

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

THE MCPHERSON BUILDING
901 FIFTEENTH STREET, N.W., SUITE 1100
WASHINGTON, D.C. 20005-2327

425 PARK AVENUE
NEW YORK, NY 10022-3598
(212) 836-8000

1999 AVENUE OF THE STARS
SUITE 1600
LOS ANGELES, CA 90067-6048
(310) 788-1000

(202) 682-3500

FACSIMILE
(202) 682-3580

18TH FLOOR
NINE QUEEN'S ROAD CENTRAL
HONG KONG
(852) 845-8989

SCITE TOWER, SUITE 708
22 JIANGUOMENWAI DAJIE
BEIJING
PEOPLE'S REPUBLIC OF CHINA
(861) 512-4755

FACSIMILE
NEW YORK (212) 836-8689
WASHINGTON (202) 682-3580
LOS ANGELES (310) 788-1200
HONG KONG (852) 845-3682
BEIJING (852) 845-2389
(861) 512-4760

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

WRITER'S DIRECT DIAL NUMBER

(202) 682-3526
(Internet E-Mail Address
irvg@netcom.com)

July 10, 1995

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Review of the Commission's Regulations
Governing Television Broadcasting
(MM Docket Nos. 91-221 and 87-8)

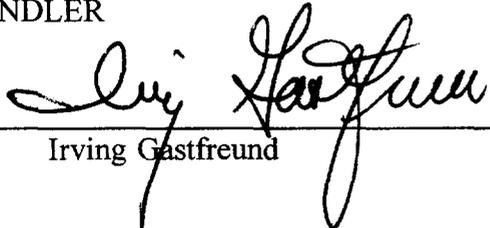
Dear Mr. Caton:

Submitted herewith for filing, on behalf of our client, Malrite Communications Group, Inc., are an original and nine copies of its Reply Comments in the above-referenced rulemaking proceeding, involving review of the Commission's regulations governing television broadcasting.

Please direct any inquiries concerning this submission to the undersigned.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS &
HANDLER

By: 
Irving Gastfreund

Enclosures

219

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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JUL 10 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Review of the Commission's)
Regulations Governing Television)
Broadcasting)
)
Television Satellite Stations)
Review of Policy and Rules)

MM Docket No. 91-221

MM Docket No. 87-8

TO: The Commission

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REPLY COMMENTS OF MALRITE COMMUNICATIONS GROUP, INC.

Jason L. Shrinsky, Esq.

Irving Gastfreund, Esq.

Kaye, Scholer, Fierman, Hays &
Handler
901 15th Street, N.W., Suite 1100
Washington, D.C. 20005
(202) 682-3526

Its Attorneys

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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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TO: The Commission

REPLY COMMENTS OF MALRITE COMMUNICATIONS GROUP, INC.

MALRITE COMMUNICATIONS GROUP, INC. ("Malrite"), by its attorneys, pursuant to Sections 1.415 and 1.419 of the Commission's Rules, hereby submits its instant Reply Comments in response to the Commission's Further Notice of Proposed Rule Making in this proceeding, __ FCC Rcd __, FCC 94-322 (released January 17, 1995) ("NPRM").¹ In support whereof, it is shown as follows:

I. Introduction

In its NPRM, the Commission solicited further comment on proposals to change its broadcast multiple ownership rules insofar as they pertain to television stations. The Commission's NPRM sought comment on possible liberalization of its local ownership rule (the "duopoly" rule), as set forth in Section 73.3555(b) of the Commission's Rules, which presently prohibits common ownership of attributable interests in two television stations

¹ By Order Granting Extension of Time For Filing Reply Comments, __ FCC Rcd __, DA 95-1373 (Mass Media Bureau released June 16, 1995), the deadline for the filing of reply comments in this proceeding was extended to and including July 10, 1995. Consequently, Malrite's instant Reply Comments are timely-filed.

whose respective Grade B contours overlap. The Commission's NPRM also solicits comments on possible changes in the "one-to-a-market" ownership rule (Section 73.3555(c) of the Commission's Rules)², and on possible revisions to the National Multiple Ownership Rule, as set forth in Section 73.3555(e) of the Commission's Rules. Furthermore, in its NPRM, the Commission requested public comment on what rules and policies, if any, to adopt with respect to television Local Marketing Agreements ("LMAs").

