

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

COMMENTS OF ARBITRON INC.

Timothy T. Smith
Executive Vice President & Chief Legal
Officer, Legal & Business Affairs
Michelle Levister
Deputy General Counsel
ARBITRON INC.
9705 Patuxent Woods Drive
Columbia, MD 21046-1572

John Griffith Johnson, Jr.
M. Lily Woodland
PAUL HASTINGS JANOFSKY
& WALKER, LLP
875 15th Street, N.W.
Washington, D.C. 20005

Counsel to Arbitron Inc.

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SUMMARY

In these Comments, Arbitron demonstrates that the Commission has absolutely no authority to impose regulations upon Arbitron's exciting new technology for more reliably measuring radio-station listeners' exposure to stations' signals – known as the Portable People Meter™ or PPM™ – than is achievable using the older paper-and-pencil method for consumers to self-report their listening experiences in a journal-type diary. Congress has considered on multiple occasions whether to put media audience measurement services under federal government regulation, and just as often has rejected doing so. The Commission itself has concluded that it lacks jurisdiction over services such as Arbitron's. There is no provision in the Communications Act of 1934, as amended (the “*Act*”), that grants such authority to the Commission, and the courts have repeatedly rebuffed attempts by the Commission to assert jurisdiction over specific kinds of communications-related activities that are not themselves addressed in the Act, simply based upon generalized statements of policy or intent that can be found in the Commission's enabling statute. These Comments review relevant legislative history, the Commission's own precedents, and pertinent rulings by the courts that have placed limits upon the Commission's attempts in the past to expand its authority in the absence of a specific delegation of power in the Act.

To the extent that the Commission may have jurisdiction over the transmission of radio broadcasting signals into which station-identifying PPM codes are inserted on a non-interfering basis by cooperating stations in the exercise of their business judgment, these Comments demonstrate that the Commission may not restrain the transmission of that lawful information consistent with the protection of those stations' and Arbitron's freedom of speech and expression established in the First Amendment and jealously guarded by the courts. These Comments

discuss relevant case law and demonstrate that judicial precedent has demanded a specific delegation in the Act to the Commission of authority to regulate content before a self-generated Commission regulation purporting to do so will be upheld.

Having established the Commission's lack of authority to do more in this proceeding than gather information, perhaps make assessments concerning the state of the radio broadcasting station audience measurement industry and the PPM's service's role in that environment, and possibly to issue a report with or without recommendations, these Comments go on to describe the PPM service and its significant technological advancements over the decades-old diary system for participants to self-report their listening experiences. Specific examples are given to illustrate how and why the PPM method more effectively addresses the broadcast industry's need for recordation of exposure to radio stations and their embedded advertising messages than the diary method, which is subject to human error. Notwithstanding the progress that the PPM service represents over the diary, Arbitron shows in these Comments that it is actively and continuously seeking out suggestions for improvements in the PPM methodology, and recites a number of such improvements that have already been implemented, or that are on schedule for near-term implementation, and that are specifically geared toward boosting the recruitment and compliance with PPM service requirements on the part of PPM panelists that are Spanish-language-dominant Hispanics, English-language-dominant Hispanics, and Blacks.

Arbitron points out in these Comments that the radio industry is in danger of falling behind other media platforms – television, the Internet, personalized mobile audio delivery services such as MP3 players and iPods, and even some forms of outdoor media – that are moving towards measuring their audiences using the same kind of near-passive, electronics-based methods that the PPM service uses. In order to stay competitive with these other media in

attracting advertising dollars, radio must adapt to the 21st century, even if there will be temporary dislocations for some stations in making the transition from the diary to the PPM service.

These Comments discuss the Media Rating Council, Inc. (the “MRC”), which was formed some 40 years ago in response to Congressional hearings into media audience measurement services. Arbitron demonstrates that its commercialization of the PPM service is both consistent with the MRC’s Voluntary Code of Conduct and established industry practice in recent deployments of similar kinds of audience measurement products by providers other than Arbitron.

In a close examination of the experiences of identified radio stations that target minority audiences in a variety of markets where the PPM service has been commercialized or is in pre-commercialization, Arbitron shows that there is no consistent pattern of such stations experiencing only losses in their diary-based market rankings or audience ratings. To the contrary, these Comments point out minority-targeted stations that have seen their market ranking, and/or their audience rating, fluctuate from the last diary-based report to more recent PPM-based reports, with some stations showing improvements, others staying about the same, and some showing drop-offs, but with variations from one PPM-report to the next. Some stations that feature formats appealing to Hispanic and Black listeners have shown longer-term upward trends in their market rank and/or their audience ratings, and some have not. The facts do not support the proposition that PPM-based reports uniformly and categorically result in reductions in the reported listenership of stations that cater to minorities.

In the final section of these Comments, Arbitron addresses a number of specific questions that were posed in the Commission’s Notice of Inquiry in this proceeding, many of which can

only (or, in some cases, can most informatively) be addressed by Arbitron. In this portion of the Comments, Arbitron demonstrates, among other things, that in examining specific statistical performance across a wide range of metrics as between (1) the diary-based radio market reports that have long been accredited by the MRC, on the one hand, and reports based upon the “Radio First” PPM service for which MRC accreditation is being sought, on the other hand, and (2) reports based upon an early version of the PPM service that was commercialized in Houston after it received MRC accreditation for monthly average-quarter-hour, time-period radio ratings, on the one hand, and the subsequent version of PPM known as “Radio First” that has been commercialized or is awaiting commercialization in other markets, on the other hand, there are no consistent variances. The Houston PPM data (which has received MRC accreditation for monthly average-quarter-hour, time-period radio ratings) and the Radio First PPM data (which has received MRC accreditation for monthly average-quarter-hour, time-period radio ratings in one market – Riverside/San Bernardino) differ only slightly – to the extent that approximately half of the PPM panelists in Houston were recruited in person from an address-based sample frame, while the other half were recruited over the telephone, while most of the Radio First panelists were recruited by telephone from a telephone-based sample frame, other than panelists now recruited from an address-based sample frame for cell-phone-only (“CPO”) households. Despite that difference, the two PPM recruitment methods produce panelists that show consistent metrics in terms of their compliance with PPM service requirements. From the point of view of statistical validity, the sample sizes, recruitment techniques, demographic composition of the samples, panelist compliance, differentiation between panelists from CPO households and those from households using landline telephones, and other relevant characteristics all support

Arbitron's position that the Radio First PPM service yields data that are as reliable as data produced either from the diary service or from the Houston PPM service.

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Arbitron Inc. (“*Arbitron*”) hereby respectfully submits its Comments in response to the *Notice of Inquiry* in the matter of “Impact of Arbitron Audience Ratings Measurements on Radio Broadcasters,” MB Docket No. 08-187, FCC 09-43, released by the Federal Communications Commission (the “*Commission*” or the “*FCC*”) on May 18, 2009 (the “*NOI*”), 24 FCC Rcd. ____, 2009 WL 1373002, 74 Fed. Reg. 26,235 (published June 1, 2009). The *NOI* invited comments from interested parties with respect to the commercial use of Arbitron’s Portable People Meter™ (the “*PPM*”™) service.

I. INTRODUCTION AND STATEMENT OF INTEREST

Arbitron is a leading provider of radio station audience measurement data in the United States. It has for years gathered and published estimates of station audiences in designated markets on the basis of information concerning the listening behaviors of radio consumers, using a method by which recruited participants self-report their listening experiences in a written “diary” that they keep for one week at a time. This “diary” method continues to be the method

that Arbitron uses in the mid-sized and smaller markets to gather and publish ratings reports. At the same time, after 16 years of careful research and development, Arbitron is now in the process of commercializing a replacement method in the larger markets, known as the PPM service. The PPM service requires that the participants who are recruited carry a small electronic meter on their persons during the course of a day (for a period of up to two years). The meter passively records the participant's exposure to radio station signals that have been inaudibly encoded with information that identifies the station signals to the meter. A more complete description of both the diary method and the PPM service is found in these Comments.

Arbitron's PPM service is the subject of the Commission's *NOI* in this proceeding.¹ At the outset, Arbitron is pleased to be able to present information to the Commission regarding the PPM service, including how that service represents a significant technological advancement over the diary method; how it addresses the specific expressed needs of the broadcast industry for data on listener exposure to radio stations and their embedded advertising messages; how the PPM service has been commercialized in accordance with common practice in the media audience survey industry and the requirements of the private organization that was established four decades ago to review and accredit media audience ratings methodologies; and how PPM is being used by stations (including stations that are owned by, or that are programmed primarily to reach, Hispanics and Blacks) to retain or improve upon their diary-reported market rankings and audience ratings in a variety of markets. Arbitron hopes that the Commission will find these

¹ *Notice of Inquiry*, "Impact of Arbitron Audience Ratings Measurements on Radio Broadcasters," MB Docket No. 08-187, FCC 09-43, released by the Federal Communications Commission on May 18, 2009 (the "*NOI*"), 24 FCC Red. ___, 2009 WL 1373002, 74 Fed. Reg. 26,235 (published June 1, 2009).

Comments helpful in understanding the PPM service and why its continuing improvements and ongoing deployment offer a promising future for the radio industry in its competition with other media platforms that are migrating to similar forms of near-passive, electronics-based audience measurement technologies.

In providing these Comments, and in its efforts to help educate the Commission with respect to the role that PPM is playing in the radio audience measurement environment, however, Arbitron is constrained to point out – as the next Section of these Comments describe in detail – that the Commission has no authority whatsoever to assert its regulatory power over Arbitron or the PPM service. The Commission may possess the authority to ask questions, to educate itself and interested parties, and to submit its findings and recommendations, if any, pertaining to these matters; but beyond that, the Commission is without jurisdiction, and by submitting these Comments and continuing to extend its offer to work cooperatively with the Commission and the various stakeholders, Arbitron neither submits to the Commission’s regulatory authority nor waives any rights it has to challenge any attempt by the Commission to expand its jurisdiction to reach Arbitron’s assets and operations.

II. THE COMMISSION LACKS JURISDICTION TO REGULATE AUDIENCE MEASUREMENT SERVICES

“It is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress.”² That the Commission has no authority to regulate media audience survey methodologies is clear: Congress expressly declined to grant the Commission such authority; no provision of the Communications Act of 1934, as amended (the “Act”) authorizes the Commission to regulate in this area; and the Commission itself has

² *Am. Library Ass'n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005) (“*American Library*”).

recognized that it does not have jurisdiction over audience ratings services. Despite the lack of authority to regulate ratings services, the Commission has embarked on a wide-ranging Notice of Inquiry proceeding. The Commission's *NOI* delves into the very questions that Congress determined were best left to industry self-regulation.

A. Congress Has Expressly Declined to Grant the Commission Jurisdiction Over Audience Measurement Services

In the 1960s, amidst concerns regarding the preparation and use of broadcast audience ratings, Congress, through a Special Subcommittee on Investigations of the Interstate and Foreign Commerce Committee (the "*Harris Committee*"), undertook an extensive review of audience ratings services.³ The scope of the Harris Committee's investigation included days of hearings and "extensive and painstaking investigations" conducted by subcommittee staff.⁴

The Harris Committee Report expressly recognized that the FCC is charged with "licensing and regulating broadcast operations in the public interest," and noted that audience ratings affect broadcasters in relation to listeners and viewers and in competitive relations with one another.⁵ However, notwithstanding that audience ratings affect entities over which the Commission has jurisdictional authority, the Harris Committee expressly stated that "neither [the Federal Trade Commission nor the FCC] has a direct mandate from Congress to regulate specifically the activities of rating services."⁶

³ House Rpt. No. 1212, 89th Congress (1966).

⁴ *Id.* at 1.

⁵ *Id.* at 11.

⁶ *Id.* at 10.

Although the Commission may have the bare authority to seek comment on the limits of its jurisdiction in these matters, the Commission has no role in the regulation of ratings services themselves. Congress expressly declined to delegate the authority to regulate audience measurement services to either the FCC or the Federal Trade Commission.⁷ Instead, the Harris Committee concluded that industry self-regulation, including independent audits of audience measurement services, was preferable to government oversight. Thus, the Harris Committee's final summary and recommendations state:

The enactment, at this time at least, of legislation providing for government regulation of broadcast audience measurement activities is not advisable. The administration of a statute providing for such regulation would place an unnecessary burden on the Federal Government, and it is doubtful that more would be accomplished than can be accomplished by effective industry regulation.⁸

In addition, the Harris Committee noted that the enactment of subsequent legislation would be necessary, in the future, to provide for government regulation of audience ratings operations.⁹

Although the Act has been amended since the Harris Committee's investigation into audience ratings services in the 1960s, Congress declined to grant the Commission the authority to regulate audience ratings services as recently as 2005, and it is clear that Congress does not

⁷ *Id.* at 18 (“Requiring the disclosure of relevant information by rating services, establishing minimum standards for rating services, auditing the performance of rating services, and licensing such services might *conceivably* be required in a Federal statute and a Federal agency might be directed to discharge these responsibilities.”) (emphasis added).

⁸ *Id.* at 21.

⁹ *Id.* at 19 (noting that “should ... the industry program of self-regulation ... be found at a later date to be substantially deficient ... [the] enactment of appropriate legislation providing for Government regulation of rating operations may prove to be the only recourse”).

believe that the Commission has such authority. For example, four years ago, with the deployment of Nielsen Media Research's ("*Nielsen's*") Local People Meter ("*LPM*") service, two bills were introduced in Congress which sought "[t]o provide for the accuracy of television ratings services...."¹⁰ At the time, members of Congress expressed concern about the accuracy of Nielsen's television ratings in light of higher "fault rates" among certain demographics in the LPM service, including certain minority groups, younger viewers, larger families and others.¹¹

However, amidst similar concerns as those that have been expressed with regard to Arbitron's PPM service, neither bill that was introduced in the 109th Congress contemplated extending the Commission's authority into the realm of audience ratings services. The Commission is only mentioned in Senate Bill 1372, and there only as a recipient of an annual report to be prepared by the industry-organized entity that was formed in the aftermath of the Harris Committee Report, namely, the Media Rating Council, Inc. (the "*MRC*").¹² Instead, the bills reflected the Congressional commitment to vesting oversight of audience ratings services with a "private, self-governing, industry body" – *i.e.*, the MRC – which Congress thought to be "the best way to ensure that accurate TV ratings are in the public interest."¹³ Upon presenting Senate Bill 1372, the bill's sponsor expressly stated that "there is no government role whatsoever envisioned in this bill. It does not create any new government standards, regulation, or bureaucracy...."¹⁴ Rather, both bills (S. 1372 and H.R. 3298) sought to require MRC

¹⁰ Fairness, Accuracy, Inclusivity and Responsiveness in Ratings Act of 2005, S. 1372, 109th Cong. (2005); *see also* Television Viewer Consumer Protection Act of 2005, H.R. 3298, 109th Cong. (2005).

¹¹ 151 Cong. Rec. S7912, 7913 (July 1, 2005) (Statement of Sen. Burns).

¹² S. 1372 § 6(a).

¹³ 151 Cong. Rec. S7912, 7913 (July 1, 2005) (Statement of Sen. Burns).

¹⁴ *Id.*

accreditation before television ratings data could be used commercially or as currency ratings.¹⁵ Although the bills were introduced and referred to Committee, Congress took no further action.

Taken in conjunction with the Harris Committee's clear conclusion that industry self-regulation is preferable to federal legislation "providing for Government regulation of broadcast audience measurement activities,"¹⁶ it is apparent that Congress did not intend for and has not subsequently granted the Commission the authority to regulate the activities of entities such as Arbitron.

B. The Commission Has Previously Recognized That It Does Not Have Jurisdiction Over Audience Measurement Services

The Commission itself has expressly recognized that it lacks jurisdiction to regulate audience measurement services. For example, in 1980 the FCC conducted an investigation into "obstacles to minority acquisition of broadcast properties."¹⁷ As part of this investigation, the FCC contracted with an outside consultant to conduct research on "the financing of broadcast station purchases and techniques of commercial audience measurement (ratings) services...."¹⁸ Although the final report concluded that ratings services do not accurately estimate the audiences of minority-programmed stations,¹⁹ the Commission nonetheless rejected a request by a broadcast-oriented, minority advocacy organization for the Commission to regulate audience

¹⁵ See Fairness, Accuracy, Inclusivity and Responsiveness in Ratings Act of 2005, S. 1372, 109th Cong. (2005); Television Viewer Consumer Protection Act of 2005, H.R. 3298, 109th Cong. (2005).

¹⁶ House Rpt. No. 1212, 89th Congress at 21 (1966).

¹⁷ See Federal Communications Commission, Office of Public Affairs, EEO-Minority Enterprise Division, *Minority Ownership of Broadcast Facilities: A Report* at 1 (Dec. 1979). This report is a staff report summarizing the findings of CCG, Inc., an outside consultant retained by the Commission to study various issues related to minority broadcast ownership.

