 2013), http://docs.techfreedom.org/E_Rate_Reply_Comments.pdf ("the FCC should have issued a Notice of Inquiry before issuing this NPRM for precisely this reason—a mistake the FCC all too often makes, frequently putting the Commission in the awkward position of being on the verge of rulemaking without first properly exploring the facts on the ground. This is the worst kind of putting the cart before the horse.").

[17] Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. § 551 et seq.).

[18] *See also FCC Violates Basic Legal Principles in Rush to Regulate Set-Top Boxes*, TECHFREEDOM (Feb. 18, 2016), https://techfreedom.org/fcc-violates-basic-legal-principles-in-rush-to/ ("This is simply the latest example of the FCC abusing the rulemaking process by bypassing the Notice of Inquiry . . . Every time the FCC does this, it means the gun is already loaded, and 'fact-finding' is a mere formality.").

[19] Petition at 16.

one that the D.C. Circuit recently faced in *NAB v. FCC*.[20] There, the FCC attempted to bootstrap off the statutory language of Section 317 regarding foreign-government sponsored programming to require broadcast stations to "independently confirm the sponsor's status, at both the time of the lease and the time of any renewal, by checking the Department of Justice's Foreign Agents Registration Act website and the FCC's U.S.-based foreign media outlets reports."[21] The problem, the court found, was that this latter requirement was nowhere articulated in the statute. The FCC argued that the language of Section 317 was broad enough to encompass the layering on of this additional requirement. The court disagreed.

> [T]he FCC argues that even if § 317(c) does not affirmatively authorize it to require searches of the federal sources, it can require the searches as part of its general authority to "prescribe appropriate rules and regulations to carry out the provisions" of § 317. 47 U.S.C. § 317(e). A generic grant of rulemaking authority to fill gaps, however, does not allow the FCC to alter the specific choices Congress made. See Murray Energy Corp. v. EPA, 936 F.3d 597, 627 (D.C. Cir. 2019) ("A general grant of authority cannot displace the clear, specific text of the Act."); Alabama Association of Realtors v. Department of Health & Human Services, 141 S. Ct. 2485, 2488 (2021). Instead, the FCC must abide "not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." Colorado River Indian Tribes v. National Indian Gaming Commission, 466 F.3d 134, 139-40 (D.C. Cir. 2006) (quoting MCI Telecommunications, Corp. v. American Telephone & Telegraph Co., 512 U.S. 218, 231 n.4 (1994)).[22]

[20] Nat'l Ass'n of Broads. v. FCC, No. 21-1171, 2022 WL 2677304 (D.C. Cir. July 12, 2022).

[21] *Id.* at *3, *citing* "In the Matter of Sponsorship Identification Requirements for Foreign Government-Provided Programming." 36 FCC Rcd. 7702, ¶ 35 (2021).

[22] *Id.* at *5-6.

The Commission has even less power under Section 163. Section 163 lacks a congressional directive to the FCC to adopt rules to facilitate its Communications Market Reports, leaving the Commission bereft of any authority to implement a CVDR.

Moreover, The Supreme Court made clear in *West Virginia v. EPA*[23] that agencies are no longer free to find a vague provision in their governing statute and use it as a launching point to regulate. After discussing previous decisions in which the Supreme Court had limited agency actions, Chief Justice Roberts continued:

> All of these regulatory assertions had a colorable textual basis. And yet, in each case, given the various circumstances, "common sense as to the manner in which Congress [would have been] likely to delegate" such power to the agency at issue, Brown & Williamson, 529 U.S., at 133, made it very unlikely that Congress had actually done so. Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." Whitman, 531 U. S., at 468. Nor does Congress typically use oblique or elliptical language to empower an agency to make a "radical or fundamental change" to a statutory scheme. MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 512 U. S. 218, 229 (1994). Agencies have only those powers given to them by Congress, and "enabling legislation" is generally not an "open book to which the agency [may] add pages and change the plot line." E. Gellhorn & P. Verkuil, Controlling Chevron-Based Delegations, 20 Cardozo L. Rev. 989, 1011 (1999). We presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." United States Telecom Assn. v. FCC, 855 F. 3d 381, 419 (CADC 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).
>
> Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. Utility Air, 573 U. S., at 324. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.[24]

[23] West Virginia v. EPA, 142 S. Ct. 2587 (2022).

[24] *Id.* at 2609.

The FUSE Petition can point to no such authority under Section 163.

Nor can the Commission invoke "ancillary" authority to solve this problem.[25] The Commission need look no further than its loss in the "broadcast flag" case, however, as a cautionary tale on relying on ancillary authority.

