

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

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

REPLY COMMENTS OF ICBC BROADCAST HOLDINGS, INC.

ICBC Broadcast Holdings, Inc. ("ICBC"), by its attorneys, hereby submits its Reply Comments ("Reply") in the above-referenced proceeding. As further indicated below, the Comments in this proceeding establish that the Portable People Meter™ ("PPM") being deployed by Arbitron Inc. ("Arbitron") was rushed to market without the support of a credible or appropriate survey sampling basis and is causing substantial harm to minority radio broadcasters. Without prompt assistance from the Commission, such harm will be irreparable.

I. Record Evidence Proves that PPM is Damaging Minority Broadcasters.

In its Comments, ICBC demonstrated that, immediately upon Arbitron switching from diaries to PPM in New York and San Francisco, ICBC stations suffered crushing losses of ratings of as much as 50% and 60%, and plummeted from the 3rd ranked to the 8th and 13th ranked stations, respectively, in those markets.¹ Concurrent revenue declines were as much as 44%.² Up until that time, those ICBC radio stations held successful and consistent ratings and rankings in their markets. It cannot be coincidence that such staggering losses occurred immediately upon use of PPM as "currency" in those markets. Tens of thousands of listeners simply did not suddenly change their habits the day that Arbitron switched to PPM.

¹ ICBC Comments, pp. 2-3 (Jul. 1, 2009).

² *Ibid.*

Spanish language broadcasters have provided substantially similar evidence to the Commission. For example, the Association of Hispanic Advertising Agencies ("AHAA"), which represents approximately 98% of Hispanic-specialized agencies, states:

The Hispanic-specialized advertising industry is facing a serious challenge with PPM implementation. The roll out of flawed statistical data representing Hispanic listeners will have devastating effects on an industry that has been flourishing for more than 30 years: an industry built by pioneers and visionaries that today represents more than \$5 billion in advertising investments, a significant portion of which is dedicated to radio.³

Spanish-language broadcasters are experiencing devastating effects to their businesses and many smaller station owners have been, and will be, forced to close eliminating a vital lifeline to critical information for Latino communities and a valuable medium for advertisers.⁴

Many Spanish language radio broadcasters demonstrated to the Commission the devastating effect of Arbitron's switch to PPM and have asked the Commission for relief. Those broadcasters include: Univision Communications ("Univision"), Spanish Broadcasting System ("SBS"), Entravision and the Spanish Radio Association.⁵ For example, SBS showed that its two radio stations serving New York City declined 55% and 67% in ratings following Arbitron's switch to PPM.⁶ In New York, the ratings of Spanish and Urban formats plummeted between 44% and 70% under PPM, as compared to diary ratings.⁷ In the Los Angeles market, Univision's radio station dropped 54% in ratings.⁸ Univision is refusing to participate in PPM.⁹

African American radio stations have fared as badly. As noted above, ICBC's ratings and rankings dropped precipitously. Further, under PPM measurement, African American owned

³ AHAA Comments, p. 1 (Jul. 1, 2009).

⁴ *Id.* at 5.

⁵ See PPM Coalition Comments (Jul. 1, 2009).

⁶ *Id.* at 9-10.

⁷ *Id.* at 12.

⁸ *Id.* at 11.

⁹ See *Univision Won't Renew PPM Contracts with Arbitron*, RADIO ONLINE (Jul. 22, 2009) (available at http://news.radio-online.com/cgi-bin/rol.exe/headline_id=b11762).

KJLH(FM), serving Los Angeles, upon implementation of PPM overnight lost 70% of its market share and its revenues fell 48%.¹⁰

KJLH has an urban format, with an acclaimed public affairs component, that has been highly popular in the marketplace; yet its ratings dropped by almost two-thirds when PPM was introduced (*i.e.* PPM ratings are about one-third of diary ratings). This sudden and precipitous drop cannot be an accurate reflection of true audience levels, but it has threatened the survival of KJLH as a business enterprise. If KJLH does not survive, a minority-owned, small business enterprise that is not part of a conglomerate will die; and important policy goals of the Commission and our government as a whole will be frustrated.¹¹

Many other broadcasters have informed the Commission about substantial problems with the PPM and harms caused by it.¹² Even the parties that support PPM, with the exception of Arbitron, do not broadly endorse its methodology or dispute the evidence provided by minority broadcasters. Of course, that is consistent with the Media Ratings Council, Inc. ("MRC"), which has accredited PPM in only two markets, Houston, Texas and Riverside, California. MRC has refused accreditation in 13 (86%) of the 15 markets in which Arbitron has deployed PPM.