¹⁸ *Id.*

¹⁹ *Id.* at 18-21.

ratings firms.²⁰ In so doing, the Commission recognized that “[it] does not appear to have direct jurisdiction over audience ratings firms,”²¹ and thus denied a “request that the Commission investigate the alleged failure of audience ratings firms to adequately sample Black listeners and viewers...”²²

Similarly, the FCC staff has recently recognized in correspondence from the Senior Deputy Chief of the Media Bureau to a Congressman that “Arbitron...is not regulated by the Commission.”²³

There is no basis on which the Commission can reasonably overturn its established precedent that it lacks authority to regulate audience measurement, given the express Congressional determinations not to grant it that authority.²⁴

C. The Commission Has No Statutory Authority to Regulate Audience Measurement Services

In light of the Harris Committee’s ultimate conclusion that the governance of audience measurement services could more effectively be accomplished by industry self-regulation, it is

²⁰ *Rules and Policies to Further the Advancement of Black Americans in Mass Communications*, 76 FCC 835 (1980), at paras. 30, 44.

²¹ *Id.* at para. 30.

²² *Id.* at para. 44.

²³ See Letter from Roy J. Stewart, then-Senior Deputy Chief of the Federal Communications Commission’s Media Bureau, to Congressman Gene Taylor of Mississippi (Mar. 20, 2008). While staff letters are, of course, not binding on the Commission, they do reflect the staff’s understanding of Commission precedent. A copy of Mr. Stewart’s letter was submitted as Appendix 1 to Arbitron’s Comments filed with the Commission on September 24, 2008 in MB Docket No. 08-187 (“*Arbitron’s September 24, 2008 Comments*”).

²⁴ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155-56 (2000) (finding, in part, that the FDA’s later assertion of jurisdiction contravened the clear intent of Congress, on the grounds that Congress had ratified the FDA’s longstanding position that it lacked jurisdiction to regulate tobacco by “creating a distinct regulatory scheme” for tobacco while aware of the FDA’s assertion that it lacked jurisdiction).

not surprising that no provision of the Act provides the Commission with express statutory authority to regulate audience survey methodologies or audience measurement services. Because the Commission is constrained to regulate only in areas where Congress has specifically delegated the Commission the authority to act, any attempt by the Commission to regulate Arbitron or audience ratings measurement in general would be an impermissible extension of the Commission's authority.

Indeed, courts interpreting the Act have routinely confined the Commission to the authority that Congress gave it, and no more. For example, in *FCC v. Midwest Video Corp.* ("*Midwest Video II*"), the Supreme Court rejected the Commission's argument that that it had the authority to promulgate rules requiring cable television systems to develop a minimum channel capacity and to make certain channels, equipment and facilities available to third parties.²⁵ Although the Court had previously found that cable television was "communication by wire or radio,"²⁶ and thus covered by Title I of the Act, the Court in *Midwest Video II* found that the rules in question effectively imposed common carrier status on cable operators, which the Commission was explicitly prevented from doing by Section 3(h) of the Act.²⁷

Similarly, in *Motion Picture Association of America v. FCC* ("*MPAA*"), the United States Court of Appeals for the District of Columbia Circuit rejected the Commission's argument that Sections 1, 2(a), 4(i) and 303(r) of the Act gave the Commission statutory authority to adopt rules requiring certain video programmers to supplement their programming with video

²⁵ *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

²⁶ *Id.* at 696-98 (discussing *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968), and *U.S. v. Midwest Video Corp.*, 406 U.S. 649 (1972)).

²⁷ *Id.* at 708.

descriptions.²⁸ In vacating the Commission’s rules, the Court found that “Section 1 does not otherwise authorize the FCC to regulate program content, as the video description rules clearly do. Both the terms of § 1 and the case law amplifying it focus on the FCC’s power to promote the accessibility and universality of transmission, not to regulate program content.”²⁹ The Court made clear, in light of potential First Amendment issues, that the general provisions of Section 1 have never been construed to permit the Commission to regulate program content, and “Congress has been scrupulously clear when it intends to delegate authority to the FCC to address areas significantly implicating program content.”³⁰

The Court in *MPAA* also rejected the Commission’s argument that Section 303(r), which permits the FCC to regulate in the public interest “as may be necessary to carry out the provisions of the Act,” was sufficient statutory authority to promulgate the video description rules.³¹ The Court emphasized that the “FCC cannot act in the ‘public interest’ if the agency does not otherwise have the authority to promulgate the regulations at issue,”³² and the FCC “must act pursuant to *delegated authority* before any ‘public interest’ inquiry is made under § 303(r).”³³ Because Congress had failed to delegate to the Commission the authority necessary to promulgate the video description rules at issue – which was clear from the statutory language of

²⁸ *Motion Picture Ass’n of America v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).

²⁹ *Id.* at 804.

³⁰ *Id.* at 805 (citing Sections 1464 (indecent speech), 315 (equal opportunities provision), 399 (prohibition of noncommercial stations supporting or opposing political candidates) and 326 (censorship provision) of the Act).

³¹ *Id.* at 806.

³² *Id.*

³³ *Id.* (emphasis in original).

the Act – the Commission could not rely upon the general public interest provisions of the Act as authority to regulate.

The Court in *MPAA* also found that Section 4(i), which permits the Commission to “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,” without more, does not give the agency authority to promulgate regulations in the “public interest.”³⁴ Quoting then-Commissioner Powell, the Court noted that “section 4(i) is not a stand-alone basis of authority and cannot be read in isolation....Section 4(i)’s authority must be reasonably ancillary to other express provisions.”³⁵

Most recently, in *American Library*, the United States Court of Appeals for the District of Columbia Circuit struck down the Commission’s “broadcast flag” regulations as an unauthorized extension of Commission jurisdiction, finding that because the challenged rules purported to “regulate demodulator products after the transmission of a DTV broadcast is complete, [the] regulations exceed the scope of authority that Congress delegated to the FCC.”³⁶ In reaching its conclusion, the Court noted that “the Commission can only issue regulations on subjects *over which it has been delegated authority by Congress*,...”³⁷ Because nothing in the Act gave the Commission the authority “to regulate *any* ‘apparatus’ that is associated with television

³⁴ *Id.*

³⁵ *Id.* The Court summarily dismissed Section 2(a) of the Act as a basis for jurisdiction, stating that the “provision does not, on its own, support the regulations.” *Id.* at 806.

³⁶ *American Library*, 406 F.3d at 705.

³⁷ *Id.* (emphasis added).

broadcasts,”³⁸ and because “no provision in Title I addressed the requirements for demodulator products not engaged in communication by wire or radio,” the Commission’s rules were “invalid at the threshold jurisdictional inquiry.”³⁹

The courts’ instructions in *Midwest Video II*, *MPAA* and *American Library* are clear – the Commission may regulate only in areas where Congress has specifically delegated to the Commission the authority to act. Congress has made no delegation of authority over audience measurement services or methodologies. Indeed, as noted above, when presented with the question of whether to delegate such authority, Congress expressly chose not to. Any attempt to interpret the Act in order to empower the Commission’s regulation of Arbitron would lack a statutory basis and would contravene the express intent of Congress to vest the oversight of audience ratings services in the MRC, a body designed to perform such functions and having the expertise necessary to discharge them.

D. The Commission Cannot Regulate Arbitron or the PPM Service Pursuant to the Doctrine of Ancillary Jurisdiction

Because no specific provision of the Act provides the Commission statutory authority to regulate audience ratings or ratings services, the Commission could only permissibly regulate, if at all, pursuant to the doctrine of ancillary jurisdiction.⁴⁰ Under that doctrine, the Commission’s action must be “reasonably ancillary” to the Commission’s delegated responsibilities. Here,

³⁸ *Id.* at 703 (emphasis added).

³⁹ *Id.* at 705.

⁴⁰ *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (permitting the Commission to regulate the retransmission of television signals by cable systems under Section 152(a) of the Act as “reasonably ancillary to the effective performance of the Commission’s various responsibilities for the regulation of television broadcasting”).

however, any attempt by the Commission to regulate audience measurement services would “rest on no apparent statutory foundation” and would, therefore, be “ancillary to nothing.”⁴¹

The doctrine of ancillary jurisdiction, first articulated by the Supreme Court in *U.S. v. Southwestern Cable Co.*, requires that “the subject of the regulation must be covered by the Commission’s general grant of jurisdiction under Title I of the Communications Act,…” and “the subject of the regulation must be ‘reasonably ancillary to the effective performance of the Commission’s various responsibilities.’”⁴² Although “afforded wide latitude… the Commission was not delegated unrestrained authority,”⁴³ and courts have proceeded cautiously when deciding whether the Commission has validly invoked its ancillary jurisdiction, even when regulations clearly address “communication by wire or radio.”⁴⁴ Indeed, courts have explicitly limited the Commission’s ancillary jurisdiction to the authority delegated to it by Congress, and the doctrine of ancillary jurisdiction does not permit the Commission to extend its authority into an area that Congress has expressly denied it the power to regulate.

The Commission has initiated this *NOI* proceeding under its authority in Sections 1, 4(i), 4(j) and 403 of the Act.⁴⁵ Section 403 itself only grants the Commission the power and authority to institute an inquiry concerning questions that “may arise under any provision of the Act,”⁴⁶

⁴¹ *American Library*, 406 F.3d at 702.

⁴² *Id.* at 692-93.

⁴³ *Id.* at 702 (quoting *Midwest Video II*, 440 U.S. at 706).

⁴⁴ *American Library*, 406 F.3d at 702 (“[T]he Court [in *Southwestern Cable*] appeared to be treading lightly even where the activity at issue’ involved cable television, which ‘easily falls within’ Title I’s general jurisdictional grant.”) (quoting *Ill. Citizens Comm. for Broad. v. FCC*, 467 F.2d 1397, 1400 (7th Cir. 1972)).

⁴⁵ *See NOI*, at para. 34.

⁴⁶ 47 U.S.C § 403.

and Section 4(j) permits the Commission to “conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.”⁴⁷ As discussed in detail below, it is clear both from the express statutory language and from court precedent interpreting the scope of the Commission’s jurisdiction under the Act that the Commission lacks the specific delegated authority from Congress under either Section 1 or 4(i) to regulate audience ratings measurement services.

Indeed, the controlling factor here is that the FCC’s general jurisdictional grant in Title I of the Act does not encompass the subject matter of the *NOI*. In *American Library*, the Court struck down the Commission’s regulations on the grounds that the broadcast flag rule did not regulate the broadcast transmission itself, but sought to impose “regulations on devices that receive communications after those communications have occurred.”⁴⁸ Here, too, the Commission does not seek to regulate any broadcast transmission, as such, and instead is focusing its attention and inquiry on Arbitron’s business of gathering data, compiling those data into estimates of audience shares, and providing various reports to its customers. None of this activity, at its core, is related to the broadcast transmission or “communication by wire and radio.” Therefore, under the test articulated in *Southwestern Cable Co.* and construed by the court in *American Library*,⁴⁹ the Commission cannot satisfy the first precondition necessary to assert ancillary jurisdiction over Arbitron’s PPM service.

⁴⁷ 47 U.S.C. § 4(j).

⁴⁸ *American Library*, 406 F.3d at 703.

⁴⁹ *Id.* at 702 (“[T]he Commission may not invoke its ancillary jurisdiction under Title I to regulate matters outside of the compass of communication by wire and radio.”)

Additionally, although Section 1 of the Act allows the Commission to regulate interstate radio communications in the public interest, the Court in *MPAA* clearly held that Section 1 does not permit or authorize the Commission to regulate program content. Rather, “the terms of § 1 and the case law amplifying it focus on the FCC’s power to promote the accessibility and universality of *transmission*,...”⁵⁰ Thus, although the Commission has authority to control some aspects of signal creation and transmission (*i.e.*, the Commission may restrict a station to operating only on its frequency and subject to limits on power, in order to prevent electrical interference), the purpose of this authority is not to control content, but to assure that the spectrum can be efficiently and effectively used without destructive interference. However, neither Arbitron’s encoding equipment nor the PPM apparatus interferes with or degrades the broadcast signal in any way or otherwise risks causing interference to the signals of other users of the electromagnetic spectrum – and neither the Commission nor the PPM Coalition (the “*Coalition*”), whose Petition induced the Commission to issue the *NOI*, has suggested or argued that they do. This fact is amply illustrated by the specific questions outlined by the Commission in the *NOI* itself, which focus on Arbitron’s recruitment, sampling methods, methodology, and panel composition.

Those attacking the PPM service are not concerned with the broadcast of the inaudible PPM identification code that is transmitted with the participating radio station’s audible program material, but rather with Arbitron’s use of the information generated, in part, as the result of the transmission of that code, as recognized and recorded by the PPM device, to create (using other available information) a report of panelist exposure to certain programming. To that extent, the

⁵⁰ *MPAA*, 309 F.3d at 804 (emphasis added).

Commission’s express concern is rooted in the post-transmission *content* and use of the transmitted information, not the transmission itself. Any Commission order attempting to regulate or to assess the reliability of Arbitron’s ratings would have the specific purpose of attempting to regulate content that is part of the non-interfering signal transmission and the use to which information derived from that content is put.⁵¹ However, as the Court in *MPAA* made clear, in light of First Amendment issues, “Congress has been scrupulously clear when it intends to delegate authority to the FCC to address areas significantly implicating program content.”⁵² Here, Congress has made no such delegation and has specifically declined to give the Commission the jurisdiction to regulate audience ratings.

Moreover, in addition to the fact that the inaudible code that is inserted into the broadcast signal is properly understood as program content, both the station identification data gathered by Arbitron’s PPM service,⁵³ and the final ratings reports created and published by Arbitron,⁵⁴

⁵¹ Indeed, the Commission’s effort to assert regulatory authority over Arbitron’s use of a code that identifies the station and the time at which the coded signal is received is particularly suspect because it would discriminatorily regulate on the basis of the Commission’s disagreement with the content of Arbitron’s audience estimate reports. Stations routinely broadcast inaudible coded signals providing call sign and format or other information, which are used by multiple receivers on the market to display that information. The Commission has not sought to regulate that use. Arbitron’s use of similar data, together with program information, to provide ratings of panelist exposure to signals does not create an issue as to signal quality, but would be singled out for regulation because the Commission disapproves of the resulting product.

⁵² *MPAA*, 309 F.3d at 805.

⁵³ *See Univ’l City Studios, Inc. v. Corley*, 273 F.3d 429, 446 (2d. Cir. 2001) (finding that “[e]ven dry information, devoid of advocacy, political relevance, or artistic expression has been accorded First Amendment protection”) (“*Univ’l City Studios*”).

⁵⁴ *See Univision v. Nielsen*, 2004 WL 3050799, at *3 (Cal. Superior Court, July 7, 2004) (denying Univision’s motion for a preliminary injunction to prevent the dissemination by Nielsen of television audience ratings estimates based upon the LPM, in part on the grounds that Univision sought to enjoin Nielsen’s First Amendment rights, and reasoning that Nielsen’s ratings could be afforded full First Amendment protection, rather than the intermediate level of scrutiny afforded to commercial speech, because “the rating system itself does not propose a commercial transaction”); *see also Sorenson Communications, Inc. v. FCC*, 2009 WL 1561430 (10th Cir. 2009) (finding that the FCC’s regulation restricting the use of customer data collected in the course of providing telecommunications relay services for disabled individuals violated the First Amendment rights of the providers, because it “limits a preferred channel of communication between
(continued...)

constitute protected speech under the First Amendment. The fact that Arbitron’s ratings reports are created from data that are communicated by inaudible codes inserted into the broadcast signal, in combination with other data, does not remove Arbitron’s ratings reports from the realm of First Amendment protection. Indeed, courts evaluating the applicability of the First Amendment to the analogous realm of computer code have held that “the fact that a program has the capacity to direct the functioning of a computer does not mean that it lacks the additional capacity to convey information, and it is conveyance of information that renders instructions ‘speech’ for purposes of the First Amendment.”⁵⁵

Section 4(i) of the Act also fails to give the Commission the authority to regulate Arbitron or its audience ratings services. Section 4(i) is limited both by the language of the statute itself and by the court cases construing the scope of the Commission’s authority under that provision. Under the Court’s ruling in *MPAA*, Section 4(i), alone, is an insufficient basis for authority to regulate in the “public interest.”⁵⁶ Rather, the Commission’s authority to regulate under Section 4(i) must be reasonably ancillary to another express provision of the Act. Similarly, the Commission cannot rely solely upon its public-interest mandate to regulate, where the agency does not otherwise have authority. In addressing this exact argument, the Court in *MPAA* clearly instructed that the “FCC must act pursuant to *delegated authority* before any

(...continued)

the speaker and the intended audience,” and the FCC failed to demonstrate why the regulation was justified).

⁵⁵ *Univ’l City Studios*, 273 F.3d at 447. See also *Junger v. Daley*, 209 F.3d 481, 485 (6th Cir. 2000) (finding that “because computer source code is an expressive means for the exchange of information and ideas about computer programming,” it is protected by the First Amendment); *United States v. Elcome Ltd.*, 203 F.Supp.2d 1111, 1126-27 (N.D. Ca. 2002) (finding that that “[a]ll modes by which ideas may be expressed, or perhaps, emotions evoked – including speech, books, movies, art and music – are within the area of First Amendment concern. As computer code – whether source or object – is a means of expressing ideas, the First Amendment must be considered before dissemination may be prohibited or regulated.”).