On May 17, 1995, Malrite filed its Comments in this proceeding in which it addressed those portions of the Commission's NPRM relating to the television duopoly rule and to the establishment of policies and rules governing LMAs. In its Comments, Malrite demonstrated that the current television duopoly rule, adopted by the Commission in 1964, fails to take into account the dramatic changes that have taken place over the past three decades in the competitive landscape in which television broadcasters operate, particularly the emergence of today's multichannel marketplace. Consequently, in its Comments, Malrite urged the Commission to modify the television duopoly rule to : (i) permit common ownership of attributable interests in two UHF television stations in the same market; and (ii) permit common ownership of attributable interests in one UHF station and one VHF station in the same television market or in two VHF television stations in the same market on a case-by-case basis, if the applicant can demonstrate that such a UHF-VHF duopoly or such a VHF-VHF duopoly will not adversely affect competition. In addition, but not as a substitute for, the foregoing, Malrite endorsed the Commission's proposal to relax the present television

² In its NPRM, the Commission refers to this rule as the Radio-Television Cross-Ownership Rule.

duopoly rule by decreasing its prohibited contour overlap from Grade B overlap to Grade A overlap, so that television stations would be deemed to be operating in the same market, for purposes of the duopoly rule, only if their respective Grade A field intensity contours overlap with one another. See NPRM, slip op. at 51, ¶116.

Furthermore, in its Comments, Malrite urged that the Commission should not adopt any rules or policies that will inhibit the use of LMAs for television. In this regard, Malrite demonstrated that TV LMAs have led to efficiencies of operations and economies of scale that have, in turn, fostered the development of more and better public service programming, and, indeed, have allowed many television stations to survive where such stations would not be able to remain viable in the absence of LMAs. In the event that the Commission decides to adopt rules and policies governing television LMAs, Malrite urged the Commission to "grandfather" LMAs entered into among two television stations in the same market before the December 15, 1994 adoption date of the NPRM in this proceeding, both during the initial term of any such agreements and during any renewal or extension terms of those agreements, irrespective of whether the television duopoly rule is modified by the Commission in this proceeding. Moreover, in its Comments, Malrite suggested that, regardless of any changes in the television duopoly rule adopted in this proceeding, the Commission should allow the contract rights associated with such existing "grandfathered" television LMAs to be transferrable when the brokering station is sold.³ Malrite's Comments demonstrated that the

³ Furthermore, Malrite urged the Commission to permit interests by the brokering station in the brokered station, under such "grandfathered" LMAs, to be converted into a full ownership interest in the brokered station, irrespective of the revisions to the television duopoly rule which may be adopted by the Commission in this proceeding.

continuation of existing LMAs under such "grandfathered" provisions will not adversely affect either competition or diversity in the local market; to the contrary, such LMAs will foster a diversity of viewpoints. For the reasons set forth below, the record in this proceeding supports relaxation and revision of the television duopoly rule and the sanctioning and grandfathering of television LMAs, as proposed by Malrite. None of the comments submitted in this proceeding contain any showings justifying retention of the duopoly rule in its present form or justifying restriction of television LMAs.

II. Argument

The overwhelming majority of parties commenting in this proceeding favor some revision and relaxation of the television duopoly rule, as well as continued use of LMAs in television, regardless of any changes in the television duopoly rule which may be adopted in this proceeding. Significantly, all of the economic studies submitted by parties in response to the Commission's NPRM support the significant relaxation of the Commission's television duopoly rule. On the other hand, the arguments raised in opposition to the relaxation or revision of the television duopoly rule were unsupported by any economic analysis or any specific factual data.

Several commenters that oppose any change in the Commission's television duopoly rules do so based on conclusory statements that maintenance of the present duopoly rules will promote diversity. See, e.g., Comments of National Association of Black Owned Broadcasters ("NABOB"); Comments of Black Citizens For a Fair Media et al. Yet, those comments do not include any economic analysis or any analysis of the competitive effects of any proposed changes to the rules. Rather, those Comments favor maintaining the

Commission's existing rules based solely on the assumption that any relaxation in the duopoly rule and any official sanctioning of LMAs will necessarily result in decreased diversity of viewpoints. However, these comments ignore the dramatic changes that have occurred in the video marketplace over the last several years. Malrite's Comments in this proceeding fully demonstrate that the video marketplace today is marked by a multitude of competing media voices, thereby assuring continued diversity, regardless of any changes in the Commission's multiple ownership rules affecting television.

Black Citizens For A Fair Media et al. go so far as to suggest that the Commission must reject any proposal to set local ownership limits based on a minimum number of independent media voices; this far-reaching argument is based on the claim that the First Amendment goal of viewpoint diversity cannot be attained by setting a minimum number of independent voices that provides sufficient diversity. Comments of Black Citizens For a Fair Media et al. at 34. These comments simply ignore the substantial record that has been developed that demonstrates that diversity will be enhanced and not harmed by modification of the television duopoly rule. Malrite's Comments clearly demonstrated that:

1. All television stations face robust competition from a multitude of operators of video programming, including significant competition from operators of multichannel video delivery systems;
2. UHF television stations continue to be competitively disadvantaged vis-a-vis VHF television stations;
3. Liberalization of the television duopoly rule, as proposed by Malrite, will not harm competition in television local markets;

4. Liberalization of the television duopoly rule will promote greater viability for television stations in light of economies of scale; and
5. Liberalization of the television duopoly rule will, in fact, foster diversity.

