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September 2, 2008

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SEP - 2 2008

Federal Communications Commission
Office of the Secretary

Marlene Dortch, Secretary
 Federal Communications Commission
 445 12th Street, S.W.
 Washington, DC 20554

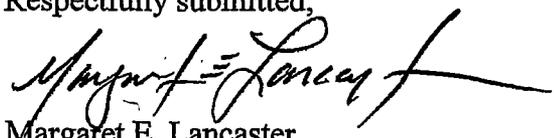
RE: Emergency Petition for Section 403 Inquiry

Dear Ms. Dortch:

By and through its undersigned counsel, and under Section 403 of the Communications Act, the PPM Coalition ("PPMC") hereby requests that the Commission review the enclosed Emergency Petition submitted herewith by the PPMC and immediately open an inquiry into the current Portable People Meter ("PPM") methodology used by Arbitron, Inc.

Should you have any questions concerning this submission, kindly contact the undersigned.

Respectfully submitted,



Margaret E. Lancaster
 Counsel for the PPM Coalition

Enclosure

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

In re)

Portable People Meter)

MB Docket No. _____

FILED/ACCEPTED
SEP - 2 2008
Federal Communications Commission
Office of the Secretary

TO THE COMMISSION

EMERGENCY PETITION FOR SECTION 403 INQUIRY

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September 2, 2008

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. Rather, PPMC seeks only an accurate and fair ratings methodology.

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.

Time is of the essence. 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.

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

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

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 Urban 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 radio³ – 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.

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, MMTTC 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.

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

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

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

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.

(cont'd)

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 deregulation²⁰ and structural deregulation²¹ are premised

(cont'd from previous page)

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 Comm'n of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983) (emphasizing that

(cont'd)

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

²⁵ See "Bruce Beasley: 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

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- 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 <http://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 WQCD's Smooth Jazz," N.Y. Daily News, Feb. 11, 2008, available at http://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

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](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/afxnews/limited/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

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

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