‘public interest’ inquiry is made under § 303(r).”⁵⁷ However, as stated above, nothing in the Act grants the Commission the authority to regulate audience ratings services, and Congress soundly and repeatedly has declined to extend such authority to the Commission.

The reference to Section 257 of the Act found in then-Acting Chairman Copps’ separate statement accompanying the *NOI* is similarly unpersuasive. Section 257(a) directs the Commission to “complete a proceeding for the purpose of identifying and eliminating, by regulations *pursuant to its authority under this Act (other than this section)*, market entry barriers...”⁵⁸ As a result, under the plain language of the statutory text, Section 257 does not, itself, provide an independent grant of jurisdiction to the Commission, and instead confines the Commission’s authority under Section 257 to other provisions of the Act, none of which grant the Commission authority over media audience measurement activities.

Even assuming that Section 257 were not so confined, Section 257, by its terms, only gives the Commission authority to address barriers to entry into the provision and ownership of telecommunications services and information services. Audience ratings, by their nature, do not involve entry into a market, but rather provide information pertaining to existing participants already in the market, in terms of attracting and holding their stations’ audiences.

The *NOI* has also requested comment on whether the Commission’s use of, and reliance on, Arbitron’s radio market definitions and audience ratings are a sufficient basis to require submission of data necessary to evaluate the reliability of Arbitron’s service. This purported link

(...continued)

⁵⁶ *MPAA*, 309 F.3d at 806.

⁵⁷ *Id.* (emphasis in original).

⁵⁸ 47 U.S.C. 257(a) (emphasis added).

between Arbitron's lawful business activities in service of the radio industry's need for defined markets and audience estimates, on the one hand, and the Commission's voluntary decision to import some of Arbitron's products into the Commission's regulations, on the other hand, is unavailing. In the first instance, Arbitron's market definitions have been in place for many years prior to the advent of the PPM service and have been used in Arbitron's diary-based audience estimates (described in more detail in Section III, *infra*) for a significant period of time. The PPM service did not change those market definitions. To the extent that those definitions are or are not deemed to be useful in the Commission's dispatch of its regulatory mission, the PPM service is not implicated. Therefore, the Commission's reliance on these unchanged or unaffected definitions cannot be a sufficient basis for the Commission to question the PPM service.

Second, to the extent that the Commission relies on Arbitron's ratings of individual station audience levels in evaluating applications involving station ownership changes under 47 C.F.R. § 73.3555, the Commission chose, on its own, to do so. Arbitron's business is to create the most reliable audience ratings reports possible. The Commission's independent decision to use Arbitron's data in select circumstances does not and cannot extend the Commission's jurisdiction over Arbitron's activity, any more than the Commission's use in its rules of measures of heights and other standard metrics could give the Commission jurisdiction over the National Institute of Standards and Technology, which defines and publishes those metrics. To suggest that the Commission could expand its jurisdiction over areas beyond the Act's delegations of authority, merely by incorporating into the Commission's rules some aspect of previously unregulated activity, would be to give the Commission the power to extend its own

jurisdiction without regard to Congressional or judicial restraints. Such is not within the Commission's power.

In initiating the *NOI* and in seeking comment on the methodology and ultimate reliability of Arbitron's PPM service, the Commission has inserted itself into a role that Congress expressly determined was better left to industry self-regulation. Unlike the MRC, the entity created at the behest of Congress following the Harris Committee investigation, the Commission does not have the expertise in social science research, survey methodology, consumer behavior, and relevant hardware and software design to evaluate the statistical reliability of Arbitron's service. In addition, regardless of the outcome of the present *NOI* inquiry, it is clear from the Act itself and the relevant case law interpreting the scope of the Commission's authority under the Act that the Commission is restrained from regulating Arbitron, Arbitron's ratings methodology, or the use to which Arbitron's ratings estimates are put.

III. ARBITRON'S PPM SERVICE

Arbitron's PPM service is the product of over 16 years of research into technology, consumer behavior, and social science. In summary form, the PPM service begins with the recruitment of panelists who agree to carry on their persons throughout the day a device approximating in size that of a mobile telephone, known as a PPM meter. The PPM meter captures the codes from encoded radio station signals to which the wearer is exposed in the course of his or her day. The PPM service methodology is described in Paragraph 10 of the *NOI*:

The PPM detects inaudible identification codes that are embedded in the audio of certain programming to which the consumer is exposed. An encoder at the programming or distribution source inserts the inaudible identification codes. In addition, a station monitor is installed at the programming source to ensure audio content is encoded properly. At the end of each day, each survey participant places the PPM device in a base station to recharge the

battery and to send collected codes to a household collection device known as a “hub.” The household hub collects the codes from all the base stations in the survey household and transmits them to Arbitron.⁵⁹

Based upon the information received from the household hubs of all of the panelists whose compliance with the PPM panelist behavioral requirements qualify them for inclusion in the report – which includes the requirement that they carry their PPM meter for a minimum of eight or more hours per day for adults and five or more hours per day for persons aged six to seventeen – Arbitron produces an estimate of the total radio exposure of such qualifying panelists.

Arbitron has employed two methodologies in selecting the sample participants in the PPM service. In the Houston, Texas market, Arbitron used an address-based sample frame and both in-person and telephone-based recruitment methods to recruit panelists. In subsequent PPM markets, typically referred to as Radio First markets, Arbitron used a telephone-number based sample frame to select both landline and cell-phone-only (“CPO”) households for recruitment by telephone and is now using an address-based sample frame to select CPO households for telephone recruitment in these markets.

Arbitron is in the process, as noted in the *NOI*, of bringing its PPM service to the largest United States radio markets by next year;⁶⁰ the PPM service is already currency (meaning that it is used for the buying and selling of radio broadcasting advertisements) in 15 markets, and is in the pre-currency mode in another five markets. In those markets, the PPM service is replacing a diary service, where participants agree to record based on their recollection of their radio

⁵⁹ *NOI*, at para. 10.

⁶⁰ *Id.* at para. 11.

exposure experiences over the course of a week in a paper diary. In markets where the PPM service is not implemented, Arbitron will continue to provide radio station estimates based upon diary self-reporting.

IV. ARBITRON'S PPM SERVICE IS A TECHNOLOGICAL ADVANCEMENT OVER THE CURRENT DIARY METHOD FOR RECORDING LISTENER EXPOSURE TO RADIO STATIONS AND PROMOTES RADIO'S COMPETITIVE POSITION IN A MULTI-PLATFORM MEDIA UNIVERSE

There exists a general consensus that measuring listener exposure to radio stations is more reliably accomplished through the use of near-passive, electronic devices that record such exposure (such as the PPM meters) than through self-reporting on the part of participants (such as the diary method). This is underscored in testimony given to the Commission last July at its *En Banc* hearing into “Overcoming Barriers to Communications Financing,” held in New York, New York. Specifically, the Executive Director and Chief Executive Officer of the MRC, which – as explained earlier – is the industry organization charged with reviewing and accrediting media audience measurement services, stated as follows:

[A] broad industry consensus exists that electronic measurement such as that enabled by Arbitron’s PPM technology is a significant step forward in terms of capturing listener exposure. Not to say that electronic measurement is perfect, but it is broadly considered better than the current hand-written, recall-based diary technique when implemented properly.⁶¹

One of the principal advancements that the PPM service has made over the diary method is that the PPM service records actual listener exposure to radio signals as such exposure occurs.

⁶¹ Testimony of George Ivie, Executive Director and Chief Executive Officer of the Media Rating Council, Inc., at the *En Banc* Hearing of the Federal Communications Commission held July 29, 2008 at the Schomburg Center in New York, New York, “Overcoming Barriers to Communications Financing,” at 5. A copy of Mr. Ivie’s written testimony was submitted as Attachment 9 to the Letter to Monica Desai, then-Chief of the Commission’s Media Bureau, from Timothy T. Smith, Executive Vice President and Chief Legal Officer for Arbitron, dated August 22, 2008 (the “*Smith Letter*”).

Unlike the diary service, which requires active, manual entry of listening exposure – a requirement that in and of itself may affect the participant’s behavior – and which is subject to being filled out by the participant many days after the actual exposure, and hence may reflect that participant’s faulty memory, or his or her customary listening patterns or general preferences for certain stations or program formats (as opposed to his or her actual listening experiences on the day in question), the PPM service is not dependent upon participant recall and not subject to participant bias. Arbitron has previously submitted examples of filled-out diaries that indicate facially-questionable listening experiences from the self-reporting participants:⁶²

- a male non-Hispanic, non-Black diarist,⁶³ aged 28, in Arbitron’s Spring, 2008 survey in the New York, New York market reported that he listened to a single radio station between the hours of 9:00 AM and 5:00 PM, constituting a space of eight uninterrupted hours;
- a male Hispanic diarist, aged 24, in the same survey reported that he listened to a single station between 8:30 AM and 6:00 PM, which would mean that he not once in the span of nine-and-one-half hours did anything that would have drawn him away from listening to that station.

Arbitron’s internal research has included a comparison of the exact same participants’ listening experiences while carrying a PPM meter and – one year later – filling out a paper diary.⁶⁴ The experiment was conducted in the Philadelphia, Pennsylvania market. *Inter alia*, the experiment yielded the following conclusions in comparing PPM-recorded listening experiences with diary self-reporting involving the exact same persons: the PPM data showed 72% more

⁶² See Exhibit 1 to Arbitron’s *ex parte* submission to the Commission in MB Docket No. 08-187 in the form of a letter dated October 21, 2008 to the Commission’s Secretary from Lawrence R. Sidman, Esq., Arbitron’s then-attorney (the “*Sidman Letter*”). A copy of that Exhibit is submitted as Appendix A to these Comments.

⁶³ In Arbitron’s internal classification system, a non-Hispanic, non-Black participant is referred to as “Other.”

⁶⁴ See Smith Letter, at Attachment 3; see also Sidman Letter, at Exhibits 1 & 2. A copy of the Exhibits to the Sidman Letter are submitted as Appendix B to these Comments.

episodes of radio listening each week than reported in the diary (28.5 versus 16.6), but each listening episode was roughly half as long as reported in the diary (36 minutes versus 83 minutes); the PPM data showed about twice as many stations as reported in the diary (6.3 versus 3.1); and the PPM data showed listening start times that were spread equally across the clock quarter-hours, compared to the diary data in which nearly half (45%) of the reported listening episodes started at the top of the hour.

An additional study was conducted in Chicago, Illinois in 2008 with similar results. In the Chicago study, Arbitron asked the same participants to fill out a paper diary during the same time period that those participants also carried a PPM meter. The PPM data showed 74% more episodes of radio listening each week than reported in the diary (23.3 versus 13.5), but each listening episode was roughly half as long (44 minutes versus 92 minutes). The PPM reports showed 60% more stations (4.6 versus 2.9), and the listening start times in the PPM reports were evenly distributed across the clock-quarter hours, compared to the diary data where 43% of all listening episodes started at the top of the hour and 30% of all episodes started at half past the hour.

PPM critics have suggested that any difference in audience estimates between the PPM service and the diary service result from inadequate PPM sample representation. However, comparisons of the exact same participants under both the diary service and the PPM service reveal consistent differences in their patterns of listening behavior, which demonstrates that these differences are not due to differing sample representation (because in these experiments, the samples are identical), but rather result from the differences in what is measured by the measurement device itself. This is not to suggest that the diary is an unreliable tool. It merely suggests that the diary introduces a step involving human intervention, requiring a level of

accuracy in self-reporting that may not be consistently achieved by respondents; the diarist, consciously or otherwise, does not always report precisely which radio stations he or she was exposed to in the course of a week. By contrast, the PPM meter does.

It has long been Arbitron's explicit mission to report what persons are hearing, because that is what the broadcast industry itself has asked for. In the 1980's, the radio industry debated the proper way to define the total "audience" to a given radio station: should the definition of "audience" include only those people who report actively listening to the station; or only those who personally choose the station; or only those who liked the station; or those who are exposed to the station, that is, anyone who could hear the program or advertisements in question? After much study and consultation, the National Association of Broadcasters (the "NAB") recommended to Arbitron that the radio "audience" definition should be based upon whether a person could "hear" the radio station in question. There should be no requirement for "actively listening to" or any other form of perceived engagement preference or other subjective criterion.

The NAB's Committee on Local Radio Audience Measurement, known as "COLRAM," worked directly with Arbitron to craft an updated diary design and diary instructions that were worded to stress this point: "*Listening' means any time you can hear a radio – whether you chose the station or not.*" Those instructions, and the audience definition based upon "hearing" a station, were adopted in 1988 and have been in force ever since. What the PPM technology does is provide an objective, near-passive, electronics-based – and hence, more reliable – technique for measuring and recording exposure, in comparison to the diary. The development of the PPM service since its inception in 1993 has been guided by that basic goal: to passively and electronically detect and report audible exposures to any encoded radio source. Extensive laboratory experimentation and real-world tests conducted by Arbitron and by independent,

expert reviewers (including the auditors at Ernst & Young) have established that the PPM meter detects and credits audible exposures to radio stations in a manner consistent with this long-standing industry definition of the total “audience” to a radio station.

It is also Arbitron’s mission to consult with its clients in the radio broadcasting and advertising industries and to seek out their comments regarding the PPM service, to re-examine PPM methodologies in light of those comments, and to take steps to modify those methodologies when the comments persuasively suggest that such modifications are appropriate.⁶⁵ In fact, as noted in the *NOI*,⁶⁶ Arbitron is committed to a continuous improvement program for the PPM service that has already witnessed several significant refinements in the service. They include:

- increased CPO sampling beyond those markets that were the subjects of Arbitron’s agreements with the Attorneys General of the States of New York, New Jersey, and Maryland, with a target of having an average of fifteen percent CPO households in the samples by the end of 2009;⁶⁷
- introduction of addressed-based recruitment of CPO panelists, rather than reliance solely upon telephone-based recruitment using so-called “random digit dialing;”
- introduction of country of origin (“*COO*”) and zip code information in ratings reports;
- enhanced efforts to obtain greater Black and Hispanic panelist recruitment and compliance, including assignment of personal telephone compliance coaches to

⁶⁵ Witness, for example, a comment submitted in MB Docket No. 08-187. J.L. Media, Inc. of Union, New Jersey – which identifies itself as a media buying company with significant investments in the radio marketplace – noted that “Arbitron and their clients (both Stations and Advertisers/Agencies) have been involved from day one in and [*sic*] open and honest dialogue regarding this new [PPM] methodology.” See Letter to the Commission’s Secretary from Stan Gerber, Executive Vice President Chief Strategy Officer for J.L. Media, Inc. of Union, New Jersey filed with the Commission on September 24, 2008 in MB Docket No. 08-187.

⁶⁶ *NOI*, at para. 14 (quoting Michael Skarzynski, Arbitron’s President and Chief Executive Officer).

⁶⁷ *Id.* at para. 15. The *NOI* indicates that the 15% CPO target was originally set to be achieved by the end of 2010, but as part of its continuous improvement program, Arbitron earlier this spring announced that it was accelerating its self-imposed date for the achievement of that target to the end of 2009.

Black young adults; providing customized accessories for the PPM meters carried by Black young adults; higher weekly incentive awards and retention bonuses for all Spanish-language-dominant Hispanics, and other efforts, all as more fully described in Appendix C to these Comments, an Arbitron document entitled, “PPM Hispanic and Black Initiatives.”

The *NOI* observes that Nielsen is in the process of introducing a competing radio station audience measurement service to Arbitron’s that will apparently rely in part upon participant self-reporting.⁶⁸ As initially reported, this new service is being introduced in a number of smaller and mid-sized markets this year and will utilize a form of “sticker diary” reporting for participants to indicate to which radio stations they listened during the survey period in question.⁶⁹ Arbitron welcomes the competition: it will allow stations, advertisers, and advertising agencies (*i.e.*, the marketplace of sellers and buyers of audience measurement data) to decide for themselves whether they prefer the PPM methodology (where available) or the Nielsen one (where available; if sufficiently well-received in the smaller and mid-sized markets where it will initially be launched, Nielsen may choose to expand its new service’s availability to larger markets where it will compete head-to-head with the PPM service). There is no suggestion in the *NOI*, or elsewhere as far as Arbitron is aware, that the Commission should initiate an investigation into Nielsen’s new service’s methodology, any more than the Commission has ever initiated an investigation into Arbitron’s decades-old diary method. In fact, it would be entirely inappropriate for the federal government to intrude into the marketplace and attempt to handicap the workings of that marketplace by investigating some of the available vendors’ services and products, but not others’.

⁶⁸ *Id.* at n.5.

⁶⁹ *See* en-us.nielsen.com, Improving Radio Audience Measurement in the U.S., [http://en-us.nielsen.com/etc/medialib/nielsen_dotcom/en_us/documents/pdf/fact_sheets.Par.85768.File.dat/Nielsen%](http://en-us.nielsen.com/etc/medialib/nielsen_dotcom/en_us/documents/pdf/fact_sheets.Par.85768.File.dat/Nielsen%20fact_sheets.pdf)
(continued...)

