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

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

TO THE COMMISSION

COMMENTS OF THE PPM COALITION

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EXECUTIVE SUMMARY

For many years, the nation's minority radio broadcasters have helped fulfill the Federal Communications Commission's ("FCC" or "Commission") longstanding commitment to serving America's diverse radio audiences. But over the last year, the ratings for minority radio have cratered. For example, since October 2008, ratings for minority broadcasters in New York have fallen 40-60%. Broadcasting revenue is directly related to ratings, and it has fallen precipitously as well.

Have those who used to listen to minority radio turned off their radios or developed new preferred formats? Absolutely not. Minority audiences are as vibrant and loyal as ever. Instead, Arbitron, the monopoly provider of radio audience measurement, has stopped measuring representative samples of minority audiences. Why? Because it has determined in its headlong rush to deploy its lucrative new product—the Portable People Meter ("PPM") rating service—that accurately measuring minority audiences is too expensive. Arbitron's corner-cutting, inferior, sub-standard research methodology has devastated minority radio stations. Unless the Commission acts, the diversity of the radio airwaves will soon be extinguished.

Arbitron is the monopoly provider of an essential service. As a result, its customers have little control over its practices. Recognizing this problem, Congress long ago turned to an independent body of experts, the Media Rating Council ("MRC"), to audit audience measurement services. Arbitron has repeatedly submitted its PPM service to the MRC, and the PPM service has repeatedly flunked the MRC's accreditation process. Failing the industry accreditation process would give a responsible company pause, but, in an unprecedented flouting of the MRC process, Arbitron has exploited its monopoly position to ignore the MRC's concerns and roll out its unaccredited service in the nation's top radio markets, heedless of the devastating consequences on minority radio stations whose audiences are grossly undercounted.

Arbitron's release of the flawed, misleading, and discriminatory audience estimates in the nation's largest markets has caused severe problems. Accordingly, three states have taken exceptional actions regarding Arbitron's PPM methodology. The Attorneys General of New York and New Jersey have sued Arbitron, alleging that Arbitron data is flawed and misleading. In response, Arbitron entered into consent decrees with both states. Arbitron also entered into a settlement agreement with the Maryland Attorney General to avoid similar litigation. But Arbitron's PPM methodology remains far from being reliable: It continues to undercount minority audiences and devastate minority radio stations; Arbitron's consent decrees and settlements do not even apply beyond a few markets; and the PPM service remains conspicuously unaccredited in almost every market in which Arbitron has brazenly pushed forward with its deployment.

PPM audience measurement as currently marketed by Arbitron is not accurate or reliable. The Commission has traditionally relied on Arbitron's audience estimates in its own processes, providing an implicit approval of Arbitron's methodology and results. Arbitron has violated the trust that the Commission, Congress and the broadcast industry have placed in it by deploying a new deeply flawed PPM methodology. Given the glaring deficiencies in Arbitron's PPM methodology and results, and their discriminatory effects, it is arbitrary and capricious for the Commission to continue to reply on Arbitron's PPM audience estimates. The Commission should therefore immediately cease use of unaccredited PPM data and require MRC accreditation before allowing licensees to rely on such data in their filings with the FCC.

Arbitron cloaks its defense of PPM in the veneer of technological sophistication and progress. The flaws in Arbitron's PPM service, however, are not technological. Arbitron provides PPM survey panelists with pager-sized devices that detect signals encoded in radio broadcasts and thereby ostensibly track all of the radio stations to which a panelist is exposed. In Arbitron's version, only a Luddite could prefer the old system of paper diaries (which, unlike PPM, long has received MRC accreditation for being accurate and reliable). No matter how sophisticated the technology, the audience estimates it produces will be misleading if Arbitron does not recruit, train, and retain a sample panel that is reflective of the diversity of the community and if those in the sample panel do not faithfully and properly use their PPM devices. If Arbitron wishes to use PPM, it must invest the money and resources necessary to ensure reliable data and gain MRC accreditation.

As explained more fully in the following pages, several fundamental problems with Arbitron's current PPM service lead to flawed and unreliable sampling of minority and other audiences:

- **Arbitron's telephone-based sample excludes many listeners**: Arbitron's primary sample includes only households with listed landline numbers. *Those with unlisted numbers, no telephones, and cell-phone-only users are excluded from the main sample.* Notably, Arbitron has an address-based sample methodology in Houston, one of only two markets in which Arbitron has been able to gain MRC accreditation for PPM, but Arbitron has deemed that address-based methodology too expensive to use elsewhere, despite its benefits for accuracy and reliability. Instead, Arbitron has rolled out the cheaper service that has repeatedly flunked accreditation.

- **Arbitron's separate cell-phone-only sample is too small**: Arbitron drastically under-samples cell-phone-only households, which are disproportionately young and minority. 25% of Hispanics live in cell-phone-only households, as do 21.4% of African Americans, and 41.5% of those aged 25-29. Yet Arbitron's sample panel currently includes only 10% cell-phone-only users.

- **Black and Hispanics are underrepresented in the sample panels**: Arbitron has proved unable to meet its own internal metrics for minority participation in its sample panels. For example, Arbitron recruited only 64% of the Black panelists it was seeking in Los Angeles in April and just 59% of the Black panelists it was seeking in Detroit.

- **Arbitron's panels are shockingly small**: In Riverside-San Bernardino, Arbitron's sample cell for Black Women Age 65+ was *one woman*. In Atlanta, each Black panelist is assumed to represent 10,000 others. As a result, when a Black family of PPM panelists traveled to New York over Thanksgiving weekend, Arbitron reported that 30,000 Atlantans had tuned in to a New York station—which could not be heard anywhere within a thousand miles of Atlanta—and thus the station was the 34th most popular station in Atlanta that week.

- **PPM Panelists do not use the devices properly:** For decades, Arbitron has reported that radio listenership peaked from 6AM to 10AM, while people listened to their clock radios during their morning routines and during their drives to work. With PPM, Arbitron reports that people no longer listen to their radios in the morning. Does anyone other than Arbitron seriously believe that PPM panelists put on their PPM device while they shower, dress, and enjoy their morning breakfast and coffee?

Arbitron's PPM methodology is analogous to the infamous Presidential election poll conducted by Literary Digest in 1936. Literary Digest crafted a sample based on its own subscribers, listed landline telephones, and automobile ownership records, notwithstanding the fact that millions of Americans during the Depression owned neither a car nor a telephone. *See* Peverill Squire, *Why the 1936 Literary Digest Poll Failed*, Pub. Opinion Q., Spring 1988, at 125. Based on this sample, Literary Digest confidently predicted that Alfred Landon would trounce Franklin Roosevelt. Election Day came, and with it Roosevelt's landslide victory. The Literary Digest poll showed that statistical sampling is reliable only if the sample population that responds to the survey is representative of the community. The MRC has concluded that Arbitron's current PPM sample cannot be trusted. Data that is too flawed and unreliable for the MRC is too flawed and unreliable for the Commission to use. The reasons that have led the

MRC to reject it, moreover, also should lead the Commission to reject it. Diversity in the nation's radio industry is too important to be destroyed by an unreliable, inferior, and inadequate ratings service.

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TO THE COMMISSION

COMMENTS OF THE PPM COALITION

I. INTRODUCTON

The PPM Coalition ("PPMC") welcomes the opportunity to submit these Initial Comments in response to the Notice of Inquiry ("*NOI*")[1] concerning the commercial use of the Portable People Meter ("PPM"), a radio audience measurement service developed by Arbitron, Inc. ("Arbitron"). On September 2, 2008, following years of futile negotiations with Arbitron, PPMC filed an Emergency Petition for a Section 403 Inquiry ("Emergency Petition")[2] urging the Commission to assess the reliability of PPM data and the impact of its commercial use on minority-owned broadcasters, stations primarily targeting minority audiences (collectively referred to herein as "minority broadcasters"),[3] and advertisers. Expressly, we indicated:

- The PPM methodology, as it was then designed, grossly undercounted and misrepresented the number and loyalty of minority radio listeners.

1 See *Notice of Inquiry*, *In the Matter of Impact of Arbitron Audience Ratings Measurements on Radio Broadcasters* (released May 18, 2009) ("*NOI*").

2 See *Emergency Petition of PPM Coalition for Section 403 Inquiry* (September 2, 2008) ("Emergency Petition").

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

- Unless the Commission acted, PPM's flawed methodology that was being implemented would have a devastating financial impact on minority broadcasters.

- Years of negotiations with Arbitron have produced only stonewalling and delay. Arbitron has made clear that further negotiations would be futile – even though Arbitron, the monopoly supplier of quantitative radio ratings data, plans to proceed to market with a fundamentally flawed product, which has been denied accreditation by the Media Rating Council ("MRC")[4] and despite the devastating impact that its flunked methodology will have on minority stations.

- The Commission has a long standing commitment to preserving minority media ownership, an understanding of radio audience measurement and the ability to conduct and conclude an inquiry fairly and expeditiously.[5]

As we anticipated in the Emergency Petition, over the last eight months PPM has produced unreliable data since being released as "currency" in major markets.[6] Despite a direct request by the New York City Council asking the Commission to investigate PPM,[7] lawsuits brought by both the New York and New Jersey Attorneys General based upon Arbitron's flawed data with respect to minority audiences,[8] a settlement with the Maryland Attorney General based

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

5 See Emergency Petition at i.

6 See id. The term "currency" as used by the radio broadcast industry refers to the value ascribed to a station's ratings which determines the price of advertising sales. Arbitron mandates which audience measurement results can be used for advertising transactions. All PPM market subscribers no longer have access to previous diary data.

7 See New York City Council, "Resolution calling on the Federal Communications Commission to investigate Arbitron's Portable People Meter system and its potential effect on the diversity of radio," Res. No. 1583-A (Adopted September 24, 2008) available at http://webdocs.nyccouncil.info/textfiles/Res%201583-2008.htm?CFID=292390&CFTOKEN=20869871.

8 See McBride, Sarah, "Arbitron is Sued Over New Gauge of Audience Size," The Wall Street Journal, October 11, 2008 (discussing the lawsuits brought against Arbitron by the New York and New Jersey Attorneys General) available at http://online.wsj.com/article/SB122367727100824333.html. The three lawsuits resulted

(cont'd)

on similar allegations; and the fact that the MRC has failed to accredit PPM in all but two of the markets into which PPM has been introduced,[9] Arbitron continues to roll-out a sub-standard product with a flawed sampling methodology to the detriment of the radio broadcast industry and the radio listening public. Additionally, Arbitron has continually failed to meet its own self-established benchmarks for improving its PPM sampling of minority radio listeners and continues to take lackluster steps to offer improvements to its recruitment methodology. As a result, minority radio stations continue to experience precipitous declines in ratings and above average revenue losses as compared to the overall market.[10]

Just this week Congressman Towns, Chairman of the House Committee on Oversight and Government Reform, announced the start of a formal investigation by the Committee into the problems with PPM and the potential threat to the financial viability of minority targeted radio stations.[11] Likewise, on June 30th the Miami-Dade Board of County

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in settlements that required Arbitron to revise its methodology. See *Anne Milgram v. Arbitron*, Final Consent Judgment, Superior Court of New Jersey (Jan. 7, 2009) ("New Jersey Settlement Agreement") available at http://www.nj.gov/oag/newsreleases08/pr20090107c-Arbitron-ConsentJudgment.pdf; See *New York v. Arbitron*, Stipulated Order on Consent, Supreme Court of the State of New York, County of New York (Jan. 7, 2009) ("New York Settlement Agreement") available at http://www.oag.state.ny.us/bureaus/civil_rights/pdfs/Arbitron%20Consent%20Order%2001-07-08.pdf. Arbitron also reached a settlement with the Maryland Attorney General. See "Attorney General Gansler Announces Radio Ratings Agreement with Arbitron Inc. Company Will Improve its PPM System To Better Reflect Radio Audience," Maryland Attorney General Press Release (Feb. 6, 2009) ("Press Release Describing Maryland Settlement Agreement") available at http://www.oag.state.md.us/Press/2009/020609.htm.

