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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of the Secretary

In re	)	
	)	
Portable People Meter	)	MB Docket No. _________

TO THE COMMISSION

EMERGENCY PETITION FOR SECTION 403 INQUIRY

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EXECUTIVE SUMMARY

To save minority broadcasting in the United States from widespread decimation, the Commission must grant this Emergency Petition. The widespread use of Arbitron's new Portable People Meter in its present form would bring about by far the greatest loss of minority owners' asset value in the history of broadcasting.

In this Emergency Petition, the PPM Coalition ("PPMC") asks the Commission to immediately open an inquiry, under Section 403 of the Communications Act, into the current Portable People Meter ("PPM") methodology used by Arbitron, Inc. ("Arbitron"). On July 28, 2008, the Commission's Advisory Committee on Diversity recommended the same action that PPMC formally seeks here. The Commission should open an inquiry now because:

- The current PPM methodology grossly undercounts and misrepresents the number and loyalty of minority radio listeners.
- Unless the Commission acts now, the current PPM methodology will most likely wipe out half of the nation's minority broadcasters – beginning on October 8, 2008, when PPM attains currency in eight markets including the top four radio markets: New York, Los Angeles, Chicago and San Francisco.
- Years of negotiations with Arbitron have produced only stonewalling and delay. Arbitron has made clear that further negotiations would be futile – even though Arbitron, the monopoly supplier of quantitative radio ratings data, plans to proceed to market with a fundamentally flawed product, which has been denied accreditation and despite the devastating impact that its flunked methodology will have on minority stations.
- The Commission has a long standing commitment to preserving minority media ownership, an understanding of radio audience measurement and the ability to conduct and conclude an inquiry fairly and expeditiously.

A Section 403 inquiry sheds light, not heat. Through a suitable protective order and in camera review of documents, a finder of fact can protect Arbitron's, other parties' and witnesses' right to shield legitimate trade secrets from public disclosure. The inquiry could produce an authoritative final Inquiry Report in a matter of weeks. The Inquiry Report would be entitled to the greatest respect. Congress, other agencies or tribunals, or the Commission itself could make use of the Inquiry Report to craft equitable remedies.

PPMC emphasizes that it is only with the greatest reluctance, and as a last resort, that it is compelled to file this Emergency Petition. The radio industry needs electronic measurement, but the methodology must be reliable and fair. PPMC does not seek a guarantee of improved ratings for minority broadcasters. <u>Rather, PPMC seeks only an accurate and fair ratings methodology.</u>

Notwithstanding PPMC's sharp disagreement with Arbitron about PPM's methodology, each of the PPMC organizations has enjoyed a long-term and productive working relationship with Arbitron. The filing of this Emergency Petition should not be misread as a sign of no confidence in Arbitron's diary or specialized research products, including its ethnic market reports. Rather, the sole issue presented by this Emergency Petition is the impact of the flawed PPM methodology on the Commission's ability to foster minority participation in radio.

<u>Time is of the essence.</u> Arbitron will have only one opportunity to get PPM right before its methodology has a profound and likely irreversible impact on the health of minority radio stations. Although Arbitron has indicated that it is willing (in a manner unspecified) to re-examine its sampling methods and make improvements by 2010, that is far too little and far too late. A station's sharp drop in ratings will not be forgiven by advertisers and advertising agencies. Most advertisers are likely to accept Arbitron's assertion that the PPM results are more accurate than the diary results, and in light of Arbitron's undisputed monopoly position will have no alternative but to rely on Arbitron's flawed data. This will lead to drastically lower

advertising revenues for urban and Hispanic formatted stations immediately after the October 8, 2008 commercialization of PPM in the four largest markets. Therefore, Arbitron's purported plan to improve PPM by 2010 is a wholly inadequate and disingenuous response to a devastating problem that Arbitron will create in less than two months.

Nearly three years of discussions with Arbitron have yielded almost nothing. If there is any further delay in resolving the methodological issues, many of the minority broadcasters will be gone and others will be so gravely injured that their recovery could take years.

The future of broadcast diversity is in the Commission's hands. A Section 403 inquiry is the only way the Commission can shed light on the methodological problems identified in early PPM markets and avert the potentially disastrous consequences for minority broadcasters should PPM be allowed to roll-out commercially with a flawed methodology which dramatically undercounts minority audiences.

TABLE OF CONTENTS

Before the
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In re	)	
	)	
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TO THE COMMISSION

EMERGENCY PETITION FOR SECTION 403 INQUIRY

The PPM Coalition ("PPMC") respectfully requests the Commission's immediate action to open an inquiry, pursuant to 47 U.S.C. § 403 and 47 C.F.R. § 1.1, into the current Portable People Meter ("PPM") methodology employed by Arbitron, Inc. ("Arbitron"). The PPMC urges the Commission to undertake such an inquiry in order to assess the reliability of PPM data and the impact of its commercial use on minority-owned broadcasters and stations primarily targeting minority audiences (collectively referred to herein as "minority broadcasters"),[1] advertisers, and the Commission's ability to fulfill its statutory obligations.

Time is of the essence as Arbitron has announced its intention to move forward with the mass commercialization of PPM, regardless of its existing shortcomings, on October 8, 2008. Over the last several months, Arbitron has admitted that it has experienced ongoing problems recruiting and maintaining its sample panels. Furthermore, it has indicated that it has begun initiatives to re-examine its sampling methods and expects that once its improvements are

[1] References to "minority broadcasters" herein primarily refers to broadcast companies that target minority audiences. Some minority broadcasters are not minority owned; for example, the urban divisions of companies like Clear Channel Radio, Cox Radio and Cumulus, and Spanish language specialists such as Univision, Entravision and Davidson Media. References to minority-owned broadcasters are made explicitly where necessary for context.

put into place PPM should be perfected by early 2010. But by 2010, it will be too late to save minority-owned radio.

We urge the Commission to act expeditiously to answer the fundamental questions that have surrounded the roll-out of PPM for over a year and assess the potential harm to the broadcast industry that may result if Arbitron is allowed to commercialize its PPM service with its existing methodological flaws.

I. THE PETITIONERS

PPMC is an unincorporated association of companies and public interest organizations in the broadcasting and advertising industries. PPMC members seek to document, correct and avoid the potentially devastating adverse impact of Arbitron's PPM methodology on minority participation in the radio industry and the radio industry's service to minority audiences.

Each of PPMC's members has participated in a host of Commission proceedings over many years. The PPMC members are:

Organizations

The National Association of Black Owned Broadcasters ("NABOB"), is the trade association representing the interests of the 245 radio and 13 television stations owned by African Americans across the country. The association was organized in 1976 by African American broadcasters who desired to establish a voice and a viable presence in the industry, to increase minority station ownership, and to improve the business climate in which these stations operate.

The Spanish Radio Association ("SRA"), successor to the Independent Spanish Broadcasters Association ("ISBA"), is the trade association that represents Spanish language radio broadcasters. Recently reconstituted, the SRA was reformed specifically to address and voice concerns about the potentially harmful impact Arbitron's Portable People Meter electronic audience measurement system could have on the Hispanic marketplace.

The Minority Media and Telecommunications Council ("MMTC") is the leading public interest advocate for minority entrepreneurship in all FCC-regulated industries.

The American Hispanic Advertising Association ("AHAA") is the trade association representing advertising agencies owned or controlled by Hispanics, including agencies primarily focused on service to Hispanic consumers.

Companies

Border Media Partners ("BMP") is the largest privately-owned, Hispanic-focused radio company in the United States and is headquartered in Dallas, Texas. BMP is a leading operator of Spanish language and Hispanic-targeted English language radio stations in Texas. BMP owns or operates approximately 30 radio stations with diverse format line-ups in five fast-growing Texas cities including San Antonio, Austin, the Rio Grande Valley, Laredo, and Waco.

Entravision Communications Corporation is a diversified Spanish-language media company utilizing a combination of television and radio operations to reach Hispanic consumers across the United States, as well as the border markets of Mexico. Entravision is the largest affiliate group of both the top-ranked Univision television network and Univision's TeleFutura network, with television stations in 20 of the nation's top 50 Hispanic markets. The company also operates one of the nation's largest groups of primarily Spanish-language radio stations, consisting of 48 owned and operated radio stations.

ICBC Broadcast Holdings, Inc. ("ICBC") is the second largest African American owned broadcasting company in the U.S. Primarily targeting the urban market, ICBC owns seventeen radio stations located in the top markets of New York and San Francisco, as well as smaller market stations in South Carolina and Mississippi.

Spanish Broadcasting System, Inc. ("SBS"), is the largest publicly traded Hispanic-controlled media and entertainment company in the United States. SBS owns and/or operates 21 radio stations located in the top Hispanic markets of New York, Los Angeles, Miami, Chicago, San Francisco and Puerto Rico, airing Tropical, Mexican Regional, Spanish Adult Contemporary and Hurban format genres. In addition, the Company owns and operates Mega TV, produces live concerts and events as well as operates LaMusica.com which provides on-line content related to Latin music, entertainment, news and culture.

Univision Communications Inc. is the leading Spanish-language media company in the United States. Its portfolio includes television, radio, music content and Internet service offerings. Univision Radio, the largest Spanish-language radio broadcaster in the U.S., owns and/or programs 70 radio stations in 16 of the top 25 United States Hispanic markets and 5 stations in Puerto Rico.

Diversity is the bedrock of our broadcast regulatory system. This Emergency Petition seeks the Commission's immediate assistance in protecting radio consumers' access to the wide range of information and diverse viewpoints that is made available to all Americans by a healthy stratum of minority broadcasters.[2] Minority-owned radio companies also promote diversity by serving as the principal training ground for minority radio professionals. Minority-owned radio companies employ over half of the minorities working in radio[3] – a particularly vital service in light of non-minority broadcasters' elimination of nearly all minority radio news professionals from their ranks in recent years.[4]

PPMC seeks to ensure that minority broadcasters will be able to survive and compete, and thus continue to deliver the contributions of diversity of information, viewpoints and employment to the American people.

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2 See Waters Broadcasting Corporation, 88 FCC 2d 1204, 1210 (1981), aff'd sub nom. West Michigan Broad. Co. v. FCC, 735 F.2d 601 (D.C. Cir. 1984) (in awarding an FM station license to an African American woman who did not live in the community of license, the Commission stated that "the absence of minority ownership was 'detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience'" (citing Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979, 980-981 (1978) ("1978 Minority Ownership Policy Statement")).

3 See Comments of EEO Supporters, Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, MM Docket No. 98-204 (Apr. 15, 2002), at 52-53.