Furthermore, Malrite provided dramatic evidence, based on its own experience with a television LMA in the Cleveland market, that television LMAs do enhance competitiveness and diversity in local television markets and that continuation of such LMAs will not harm competition or diversity. As CBS, Inc., has stated in its Comments in this proceeding;

"Where an intellectual market would be genuinely diverse without government intervention, it is inappropriate for the government to impose ownership rules or other structural limitations in the name of achieving some still-higher, 'optimal' level of diversity."

CBS, Inc. Comments, at 23.

As the economic analyses and data submitted by the parties in this proceeding demonstrate, the Commission's current television duopoly rule restricts and prevents combinations and acquisitions that pose little or no anticompetitive concerns or concerns regarding lack of diversity. Adequate safeguards exist under antitrust laws to assure that any relaxation of the Commission's television duopoly rule will not adversely impact on competition.

While the majority of the parties commenting in this proceeding agreed with Malrite that television LMAs served the public interest and should be permitted to continue regardless of any changes made in the television duopoly rule in this proceeding, nonetheless, certain commenters suggest that the Commission should restrict the use of LMAs in the television industry. For example, the Television Operators Caucus opposes television LMAs "... since in all material economic ways they function as de facto waivers of the duopoly rules."

Television Operators Caucus Comments at 3. Similarly, Post-Newsweek Stations, Inc., suggests that, at present, there are no Commission rules regulating television LMAs. Id. at 8.

These comments unfortunately ignore the substantial body of case law which has been established by the Commission (albeit in the context of ad hoc adjudication involving radio LMAs) that approves of the use of LMAs and provides a concrete regulatory framework for them. That precedent reaffirms that the licensee of the brokered station must always maintain control over its facilities, including control over programming, personnel and finances. See e.g., Letter to Roy R. Russo, 5 FCC Rcd 7586 (Mass Media Bureau 1990); Letter to Joseph A. Belisle, 5 FCC Rcd 7585 (Mass Media Bureau 1990); Letter to J. Dominic Monahan, 6 FCC Rcd 1867 (Mass Media Bureau 1991); Letter to Brian M. Madden, 6 FCC Rcd 1871 (Mass Media Bureau 1991); Letter to Peter D. O'Connell, 6 FCC Rcd 1869 (Mass Media Bureau 1991). All of these staff rulings were specifically endorsed and cited approvingly by the Commission in Revision of Radio Rules And Policies, 6 FCC Rcd 3275, 3281-83 (1991).

In short, it is simply not the case that the Commission has left a vacuum in which LMAs are subject to absolutely no ground rules. In Revision of Radio Rules And Policies, supra, the Commission expressly stated as follows with respect to LMAs:

"The Commission has previously determined that issues of joint advertising sales should be left to antitrust enforcement, [Second Report and Order in MM Docket No. 83-842, FCC 86-111 (March 31, 1986), 51 Fed. Reg. 11914 (April 8, 1986)], and has specifically amended its 'cross-interest' policy to exempt time brokerage arrangements from its coverage [Policy Statement in MM Docket No. 87-154, 4 FCC Rcd 2208, 2214 (1989)], provided that licensees maintain control over station operations [footnote omitted] and otherwise comply with the Commission's rules and policies, the agreements do not violate the law."

Id. at 3282.

These principles, which are based on well-established law, are equally applicable to television LMAs. There is simply no basis whatsoever for the unfounded speculations by certain of the commenting parties that television LMAs are subject to no ground rules and constitute essentially waivers of existing Commission multiple ownership rules.

It should be noted, in this regard, that, on June 15, 1995, the United States Senate overwhelmingly passed a bill (S.652 (1995)) amending the Communications Act; the legislation passed the Senate by a vote of 81-18. That bill contains the following language, in which the Senate specifically sanctions the continued use of LMAs by television stations:

"LOCAL MARKETING AGREEMENT. Nothing in this Act shall be construed to prohibit the continuation or renewal of any television local marketing agreement that is in effect on the date of enactment of this Act and that is in compliance with the Commission's regulations."

