



## SUMMARY

In these reply comments, Media Access Project demonstrates that the Commission has the authority to regulate audience measurement services, authority grounded in the language of the *Communications Act of 1934*. Judicial precedent has upheld the Commission's expansive authority. These authorities reflect Congress' desire that the Commission have broad and flexible powers in order to respond to the rapid changes in the telecommunications industry.

These reply comments show that though the *Communications Act* does not explicitly mention audience measurement services they are within the Commission's jurisdiction. The Commission has previously elected not to regulate an industry associated with communications and later reversed course, an administrative decision upheld on judicial review. Contrary to Arbitron's arguments, there is a solid statutory basis for regulating audience measurement services, because those services impact broadcast diversity. Therefore, because the Commission is charged with fostering broadcast diversity, it has jurisdiction over these services under its ancillary authority.

Media Access Project's reply shows that the Commission clearly has the authority to regulate in this area. At the same time, this reply points out that the Commission has more powers than just those of regulation. Because the Commission uses Arbitron data for regulatory purposes the Commission may undertake an inquiry into whether or not its continued reliance on Arbitron's Personal People Meter audience measurement service is warranted. Actual regulation need not issue from such an inquiry, which need only explore whether the Commission's reliance on Arbitron data is detrimental to the public interest in broadcast diversity.

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**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20005**

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

**REPLY COMMENTS OF MEDIA ACCESS PROJECT**

Media Access Project respectfully submits these reply comments in the above-captioned docket. MAP will address the issue of the Commission’s jurisdiction over Arbitron and the basis thereof. The Commission sought comment on these threshold issues in its *Notice of Inquiry*, 24 FCC Rcd. 6141, 6157-6158 (May 18th, 2009).

**I. INTRODUCTION**

In its *Notice of Inquiry* the Commission suggests several possible bases for jurisdiction, including its reliance on Arbitron data and definitions for regulatory purposes; the effect Arbitron’s data has upon radio diversity and competition, which, by statute, the Commission has a duty to promote; the intertwining of Portable People Meter (“PPM”) technology with radio broadcasts; and the transmission of encoded signals over the airwaves, via Arbitron equipment attached to radio station signal sources. *Id.*

In its *Comments* filed on July 1, 2009, Arbitron flatly asserts “that the Commission has no authority whatsoever to assert its regulatory power over Arbitron or the PPM service.” *Comments of Arbitron* in MB Docket No. 08-187, p. 3 (July 1, 2009). Conceding only that the Commission “may possess the authority to ask questions, to educate itself and interested parties, and to submit its findings and recommendations,” *id.*, Arbitron makes several arguments. First, it argues, the Commission lacks authority to regulate audience measurement services because

Congress has “expressly declined” the Commission the power to regulate in that area. *Id.*, at 4-7. Second, Arbitron claims that the Commission “has expressly recognized that it lacks jurisdiction to regulate audience measurement services.” *Id.*, at 7-8. Arbitron’s third and fourth arguments assert that the Commission can assert neither statutory authority, *id.*, at 8-12, nor authority based on the doctrine of ancillary jurisdiction, *id.*, at 12-20, over audience measurement services.

As these reply comments will demonstrate, under the provisions of the *Communications Act of 1934*, as explicated by judicial precedent, any of the possible bases of jurisdiction posited by the Commission are sufficient to regulate Arbitron’s PPM service. Further, in rebutting Arbitron’s arguments, these reply comments will show that the Commission has strong authority to regulate all audience measurement services based on the doctrine of ancillary jurisdiction, pursuant to its statutory mandate to promote radio diversity and competition.

## **II. STATUTORY AND JUDICIAL FOUNDATIONS OF THE COMMISSION’S AUTHORITY**

These proceedings were implemented under §§1, 4(i), 4(j), and 403 of the Communications Act of 1934. *Notice of Inquiry, supra* 24 FCC Rcd. at 6159. Section 1 describes the purpose of the Act. That purpose is very broad. It was passed, “For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin....” 47 U.S.C. §151 (1934); *Communications Act of 1934* §1.

Sections 4(i) and 4(j) are likewise broad. These sections give the Commission the powers to settle its business, and endow it with flexibility in determining how to do so. Sections 4(i) states, “The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its

functions.” *Id.*, at §4(i). Section 4(j) declares, “The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice....” *Id.*, at §4(j).