9 PPM has received accreditation in Houston, the first market to employ PPM using an address-based recruitment methodology. In February 2009, Arbitron achieved MRC accreditation in the Riverside-San Bernardino market which employs the telephone based Radio First methodology.

10 See Mike Boyle, "Arbitron Misses Ethnic Benchmarks," Media Week, May 29, 2009 (stating that Arbitron has failed to meet its April designated delivery index (DDI) benchmarks for "African-American," "Hispanic," and "Other" ethnic demographics and reporting that a data entry error in New York, caused Arbitron to delay releasing its April 2009 PPM results) available at http://www.mediaweek.com/mw/content_display/news/local-broadcast/e3if6edc43bfbecc72a2a18d0162e459958. See also, Karina Ioeffe, "People Meters Threaten Ethnic Radio," New America Media, Oct. 2, 2008, available at http://www.newamericamedia.org/news/.

11 "Congress wants info on PPM," Radio Business Report/Television Business Report, June 29, 2009, available at http://www.rbr.com/radio/15496.html?print; "U.S. lawmaker probes device over minority radio data," Reuters, June 29, 2009, available at http://www.reuters.com/articlePrint?articleId=USTRE55S64Y20090629; "House

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Commissioners voted unanimously in favor of a resolution urging Congress to enact legislation and the FCC to enact rules to ensure that the PPM methodology does not under-represent minority radio listeners. The resolution also calls on the Florida Legislature and state Public Service Commission to enact legislation and rules as well as calling upon the state Attorney General to investigate PPM to ensure that the terms of the settlements by the Attorneys General in New York and New Jersey are applie in Florida.[12]

In response to the growing number of concerns expressed about the commercial introduction of Arbitron's new PPM service, the Commission has now begun a much needed fact finding inquiry to examine whether Arbitron's PPM ratings data is sufficiently accurate and reliable to merit reliance by broadcasters and by the Commission itself. In the *NOI*, the Commission seeks comment and empirical evidence with respect to PPM and its effect on minority and urban-formatted station revenues in the markets where PPM is currently in use. The Commission also seeks further information on the issues originally raised by PPMC regarding Arbitron's sampling, among others, specifically (i) whether the current sampling methodology undercounts and misrepresents audience sizes for minority radio listeners; (ii) whether there is a difference in ratings between the Houston market, where an address-based database is used to select the sample, and other markets where the sample is selected using a telephone-based sample frame; (iii) whether the under inclusion of cell-phone-only respondents within the samples skews the results for PPM and (iv) what steps, if any, Arbitron should take to correct the problems and ensure that the reported audience ratings accurately reflect the actual

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Oversight Committee to Look At PPM," Radio Ink Magazine, June 29, 2009, available at http://www.radioink.com/Article.asp?id=1391660&spid=24698.

12 *Resolution urging Congress, the Florida Legislature, and Federal and State Officials to ensure that the rating methodology used by the Portable People Meter Ratings System designed to measure radio station listenership does not under-represent minority radio listeners*, Agenda Item No. 11(A)(2), June 30, 2009.

listening audience. Finally, the Commission seeks comment on the importance and adequacy of MRC accreditation in ensuring the integrity of the sampling methodology; and how existing concerns about PPM's reliability implicate the Commission's use of Arbitron data in the implementation of its own rules and regulations.

For the reasons set forth in more detail below, the PPMC requests that the Commission refrain from using any Arbitron PPM data that is not the product of an MRC accredited methodology and prohibit broadcasters from relying on the data in their submissions to the Commission until it is accredited by the MRC.

II. THE PPM COALITION

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

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

Organizations:

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

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

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

The American Association of Hispanic Advertising Agencies ("AHAA") is the trade association representing 98 percent of Hispanic-specialized marketing and advertising agencies, as well as media buying agencies and media companies.

Companies:

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

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

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

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

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

III. BACKGROUND

A. Arbitron's Ratings Services – Sole Provider of Radio Ratings in the Top 50 Radio Markets

Arbitron developed the Portable People Meter, an electronic tracking device (slightly larger than old-style pagers) that survey panelists carry with them throughout the day – generally clipped to a belt – which records signals from the radio stations that they encounter.[13] At the end of each listening day, panelists are required to place their PPM device into a docking station that transmits the recorded data to Arbitron for tabulation. Arbitron compiles PPM data on a weekly basis and then releases ratings reports based on a four week average approximately two weeks after the close of each month. Arbitron intends to replace its existing Diary service with PPM in the top 50 radio markets in the U.S. by the end of 2010.

Under the Diary system respondents are provided paper "diaries," in which panelists confidentially record their radio listening habits by hand. In contrast to PPM, where panelists remain in the sample for up to two years, in the diary-based system, respondents are mailed a log in which to write down the radio stations they listen to over a one week period and then return their diaries to Arbitron at the end of the week. The next week, Arbitron uses an entirely different sample group. Arbitron mails diaries to thousands each week and tabulates the results of the diaries over a 12 week ratings period; then it compiles the information in ratings books which are released each quarter.

Arbitron's ratings are the "currency" that is used by commercial radio stations to price and sell advertising time and sponsorships to media buyers.

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

B. The Media Rating Council – A Voluntary Audience-Rating Accreditation Organization

MRC is a nonprofit organization created to address the research auditing needs that were found to be necessary in the Harris Committee Hearings held by Congress in 1964.[14] MRC audits are designed to scrupulously analyze every element of an audience measurement service and employ stringent safeguards to assure that accreditation decisions are based only on merit, including voting policies, staff executed process controls and formal appeal procedures, if necessary.[15] The MRC accreditation procedure is also designed with mechanisms to ensure that accreditation remains unbiased and that a service receives accreditation based only upon merit.[16] To that end, participating audience measurement firms are required to provide full transparency to the audit team and staff of the MRC.

Often referred to as the "gold seal" of approval, accreditation by the MRC ensures that an audience measurement service and its implementing methodology have met the minimum standards for reliable audience measurement research as established by the industry itself. Yet, in the eight months since Arbitron prematurely released PPM into the market, Arbitron has failed to achieve accreditation in almost all markets in which PPM has been released. PPM initially did receive MRC accreditation in the Houston-Galveston market utilizing a different recruitment methodology with an address-based sample frame. Subsequently however, Arbitron abandoned address-based sampling and in-person recruitment in all other PPM markets. In all other PPM

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14 See Emergency Petition at n.9 citing George Ivie Testimony (In these hearings "Congress reached three basic conclusions: First, that there was a need for professional, independent review of audience measurement services. Second, that industry self-regulation – rather than the heavy hand of direct government regulation – was the best means of assuring the quality and accuracy of audience rating data; and, third, through the federal laws regulating anti-competitive conduct and deceptive practices, the federal government retained the means to deal with the most serious potential abuses.").

15 See generally, George Ivie Testimony.

16 See generally, George Ivie Testimony (MRC "employs stringent safeguards to assure that accreditation decisions are based only on merit, including voting policies, staff-executed process controls and formal appeal procedures, if necessary.").

markets, Arbitron has deployed a sampling methodology predicated on telephone-based recruitment which is cheaper to implement than Houston's accredited, address-based recruitment methodology.[17] Arbitron's telephone-based methodology is entitled "Radio First." Radio First relies on random digit dialing, which is a computer process that generates landline telephone numbers based on known area codes and exchanges for the relevant market area. Of the 15 markets where PPM is now in commercial release, Arbitron's Radio First recruitment methodology has achieved accreditation in only *one* of those markets, Riverside-San Bernardino. In all other markets, including the top five markets of New York, Los Angeles, Chicago, San Francisco and Dallas-Fort Worth, Arbitron has not yet received accreditation by the MRC.[18]

Many analysts of PPM, including commenters here, have insisted that in today's communications environment, reliance on telephone-based recruitment significantly affects the representativeness of a given sample and under-represents minorities and lower income persons who are more difficult to recruit and who rely more and more on wireless phones to meet their communications needs.

IV. THE COMMERCIALIZATION OF PPM USING ARBITRON'S FLAWED METHODOLOGY HAS DEVASTATED MINORITY RADIO

Since PPM became operational in New York in October 2008, minority broadcasters have experienced an average 40 – 60% drop in their average quarter hour ratings ("AQH"); coupled with a corresponding drop in the average rates minority broadcasters are able to charge to advertisers who have been unwilling to accept higher ad rates to reach what appears to be a smaller audience. Spanish Broadcasting System ("SBS") owns two stations in the New York market: WSKQ reports a 55% decline in its AQH Rating year-to-year; and WPAT has

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

[18] As of June 2009, Arbitron has failed three times in its efforts to achieve accreditation in the New York market.

experienced a 67% decline in its AQH Rating year-to-year. In the New York market alone, SBS has experienced a 37% reduction in staff as a result of corresponding revenue declines. The impact on the ad-rates stations are able to charge has forced the stations to look for additional sources of revenue in the market. SBS' Chief Revenue Officer, Frank Flores, explains, "Because our ability to price has been so severely affected – we're having to secure more advertisers to compensate for the change in our ad-rates."

Day Part: M-F 6A-10A Demo 18-34	**Spring 2008 Average Qt Hour Rtg**	**April 2009 Average Qt. Hour Rtg**	**% Difference**
WSKQ	1.1	.5	(down) – 55%
WPAT	.6	.2	(down) – 67%

Source: Figures supplied by Spanish Broadcasting System

Recent estimates indicate advertising revenue in the New York market is down on average by approximately 28%.[19] However, while radio industry revenues as a whole are down given the current economic crisis, Inner City Broadcasting Holdings' Chief Operating Officer, Charles Warfield, estimates that the introduction of PPM is responsible for an *additional* 30% revenue loss for his stations as compared to the general market. Since the introduction of PPM in New York, Inner City has significantly reduced the staff of its programming departments. Inner City Broadcasting's San Francisco station, KBLX, has laid off 13% of its staff and cut salaries by 10%.

Across the country, the outlook is nearly as grim. NABOB member KJLH-FM in Los Angeles has seen its revenue fall dramatically, over 48% year-to-date since PPM was introduced in LA. The average revenue decline in the Los Angeles market is estimated at

[19] Estimates provided by Miller, Kaplan, Arase & Co., which produces market revenue reports to subscribing clients. Figures have been extracted from MKA's Revenue Report for May 2009.

approximately 29%.[20] Shrinking cash flow has forced KJLH to lay off 13% of its staff, the majority from its programming department, including the elimination of news segments, traffic announcers, promotions coordinators, producers, a co-hosts and overnight disc-jockeys. Under the Diary system, the station's audience share was around 1.3 percent, but dropped to 0.4 percent when PPM came into the market. As a result of Arbitron's switch to its PPM ratings service, KJLH lost over 70 percent of its market share – (representing approximately 100,000 listeners) essentially overnight. It's a drop that General Manager Karen Slade of KJLH believes, "doesn't reflect reality."[21] The financial impact of such ratings declines is huge. The Southern California Broadcasters Association indicates that under the Diary service, a rise or drop of just 0.1 share points translated into a corresponding increase or decrease of $1.2 million in annual revenue.[22]

In the first quarter of 2009, Arbitron PPM data showed staggering, inexplicable declines in listeners for Spanish-language and urban radio stations in the Los Angeles market. For example, Univision's KLVE's ratings plummeted by 54% from their previous years Q1 2008 numbers. If you were to believe the PPM data, nearly half its audience has simply vanished. Similar declines are seen by Spanish-language and Urban stations in all PPM markets.