4 See Comments of the Minority Media and Telecommunications Council, Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, MM Docket No. 98-204 (May 22, 2008), at p. 7 (reporting that "In 1995, RTNDA reported that minorities were 14.7% of radio news employees, but that number actually had declined to 6.2% by 2006. Starting from this percentage, MMTC has calculated that minority news employment at non-minority owned, English language radio stations is statistically zero – about where it was in 1950." (citations omitted)).

II. ARBITRON'S PORTABLE PEOPLE METER SERVICE

Companies in new media platforms, including Internet radio, satellite radio, and music downloading systems, which are capable of obtaining precise user data down to the individual user level, have put pressure upon terrestrial radio stations to develop comparably laser-sharp metrics.[5] Accordingly, Arbitron developed the Portable People Meter, an electronic tracking device (slightly larger than old-style pagers) that subjects carry with them throughout the day – usually clipped to a belt or handbag – to record signals from the radio stations that they encounter.[6] At the end of each listening day, the subjects place their PPM device into a docking station that transmits the recorded data to Arbitron via standard telephone lines. Arbitron then instantly tabulates the data. PPM subjects remain in the sample for up to two years.

PPM ultimately would replace the current systems of paper "diaries,"[7] in which subjects confidentially record their radio listening habits by hand. In the diary-based system, the subjects submit their diaries to Arbitron upon the conclusion of the reporting period, which is one week. Arbitron then tabulates the results of the diaries and compiles them into ratings reports, or ratings "books," which Arbitron releases seasonally.

Arbitron's ratings data is utilized by the Commission in the application of its radio broadcast ownership rules and Arbitron's ratings are the only currency that is used by commercial radio stations to package and sell advertising time and sponsorships to media buyers.

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5 See generally "How's Your Site Look? Internet Metrics Set to Change," Brandweek, June 4, 2007, http://www.brandweek.com/bw/news/recent_display.jsp?vnu_content_id=1003593341.

6 See Brian Stelter, "New Way of Counting Listeners May Cut Ad Income," New York Times, Nov. 12, 2007, available at http://www.nytimes.com/2007/11/12/business/media/12radio.html.

7 Id.

The complexity and cost of establishing and securing industry acceptance of a national competing service is prohibitive.[8]

A. The Media Ratings Council Has Denied Accreditation of Arbitron's Current Radio First PPM Methodology

In January 2008, the Media Ratings Council ("MRC") denied accreditation to Arbitron's PPM sampling methodology employed in Philadelphia and New York City citing significant problems with Arbitron's panel results in both of these markets.[9] In Philadelphia and New York, Arbitron has deployed a sampling methodology predicated on telephone based recruitment which appears cheaper to implement than its originally installed address based recruitment methodology implemented in the first PPM market, Houston.[10] In contrast to the Houston market, which has shown a level of consistency in its ratings data and which has received MRC accreditation, the Philadelphia and New York markets (as well as subsequent markets implementing the unaccredited Radio First telephone based method), have suffered from poor sample demographic cell balance and a consistent inability on the part of Arbitron to meet its sample size targets in the 18 – 34 demo.[11]

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[8] Small broadcast broadcasters have been planning to develop a new ratings measurement service, but the service would be available only in smaller radio markets ranked 101+ and the rollout date has not been determined. No research firm has yet been selected. See "Cumulus' ratings alternative is moving forward," Inside Radio, Aug. 12, 2003, at 1.

[9] The MRC is the independent organization created at the behest Congress to review and accredit audience measurement services. An MRC audit includes a detailed and objective examination of each aspect of the operations of a measurement service and employs stringent safeguards to assure that accreditation decisions are based only on merit, including voting policies, staff executed process controls and formal appeal procedures, if necessary. See Testimony of George Ivie, Executive Director and CEO, Media Ratings Council, Inc., FCC *En Banc* Hearing on Overcoming Barriers to Communications Financing, July 29, 2008.

[10] In Houston, the first market to test PPM, Arbitron implemented a door-to-door sampling methodology that received MRC accreditation in January 2007, specifically for PPM monthly average quarter hour data only. PPM went to currency in the Houston market in July of 2007.

[11] See "Tale of Two Cities, A Comparison of the Results of Two Different PPM Methodologies," R.M. Kabrich & Associates, released May 2008.

Six months after its denial of accreditation, at the Commission's recent *En Banc* Hearing held on July 29, 2008, George Ivie, Executive Director and CEO of the MRC, stated that the MRC still has **"important ongoing concerns"** with Arbitron's implementation of PPM.[12] As Mr. Ivie stated in his testimony, the question is not whether electronic measurement technology can offer improvements in terms of measurement accuracy, but whether that technology is being implemented properly "to assure a representative sample of users that comply with the PPM methodology to capture the preponderance of their radio exposure."[13]

B. The FCC's Federal Advisory Committee on Diversity Has Requested that the Commission Investigate the Implementation of PPM

On July 28, 2008, the Commission's Advisory Committee on Diversity for Communications in the Digital Age ("Diversity Committee") adopted a resolution requesting that the Commission investigate Arbitron's new PPM audience measurement system to determine whether the system is having or will have a detrimental and discriminatory effect upon stations targeting minority audiences; to determine whether the Commission possesses authority to address such discriminatory impact; and to determine whether the Commission should submit the results of its investigation to Congress for consideration of possible legislative action or action by sister agencies.[14]

Free over-the-air radio relies on a single revenue stream generated by the sale of commercial advertising. Here the commercial release of a flawed ratings service disproportionately threatens the viability of minority broadcasters. The Diversity Committee

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[12] Testimony of George Ivie, Executive Director and CEO, Media Ratings Council, Inc., FCC *En Banc* Hearing on Overcoming Barriers to Communications Financing, July 29, 2008.

[13] Id.

[14] See Resolution of the FCC's Federal Advisory Committee on Diversity of Communications for the Digital Age, adopted, July 28, 2008.

accordingly found that the potential detrimental impact on minority broadcast stations could be substantial enough to eradicate any economic gains anticipated to flow from the twelve new ownership diversity policies adopted by the Commission in December 2007 and that such a potential economic blow to minority broadcasters could substantially frustrate the Commission's ability to execute its Congressional directives pursuant to Sections 151, 257, 303(g) and 309(j) of the Communications Act.[15] As a result of these conclusions, the Diversity Committee recommended the Commission investigate the implementation of PPM.[16]

No member of the Committee objected to the merits of the Resolution. Moreover, the three dissenting members expressly asked that their votes be recorded as having been cast as "no" only because of the question of the Commission's jurisdiction.[17]

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15 See 47 U.S.C. §§ 151; 257; 303(g) and 309(j).

16 The Diversity Committee adopted its Resolution after providing representatives of Arbitron and minority broadcasters an opportunity to present their views in person at the Committee's July 28, 2008 open meeting at Barnard College in New York City. Among those appearing before the Committee were Stephen Morris, Chairman, President and CEO of Arbitron, and Owen Charlebois, President, Operations, Technology and R&D of Arbitron. In his opening statement to the Diversity Committee, Mr. Morris asserted that the Commission does not possess the "expertise" to evaluate audience measurement methodologies. Suffice it to say that over the past 74 years the Commission has acquired ample experience concerning radio markets and the measurement of radio audiences.

17 In her Dissenting Statement to the Diversity Committee's July 28 Resolution, Committee member Anne Lucey, representing CBS Corp., explained:

> CBS has a proud record of diversity and supporting ownership of media by minorities and women. We, too, are concerned about the sample size Arbitron relies upon in both its older diary and newer PPM measurements, but we regret that we must vote "no" on the resolution before us which recommends that the FCC investigate Arbitron. . . . [T]he resolution urges the FCC to launch an investigation of an entity that holds no FCC license and is clearly not regulated by the agency. We view such expanded Commission jurisdiction as inappropriate and, if exercised in this case, a precedent for FCC involvement in the practices of any entity whose business is at all related to any regulated service.

PPMC agrees that designation of a Section 403 investigation should not be used to open the jurisdictional door to every company that has a relationship with a regulated entity. Rather, Section 403 investigations should be reserved for examination of the small but critical category of third party relationships that threaten to undermine the core assumptions the Commission has found it necessary to adopt in order to justify its choice to regulate or to abstain from regulation in the public interest. In light of Arbitron's undisputed monopoly position in the provision of radio ratings, Arbitron's flawed methodology will have a profound impact on FCC regulated entities and the Commission's core goals. The Commission's jurisdiction to conduct the inquiry requested by this Emergency Petition is clear. See discussion infra Section V.

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The Diversity Committee specifically suggested an inquiry under Section 403 of the Communications Act. A Section 403 inquiry features methods such as witness examination and document production that are likely to elicit information, as well as methods such as protective orders and in camera review of sensitive materials to protect the genuine trade secrets of all parties.[18] This Emergency Petition generally seeks the relief requested by the Diversity Committee: (1) The Commission should investigate the precise issues identified by the MRC in its denial of accreditation; (2) the Commission should assess the potential impact of releasing this flawed methodological measurement service into the broadcast radio marketplace; and (3) the Commission should consider the impact of such an action on minority broadcasters.

III. FLAWED PPM DATA WILL DEVASTATE AMERICA'S MINORITY RADIO STATIONS, DEFEAT THE COMMISSION'S PRO-DIVERSITY INITIATIVES AND CALL INTO QUESTION THE CONTINUED VALIDITY OF MEDIA OWNERSHIP DEREGULATION

Broadcast regulation is premised on the continued validity of factual findings that the Commission painstakingly renders in notice and comment rulemakings. If a key premise evaporates, the viability of the regulatory scheme must be called into question. As the D.C. Circuit has famously pointed out, "[e]ven a statute dependent for its validity on a premise extant at the time of enactment may become invalid if suddenly that predicate disappears."[19]

Minority ownership cannot be disregarded, because it is an indispensable element of broadcast regulatory policy. Content deregulation[20] and structural deregulation[21] are premised

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[18] See infra, Section VI.

[19] Geller v. FCC, 610 F.2d 973, 980 (D.C. Cir. 1979) (citing Chastleton Corp. v. Sinclair, 264 U.S. 543, 547-48 (1924)).

[20] See, e.g., Deregulation of Radio, 84 FCC 2d 968, 977 (1981), aff'd in part and remanded in part sub nom. Office of Commc'n of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983) (emphasizing that

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on the continued vitality of minority owned broadcasters. It should be axiomatic, then, that if a preventable event is about to occur which would devastate minority broadcasting in this country, the Commission must act and act fast to prevent that event from taking place. At an absolute minimum, the Commission should grant this Emergency Petition, which asks only that the Commission learn and report the facts.