> Great caution is warranted here, because the disputed [] regulations rest on no apparent statutory foundation and, thus, appear to be ancillary to nothing. Just as the Supreme Court refused to countenance an interpretation of the second prong of the ancillary jurisdiction test that would confer "unbounded" jurisdiction on the Commission, Midwest Video II, 440 U.S. at 706, 99 S.Ct. 1435, we will not construe the first prong in a manner that imposes no meaningful limits on the scope of the FCC's general jurisdictional grant.[26]

In the same way that the Commission could not bootstrap off the All-Channel Receivers Act to require television manufacturers to implement broadcast flag hardware, it cannot use a strictly reporting requirement in the Communications Act to implement a burdensome reporting regime on entities, some of which it has at best a tenuous regulatory authority over.

V. THE CVDR IMPLICATES SIGNIFICANT CONSTITUTIONAL ISSUES

A. The CVDR, as Contemplated in the Petition, Can't Withstand Strict Scrutiny Analysis

The petition's diversity reporting is based on quantifying the number of minority employees of content vendors (however that is ultimately defined) based on the Office of

[25] *In the Matter of Promoting Efficient Use of Spectrum through Improved Receiver Interference Immunity Performance.* 87 FCC Rcd. 29248, ¶ 169 (2022) ("Are such regulations reasonably ancillary to the Commission's broad authority to ensure efficient use of radio spectrum?").

[26] Am. Libr. Ass'n v. FCC, 406 F.3d 689, 692 (D.C. Cir. 2005).

Management and Budget's definition.[27] Data collection impacting employment opportunities are subject to strict scrutiny under *Adarand*[28] and *Lutheran Church-Missouri*.[29] The court in *Lutheran Church-Missouri* followed the general rules established in *Adarand* to hold that race-based classifications that affect employment decisions are subject to strict scrutiny under a Fifth Amendment Equal Protection challenge.[30] Under strict scrutiny, the CVDR proposal could only survive if a clear compelling government interest can be articulated by the Commission, and the policy must be narrowly tailored to fulfill this interest.[31]

The Petition claims several government interests: promoting consumer awareness and selectivity in the media brands they choose to support, preventing market entry barriers, promoting competition with diverse viewpoints, preventing discrimination, and general enablement of diversity, equity, and inclusion, claiming authority under 47 U.S.C. §163(b)(1).[32] The court in *Lutheran Church*-Missouri found that promoting viewpoint diversity was not a compelling government interest.[33] The court noted that "the interest in diversity of viewpoints provides no legitimate, much less important, reason to employ race

[27] Petition at 4; *Office of Management and Budget, Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58782 (1997) (categorizing race into five groups: "American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, and White.").

[28] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[29] Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 346 (D.C. Cir. 1998).

[30] *Lutheran Church-Missouri*, 141 F.3d at 351; *Adarand*, 515 U.S. at 158.

[31] *Lutheran Church-Missouri*, 141 F.3d at 351.

[32] Petition at 3–4, 12, 16–19. As noted above, however, Section 163(b)(1) is merely a reporting statute, it provides no substantive new regulatory powers to the FCC.

[33] *Lutheran Church-Missouri*, 141 F.3d at 355.

classifications apart from generalizations impermissibly equating race with thoughts and behavior."[34] The court also doubted that "the Constitution permits the government to take account of racially based differences, much less encourage them."[35]

Further, the Petition will likely fail the second prong of the strict scrutiny application because the CVDR proposal is not narrowly tailored. The court in *Lutheran Church-Missouri* found that the Commission's diversity reporting system was not narrowly tailored as it enforced a diversity minimum for lower-level employees that would not impact the diversity of media on airwaves since there was not a strong enough link between representation and the initiative itself.

> The FCC would thus have us believe that low-level employees manage to get their "racial viewpoint" on the air but lack the influence to convey their religious views. That contradiction makes a mockery out of the Commission's contention that its EEO program requirements are designed for broadcast diversity purposes. The regulations could not pass the substantial relation prong of intermediate scrutiny, let alone the narrow tailoring prong of strict scrutiny.[36]

The Fuse petition similarly calls for diversity reporting of full-time employees who are yet to be defined and may not have an impact on the viewpoint diversity that it wishes for.[37] Further, in striking down the FCC's revised EEO reporting requirements adopted in 2000, the court found that the application of rules to all broadcasters without a specific finding of individual prior discrimination of individual stations rendered the rules overbroad.[38]

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[34] *Id*. (quoting (O'Connor, J., dissenting) Metro Broad., Inc. v. FCC, 497 U.S. 547, 616 (1990)).

[35] *Id*.

[36] *Lutheran Church-Missouri*, 141 F.3d at 356.

[37] Petition at 3–4.

[38] MD/DC/DE Broadcasters Ass'n v. FCC, 236 F.3d 13, 23 (D.C. Cir. 2001).