As of May 2009, Arbitron had released PPM commercially in fifteen markets. Another five additional markets were released for commercial use of PPM ratings in June 2009.

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20 Id.

21 Charles Protor, "On the Hit List," Los Angeles Business Journal, April 27, 2009, available at http://www.labusinessjournal.com/weekly_article.asp?aID=136399.

22 "PPM Hurts KJLH in LA/Layoffs and Cancelled Shows Possible," RadioFacts, May 01,2009, available at http://www.radiofacts.com/2009/05/01/. Note, a similar metric has not been calculated for PPM yet as the service has not been in operation for more than a year.

Currency Markets

Houston-Galveston
Philadelphia
New York
Nassau-Suffolk
Middlesex-Somerset-Union
Los Angeles
Riverside-San Bernardino
Chicago
Miami-Ft. Lauderdale
Seattle-Tacoma
Phoenix
Minneapolis-St. Paul
San Diego
San Francisco
San Jose
Atlanta
Dallas-Fort Worth
Detroit
Washington, DC
Boston

The charts below provide an overview of the ratings impact on Spanish-language and Urban formatted stations as compared to general market stations in New York. Further examples from San Francisco, Chicago and Dallas are found at Exhibit A.

NEW YORK FORMAT COMPARISON: DIARY v. PPM[23]

Format	Time Period	Estimate	SPRING '08 DIARY	MAY '09 PPM	% Var to Diary
ENGL TOP5	Mo-Su 6A-12A	AQH Persons	407,500	374,400	**-8%**
Top 5		AQH Rtg%	2.7	2.4	**-11%**
		AVG WK Cume	6,071,200	10,752,400	**77%**
		AWTE	8:30	4:15	**-50%**
URBAN	Mo-Su 6A-12A	AQH Persons	365,700	210,000	**-43%**
Urban Formats		AQH Rtg%	2.4	1.4	**-42%**
		AVG WK Cume	3,558,100	5,273,500	**48%**
		AWTE	13:00	4:45	**-63%**
SPANISH	Mo-Su 6A-12A	AQH Persons	310,700	141,500	**-54%**
Span Formats		AQH Rtg%	2	0.9	**-55%**
		AVG WK Cume	2,142,100	3,101,100	**45%**
		AWTE	18:15	5:30	**-70%**

[23] See Total P12+ / Mon. – Sun. 6a-12mid for San Francisco May '09 PPM, Arbitron; San Francisco Spring 2008 Diary, Arbitron.

V. ARBITRON'S ANTIQUATED RECRUITMENT SYSTEM RELIES ON TELEPHONE BOOKS AND UNDER-SAMPLE OF CELL-PHONE-ONLY HOUSEHOLDS RESULTING IN INACCURATE MEASUREMENTS FOR RADIO

PPMC maintains that due to ongoing methodological issues present in Arbitron's sample panels, PPM does not produce accurate ratings data sufficient enough to be relied upon by the radio broadcast industry or the Commission. Arbitron continues to under-sample cell-phone-only respondents and minorities within the critical 18-34 year old demographic group. Moreover, researchers and others in the radio industry continue to question the representativeness of Arbitron's panels given the confidence levels, low sample performance index (SPI) (currently in the teens and low twenties) and the company's numerous compliance problems – actually getting panelists to remember to carry and dock their meters – has raised more questions over the last few months as to what the PPM device is actually picking up.[24]

PPMC is not opposed to the introduction of electronic measurement for radio. PPMC believes that, if implemented properly, electronic measurement could indeed lead to improved information and data. However, Arbitron has not implemented PPM correctly. Further, MRC has refused to accredit PPM except in 2 of the 15 markets.

In sum, Arbitron has rolled out an electronic measurement system established by taking short cuts and cost-saving measures that have compromised the potential of its product and the information and data it has released into the marketplace – all at the expense and harm to minority broadcasters.

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[24] See Series 10 Questions FCC Should Ask Arbitron, Harker Research, June 2009, available at http://harkerresearch.typepad.com/radioinsights/.

A. Landline Telephone Book-Based Sampling Ignores One-Third of the Listening Audience

Arbitron's PPM sampling methodology called "Radio First" relies on a telephone-based recruitment frame that uses random digit dialing ("RDD"), which is a computer process that uses landline telephone numbers based on known area codes and exchanges for the relevant market area (i.e., numbers from the telephone book). PPMC has repeatedly pointed out the insufficiency of telephone-based recruitment because it does not deliver the most representative sample of the market. An address-based sample frame provides greater coverage of residential households, going beyond listed telephones to add unlisted landline telephones, cell-phone-only households and households with no telephone service that are excluded from traditional telephone frame samples. In addition to the 20% of households not listed in a telephone frame, there are approximately 15% of households whose numbers are also not part of a traditional RDD sample frame because they have fewer than 2 listed numbers in the block group, bringing the reach of an RDD to less than two thirds of the market. An address-based frame provides a single, unified form of sampling that is capable of reaching all households which are currently excluded by Arbitron's method. Nielsen points out that with address-based recruiting it is able to identify 98% of the households in a market, versus Arbitron's 66%.[25] The Telephone Consumer Protection Act prohibits the use of RDD to generate cell phone numbers.[26]

Furthermore, landline-telephone-based recruitment yields fewer willing minority participants[27] compared to address-based recruitment. This fact has been repeatedly

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[25] "20% of Persons 12+ in Lexington, KY Use Only Cell Phones," Nielsen News Release, March 5, 2009, available at http://enewsnielsen.com/main/news_releases/2009/march/20_percent-of_persons.

[26] 47 U.S.C. §227 (b)(iii).

[27] See "NABOB and SRA Disappointed with Arbitron's promises for PPM Upgrade," Target Market News, March 5, 2009 (quoting the National Association of Black Owned Broadcasters ("NABOB") and the Spanish Radio Association ("SRA"): "As reflected in current panels, some segments of minority communities are

(cont'd)

demonstrated.[28] It is easier for the average person to say "no" on the telephone than it is in person and much more difficult to convert that initial "no" to a "yes" over the phone. Spanish speaking Hispanics and African Americans are traditionally the most difficult respondents to recruit for research.[29] In general, research companies doing in-person recruitment try to match the recruiter with the demographics of the neighborhood to improve cooperation and eliminate fear and other concerns about participating in a panel. In today's environment, given existing attitudes about immigration, a Spanish-speaking Hispanic is much more likely to be able to recruit another Spanish-speaking Hispanic in person than an unfamiliar voice over the phone.[30]

Arbitron recently attempted to respond to sustained demands to increase cell-phone-only households by adding address-based sampling to recruit cell-phone-only participants, but refuses to increase its use of address-based sampling beyond that necessary to achieve its stated cell-phone-only goal of 15 percent of its sampling efforts by the end of 2010 -- a proportion which is significantly lower than the current projected penetration rate for cell-phone-only use.[31]

(cont'd from previous page)

disproportionately likely to decline to participate in the PPM sample when contacted by telephone."), available at http://www.targetmarketnews.com/storyid03060901.htm.

28 See Emergency Petition at 6 (contrasting the consistent radio data that is being produced in Houston, where address-based sampling is used for PPM surveys and where MRC has accredited PPM, compared to the inconsistent data in New York and Philadelphia, where a cheaper, telephone-based recruitment method is used, and where MRC has not accredited PPM) (citing "Tale of Two Cities, A Comparison of the Results of Two Different PPM Methodologies," R.M. Kabrich & Associates, (released May 2008)).

29 Testimony of Ceril Shagrin, Senior Vice President Corporate Research, Univision, before the New York City Council Hearing on Arbitron's PPM, September 10, 2008.

30 Id.

31 See "Arbitron Confirms Continuous Improvement Commitments in all PPM Markets," Arbitron Press Release, March 2, 2009, available at http://arbitron.mediaroom.com/index.php?s=43&item=42 ("Arbitron's Continuous Improvement Commitments").

B. Cell-Phone-Only Households are Virtually Ignored by Arbitron

There is abundant evidence that individuals who rely solely upon cell phones are disproportionately minority and poor.[32] According to the most recent data, 25% of Hispanics currently live in cell-phone-only households and 21.4% of African Americans have abandoned their landline phones.[33] Both the Center for Disease Control and a recent study conducted by Nielsen also indicate there are dramatic differences by age as well, with 33.1% of adults 18 – 24 and 41.5% of adults 25 – 29 living in cell-phone-only homes.[34]

As a result of its settlement with the New York and New Jersey Attorneys General, Arbitron is required to raise its percentage of cell-phone-only sampling, from its previous 7.5%, to 10% of its sample in the New York market by July of this year and to 15% by July 2010.[35] Following on this mandate, Arbitron recently announced its intent to increase its cell-phone-only sampling percentages in all of its PPM markets to 15% by the end of 2010.[36] As with its initial cell-phone-only sampling targets of 5 - 7%, this goal lags far behind the existing national average for cell-phone-only use across the United States, which in December of 2008 was estimated at 20.2%,[37] which represents a 2.7% increase during the last six months of 2008. The national average was estimated at 17.5% in June 2008.[38] Even more startling is that within a

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32 See Blumberg, Stephen J. and Luke, Julian V., "Wireless Substitution: Early Release of Estimates From National Health Interview Survey," July – Dec. 2008 (Released 5/06/2009), at Exhibit F ("Wireless Substitution Report - December 2008").

33 See Wireless Substitution Report - December 2008.

34 See Wireless Substitution Report - December 2008.

35 See *State of New York v. Arbitron*, Consent Decree entered January 7, 2009, Case No. 402516/2008 at Exhibit I

36 See "Arbitron Confirms Continuous Improvement Commitments in all PPM Markets," Arbitron Press Release, March 2, 2009.

37 See Wireless Substitution Report - December 2008.

38 Id.

two year period from 2006 to 2008, the national average of cell-phone-only households has increased 60% -- from 12.8 to 20.2%. If the current trend continues by the end of 2010, when Arbitron completes its increase to 15%, the national average could well be closer to 30%. As a result, the high percentage of households which are cell-phone-only, and disproportionately minority, are less likely to be included in Arbitron's overall sample.

In a recent pilot study of radio listening conducted in Lexington, Kentucky, Nielsen found that people in homes that use cell phones as their sole source of communication made up more than 20% of the sample and skewed toward the 18 to 34 year old demographic, significantly younger than landline-only homes.[39] Moreover, Nielsen also found that cell-phone-only homes listened to radio an average of 23 hours per week, while the total sample spent just more than 19 hours listening to radio.[40] Thus, an under-counting of cell-phone-only households significantly under-represents the vital 18-34 year old demographic – a group that data has shown listens to more radio and longer than any other group.