Section 403, like the foregoing sections, is couched in broad terms. Congress declared that, pursuant to this section, “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.” *Id.*, at §403.

In furtherance of the agency’s general purpose described in §1 of the Act, Congress granted the Commission the power to license broadcast radio stations, that power being found in §301, which says:

“It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio... except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.”

*Id.*, at §301.

Section 303 of the Act describes a large array of actions which the Commission may take regarding radio. In keeping with the broad authority granted to it in §1 of the Act, under Section 303(r) the Commission is instructed to wield that power to protect the public interest: “the Commission from time to time, as public convenience, interest, or necessity requires shall...

[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act.” *Id.*, at §303(r).

This public interest regulatory authority regarding radio has been interpreted broadly. In upholding Congress’ intent that the “public interest” standard should be applied to broadcast licensing, the Supreme Court concluded that the provisions of §303 elucidate, but do not limit, the Commission’s authority:

The avowed aim of the Communications Act was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the...Commission with comprehensive powers to promote and realize the vast potentialities of radio. Section 303 (g) provides that the Commission shall “generally encourage the larger and more effective use of radio in the public interest”...and subsection (r) empowers it to adopt “such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act.” These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the “larger and more effective use of radio in the public interest.”

*NBC v. United States*, 319 U.S. 190, 217 (1943).

The broad authority of the Commission in the area of radio has been continually upheld. As the Supreme Court explained over three decades after *NBC v. U.S.*, “[I]t is now well established that this general rule-making authority supplies a statutory basis for the Commission to issue regulations codifying its view of the public-interest licensing standard, so long as that view is based on consideration of permissible factors and is otherwise reasonable.” *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 793 (1978) (internal citations omitted).

The breadth of the Commission’s authority is made wider still under the doctrine of ancillary jurisdiction. Under this doctrine, so long as it is “reasonably ancillary to the effective performance of the Commission's various responsibilities...[t]he Commission may...issue ‘such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,’

as ‘public convenience, interest, or necessity requires.’” *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). In *CCIA v. FCC* 693 F.2d 198 (D.C. Cir. 1982), the D.C. Circuit expounded upon the breadth of the authority granted to the Commission under this doctrine, and the rationale behind it:

In designing the Communications Act, Congress sought “to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications.” Congress thus hoped “to avoid the necessity of repetitive legislation.” In *Computer II* the Commission took full advantage of its broad powers to serve the public interest by accommodating a new development in the communications industry, the confluence of communications and data processing. Because the Commission’s judgment on “how the public interest is best served is entitled to substantial judicial deference,” the Commission’s choice of regulatory tools in *Computer II* must be upheld unless arbitrary or capricious. Our review of the Commission’s decision convinces us that the Commission acted reasonably in defining its jurisdiction over enhanced services and CPE. We therefore uphold the *Computer II* scheme.

*CCIA v. FCC*, *supra* 693 F.2d at 213-214 (D.C. Cir 1982) (internal citations omitted).

As *CCIA v. FCC* demonstrates, under this doctrine the Commission has expansive powers, and the discretion to apply them in the ways it believes are best. The agency’s discretion is subject to being overturned on judicial review only in the most egregious cases of overreach. This is in line with Congress’ intent in establishing the FCC, as the Supreme Court states in the case which established the doctrine of ancillary jurisdiction, *U.S. v. Southwestern Cable Co.*, *supra*.

*Southwestern Cable* arose from a dispute over rules regulating community antenna television, or CATV, systems. *Southwestern Cable*, *supra* 392 U.S. at 159-160. The Commission had previously declined to regulate CATV, “declar[ing] that it had not been given plenary authority over ‘any and all enterprises which happen to be connected with one of the many aspects of communications.’” *Id.*, 392 U.S. at 164 (citing *CATV and TV Repeater*

*Services*, 26 FCC 403, 429 (1959)). It opted instead to seek from Congress “appropriate legislation ‘to clarify the situation.’” *Id.* (citing *CATV and TV Repeater Services*, 26 FCC at 429). Though a bill was debated in the Senate, no legislation was ever actually passed. *Id.*, at 165.

