

TABLE OF CONTENTS

SUMMARY	ii
I. INTRODUCTION	1
II. STATUTORY AUTHORITY FOR FCC REGULATION OF BROADCAST OWNERSHIP	2
III. SECTION 403 EMPOWERS THE COMMISSION TO INVESTIGATE USE OF PPM AND, IF NECESSARY, COMPEL ARBITRON'S COOPERATION	3
A. Section 403 Gives the FCC Jurisdiction to Investigate PPM	4
B. Case Law Shows That Section 403 Power Extends To The Investigation of PPM	4
C. The Commission Has Power Under Section 403 to Compel Production of Relevant Information If Necessary	6
CONCLUSION	8

SUMMARY

This is a vitally important proceeding, because the very future of minority-owned and oriented radio is in jeopardy. The Commission can and must proceed to investigate Arbitron's practices with respect to the use of the Portable People Meter ("PPM") technology.

The Commission has broad authority to regulate broadcast ownership. Section 403 of the Communications Act empowers the Commission to investigate matters relating to the exercise of this power. This jurisdiction extends to Arbitron's use of PPM. Moreover, were it necessary, the Commission has the power to compel Arbitron to submit information essential to the inquiry.

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of)
)
Impact of Arbitron Audience Ratings) MB Docket No. 08-187
Measurements on Radio Broadcasters)
)

TO: The Commission

COMMENTS OF MEDIA ACCESS PROJECT

Media Access Project (“MAP”) respectfully submits these comments in response to the Commission’s *Notice of Inquiry* (“NOI”) in the above-captioned matter. *Notice of Inquiry*, 24 FCCRcd 6141 (2009).

The *NOI* requests comment, among other things, on whether the Commission has “jurisdiction to require the submission of information concerning PPM methodology or the authority to regulate Arbitron’s PPM methodology.” *Id.*, 24 FCCRcd at 6156. MAP addresses that question, concluding that the Commission’s authority under Section 403 of Communications Act empowers it to conduct an inquiry into matters related to its Congressionally-granted powers and, if necessary, to compel Arbitron’s cooperation.

This is a vitally important proceeding, because the very future of minority-owned and oriented radio is in jeopardy. The Commission can and must proceed to investigate Arbitron’s practices.

I. INTRODUCTION.

Arbitron, Inc. (“Arbitron”) creates and sells the nation’s major commercial radio ratings service. It has recently introduced a new radio audience measurement device known as the “Portable People Meter” (“PPM”).

The Commission has long employed Arbitron's rating and market measurement statistics in its regulation of radio ownership. In particular, the Commission uses Arbitron's local radio market definitions for the purposes of its local multiple ownership rule, and its local radio ownership rule. As the Commission explained in the *NOI*,

The Commission's local multiple ownership rules limit the number of radio and television stations one entity may own in a local market, and they also limit the cross-ownership of radio stations, television stations and/or newspapers in the same geographic market....The Commission must define a radio market in order to determine whether license transfers, mergers and acquisitions comply with the numerical limits of the local radio ownership rule. The Commission relies on radio Metro markets, defined by Arbitron, to determine compliance for stations located within, or garnering sufficient listeners located within, the geographically defined Arbitron radio Metro markets.

NOI, 24 FCCRcd at 6155-56.¹

As is set forth in the *NOI*, serious questions have arisen as to the validity of the measurements produced using the PPM technology. *Id.*, 24 FCCRcd at 6144-5. MAP explains below that the need to examine the impact of PPM on radio market and audience measurement affords jurisdiction for the Commission to institute an inquiry into PPM.

II. STATUTORY AUTHORITY FOR FCC REGULATION OF BROADCAST OWNERSHIP.

The Commission has jurisdiction to examine and regulate broadcast ownership incident to Sections 1, 4(i), 4(j), 4(k) and 303(r) of the Communications Act of 1934 ("the Act").

As stated in Section 1 of the Act, the Commission was created

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, Nationwide, and world-wide wire and radio communication service....

¹The Commission also pointed out that it "relies on the information produced by Arbitron to fulfill its statutory obligation to evaluate the continued necessity of its local radio ownership rule as well as the cross-ownership rules." *Id.*, 24 FCCRcd at 6156.