Studies commissioned and later buried by Arbitron indicate that Arbitron's "inclusion of cell-phone-only households is problematic."[41] In June of 2008, Arbitron commissioned two reports, one from Arizona State University and the other from Howard University's John H. Johnson School of Communications, to analyze its PPM methodology as a

39 See "Nielsen: Adults Do Listen to Radio," Radio Insights (originally published by Ad Age), March 6, 2009, available at http://harkerresearch.typepad.com/radioinsights.

40 Id. Nielsen's finding that 20% of listeners live in cell-phone-only households and that these people spend 20% more time with radio is significant. Nielsen's study reveals that methodological issues may be the key reasons for Arbitron documented decline in radio listenership. If Nielsen preliminary data holds true for other radio markets, it essentially proves that Arbitron's reported audience declines for radio are more a product of Arbitron's antiquated recruitment rather than a real decline in listenership.

41 See "Assessing Arbitron's Portable People Meter System Methodology," a study prepared by The Howard University John H. Johnson School of Communications, July 18, 2008 at Exhibit G. ("Howard University Study").

result of questions and concerns related to the representation of minorities.[42] The ASU Study pointed out that the assumption in Arbitron's methodology that only 7.5 percent of telephones in a PPM market are cell phones presented a "major concern" due to the implied vast undercoverage of Hispanics who rely only on cell phones.[43] "This [concern] is further underscored when considering that the highest rates of cell-phone-only users in the U.S. are Spanish-Dominant and in the coveted 18-to-34 year old age group (no race or ethnicity)."[44]

The chart below reveals Arbitron's marginal efforts to increase its cell-phone-only inclusion. According to its released figures from April, Arbitron is averaging just seventeen (17) cell-phone-only respondents in their daily usable sample across all of their PPM markets.

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[42] Id. and "Arbitron PPM Hispanic Measurement Review," prepared by the National Measurement PPM Review Panel, a project of Arizona State University's Center for Community Development and Civil Rights, June 17, 2009 at Exhibit H ("ASU Study").

[43] ASU Study, at p. 10.

[44] Id.

Arbitron PPM Cell-phone-only Respondent Count (April 2009)

Market	Total metro In-Tab sample	"Basic" CPO In-tab**	Total CPO in sample	% In-tab	% of Sample
New York	5163	29	271	.06%	5.2%
Nassau Suffolk (Imbedded In NY	1328	6	17	.45%	1.2%
Middlesex (Imbedded In NY)	859	2	18	.23%	2%
Los Angeles	3394	19	107	.56%	3.15%
Riverside-San Bernadino	1146	6	27	.57%	2.36%
Chicago	2634	30	89	1.1%	3.4%
Houston	2147	There is no CPO data provided			
Washington DC	1867	19	81	1.0%	4.3%
Philadelphia	2108	26	108	1.2%	5.1%
Detroit	2065	5	22	.24%	1.1%
Atlanta	1955	26	72	1.3%	3.7%
Dallas	2052	20	68	.97%	3.3%
San Francisco	2799	30	118	1.07%	4.22%
San Jose (imbedded In SF)	1153	5	22	.43%	1.91%
Boston	2101	20	84	.95%	4%
Average		17	79		

** "Basic" sample are the panelists who are participating in the sample and are in-tab in any given day.

Source: Arbitron's April 2009 e

Arbitron's stated goal of cell-phone-only inclusion of 15% by the end of 2010 is inferior at its outset and behind the current trend in media research.

C. Blacks and Hispanics are Severely Under-Represented in Arbitron's PPM Panels

One of the metrics utilized by Arbitron as an indicator of sample performance is called its Designated Delivery Index ("DDI"). This figure is calculated by dividing the actual number of participating panelists for a given demo by the target number of panelists Arbitron sought to include. Arbitron uses the terms "actual in-tab" and "target in-tab." Therefore, if

Arbitron's target is 100 persons age 18 – 34 in-tab within the demo and it gets 72, its DDI is 72.[45]

In April, Arbitron's average DDI for Blacks in 18 – 34 in Detroit, where African Americans make up 21.8% of the 12+ population, was just 59. In actual numbers, here is what that looks like: In Detroit for the month of April, Arbitron target-in-tab was 82 African Americans, age 18 – 34, to participate in its panel on a daily basis. A DDI of 59 means that on average only 49 of the 82 people participated on a daily basis. That means 49 African Americans age 18 – 34 determine the fate of Urban formatted radio stations in that age demo in Detroit. Significantly, the only market where Blacks 18 – 34 DDI exceeded 100 was Houston (the only address-based market).[46]

Arbitron often touts its DDI figures and insists that it is making significant progress in ethnic demographics. But Arbitron's DDI is only a measure against the company's self-established targets. For example, if Arbitron has 100 panelists installed in the 18 – 34 demo, Arbitron could set its target-in-tab at 80% of the number of installed panelists (i.e., 80 panelists could be the target-in-tab). In a month where only 60 panelists return usable data, Arbitron can still say it has exceeded its 70% benchmark within the 18 – 34 demo because its DDI is 75% of the target. What the DDI metric does not reveal is *what percentage of installed panelists*

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45 DDI = (Actual in-tab / Target In-tab) x 100. Arbitron typically calculates its DDI performance measure by averaging the metric over a period of months, allowing it to appear more stable. If Arbitron's DDI falls in any given month, Arbitron will oversample the demo in the following month to raise its average. Note: DDI is not a reflection of representativeness.

46 Utilizing address-based sampling in the Houston market, Arbitron's historical performance of PPM ratings are shown to be much more stable than other markets which have experienced greater swings and fluctuations in ratings data. Ethnic stations perform much better in the address-based sample frame," according to Randy Kabrich, a radio consultant based in Florida. Kabrich tracked two Urban stations in Houston, KMJQ and KBXX to demonstrate that larger sampling and greater in-tab rates correspond to a rise in ratings for both stations. See "Houston Data Suggest Greater Connection Between Intab and Station Results," Inside Radio, June 29, 2009; See Chart at Exhibit E.

actually submitted usable data for a given demo. For that we must look to Arbitron's "In-tab" compliance rates which are a much better measure of the sample panel's performance.

An "in-tab" rate is the metric that reveals how many installed PPM meters are actually providing usable ratings data for a given demo. Looking at "in-tab rate," however, reveals a grave situation. The average in-tab rate for Blacks 18-34 was 66% across all fifteen PPM markets. In New York where Arbitron was required, under a Consent Decree with the New York Attorney General, to achieve a 75% in-tab rate for all major demographic groups by April 1, 2009 and to maintain a monthly in-tab rate above 67.5% for all sub-categories of race, ethnicity and gender, PPM fell short.[47] The chart below depicts Arbitron's average year-to-date in-tab rates for the critical 18 – 34 year old demo in the New York market in May (*figures in bold indicate where Arbitron is below its self-established benchmark of 70%*; *Benchmark in NY is 75%*).

In Tab Percentage: 18 – 34

Market	Person 18 – 34 Avg. to Date	Black 18 – 34 Avg. to Date	Hispanic 18 -34 Avg. to Date
New York Core	71%	**68%**	72%
Nassau-Suffolk	**69%**	**66%**	70%
Middlesex-Somerset-Union	73%	72%	**67%**

Source: Arbitron PPM Monthly Client Update, April 2009

For Blacks and Hispanics, such low in-tab measures are often exacerbated by the small sample size intended to represent a given demographic group. For example Arbitron's average daily in-tab rate for Blacks 18 – 34 in New York is 68%, yet Arbitron only sought to secure 104 African Americans age 18 – 34 for its panel, therefore only 70 people on any given

47 Under the terms of its agreement with the NY Attorney General Arbitron is required to raise its national benchmark for all major demographic groups Persons, Black, Hispanic and Other.

day in April actually submitted usable PPM data. That means 70 people are supposed to represent the listening habits of approximately 629,000 Blacks in the New York market.

So, how do these low sample size numbers affect ratings? Reviewing data for the Nassau-Suffolk market for April and May 2009, Arbitron's DDI for Hispanics 18 – 34 was just 57 and 69, respectively. Its average daily in-tab for Hispanics 18 – 34 (persons submitting usable data) in April was 28 out of a target in-tab of just 49 and in May, 34 out of a target in-tab of 49.

The Nassau-Suffolk market has a sizable population of Hispanics estimated at over 328,000 and among Hispanics 18 – 34 the most recent figures estimate the population at approximately 115,800. Ethnic-formatted stations in the market sell advertising based on demographic subsets broken down by age, gender <u>and</u> race and typically among the overall 18-34 demographic WBLI-FM, a CHR (Contemporary Hits Radio) station holds the number 1 rank for this demo. But in April, WKJY held the number 1 market share for the critical 18 – 34 demo and curiously ranked number 1 among Hispanic women 18 – 24. WKJY is an Adult Contemporary station and the results seemed at odds with the traditional demographic breakdown for the market.

A closer look at Arbitron's PPM in-tab rates revealed the reason behind the odd outcome. There were only four daily in-tabs for Hispanic Women 18 – 24 in the sample. This bears repeating: **4 HISPANIC WOMEN CONSTITUTE THE ENTIRE PANEL.** When the numbers are small, Arbitron "weights" the respondents to match the population threshold. Dividing those four individuals into the population of Hispanic Women 18 – 24, which is 17,100 for the Nassau-Suffolk market, each of the four women in the sample represents between 5000 and 7000 people. That is the number that is reflected in a station's "cume" (cumulative listeners). In the case of WKJY, it only took 2 of the four in-tabs to give the station a 40% share of the market among Hispanic Women 18 – 24, which put it over the top for the major 18 – 34 demo.[48] A sample of two individuals cannot be relied upon for accuracy.

Another shocking example from PPM November 2008 ratings further illustrates that Arbitron's reliance on heavy weighting of such small samples yields data susceptible to high variability and high volatility. In November 2008, Arbitron's data showed that over 30,600 Atlanta listeners tuned in to WBLS, a station located in New York City. Investigators discovered that a single African-American family had traveled to New York for Thanksgiving, and the three of them had listened to the New York station. Because Arbitron has so few African-American panelists, it assumes that each African-American represented the views of over 10,000 African-Americans in Atlanta. One family's trip to New York transformed a New York station, which cannot be heard anywhere within a thousand miles of Atlanta, into the 34th ranked station in the Atlanta market.

D. Panelists' Response and Compliance Rates Remain Very Poor

Arbitron's SPI (sample performance indicator) is a metric that measures the initial response and ongoing cooperation rates of its panels. For example, on a given day Arbitron's RDD sample frames may generate 1000 individuals based on area codes to be contacted in the PPM sample. If only 180 agree to participate out of the initial 1000 contacted and those 180 comply with PPM's carry rate (i.e., they submit usable data by carrying their PPMs for 8 hours a day), then Arbitron's SPI is 18%. Put another way, SPI represents the percentage of initial respondents, out of all of the individuals originally contacted, that agreed to participate in the

48 See Exhibit B which is a print screen from Arbitron's analysis database "Radio Ranker". Note, the annotations at the bottom of the screen that indicate that the software cannot run the requested analysis because there are an insufficient number of participants in the selected panel.

PPM panel for the market and ultimately provide usable data.[49] An SPI of 18% means that only 18% of the initially designated households are providing usable data.