Problems with PPM have continued even during the four weeks since initial comments were filed in this proceeding. Univision announced that it will refuse to participate in PPM.¹³ The Attorney General of Florida has sued Arbitron because of its plan to make PPM "currency" in Miami.¹⁴ Rather than negotiate, Arbitron immediately made PPM "currency" in Miami.¹⁵

¹⁰ PPM Coalition Comments, pp. 10-11.

¹¹ Comments of Taxi Productions, Inc., p. 2 (Jul.1, 2009)

¹² *See, e.g.*, The New Jersey Broadcasters Association Comments (Jul. 1, 2009); Will Lewis (KCRW) Comments (June 29, 2009); The National Association of Black Owned Broadcasters, Inc. ("NABOB") Comments (Jul. 1, 2009).

¹³ On July 23, 2009, *Radio Ink* reported that Arbitron revealed that Univision will not renew its PPM contract for ratings in Miami, San Diego and Phoenix. Univision already refused to participate in PPM for Los Angeles. *See* ICBC Comments, p. 5.

¹⁴ *See McCollum sues Arbitron Over Pending Release of Flawed Radio Station Ratings*, Attorney General Bill McCollum News Release (Jul. 14, 2009) (available at www.myfloridalegal.com/newsrel.nsf/newsreleases/0156085D23531CEA852575F30069D257).

Arbitron now has been sued by the Attorneys General of Florida, New York and New Jersey. Arbitron has settled with the Attorneys General of Maryland, New York and New Jersey based upon financial payments and promises to improve PPM for ratings of minority broadcasters—promises which have not been fulfilled.

A week ago, by letter dated July 23, 2009, ten Members of Congress asked the Government Accountability Office ("GAO") to conduct a detailed audit of the PPM system.

Yesterday (July 30, 2009), *Inside Radio* reported:

Analysis: Ethnic ratings drop more than double those of general market stations. ... The typical urban station watched its ratings fall 34% while Spanish-language formats were off 42%. Among Black-targeted stations, Chicago saw the biggest ratings decline (-63%) followed by Atlanta (-56%). ... The average Spanish station in Dallas, Miami and San Diego lost more than 60% of its ratings. Philadelphia's only top ten Hispanic station — "Rumba 104.5" WUBA — changed format to rock after PPM was introduced. Arbitron has released 12+ analysis in the past, but this is the first time a multi-market "money demo" comparison was done. Consultant Randy Kabrich says, "No one really cares that a station ranked #22 is now #20 or #28 as that really has little impact in overall revenue. The top ten stations are where the revenue picture really is and how jaw-dropping the changes are."

The evidence before the Commission is overwhelming that PPM is seriously flawed and causing severe harm to many radio broadcasters, especially for Spanish and African American stations. PPM has caused stunning losses in rankings for minority radio in every market in which it has been deployed. It has forced ethnic stations to change formats to survive.

II. Arbitron Has Not Justified the Harm Caused by PPM.

Arbitron's Comments are substantially devoted to instructing the FCC that it has no legal authority to take any action in this or any other proceeding.¹⁵ Arbitron takes that position despite the extensive body of evidence documenting serious problems and failures of PPM, including

¹⁵ See *Florida Sues Arbitron; Arbitron Bumps Up PPM Date*, MediaPost Comms. (Jul. 14, 2009) (available at www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=109821).

¹⁶ See Arbitron Comments, pp. 1-20.

Arbitron's admitted underrepresentation of audiences, surveying errors, inadequate representation of minorities, younger listeners and cell phone only households,¹⁷ MRC's refusal to accredit PPM, and the fact that, so far, Arbitron has been sued over PPM abuses by three states' Attorneys General. Arbitron defends itself with many self-serving suggestions, including: (1) that nothing should interfere with its unilateral (monopoly) roll-out of PPM because the radio industry "needs" an advanced, electronic measurement system to remain "competitive" with other media;¹⁸ (2) that Arbitron has a better understanding of minority audiences than the minority-owned broadcasters who request FCC relief;¹⁹ and (3) even though it is "committed" to "continuous improvement" (and was forced to make certain commitments to settle with the Attorneys General of New York, New Jersey and Maryland), Arbitron vigorously argues that there is no flaw whatsoever in PPM.²⁰

ICBC submits that the weight of the evidence presented to the Commission overwhelmingly establishes that immediate action is necessary to preserve minority, and other, radio broadcasters from destruction. Therefore, ICBC will respond very briefly to Arbitron's contentions, as follows.

Arbitron's primary defense is to school the FCC in law by instructing it that the Commission has no legal authority to require anything of Arbitron and that the FCC does not even have the authority to regulate radio broadcasters directly in order to address PPM problems.