Fortunately, in Section 403 of the Communications Act, Congress had the foresight to provide the Commission with the authority and the tools to respond immediately to a serious disruption of a bedrock premise of broadcast regulation. To fulfill Congress' instructions to promote the public interest in broadcast licensing,[22] oversee an industry swept clean of racial discrimination,[23] and eliminate market entry barriers,[24] the Commission should learn all it can about relationships between broadcasters and third parties, such as ratings services, that could dismantle ownership diversity.

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"This proceeding leaves untouched our Equal Employment Opportunities rules for broadcast stations and our minority ownership policies." (fn. omitted)).

21 See Prometheus Radio Project v. FCC, 373 F.3d 372, 421 (3rd Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005) ("Prometheus") ("[i]n repealing the FSSR [Failing Station Solicitation Rule] without any discussion of the effect of its decision on minority television station ownership (and without even acknowledging the decline in minority station ownership notwithstanding the FSSR), the Commission 'entirely failed to consider an important aspect of the problem,' and this amounts to arbitrary and capricious rulemaking," citing Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

22 47 U.S.C. § 309(a) ("the Commission shall determine, in the case of each [license] application . . . . whether the public interest, convenience, and necessity will be served. . .").

23 47 U.S.C. § 151 (creating 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 origin, or sex*, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . ." (language added in the Telecommunications Act of 1996 italicized)).

24 See 47 U.S.C. § 257(a) (requiring the Commission to complete a proceeding on "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services" in which it "shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity); 47 U.S.C. § 257(c) (providing for triennial reports on the Commission's efforts to lift market entry barriers).

IV. IMPLEMENTATION OF A FLAWED PPM METHODOLOGY WOULD DROP A FINANCIAL NUCLEAR BOMB ON AMERICA'S MINORITY RADIO STATIONS

PPM's flawed Radio First methodology has already gone to currency in Philadelphia with resulting volatile ratings data over the last year.[25] More recently, in New York, Los Angeles and Chicago, where PPM's Radio First methodology is still being tested, sixteen out of seventeen Spanish language or urban broadcasters' experienced precipitous ratings declines compared to the ratings of the same stations under the diary system.[26] On the other hand, every general market station either maintained its diary rank or experienced a market rank increase under PPM.[27]

Preliminary estimates have predicted that if PPM were rolled-out nationally in its current form, minority broadcasters' annual gross revenues would decline by approximately 30-40%.[28] That financial nuclear bomb, dropped on America's minority broadcasters, would have these direct and almost immediate consequences:

- Dramatically reduce minority broadcasters' asset values and profit potential, thus preventing minority broadcasters from accessing the capital necessary to purchase more stations.[29] Sadly, this impact of PPM would arrive at the very moment that the two largest radio broadcasters have placed over 100 highly desirable stations on the market.[30]

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25 See "Bruce Beasely: PPM Causing *Unnecessary Volatility* in Philly," Inside Radio, May 6, 2008 (Beasley and other broadcaster in the market are suffering from unnecessary ratings and share volatility that . . . continue to impact [their] operating results.").

26 See Testimony of James Winston, Executive Director, National Association of Black Owned Broadcasters, at the Commission's En Banc Hearing on Communications Financing, Schomburg Center, New York, NY, July 29, 2008, at 3 (citing Arbitron New York, Los Angeles and Chicago Spring 2008 Diary and PPM data for persons 12+ M-S 6a-12p).

27 Id.

28 Testimony of Charles M. Warfield, Chief Operating Officer, ICBC Broadcast Holdings, Inc., FCC *En Banc* Hearing on Overcoming Barriers to Communications Financing, July 29, 2008.

29 Id.

30 See CBS Expects to Sell Some Radio Assets, New York Times, Aug. 1, 2008, available at www.nytimes.com/2008/08/01/business/media/01cbs.html (last visited Aug. 13, 2008); Clear Channel Selling

(cont'd)

- Force many minority broadcasters to lay off staff and reduce their level of service.[31]

- Force dozens of minority broadcasters into bankruptcy as their lenders call their notes.

Absent corrective measures, the nationwide rollout of PPM could decrease minority radio stations' annual revenues by as much as $500,000,000 – an amount that dwarfs the positive impact of the new rules the Commission adopted in its recent Broadcast Diversity Order. *It would constitute the greatest loss of value in the history of minorities in broadcasting.*[32]

Radio programmers are taking the preliminary PPM under-reporting of minority radio listening so seriously that programmers who can do so are already beginning to abandon formats that target minority audiences.[33] Moreover, to help programmers present themselves to

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60 More Radio Stations, Media Daily News, Aug. 6, 2008, available at http://www.mediapost.com/publications/?fa=Articles.showArticleHomePage&art_aid=88018.

[31] Testimony of Charles M. Warfield, Chief Operating Officer, ICBC Broadcast Holdings, Inc., FCC *En Banc* Hearing on Overcoming Barriers to Communications Financing, July 29, 2008.

[32] See MMTC Road Map for Telecommunications Policy, at 24.

[33] One trend that may accelerate under PPM is format changes from "Smooth Jazz" (i.e., music featuring saxophone, piano and bass parts that are sometimes acoustic) to less urban-sounding formats such as Talk, Pop, and rock. Examples of this trend include Radio One-owned WYJZ in Indianapolis which flipped to CHR WNOU on October 10, 2007. See "WNOU," Wikipedia, Feb. 28, 2008, available at hhttp://en.wikipedia.org/wiki/WNOU. Emmis-owned Smooth Jazz WQCD in New York City changed its format to Album rock and its call letters to WRXP on February 5, 2008. See David Hinckley, "Why Rock Replaced WOCD's Smooth Jazz," N.Y. Daily News, Feb. 11, 2008, available at hhttp://nydailynews.com/entertainment/tv/2008/02/11/2008-02-11_why_rock_replaced_wqcds_smooth_jazz.html?print=1&page=all (stating that the reason behind Emmis broadcasting's decision to change WQCD's format, from smooth jazz to rock was, in part, due to the PPM's impending rollout in New York and the fact that rock formats fare better than smooth jazz in PPM markets). On February 29, 2008, Citadel-owned Smooth Jazz WJZW in Washington, DC changed its format to Oldies and put Don Imus on the air in the morning drive. See Marc Fisher, "Listener: Agitated Fans Lose Smooth Jazz," Washington Post, Mar. 8, 2008, available at http://blog.washingtonpost.com/rawfisher/2008/03/listener_agitated_fans_lose_sm.html. Clear Channel-owned Smooth Jazz WCHH in Baltimore flipped to Modern Rock on May 23, 2008. See "WSMJ/Baltimore Flips to Modern Rock," FMQB, May 23, 2008, available at http://www.fmqb.com/Article.asp?id=715362.

advertisers as cleansed of minority influence, Arbitron has added a format descriptor called "Smooth AC," (i.e., Smooth Adult Contemporary) to its station identifier options. Using that descriptor, station owners who currently program Smooth Jazz, and who do not wish to sell to advertisers using the "Smooth Jazz" descriptor, will have a less urban-sounding commercial designation available.[34]

Today's wave of PPM-anticipating format changes is the canary in a deep coal mine of danger to minority broadcasters, especially those whose business plans, studio locations, staffing arrangements, branding, promotional campaigns and program contracts unalterably position them as multilingual or multicultural service providers. These broadcasters cannot – and do not want to – abandon the core audiences they have undertaken to serve. Indeed, the existence, persistence and health of our nation's multilingual and multicultural broadcasters is a central assumption of broadcast policy and regulation.[35]

Over the past 30 years, the Commission has repeatedly reaffirmed that it intends to take pro-active steps to eliminate market entry barriers that inhibit minority broadcast ownership,[36] and the Commission recently took several laudable steps aimed at achieving that goal.[37] Unfortunately, the Commission's efforts to achieve this goal in the radio industry will be

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34 See "Arbitron Approves 'Smooth AC' as New Format Descriptor," Radio Online, June 2, 29008, available at http:/news.radio-online.com/cgi-bin/$rol.exe/headline_id=n18010.

35 See supra, Section III.

36 See, e.g., Broadcast Localism, MB Docket No. 04-233, Report and Notice of Proposed Rulemaking, 23 FCC Rcd 1324, 1356 (2007) (expressing the Commission's plans to promote diversity for "new entrants and small businesses, including minority- and women-owned businesses"); 1978 Minority Ownership Policy Statement, 68 FCC 2d at 981 n.10 ("It is apparent that there is a dearth of minority ownership in the broadcast industry. Full minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming.")

37 See Promoting Diversification of Ownership In Broadcasting Service, MB Docket No. 07-294, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922 (2008) ("Broadcast Diversity Order"). This Order adopted 12 of the 29 minority ownership proposals submitted by the Diversity and Competition Supporters ("DCS") to expand opportunities for minority participation in the broadcasting

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entirely for naught if PPM, as it is presently configured, is rolled-out in eight radio markets – including the nation's top four markets – on October 8, 2008.[38] Indeed, Arbitron's premature roll-out of a flawed measurement service would directly jeopardize the single most important step the Commission took in its Broadcast Diversity Order - banning racial discrimination in the sale of broadcast advertising,[39] a step MMTC calculates (based on Commission and other research) could restore $200,000,000 annually that minority broadcasters lose because of racial discrimination in advertising.[40] Discriminators' first defense is always to assert a pretext to justify their behavior.[41] The commercialization of flawed PPM data would be the pretextual gift that keeps on giving, allowing discriminators to point to ostensibly low ratings to justify their continued refusal to use minority media because of the race of the target audience.

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industry. The Order also put 13 of DCS' minority ownership proposals out for public comment. In the Order, the Commission stated:

> It has long been a basic tenet of national communications policy that the widest dissemination of information from diverse . . . sources is essential to the welfare of the public. By broadening participation in the broadcast industry, the Commission seeks to strengthen the diverse and robust marketplace of ideas that is essential to our democracy. Beyond fostering viewpoint diversity, the Commission also believes that taking steps to facilitate the entry of new participants into the broadcasting industry may promote innovation in the field because in many cases, the most potent sources of innovation often arise not from incumbents but from new entrants. The Commission believes that this may be particularly true with respect to small businesses, including those owned by minorities and women.

Id. at 5924 (footnotes and internal citations omitted).