SPI is indicative of the representativeness of a given sample and is one of the crucial factors considered by the MRC in their decision to grant or deny accreditation with a PPM market.[50] The closer that this index comes to 100 percent, the more accurate and reliable are the estimates.[51] Bear in mind that even with an SPI of 100%, an RDD-generated sample will not adequately measure minority cell-phone-only households. Yet, over the last eight months as PPM has been rolled-out in top U.S. markets, Arbitron's SPI numbers have consistently been in the low teens and are currently hovering in the low twenties, leaving significant room for improvement. As a point of comparison, while SPI rates for the Diary average between 40 – 50% across demographic groups, and for Nielsen's national electronic television ratings service, SPI rates are over 40%.[52] The chart below reveals Arbitron's average SPI for April 2009.[53]

Market	**SPI**
Philadelphia	20.3%
Houston	20.4%
NY (Total Market)	16.7%
Nassau-Suffolk	16.2%
Middlesex-Union	17.5%
Los Angeles	20.6%
Riverside-San Bernardino	25.4%
Chicago	21.5%
San Francisco (Total Market)	18.5%
San Jose	16.7%

49 See Emergency Petition at 28-29 (citing Arbitron PPM Description of Methodology, February 2008, page 3-4).

50 Only two PPM markets are currently accredited by the MRC. One is the Houston market, which utilizes a different sampling methodology, based on address-based recruitment, and the other is Riverside-San Bernardino, a majority minority market making up a portion of the greater Los Angeles designated market area.

51 See id. at 29.

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

53 Arbitron has stated that it only hopes to achieve a meager 21 percent average SPI by the end of 2010.

Atlanta	20.6%
Dallas	24.0%
Detroit	24.4%
Washington, D.C.	21.0%
Boston	18.7%

Arbitron's April 2009 PPM Client Update

The level of cooperation required by PPM panelists in carrying their meters is unprecedented in audience measurement research. The pager size meter is required to be worn by panelists from the time they wake up in the morning until they retire at night. An adult panelist must wear the meter for 8 hours a day to be considered "in-tab" for the day and for Arbitron to consider the recorded data usable. The meter has a built-in "motion detector" that is supposedly able to gauge whether a respondent is wearing his/her meter. If the subject is stationary, the meter is designed to emit a warning signal that requires the panelists to shake the device to indicate their compliance.

One of the most glaring clues that indicates that the cooperation of PPM panelists is a major issue is the severe drop in "Morning Drive" radio listenership, as reported by PPM.[54] According to media research consultant Harker Research, which averaged January PPM ratings in the top three markets, New York, Los Angeles and Chicago, and compared those figures against the Winter 2008 diary number, the "cume" (cumulative listeners) for over-all morning drive has decline approximately 12% across the top three radio markets.[55] Moreover, when the decline in cume is coupled with the 33% decline in time spent listening (TSL), radio stations in

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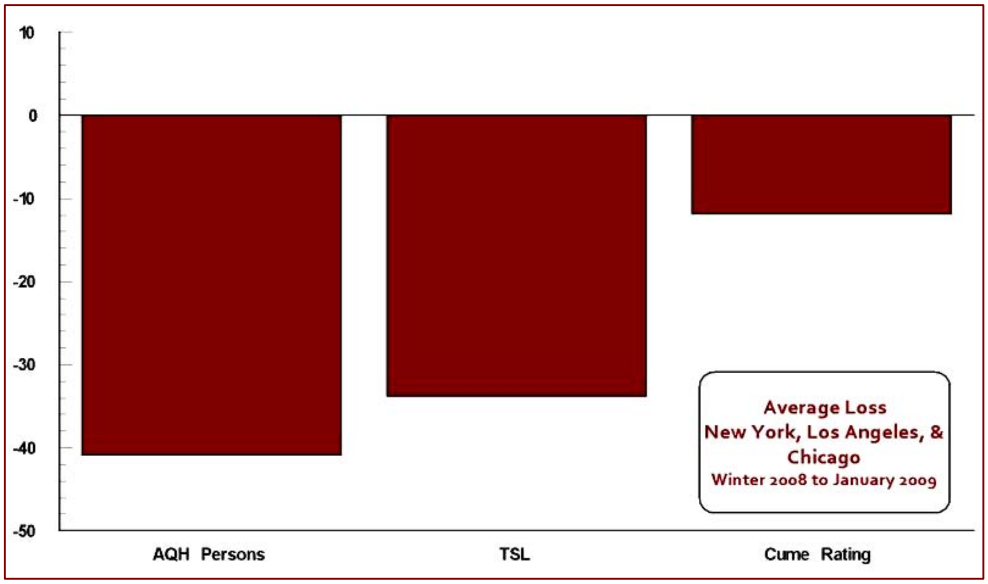
[54] Radio Advertising is traditionally sold in what the industry terms "day-parts." Morning Drive is defined as the hours between 6 – 10am Monday through Friday.

[55] See "PPM is Missing Morning Numbers," Radio InSights, March 9, 2009, available at http://harkerresearch.typepad.com/radioinsights/2009/03/ppms-missing-morning-numbers.html.

New York, LA and Chicago experience a massive 40% decline in average quarter-hour ("AQH") Persons. AQH Persons is the ratings figure that governs advertising rates.



Source: Radio InSights, Harker Research

Traditionally, "morning drive" has been the radio industry's bread and butter, carrying the highest unit rate based on the maximum listenership numbers of a station. But PPM data shows morning drive to be, in many cases, radio's third-highest day-part in terms of listenership. Are the latest PPM ratings correcting decades of Arbitron's own bad data and the numerous studies by other researchers over the past forty years that have indicated that morning radio is a major part of the American landscape? Or does morning drive perform so poorly in PPM because panelists don't think to remove the device from its docking station until heading out the door? Arbitron's own data demonstrates that the average start-time for PPM devices across markets is close to 8:00 a.m. hour, which is fairly late in the morning for <u>most</u> employed adults. (See Exhibit C) Think about your own morning routine. Getting ready for work, are panelists carrying the PPM meter around with them in the bedroom, to the shower, in the kitchen while preparing breakfast or their kids' lunch, or is the PPM meter in its docking station next to the mobile phone on the table in the hallway ready to be picked up before heading out to work?

Arbitron's most common response when the issue of docked meters missing morning drive is raised, has been: "…the average person wakes up between 7:15 – 7:45am and puts the meter on immediately – they always have it on." The very notion that an individual rolls out of bed and puts on the PPM meter is at best counterintuitive and at worst ludicrous. Teenagers are panelists – need we say more! Yet Arbitron insists that PPM has revealed the "truth" and that the diary has been wrong for years. It claims that people inflated their listening as they filled out their diaries. Why would a person write down too many minutes of morning listening? And given that the greatest drops have been in morning drive, is Arbitron suggesting that people inflated their morning listening more than the rest of the day? A more plausible explanation is that the meter is missing the clock-radio and that critical hour to an hour-and-a-half when average person is showering, having breakfast and dressing for work. (See Exhibit D which provides an overview of the decline in Morning Drive Ratings in select markets.)

E. Arbitron's Panels Are Too Small To Be Statistically Reliable – A Single Person Qualifies as a Panel

PPMC has discussed at length the inadequate PPM sample size in the Emergency Petition.[56] Namely, we emphasized that PPM's sample panels were 66 percent smaller in size than the diary panels.[57] Moreover, Arbitron's reliance on smaller panel cells to cover minority demographics leaves Arbitron with virtually no margin for error in its data collection efforts. In some cases Arbitron is providing ratings data based on panel cells as small as 1 PERSON. For example, in the Riverside – San Bernardino market, Arbitron's sample cell for Black Women Age 65+ consisted of just one individual.[58] As pointed out previously, Arbitron's sample cell for

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[56] See Emergency Petition at 22-23.

[57] See id.

[58] See id. at 23.

Hispanic Women 18 – 24 in the Nassau-Suffolk market had just 4 in-tabs for April; the overall 18 – 34 demo for Hispanic women has 11 respondents for a population of 51,200.

Within its current samples, Arbitron sets its average daily in-tab targets for minorities so low it is imperative that Arbitron achieve high compliance/in-tab rates to even come close to accurately representing the market. However, Arbitron's average in-tab rates for Blacks and Hispanics across its 15 PPM markets is at just 66% and 75% respectively.

Average Daily In-Tab Rates
14 PPM Currency Markets
May 2009 PPM Survey Month (April 30, 2009-May 27, 2009)

`	Persons 6+ May	Persons 6+ Avg. to date	Persons 18-34 Avg. to date	Black 18-34 Avg. to date	Hispanic 18-34 Avg. to date	Other 18-34 Avg. to date
Benchmark		75%	70%	70%	70%	70%
Overall Average	75%	77%	71%	66%	72%	71%
New York Core	76%	79%	71%	68%	72%	71%
Los Angeles	76%	80%	75%	68%	76%	73%
Chicago	76%	80%	73%	64%	78%	73%
San Fran Core	75%	78%	72%	68%	73%	72%
Dallas	74%	76%	72%	67%	76%	70%
Houston	74%	73%	66%	62%	68%	66%
Atlanta	73%	75%	69%	67%	78%	69%
Philadelphia	72%	75%	68%	64%	71%	68%
Washington, DC	74%	74%	66%	62%	67%	69%
Boston	73%	75%	69%	67%	68%	69%
Detroit	76%	79%	71%	61%	n/a	74%
Middlesex-Somerset-Union	76%	81%	73%	72%	67%	76%
Riverside- San Bernardino	77%	80%	74%	75%	74%	73%
San Jose	76%	78%	72%	n/a	72%	73%
Nassau-Suffolk	76%	79%	69%	66%	70%	69%

Source: Arbitron PPM Client Update May 2009

An overview of the Houston market underscores PPMC's continued insistence that Arbitron raise its DDI and in-tab compliance rates. Exhibit E illustrates the correlation between high in-tab percentages and the ratings for urban-formatted stations in the market. The data shows that the more respondents that Arbitron gets and keeps in-tab, the higher the stations listening audience and ratings share. It is rather simple: Urban and Hispanic radio cannot perform well under PPM unless Arbitron puts forth the effort to make sure its minority sample is properly balanced and adequately performing. Because PPM sample panels are significantly smaller than the diary sample, it is all the more critical that Arbitron correctly balance its sample panels by age, gender, ethnicity, geography and socio-economic factors. Arbitron has left itself with simply no "wiggle room" in a sample so small.

While in recent months, Arbitron appears to have made an effort to address its in-tab percentages for Hispanics, its latest monthly report still shows ratings for African American demographics based on an alarming low number of sample participants and even lower in-tab percentages. For New York, Chicago, Atlanta and Washington, DC, which are the top 4 markets for Blacks, the 18 – 34 demo consisted of just 79 average daily in-tabs (79 people) for New York representing a population of approximately 629,200; 63 daily in-tabs (63 people) in Chicago for a population of 456,700; 105 daily in-tab (105 people) in Atlanta representing a population of 408,800; and 76 daily in-tabs (76 people) for Washington, DC. where the population of 18 – 34 year old African Americans is estimated at over 316,000.

Although the New York and New Jersey settlements require Arbitron to recruit a proportionate number of minorities that reflects the demographics of the marketplace, Arbitron has made little progress.[59]

F. PPM Measures Audience Exposure / Diary Measures Listening Preferences

The question of accuracy depends on what it is that Arbitron, broadcasters and advertisers are seeking to measure. Traditionally, the Diary measured listening. Arbitron asked a person what stations he/she listened to and actually heard. With PPM, Arbitron does not

[59] See New York Consent Decree, Exhibit I at 5.

measure listenership. It measures exposure. As a measure of station signals received by the PPM device, PPM reports exposure, not listening, because listening requires that the recipient actually engage with the received signal.