> First, [the FCC's EEO reporting rule] places pressure upon each broadcaster to recruit minorities without a predicate finding that the particular broadcaster discriminated in the past or reasonably could be expected to do so in the future. Quite apart from the question of a compelling governmental interest, such a sweeping requirement is the antithesis of rule narrowly tailored to meet a real problem. Cf., e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 508, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (noting that City's "interest in avoiding the bureaucratic effort necessary to tailor remedial relief ... cannot justify a rigid line drawn on the basis of a suspect classification").

Crafting a narrowly tailored CVDR program against this backdrop will be difficult, if not impossible.

B. There Is a First Amendment Issue Here That Can't Be Ignored

The Fuse Petition argues that the CVDR scheme it envisions is consistent with the First Amendment, relying on a citation to *Turner Broadcasting System v. FCC*.[39] The First Amendment analysis is far from this simple, however. First, the FCC must recognize that *Turner* was a narrow, 5-4 decision that is not applicable to services beyond cable. In upholding the congressionally imposed must-carry regime for cable, the Supreme Court referenced extensive legislative history and congressional findings.

> Congress declared that the must-carry provisions serve three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.[40]

[39] Petition at 8, *citing* Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 663 (1994).

[40] *Turner Broadcasting*, 512 U.S. at 662, *citing* S. Rep. No. 102-92, at 58 (1991); H. R. Rep. No. 102-628 at 63 (1992); 1992 Cable Act, §§ 2(a)(8), (9), and (10).

The CVDR program envisioned by the Petition does nothing to protect free over-the-air television, the key government interest found in *Turner*.[41]

Further, the *Turner* court noted the unique role cable played at the time in providing programming to consumers, and that the must-carry regime was narrowly tailored to meet congressional objectives.

> This overriding congressional purpose is unrelated to the content of expression disseminated by cable and broadcast speakers. Indeed, our precedents have held that "protecting noncable households from loss of regular television broadcasting service due to competition from cable systems," is not only a permissible governmental justification, but an "important and substantial federal interest." Capital Cities Cable, Inc. v. Crisp, 467 U. S. 691, 714 (1984); see also United States v. Midwest Video Corp., 406 U. S. 649, 661-662, 664 (1972) (plurality opinion).[42]

The FUSE Petition does not limit the CVDR to broadcasters or cable operators, the media companies over which the FCC does exercise a certain amount of regulatory authority regarding the content they carry. Instead, the Petition seeks to have the FCC collect racial data from thousands (possibly millions) of content creators, the vast majority of whom deliver content to subscribers over platforms over which the FCC has little to no regulatory

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[41] *Turner Broadcasting*, 512 U.S. at 634, 646 ("Our review of the [Cable] Act and its various findings persuades us that Congress' overriding objective in enacting must-carry was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable."). Indeed, to the extent that the CVDR regime would impact the types of independent broadcasters Congress intended to protect with the must-carry regime, that impact would be severely negative – burdening these independent broadcasters with a massive new reporting requirement that would drain resources from diverse programming content.

[42] *Id.* at 647.

authority. These content providers possess full First Amendment rights.[43] Imposing a reporting requirement on such service, which may impact what programming they choose to carry raises substantial First Amendment concerns.

C. Regulation by "Raised Eyebrow" Is Dangerous

Ultimately, the FUSE Petition seeks to have the FCC implement a reporting scheme by which it, or others, can influence the programming choices of platforms. This "raised eyebrow" approach to regulation is exactly what the court in *MD/DC/DE Broadcasters* was concerned about.

> A regulatory agency may be able to put pressure upon a regulated firm in a number of ways, some more subtle than others. The Commission in particular has a long history of employing: a variety of *sub silentio* pressures and "raised eyebrow" regulation of program content .... The practice of forwarding viewer or listener complaints to the broadcaster with a request for a formal response to the FCC, the prominent speech or statement by a Commissioner or Executive official, the issuance of notices of inquiry ... all serve as means for communicating official pressures to the licensee. Community–Service Broadcasting of Mid–America, Inc. v. FCC, 593 F.2d 1102, 1116 (D.C.Cir.1978) (en banc); cf. Writers Guild of America v. American Broadcasting Co., Inc., 609 F.2d 355, 365–66 (9th Cir.1979) (noting that "the line between permissible regulatory activity and impermissible 'raised eyebrow' harassment of vulnerable licensees is ... exceedingly vague").[44]

Not only does the Petition call for the collection of the racial makeup of content providers, ostensibly to be used as part of the FCC's Market Competition Reports to Congress

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[43] *See* TechFreedom, Comments on National Telecommunications and Information Administration Petition for Rulemaking to Clarify provisions of Section 230 of the Communications Act of 1934 at 11, 27, 32, RM–11862 (Sept. 2, 2020), https://techfreedom.org/wp-content/uploads/2020/09/NTIA-230-Petition-Comments-%E2%80%93-9.2.2020.pdf; *see also* Letter from TechFreedom to Congressmen Frank Pallone and Greg Walden (Oct. 15, 2019), https://techfreedom.org/wp-content/uploads/2019/10/TechFreedom-Memo-to-House-Section-230-Hearing-10.16.2019-1.pdf (citing Reno v. ACLU, 521 U.S. 844 (1997)).