In light of, or perhaps due to, Congressional inaction, the Commission “gradually asserted jurisdiction over CATV,” which led up to a finding “that ‘the likelihood or probability of [CATV’s] adverse impact upon potential and existing service has become too substantial to be dismissed,’” *id.* (citing *Carter Mountain Transmission Corp.*, 32 FCC 459 (1962), *aff’d* 321 F.2d. 359 (D.C. Cir. 1963)), and “that ‘CATV competition can have a substantial negative effect upon station audience and revenues....’” *Id.* (citing First Report and Order, 38 FCC 683, 710-711 (1965)). Ultimately, after additional administrative hearings, the Commission determined “that the Act confers adequate regulatory authority over all CATV systems.” *Id.*, 392 U.S. at 166.

In holding that the FCC had jurisdiction over CATV, the Supreme Court went to great length in discussing the breadth of the agency’s granted powers under the Communications Act:

The Act’s provisions are explicitly applicable to ‘all interstate and foreign communication by wire or radio....’ 47 U.S.C. §152(a). The Commission’s responsibilities are no more narrow: it is required to endeavor to ‘make available...to all the people of the United States a rapid, efficient, Nationwide, and worldwide wire and radio communication service....’ 47 U.S.C. §151....As this court emphasized in an earlier case, the Act’s terms, purposes, and history all indicate that Congress “formulated a unified and comprehensive regulatory system for the [broadcasting] industry.”

*Id.*, 392 U.S. at 167-168 (citing *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940)).

Based on this reading of the Act, the Court found unpersuasive the respondent CATV operators’ arguments that they were not subject to the FCC’s jurisdiction. The first of these

arguments centered on the Commission's having sought legislative clarification of its powers, in lieu of implementing any regulation. *Id.*, 392 U.S. at 169-170. The Court stated,

In the circumstances, here...this cannot be dispositive. The Commission's requests for legislation evidently reflected in each instance both its uncertainty as to the proper width of its authority and its understandable preference for more detailed policy guidance than the Communications Act now provides. We have recognized that administrative agencies should, in such situations, be encouraged to seek from Congress clarification of the pertinent statutory provisions....Nor can we obtain significant assistance from the various expressions of congressional opinion that followed the Commission's requests...it is far from clear that Congress believed, as it considered these requests for legislation that the Commission did not already possess regulatory authority over CATV.

*Id.*, 392 U.S. at 170-171.

The second argument raised by the respondents was "that §152(a) [of the Communications Act] does not independently confer regulatory authority upon the Commission, but instead merely prescribes the forms of communication to which the Act's other provisions may separately be made applicable." *Id.*, 392 U.S. at 171-172. Reiterating that the Act is constructed as a grant of broad authority to the Commission, the Court agreed with the Commission's finding "that its statutory responsibilities demand that it 'plan in advance of foreseeable events, instead of waiting to react to them....' The Commission has reasonably found that the successful performance of these duties demands prompt and efficacious regulation...." *Id.*, 392 U.S. at 177 (citing First Report and Order, 38 F.C.C. 683, 701).

Finally, in holding the Commission had properly granted administrative relief, the Court again emphasized just how expansive and flexible the Commission's powers are:

"This Court has recognized that "the administrative process [must] possess sufficient flexibility to adjust itself" to the "dynamic aspects of radio transmission," *F.C.C. v. Pottsville Broadcasting Co.*....and that it was precisely for that reason that Congress declined to "stereotyp[e] the powers of the Commission to specific details..." *National Broadcasting Co. v. United States*....Thus, the Commission has been explicitly authorized to issue "such

orders, not inconsistent with this [Act], as may be necessary in the execution of its functions.” 47 U.S.C. §154(i). *See also* 47 U.S.C. §303(r)

*Id.*, 392 U.S. at 180-181.