If you're a PPM panelist waiting in your doctor's office prior to an appointment and the receptionists have the radio tuned to Easy Listening, that station gets credit, even though you were reading the latest issue of People Magazine and weren't even aware of what was playing. If you were a diary keeper, you probably wouldn't write the station down when you got around to filling out your diary. If you're a diary keeper who listens to the same station every morning driving to work, you'd probably write the station down all five workdays. If you normally carried a PPM but forgot to carry it a couple days a week, the station would lose credit.

PPM fails to include any measure that would distinguish exposure from actual engaged listening. As a result, PPM tends to present no indication of listener engagement – the earmark of minority radio and a function of the extraordinarily high brand loyalty of minority consumers.[60] Thus, in changing from diaries to PPM, Arbitron has replaced a metric that reflects engagement with one that does not.

The purpose of radio listening estimates is to demonstrate to advertisers how many people are likely to listen to their spots. Therefore, the Diary may offer a more accurate estimate than the current version of PPM, because it counts only those listeners who were

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60 Reyes, Sonia, "Brand Loyalty Strong Among Minorities," Adweek, Aug. 16, 2006, available at http://www.marketingymedios.com/marketingymedios/noticias/article_display.jsp?vnu_content_id=1003018426 (citing the Yankelovich Monitor Multicultural Marketing Study, which suggests that both African Americans and Hispanics have strong trust in brands. "Fifty eight percent of Hispanics and 55 percent of African Americans said, 'It is risky to buy a brand you are not familiar with' . . . Only 42 percent of African Americans and 40 percent of Hispanics said they would 'buy private label and generic brands' if their families unexpectedly found themselves with less money.") (last visited Aug. 18, 2008). It is ironic that one of the principal methodological limitations of PPM stems from a key design flaw in another Arbitron product, the diary. This attribute of diaries is the least well-kept secret in the advertising world. Advertisers understand that diary over-reporting happens, and that it reflects loyalty, which happens to be an attribute that advertisers highly value. Advertiser acceptance of diary ratings with over-reports that embed loyalty is what makes it possible for Arbitron to continue to offer its diary product and assert its credibility. It doesn't measure what Arbitron says it measures, but what it does measure is what advertisers crave.

actually *aware* of what they were listening to as opposed to mere exposure. Given the choice between the current version of PPM that measures exposure, not listenership, and diaries that measure listenership weighted by loyalty, advertisers would be better served by using Diary estimates rather than the current PPM estimates.

A key radio measure is the percent of persons reached or "cume" audience. The current version of PPM favors radio stations with a high number of cumulative (cume) listeners, over stations with comparatively lower cumes, but which have historically generated higher listener engagement. The current version of PPM overstates cume audience for certain formats and English radio because current PPM panelists are more likely to be exposed to the most popular stations. Hispanic PPM panelists exposed by chance to English radio inflates those stations reach or cume while non-Hispanic panelists are unlikely to be exposed to Spanish language radio. For example, English language stations are more likely to be played in public places. Further, general market English radio stations are more likely than minority-owned stations to program formats that appeal either to mostly non-minority audiences, such as rock or "easy listening", or which have "mass appeal" demographics, such as contemporary hit radio ("CHR") or CHR Rhythmic. On the other hand, many minority-owned stations do not target non-minorities, but generate strong minority listenership. The appeal to advertisers of minority-owned radio stations is that their listeners tend to be more loyal to particular radio stations and to advertised brands; indeed, minorities are by far the most brand-loyal of all consumers.[61]

One of Arbitron's own commissioned studies, produced by Howard University, also recommended the addition of a qualitative measure. "PPM methodology needs to incorporate some form of qualitative insight. This is extremely important when measuring

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

exposure to the loyal listeners of Urban radio. Arbitron must work to determine the most efficient and effective way to harness the objectivity of the PPM technology with the subjectivity of the Diary, generating data that is not only representative of the general population, but at the same time provides insight into the consumer decision making process."[62] PPMC believes that Arbitron could create an explicit measure of station engagement, such as a metric of stations that garner exclusive listenership. Arbitron's failure to create a metric for engagement means that the diary methodology, which reflected minority consumers' strongest asset, is being replaced with a new methodology that that does not contain even a shadow of that asset. PPMC has requested that Arbitron correct this serious shortcoming.

VI. MRC ACCREDITATION, LARGER SAMPLES, ADDRESS BASED RECRUITMENT AND AN INCREASE IN CELL PHONE HOUSEHOLDS WOULD CORRECT THE MOST SIGNIFICANT PPM METHODOLOGICAL PROBLEMS

The Commission's *NOI* makes a point to acknowledge several improvements that Arbitron has promised to implement for each PPM market.[63] However, Arbitron's promises have yet to manifest themselves in fact. Its latest figures indicate that it may in fact miss several of the benchmarks established for it under the New York Consent Decree. Specifically, its in-tab rates continue to experience wide fluctuation and it has only achieved an 8% cell-phone-only inclusion for its New York panel, although it is required to be at 10% by July 1. Further, just weeks after the release of the Commission's *NOI*, Arbitron announced that, in addition to its existing sample problems, its ratings data for the New York market had been compromised due

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[62] See The Howard University Study, Exhibit G at 12.

[63] See *Impact of Arbitron Audience Ratings Measurement on Radio Broadcasters, Notice of Inquiry*, MB Docket No. 08-187, FCC 09-43, ¶¶15-16 (rel. May 18, 2009).

to incorrectly entered "universe estimates" from December 2008 through April 2009.[64] Depending on the length of time it takes to recognize these mistakes, correcting them afterwards may not be sufficient to undo the harm caused to affected broadcasters. Arbitron has indicated that it is now implementing internal procedures to ensure that such mistakes do not happen again, but the absence of such internal controls once again illustrates the need for MRC accreditation for all aspects of PPM.

A. New York, New Jersey and Maryland Attorneys General Settlements Are First Steps

Last fall, as Arbitron rushed to release PPM into the market,[65] the Attorneys General of New York and New Jersey brought suit against Arbitron alleging fraud, deceptive business practices, false advertising, and discrimination on the basis of race and national origin.[66] According to the factual allegations asserted in the New York State pleadings, independent reports commissioned by Arbitron, the MRC, Ernst & Young and the NY Attorney General's own expert revealed that PPM suffered from five key design flaws: (i) PPM did not adequately represent African-American and Hispanic listeners; (ii) PPM did not appropriately account for cell-phone-only households, which disproportionately impacted young and minority listeners; (iii) PPM did not adequately account for non-English speaking listeners; (iv) Arbitron did not use

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[64] See Mike Boyle, "Arbitron Misses Minority Sampling Goals," MediaWeek.com, May 29, 2009, available at http://www.mediaweek.com/mw/content_display/esearch/e3if6edc43bfbecc72a44f2221206838967.

[65] See Kevin Downey, "Consider Arbitron PPM here to Stay," Media Life Magazine, October 10, 2008, available at http://www.medialifemagazine.com/artman2/publish/Radio_46/Consider_Arbitron_s_PPM_here_to_stay.asp (last visited June 17, 2009) ("When Arbitron rolled out its portable people meter on Monday, two days early, it was a preemptive move against New York Attorney General Andrew Cuomo, who had threatened suit to block it, contending the new radio measurement system undercounts minority listeners. […] Courts are generally reluctant to order companies to do things that would cause major disruptions in the marketplace, as would the rollback of the PPM once it's become the currency in a particular market between radio stations and media buyers…").

[66] See Sarah McBride, "Arbitron is Sued Over New Gauge of Audience Size," Wall Street Journal, October 11, 2008, available at http://online.wsj.com/article/SB122367727100824333.html?mod=googlewsj (last visited June 17, 2009). See also "Arbitron Fails to Meet Minimum Sample Sizes," Media Buyer Planner, June 1, 2009, available at www.mediabuyerplanner.com/entry/41561/arbitron-fails-to-meet-minimum-sample-sizes/.

adequate recruitment methods to represent the diversity of minority listeners; and (v) PPM provided insufficient geographic granularity and data regarding the income of listeners and their country of origin. The result of these design flaws was that PPM disproportionately under-counted minority audiences, thereby injuring minority broadcasters, communities and businesses.

The Attorney General of Maryland also began an investigation into the introduction of PPM into the Washington, DC and Baltimore markets and by the start of 2009, Arbitron had entered into settlement agreements with all three Attorneys General requiring the company to make efforts to improve its PPM sampling methodology. The New York and New Jersey settlements covering both the New York and Philadelphia markets took the form of consent decrees which were filed in each State court. Arbitron entered into a substantially similar private settlement agreement with the Maryland Attorney General in an effort to stave off an additional complaint.

All three settlement agreements contain substantially similar terms that require Arbitron to implement substantive changes to its PPM sampling methodology in order to more accurately reflect the diverse demographics of the various markets.[67] Arbitron agreed to make improvements in five key areas in accordance with the time table and minimum benchmark targets established in negotiation with each of the Attorneys General:

> **MRC Accreditation –** Arbitron has agreed to make a good faith effort to achieve MRC accreditation in the New York and Philadelphia markets by October 15, 2009 and December 31, 2009 respectively.
>
> **Hybrid Telephone/Address-Based Recruitment –** Arbitron has agreed to introduce a hybrid telephone/address-based recruitment method whereby 10% of its sample panel in the NY and Philadelphia radio markets will be address-based by July 1, 2009. It will increase the overall percentage of address-based panelists to 15% in NY by July 1, 2010 and in Philadelphia, Washington, D.C. and Baltimore the panel will be 15% address based by December 31, 2010.

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67 See New York Consent Decree at Exhibit I.

Cell-phone-only – Arbitron is obligated to increase the percentage of cell-phone-only participants in its panel to 10% by July 1, 2009 in both the NY and Philadelphia markets. It will increase the proportion of cell-phone-only users in percentage increments – 12.5% in NY by December 2009; and 12.5% in Philadelphia by June 2010 and 15% in New York and Philadelphia by July 2010 and December 2010, respectively. For the Washington, DC and Baltimore markets, Arbitron must ensure 10% of its panel includes cell-phone-only participants by October 2009 in DC and prior to going to currency in Baltimore by September 2009. Both Washington, DC and Baltimore must include at least 15% cell-phone-only by December 2010.

Sample Performance Indicator – Arbitron has agreed to raise this performance index to a minimum of 17% in the NY and Philadelphia markets by June 2010 and November 2010, respectively. In Washington, DC and Baltimore, Arbitron has also agreed to at least a minimum of 17% SPI by end of 2010. For PPM, SPI is a key performance metric that shows what percent of total persons in the original, pre-designated random sample selected for the PPM panel were actually in the panel and actually cooperated by wearing their meter for at least eight hours on a given day. The MRC generally requires SPI to be above 20% for a market to receive accreditation.

Compliance Rates – In New York, Arbitron has committed to take steps to raise the compliance rate of panelists to 75% across all demographic groups. For example, where Arbitron installs PPM meters with 100 men ages 18-24 and establishes an "in-tab target" of 90 to submit usable data in a given month, 68 respondents would be required to reach the 75% threshold. Prior to settlement, Arbitron's self-established benchmark for this discrete demo was set at 60%; suggesting that if Arbitron got 54 men age 18-24 to submit usable data it considered this a successful representative sample. Arbitron is now required to raise this benchmark to 75% of target. In New Jersey, Philadelphia, Washington and Baltimore, Arbitron has committed only to achieving an average 75% in-tab rate for its overall 6+ population.