[44] MD/DC/DE Broadcasters Ass'n v. FCC, 236 F.3d 13, 19 (D.C. Cir. 2001).

under Section 163, it also calls upon the Commission to widely publish this information, presumably on a station-by-station basis.

> 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.[45]

Will the FCC thus entertain petitions to deny license renewals based on the failure of licensees to provide sufficiently diverse programming? One only needs to look back a few decades to when license renewal applications were routinely challenged based on allegations that the licensee was not serving the public interest when its staff didn't contain sufficient minorities.[46]

A CVDR regime would have a further perverse impact in that large media companies with vast financial resources and market power would be in a much better position to pressure their content creators to report their racial diversity. In contrast, smaller stations who do not have the funds to engage in detailed diversity reporting could end up with a black mark on their records for not being able to report as widely on the diversity of their content

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[45] Petition at 3.

[46] *See* Lili Levi, *Not With a Bang But a Whimper: Broadcast License Renewal and the Telecommunications Act of 1996*, 29 CONN. L. REV. 243 (1996) (detailing how "[i]n 1969, public outrage derailed a bill providing that the [FCC] could not consider competing applications for broadcast licenses unless it first found that renewal of the incumbent's license would not be in the public interest." Further notes how citizen groups challenged license renewals based on diversity statistics).

providers.[47] The CVDR would reward those with the resources to "game the system," and punish smaller operators, even if they provide far more diverse programming than media giants.

VI. THE CVDR COULD IMPOSE SUCH BURDENSOME REPORTING REQUIREMENTS THAT THE RESULT WOULD BE A LESSENING IN DIVERSE PROGRAMMING

We've discussed throughout these comments the burdens a CVDR could place on content companies, and we return to that issue to conclude. Regulations always impose costs on the regulated entity. Depending on far up and down the chain the CVDR could apply, the paperwork could be staggering. Faced with 51 million separate reports that it could have to file, one for each of its content channels, YouTube could look very different under a CVDR regime. It might have to retool to eliminate less popular, but more diverse, channels to ease its regulatory burdens. The same would apply to many platforms, which could choose to eliminate diverse programming that few watch, rather than have to file reports on each content vendor to the FCC. In short, implementing a CVDR might have the exact opposite effect from what the petitioners seek, and drive diverse programming off platforms. We've seen this before. The FTC's interpretation of COPPA has driven many smaller and diverse

[47] *See* Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 349–350, 356 (D.C. Cir. 1998) (holding that the remedial reporting conditions, which required the Church to keep extremely detailed employment records, would further burden the Church by increasing an already significant regulatory encumbrance. The court also held that the remedial reporting condition did in fact further aggrieve the church through its regulatory process by asking stations to complete additional "paperwork, monitoring, and spending more money on advertisements.").

content creators out of the market.[48] The FCC's children's television rules all but destroyed local children's programming.[49] Such can be the unintended consequence of regulatory burdens, even those imposed with the best of intentions.

CONCLUSION

The Commission certainly has a role in promoting a diversity of voices in programming. It must do this, however, in a way that is both constitutionally sound and within its statutory authority. The FUSE Petition, on its face, does not provide the Commission with a pathway that can withstand either legal challenge. The Petition should be dismissed, and the Commission should look elsewhere for tools to promote diverse voices.

Respectfully submitted,
_____/s/_____
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Dated: July 22, 2022

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[48] *TechFreedom Event: 20 Years of Coping with COPPA*, TECHFREEDOM, https://techfreedom.org/techfreedom-event-20-years-coping-coppa/ (last visited July 22, 2022); *Children's Online Privacy Protection Act*, C-SPAN VIDEO LIBRARY (Jan. 13, 2020), https://www.c-span.org/video/?468062-1/childrens-online-privacy-protection-act.

[49] Virtually all educational (E/I) programming today is provided by networks and syndicators. This stands in sharp contrast to the many fine locally produced E/I shows that existed prior to the enactment of the Children's Television Act (CTA). *See, e.g.*, Children's Television Programming: Hearings before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the Comm. on Energy and Commerce, 99th Cong. 39 (1985), https://files.eric.ed.gov/fulltext/ED275400.pdf (citing several examples of locally produced educational programming); *see also The Wallace and Ladmo Show*, ARIZONA PBS (Feb. 8, 2011), https://azpbs.org/horizon/2011/02/the-wallace-and-ladmo-show/ (interview of the creators of "Wallace and Ladmo," a locally produced children's show that ran from 1954 until 1989, just before enactment of the CTA).