### **III. REPLY TO ARBITRON’S COMMENTS OF JULY 1, 2009**

The situation presently before the Commission is remarkably similar to that which led up to *Southwestern Cable*. An industry, arguably engaged in communication by wire or radio, and whose activities have an impact on known FCC licensees, suddenly finds itself the potential subject of regulation. That industry grasps onto the fact that it had not, up to that point, been regulated. Though there is not an explicit grant of authority to the FCC covering that industry—as with CATV, audience measurement services are not specifically mentioned in the Act—the Commission’s broad authority appears to cover that industry; nevertheless, the Commission has held back from exerting such authority until this time. As is clear from this precedent, the Commission can undertake an inquiry to determine whether to change course. Additionally, the Commission may act with or without a change to its legislated authority.

Arbitron’s argument that the Commission has no jurisdiction is premised on a misreading of judicial precedent regarding §303(r) of the Act found in *Motion Picture Ass’n of America v. FCC*, 309 F.3d 796 at 798, 806 (D.C. Cir. 2002). *Comments of Arbitron, supra* at 9-11. *MPAA* held that the public interest language of §303(r) does not give the Commission the authority to regulate outside of the authority granted to it in the Act. *MPAA v. FCC, supra* 309 F.3d at 798 (“...the FCC cannot act in the ‘public interest’ if the agency does not otherwise have the authority to promulgate the regulations at issue...the FCC must act pursuant to *delegated authority* before any ‘public interest’ inquiry is made under §303(r).”) (emphasis in original). Arbitron’s reference to this case is its undoing, rather than its salvation, because Congress has specifically granted the Commission the authority to regulate broadcast ownership. As shown in

the precedent of *NBC v. United States*, the agency has been granted the requisite authority to allocate broadcast licenses under public interest standard. Acting pursuant to that authority, the Commission used its broad powers found in §303(r) to delineate areas in which entities are restricted from owning more than a prescribed number of broadcast stations of a single format, and/or from owning more than one type of broadcast station in that area, the Commission's well-known local- and cross-ownership rules. Accordingly, the Commission has jurisdiction over Arbitron under the broad authority granted to it under Section 303(r).

Arbitron also argues that Congress gave the Commission no authority to regulate rating services, that the legislature instead vested that power in the Media Rating Council, Inc. This, it asserts, shows Congressional belief that industry self-regulation was preferable to that of the FCC. However, Arbitron undercuts its own argument. As it states in its *Comments*, the MRC was created in the aftermath of the Harris Committee. At the same time, the Committee directed the MRC to provide the FCC with an annual report. Furthermore, it stated that future legislation might be needed, "should...the industry program of self-regulation...be found at a later date to be substantially deficient." *Comments of Arbitron, supra* at 5-6. The Commission is empowered to undertake investigations, and also to make recommendations to Congress. Thus it could inquire into Arbitron's PPM methodology for the express purpose of recommending to Congress legislative action, as Arbitron's flouting of the MRC accreditation process indicates that the system of industry self-regulation has become substantially deficient, if it has not always been so. Furthermore, as *Southwestern Cable* demonstrates, Congress' failure to declare a given aspect of communication as expressly within the FCC's jurisdiction does not mean that aspect of communication is outside of the Commission's jurisdiction. Neither do prior acts of the Commission suggesting that a given area of communications is outside of its jurisdiction.

Additionally, it should be noted that the Harris Committee report quoted by Arbitron is far from definitive about the FCC's jurisdiction over audience rating services. As Arbitron notes in its *Comments*, the report merely says that the FCC does not have a "direct mandate" and that "enactment of appropriate legislation providing for Government regulation of rating operations may prove to be the only recourse." *Id.*, at 4, 5. This language is far from unequivocal.

The above holds true for Arbitron's argument formulated around prior FCC precedents. *Id.*, at 7-8. These precedents, which Arbitron cites in order to show some kind of recognition by the FCC that audience measurement services cannot be regulated by the Commission, period, indicate, if anything at all, proper agency restraint. As the Supreme Court said in *Southwestern Cable*, agencies can, and should, exercise caution when wielding their granted power. Nevertheless, prior decisions not to exercise that power do not constrain the agency from doing so in the future, if it indeed has that power. Like CATV, PPM presents a new and unique challenge to the Commission. The Commission has, in recent years, relied more heavily on Arbitron data for regulatory purposes, and the Commission has authority to regulate in the area of broadcast diversity. Thus it is absurd to suggest that the Commission cannot undertake "regulation" to decide whether now is the proper time to wield its authority over Arbitron, and decide the form and function thereof. Under the precedent of this Nation's highest Court, the only restriction would be that the agency could not act arbitrarily and capriciously in doing so. The Commission's *Notice of Inquiry* was but the first step in a long path of compliance with that precedent. The precedent of *Southwestern Cable* shows that agencies can elect not to impose regulations on those entities within its authority to regulate, but later reverse its prior decision. *Southwestern Cable*, *supra* 392 U.S. at 167-168.