Transparency – Arbitron has committed to begin providing more granular data regarding the distribution of PPM meters within the NY and Philadelphia markets, including information on meters by zip-code, number of installed versus in-tab meters and racial and ethnic breakdowns of panelists by county.

Other settlement terms contained in the New York and New Jersey Consent Decrees require Arbitron to conduct a study detailing whether any measurable bias to racial and ethnic minorities exists in regard to the application of its PPM methodology. Results of the bias study are due in July and if any issues are revealed, Arbitron must then develop means to address the identified problems.[68]

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[68] Id. at ¶ 21.

B. MRC Accreditation is an Integral Part of Ensuring the Reliability of Audience Measurement

Congress, several states, and most companies in the media and advertising industries all recognize the importance of MRC accreditation to obtain accurate and reliable audience measurement data.[69] MRC has perfected its accrediting and auditing process over the course of forty-plus years; thorough auditing procedures ensure accurate and reliable audience measurements that are necessary for the radio industry's use.[70] It has been made obvious, by disproportionate measurements and flagrant mistakes, that Arbitron cannot ensure PPM quality on its own. Therefore, it was absolutely necessary that MRC accreditation should have been achieved before PPM results were used as currency. The industry should have been assured, through receipt of the MRC accreditation, that the PPM system was capable of delivering accurate ratings for minority audiences.

A statement released by Chairman Copps in conjunction with the PPM *NOI* aptly summarized the need for accurate broadcasting data at the Commission.

> "Anything that affects media diversity and minority ownership—and the instant item does not draw any conclusions—affects our ability to do our job. Moreover, the Commission relies on Arbitron data to evaluate broadcast radio transactions, issue periodic industry trend reports, and conduct congressionally mandated reviews of our media ownership rules. Without confidence in the underlying data, those important functions could be undercut."[71]

The MRC is essential to meeting precisely these needs. The MRC is successful and reliable because the minimum standards of accreditation provide quality assurance through ethical,

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69 See New York Consent Decree and New Jersey Consent Decree at Exhibit I.

70 See George Ivie Testimony at 2. See also PPMC Comments at 10-11.

71 Statement of Acting Chairman Michael J. Copps, Impact of Arbitron Audience Ratings Measurements on Radio Broadcasters, MB Docket No. 08-187 (rel. May 18, 2009).

operational, disclosure, and electronic delivery requirements.[72] These requirements maintain the ratings process and provide much needed transparency for the service's clients, auditors, and the MRC.[73]

The minimum ethical and operational standards for accreditation include stipulations addressing the constant need for the ratings service to vigilantly reduce bias, distortion and human error in the process and results;[74] ensuring its sample plan is an accurate representation of the statistical population of the targeted market and that target markets are clearly defined in each ratings report.[75] To provide the necessary transparency, the MRC requires each participating ratings service to prominently disclose a geographic distribution comparison between sample and universal data and, for local reports, include data at the county level.[76] Electronic delivery requirements ensure minimum reporting and system control by requiring the ratings service to alert users to potentially unreliable electronic audience estimates; the minimum number of sample returns required for accurate customized system analysis; and report use of unaccredited sources.[77]

Most importantly, the MRC's minimum standards ensure that the results, on which the industry, the public and the Commission rely, are accurate representations of the actual market. Without some mechanism or organization, such as the MRC, to ensure the integrity of

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72 PPMC Comments at 8.

73 Id.

74 Id. Arbitron's unaccredited PPM methodology has struggled with, and failed, each of these basic research principles.

75 Id.

76 Id. at 9.

77 See id.

the data the industry has no way of knowing whether the data they rely on so heavily is biased or unreliable.[78]

C. Increasing The Sample Size is a Cost Efficient and Easy Fix

One of the easiest and perhaps most cost efficient improvements Arbitron can implement is to increase its overall sample size per market. Specifically, if Arbitron can raise its sample for minority audiences it would provide itself with a wider margin of error in terms of minority demographics. Presently, Arbitron under-samples minorities and then weights the respondents to compensate. A larger minority sample coupled with an increased in-tab percentages will reduce the reliance on weights and provide more stability for Arbitron minority sample demos. This remedy will not address all of PPM's existing issues, but it will provide for greater reliability across a demographic group.

D. Implementation of Address-Based Recruitment Would Solve a Number of Arbitron's Existing Problems

In its *NOI*, the Commission has questioned whether the improvements covered under the settlement agreements cure the existing problems that have been outlined. All three settlements set separate targets for the percentage of panelists that must be recruited by address-based recruitment and the percentage of panelists that must be cell-phone-only users. In reality, Arbitron is collapsing these two separate requirements into one requirement.[79] All of Arbitron's address-based recruitment is targeted at cell-phone-only users. The intention behind the separate requirements was to force Arbitron to recruit some of its panelists who have landlines through address-based recruitment. In Houston, when Arbitron makes an effort to conduct in-person

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78 PPMC Comments at 10.

79 Arbitron's method of addressed based sampling is to mail recruitment letters to addresses that do not have a corresponding landline telephone number in their RDD frame. Arbitron then mails a letter to these addresses inquiring as to whether they are cell-phone-only users.

recruiting at homes selected randomly based on their addresses, it has a much higher success rate of convincing potential panelists to participate. This is particularly important because in-person recruitment has proven especially effective at convincing reluctant minorities to participate as panelists. One critical way for Arbitron to improve its SPI is through in-person recruiting and in-person coaching. Arbitron has recently introduced a new in-person coaching program entitled "Feet on the Street" for low compliance minority households. PPMC recommends that the program be expanded and implemented across all PPM markets, in high density Black and Hispanic areas, to reach Arbitron's stated commitment to begin introducing "true" address based sampling.

In conjunction with a move to address-based sampling, properly implemented improvements should increase the cell-phone-only targets much more rapidly and above the 10% and 15% targets Arbitron has committed to by 2010. Arbitron's stated goal lags far behind the current national average which is 20.2% as of December 2008. There is every reason to believe that many more people will abandon landlines in the coming year. Moreover, cell-phone-only users are disproportionately minorities, and the recent Nielsen study showed that cell-phone-only individuals listen to more radio than individuals with landlines. Arbitron's unwillingness to recruit a sufficient number of cell-phone-only panelists results in further undercounting of the preferences of minority radio listeners. Arbitron must set more aggressive targets for cell-phone-only users so that Arbitron's panelists quickly begin to reflect the general public. PPMC would suggest a requirement of 15% by September 2009 and 20% by April 2010. We note that Arbitron's refusal to actively recruit cell-phone-only participants is based solely on cost and could be quickly corrected if Arbitron were willing to solve the problem.

VII. RELIANCE ON FLAWED ARBITRON DATA UNDERMINES PUBLIC CONFIDENCE IN THE COMMISSION'S PROCESS AND CREATES A FICTIONAL STANDARD FOR MEASURING COMPLIANCE WITH THE RULES

The Commission relies on Arbitron data (market definitions) to determine licensee compliance with respect to a number of its rules, including multiple ownership, cross-ownership, and local ownership.[80] The reliability and accuracy of that data has proven to be seriously flawed. The Commission's continued reliance on Arbitron data calls into question not only the credibility of the Commission's own processes but the underlying legal basis for its decisions and, in the case of its Quadrennial Reviews, its statutory duties to assess the radio market.[81] Consequently, the *NOI* asks for comments on several questions regarding the implications of the Commission's continued use of the Arbitron data in reviewing transactions and measuring compliance with its broadcast rules. It also seeks comment on the integrity of its analysis in trend reporting and the impact and reliability of continued use of Arbitron data on its policies and rules with respect to competition and ownership. Finally, the *NOI* asks if there is a more reliable data source that should be used or, at the very least, should MRC accreditation be required before the PPM methodology can be used.[82]

A. The Integrity of any Future Commission Rulemaking, Compliance Analysis and Trend Reporting will be Compromised if it Relies upon the Flawed PPM Measurement Data

The Arbitron PPM methodology has been discredited. Absent MRC accreditation and significant corrective measures, the Commission cannot rely on or use it to support its analysis in any future rulemaking or order; or to comply with its market analysis obligations

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80 *NOI* at ¶ 23.

81 *NOI* at ¶ 25.

82 *NOI* at ¶¶ 24-25.

under the Communications Act. Further, radio broadcasters should be barred from using Arbitron data from unaccredited markets in any filings with the FCC until Arbitron attains MRC accreditation.

The mounting body of evidence clearly demonstrates that the PPM methodology is unreliable. The FCC's Advisory Committee on Diversity of Communications in the Digital Age ("Diversity Committee") has questioned the accuracy of Arbitron's audience measurement methods.[83] The Media Bureau is investigating the accuracy of the PPM methodology.[84] Members of Congress have written to the Commission questioning Arbitron's use of PPM. Congressman Towns this week announced an investigation by the House Oversight and Government Reform Committee into the problems with PPM and the potential threat tot he financial viability of minority targeted radio stations.[85] Likewise, on June 30th the Miami-Dade Board of County Commissioners voted unanimously in favor of a resolution urging Congress to enact legislation and the FCC to enact rules to ensure that the PPM methodology does not under-represent minority radio listeners. The resolution also calls on the Florida Legislature and state Public Service Commission to enact legislation and rules as well as calling upon the state Attorney General to investigate PPM to ensure that the terms of the settlements by the Attorneys General in New York and New Jersey are apply in Florida.[86] Arbitron settled two lawsuits; one brought by the Attorney General of New York and another by the New Jersey Attorney General. Both suits were based on the flawed PPM methodology.[87] Arbitron warded off at least one other

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[83] *NOI* at ¶ 2.

[84] *NOI* at ¶ 13.

[85] See supra n. 11.

[86] See supra n. 12.

[87] *NOI* at ¶ 14; supra n. 11.

suit by entering into an agreement with the Maryland Attorney General to improve its PPM methodology.[88] The MRC has repeatedly refused to accredit Arbitron's PPM measurement system.[89] Finally, there is already significant evidence in the record demonstrating that the PPM methodology is statistically flawed. The Commission simply cannot ignore this ever growing body of evidence or the potential legal consequences of relying on flawed Arbitron data in any future rulemaking, order or proceeding.

As a preliminary matter, the evidence weighing against Arbitron's PPM methodology negates the very rationale used by the Commission in the first instance to support its adoption as a standard.[90] As the Commission stated in its 2002 Biennial Review adopting Arbitron market definitions: "Where a commercially accepted and recognized definition of a radio market exists, it seems sensible to us to rely on that market definition for purposes of applying the local radio ownership rule."[91] The Commission went on to say: "The record shows that Arbitron's market definitions are an industry standard and represents a reasonable geographic market delineation within which radio stations compete."[92] Finally, "[g]iven the

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88 *NOI* at ¶ 14. A key component of theses settlements is an obligation on the part of Arbitron to obtain MRC accreditation in short order. The New York Consent Decree has a deadline for attaining MRC accreditation by October 15, 2009. The New Jersey Consent Decree has a deadline of December 31, 2009.

89 <u>See</u> <u>supra</u> at 8-9.