38 See "Arbitron resumes commercialization of portable people meter services," Forbes, June 12, 2008, available at http://www.forbes.com/afxnewslimited/feeds/afx/2008/06/12/afx5111812.html. The markets are the nation's four largest: New York, Los Angeles, Chicago and San Francisco, along with four "embedded" markets, Nassau-Suffolk, Middlesex-Somerset-Union, Riverside-San Bernardino, and San Jose.

39 Broadcast Diversity Order, 23 FCC Rcd at 5941-42.

40 MMTC Road Map for Telecommunications Policy (July 21, 2008), at 6.

41 See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (holding that even though the petitioner employer had made a sufficient rebuttal against respondent's *prima facie* case of employment discrimination, the respondent must still "be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext" for prohibited discriminatory conduct).

V. THE COMMISSION HAS JURISDICTION TO CONDUCT THE SECTION 403 INQUIRY

For investigative purposes as contemplated by Section 403, the Commission has jurisdiction over Arbitron.[42] To the extent that the Commission lacks jurisdiction to regulate a non-licensee such as Arbitron, the Commission's jurisdiction under Section 403 to learn the facts about recurring and policy-impacting relationships between licensees and non-licensees has been settled for three generations. Moreover, the Commission's regulations specifically envision the use of Section 403 inquiries to enable the Commission to collect information necessary or helpful in determining its policies, carrying out its duties, or amending its rules and regulations. For decades, the Commission has relied upon the reliability and accuracy of Arbitron's market definitions and ratings data as a central component of its multiple ownership analysis. The

[42] That authority is self-evident from the broad language of Section 403:

> **Inquiry By Commission on Its Own Motion.** The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.

Section 403 is implemented by 47 C.F.R. § 1.1, which provides:

> **Proceedings before the Commission.** The Commission may on its own motion or petition of any interested party hold such proceedings as it may deem necessary from time to time in connection with the investigation of any matter which it has power to investigate under the law, or for the purpose of obtaining information necessary or helpful in the determination of its policies, the carrying out of its duties or the formulation or amendment of its rules and regulations. For such purposes it may subpoena witnesses and require the production of evidence. Procedures to be followed by the Commission shall, unless specifically prescribed in this part, be such as in the opinion of the Commission will best serve the purposes of such proceedings.

Commission has a vital interest in ensuring that the data upon which its own rules are reliant remains valid and reliable.[43]

The Commission also has subject matter jurisdiction over the issues raised in this Emergency Petition.[44] The case for the Commission's exercise of its subject matter jurisdiction is especially compelling when the actions of a sole supplier of an essential service threaten to bring about market failure.[45] Previously, the Commission has not hesitated to protect minority groups' access to markets in instances where a company dominating an industry or sub-industry is positioned to become a bottleneck.[46]

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[43] See 47 C.F.R. § 73.3555. The Commission's multiple ownership rules rely on market definitions established by Arbitron. Furthermore, Arbitron's ratings data may be utilized in determining how many independently owned media voices remain in a given market (e.g., the radio-television cross-ownership rules permit an independently owned out-of-market radio stations with a minimum share as reported by Arbitron to be counted as a remaining media voice.)

[44] See 47 U.S.C. § 303(g) (Commission is authorized to "generally encourage the larger and more effective use of radio in the public interest"); see also 47 U.S.C. § 154(i) and § 303(r) (generally authorizing Commission to take steps necessary and permitted by law to accomplish the purposes of the Communications Act).

[45] The exercise of jurisdiction over broadcasters' relationships with third parties is especially appropriate where, as here, one party is a sole supplier of an essential service and that party's actions threaten to distort the operation of a free and competitive market. Indeed, such a party need not be a monopoly; an oligopoly exercising coercive market-distorting power can be investigated under Section 403. See, e.g., Payola Inquiry Procedures, supra (establishing procedures for a Section 403 investigation aimed at gathering information about payola practices in the broadcasting industry). Since 1988, the Commission's reliance on competition has been unwavering; see Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations (Report and Order), 3 FCC Rcd 638, 640 (1988) (declaring that the Commission will henceforth rely on market forces to promote competition and will abandon the "Carroll Doctrine" of "ruinous competition" (per Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C. Cir. 1958)). As Commissioner McDowell has explained, "I trust free people acting within free markets to make better decisions than those of us in government. For the most part, government should do all that it can to get out of the way and to remove barriers to entry. However, there are times when the government should address market failure so new entrepreneurial ideas have a chance to compete in the market place and succeed or fail on their own merits - and their own merits alone. Any remedies applied to market failure should be narrowly-tailored, and sunseted, to maximize freedom for all market players, especially consumers." Remarks of Commissioner Robert McDowell, Media Institute Dinner, Oct. 16, 2006, at 2.

[46] See, e.g., Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor To Sirius Satellite Radio Inc., Transferee, MB Docket No. 07-57, Memorandum Opinion and Order and Report and Order, FCC 08-178 (Aug. 5, 2008), ¶¶ 70-72 and 131-35 (acknowledging the potential threat to diversity posed by having a single entity SDARS provider, and conditioning its approval of the merger on Sirius' voluntary commitment to set aside a minimum percentage of its capacity for minority programmers, as well as enforcement provisions including requirements that (1) set-asides be determined annually based on total system capacity; (2) such channels be provided at no additional charge to subscribers; and (3) the merged entity relinquish control over the programmers of the set-aside channels.)

Indeed, the Commission's subject matter jurisdiction extends well beyond the jurisdiction needed to authorize a fact-finding inquiry. Although not at issue in this Emergency Petition – which seeks only an inquiry to determine the facts – the Commission is empowered to regulate the terms of its licensees' contracts with Arbitron should that be necessary to protect the public interest. Since licensees are responsible for actions of their agents when those actions offend the Commission's rules or policies,[47] the Commission is empowered to regulate the terms of its licensees' contracts with third parties, and the Commission has not hesitated to do so where necessary to protect and advance minority participation in broadcasting.[48]

VI. THE DESIGN OF A SECTION 403 INQUIRY OF PPM METHODOLOGY

A Section 403 inquiry is especially well suited to the review of a social science research methodology. Where, as here, a proposed methodology will devastate diversity in radio broadcasting (and has flunked accreditation by an independent entity), it is particularly important for the Commission to review it.[49]

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47 Under 47 U.S.C. §§ 308(b) and 309(e), the Commission has jurisdiction over a broadcaster for its actions and omissions arising from contractual relationships with unregulated third parties. For example, a broadcaster will not escape liability for an engineering violation because it relied on a contract engineer. See, e.g., Brasfield & Gorrie, LLC, 21 FCC Rcd 9726, 9728 (2007) ("[T]he action by a third party contractor in installing the unauthorized frequency which resulted in the violation does not excuse the licensee from forfeiture liability.") Thus - although not requested here - the Commission has the authority to require its licensees to certify that their contracts with audience measurement services do not contemplate the delivery of a product whose methodological deficiencies severely inhibit minority participation in broadcasting. See supra, n.44.

48 The Commission has not hesitated to proscribe contracts that require broadcasters to be parties to anticompetitive, market-distorting practices of unregulated third parties. Examples include the rule against advertising discrimination (See In the Matter of Promoting Diversification of Ownership in the Broadcasting Services, 73 FR 28361, 28364 (2008)), the rule against transactional discrimination (See id. at 28363), and the rule against discrimination in broadcasters' contracts with unions (See 47 U.S.C. 22.321(a)(2)(ii)(B)). The Commission has also investigated non-licensees where racially discriminatory conduct was not alleged. See e.g., Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992, Inquiry into Sports Programming Migration, 8 FCC Rcd 1492 (1993) (seeking data and information needed to conduct a sports programming study in accordance with the Cable Act of 1992).

49 See W. Lawrence Newman, "Social Research Methods: Qualitative and Quantitative Approaches" (6th ed. 2006); see also Walter Rudin, "Principles of Mathematical Analysis" (3rd Rev. ed. 1976); see also William I.B. Beveridge, "The Art of Scientific Investigation" (1957).

An inquiry should be designed to introduce the elements of transparency and peer review to the evaluation of the methodology that is presently lacking in the MRC accreditation process. In an academic setting, transparency and peer review ensure the reliability and general acceptance of research methodologies. In the context of media ratings research, the MRC's mission is to serve that role – to ensure that the ratings services relied upon by advertisers and the public are valid, reliable and effective. However, the structure of the MRC's audit process does not allow for such transparency. MRC's audit reports are governed by stringent confidentiality protections and are available only to MRC members who then vote to approve or deny accreditation based on the results. To receive accreditation means that the ratings service and its underlying methodology have met the "minimum standards" for media rating research established by the MRC. An "up or down" vote is the only information disclosed to the public. In situations like the one at hand, where Arbitron has elected to go to currency notwithstanding its failure to secure MRC accreditation, the public has very little insight into the reasons why the measurement service has failed.

Arbitron may be unwisely seeking merely to cut costs despite the havoc its inferior product will wreak on the radio broadcast landscape. For example, a greater degree of sample representativeness of minorities may be essential to minority broadcasters' survival, but offering that degree of representativeness might be more costly for Arbitron. Indeed, it seems that cost must be the reason given that Arbitron has used more rigorous sample methods in Houston, where it originally rolled-out PPM and where it has received MRC accreditation, but has refused to implement the same sampling methodology in Philadelphia and New York (and other proposed markets) where its methodology failed accreditation. A Section 403 inquiry would clearly describe the methodological issues and analyze their impact on minorities, while at the same time considering – if Arbitron places it in issue – the financial cost to Arbitron of potential methodological improvements.

The Commission may assign one of its members to conduct a Section 403 inquiry,[50] although administrative law judges typically handle these inquiries.[51]

A Section 403 inquiry is non-adversarial, and therefore it is not necessary for the finder of fact to follow precisely the procedures used in Section 309(e) evidentiary hearings.[52] However, most of the Commission's hearing rules, although designed for adversarial matters, are well understood by members of the bar and are well suited for Section 403 fact-finding inquiries. In particular, the Commission should make use of standard investigative tools it is authorized to employ, including subpoenas for document production and witness testimony under oath.[53]

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[50] See, e.g., First Payola Inquiry (Order Initiating Inquiry), 3 RR2d 827 (1964) (designating Chairman E. William Henry to conduct the inquiry).

[51] See, e.g., Second Payola Inquiry (Order Resuming Inquiry), 62 FCC 2d 111, 112 (1976) (delegating the matter to the Chief Administrative Law Judge who, in turn, would designate an ALJ to conduct the inquiry).