The Commission must also be mindful that other entertainment and information media, besides radio, are migrating to the kind of near-passive, electronics-based technology that the PPM service represents. Television, the Internet, personalized mobile audio delivery platforms such as MP3 players and iPods, even some forms of outdoor media, are all moving to technologies that record exposure to encoded media content – including its embedded advertising messages – based upon participants carrying meters that record such exposure. Those kinds of services, like the PPM service, provide information that is (a) very specific, such as the moment at which a participant commenced and terminated his or her exposure, which can be correlated to the content that was being introduced at that precise moment; and (b) very timely and can be accessed within a matter of weeks after a media outlet has introduced a new program feature or delivery means. There is a growing concern within the radio industry and those who support it that if radio is unable to present to advertising buyers the same kind of credibility, granularity, and timeliness that competing media are increasingly able to deliver, radio will begin to cede its historic share of advertising expenditures to these other media platforms. As was noted in one of the comments filed with the Commission last fall in MB Docket No. 08-187:

Radio needs to stay competitive with all the other options that advertisers have in today's market place – without an electronic system they will fall behind and everyone will lose out.⁷⁰

Notwithstanding its lack of authority to do so, were the Commission to attempt to impose a unique regulatory regime upon the PPM service in a multi-vendor, multi-platform advertising

(...continued)

20Radio%20-%20World%20Class%20Radio%20Ratings%20Fact%20Sheet.pdf (last visited on June 26, 2009).

⁷⁰ Letter to the Commission's Secretary dated September 23, 2008 from Karen Klein, Broadcast Manager for Allscope Media of New York, New York filed with the Commission on September 25, 2008 in MB Docket No. 08-187.

marketplace in which competing vendors and platforms were not to be so regulated, the Commission would be doing a disservice to the radio industry by penalizing a more-advanced technology in its competition with a less-advanced one, while saddling radio with a burden and handing a gift to the media platforms with which radio competes. That surely cannot be the Commission's goal.

V. ARBITRON HAS COMMERCIALIZED THE PPM SERVICE IN CONFORMANCE WITH THE MRC'S VOLUNTARY CODE OF CONDUCT AND INDUSTRY PRACTICE

As noted in the discussion in Section II of these Comments, *supra*, regarding the FCC's lack of jurisdiction to adopt regulations governing Arbitron, its assets, or its operations – including the PPM service – the MRC was formed in part in response to the conclusions reached by the Harris Committee that a private, industry-organized body, and not the federal government, should undertake the responsibility of reviewing and accrediting media audience measurement services. The MRC's Voluntary Code of Conduct (the “Code”) specifically provides that neither the MRC's Procedures for Accreditation, nor the Code itself, nor the MRC's Minimum Standards for Media Rating Research⁷¹ shall preclude an audience ratings service from offering unaccredited audience measurement products or the purchase or use of such information by any person, firm, or corporation (whether or not a member of the MRC).⁷²

There is a sound reason why the MRC does not, indeed cannot, condition commercialization of a new audience measurement service upon prior MRC accreditation. The

⁷¹ A copy of the MRC's Minimum Standards for Media Rating Research was submitted as Exhibit 2 to the Coalition's Comments filed with the Commission on September 24, 2008 in MB Docket No. 08-187.

⁷² Code, at Section 1.6.B. A copy of the Code, dated November 29, 2005, was submitted as Exhibit B to the MRC's Comments filed with the Commission on June 30, 2009 in response to the *NOI*. Arbitron understands that the Code was adopted by the MRC Board of Directors in December 2008.

MRC is composed of participants from all sectors of the industries involved, from the “sell side” (*i.e.*, media companies) and from the “buy side” (*i.e.*, advertisers and their agencies). MRC members actively and directly compete with one another, and as a private organization, the MRC’s activities are subject to review by the United States Department of Justice (the “*DOJ*”) for possible antitrust concerns. Because the MRC’s membership includes fiercely competitive commercial businesses, and because their competitive interests could be differently and directly affected by changes in audience ratings methodologies, the members of the MRC have direct and often divergent interests in voting to recommend the granting or the withholding of accreditation for a new ratings service. The DOJ has recognized that this aspect of the MRC’s process could lend itself to a possible restraint of trade in contravention of the antitrust laws, and has emphasized that the DOJ’s determination not to enforce those laws against certain aspects of the MRC process is dependent, in part, upon the voluntary nature of the process and the fact that unaccredited rating services may nonetheless be commercialized.

The potential restraint-of-trade effect is specifically demonstrated by the process and conditions under which the DOJ recently determined not to seek relief against the MRC’s proposed changes to the Code with respect to the auditing and accreditation of an audience measurement service that replaces an accredited service with a replacement service that has not yet been accredited. In agreeing not to bring antitrust enforcement proceedings against the proposed changes to the Code, the then-Assistant Attorney General of the DOJ’s Antitrust Division directed a business review letter dated April 11, 2008 to the MRC’s counsel. Among other things, the DOJ’s letter pointed out that a factor in the DOJ’s decision not to seek relief against the proposed changes to the Code was the representation by the MRC that under those proposed changes, “MRC’s members will remain free to use unaccredited Currency . . .

[audience measurement products], . . .” and “to the extent a rating service wished to seek MRC accreditation after commercializing a replacement of a Currency . . . [audience measurement product], you have represented that it would not suffer prejudice by virtue of having commercialized its product prior to seeing accreditation.”⁷³

In the case of the PPM service, Arbitron has gone the proverbial extra mile. Arbitron did not commercialize the PPM service in the first market in which the PPM service was introduced (Houston, Texas) until after the MRC had accredited the monthly average-quarter-hour, time-period radio ratings data produced by the PPM ratings service in that market. Thereafter, Arbitron has commercialized the Radio First service in each succeeding market only after submitting an exhaustive audit (conducted by the independent auditing firm of Ernst & Young) to the MRC and having the audit “illuminated” (that is, the audit results have been disclosed to the MRC’s Audit Committee and to Arbitron itself by Ernst & Young), all in compliance with the minimum standards of the Code. Arbitron is committed to achieving accreditation from the MRC in each of the markets in which the PPM service has been commercialized, and is in the process of pursuing such accreditation in multiple markets. Arbitron is pleased to report that the MRC in January of this year granted accreditation to the monthly average-quarter-hour, time-period radio ratings data produced by Arbitron in the Riverside/San Bernardino, California market, which uses Radio First PPM methodology.

Arbitron’s approach in commercializing the PPM service is consistent with industry practice. As set forth in detail in Arbitron’s October 6, 2008 Reply Comments, Nielsen in the

⁷³ See Letter from Thomas O. Barnett, Assistant Attorney General, Antitrust Division, United States Department of Justice, to Jonathan R. Yarowsky, Esq. of Patton Boggs L.L.P., counsel to the MRC, dated April 11, 2008, at 4. A copy of that letter was submitted as Appendix 1 to Arbitron’s Reply Comments (continued...)

early part of this decade commercialized its new LPM television audience measurement service (which, like the PPM service, involves the use of near-passive electronics to measure audience behavior) in market after market, without MRC accreditation, in some cases even prior to the completion of an independent audit, and indeed even in defiance of the MRC's requests that Nielsen not continue to do so.⁷⁴

VI. MOVEMENT IN STATION RANKINGS AND RATINGS IN THE TRANSITION FROM THE DIARY SERVICE TO THE PPM SERVICE HAS BEEN POSITIVE FOR A NUMBER OF STATIONS THAT TARGET MINORITY AUDIENCES IN A VARIETY OF MARKETS

Arbitron's Comments that were filed in this docket last fall describe the experiences of stations in the Houston market in making the transition from the diary service to the PPM service.⁷⁵ For example, Arbitron's Comments showed how two stations having an "urban" format that is designed to appeal to Black audiences (KBXX-FM and KMJQ-FM) initially experienced a decline in their market rankings for Average Quarter Hour ("AQH") persons aged 12 and over between the hours of 6:00 AM and Midnight, Monday through Sunday: the stations dropped from the Number One- and Number Three-rated stations in the market, respectively, in the last diary report for Houston (Winter, 2007) to the Number Six and Eight positions, respectively, in the June, 2007 reports under the PPM service. However, one year later, in June of 2008, after those stations had made changes to their programming and promotion practices – but not to their basic music and entertainment formats – they recovered and even improved upon

(...continued)

filed with the Commission on October 6, 2008 in MB Docket No. 08-187 ("*Arbitron's October 6, 2008 Reply Comments*").

⁷⁴ See Arbitron's October 6, 2008 Reply Comments, at 8-11.

⁷⁵ See Arbitron's September 24, 2008 Comments, at 23-24.

their former rankings, with KBXX-FM resuming its Number One position and KMJQ-FM climbing up to a Number Two ranking.⁷⁶

Arbitron's Comments similarly describe how five named stations in New York, Los Angeles, Chicago, and San Francisco – one of which has a format that is designed to appeal to Black listeners (WWPR-FM in New York) and four of which have formats that are designed to appeal to Hispanic listeners (WSKQ-FM in New York, KSCA-FM in Los Angeles, WLEY-FM in Chicago, and KRZZ-FM in San Francisco) – either maintained or even bettered their market rankings in the transition from diary to the PPM service.⁷⁷

Arbitron's October 6, 2008 Reply Comments analyze PPM-based ratings reports in comparison to the most recent diary reports in a number of markets in which the PPM service was being commercialized.⁷⁸ In Chicago, for example, two urban contemporary stations, targeting Black listeners, increased their shares of audience among persons 12 years of age and older. In San Francisco, among stations having Latino-oriented formats, one station gained 24% in its PPM-service-reported share of audience among persons 12 years of age and older, as compared to the diary. An urban-format station in San Francisco gained more than 60% over its diary-reported share of audience among persons aged 12 and over. A similar outcome was found in New York, where one station with an urban format experienced a six percent upward movement from diary-based to PPM-based audience share of persons 12 years of age and older. In Los Angeles, a Spanish-language station saw its audience share among persons aged 12 and

⁷⁶ *Id.*

⁷⁷ *Id.* at 25-26.

⁷⁸ Arbitron's October 6, 2008 Reply Comments, at 20-21.

older jump 44% from the diary reports to the PPM service reports, and 61% among persons between 18 and 49 years of age.

The fact that the PPM service does not have a predictable negative impact upon the reported audiences of stations having formats that appeal to minority listeners is not confined to the markets discussed in Arbitron's earlier Comments and Reply Comments in this docket. A June 5, 2009 article appearing in *Radio & Records* by Darnella Dunham, entitled "PPM Preparation Helps WJLB Win – Detroit's Heritage Urban Outlet Tops Ratings for First Time in PPM Era," tells the story of radio station WJLB in Detroit, which features an urban format.⁷⁹ The good news is that WJLB placed first among listeners in the 18-to-34 age category in the April, 2009 PPM service reports, and also placed first among listeners aged six and older for the first time since Detroit transitioned from the diary reports in December of last year.⁸⁰

An examination of the experiences of various radio stations that serve predominantly minority listeners in the Atlanta, Dallas, and Houston markets in transitioning from diary-based reporting to PPM-based reporting establishes that there is no consistent pattern in ratings fluctuations among AQH persons aged 25-to-54, Monday through Sunday, 6:00 AM to 12 Midnight. Appendix D to these Comments sets forth, in bar-graph form, a summary of those experiences. For example, in Atlanta, WBZY-FM (a station featuring a Mexican regional format) has witnessed its PPM-reported shares (between December, 2008 and May, 2009) consistently outperform its last diary-reported share (Summer, 2008), in all cases by very

⁷⁹ Darnella Dunham, *PPM Preparation Helps WJLB Win – Detroit's Heritage Urban Outlet Tops Ratings for First Time in PPM Era*, *Radio & Records* (June 5, 2009).

⁸⁰ *Id.* The cited article credits the director of urban programming for WJLB and its "sister" urban adult contemporary station in Detroit, WMXD, for educating himself and his staff with respect to PPM and its impact, and then making certain adjustments to the station's on-air presentation.

substantial margins. For WBTS-FM, with a rhythmic contemporary hit radio format, four of the PPM-based reports show the station nearly matching or exceeding its last diary-based report, with the remaining three PPM-based reports showing incrementally-smaller shares than the last diary-based report. Spanish-contemporary-format WWVA-FM has generally seen its PPM-reported shares equal or exceed its last diary-reported share, with only one exception. WHTA-FM, with an urban contemporary format, has not yet enjoyed a PPM-reported share equal to its last diary-reported share, but the fall-off for the last four PPM reports has not been large. Likewise, WAMJ-FM, which presents an urban adult contemporary format, initially showed significant drop-offs in its PPM-reported shares, in comparison to its last diary-reported share, but the more recent PPM reports show that the station has largely regained (and, in one report, even exceeded) the share reported in the Summer, 2008 diary. For WALR-FM in Atlanta, also having an urban adult contemporary format, the fluctuations appear to run in the opposite direction, with an early PPM-based report showing the station's share matching the last diary-reported share, but with subsequent PPM reports showing some fall-off from the diary.⁸¹

The Dallas stations likewise show no consistent pattern of decline in reported audience shares of minority-oriented stations as between the final diary report (Summer, 2008) and the more recent PPM reports (beginning in December of 2008 and continuing through May, 2009) in AQH persons 25-to-54, Monday through Sunday, 6:00 AM to 12:00 Midnight. As shown in Appendix D to these Comments, several Hispanic-oriented stations have seen their reported shares remain essentially steady or even increase in the transition from the diary to the PPM service. They include Latino/urban-format KZZA-FM, KBOC-FM, KNOR-FM, and KMVK-

⁸¹ See Appendix D to these Comments at 1.

FM.⁸² For KRNB-FM, an urban contemporary station, its initial audience shares as reported in PPM fell substantially below its final diary-based share, but the two most recent PPM-based reports show that the station's share is climbing back and approaching or equaling its last diary-based reported share. For KLNO-FM, a Spanish adult hits-format station, and for KTCY-FM, a Spanish contemporary-format station, the opposite appears to be the case: after four or five consecutive PPM reports in which the stations' reported audience shares nearly equaled or exceeded their last diary-reported shares, the two or three most recent PPM reports show a fall-off. In the case of KBFB-FM, which has a rhythmic contemporary hit radio format, there does not seem to be a pattern; the initial PPM reports showed the station's audience share measurably below the share reported in the last diary-based survey, a subsequent PPM report showed the station's share growing to match the diary-reported share, and the most recent two PPM reports indicate slippage. For KSOC-FM, which has an urban contemporary format, the station's reported audience shares under PPM have been relatively consistent, all identifiably lower than the diary-based reported share.⁸³

Houston's tale is not materially variant from the experiences of minority-oriented stations in Atlanta and Dallas. In Houston, urban-contemporary-format KMJQ-FM (as previously discussed in these Comments) experienced a dip in its reported AQH audience share among persons 25-to-54 years of age, Monday through Sunday, 6:00 AM to Midnight, between the last diary report in the market (Winter, 2007) and the initial PPM reports (beginning in June, 2007 and continuing to May, 2009). However, subsequent PPM reports show the station's audience

⁸² KMVK-FM changed its format from rhythmic adult contemporary to Spanish hot contemporary in February, 2009. However, its reported audience shares under PPM, both before and after the format change, nearly equal or actually exceed its reported audience share under the diary.

⁸³ See Appendix D to these Comments at 2.

shares steadily climbing, and in the last four PPM reports coming close to the final diary-based reported share. KBXX-FM (which has a rhythmic contemporary hit radio format) has both outperformed and underperformed its diary-reported audience share since the advent of PPM, with 12 PPM-based reports showing shares that exceed the diary-reported share, and 14 PPM-based reports showing shares that fall short of the diary-reported share. Similarly, KTJM-FM, which presents a Mexican regional format, has shown fluctuations in its PPM-reported audience share in comparison to its last diary-reported share, with 19 PPM reports showing some degree of fall-off from the diary report and seven PPM reports showing audience shares in excess of the share shown in the last diary report. By contrast, KLOL-FM (whose format is Spanish contemporary) has experienced only increases in its audience shares as reported under PPM in comparison to its audience share as reported in the last diary-based survey – 26 consecutive PPM reports reflect that the station has a reported audience share that is greater (in many instances, significantly greater) than the share last reported in the diary.⁸⁴

In Miami, which is currently undergoing “pre-currency” for the PPM service (*i.e.*, the PPM service has not yet been declared to be currency for the buying and selling of radio advertising in the market) a Spanish contemporary-format station moved from the Number Thirteen ranking in the market to Number Seven, and increased its AQH share of persons 18-to-49 years of age, 6:00 AM to 12 Midnight, Monday through Sunday, by 40% between the last diary report (Winter, 2009) and the May, 2009 PPM service pre-currency report. In Phoenix, a station having a rhythmic contemporary hit radio format appealing to a Black audience climbed from the eleventh-ranked station in the market in the most recent diary survey (Winter, 2009) to

⁸⁴ *Id.* at 3.

the fifth-ranked station in the market in the May, 2009 pre-currency PPM service reports among persons 18-to-49 years of age, 6:00 AM to 12 Midnight, Monday through Sunday, and saw its audience share of such persons go up by over six percent. Another station in Phoenix having a Spanish adult hits format moved from a Number Nineteen ranking in the market to a Number Thirteen ranking among persons 18-to-49 in the same time periods, with its share increasing by almost 12% between the Winter, 2009 diary report and the May, 2009 pre-currency PPM service report. In San Diego, a station having a new adult contemporary/smooth jazz format that is designed to appeal to a Black audience moved from the seventeenth-ranked station in the market to the sixth-ranked station between the Winter, 2009 diary and the May, 2009 pre-currency PPM service report among persons 18-to-49 years of age, 6:00 AM to Midnight, Monday through Sunday, and saw its share of audience among such persons increase by nearly 60%.