90 To be clear, the PPM Coalition does not take issue with the Commission's rational for abandoning the contour-overlap methodology and replacing it with Arbitron's market definitions in the 2002 Biennial Review. <u>See</u> <u>infra</u> n. 91. Nor is the PPMC seeking Commission reconsideration of that order. The point that the PPMC is trying to make in these comments is that Arbitron's use of PPM has rendered the market definitions unreliable. And, while the Court upheld the Commission's decision to use Arbitron market definitions which, at the time, was a Diary-based methodology, the recent replacement of Diaries with PPM casts a cloud over the Commission's continued use of those definitions – at the very least until MRC accreditation is attained.

91 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13725 (2003), aff'd in part and remanded in part, *Prometheus Radio Project et. al. v. FCC*, 373 F.3d 372 (3rd. Cir 2004), stay modified on rehearing, No. 03-3388 (3d Cir. Sept. 3, 2004), cert. denied, 545 U.S. 1123 (2005) ("2002 Biennial Review").

92 <u>Id</u>. The Court cited this finding in its decision upholding the Commission's decision to replace the contour-overlap methodology with Arbitron Metro markets. *Prometheus Radio Project v. FCC*, 373 F.3rd at 424 (the

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long-standing industry recognition of the value of Arbitron's service, we believe there is strong reason to adopt a local radio market definition that is based on this established industry standard."[93]

In the *NOI*, the Commission again refers to the Arbitron market definitions which are derived using its PPM methodology as "the industry standard."[94] The problem is, as the record demonstrates, the Arbitron data is flawed and no longer acceptable as an industry standard. Moreover, the principal rationale given by the Commission in the 2002 Biennial Review to overcome industry objections at that time arguing against adoption of Arbitron market definitions has proven false. In the 2002 Biennial Review commenters argued, among other things, that the Arbitron data was unreliable and susceptible to dramatic changes.[95] The Commission stated that it was "not convinced that such changes occur with such frequency, *or that they are so drastic*, that we must reject reliance on those boundaries in defining the relevant radio markets."[96] The evidence shows that that assumption is no longer true. Arbitron's switch to PPM has resulted in swift and drastic changes in its market definitions.

By way of example, with Arbitron's change to PPM the New York market jumped from 37 radio stations serving the market to 63. Los Angeles increased from 43 to 56 and Chicago went from 37 to 59.[97] These are just three examples of the dramatic effect PPM has

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Commission decided to "employ Arbitron's existing geographical definitions of local markets, finding they are 'established industry standard' that 'represents a reasonable geographic market delineation within which radio stations compete.'")

93 2002 Biennial Review at 13725.

94 *NOI* at ¶¶ 8, 23.

95 2002 Biennial Review at 13726-28.

96 Id. at 13726 (emphasis added).

97 "Stations Home to Arbitron Metro Area," as reported by Arbitron in its PPM eBook for New York, Los Angeles and Chicago, May 2009.

had on Arbitron's market definitions. Further, because many of the Commission's broadcast rules and policies (minority ownership, independent voices, among others) use Arbitron's market definitions as the starting point for analysis, the decision by Arbitron to adopt PPM will have a substantial and significant ripple effect that could dramatically change the whole broadcast landscape.

In its efforts to foster diversity in media ownership, the Commission adopted rules that require the survival of a minimum number of independently owned media voices following a merger of broadcast properties.[98] To determine how many such media voices would remain, the rules specify that radio stations are to be counted "in the radio metro market (as defined by Arbitron or another nationally recognized audience rating service)"[99] and when they are "out-of-market broadcast radio stations with a minimum share as reported by Arbitron."[100]

The Commission's rules vary the number of stations that a single party may own through four tiers based on the number of radio stations in the market: 45 or more, between 30 and 44, between 15 and 29, and 14 or fewer radio stations.[101] Thus, in New York, where the number of reported radio stations jumped from 37 to 55, based solely on Arbitron's decision to switch from a Diary-based methodology to PPM, the number of permissible co-owned radio stations increased *without the grant of a single new license*. The same is true for Los Angeles, Chicago and the other major markets that are now being defined based on faulty PPM data. This result would have an even more dramatic effect in smaller markets, where the addition of an additional station to a cluster could have a disproportionate influence on advertising sales and

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98 47 C.F.R. § 73.3555(c).

99 47 C.F.R. § 73.3555(c)(3)(ii)(A)(1).

100 47 C.F.R. § 73.3555(c)(3)(ii)(A)(2).

101 47 C.F.R. § 73.3555(a)(1)(i)-(iv).

competition. Commission decisions affecting competition and consolidation should not be based on Arbitron data that is so manifestly unreliable and so volatile in the fluctuation of the count of reportable stations in markets. Over time, the ownership structure of the broadcasting industry could be irrevocably altered in a manner that would diminish diversity and further impede media ownership by minority interests.

Accordingly, absent MRC accreditation, not only has the original basis for Commission adoption of Arbitron as a legal standard been undermined but it is hard to justify continued use as the "industry standard." This then sets up a potential legal challenge for the Commission. If the very rationale used by the Commission in adopting Arbitron as its legal standard is no longer valid, any decision or analysis by the Commission using that standard is arbitrary and capricious and risks court challenge.[102] In other words, if the Commission's starting point is based on flawed data, any end result will necessarily be flawed.[103] Thus, the Commission cannot rely on Arbitron data in any rulemaking, proceeding, analysis or trend report for so long as such data remains unreliable. The measure of reliability is MRC accreditation.

B. MRC Accreditation Should be a Condition Precedent to FCC Licensee Reliance on PPM Methodology in Filings with the Commission.

A key component of the settlement agreements with the state Attorneys General is an obligation that Arbitron obtains MRC accreditation for its PPM by a date certain.[104] The PPMC agrees with the state Attorneys General and recommends that the Commission follow

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[102] See *Radio-Television News Directors Assoc. et al. v FCC*, 184 F.3d 872, 885 (D.C. Cir. 1999) (the original rationale for a challenged rule had been abrogated; Commission required to justify retention "despite the fact that the rule was justified when initially promulgated.").

[103] See *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 240-241 (D.C. Cir. 2008) (failure to comply with APA by withholding underlying data/studies used as basis for adopting rule and by failing to fully explain application of old technical standard to new situation); cf. *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027 (D.C. Cir. 2008) (failure to provide reasoned explanation for decision, among other things).

[104] See supra n. 88 (MRC accreditation required by October 15, 2009 for New York and December 31, 2009 in New Jersey).

suit.[105] The MRC is the only real uninterested third-party that has access to all of Arbitron's underlying data and methodologies. As discussed above in Section VI. B., MRC audits scrupulously analyze every element of an audience measurement service; the audits are unbiased and assure that accreditation decisions are based only on merit.[106] To that end Arbitron is required to provide full transparency to the audit team and MRC staff. Since the MRC is the only non-interested third-party with all underlying data regarding PPM, the fact that it has withheld its accreditation is telling. The Commission should take note and require MRC accreditation as a condition precedent to any further licensee reliance on Arbitron data in filings with the FCC.

VIII. THE COMMISSION HAS JURISDICTION TO REQUIRE THE SUBMISSION OF INFORMATION CONCERNING PPM METHODOLOGY AS PART AND PARCEL TO ITS STATUTORILY MANDATED OVERSIGHT OF THE RADIO BROADCAST INDUSTRY

The *NOI* seeks comment on the basis for the Commission's jurisdiction to require the submission of information concerning Arbitron's PPM methodology or to regulate PPM methodology.[107] In this regard, it asks if the Commission's reliance on the PPM methodology and Arbitron's market definitions in its rules and analysis for determining industry compliance, as well as impact on diversity and competition, is sufficient to assert jurisdiction and if so, what statutory provisions apply.[108] Finally, if the Commission has jurisdiction, the *NOI* seeks comment on the actions the Commission should take in response to the information it receives.[109]

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105 The PPMC recommends that the Commission require MRC accreditation by October 15, 2009 as in the case of New York but no later than the December 31, 2009 deadline of New Jersey.

106 <u>See</u> <u>supra</u> at 8-9.

107 *NOI* at ¶ 27.

108 The *NOI* also asks if there is a technical basis for asserting jurisdiction (*i.e.*, the intertwining of the PPMs in the broadcasting transmission signals). *NOI* at ¶ 27.

109 *NOI* at ¶ 28.

A. The Commission has the Necessary Authority to Ensure that the Arbitron PPM Data is Credible and Accurate Where Such Data is Used to Support its Radio Broadcasting Policies and Rules.

Section 154(i) and Section 403 provide the Commission with ample authority to investigate and to require the submission of information to determine the accuracy and reliability of Arbitron's PPM ratings methodology.[110] Arbitron's PPM methodology for defining radio markets underpins – and indeed is the starting point – for many of the Commission's broadcast policies, regulations and procedures critical to radio broadcasters.[111] If, as the PPMC and several attorneys general have demonstrated, Arbitron's PPM methodology is unreliable, it completely undermines the Commission's reliance on such data and ability to effectively regulate the radio industry in the public interest. Thus, the Commission has a vital interest in ensuring that the data upon which its own rules depend is accurate, valid and reliable.[112]

Arbitron's exception to the Commission jurisdiction, as noted in the *NOI*, is unavailing.[113] The Commission's authority is self-evident from the broad language of Section 403 itself:

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

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110 In addition to Section 403, the Commission has authority to investigate PPMs under its general public interest authority, as well as, Section 257 and 309 of the Communications Act.

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

112 Id.

113 See *NOI* at ¶ 6, n.24, ¶ 26.

> complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.

Moreover, the Commission's regulations implementing Section 403 specifically envision its use to make inquiries to enable the Commission to collect information necessary or helpful in determining its policies, carrying out its duties, or amending its rules and regulations.[114]

The Commission also has subject matter jurisdiction over Arbitron to compel submission of PPM information for evaluation.[115] The case for the Commission's exercise of its subject matter jurisdiction is especially compelling when the actions of a sole supplier of an essential service threaten to bring about market failure.[116] Previously, the Commission has not

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

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

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

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

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hesitated to protect minority groups' access to markets in instances where a company dominating an industry or sub-industry is positioned to become a bottleneck.[117]

B. The Commission Should Take Appropriate Steps to Ensure that the Data Relied Upon By the FCC and the Industry is Credible, Verifiable and Transparent – At a Minimum MRC Accreditation Should be Required.

The specific actions the Commission should take in response to the information collected from Arbitron will be largely dependent upon Arbitron's willingness to work with the Commission and interested parties to correct the deficiencies in the data collection methodology and timing for implementing corrective measures. At the very least, the MRC Accreditation should be required. Commission reliance on unreliable data undermines consumer confidence and the Commission's authority to regulate radio broadcasting. Further, as discussed elsewhere, it undermines key Commission policies that are directed to fostering minority broadcasters and ownership diversity, among others. Thus, time is of essence. The PPMC suggests, after receipt of the PPM information, if the MRC continues to withhold its accreditation and Arbitron is unwilling to cooperate to rectify the deficiencies in its data collection methodology, the Commission should take appropriate steps to adopt an alternative methodology that is credible, verifiable and transparent.

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market players, especially consumers." Remarks of Commissioner Robert McDowell, Media Institute Dinner, Oct. 16, 2006 at 2.

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

IX. CONCLUSION

For the reasons set forth herein, the Commission should investigate the reliability of Arbitron's PPM methodology; its impact on minority ownership stations and not rely on unaccredited Arbitron data or market definitions stemming from such data in any rulemaking, order or analysis, including prohibiting FCC licensees from using such data in any filing.

Respectfully submitted,

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