[52] These procedures are set out in Part I, Subpart B of the Commission's Rules, 47 C.F.R. §1.201 - § 1.364. Section 403 proceedings are investigative and non-adjudicatory and, therefore, not subject to trial-type procedures. See 74 Am. Jur. 2d Telecommunications § 150 (2007) (citing the leading Section 403 case, FCC v. Schreiber, 201 F. Supp. 421, 424-25 (S.D. Cal. 1962), order modified, 329 F.2d 517 (9th Cir. 1964), cert. granted, 379 U.S. 927 (1964) and judgment modified, 381 U.S. 279 (1965) ("Schreiber") (holding, in part, that investigatory proceedings conducted by the FCC are investigative in nature and, therefore, not subject to trial-like procedures that are reminiscent of adjudicatory proceedings)). For example, in Schreiber, the Respondent argued, in part, that it should not be required to produce evidence subpoenaed by the Commission, because the Commission had not, in accordance with the Administrative Procedure Act, established any "ground rules" for the § 403 proceeding in that case. Id., 201 F. Supp. at 425. The Schreiber court noted that it is "doubtful" that the provisions of the Administrative Procedure Act apply to "any but adjudicating agencies." Id., citing Hannah v. Larche, 363 U.S. 420 (1960). Thus, the Court held that "until an adjudicative stage is reached, the failure to make rules becomes an abstract question which need not be decided now." Schreiber, 201 F. Supp. at 425. The Schreiber court further held that, although investigative proceedings do not require trial-like procedures, evidence introduced in investigatory proceedings may be preserved for a subsequent trial, if any. Id.

[53] See 47 U.S.C. § 409(e) and 47 C.F.R. § 1.27. The Commission is entitled to use such procedures as subpoenas for document production and witness testimony to elicit the facts in a Section 403 investigation. See Schreiber, 201 F. Supp. at 424-25. Furthermore, Section 555(b) of the Administrative Procedure Act states that "[a] person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative." 5 U.S.C. § 555(b). However, the scope of such representation is very limited. See Schreiber, 201 F. Supp. at 423, citing Hannah v. Larche, 363 U. S. 420 (1960). For example, while counsel may advise their clients on whether or not to answer questions and, in addition, may also raise objections, counsel may not cross-examine witnesses or

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These steps are essential because Arbitron is unlikely to voluntarily produce the information necessary for an independent finder of fact to evaluate its PPM methodology,[54] and because an essential party, the MRC, pursuant to certain confidentiality constraints, may not disclose the reasons it has thus far declined to accredit Arbitron's PPM methodology without the legal impetus of a subpoena. As with any other subpoena, an appropriate protective order providing for in camera review could be crafted to avoid exposure of confidential information.

In specifying a Section 403 inquiry, the Commission should make it clear the purpose of the inquiry is to ascertain the facts about PPM. Unlike a Section 309(e) hearing, in which an ALJ generally seeks to determine whether a licensee has complied with Commission rules, the question here is not whether PPM has violated a Commission rule but whether PPM's methodological deficiencies would result in an unacceptable level of ratings volatility and have an unwarranted negative effect on diversity among radio stations to the detriment of the Commission's policies.[55]

VII. A COMPREHENSIVE SLATE OF ISSUES SHOULD BE EXPLORED IN A SECTION 403 INQUIRY TO ASSESS THE CONCERNS THAT ARBITRON'S PPM METHODOLOGY MISREPRESENTS AND INACCURATELY REFLECTS THE LISTENING HABITS OF AMERICAN'S MINORITY CONSUMERS

PPMC sets out below the most significant methodological flaws identified to date regarding PPM. These flaws are both numerous and profound in their impact on all broadcasters and, especially, in their impact on minority broadcasters.

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introduce evidence. See Schreiber, 201 F. Supp. at 423; see also FCC v. Cohn, 154 F. Supp. 899, 906 (S.D.N.Y. 1957) and 47 C.F.R. § 1.27(d).

[54] PPMC is aware that the Media Bureau has written to Arbitron seeking more information about PPM. Such a letter is not unhelpful, but it is certain not to elicit the facts needed for a meaningful evaluation of PPM. In no sense is such a letter a substitute for a Section 403 inquiry.

[55] Conclusions of law are contemplated under the hearing rules customarily used in Section 309(e) proceedings. See 47 C.F.R. §§ 1.263 and 1.264.

As the Commission considers these issues, it should bear in mind that minority broadcasters face an immediate crisis if Arbitron's flawed methodology proceeds to commercialization. Arbitron has indicated that it is willing (in a manner unspecified) to re-examine its sampling methods and make improvements by 2010 – but that is far too little and far too late.

Nearly three years of discussions with Arbitron have yielded almost no progress. If there is any further delay in resolving the methodological issues, many of the minority broadcasters will be gone and others will be so gravely injured that their recovery could take years.

A. The Media Ratings Council has Withheld Accreditation from PPM

1. It is vital to know why MRC accreditation was withheld.

In January 2008, the MRC withheld accreditation for Arbitron's PPM methodology in Philadelphia and New York City. In the Commission's July 29, 2008 En Banc hearing on Communications Financing, George Ivie, President and CEO of the MRC, indicated that the MRC has "important ongoing concerns" with the implementation of PPM.[56] However, without a subpoena, the MRC is not permitted to publicly disclose what specific issues caused it to withhold accreditation, nor the specific recommendations made by MRC to improve Arbitron's sample panels and other procedures suggested to correct identified deficiencies. In a statement released in January, the MRC indicated that it would continue to work with Arbitron to implement a plan to address MRC's concerns. Without a neutral finder of fact, however, the

[56] See Testimony of George Ivie, Executive Director and CEO, Media Ratings Council, Inc., FCC *En Banc* Hearing on Overcoming Barriers to Communications Financing at p. 5.

industry has no knowledge of whether Arbitron has submitted such a plan or revised methodology to address the MRC's concerns.

The Commission therefore needs to learn the status of Arbitron's re-audits for the Philadelphia and New York markets and why Arbitron was unwilling to wait for accreditation of its "Radio First" methodology in these markets before proceeding to currency, and why Arbitron evidently intends to proceed to mass commercialization in eight other markets on October 8, 2008 without MRC accreditation.

2. It is unclear why Arbitron has withheld certain data sets from the MRC accreditation process.

At the Commission's July 29, 2008 En Banc hearing, the MRC's Executive Director, Mr. Ivie, also revealed that Arbitron has not yet submitted all of its data sets for accreditation.[57] It is vital for the Commission to learn the breakdown of the data sets Arbitron has provided to the MRC, what data sets Arbitron has withheld from the MRC, and why Arbitron has withheld certain data sets from independent evaluation.

B. PPM Sample Sizes are Inadequate and are Unrepresentative of the Population

1. PPM has a 66% smaller sample size than the diary, thereby making it impossible to use PPM to target age or gender subsets of minority audiences even in the largest markets.

PPM has about 66% fewer members of its sample than in the diary sample. For example, the July 2008 PPM pre-currency data in Los Angeles shows that there was only a target

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[57] "Monthly Average Quarter Hour estimates from Arbitron's Houston PPM Service have been accredited by MRC. Subsequently introduced PPM Services (which have several significant methodological differences from Houston), including Philadelphia and New York where audits have been completed, have not yet achieved accreditation. . . . Also, there are other data-types which are used by the marketplace in all these markets that have not been submitted to the accreditation process, such as weekly data and minute-level data." Statements of George Ivie, Executive Director and CEO of MRC, FCC En Banc Hearing on Overcoming Barriers to Communications Financing, July 29, 2008.

of 42 African Americans age 18-34, with a daily average of only 37 African Americans age 18-34 submitting reportable data.[58] This has particular negative repercussions for minority broadcasters since they, unlike general audience broadcasters, must sell advertising based on demographic subsets broken down by age, gender and race (and sometimes other factors such as zip code and income). For example, in Los Angeles, if the 18-34 sample cell consisting of only 37 participants had included half men and half women, there would be only (about) 18 persons in each sub-cell. Unfortunately, radio station salespeople and programmers are not able, with any statistical reliability, to calculate the ratings for African American men 18-34 or African American women 18-34 since the standard industry metrics require at least 30 respondents in a cell to run the data. Shockingly, the sample cell for African American women age 65+ in the July PPM report for the Riverside-San Bernardino market contained only one person.[59]

Beyond the impossibility of selling airtime based on a sample so small that it cannot be subdivided into radio's natural demographic components, the sample size is so small that even without demographic subdivision it yields data susceptible to very high variability around the mean and high volatility over time. Los Angeles is a market of 11 million people and almost one million African Americans. A media buying decision in Los Angeles can be worth millions of dollars, and such a decision cannot possibly be made based on a sub-sample of only 40 young African American adults. Arbitron has proposed resolving this issue by "reducing" the sample size metric necessary to pull an ethnic run; however, that approach would not ensure the stability or proportionality of the data in the four key age demographics: 18-24, 25-34, 34-54, and 55+.

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58 Arbitron, PPM Los Angeles Sample July 2008.

59 Arbitron, PPM Riverside-San Bernardino July 2008.

2. Young African American and Hispanic listeners are not adequately included in Arbitron PPM samples.

Three demographic groups are the prime target audience for stations that program to African Americans and Hispanics: African Americans, Hispanics, and young adults (persons 18-34) of all races.[60] Minority broadcasters have expressed concerns about Arbitron's inability to consistently reach its PPM sample targets for young adults, and especially for young African Americans and Hispanics. It is not clear why Arbitron is having this difficulty. Arbitron has indicated that it has begun several initiatives to improve its recruitment of minority audiences, including commissioning studies from Arizona State University and Howard University.[61] While these studies are laudable, any recommendations that might emerge from the Arizona State and Howard studies cannot be implemented before the October 8, 2008 currency deadline in the nation's four largest radio markets.[62]

3. Arbitron under-samples cell phone-only households, which dramatically affects the participation level of young adults in the sample panels.

The most recent data conducted by the Pew Research Center estimates that the percentage of cell phone-only ("CPO") households has risen to 14.5 % among all adults.[63] Jacobs Media estimates that nearly half of young adults (18-45) have "cut the cord" and are CPO

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60 Minority populations tend to skew younger as evidence by Nielsen's Median Age analysis. According to Nielsen's 2008 Median Age by DMA Universe Estimates Hispanics median age is 27.6 years versus Total U.S. Median age of 37.2 years and Non-Hispanic median age of 39.0 years.