The experiences of multiple minority-targeted radio stations in market after market are that there have been upward movements in those stations' *pre*-PPM service and post-PPM service market rankings and audience shares. There is simply no basis in fact to assert that the advent of the PPM service foretells a diminution in the reported listenership of radio stations that program to Black or Hispanic consumers.

VII. ARBITRON'S RESPONSES TO SPECIFIC QUESTIONS RAISED IN THE COMMISSION'S NOTICE OF INQUIRY

The *NOI* raises a number of specific questions related to the reliability and methodology of Arbitron's PPM service, as well questions related to the shift in audience ratings from the diary-based system to the PPM service. As the below discussion demonstrates, Arbitron's sampling methodology, recruitment, retention and compliance initiatives result in PPM sample panels that are statistically sound and that reliably measure audiences. In addition, Arbitron

remains committed to working with its customers, the MRC, and other interested stakeholders to ensure the continuing reliability and constant improvement of the PPM service.⁸⁵

A. Sampling Methodology and Recruitment

The Commission has asked for information “concerning Arbitron’s sampling methods to determine the impact on the radio market of commercialization of PPMs, particularly with respect to the shift to collecting audience data by PPMs rather than by diaries.”⁸⁶ The question seems to imply that Arbitron’s PPM sampling methods, compared to the sampling methods utilized in the diary service, may somehow result in inaccurate representation of certain key demographic groups. However, the sampling approaches for the PPM data and for the diary-based radio market reports – which have long been accredited by the MRC – are largely the same.⁸⁷

Under both systems, Arbitron’s sampling methodology starts with the creation of a “sample frame,” which is comprised of randomly-selected households within any particular Arbitron Metro market that are selected by randomly generating telephone numbers (*i.e.*, random digit dialing, or “RDD”), to ensure that both listed and unlisted numbers are included. From this initial sample frame, panel participants under both the diary and the Radio First sampling methods are recruited in an identical manner – through the use of RDD telephone recruitment.

⁸⁵ As the Commission is aware, the MRC proceedings are confidential, and Arbitron cannot discuss the specific details of the accreditation process. *See NOI*, at paras. 21-22 (requesting comment on whether Arbitron’s improvements to the PPM service are consistent with MRC standards for accreditation and requesting comment on “the status of Arbitron’s MRC accreditation applications and any objections, problems or concerns that have been raised regarding them”).

⁸⁶ *Id.* at para. 19.

⁸⁷ *See* Arbitron’s September 24, 2008 Comments, at 36-37; Arbitron’s October 6, 2008 Reply Comments, at 11-13.

The primary difference between the PPM methodology and the diary service, initially, was the inclusion of CPO households in the PPM sample frame but not in the diary sample frame.⁸⁸ As a result of this combined method of sample frame creation, the PPM sample frames cover over 95% of all households.

In order to ensure that the final sample adequately represents key demographic and ethnic groups within each radio Metro market in both the PPM and the diary service, Arbitron uses a process known as “stratification.” Households within the sample frame are sorted based upon key information – county, area code, zip code, exchange, hundred block, *etc.* This process, commonly accepted within the industry, allows Arbitron to focus recruiting efforts for households on geographic areas with historically low response rates and on areas with large minority and ethnic populations, ensuring effective representation of key demographic and ethnic groups in Arbitron’s audience ratings surveys.

⁸⁸ Arbitron’s PPM methodology has been criticized by certain parties for not including more CPO households in its sample, an issue which will be discussed in greater detail in Section VII.B.1, *infra*. As Arbitron noted in its October 6, 2008 Reply Comments, the diary system, against which the Coalition and other groups compare the PPM audience ratings results, has not, historically, included **any** CPO households. *See* Arbitron’s October 6, 2008 Reply Comments, at 11 & n.37. However, starting with the Spring 2009 diary reports, Arbitron for the first time included CPO households in 151 diary markets, with the remainder of the markets in the continental U.S., Alaska and Hawaii scheduled for CPO inclusion in the Fall of 2009. *See* Arbitron Cell Phone Only Diary Service Update at 4 (Mar. 11, 2009) *available at* http://www.arbitron.com/downloads/cell_phone_only_update_3_09.pdf.

Initially, CPO households in PPM markets were selected based upon RDD recruitment similar to that used in soliciting landline telephone households. Starting in the First Quarter of 2009, Arbitron implemented an address-based sampling approach in certain PPM markets in order to increase the efficiency of soliciting CPO participation and to more rapidly increase the total percentage of CPO households in the survey panels. Under this method, Arbitron begins by randomly selecting a sample from an address-based sample frame. If the identified address matches a landline telephone number, using an industry-standard matching database, that address is eliminated from the potential pool of sample participants, which typically results in the exclusion of 60% of the randomly selected addresses. Of the 40% of addresses that remain, Arbitron mails a short survey, including questions related to radio and TV, household composition, and phone status. From the results of the survey, Arbitron identifies CPO households and solicits participation. *See id.* at 13.

In short, the PPM sampling methodology from the beginning has been virtually identical to the methodology used to identify, contact, and solicit participation in Arbitron's long-standing and largely uncontroversial diary service, and the PPM sampling methods cannot be blamed for the reported decreases in published audience estimates for minority-owned or minority-oriented radio stations in the transition from the diary to the PPM service, as alleged by some of Arbitron's critics.

In addition to seeking comment about the shift in sampling methodologies, the Commission has also sought comment on "lowered advertising sales revenue based on a decline in audience ratings as measured by PPMs."⁸⁹ Any instance of decreased advertising revenues must be considered in light of the overall economy and current market conditions, and cannot be blamed on the PPM methodology. Radio revenues have declined, in part, due to competition from new technologies and because radio's "biggest advertisers, automotive and retail, have been hit hardest by the recession."⁹⁰ Across the industry, radio revenue declined 10% in 2008, and "[m]uch of radio's revenue decline can be attributed to the medium's top ad categories. Automotive ad spend, 15 percent of radio's total revenue and the medium's No. 1 ad category,

⁸⁹ *NOI*, at para. 18. This question, if posed to a witness in a court of law, would be objectionable on the grounds that its very phrasing assumes "a fact not in evidence," to wit, that "lowered advertising sales revenue" is based upon a "decline in audience ratings as measured by PPMs." In Section VI of these Comments, Arbitron has demonstrated that a variety of stations in different markets have not, in fact, experienced "a decline in audience ratings as measured by PPMs." Moreover, the causes for "lowered advertising sales revenue" at radio stations in today's economic environment are many and complicated, and reduced advertising sales in the radio broadcast industry (which includes markets in which PPM has not been introduced) can hardly be laid at the doorstep of the PPM service exclusively.

⁹⁰ Joanne Ostrow, *Wavering on Radio: The Venerable Medium Faces an Army of Competitors: iPods, Downloads, Music Phones. Signals from the Future are Anything But Clear*, Denver Post, June 17, 2009, at A-01 (noting that revenues fell 24% in the first quarter of 2009).

declined 22 percent to \$2.5 billion.”⁹¹ As the Commission is aware, the industry has experienced decreased advertising revenues – regardless of whether audience share is measured by the PPM or by the diary service. In point of fact, as discussed in Section IV of these Comments, *supra*, the economic health of the radio industry as a whole is more directly at risk in the absence of a near-passive, electronic audience measurement service, such as PPM, rather than because of the PPM service.

1. Sample Sizes In the PPM Service Are Large Enough to Produce Usable Estimates for Key Demographic Groups

The Commission has also requested comment on the ability of the PPM service to “determine the audience of radio stations targeting specific demographic groups (*e.g.*, African-American women aged 18-34).”⁹² The sample size needed in order to produce reliable data is directly correlated to the amount of audience measurement data generated. In designing the PPM service, Arbitron sought to create a near-passive, electronics-based measurement service that generates audience estimates on a monthly basis that are as reliable as those generated by the diary service on a quarterly basis. Thus, in determining the appropriate sample size, Arbitron evaluated the total amount of data provided by the diary service, compared to the total amount of data provided by the PPM service.

⁹¹ Katy Bachman, *Radio Revenue Dips 10% in '08*, mediaweek.com, Feb. 20, 2009 available at http://www.mediaweek.com/mw/content_display/esearch/e3iab3b217aa919c5efb6d875ad453dfff9; see also Stephanie Clifford, *Radio's Revenue Falls Even as Audience Grows*, N.Y. Times, Nov. 26, 2008, at B2 (noting that radio advertising was down 10 percent in October 2008, despite increased number of listeners, amidst iPod, internet and satellite radio audience competition, television and internet advertising competition, and continuing decline in advertising expenditures from the automotive and retail industries); Carroll Trosclair, *Radio Audience and Advertising: Young Music Listeners Increases, But Ad Revenue Falling* (noting that the Radio Advertising Bureau reported in October 2008 that the industry's advertising revenue continuously decreased from January to September 2008) available at http://radio-advertising.suite101.com/article.cfm/radio_audience_and_advertising#ixzz0Iox2lrXo&C (last visited July 1, 2009).

⁹² *NOI*, at para. 20.

The diary service is one-week survey in which the sample turns over completely every week. The PPM service, on the other hand, seeks to measure installed panelists every day for a period of up to two years, with approximately 6% to 10% of the sample turning over each month. Although there are fewer “unique persons” in a PPM service sample, the average number of people who are included in the in-table sample each day is substantially higher in the PPM service than in the diary service. Thus, the continuous measurement of PPM panelists results in far more “person days” of data than the one-week-long diary system typically yields. For example, Table 1 below (using Chicago as an example) demonstrates that the PPM service, on a quarterly basis, results in four times the number of “person days,” as compared to the diary service:

Table 1: Comparison of “Person Days” of Data Measured by the Winter 2009 PPM (Persons 6+) and Winter 2008 Diary (Persons 12+) Service

Chicago	Total Sample		Black Persons		Hispanic Persons	
	PPM	Diary	PPM	Diary	PPM	Diary
In-tab Person Days	178,675	43,484	31,932	7,231	35,857	5,614
Average Daily In-Tab Persons	2,127	518	380	86	427	67
Unique In-tab Persons	2,921	6,212	581	1,033	572	802

In statistical terms, the increased number of person days being measured results in higher statistical efficiency or power for the sample being measured, and the higher statistical efficiency of the PPM sample means Arbitron can sample fewer people and yet achieve the same level of reliability in its ratings estimates as those achieved with the diary.⁹³ Measuring people over a

⁹³ Because the PPM and diary survey designs are so different, the appropriate way to compare sample sizes between the two services is to determine the Effective Sample Base (“ESB”) for the PPM service and the diary service. The ESB for a given sample design is determined through an analysis of the data in which repeated sub-samples of the survey are taken and used to produce estimates to determine empirically the statistical reliability provided by that sample. This analysis was originally conducted for the diary data in

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longer time period also allows the PPM service to provide more reliable estimates of changes in ratings than are provided in the diary service.

Moreover, because audience ratings represent averages of exposures across a sample and across a given demographic group, increasing the sample size does not, in and of itself, result in increases or decreases in a given station's ratings. By all statistical measures, Arbitron's target PPM sample sizes result in statistically sound ratings that are as reliable as those afforded by the diary system, but more timely since the PPM estimates are provided on a monthly basis compared to the diary estimates which are provided on a quarterly basis.

2. Houston's Address-Based and Radio First's Telephone-Based Recruitment Methodologies Show Similar Patterns in Ratings and Sample Quality and Compliance Metrics

The Commission has also asked parties to discuss the "difference in ratings between markets where an address database was used to select the sample and markets where samples were chosen using telephone-based surveys."⁹⁴ At the outset, it is important to note that the MRC has now accredited the monthly average-quarter-hour, time-period radio ratings data produced by the PPM ratings service under both the address-based methodology employed in the Houston market, and the Radio First methodology employed in Riverside/San Bernardino market. Although PPM critics have made much of the distinction between the two initial

(...continued)

the 1980s, and the ESB values for the diary service are reported in every diary report. The same type of analysis was conducted with PPM data in order to determine the sample sizes necessary so that the PPM service would provide the same overall statistical reliability on a monthly basis as the diary service did on a quarterly basis. Comparisons between the PPM and diary ESBs demonstrate that overall, the monthly PPM service provides ESB values that are about the same as the quarterly diary service.

⁹⁴ *NOI*, at para. 20.

sampling methodologies,⁹⁵ MRC accreditation for the monthly average-quarter-hour, time-period radio ratings data in Riverside/San Bernardino indicates that telephone-based recruitment methods, long used by Arbitron in the diary service, are a reliable and sound means by which to develop a sample frame for purposes of audience measurement.

Indeed, comparisons between AQH ratings reported in the diary service and AQH ratings reported in the PPM service show similar patterns across markets and across demographics, regardless of whether the sample was recruited using an address-based or a telephone-based recruitment system. Comparing the last reported diary-based AQH ratings with the PPM-reported results from the final month of the diary survey period, the average PPM to Diary Ratings Index across fourteen PPM markets was 79%, with an overall range of 69-90%.⁹⁶ Broken down by market, the PPM to Diary Ratings Index in Houston was approximately 76%, 77% in Atlanta, 82% in Dallas, 76% in Chicago, 76% in New York, 90% in Phoenix and 69% in Riverside/San Bernardino. Similar patterns exist when comparing the PPM to Diary Ratings Indices by demographic groups.⁹⁷

⁹⁵ See Coalition's Comments filed with the Commission on September 24, 2008 in MB Docket No. 08-187, at 4-6.

⁹⁶ The PPM to Diary Ratings Index is a measure of how the PPM ratings compare to the diary ratings for any particular PPM market, using the total AQH ratings results. The figures above were determined by comparing the (1) Monday – Sunday, 6AM to midnight, AQH ratings reported under the last diary report in each market with (2) the Monday-Sunday, 6AM to midnight, AQH ratings reported by PPM for the last month in that diary service period. Thus, if the PPM AQH Rating was 9.0 and the diary AQH rating was 12.0, the PPM to Diary Rating Index would be 75%.

⁹⁷ For example, the PPM to Diary Ratings Index for Black 12+ in PPM markets with 10% or larger Black population was 66% in Houston, compared to 69% in Atlanta, 46% in Chicago, 75% in Dallas, 57% in Los Angeles, 76% in Miami, 68% in New York and 82% in Washington, DC. *Id.* at 3. Similar results are seen in Hispanic 12+ Total Radio in PPM markets with 10% or larger Hispanic populations, where Houston showed a PPM to Diary Ratings Index of 77%, compared to 62% in Atlanta, 82% in Dallas, 60% in Los Angeles, 91% in Miami, 58% in New York and 75% in Riverside. *Id.* at 4. For Hispanic panelists 12+ listening to Spanish radio, the PPM to Diary Ratings Index in Houston was 81%, compared to 139% in Atlanta, 66% in Chicago, 87% in Dallas, 59% in Los Angeles, 108% in Miami, and 48% in New York.

AQH ratings are lower under the PPM service, as compared to the diary service, not because the recruitment methodology differs substantially – because it does not – or because of the use of a telephone-based recruitment procedure in Radio First markets. As the above demonstrates, some Radio First markets had a PPM to Diary Ratings Index that was above, below, or nearly equal to the Houston PPM to Diary Ratings Index (where Houston used, in part, an address-based recruitment, and Radio First did not). Rather, the decrease in AQH ratings is a result of a variety of factors that are independent of the PPM service’s sampling methodology. For example, as discussed above, studies conducted by Arbitron on identical sample participants show that the PPM service records listening exposure that differs from that recorded in the diary service – the identical participants listened to more radio stations under PPM than they previously recorded in the diary, they had more listening episodes, and those episodes were typically shorter in duration.⁹⁸

In addition to Houston’s address-based methodology and the Radio First’s telephone-based methodology showing similar patterns in ratings results, a comparison of sample quality and compliance metrics across both the Houston and the Radio First sampling methods demonstrate that both provide high-quality samples for use in PPM panels:

⁹⁸ See discussion in Section IV of these Comments, *supra*.