Additionally, Arbitron argues that *American Library Assoc. v. FCC*, 406 F.3d 689 (D.C. Cir 2005) puts Arbitron outside of the Commission's ancillary jurisdiction. As with *MPAA*, Arbitron misinterprets that precedent. *Comments of Arbitron, supra* at 5-6.

The *ALA* court went to great lengths to distinguish the facts of its case from *CCIA v. FCC*, which, as noted above, was a reassertion of the Commission's broad authority. *ALA* invalidated the Commission's broadcast flag regulations because they regulated content *after* a transmission. *American Library Assoc. v. FCC, supra* 406 F.3d at 695. The Commission has authority over "communication by wire or radio," so regulation of communications and the means of transmission are presumptively permissible under that statutory authority; *ALA* simply holds that regulation of a communication post-transmission is not. *Id.*, 406 F.3d at 707. The instant matter does not involve regulating communications post-transmission. Rather, it involves fact-finding to determine whether the Commission's method of defining markets for broadcast ownership purposes serves the public interest. Such authority is granted to the Commission by the Act, so the Commission may exercise its ancillary jurisdiction. That exercise would be "reasonably ancillary to the effective performance of the Commission's various responsibilities" concerning broadcast ownership. *Southwestern Cable, supra* 392 U.S. at 178. Therefore, quite to the contrary of Arbitron's argument, there is a well-established statutory basis for invoking the Commission's ancillary authority. This is because Arbitron's PPM methodologies are unarguably impacting broadcast ownership and diversity.

Moreover, in formulating arguments regarding the FCC's authority to regulate, Arbitron overlooks an entire area of the agency's authority. No party has disputed that it is within the Commission's authority, to inquire into Arbitron's audience measurement methodologies for the purposes of determining whether or not the Commission ought to continue to rely on the data

collected by Arbitron. In fact, such an inquiry needn't be couched as a "regulation," but rather an investigation, and needn't extend beyond the Commission's usage of Arbitron's data for regulatory purposes. Should Arbitron not comply with such an investigation, the Commission could weigh bringing to bear the full measure of its enforcement measures, up to and including a summary decision to abandon the use of Arbitron data. Media Access Project already pointed this out in detail, in its *Comments* filed with the Commission in this matter on June 30, 2009. Therefore it is not necessary to go into the matter further, aside from noting that the main parties in this proceeding are ignoring an entire, well-settled area of the Commission's power. This authority, at the very minimum, enables the Commission to implement a regulatory proceeding whereby it may draw conclusions from which it may make recommendations to Congress. That is the very least that the Commission may do; as discussed, above, the Commission may do much more.<sup>1</sup>

#### **IV. CONCLUSION**

The Commission has the authority to determine whether a particular audience rating service can be used for its own regulations and to determine whether broadcasters can rely upon audience rating services for promotion and other business practices. It is not necessary to reach or even resolve these questions, however, in order to conduct a thorough examination of whether such regulations are necessary. Should the Commission conclude it is necessary, it can then determine whether it has the power to impose the regulations or recommend to Congress that it should be given those powers legislatively. Regardless of its ultimate administrative choice, the Commission can and should proceed with its inquiry. If Arbitron fails to provide necessary

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<sup>1</sup> Arbitron's argument that its PPM methodology is speech protected by the First Amendment merits only a brief response. Any regulation which might issue would not constitute a content-based restriction and would be viewpoint-neutral. Arbitron is not engaged in expressive speech. Furthermore, the grant of power to the Commission under Section 1 of the Act is a Congressional assertion that there is a substantial governmental interest in promoting non-discriminatory use of the airwaves.

information for the Commission to make findings and conclusions, the Commission has broad power to compel Arbitron to provide information essential to the inquiry.

Respectfully submitted,

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