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Albert R. Wynn
Washington Office

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

THE CHAIRMAN

March 30, 2005

The Honorable Albert Wynn
United States House of Representatives
Washington, D.C. 20515-2004

Dear Representative Wynn:

I am responding to your letter concerning Nielsen Media Research's new system for measuring television viewing in local markets, the Local People Meter system ("LPM"). You expressed concern that Nielsen Media Research ("Nielsen") is introducing this system into local markets despite problems with accuracy and without accreditation from the industry self-regulatory body, the Media Ratings Council ("MRC").[1]

The FTC staff met with the MRC and representatives of the Don't Count Us Out Coalition and Fox Television Stations, Inc., as well as representatives of Nielsen, and has reviewed a range of materials concerning LPMs. The staff has learned that Nielsen has voluntarily submitted its LPM systems to the MRC for audit, and extensive audits have been and are being conducted on the MRC's behalf by Ernst & Young. Both Nielsen and the MRC agree that the people-meter approach to audience measurement is appropriate and, indeed, capable of being more reliable than the systems it would replace. An accredited national people meter system has been in place for some time. The audits have demonstrated problems with LPM implementation, and Nielsen has not challenged the legitimacy of the audit results through the available MRC appeals process. To the contrary, it has been working with the MRC to correct the problems and attain accreditation.[2]

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[1] As you know, the MRC was established by the industry in the 1960s in response to congressional concerns with the reliability of media ratings. Its members include customers of Nielsen and others concerned with broadcast ratings, including broadcasters, cablecasters, advertisers, advertising agencies, and industry trade associations.

[2] In addition, Nielsen has agreed to implement many of the recommendations contained in a recent report by the Independent Task Force on Television Measurement. News Release, Nielsen to Implement Recommendations of Independent Task Force on Television Measurement (Mar. 23, 2005), *available at* http://www.everyonecounts.tv/news/0323_taskforcereport.htm. The report's recommendations included improvements in the composition of the LPM samples, training for the field force, and fault rates. INDEPENDENT TASK FORCE ON TELEVISION MEASUREMENT, REPORT OF THE INDEPENDENT TASK FORCE ON TELEVISION MEASUREMENT (2005), *available at*

The MRC and Nielsen both recognize that there are significant challenges in implementing an LPM system. Also, various parties may disagree about whether Nielsen has acted with an appropriate level of effort and speed in addressing problems with the LPM system implementation. Nonetheless, it appears to the Commission that the existing self-regulatory approach is having a significant effect in attaining both extensive transparency and greater reliability in media ratings. In many circumstances well-constructed industry self-regulatory efforts can be more prompt, flexible, and effective than government regulation.[3]

The staff's discussions with the MRC and others and the materials staff has reviewed do not show that Nielsen has engaged in deceptive or unfair practices in violation of the FTC Act, such as misrepresenting its ratings system or failing to disclose material facts about the system.[4] An act or practice is deceptive under Section 5 of the FTC Act if: 1) if there is a representation or omission of information that is likely to mislead the consumer acting reasonably under the circumstances; and 2) if that representation or omission is "material" – defined as an act or practice likely to affect the consumer's choice of or conduct regarding a product or service.[5] When the Commission considers whether a representation or sales practice is misleading, it determines reasonableness from the perspective of the target audience.[6] Therefore, the Commission's determination of both the claims that reasonable consumers take from an advertisement and the extent to which a misrepresentation or omission of information is injurious to consumers are fact-specific questions dependent on the context in which the claims are

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http://www.everyonecounts.tv/news/documents/taskforcereport.pdf. Problems with these factors can have disproportionate effects on certain communities.

[3] See, e.g., Federal Trade Commission Report, Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries 3 (2000); Federal Trade Commission Report to Congress, Self-Regulation in the Alcohol Industry 3 (1999).

[4] Section 5 of the FTC Act prohibits unfair or deceptive practices that are in or affecting commerce. A practice is unfair under Section 5 if it causes, or is likely to cause, substantial injury to consumers which is not reasonably avoidable and is not outweighed by countervailing benefits to consumers or competition. 15 U.S.C. § 45(n). Section 5 also prohibits unfair methods of competition which include exclusionary monopoly practices, collusion, and anticompetitive mergers. Staff's discussions and the material presented do not evidence such anticompetitive activity. If Nielsen should attempt to obtain or maintain monopoly power through anticompetitive mergers or other unfair methods of competition, Section 5 and the Clayton Act, 15 U.S.C. §§ 12-27, are sufficient to allow the Commission to halt such practices.

[5] Deception Policy Statement, appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 175, 182 (1984).

[6] Id. at 179.

conveyed, the nature of the audience for the claims, and the materiality of the representation to the target audience.

The audience for Nielsen's statements about its rating services consists largely of media companies, many of which are highly sophisticated and capable of evaluating the information Nielsen provides. Nielsen frequently has expressed its opinion of the LPM system's accuracy, particularly in comparison with alternative systems, but Nielsen also discloses in detail the methodology and shortcomings of the system. The FTC staff's discussions and review of materials submitted to us have not indicated that Nielsen has misrepresented the LPM system or failed to disclose facts material to its customers' decisions. Moreover, the MRC's audits provide a great amount of transparency to Nielsen's customers about Nielsen's methods and products. Under those circumstances, deception in violation of Section 5 of the FTC Act seems unlikely.

The Commission cannot judge whether the LPM system or alternative systems now in use – which have shortcomings as well – come closer to the actual truth of audience viewing behavior. Absent deceptive or unfair practices, it would not be within the Commission's authority to impose quality standards for accuracy in audience measurement.

Thank you for your inquiry in this matter. Please let me know if you would like any additional information.

Deborah P. Majoras

Deborah Platt Majoras
Chairman