61 See Testimony of Steve Morris "Open FCC Hearing" available at http://www.hitnonline.tv/index.php?id=537.

62 Preliminary PPM or "pre-currency" data in the eight markets scheduled to go to currency on October 8, 2008 was disclosed on Aug. 13, 2008. See Steve Carney, "Radio Will Get Meter Ratings," Los Angeles Times, Aug. 12, 2008, available at http://www.latimes.com/entertainment/la-et-arbitron12-2008aug12,0,1606327.story ("Carney").

63 Blumberg SJ, Luke JV. "Wireless substitution: Early release of estimates from the National Health Interview Survey, July 2007 - December 2007," National Center for Health Statistics (May 13, 2008) ("Wireless Substitution Report"), http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200805.pdf.

households.[64] According to 2007 data reported in the Center for Disease Control (CDC) Health Interview Survey's Wireless Substitution report, CPO household incidence is nearly 16% among all U.S. households and varies widely by age; i.e. more than one in three adults aged 25-29 years (34.5%) lived in CPO households and that nearly 31% of adults aged 18-24 years lived in CPO households.[65]

Hispanics and African Americans index higher for CPO – 19.3% for Hispanics and 18.3% for African Americans versus 12.9% for Non-Hispanic whites (Hispanic Index 150, African American Index 142).[66] The percent of CPO for Hispanics has tripled in the last three years - moving from 6.8% to 19.3%.[67] Nonetheless, only 5-6% of the PPM sample is CPO households,[68] and Arbitron has advised the Commission that its telephone recruitment incorporated only 7.5% cell phone respondents – a figure that apparently includes CPO households as well as some cell phone users in households that also have landlines.[69] It is unclear whether Arbitron's recruitment methodology and script specifically identifies whether a cell phone respondent is in a CPO household.

Further, as far as PPMC is aware, Arbitron has no data indicating that, controlling for other factors, CPO households, and especially African American and Hispanic CPO users,

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64 Jacobs Media, Tech Survey IV, Executive Summary (2008), available at http://www.jacobsmedia.com/articles/tech4exec.asp.

65 See Wireless Substitution Report, supra at 2.

66 See id. at 3.

67 See id. at 7.

68 Arbitron's current practice is to cap cell phone only households in its PPM samples at 5-6%. The stated reason behind such practices is that the costs to recruit cell-only households using traditional telephone frame random digit dialing techniques is several orders of magnitude higher than the cost of recruiting landline households. Reasons for the higher costs are said to include the higher no-answer rate, lower cooperation rates and the fact that current laws and regulations prohibit the use of auto-dialers (i.e., cell only households recruitment calls must be made by hand).

69 Inside Radio, Cell Phone Households Get Bigger Bite of PPM Markets June 17, 2008.

exhibit the same station preferences, cumulative numbers and TSL numbers as their landline-using counterparts. Indeed, stark radio listenership preference differences between CPO households and other households are entirely predictable. The National Health Interview Survey showed that adults living in poverty (27.4%) were more than twice as likely as those who are not poor (11.9%) to be living in CPO households;[70] and that students were more likely (28.9%) than employed people (16.6%) or homemakers (12.8%) to be living in CPO households.[71] Further, a CPO household is likely to be more tech-savvy and budget-conscious than other households.[72] All of these qualitative attributes correlate to format and station listenership preferences.

To ensure statistically representative inclusion of CPO households, Gallup and Nielsen now sample using street addresses.[73] Interestingly, Arbitron used street addresses to construct its PPM sample for Houston – the only market in which PPM has received MRC accreditation – but not in Philadelphia or New York, where its product was denied MRC accreditation. PPMC is alarmed that Arbitron has not used street addresses to build its samples in any of the eight markets scheduled for currency on October 8, 2008. The Commission should find out, urgently, why that is.

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70 See Wireless Substitution Report, supra, n. 62.

71 Wireless Substitution Report, supra, n. 62.

72 See Scott Keeter, Courtney Kennedy, April Clark, Trevor Tompson and Mike Mokrzycki, "What's Missing From National Landline RDD Surveys? The Impact of the Growing Cell-Only Population" Public Opinion Quarterly p. 783 (2007) available at http://poq.oxfordjournals.org/cgi/reprint/71/5/772 (stating "There is some evidence that young adults with landlines are less technology savvy than their cell-only peers. They are significantly less likely to report having sent or received an e-mail (49 percent versus 65 percent), text message (42 percent versus 74 percent), or instant message (28 percent versus 38 percent) in the previous 24 hours. Similarly, about half (52 percent) of the young adults with landlines have used social networking web sites like Facebook or MySpace, compared with roughly three-fifths (62 percent) of those who are cell-only.")

73 Nielsen employs address-based sampling (area of probability) in all their electronically measured markets. See Nielsen Introduces Local People Meters (September 2007).

4. Arbitron's failure to overcome 18-34 year old minorities' hesitancy to carry visible PPM recording devices introduces racial bias into radio listenership reports.

A PPM panelist is expected to transmit, to Arbitron, very sensitive personal data that can have political and ideological attributes, such as listenership to particular talk shows. Although PPMC does not believe that Arbitron would voluntarily provide this data to government investigators or negligently release it to the public, today's climate of concern over personal data security and the increasingly public disclosures regarding database breaches and the inappropriate uses of sensitive personal data has understandably resulted in skepticism on the part of many young adults who are reluctant to allow anyone to monitor their daily behavior. This hesitancy is particularly strong among Hispanic immigrants, including legal permanent residents, who often are unwilling to join the democratic commons[74] – much less be metered for PPM – in light of the current political climate regarding immigration as well.[75]

Fear of government data gathering and misuse is hardly the only reason why many young people of color are hesitant to be metered. The PPM recording device is similar to a pager. In some neighborhoods and in some venues such as clubs and community centers, wearing such a device can endanger the wearer, who might be marked as either a police informant or as a drug dealer.

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74 See "Fact Sheet: Unequal Opportunities for Civic Participation, Annie E. Casey Foundation," available at http://www.aecf.org/upload/PublicationFiles/fact_sheet10.pdf (citing S. Verba et.al., Voice and Equality: Civic Voluntarism in American Politics, Harvard University Press, 1995).

75 See e.g., N.C. Aizenman, "Hispanics Feeling Heat Of Immigration Debate," Washington Post, Dec. 14, 2007, at A22 (discussing views of Hispanics across the United States who feel anxious and discriminated against amid the intensifying debate over immigration); see also Bassina Farbenblum and Janet LeMonnier "Family of Lawful Permanent Residents Joins Immigration Raids Suit, Reuters, May 22, 2008 available at http://www.reuters.com/article/pressRelease/idUS194295+22-May-2008+PRN20080522 (discussing suit by legal immigrants to end warrantless home-raids by Immigration and Customs Enforcement where legal immigrants are threatened and harassed).

One's skepticism about or fear of the government, desire for personal privacy, and concern for physical safety certainly would correlate with radio listenership preferences both within and among racial groups. As far as PPMC is aware, Arbitron has no data that would establish whether these sociological factors have a material impact on radio listenership patterns.

While acknowledging this problem, Arbitron has not taken either of two vital curative steps: implementing much more thorough, and door-to-door, recruitment of minorities, and undertaking a public awareness campaign targeted to students in high school and college and to immigrant centers and agricultural plants and factories.

5. Hispanic recruitment methods skew toward English-dominant persons.

When recruiting Hispanics to serve as PPM panelists, Arbitron asks for a self-identification based on a Yes/No answer to whether they are "of Spanish, Hispanic or Latino origin." The word "origin" introduces a selection bias favoring the recruitment of English-Dominant persons, since the word "origin" connotes ancestral homeland rather than racial or cultural identification. Arbitron's current methodology suggests that a first generation immigrant will have the same habits as a fifth generation immigrant as long as their language characteristics are the same. However, English-Dominant Hispanics are substantially less likely to prefer Spanish language radio than Spanish-Dominant Hispanics.[76]

6. Arbitron's response rates for PPM panelists recruitment are alarmingly low.

The Standard Performance Index ("SPI") measures the percentage response for panel participants based on the total number of persons eligible to partake in the market

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[76] See "The Implications of Acculturation on Marketing to a Hispanic Audience," Euro RSCG Magnet, available at http://magnet.mediaroom.com/file.php/binaries/33/HispanicPart2.pdf.

measurement.[77] While SPI rates for the diary average out between 40 – 50% across demographic groups, and for Nielsen's national electronic television ratings, its SPI rates are over 40%; for PPM, SPI rates are currently below 20%.[78] This is an important quality metric, because if everyone selected or originally targeted agreed to participate in a random sample it would result in a representative sample. The higher the SPI, the more reliable the estimates.

Minority broadcasters have repeatedly requested that Arbitron raise this target ten points or greater, but Arbitron has offered no concrete goals or benchmarks, or timelines to gauge improvements in PPM's response rate.[79]

7. PPM compliance rates by selected panelists are alarmingly low.

Sizeable percentages of panelists, particularly Hispanics, are not reporting useable data for 10 or more days of a month.[80] A compliance rate this low falls well below industry-wide statistical norms. Arbitron has not documented the compliance rates by race, gender, income, geographic isolation or age. Nor has Arbitron described a meaningful plan for counseling that would be sufficient to bring compliance rates to statistically acceptable levels.

8. Arbitron downplays the importance of "carry rate" to statistical integrity.

Arbitron has no way to measure who within the household is actually carrying the meter – just whether the meter has been in motion. Arbitron maintains that it actually over

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77 Arbitron PPM Description of Methodology, February 2008, page 3, 4.

78 See Letter to Arbitron from Clear Channel Radio, Cumulus Media, Cox Radio, ICBC Broadcast Holdings, Inc., Radio One Inc. and Saga Communications Inc., dated June 20, 2008.

79 Id. PPMC has reason to believe that this was a significant factor in Arbitron's failure to obtain MRC accreditation. See supra, Section II.A. A search of the Arbitron.com website produced no response rate initiatives for PPM and two initiatives for diary.

80 In order to be included in the monthly ratings, adults are required to carry their meter at least 8 hours and kids and teens, 5 hours per day. Arbitron Description of PPM Methodology, February 2008.

samples Hispanic and Black households. However, the fact that PPM devices are installed in a household does not mean respondents actually carry the device. Arbitron asserts that its respondents carry the meter an average of 20 days a month,[81] indicating a significant number of people carry their meters 10 days a month or less.

Arbitron samples are stratified to attempt to mirror the representation of demographic groups in the population. Thus, when a demographic group is underrepresented among panelists providing useful data, Arbitron weights that group's results, thereby introducing volatility into the data as a result of heightened variation around the mean. Consequently, even if the mean rating increases over time, the lower limit of the acceptable range of variation (e.g. two standard deviations around the mean or a 95% confidence level)[82] may decrease. Advertisers, being risk averse, will buy according to the bottom of the range of variation rather than at the mean, thereby placing relatively less value on stations preferred by minority listeners. To the best of PPMC's knowledge, Arbitron lacks advertising preference data that rebuts this inference.