Table 2: Comparison of Houston, Philadelphia, New York, and Riverside/San Bernardino PPM Panel Sample Quality and Compliance Metrics

January – May 2009	Houston	Philadelphia	New York⁹⁹	Riverside/ San Bernardino
Average Daily In-Tab ¹⁰⁰	1,443	1,594	3,988	903
Sample Performance Indicator (“SPI”) ¹⁰¹	18.7%	20.1%	16.4%	24.8%
Persons 6+ Designated Delivery Index (“DDI”) ¹⁰²	106	104	105	113
Person 18-34 DDI	98	101	93	87
Black 6+ DDI	107	114	105	79
Black 18-34 DDI	109	100	84	63
Hispanic 6+ DDI	106	118	124	117
Hispanic 18-34 DDI	100	104	118	88
Hispanic Spanish-language Dominant 6+ DDI	110	N/A	123	119
Persons 6+ In-tab Rate	75%	76%	79%	80%
Black 6+ In-tab rate	69%	71%	77%	77%
Hispanic 6+ In-tab Rate	75%	75%	77%	79%
Hispanic Spanish-language-dominant 6+ In-tab rates	77%	N/A	80%	83%
Persons 18-34 In-tab Rate	69%	69%	71%	73%
Black 18-34 In-tab Rate	65%	66%	67%	70%
Hispanic 18-34 In-tab Rate	71%	71%	74%	73%
Persons 6+ Daily motion time (hrs:min)	14:52	14:57	15:04	14:48
Black 6+ Daily motion time	15:03	15:04	15:16	15:02
Hispanic 6+ Daily motion time	14:47	14:57	14:55	14:41

⁹⁹ The DDI, In-tab Rate, and Motion Time metrics are for the unembedded portion of the New York Metro.

¹⁰⁰ “In-tab” rates refer to the number of panelists who are in compliance with the PPM’s requirements on any given day. To qualify for daily ratings tabulations, adult panel members (18 and older) must wear a PPM device for a minimum of eight hours per day. For persons aged 6-17, the minimum is five hours.

¹⁰¹ The SPI is a response metric accredited by the MRC for use in electronic media measurement. The PPM service uses an Average Daily Persons SPI, which is the percentage of the original, pre-designated sample that provides in-tab data on any given day. Households selected for the PPM panel are eligible to be in the panel for two years. The Average Daily Persons SPI is the number of pre-designated panelists on a given day who carry the meter divided by all pre-designated panelists who were approached during the last two years. If household originally selected as part of the pre-designated sample declines to join the panel or leaves the panel, an alternate is recruited to replace them. Alternate panelists are not included in the Average Daily Persons SPI.

¹⁰² The DDI compares the target sample rate, which is based upon the designated population segment’s share of the population, with the actual sample delivery for that particular sample group. Thus, DDI is calculated by taking the actual number of participants within a particular demographic group and dividing that figure by the target number. That figure is then multiplied by 100. A “perfect” DDI would equal 100, meaning that the actual sample for a particular demographic group exactly matches their relative percentage in the population.

In addition to the above, the April 2009 PPM reports indicate that the average sample performance metrics across all fifteen markets in which the PPM service is “currency” (meaning that the PPM service is used for the buying and selling of radio advertisements) are strong, with most metrics approximating or exceeding the target goals:

- Persons 6 and older had an average DDI of 107
- Persons 18-54 had an average DDI of 100
- Persons 18-34 had an average DDI of 92
 - Blacks 18-34 had an average DDI of 83
 - Hispanics 18-34 had an average DDI of 103
 - Other Persons in the sample (meaning those who are neither Blacks nor Hispanics) had an average DDI of 89
- Within the Black and Hispanic Sample:
 - Black panel participants had an average DDI of 102
 - Hispanic panel participants had an average DDI of 115
 - English-language-dominant Hispanics had an average DDI of 110
 - Spanish-language-dominant Hispanics had an average DDI of 135
- In-tab rates for Persons 6 and older averaged 78%¹⁰³

That differences exist between sampling rates for certain demographics within Radio First markets, and between Radio First markets and Houston, does not demonstrate, as some PPM critics have alleged, that the PPM sampling methodology itself is flawed or results in skewed demographic representations. As discussed above, the same telephone-based methodology as has been used in the PPM service has also been used in the diary service for decades, and the PPM critics do not attack the diary methodology or question the validity of the demographic representation of those samples. In addition, the telephone-based recruitment method, along with CPO supplementation, covers over 95% of all addresses within a given market (compared to approximately 98% of all addresses in the Houston market).

¹⁰³ See Arbitron Personal People Meter (PPM) Update, April 2009 Report Release at 19 (May 26, 2009), available at http://www.arbitron.com/downloads/monthlyppmclientupdate5_26_09.pdf. (“April 2009 Update”).

Rather, differences exist between Houston and Radio First markets on certain metrics, and between the DDI rates observed in the August 2008 and April 2009 survey reports within the Houston sample itself, because compliance metrics are inherently variable, whether as a result of seasonal changes or participant behaviors, economic trends, or other factors. Moreover, these metrics between markets differ because the markets themselves differ.

Notably, Arbitron, throughout the process of PPM commercialization, has been willing to recognize, and to take affirmative steps to improve, areas where statistical performances fall below target goals. As a result, Arbitron has raised the DDI and daily in-tab rate benchmarks, below which Arbitron will take corrective measures to reach the 100% DDI and In-Tab sample targets,¹⁰⁴ and has set certain DDI guarantees for persons aged 18-54 and other key demographic groups.¹⁰⁵ In addition, Arbitron has implemented various initiatives to improve DDI rates and in-tab rates that fall below the benchmarks, including increasing recruitment efforts for certain demographic groups and removing panelists from demographic categories that currently over-

¹⁰⁴ See April 2009 Update at 12-15. Effective April 2009, for persons aged 6 and older, Arbitron raised DDI benchmark levels for the first year of PPM service in any particular market (calculated as an average of months to-date through year one), from 90 to 95 or better, and to 100 or better for year two (calculated as a thirteen month average on a rolling basis). *Id.* at 14. As of April 2009, Arbitron met or exceeded the raised DDI benchmark levels for persons aged six and older in all PPM markets except Nassau-Suffolk, New York (92 DDI for persons 6 and older, as opposed to the 95 benchmark) and Middlesex-Union, New Jersey (91 DDI for persons 6 and older, as opposed to the 95 benchmark). *Id.* at 20. For persons aged 18-34, Arbitron raised the DDI benchmark from 70/75 to 80 or better. *Id.* at 14. April 2009 data show that Arbitron met or exceeded this benchmark for all PPM currency markets except Nassau-Suffolk, New York (79 DDI for persons aged 18-34, as opposed to the 80 benchmark). *Id.* at 22.

In addition, effective April 2009, Arbitron also raised the in-tab rate benchmark to 70% or higher (from 60%) for persons aged 18-34. *Id.* at 16. During the first month of implementation, Arbitron met this benchmark in eleven markets, and achieved an average in-tab rate for persons aged 18-34 in all markets of 72%. *Id.* at 30. Additionally, effective May 2009, in markets where Black or Hispanic persons aged 6 or older exceed 10% of the total population, Arbitron has raised the daily in-tab rate benchmark from 60% to 70%. *Id.* at 16.

¹⁰⁵ *Id.* at 17. For persons 18-54, Arbitron has issued a guarantee of an 80 DDI in year one, and a 90 DDI in year two. For Black, Hispanic and Other 18-34 year old sample participants, Arbitron has issued a guarantee of 70 or better DDI in the first six months, 75 or higher DDI for months 7-12, and 80 or better DDI in year two. *Id.*

sample the population, which both improves sample proportionality and frees up space to increase recruitment efforts in demographic groups that fall below the benchmarks. Arbitron has also created a program whereby a personal telephone coach is assigned to Black 18-34 households in certain markets, in order to provide more intensive one-on-one coaching and to increase compliance, as well as instituting a positive reinforcement initiative in May 2009 to increase in-tab rates. Finally, as discussed in more detail below, Arbitron has committed to accelerate recruitment of CPO households.¹⁰⁶

Arbitron's efforts to improve DDI and in-tab compliance rates demonstrate one of the benefits of the PPM service as compared to the diary. To Arbitron's knowledge, the PPM service is the only audience ratings measurement service that currently has the capability of monitoring daily panelist compliance. As a result, unlike the recall-based diary service, the PPM data are not at risk of reporting inflated in-tab rates, because panelists cannot re-create their PPM listening exposures after the fact, or generate inaccurate exposure reports due to rounding or failure to record their exposure to a particular station. And, when in-tab rates or DDI metrics fall below target goals, Arbitron can, and has committed to, take affirmative steps necessary to ensure the reliability of the representation of demographic groups within each PPM panel.

3. There Is No Evidence of Response-Based Bias in Sample Panels

In addition, the Commission has sought comment on "allegations that PPM response rates are below suggested averages and that Arbitron's failure to raise the average response rate is a factor in its failure to receive accreditation for its PPM surveys."¹⁰⁷ Currently, Arbitron's

¹⁰⁶ See Appendix C to these Comments.

¹⁰⁷ *NOI*, at para. 20.

average response rate for the PPM service, which is measured by the SPI,¹⁰⁸ is approximately 20.2% across all 15 PPM currency markets for individuals six years of age and older.¹⁰⁹ This means that of the original pre-designated basic households randomly selected for the “sample frame,” as discussed above, 20.2% agreed to participate in the PPM panel and then actually carried the PPM device for the required number of hours on a given day.¹¹⁰

Although response rates are one quality metric used by industry experts and analysts in evaluating audience survey methodology and reliability, it is difficult to settle on one “suggested average” or to compare response rates, because survey techniques and methodologies differ. For example, when comparing Arbitron’s PPM and diary services, response rates for the PPM service are lower, in part, than in the diary service because of the length of panel participation: rather than one week, as is the enrollment term for the diary respondents, PPM panelists are enrolled for a period of two years, increasing the likelihood that panelists will drop out of the panel for a wide variety of reasons. Regardless of why or when an original panelist may have dropped out, that panelist is deemed a “non-responder” for purposes of the response rate for the full two-year enrollment period. Despite these methodological differences, recent comparisons of March 2009 PPM response rates (as measured by SPI) to Spring 2008 diary response rates

¹⁰⁸ See discussion of SPI at n.101, *supra*.

¹⁰⁹ See April 2009 Update at 32.

¹¹⁰ The April 2009 data show no consistent difference in SPI rates between the Houston and Radio First methodologies – some Radio First markets show higher SPI percentages than Houston, while others show lower SPI percentages. For example, the average SPI for Houston in April 2009 was 20.4%, compared to 20.3% in Philadelphia, 16.7% in New York (total Metro), 16.2% in Nassau-Suffolk, 17.5% in Middlesex-Union, 20.6% in Los Angeles, 25.4% in Riverside/San Bernardino, 21.5% in Chicago, 18.5% in San Francisco (Total Metro), 16.7% in San Jose, 20.6% in Atlanta, 24.0% in Dallas, 24.4% in Detroit, 21.0% in Washington, DC, and 18.7% in Boston. See *id.* at 32. These differences show that the Radio First methodology does not produce systemically lower SPI rates; rather, differences are more accurately attributed to the market-specific difficulties of measuring a particular market.

indicate that although response rates in PPM markets are lower, the PPM service has a percentage of the pre-designated sample represented in each report that is similar to the percentage obtained in the diary reports.

Most importantly, response rates are only one quality metric and must be considered in conjunction with measurement bias, sampling discrepancies, and other forms of error when considering overall survey quality and reliability. While lower response rates can lead to bias if the radio exposure habits of non-respondents systematically differ from those of respondents, Arbitron's data and various analyses on this subject – including lifestyle studies, data collected from the same individuals under both the PPM and diary services, differential in-tab analyses, and turnover analyses – have found no evidence that there is a systematic difference in exposure habits between respondents and non-respondents. Thus, the response rate itself, without evidence of non-response bias, does not detract from the reliability of Arbitron's ratings surveys.

B. Arbitron's PPM Methodology and Recruitment and Compliance Incentives Have Resulted in High-Quality Sample Panels

The Commission has also asked for comment “on allegations that the sampling methodology undercounts and misrepresents audiences sizes, particular minority audiences.”¹¹¹ PPM sample indices demonstrate that Arbitron's PPM sampling methods, and Arbitron's recruitment, compliance, and retention incentives, have combined to produce high-quality panels that effectively sample key demographic groups.

The representation of key demographics in sample panels is tracked by two important metrics: the DDI and the sample proportionality index. As discussed above, the average DDI rates in many cases exceed the target goal of 100, and, in cases where the DDI rate falls below

that target goal, Arbitron has implemented new benchmarks and various corrective initiatives in order to improve the DDI rate. In addition, the April 2009 in-tab proportionality figures included below in Table 3 indicate that the total number of daily compliant panelists within each demographic group in the Houston, Philadelphia and New York markets typically approximates the percentage of that demographic group in the general population in each respective market. The PPM sample proportionality indices also indicate that the PPM service has a higher percentage of panelists than the diary in certain comparisons, including, for example, young adults aged 18-34.¹¹²

Table 3: Proportionality Index by Sample Type (January–May 2009)

PPM In-Tab Proportionality Index*	Houston	Philadelphia	New York	Riverside/ San Bernardino
P18-34	93	97	89	77
Black 6+	101	109	99	70
Black 18-34	102	96	79	56
Hispanic 6+	100	113	118	104
Hispanic 18-34	94	100	112	78

**Proportionality Index = (In-tab sample %, expressed as a percentage of the Population %) x 100. A proportionality index of 100 means that the percentage of in-tab panelists within the specified demographic group equals the percentage of the market's general population.*

To further ensure that ratings from the PPM service reflect the radio exposure of all key demographic groups and to reduce bias and improve the validity of the final audience survey, the PPM samples, like the diary samples, are “weighted” in order to match key demographic characteristics of the market. Thus, if any particular demographic group (*e.g.*, by age, sex, race/ethnicity, Spanish- or English-language preference for Hispanics, employment status, *etc.*)

(...continued)

¹¹¹ *NOI*, at para. 20.

¹¹² For example, a comparison of the 18-34 in-tab proportionality figures from the last diary survey in the Houston, Philadelphia, New York and Riverside/San Bernardino markets with the January-May PPM data shows an 8 point increase in Houston from the diary to the PPM, a 17 point increase in Philadelphia from the diary to the PPM, a five point increase in New York from the diary to the PPM, and a seven point decrease in Riverside/San Bernardino.

is underrepresented or overrepresented, Arbitron adjusts or “weights” the survey data information to account for the disparity. This process, known as post-stratification weighting, is well-accepted in audience survey measurement practice, because few – if any – surveys ever achieve a perfectly representative sample on all metrics. In the process of developing and implementing the PPM service, Arbitron conducted an extensive review of the impact of weighting procedures on overall ratings reliability. The results of these studies show that post-stratification weighting does not substantially affect the reliability of the PPM service’s results.

Finally, in addition to the measures discussed above to increase DDI and in-tab rates, Arbitron has also initiated special recruitment incentives in order to encourage participation within key demographic groups, including young adults and ethnic households, in an effort to ensure adequate and reliable panels. Arbitron has also instituted differential compensation programs, whereby panelists in certain demographic groups are given increased recruitment incentives, weekly compliance bonuses, or retention bonuses.¹¹³ In addition, Arbitron employs bilingual interviewers and bilingual survey materials (letters, brochures, instructions, *etc.*) to increase participation among Spanish-language-dominant Hispanics, as well as English-language-dominant Hispanics.¹¹⁴

1. Arbitron Has Committed to Increasing CPO Household Representation in PPM Panels

The Commission has specifically asked for comment on whether CPO households are underrepresented and, if so, the effect of the alleged under-sampling of such households upon the

¹¹³ See Appendix C to these Comments.

¹¹⁴ *Id.*

reliability of the resulting audience estimates.¹¹⁵ Currently, the National Health Interview Survey (“NHIS”), conducted by the Center for Disease Control (the “CDC”), is the most comprehensive estimate of total CPO households in the United States. However, the data provided by the CDC are limited in their applicability to Arbitron’s ratings methodology, because the CDC reports nationwide or regional estimates of CPO households, which do not correspond to the market-level data that is collected by Arbitron through its efforts to increase CPO participation in PPM panels. Similar to the state-level and regional differences observed in the CDC results,¹¹⁶ Arbitron’s data demonstrate that the percentage of CPO households varies from one market to the next. Thus, comparisons between Arbitron’s market-level CPO participation and the CDC’s national and regional-level percentages can be misleading.

As discussed above, Arbitron has already committed to increase the total sample target for CPO households in all PPM markets on an accelerated basis. In the month of May 2009, on average across 14 PPM markets,¹¹⁷ 8% of Total Persons in-tab sample was CPO, including 9%

¹¹⁵ *NOI*, at para. 20.

¹¹⁶ See Stephen J. Blumberg, *et al.*, *Wireless Substitution: State-level Estimates From the National Health Interview Study, January-December 2007* (Mar. 11, 2009) available at <http://www.cdc.gov/nchs/data/nhsr/nhsr014.pdf>. This March 2009 article reports the results of modeled estimates of the prevalence of CPO households and adults at the state level and notes “great variation in the prevalence of wireless-only households across states.” *Id.* at 2. For example, estimated percentages of CPO households, based on the 2007 NHIS data, range from a low of 5.1% in Vermont to a high of 26.2% in Oklahoma, with 9.0% of California households, 16.5% of Illinois households, 11.4% of New York households, 10.8% of Pennsylvania households, and 20.9% of Texas households estimated to be CPO. *Id.* at 2, 5. This variation demonstrates that national and regional estimates of CPO households are not accurate indicators of the number of CPO households present on a state or local market level. See also Stephen J. Blumberg, Ph.D. & Julian V. Luke, Division of Health Interview Statistics, National Center for Health Statistics, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2008* (noting that “[a]dults living in the South (21.3%) and Midwest (20.8%) were more likely than adults living in the Northeast (11.4%) or West (17.2%) to be living in households with only wireless telephones”) available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200905.htm#Status>.