¹⁷ See, e.g., ICBC Comments, pp. 4-6; The New Jersey Broadcasters Association Comments; NABOB Comments; AHAA Comments; PPM Coalition Comments.

¹⁸ See Arbitron Comments, pp. 22-29 (Jul. 1, 2009).

¹⁹ *Id.* at 32-38.

²⁰ *Id.* at 38-58.

As for Arbitron's first argument, the Commission has the authority to conduct this proceeding and take action against Arbitron. The Comments of Media Access Project make that clear.

Arbitron's second argument is unfounded. Essentially, Arbitron argues that the Commission cannot direct radio broadcasters to temporarily cease transmitting the PPM signal because the FCC lacks specific statutory authority to do so and that PPM encoding is "content" that the FCC is forbidden to regulate.²¹

The Communications Act provides statutory authority for the Commission to regulate virtually all aspects of radio broadcasting, including regulating aspects of broadcast content. For example, without a grant of specific statutory authority, the Commission regulates: indecency in broadcasting under a legal and regulatory standard; public interest and issue-responsive programming, including requiring the preparation of quarterly "issues/programs" lists by radio and television stations for their public inspection files; requiring television licensees to broadcast extensive consumer education announcements and notifications during the last years of the DTV transition; and requiring television licensees to broadcast Program and System Information Protocol ("PSIP") data within their broadcast signals, and to do so under specific technical standards. According to Arbitron, the FCC has no lawful basis to require any of these obligations and broadcasters should stop obeying FCC orders concerning them.

PSIP is especially relevant. PSIP is the stream of data that television stations include in their signals so that receivers, such as cable boxes, can associate station signals to designated channel numbers and provide program information to viewers. PSIP is comparable to the inaudible encoding inserted into radio broadcasts that PPM depends upon to identify stations.

²¹ *Id.* at 15-17.

The Commission requires that television licensees participate in the PSIP system and adhere to PSIP standards.²² In the same vein, the Commission may control PPM encoding.

Indeed, there is substantial precedent that the PPM encoding signal is not "content," and thus not speech, subject to any Constitutional protections. For purposes of determining radio license validity, the Commission has held that actual programming must be broadcast in order satisfy the tolling requirement under Section 312(g) of the Communications Act. So-called "dead carrier," or transmissions that are not intended to be received by the public, will not toll automatic revocation under Section 312(g), are not considered programming, and would expose a licensee to automatic license revocation for failure to broadcast.²³ As Arbitron states, PPM encoding is inaudible.²⁴ Therefore, under the Communications Act, PPM encoding is not programming, content or speech, and enjoys none of the protections Arbitron alleges are afforded to "content." It can be regulated by the FCC.

Arbitron attempts to point to isolated instances of radio stations which "target" minority programming as possible examples of stations which have not suffered due to the switch to PPM.²⁵ Those examples lack any credibility. First and foremost, the Commission has heard from numerous broadcasters which do more than "target" minority audiences; they are, in fact, minorities. The evidence from actual minority broadcasters is dispositive.

²² 47 C.F.R. § 73.682(d).

²³ See *ETC Communications, Inc.*, 24 FCC Rcd 3021 (2009); see also *A-O Broadcasting Corporation*, 23, FCC Rcd 603, 609 (2008), citing *Carlos J. Lastra, Trustee*, 16 FCC Rcd 17268 (2001), *aff'd sub nom. Per curiam, Aerco Broadcasting Corp. v. FCC*, 51 Fed. Appx. 23 (D.C. Cir. 2002) (automatic expiration pursuant to Section 312(g) not prevented by transmission of a television test pattern).

²⁴ Arbitron Comments, p. 15.

²⁵ *Id.* at 32-38.

Also troubling is that Arbitron points out ratings improvements after the deployment of PPM.²⁶ In those limited instances, as Arbitron states: "...after those stations had made changes to their programming and promotions practices – but not to their basic music and entertainment formats – they recovered and even improved upon their former rankings..."²⁷ In other words, radio stations have to change their practices in order to survive under PPM. PPM drives programming choices; for example, the Hispanic station forced to a rock format.²⁸ As ICBC pointed out, the switch to PPM has serious First Amendment implications.²⁹

That there have been, and continue to be, severe problems with the PPM system is beyond question. The evidence in this proceeding demonstrates that fact, as do the investigations by four Attorneys General, Arbitron's own admissions, Congressional hearings and Members' request to GAO for a thorough audit of PPM. Arbitron suggests that the deployment of PPM should not be delayed because radio needs electronic measurement to be competitive with other media.³⁰ However, radio will not be competitive with a flawed electronic system. And, importantly, Arbitron candidly admits that it had considered an electronic measurement system for 16 years.³¹ In the span of 16 years, numerous technological marvels have been born, for example: HDTV (and the DTV transition), HD radio, the iPod and iPhone, MySpace, Facebook, and many more; but not an effective electronic system for radio ratings. As a monopoly, Arbitron is solely responsible for the problems of PPM and its unconscionable refusal to address these problems, despite having 16 years to develop and test an electronic measurement system.