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81 Arbitron's term for carry rate, or goal or benchmark sample guarantee, is the "Designated Delivery Index" ("DDI"). The term means, for example, that if Arbitron installs 100 active PPMs, and 70 people carry them, Arbitron has met its DDI goal, which is 70%. Arbitron imposed this 70% DDI goal without securing consensus from the advertising industry; no other research company has used numbers so low. Its goal should be much higher, especially since when it is necessary to break down the data into demographic cells, e.g., by race or language. See Arbitron Description of PPM Methodology, February 2008; see also Letter to Arbitron from Clear Channel Radio, Cumulus Media, Cox Radio, ICBC Broadcast Holdings, Inc., Radio One Inc. and Saga Communications Inc., dated June 20, 2008.

82 95% Confidence level and confidence interval statistically convey the range where one can be 95% certain the rating point will fall. An example: if a station's Arbitron rating persons 18-34 is 1.3 and 2 standard deviations or 95% confidence interval = 1.96. Therefore one can be 95% confident that the rating range for this station is between .69 and 1.91. (Source: Franco Research Group Recommended Arbitron Sample Sizes and Ratings Reliability, May 2005).

C. PPM Data Omits the Key Metrics Necessary for an Accurate Assessment of Minority Radio Listenership

1. Arbitron has failed to correct PPM by adding a metric for listener engagement and loyalty, a factor reflected in diary data that represents the high credibility minorities attach to their preferred stations and the high loyalty minorities observe in selecting brands advertised on these stations.

Arbitron's PPM methodology favors radio stations with a high number of cumulative (cume) listeners, over stations with comparatively lower cumes, but which have historically generated higher engagement and loyalty indicators, such as Time Spent Listening (TSL).[83] Non-minority-owned radio stations are more likely than minority owned stations to program formats that appeal either to mostly non-minority audiences, such as rock or country, or which have "mass appeal" demographics, such as CHR or CHR Rhythmic. Naturally, these formats produce higher cume numbers – they target the majority. On the other hand, many minority-owned stations do not target non-minorities, but generate strong minority listenership and, as such, typically register lower cume numbers.[84]

Some broadcasters attempt to avoid cume losses caused by audience duplication by purchasing competing stations and subsequently packaging sponsorships and advertising schedules in clusters. Since minority broadcasters own fewer station clusters, and because their target audiences are usually minorities, cume numbers have not been their main selling point. Rather, the appeal to advertisers of minority owned radio stations is that their listeners tend to be more loyal to particular radio stations and to advertised brands; indeed, minorities are by far the

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[83] See Mike Bettelli, "Getting Ready for the Fall," FMQB, Aug. 17, 2007, available at http://www.fmqb.com/article.asp?id=456402.

[84] See generally Mitra Kalita, "A Dollar in Any Language: Ethnic Media Outlets Struggle to Lure Big Money Advertisers," Washington Post, June 10, 2005, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/06/09/AR2005060901818.html.

most brand-loyal of all consumers.[85] TSL is the product of loyalty and intensity of interest, but TSL alone does not fully measure loyalty. Although diaries were designed to measure TSL, they actually also reflect intensity of interest because some diary participants may recall listening longer than they actually listened. Thus, while diaries are supposed to measure only TSL, they actually, if inexactly, measure something even more prized by advertisers: loyalty.

As a measure of station signals received by the PPM device, PPM reports exposure, not listening, because listening requires that the recipient actually engage with the received signal. However, PPM fails to include any measure that would distinguish exposure from actual engaged listening. As a result, PPM tends to present no indication of listener engagement or loyalty – the earmark of minority radio and a function of the extraordinarily high brand loyalty of minority consumers.[86] Thus, in changing from diaries to PPM, Arbitron has replaced a metric that reflects engagement and loyalty with one that does not.

PPMC requested – and Arbitron easily could have created from PPM data – an explicit measure of station engagement and loyalty, such as stations garnering the most exclusive listenership. Arbitron's failure to create a loyalty metric means that the diary methodology,

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85 Reyes, Sonia, "Brand Loyalty Strong Among Minorities," Adweek, Aug. 16, 2006, available at http://www.marketingymedios.com/marketingymedios/noticias/article_display.jsp?vnu_content_id=1003018426.

86 See id. (citing the Yankelovich Monitor Multicultural Marketing Study, which suggests that both African Americans and Hispanics have strong trust in brands. "Fifty eight percent of Hispanics and 55 percent of African Americans said, 'It is risky to buy a brand you are not familiar with' . . . Only 42 percent of African Americans and 40 percent of Hispanics said they would 'buy private label and generic brands' if their families unexpectedly found themselves with less money.") (last visited Aug. 18, 2008). It is ironic that one of the principal methodological limitations of PPM stems from a key design flaw in another Arbitron product, the diary. This attribute of diaries is the least well-kept secret in the advertising world. Advertisers understand that diary over-reporting happens, and that it reflects loyalty, which happens to be an attribute that advertisers highly value. Advertiser acceptance of diary ratings with over-reports that embed loyalty is what makes it possible for Arbitron to continue to offer its diary product and assert its credibility. It doesn't measure what Arbitron says it measures, but what it does measure is what advertisers crave.

which reflected minority consumers' strongest asset, is being replaced with a new methodology that contains not a shadow of that asset whatsoever.

2. PPM reports provide less granular data in terms of geography.

It has always been vital for programming and sales departments to examine ratings by zip code in order to tailor program schedules and advertising schedules to advertisers that serve geographically discrete communities such as central cities or minority communities. Arbitron's reports in its diary-based system contain a much larger sample base and over a multi-book average provide a comprehensive view of a stations ratings delivery at the zip code level. The PPM's smaller overall sample size and the length of individual household participation in a panel make looking at station information at the zip code level extremely difficult for most stations and nearly impossible for minority stations. Smaller ethnic samples over longer periods of time compared to diary will make it difficult for ethnic broadcasters to look at data at the county level in some markets – much less the zip code level. Minority broadcasters have repeatedly asked to see PPM panel representation by race/ethnicity at the zip code level. This is data that is readily available in all Nielsen meter panels. Arbitron has advised minority broadcasters that it is not prepared to provide PPM sample representation by zip code.

PPMC believes that disclosure of PPM zip code information would reveal that some zip codes have no meters placed in a PPM sample. Researchers recently looked at some very large zip codes in central Houston and discovered that there were no PPMs in-tab whatsoever in at least two of the largest African American zip codes. Geographic isolation often correlates with minority listeners' format preferences; consequently, the absence of PPMs in-tab in minority zip codes would call into question the validity of PPM data as a representation of minority listenership.

3. PPM reports contain no income data.

A correlate to geographic isolation is income, which as a measure of socio-economic class often correlates to radio listening preferences within a racial demographic group. Without income data, it is impossible to know whether African American and Hispanic PPM panelists skew toward higher incomes, which could produce different listenership patterns than would have been reported if panel representation mirrored income patterns.

4. PPM reports contain no country of origin data.

In Spanish language radio, country of origin and level of acculturation are the most significant factors in format selection.[87] Nonetheless, Arbitron does not presently collect country of origin data.[88] Consequently, users are unable to determine whether the PPM Hispanic sub-sample is representative of Hispanics in the market, and whether changes in that audience are due to changes in the sample or changes in audience behavior.[89]

5. PPM language weighting does not provide sufficient data for adult demos where it is needed the most.

As noted above, Hispanics listen to the radio based on two important metrics: country of origin and level of acculturation.[90] Language is an important arbiter of

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87 Sonderup, Laura, "Capturing the Loyalty of a Critical Market Segment," Advertising & Marketing Review, April 2004, available at http://www.ad-mkt-review.com/public_html/docs/fs075.html.

88 Arbitron has disclosed that it has been discussing a test of collecting such data, indicating that they have submitted a test plan to the MRC for approval. Minutes of Spanish Radio Association Meeting, Aug. 18, 2008.

89 This falls under the definition of sample proportionality (i.e., does the sample accurately represent the market). 100% proportionality means the sample "mirrors" the market composition and characteristics (including race, age, sex, income, etc.). Each market's composition of Hispanics varies by origin. New York City's Hispanic composition is more Latin American versus Los Angeles which is primarily Mexican. Lacking origin information does not allow the sample to be accurately constructed with the appropriate number of Hispanics reflecting their origin.

90 See supra, Section VII.C.4.

acculturation,[91] and the nuances of language preference vary by age – particularly in the crucial 18-34 demo.[92] Nonetheless, Arbitron has not secured language universe estimates so the sample can be weighted separately for men and women for the following key demographics that are the lifeblood of Spanish radio: 18-24, 25-34, 35-54, and 55+.

D. The Inconvenience and Visibility of the PPM Recording Device Introduces Unreliability to the Data it Records

1. The minimal congruency between the diary and the PPM rating points appears to be due to behavior differences – not just in listening levels but in carrying levels.

One can have two systems of measurement and both can be valid based on the parameters of each system. However, there is little or no congruency between PPM and diary rating points and market rankings, especially for minority broadcasters, because TSL drops so dramatically with PPM. As noted above, much of this disparity may be attributed to low carry rates by young adults 18-34, a demographic with a much higher percentage of people of color. The PPM recording device must be carried at all times. To many, it is inconvenient, unattractive, and cumbersome, and thus it may be skewing the rating numbers. As far as PPMC is aware, Arbitron has no data showing whether persons who are declining to join a PPM sample are doing so because they do not wish to carry the PPM device or whether the majority of those declining

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91 See Frederick A. Palumbo, "Segmenting the U.S. Hispanic Market Based on Level of Acculturation" Journal of Promotion and Management at 151 (2005) (discussing aspects of Hispanic market segmentation, including level of acculturation." See also Juan Tornoe, "Net Gain: Latinos Are Going Online More Than Ever," Future Now, Dec. 13, 2007, available at http://www.grokdotcom.com/category/marketing-to-latinos).

92 Christine Mohr and Natalie Judd, "New Insight on Advertising's Holy Grail - Young Hispanics," PR Newswire, Sept. 12, 2003, (citing a study conducted by the Association of Hispanic Advertising Agencies in conjunction with Simmons Market Research Bureau. The study identifies the psychographic profile, language preference, media usage and buying habits of Hispanics age 18-34, revealing that more than half of Hispanic 18-34 year olds (68%) are Spanish-Dominant or bilingual (Spanish being the primary language spoken at home)).

to wear the device are likely to have different radio listenership preferences than those who are not bothered by the device's inconvenience and appearance.