From its very inception, and from the very first words of those which gave it being, the Commission was charged with protecting the interest of the entire public in radio communications. To achieve this goal it was endowed with expansive powers by Congress. Under Section 4(i) of the Act,

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

The Commission granted not just the ability to take action, but also the discretion to determine how that action would proceed. Under Section 4(j), “The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.” Moreover, Section 4(k)(4) commands the Commission to provide “specific recommendations to Congress as to additional legislation which the Commission deems necessary....”

The Commission’s authority to regulate broadcasting in the public interest is set forth in Title III. The specific power to regulate broadcast ownership in the public interest is derived from § 303(r) of the Act, which empowers the Commission to, “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act,...” The Supreme Court of the United States has definitively upheld this power. *FCC v. NCCB*, 436 U.S. 775, 793-96; *United States v. Storer Co.*, 351 U.S. 192 (1956); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

III. SECTION 403 EMPOWERS THE COMMISSION TO INVESTIGATE USE OF PPM AND, IF NECESSARY, COMPEL ARBITRON’S COOPERATION.

Section 403 of the Act, which is central to the discussion that follows, gives the Commission investigatory powers to implement and examine its regulatory activities:

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.

A. Section 403 Gives the FCC Jurisdiction to Investigate PPM.

The question posed by the Commission's current inquiry is not whether the FCC has authority to regulate Arbitron's activities directly.² Rather, the proper question is a much more limited one - does the FCC have the statutory power to make inquiry into Arbitron's practices? Because the FCC's radio ownership rules expressly incorporate, and rely upon, Arbitron's market definitions and ratings for purposes of taking regulatory action, and because the results of its inquiry could inform future policymaking and legislative recommendations, Section 403 plainly affords the FCC with power to make this inquiry. Moreover, were it necessary to compel Arbitron to cooperate with the Commission's investigation, the Commission would have power to require Arbitron to respond to properly drawn inquiries adopted pursuant to the Commission's established processes and procedures.

B. Case Law Shows That Section 403 Power Extends To The Investigation of PPM.

The FCC has invoked Section 403 authority in many circumstances far more attenuated than this one. The FCC has frequently employed its Section 403 authority to make inquiry even into activities beyond its direct regulation, including circumstances where it is trying to determine the outer limits of its powers. A few such examples suffice to demonstrate this point.

²For what it is worth, the FCC has frequently adopted rules governing activities of otherwise unregulated entities incident to its ancillary jurisdiction. Indeed, the Commission implemented extensive regulation of cable television for more than twenty years before specific regulatory authority was conferred in 1984. Thus, were it necessary to do so, MAP would be prepared to argue that the FCC might well have authority to regulate Arbitron's activities directly.

In 1971, the Commission invoked its Section 403 powers to conduct an inquiry into establishing limits on commercialization on children's TV programming. Responding to objections that any regulations in this area would violate the Communications Act and the First Amendment, the Commission ruled that it was not possible to make a determination with respect to those questions without first collecting necessary data:

The Commission does not have in its files sufficient data on children's TV programming upon which we can evaluate the situation to determine whether these public interest considerations in fact amount to a substantial public interest question as to whether the present use of the medium in this respect is as satisfactory as should be expected....In order to arrive at an informed determination in this area, we need the data which this Inquiry proceeding is designed to elicit through the questions set forth below. This information will give us an idea of the scope of the problem if in fact one exists, and of how it may best be approached.

Petition of Action for Childrens Television (ACT), 28 FCC2d 368, 370 (1971).³

Another instance of the use of Section 403 powers came in 1975, following a series of court decisions involving radio stations' format changes. Fearing that such adopting specific regulation of formats might be unconstitutional, the Commission initiated a proceeding to examine its authority pursuant to Section 403. *Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations*, 57 FCC2d 580, 585 (1975). In response to a petition for reconsideration challenging the agency's authority to proceed, the Commission ruled that, notwithstanding seemingly contrary judicial rulings, inquiry was necessary to determine the boundaries of the Commission's powers. *Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations*, 58 FCC2d 617, 618 (1976). The Supreme Court ultimately affirmed this course of action. *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981).

³The Commission also observed that "This Inquiry and the information elicited through it could be pertinent, among other things, to the Commission's duty, under Section 4(i) of the Act, to transmit to Congress significant data concerning the use of radio, and also legislative recommendations." *Id.*, at n. 3.

