

United States Senate

WASHINGTON, DC 20510

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May 10, 2019

The Honorable Ajit V. Pai
Chairman
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

Dear Chairman Pai:

Earlier this year, the Commission decided to review certain of its equal employment opportunity (EEO) rules for the broadcasting sector. We are writing to express concern that this review has thus far failed to address the status of FCC Form 395-B. Any conversation regarding the FCC's EEO practices is incomplete if it does not contemplate the full reinstatement of Form 395-B, which is essential to allow the Commission to fulfill a long-ignored statutory mandate to collect data about broadcast workforce diversity.

Discrimination has no place in our society, including at broadcast stations subject to FCC jurisdiction. However, the FCC's ability to evaluate such discrimination is limited if the Commission does not have access to the information it needs to identify potential EEO shortcomings. In the early 1990s, Congress specifically mandated that the FCC conduct annual assessments of racial, ethnic, and gender diversity at regulated broadcasters using Form 395-B. The collection of such data and the use of Form 395-B are not optional; they are statutory requirements under Section 334(a) of the Communications Act.

In 2001, a series of court rulings led the FCC to temporarily suspend the use of Form 395-B. In 2004, the Commission adopted a slightly revised form and sought comment in a further notice of proposed rulemaking on the narrow issue of whether the Commission should break with precedent and keep the data collected from broadcasters confidential. To date, that issue remains unresolved and the data collection remains suspended. Despite this, the Commission continues to regularly submit Form 395-B to the Office of Management and Budget (OMB) for approval. OMB most recently conditionally approved Form 395-B in 2017 pending the completion of the 2004 further notice, acting on a submission made under your leadership.¹ For 15 years, Form 395-B has languished in bureaucratic limbo, with no clear path toward reinstatement.

When Congress codified Form 395-B collection, our hope was that this data could empower the FCC to better evaluate its EEO rules, while also providing policymakers and researchers with valuable insights regarding diversity in broadcasting. Over time, the importance of these objectives has only increased. Non-governmental assessments confirm that discrimination and

¹ We note that, in its most recent submission to OMB, the Commission stated that "[t]here is no need for confidentiality with this collection of information" (<https://www.govinfo.gov/content/pkg/FR-2017-05-19/pdf/2017-10102.pdf#page=1>).

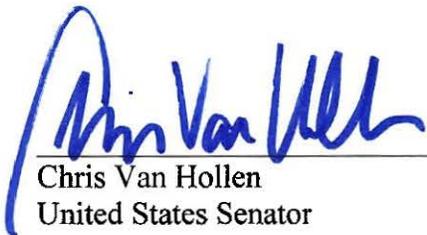
underrepresentation in broadcasting persist, and yet, we still lack the comprehensive dataset which would enable us to effectively analyze these problems and pursue solutions. The Commission has an opportunity to tackle this issue now, without allowing yet another 15 years to pass before this statutorily-mandated statistical collection resumes.

We understand that you agreed to issue a further notice of proposed rulemaking to evaluate EEO enforcement and compliance efforts at the Commission. Congress is monitoring this new proceeding with interest. However, we also understand that you declined to pursue Commissioner Starks' request to use this further notice to refresh the long-dormant record regarding Form 395-B. Doing so is an essential step toward providing the Commission with a path towards compliance with the statute. Refreshing the record in such a manner would also allow the FCC to take advantage of the expertise of its stakeholders to appropriately resolve an issue that the Commission has thus far been unable to resolve on its own.

We are aware, based on the "items on circulation" listed on the FCC's website, that the draft further notice is currently being considered by the Commission. Accordingly, it is imperative that the Commission promptly include questions in this further notice to refresh the record of the 2004 Further Notice of Proposed Rulemaking by seeking comment in that docket (98-204) to address the outstanding Form 395-B confidentiality questions. Moreover, until such time as this situation is resolved, we also believe the FCC can and should assert its authority to collect racial, ethnic, and gender data from broadcasters using Form 395-B, internally aggregate this data without attribution to particular broadcasters, and publish reports that offer industry-wide diversity assessments. If you opt to not undertake either of these actions, we respectfully request a detailed summary of your reasoning, as well as an explanation regarding why you chose to not refresh the record with respect to Form 395-B in the first place.

Thank you for your attention to this important issue. We similarly appreciate your willingness to provide the community with an opportunity to review EEO compliance and enforcement at the Commission. As Members of Congress committed to combatting discrimination in the broadcasting sector, we sincerely hope that this review will result in the full reinstatement of Form 395-B.

Sincerely,


Chris Van Hollen
United States Senator


Yvette D. Clarke
Member of Congress