2. Fewer women than men wear the PPM device, and it is not clear why or to what extent women's reluctance to wear the device may skew the resulting data.

Arbitron regards the PPM device as a "working persons" device and a methodology that is especially suited to collecting at-work listening.[93] Thus, Arbitron maintains that PPM results skew more male than female because more men than women are in the workforce.[94] Arbitron appears unwilling to acknowledge that the device is not user friendly to women, since it is designed to be physically worn on the body and women are not generally inclined to clip items to a belt or carry bulky items in pockets. Even in Houston, PPM data purports to show a steady, demonstrable erosion of females listening to Spanish language radio stations since PPM went live last year.[95] Furthermore, in minority households, women have a greater likelihood to make purchasing decision than do women in non-minority households.[96]

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93 See Arbitron Brochure, "Planning & Buying Radio Advertising in a PPM World" (2008-2009).

94 Some radio broadcasters appear to have anticipated this trend toward males and away from females. See Carney, supra (reporting that based on PPM results from Houston that showed more male listenership relative to female listenership compared to diary reports, Clear Channel changed some of its formats earlier this year. For example, "KYSR-FM (98.7) dropped its 'Star' moniker, shipped female-friendly artists, such as Jewel and John Mayer, to sister station KBIG-FM (104.3) and adopted a more aggressive persona and playlist.").

95 Houston Women 18+ PPM Jan '07-Jun '08 share of listening to Spanish-language stations, PPM shows an almost 40% decrease from the first data reporting to the June 2008 PPM Report. (Source: Houston Panel Trends, presentation provided to Spanish Radio Association).

96 See "Study Finds More Black Women Than Whites Use Internet for Info Prior to Making Purchases," Target Market News, Aug. 12, 2005 available at http://www.targetmarketnews.com/consumernews.htm (citing Cheryl Mayberry McKissack, President and CEO of Nia Enterprises, LLC, owner of the NiaOnline Research Monitor, stating that "more black women are the primary decision-makers in their households than women of other U.S. ethnic groups"). Women generally make 80% of all household purchasing decisions. See Pavalli Gogoi, "I Am Woman, Hear Me Shop," Business Week, Feb. 14, 2005, available at http://www.businessweek.com/bwdaily/dnflash/feb2005/nf20050214_9413_db_082.htm. Additionally, women outspend men in many areas, including consumer electronics. See Mickey Meece, "What Do Women Want? Just Ask," New York Times, Oct. 29, 2006, § 3, at 1.

Consequently, this woman-unfriendly attribute of the PPM device tends to disadvantage stations targeting minorities.

3. For PPM, Arbitron has abandoned both of the diary's anti-corruption defenses – panelist confidentiality and panel service time limitations.

Arbitron has experienced incidents in which radio personnel were able to identify its panelists and influence them to submit falsified diaries.[97] Laudably, to prevent corruption, Arbitron implemented two vital anti-corruption procedures: first, diary panelists only remain in the sample for a week, and second, diary panelists must never disclose to others their status as panelists.[98] These procedures are not perfect, as illustrated by an incident in Providence, RI just a few weeks ago involving substantial radio diary corruption.[99] But they are necessary.

Thus, it is startling that Arbitron has abandoned both. PPM panelists are permitted to wear their recording devices on their belts or handbags, where they are visible to others. Further, PPM panelists are expected to serve for up to two years. Since PPM is touted as an improvement over diaries, it is astonishing that Arbitron would abandon both of the anti-corruption methods – panelist confidentiality and panel service time limitations – that Arbitron had implemented for diaries.

The potential for corruption affects everyone, of course, but particularly young people,[100] especially those who are underemployed or financially disadvantaged. Young people

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97 Diane Williams, "Arbitron & Online Radio," Arbitron (2005).

98 See Arbitron Radio, Description of Diary Methodology, July 2008 at p.3.1

99 Laurel J. Sweet, "Arbitron Dials Down Ranking for John DePetro," Boston Herald, Aug. 12, 2008, available at http://www.bostonherald.com/business/media/view.bg?articleid=1112509 (stating, "The briefly stellar ratings of controversy-dogged-talkmeister John DePetro's Providence radio show tanked yesterday after a whiff of scandal forced Arbitron to reissue its spring survey of listener-dial habits.").

100 This is not a moral judgment, just an unfortunate fact. See "2006 Josephson Institute Report Card on the Ethics of American Youth: Part One – Integrity," Josephson Institute of Ethics, (Oct. 15, 2006) (stating that approximately 60% of young people cheat on tests and 28% admit to shoplifting).

often frequent clubs, station events, and concerts. Radio station personnel, who congregate at or promote events at these venues, know how to distinguish a PPM device from a pager or cell phone. When radio station personnel (or colleagues who are promoters or who work for record labels) see a person wearing a PPM device, the temptation to draw that person into a listen-for-pay scheme may be too tempting for many mortals to resist.[101] As PPM sample sizes are approximately 1/3 of diary, in PPM, a panelist is worth three times more than a diary respondent was for each currency period.[102] Even in the diary world, respondent corruption is a serious issue even though diary panelists only participate for a week at a time and diaries are not visibly carried on one's body.[103] In a PPM world, corrupting a single household would have a significant short-term impact on ratings due to a two-thirds smaller overall sample size, and a significant long term impact due to the panel duration of up to two years. To date, Arbitron has refused to acknowledge the very real possibility of panelist corruption or to explain why the anti-corruption measures it deemed essential for diaries are suddenly unnecessary for PPM.

VIII. CONCLUSION – A SECTION 403 INQUIRY WILL ENABLE THE COMMISSION TO MORE EFFECTIVELY PROTECT THE PUBLIC INTEREST

Section 403 was designed to ensure that the Commission and the public are informed about industry trends that may have an especially profound impact on regulatory policy. For that reason alone, a Section 403 inquiry of PPM methodology is amply justified. Such an

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101 Certainly the broadcasting industry has experienced its share of corrupt incidents, which in the past have been so endemic that the Commission had to invoke the Section 403 process twice (in 1964 and again in 1976) to find a cure. See First Payola Inquiry (Order Initiating Inquiry), supra; Second Payola Inquiry (Order Resuming Inquiry). The Commission almost had to invoke the Section 403 process again in 2002 due to pay-for-play allegations involving some of the nation's largest radio companies. Some of these companies faced legal liability for their alleged laxity in maintaining playlist integrity. See Greg Kot, "Music Industry Raises its Voice for Radio Reforms," Chicago Tribune, May 23, 2002, at N1.

102 Southern California Broadcasters Association, PPM and The Virtual Neighborhoods of Radio 2007, at 23.

103 See Arbitron Radio, Description of Diary Methodology, July 2008.

inquiry would yield an authoritative reading of the facts in the form of a neutral Section 403 Inquiry Report. Such a report would not be a mere academic exercise. It could be used immediately in four ways to protect the public interest:

First, it would provide a basis for the Commission to assess the reliability of Arbitron data on which the FCC relies.

Second, it would provide a basis for the Commission to consider whether it should directly regulate its licensees' relationships with Arbitron.

Third, it can provide expert findings upon which other authorities can rely.[104]

Fourth, it can provide a factual record for Congress and other governmental entities concerned about the accuracy of radio ratings data.

The Commission should immediately open a docketed Section 403 inquiry and, in doing so, direct the finder of fact to issue an Inquiry Report that would answer these questions (in which references to "reasonable" refer to the standards of reasonableness applied by established social science research norms):

1. Whether the Media Ratings Council withheld accreditation for Arbitron's Portable People Meter ("PPM") for reasons that would call into question PPM's ability to offer an accurate assessment of minority radio listenership.

2. Whether Arbitron's failure to submit all data sets to the MRC for accreditation stems from reasons that would call into question PPM's ability to offer an accurate assessment of minority radio listenership.

3. Whether PPM sample sizes are inadequate or are unrepresentative of the population, including:

    (a) Whether PPM sample size is too small to allow for the user of PPM to target age or gender subsets of minority audiences;

[104] For example, the Department of Justice and the Federal Trade Commission regard the Federal Communications Commission as having the greatest knowledge in broadcast matters, and therefore these and other authorities readily accept FCC factual findings in their oversight of industries within or ancillary to broadcasting.

(b) Whether young African American or Hispanic listeners are reasonably included in Arbitron PPM samples;

(c) Whether Arbitron under-samples cell phone-only households;

(d) Whether Arbitron's failure to overcome 18-34 year old minorities' hesitancy to carry visible PPM recording devices introduces racial bias into radio listenership reports;

(e) Whether Arbitron's sample recruitment questionnaire design introduces a selection bias favoring English-dominant persons;

(f) Whether PPM response rates are reasonable;

(g) Whether PPM compliance rates are reasonable;

(h) Whether Arbitron's carry rate is reasonable;

(i) Whether stratification of minority panelists' data is so pronounced that it drives down advertiser preferences for stations serving minorities.

4. Whether the PPM methodology that Arbitron is taking to commercialization without MRC accreditation is likely to offer an accurate assessment of minority radio listenership.

5. Whether Arbitron's PPM methodology omits certain key metrics that may be necessary for an accurate assessment of minority radio listenership, including:

(a) the measurement of engagement and listener loyalty;

(b) zip code information;

(c) income data;

(d) country of origin data;

(e) language weighting for adult demographics.

6. Whether the PPM recording device's alleged inconvenience, and its visibility, introduces an unreasonable degree of unreliability to the data it records.

7. Whether incongruency between the diary and PPM rating points is due to behavior differences in listening or carrying levels.

8. Whether women's alleged reluctance to wear the PPM device may unreasonably skew the resulting data.

9. Whether Arbitron's plans to increase carry rates among minority panelists are grounded on expert advice on multicultural marketing.

10. Whether Arbitron's abandonment, for PPM, of the diary's panelist confidentiality and panel service time limitations were reasonable in light of the potential for corruption.

Accordingly, the PPMC respectfully requests that the Commission initiate the requested 403 Inquiry as soon as possible.

Respectfully submitted,

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September 2, 2008

CERTIFICATE OF SERVICE

I, Margaret E. Lancaster, hereby certify that I have this 2nd day of September, 2008 caused a copy of the foregoing "Emergency Petition for Section 403 Inquiry" to be delivered by e-mail and Federal Express, overnight shipping charges prepaid, to the following:

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