¹¹⁷ Because the original sample panels in the Houston market were recruited using an address-based sample frame, which includes CPO households, the Houston market is not included in the CPO supplemental sample frame.

Black Persons in-tab sample, 16% Hispanic Persons in-tab sample, and 21% Hispanic Spanish-language-dominant Persons in-tab sample. Even higher percentages of Persons 18-34 in-tab sample were CPO: 15% of Total Persons 18-34, 14% of Black Persons 18-34, and 23% of Hispanic Persons 18-34. These figures, like the CDC estimates, tend to skew towards younger persons and Hispanics, particularly Spanish-language-dominant Hispanics.

Most importantly, however, the PPM data show, contrary to the Coalition's assertion in its initial Petition,¹¹⁸ that after accounting for age, sex, and race/ethnicity, CPO panel participants do not demonstrate radio exposures that differ from those on the part of individuals living in households with landline telephones. For example, an impact study of three PPM markets compared station ratings for various combinations of stations, day parts, and panelist demographic characteristics that totaled more than 179,000 such combinations. Arbitron compared the (1) ratings from the 179,000 combinations where the results included some CPO households, but were weighted to reflect the estimated total percentage of CPO households in the market, with (2) ratings from the 179,000 combinations where the results included the same number of CPO households, but were not weighted to reflect the total percentage of CPO households in that market. The study revealed no material difference in the ratings between the weighted and the non-weighted results.¹¹⁹ In fact, there was no change in ratings as a result of weighting in 91.0% of the cases studied, and in 99.4% of the cases where a difference was detected, the change was limited to plus or minus 0.1%.¹²⁰

¹¹⁸ "Emergency Petition for Section 403 Inquiry" filed with the Commission by the Coalition on September 2, 2008, at 25-26 (the "*Petition*").

¹¹⁹ See April 2009 Update at 35.

¹²⁰ *Id.*

Thus, even if PPM samples have historically contained fewer CPO households than the general Metro market population, the disparity does not have a material impact on ratings or “skew the results,”¹²¹ because exposures to radio do not differ materially between the two groups, when controlled for age, sex, and race/ethnicity.

2. Spanish-language-dominant Hispanic Persons Are Adequately Represented in PPM Panels

The *NOI* also notes that the Coalition argued in its Petition that “Hispanic PPM recruitment methods skew toward English-language-dominant persons because potential panelists are identified by origin rather than by language.”¹²² However, here, too, the data themselves undercut the allegations that PPM recruitment panels “skew” toward English-language-dominant Hispanic persons. Looking at the average DDI of Hispanic panelists in the eight PPM currency markets with significant Hispanic populations, the April 2009 release shows a DDI rate of 135 for Spanish-language-dominant Hispanic panelists and a DDI rate of 110 for English-language-dominant Hispanic panelists.¹²³ Indeed, market by market, the April 2009 DDI for Spanish-language-dominant Hispanic panelists was higher, sometimes substantially, than for English-language-dominant Hispanic panelists.¹²⁴

¹²¹ *NOI*, at para. 20.

¹²² *Id.* at para. 3.

¹²³ See April 2009 Update at 27. Markets include Houston, New York (non-embedded), Los Angeles, Chicago, Riverside/San Bernardino, San Francisco (non-embedded), San Jose, and Dallas-Fort Worth.

¹²⁴ *Id.*

3. Arbitron Has Committed to Including Zip Code and COO Information in Survey Reports

The Commission has sought comment on “the lack of zip code and country of origin data to accompany PPM ratings” and whether this purported situation will “impair stations’ and advertisers’ ability to assess the accuracy of the results.”¹²⁵ As the Commission notes in the *NOI*, Arbitron has already committed to provide, and is in fact already providing, zip code information in its monthly PPM audience survey reports.¹²⁶ In the past, including in the diary service, Arbitron did not request or include COO information, primarily out of a concern that asking potential panel participants for this information would decrease participation. However, testing conducted in Houston, Los Angeles and New York during the first quarter of 2009 demonstrated that requesting COO information – after individuals have agreed to participate in a PPM panel – showed no negative impact on panelist participation when the question is framed in this way and at that point in time.¹²⁷ Consequently, Arbitron is in the process of collecting COO information from panel participants. As noted in Appendix C to these Comments, by March of next year Hispanic COO will be reported in all Hispanic markets, with interim COO reports on installed panelists distributed in July of this year for Chicago, Miami, Riverside/San Bernardino, and San Francisco. The test market data on COO for New York, Houston, and Los Angeles will be provided by July of this year as well. By November of this year, COO information will be reported for installed panelists in Dallas, Washington, DC, Tampa, and Phoenix.

¹²⁵ *NOI*, at para. 20.

¹²⁶ *NOI*, at para. 15.

¹²⁷ *See* April 2009 Update at 36.

C. Use of Arbitron Data by the Commission

Finally, the *NOI* requests comment on the Commission's use of and reliance upon Arbitron's radio market definitions and audience ratings in certain circumstances.¹²⁸ Arbitron's mission is to create reliable radio station audience ratings reports, and for the reasons discussed above, Arbitron believes that the introduction of a near-passive, electronics-based measurement technology represented by the PPM service constitutes an advancement in the field of radio audience estimates. The Commission has voluntarily chosen to import some of Arbitron's services into the Commission's rules and regulations, and it is well within the authority of the Commission to do so. Regardless of whether the Commission decides to continue to rely upon Arbitron's services, Arbitron remains committed to providing reliable audience ratings reports for the radio industry, and plans to continue to pursue that objective.

VIII. CONCLUSION

In conclusion, Arbitron thanks the Commission for giving Arbitron and other interested parties the opportunity in this proceeding to exchange ideas and information regarding the PPM service and the exciting future that it holds for radio's ability to thrive in a multi-media universe that is increasingly gravitating to the sale of advertising messages on the basis of audience measurement data collected passively and through electronics-based technology which can provide levels of granularity, timeliness, and accountability that cannot be achieved by the pencil-and-paper diary method. Arbitron is willing to continue its ongoing dialogue with the Commission and with interested parties – including the PPM service's critics, many of whom are Arbitron customers – to assist in minimizing the disruption that the introduction of this 21st-century methodology (like most technological innovations) is inevitably causing in some

quarters. Arbitron hopes that the Commission will join with the many radio broadcasters and advertisers who have welcomed the advent of the PPM service and who are helping to refine and improve the service as it is being commercialized in the major markets. Notwithstanding the prospects for continuing cooperation in helping the radio industry to adapt and move forward, however, Arbitron reminds the Commission that its role in this matter cannot go beyond that of inquiring, educating, reporting, and recommending, and that under no circumstances can the Commission undertake to regulate Arbitron or the PPM service, for the reasons set forth in these Comments.

(...continued)

¹²⁸ *NOI*, at paras. 23-25.

Respectfully submitted,

ARBITRON INC.

By its counsel:



John Griffith Johnson, Jr.

M. Lily Woodland

PAUL HASTINGS JANOFSKY & WALKER, LLP

875 15th Street, N.W.

Washington, D.C. 20005

Telephone: (202) 551-1700

Facsimile: (202) 551-1705

Timothy T. Smith

Executive Vice President & Chief Legal Officer,

Legal & Business Affairs

Michelle Levister

Deputy General Counsel

ARBITRON INC.

9705 Patuxent Woods Drive

Columbia, MD 21046-1572

July 1, 2009

APPENDIX A

Diaries Overreport Habitual Listening

Black Listener
Female, Age 39

Hispanic Listener
Male, Age 24

"Other" Listener
Male, Age 28

WEDNESDAY									
Time	Station		Place		Mark # one		Mark # one		
	Start	Stop	Call letters, dial setting or station name <small>(Don't leave the program name)</small>	AM	FM	At Home	In Car	At Work	Other Place
Early Morning <small>(from 5 AM)</small>	05:30	06:30	WBLS	X				X	
	6:30		W	X					X
Midday			B						
			S						
Late Afternoon	2:00			X					X
	2:30	4:20	WBLS	X				X	
Night <small>(to 5 AM Thursday)</small>									

If you didn't hear a radio today, please mark (X) here.

JUEVES/THURSDAY									
Hora/Time	Estación/Station		Lugar/Place		Mark # one		Mark # one		
	Start	Stop	Call letters, dial setting or station name <small>(Don't leave the program name)</small>	AM	FM	At Home	In Car	At Work	Other Place
Temprano en la mañana Early Morning <small>(desde 5 AM / from 5 AM)</small>	8:30		97.9				X		X
A mediodía Midday	12:00		97.9			X			X
En la tarde Late Afternoon	6:00		97.9			X			X
De noche Night <small>(hasta las 5 AM viernes / to 5 AM Friday)</small>									

Si usted no oyó la radio hoy, por favor, márkelo (X) aquí.
If you didn't hear a radio today, please mark (X) here.

TUESDAY									
Time	Station		Place		Mark # one		Mark # one		
	Start	Stop	Call letters, dial setting or station name <small>(Don't leave the program name)</small>	AM	FM	At Home	In Car	At Work	Other Place
Early Morning <small>(from 5 AM)</small>									
Midday	9:00								
Late Afternoon	3:00		Sean Hannity						✓
Night <small>(to 5 AM Wednesday)</small>	5:00	8:00	ABC TALK 770						✓
	6:00	8:00	MARK LEVIN ABC TALK						✓

If you didn't hear a radio today, please mark (X) here.

Source: New York Spring 2008 survey

APPENDIX B

PPM Captures Actual Listening

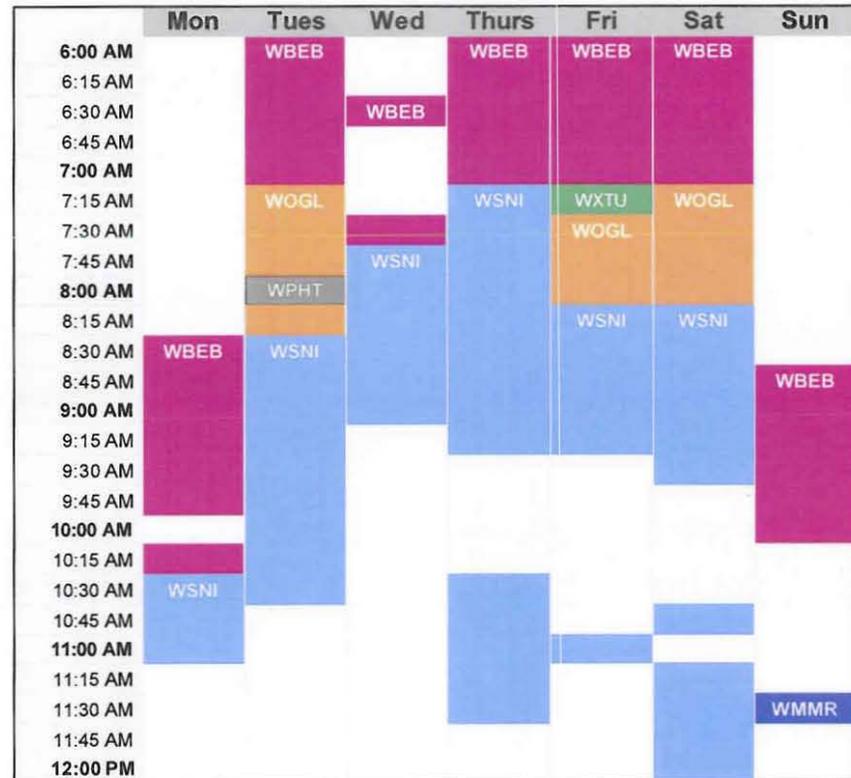
Survey records from same respondent: white male
(one year apart)

Diary



Winter 2004

PPM



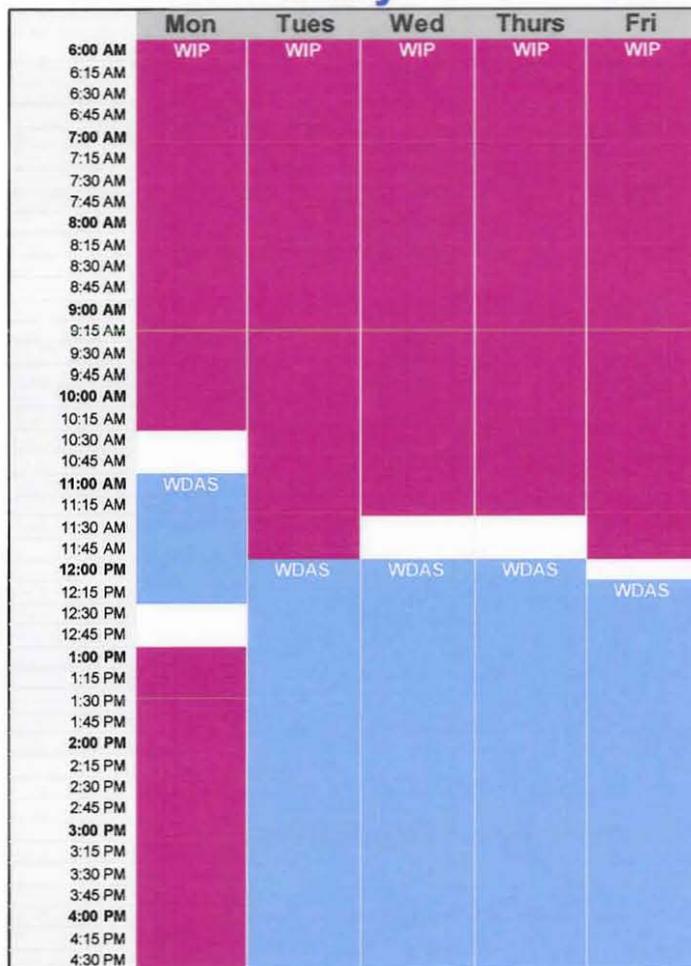
Winter 2003

Source: Philadelphia Radio Metro

PPM Captures Actual Listening

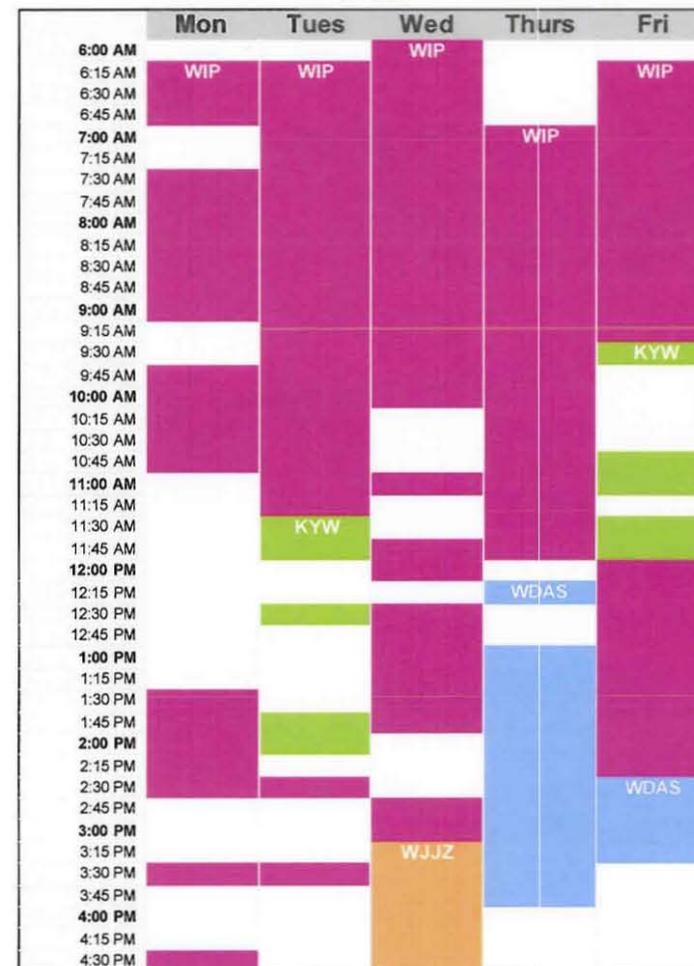
Survey records from same respondent: black male
(one year apart)

Diary



Winter 2004

PPM



Winter 2003

Source: Philadelphia Radio Metro



APPENDIX C

PPM™ Hispanic and Black Initiatives

Hispanic & Black PPM Initiative Planned for 2009

***CPO Sample Increase:** Average CPO sample target per market scheduled to be increased to 15% by December 2009.

Hispanic PPM Initiatives Planned for 2009-2010

***Hispanic Country of Origin Collection & Reporting:** Hispanic Country of Origin planning is underway with targeted implementation in March 2010 for all Hispanic markets. In March 2010, Hispanic Country of Origin will be reported in all Hispanic markets within eBook lead-in pages and in the PPM Analysis Tool as a Hispanic characteristic. Tapscan Web will incorporate Country of Origin data later in 2010.