Yet another important use of Section 403 authority can be found in the FCC's wide-ranging network inquiry initiated in 1977. Despite the lack of direct jurisdiction over broadcast networks, the Commission conducted a searching review of numerous aspects of the network business. In initiating its inquiry, the Commission

hasten[ed] to point out, however, that we have not reached any conclusions, even of a tentative nature, regarding those issues discussed below. What we contemplate at this time is solely a fact gathering inquiry designed to provide the Commission with information necessary to a thorough understanding of television networking.

Commercial Television Network Practices and the Ability of Station Licensees to Serve the Public Interest, 62 FCC2d 548 (1977). After laying out the questions it wished to be addressed, the Commission added that

[I]f at any point it appears that these procedures are inadequate, the special staff will be authorized to initiate compulsory processes under Section 403 of the Act.

Id., 62 FCC2d at 559.

Similarly, the Commission again relied on its Section 403 authority to undertake an intensive review of the economics of cable television, even though there was at that time no specific statutory authority to regulate cable. *Inquiry into the Economic Relationship Between Television Broadcasting and Cable Television*, 65 FCC2d 9, 23 (1977). See also, *Inquiry into Developing Patterns of Ownership in the CATV Industry*, 7 FCC2d 853 (1967).

C. The Commission Has Power Under Section 403 to Compel Production of Relevant Information If Necessary.

The Commission's power under Section 403 is not limited to obtaining information from Commission licensees and others directly subject to the Commission's regulations. Were it necessary to do so, the Commission could invoke its normal processes to compel Arbitron to submit information essential to its investigation.

FCC v. Cohn, 154 F.Supp. 899 (SDNY, 1957) is illustrative of the scope of the FCC's authority to compel production from third parties. Incident to an investigation into TV network program practices, the Commission sought information from program producers. Once efforts to obtain voluntary cooperation were exhausted, the Commission issued a subpoena for the information. Rejecting a challenge based on the claim that the FCC lacked power to obtain such material from unregulated parties, the Court held that

It seems plain that the Commission has been endowed with ample powers to conduct an investigation of the nature of the network study inquiry and that such investigation is in proper furtherance of the duties and functions vested in it by Congress, both under the Communications Act and by virtue of special congressional authorization. In furtherance of its powers to investigate, the Commission has been granted full power of subpoena, 47 U.S.C.A. §409(e). This power is, of course, not confined to those over whom it may exercise regulatory jurisdiction, but to any persons from whom it can obtain information and documents which are relevant and material to its inquiry. The argument of the respondents that they are exempted from the subpoena power of the Commission because the Commission has no regulatory power over them, would be wholly inconsistent with the broad powers of investigation with which the Commission is vested and would circumscribe such power so as to severely restrict its effectiveness. There is no doubt that administrative agencies vested with such powers may, by compulsory process, require the production of information and documents from third persons who are not within their regulatory jurisdictions if the information sought is necessary and relevant to their authorized and lawful inquiry. The public interest to be served by the broad investigation for which Congress has provided would necessarily outweigh any intrusion on the private rights of respondents.

Id., 154 F.Supp. at 906-7 (footnotes and citations omitted). *See also FCC v. Schreiber*, 201 F. Supp. 421, 425 (S.D. Cal. 1962), *modified in part*, 329 F.2d 517 (9th Cir. 1964), *modified in part*, 381 U.S. 279 (1965) ("The fact that the respondents were not licensees of the Commission did not prevent it from seeking information from them.")

It is indisputable this power over third parties does extend to enforcement and investigation of the Commission's broadcast ownership rules. As early as 1942, the U.S. Court of

Appeals for the District of Columbia Circuit considered just such a case. In *Stahlman v. FCC*, 126 F.2d 124 (D.C. Cir. 1942) the court ruled that the FCC's general authority to regulate radio communications empowered it to compel cooperation of unregulated parties. Thus, without even resorting to discussion of Section 403, the court upheld the Commission's inquiry into newspaper/broadcast cross-ownership as against a challenge by a non-licensee who disputed the Commission's authority to obtain information from newspaper publishers. *Id.*, 126 F.2d at 127.

Accordingly, the Commission could compel Arbitron's cooperation as necessary.

CONCLUSION

The Commission can and should proceed with its inquiry. If Arbitron fails to provide necessary information, the Commission has broad power to compel Arbitron to provide information essential to the inquiry.

Respectfully submitted,

Andrew Jay Schwartzman
Media Access Project
Suite 1000
1625 K Street, NW
Washington, DC 20006

Law Student Intern:
Bryan Utter

July 1, 2009