The Commission should be guided by this overwhelming expression of support by the U.S. Senate for television LMAs, particularly in support of the grandfathering of existing LMAs, in establishing the Commission's rules and policies in this proceeding.⁴

⁴ It should also be noted, in this regard, that the companion telecommunications reform bill (H.R. 1555 (1995)) presently pending before the U.S. House of Representatives contains language that specifically prohibits the Commission from prohibiting any person or entity from directly or indirectly owning, operating or controlling, or having a cognizable interest in, two television stations within the same television market if at least one of those stations is a UHF television station, unless the Commission were to determine that such ownership of multiple television stations in the same market in a given instance will harm competition or harm the preservation of a diversity of voices in the particular market in question. In addition, the House bill authorizes the Commission to permit the common ownership of two VHF television stations in the same television market if the Commission determines that permitting such common ownership will not harm competition or the preservation of a diversity of voices in the television market in question. Thus, the House bill would specifically sanction UHF-UHF combinations, and, a fortiori television LMAs.

III. Conclusion

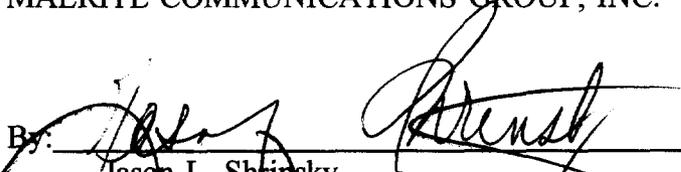
As shown by Malrite in its Comments in this proceeding, relaxation of the television duopoly rule as proposed by Malrite and the grandfathering of television LMAs is critical to the future of free over-the-air television broadcasting, particularly to the continuing survival of UHF television licensees. The Commission has a unique opportunity in this proceeding to restructure the multiple ownership rules applicable to television stations so as to provide greater flexibility for television licensees to meet the challenges posed by operating in today's highly competitive multichannel programming environment.

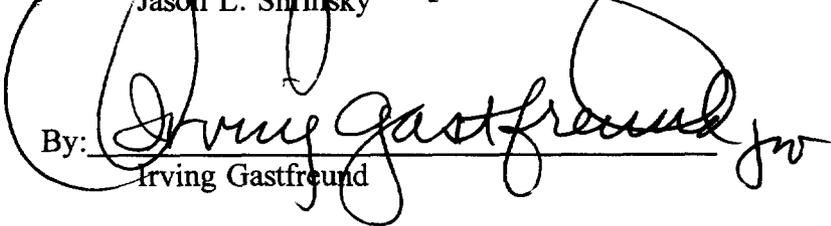
For the reasons set forth in Malrite's Comments and hereinabove, the Commission should liberalize the current television duopoly rule to permit UHF-UHF duopolies within the same market. The Commission should also permit common ownership of either (i) a UHF television and a VHF station in the same market, or (ii) two VHF television stations in the same market on a case-by-case basis, where the applicant can demonstrate that such a UHF-VHF duopoly or such a VHF-VHF duopoly will not harm competition. In addition, but not as a substitute for, the foregoing, Malrite endorses the Commission's proposal to relax the present television duopoly rule by decreasing its prohibited contour overlap from Grade B to Grade A, so that television stations would be deemed to be operating in the same market, for purposes of the duopoly rule, only if their respective Grade A contours overlap with one another.

In addition, for the reasons set forth in Malrite's Comments, the Commission should adopt guidelines that grandfather existing television LMAs so as to permit their continuation, including all extensions and renewals, and should also permit transferability of contract rights under existing LMAs. As shown by Malrite in its Comments, substantial public interest benefits can be achieved through the use of television LMAs.

Respectfully submitted,

MALRITE COMMUNICATIONS GROUP, INC.

By: 
Jason L. Shrinky

By: 
Irving Gastfreund

Kaye, Scholer, Fierman, Hays &
Handler
901 15th Street, N.W., Suite 1100
Washington, D.C. 20005
(202) 682-3526

Its Attorneys

July 10, 1995

CERTIFICATE OF SERVICE

I, Mary Odder, a secretary in the law firm of Kaye, Scholer, Fierman, Hays & Handler, do hereby certify on this 10th day of July, 1995, caused copies of the foregoing Reply Comments Of Malrite Communications Group, Inc., to be mail, via first-class U.S. mail, postage prepaid, to the following:

Angela J. Campbell, Esq.
Ilene R. Penn, Esq.
Citizens Communications Center Project
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Suite 312
Washington, D.C. 20001

Andrew Jay Schwartzman, Esq.
Gigi Sohn, Esq.
Media Access Project
2000 M Street, N.W.
Washington, D.C. 20036

Robert E. Branson, Esq.
Vice President and Chief Legal Counsel
Post-Newsweek Stations, Inc.
3 Constitution Plaza
Hartford, Connecticut 06103

Darrin N. Sacks, Esq.
Rubin, Winston, Diercks, Harris & Cooke
1333 New Hampshire Avenue, N.W.
10th Floor
Washington, D.C. 20036

Mary Jo Manning, Esq.
Television Operators Caucus, Inc.
901 31st Street, N.W.
Washington, D.C. 20007



Mary Odder