²⁶ *Id.*

²⁷ *Id.* at 32-33.

²⁸ *Inside Radio, supra*, p. 4.

²⁹ ICBC Comments, p. 2.

³⁰ Arbitron Comments, p. 28.

³¹ *Id.* at 20.

There is virtually uniform agreement that Arbitron must greatly expand the scope of audience survey, in part by including address-based participant sampling and significantly increasing the number of minority and cell phone only listeners. Those factors are part of what even Arbitron admits must be accomplished under its "continuous improvement program" and litigation settlements.³² However, the pace of improvements has been entirely too slow. Why? Arbitron profits. The improvements in sampling that minority broadcasters need to survive, and Arbitron resists and delays, are more expensive for Arbitron. This proceeding has been caused by Arbitron's intransigent unwillingness to correct a misguided PPM system because improved surveys would be marginally more expensive.

III. Conclusion and Request for Relief.

Arbitron used its monopoly position in the provision of ratings services to the radio industry to rush to market with a flawed product designed not to measure "engagement," which is the essence of the audience/advertiser relationship, but rather, "exposure;" *i.e.* whatever radio signal is picked up, even passively.³³ Essentially, Arbitron has devised a metric designed to remove any "targeted" focus in advertising in favor of a general market approach, which is exactly how the results have played-out and why they have had such devastating effects upon minority focused and minority owned radio. With the market power of a monopolist, Arbitron forced its subscribers to accept, at an inflated cost, a flawed design which was incapable of producing accurate audience measurement, particularly for minority demographics. Wherever PPM has been introduced, minority radio listenership has been undercounted, and thus, misrepresented. The effects on the revenues of minority broadcasters has threatened the

³² Arbitron Comments, p. 26.

³³ As other Commenters have pointed out, PPM often fails to measure listening. The device will "record" a radio signal even if disregarded background, for example in a store or lobby, but fails to record actual listening through ear buds. Comments of Taxi Productions, Inc., p. 3.

continued existence of minority ownership.³⁴ Heritage formats have been abandoned, jobs have been lost, all attributable to Arbitron's insistence upon introducing a product that was not ready for market.

Against this backdrop, and based upon the record in this proceeding, ICBC asks the Commission to direct Arbitron: **(1)** to delay further deployment of PPM, or implementation of PPM as "currency," until Arbitron has both completed the improvements it has promised to make (in response to actions by three Attorneys General) and, most importantly, received MRC accreditation in each market in which it chooses to deploy PPM; and **(2)** in those markets where PPM has been declared "currency" already, to withdraw PPM or simultaneously offer PPM and diary system measurements. Continued use of diaries is industry standard. Nielson Media routinely uses a combination of electronic and diary measurement for television ratings.³⁵ Urgent action is needed because in many markets where it is "currency" PPM continues to misrepresent minority radio listenership levels due to its inadequate sampling measures and other well-documented shortcomings that have led to a lack of MRC accreditation.

The Commission must balance the desire of Arbitron to maximize its monopoly profits against the ability of minority radio to survive. The forms of relief requested here, while temporarily less profitable to Arbitron, would be best for the radio industry in general and minority radio in particular. They represent a reasonable middle ground approach.

If Arbitron chooses to flout the Commission's authority to promote the public interest in a diverse and vibrant radio industry by rejecting these careful and modest actions, then the

³⁴ On July 29, 2009 *Inside Radio* reported: "Estimates are minorities make up a third of America's population, but Hofstra University researchers find the radio industry's diversity is on the decline. Recent layoffs contributed to radio's minority workforce level to drop to 9% this year. Minorities made up nearly 15% of radio employees pre-consolidation."

³⁵ See <http://www.nielsenmedia.com/nc/portal/site/Public/menuitem.55dc65b4a7d5adff3f65936147a062a0/?vgnnextoid=096047f8b5264010VgnVCM100000880a260aRCRD>.

Commission should direct that all radio stations cease encoding the inaudible PPM signal. ICBC hopes that Arbitron will cooperate with the Commission so that such an action is unnecessary.

Respectfully submitted,

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