- In 2009, interim reports for select markets will provide a distribution of installed panelists by Country of Origin:
 - July 2009: Chicago, Miami, Riverside and San Francisco. In addition, Country of Origin test market data for New York, Houston and Los Angeles will be provided.
 - November 2009: Dallas, Washington, DC, Tampa and Phoenix.

Procedures Implemented in 2009 to Improve Black Recruitment and Compliance

A variety of different techniques and initiatives have been developed in the past year to improve the recruitment and compliance. These techniques are used in selected markets based upon factors such as historical performance:

- Assigned personal phone compliance coaches to Black young adults (18-34).
- Gift cards used in conjunction with personal telephone compliance coaching.
- New customized accessories sent to Black young adults (18-34) and offered to others.
- Weekly incentive increases for persons in households with Black persons 25-34 years old. (All persons in 18-24 households already receive higher incentives.)
- Installation bonuses for landline and cell-phone-only households.
- Accelerated recruitment and installation of households with Black young adults in selected markets.
- Early deinstallation of households in selected markets in order to allow for the recruitment of households with young adults.

Existing Procedures to Improve Hispanic Recruitment and Compliance

- Bilingual pre-alerts sent to all High Density Hispanic Areas
 - First telephone call made by bilingual interviewer
- Bilingual materials sent to all Hispanic persons
 - Bilingual specialists assigned to Spanish-dominant persons
- Higher weekly incentives for all Spanish-dominant Hispanics
- Higher retention bonuses for all Spanish-dominant Hispanics
- Enhanced language collection procedures to increase the stability of language reporting. With this new process, any change in language usage reported by another household member must be confirmed directly by the affected panelists before the value is changed.

Existing procedures to Improve Recruitment and Compliance

- Ongoing compliance coaching by Panel Relations Specialists based on daily performance
- Bonus points earned for wearing meter (based on daily motion)
 - Green light on meter provides feedback that points are being earned
 - Total points earned for day and week are reported along with feedback messages when meter is docked
 - Points are converted into weekly incentives
- Higher weekly incentives for all persons who live in a household with anyone 18-24 years old
- In Person coaching of Hispanic & Black 18-34 in top 10 PPM markets
 - Targeting initial poor compliers
- Monthly mailings to each panelists with incentives earned and panelist newsletter
- Personalized website that provides individual performance metrics as well as informational and motivational information and methods to contact Arbitron

Overall Improvement Initiatives Directed to all Households Including Hispanic & Black

- Front loaded treatments—treatments offered to newly installed panelists:
 - Welcome package including welcome letter, panelist website log-in information, accessory brochure and/or meter decal booklet—January 2009, all markets
 - Travel chargers—January 2009, top 10 markets, any market with actual or forecasted Sample Performance Index (SPI)¹ of below 20
 - 4-week compliance bonus—February 2009, any market with actual or forecasted SPI of below 20
 - Positive reinforcement--training in February 2009 with schedule of contacts implemented in May 2009, any market with actual or forecasted SPI of below 20
- Targeting newer model meters with longer battery life to all newly installed households (w/persons <55)—March 2009, all markets
- Added letters and phone calls designed to convert households among the alternate sample who refused to participate at recruitment—March 2009, all Radio First markets.
- New customized carry accessories offered via a brochure sent in Welcome Package—May 2009, all markets
- Seasonal reminder/bonus plan to send reminders and/or incentives to help maintain compliance over holiday and vacation periods (e.g. Summer bonus) to all panelists—throughout year, all markets
- Recruitment callback attempts assigned to recruiter that completed last call to household—May 2009, all markets
- Increase Cell Phone Only sample target to 15%--by December 2009, average across all markets

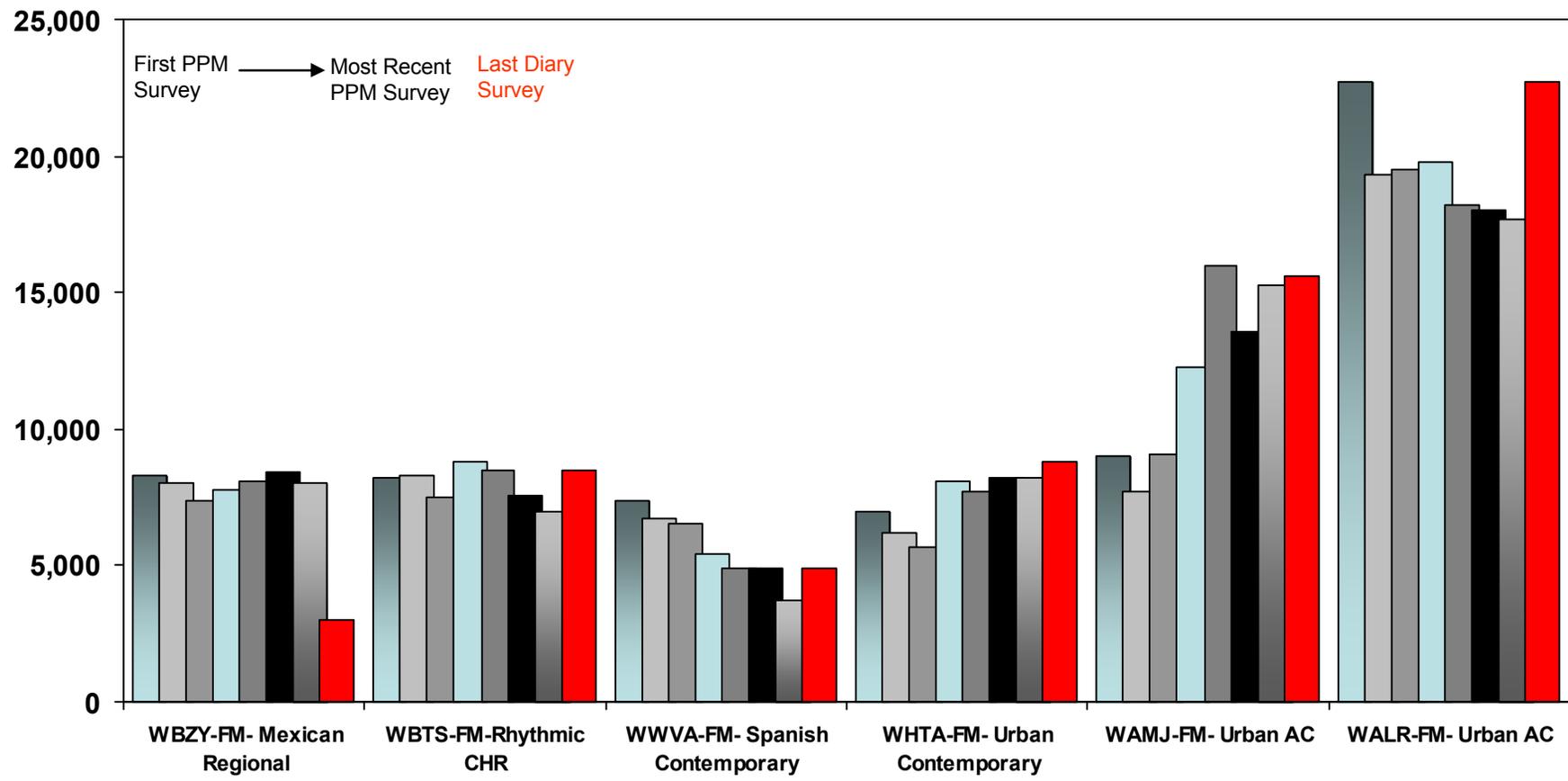
¹ SPI is a longitudinal measure that is used as a proxy for response rate in electronic media panels for radio and TV.

Last revised 7/1/09

New York 142 West 57th Street New York, New York 10019 (212) 887-1300	Chicago 222 South Riverside Plaza Suite 630 Chicago, Illinois 60606 (312) 542-1900	Atlanta 9000 Central Parkway Suite 300 Atlanta, Georgia 30328 (770) 668-5400	Los Angeles 10877 Wilshire Blvd. Suite 1600 Los Angeles, California 90024 (310) 824-6600	Dallas 13355 Noel Road, Suite 1120 Dallas, Texas 75240 (972) 385-5388	Washington/Baltimore 9705 Patuxent Woods Drive Columbia, Maryland 21046 (410) 312-8000	Birmingham 3500 Colonnade Parkway Suite 400 Birmingham, AL 35243
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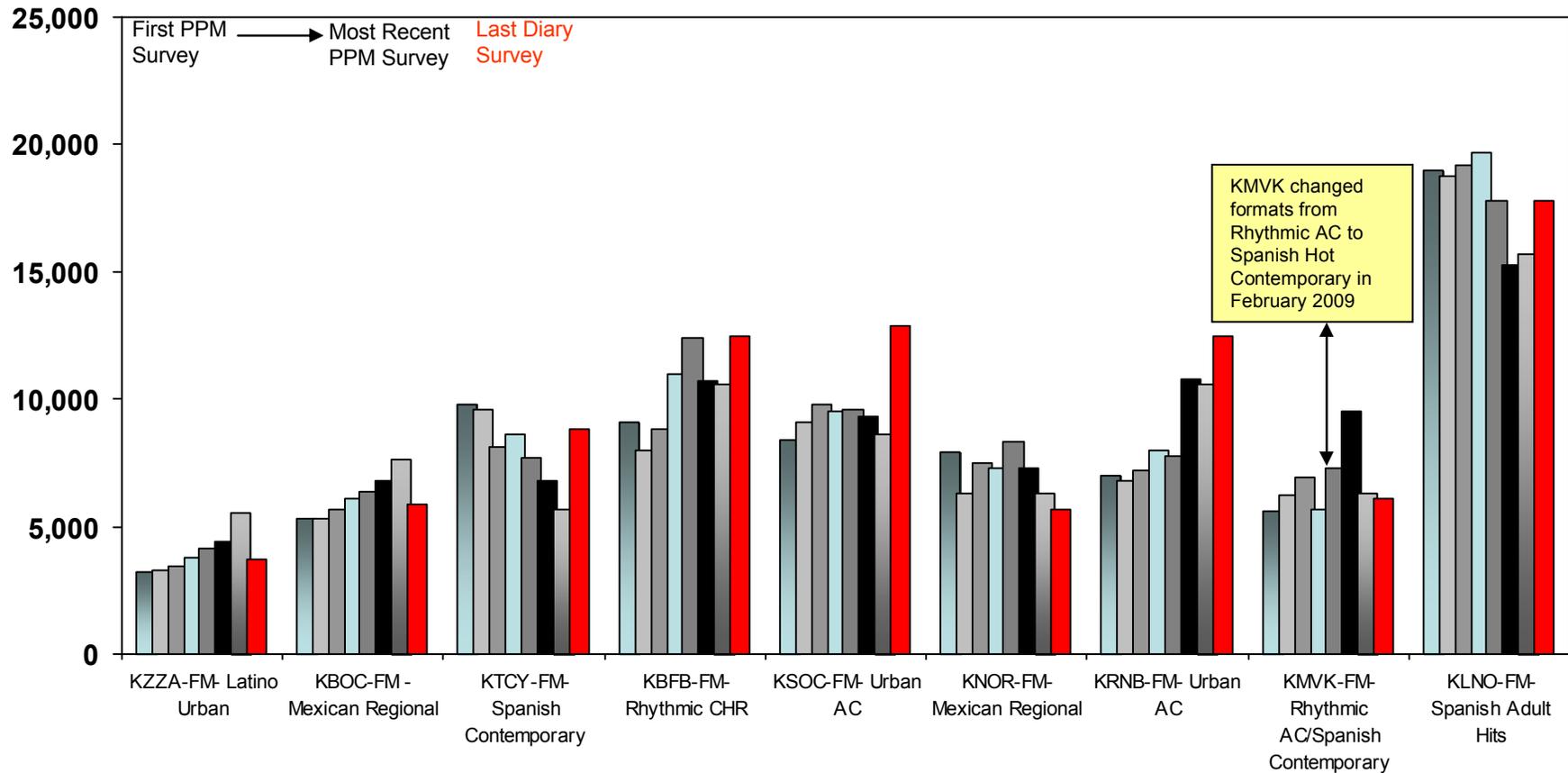
APPENDIX D

Many of the Atlanta Stations Which Attract A Black or Hispanic Audience Have Grown Close or Now Exceed Their Diary Estimate



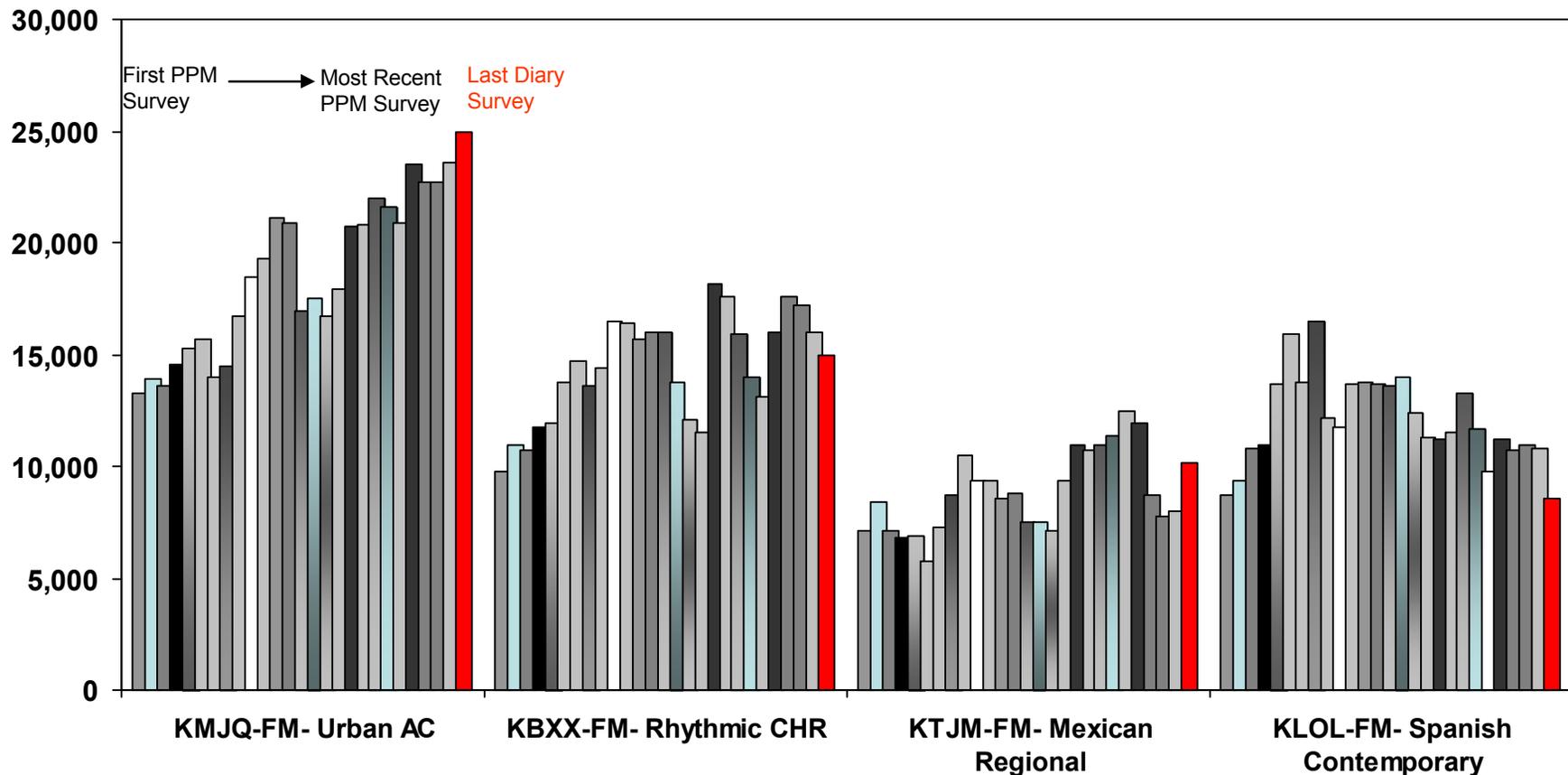
Persons 25-54, AQH Persons, Mon-Sun 6a-12m
 PPM First Survey, December 2008, Most Recent PPM Survey, May 2009
 Last Diary Survey, Summer 2008

Many of the Dallas Stations Which Attract A Black or Hispanic Audience Have Grown Close or Now Exceed Their Diary Estimate



Persons 25-54, AQH Persons, Mon-Sun 6a-12m
 PPM First Survey, December 2008, Most Recent PPM Survey, May 2009
 Last Diary Survey, Summer 2008

Many of the Houston Stations Which Attract A Black or Hispanic Audience Have Grown Close or Now Exceed Their Diary Estimate



Persons 25-54, AQH Persons, Mon-Sun 6a-12m
 PPM First Survey, June 2007, Most Recent PPM Survey, May 2009
 Last Diary Survey, Winter 2007