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

Re: MM Docket No. 91-221
MM Docket No. 87-7

Dear Mr. Caton:

On behalf of Malrite Communications Group, Inc., there is transmitted herewith and filed an original and nine (9) copies of its "Reply Comments" in response to the Commission's Second Further Notice of Proposed Rulemaking in the above-referenced dockets.

Should there be any questions concerning this matter, kindly communicate directly with the undersigned.

Very truly yours,

KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER, LLP

By: Bruce A. Eisen
Bruce A. Eisen

Enclosure

Doc #12145524.DC

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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In the Matter of	)	
	)	
Review of the Commission's Regulations	)	
Governing Television Broadcasting	)	MM Docket No. 91-221
	)	
Television Satellite Stations	)	
Review of Policy and Rules	)	MM Docket No. 87-7

TO: The Commission

REPLY COMMENTS OF
MALRITE COMMUNICATIONS GROUP, INC.
IN RESPONSE TO SECOND FURTHER NOTICE
OF PROPOSED RULEMAKING

Bruce A. Eisen, Esq.
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March 21, 1997

Doc #12145524.DC

Index

SUMMARY

Malrite Communications Group, Inc. ("Malrite") has reviewed comments file in response to the Commission's rulemaking proceeding which had proposed, inter alia, changes in the local television ownership rule and the manner in which television local marketing agreements should be regulated in the future. The comments are overwhelmingly in support of a relaxation of the rules. However, a few commenters urged contrasting points to which Malrite now replies. In particular, Malrite herein submits further data regarding the benefits, both direct and indirect, which have resulted to the Cleveland, Ohio television market as a result of the time brokerage agreement between the licensees of Stations WOIO-TV and WUAB-TV.

Although most of the comments filed in this proceeding favor the relaxation of local ownership rules, several commenters have nevertheless submitted positions that do not adequately address the benefits that result from certain duopolies and LMAs. Malrite herein demonstrates through its specific Cleveland, Ohio experience, that these benefits are manifest, and that they can be expected to apply to other communities throughout the country. Of particular importance, are the net gains to the public that arise from a multitude of new services which might not exist in the absence of properly implemented duopolies and LMAs.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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	)	
Television Satellite Stations	)	
Review of Policy and Rules	)	MM Docket No. 87-7

TO: The Commission

REPLY COMMENTS OF MALRITE COMMUNICATIONS GROUP, INC.

Malrite Communications Group, Inc. ("Malrite"), by its attorneys, hereby submits its reply to certain comments filed in response to the Commission's Second Further Notice of Proposed Rulemaking, FCC 896-438, released November 7, 1996 ("Second Further Notice"). Therein, the Commission proposed a number of changes in extant policies, including the local television ownership rule and the manner in which television local marketing agreements would be regulated in the future. In support thereof, the following is shown:

BACKGROUND

1. Malrite's February 7, 1997 comments acknowledged the Commission's opportunity to alter the television industry's

ownership structure in such a way that both the public interest and the industry, itself, would be significantly advanced.

2. Malrite suggested that the Commission liberalize its television duopoly rule to allow UHF/UHF combinations within the same television market because such action would partially neutralize the continued disadvantage of UHF television stations at the hands of their VHF counterparts. We also asked the Commission to allow waivers upon showings that ownership of a UHF television station and a VHF television station in the same market would likely preserve an otherwise failing UHF station, and we further urged the Commission to consider the Commonwealth of Puerto Rico, along with Hawaii and Alaska, as a special case where VHF/VHF television duopolies should be allowed because of the unique terrain problems that severely limit television signals in those markets. With regard to television LMAs, Malrite showed why such relationships must be grandfathered and subject to renewal and transfer without Commission intervention, as directed by Congress and reflected within the legislative history of the Telecommunications Act of 1996.

3. A review of the comments filed by other parties in this proceeding reveals overwhelming support for the relaxation of the duopoly rule. Several commenters nevertheless have offered

contrasting positions which cannot be left unchallenged. For instance, the Media Access Project has urged the Commission to exclude media other than broadcast television from analyzing questions of duopoly. It and ABC have suggested that television is no longer subject to a substantial UHF handicap and that waivers of the duopoly rules as well as the duration of television LMAs should be significantly curtailed.

LOCAL TELEVISION OWNERSHIP AND TELEVISION LMAs

4. Malrite believes that these commenters have not adequately considered real world experience. While our response to the Second Further Notice comments included statistical information to demonstrate that the UHF disadvantage still plagued the industry, it is instructive to review Malrite's own Cleveland-based experience and to thereby better understand the practical forces in that city which justify regulatory change.

5. In our comments, we referenced Malrite's time brokerage agreement with Station WUAB-TV, and we alluded to the staff gains that had been made in news/public affairs so that the operation reflected a significant increase in full-time employees. Our data showed that the largest staff increase occurred in the full-time news staff, thus revealing the strength of two UHF television stations which were able to provide greatly enhanced

news and public affairs programs. These important gains, however, are not the only reasons to encourage the continuation of such relationships through LMAs and/or UHF television duopolies.

6. The direct result of the combined production resources of Stations WOIO-TV and WUAB-TV has been to allow Malrite to bring to the city of Cleveland a children's program entitled "Planet Cleveland". It is produced as a monthly one-half hour and visits places of local interest, i.e., museums, businesses, parks, etc. The program seeks to educate first, and entertain second, and its success is entirely due to the strength of the combined WOIO/WUAB production facilities as well as the economic stability of the broadcast operation that makes the show possible. The series began in May, 1996 and has aired monthly without fail since. Shows have included:

Month	**Place of Interest**	**Topic**
May '96	Sea World of Ohio	Marine Life
June '96	Cleveland Metropark Zoo	Zoo Animals
July '96	Great Lakes Science Center	Science
August '96	NCB Youth Triathlon	Youth Fitness
Sept '96	Library, Jacob's Field	Reading
Oct '96	Lake Farmpark	A Farm
Nov '96	Inventure Place (Akron)	Science
Dec '96	Local Fire Station	Fire Safety

Jan '97	Cleveland Metropark Zoo	The Rainforest
Feb '97	Pierre's Ice Cream	How Ice Cream is made
March '97	Chagrin Valley Arts Center	How Pottery is made

7. Planet Cleveland counts towards the commitment to educational children's programming, but it is important to note that Malrite would fulfill its requirements even in the absence of the show. It is extremely expensive to produce and does not make a profit. Nevertheless, Malrite produces Planet Cleveland because it consists of truly meaningful programming directed to the children in our market. The program would not have succeeded in the absence of consolidation.

8. A second positive result of the WOIO/WUAB time brokerage agreement reflects from the combined resources of the news department, program department and production department to produce a number of successful, local specials. Examples of these specials include:

Date	**Program**	**Description**
7/4/95	Freedom Festival	Live 4th of July Fireworks Celebration
7/21/95	1995 Grand Prix Parade	Sameday coverage of a major downtown Cleveland parade

8/28- 8/31/95	Rock On Cleveland	Weeklong special previewing the opening of the Rock 'n Roll Hall of Fame & Museum in Cleveland
9/1/95	Rock On Coverage	Live one hour coverage of the opening of the Rock Hall
10/1/95	The Fan-Tastic Tribe	Half hour special highlighting the celebration of Cleveland's first pennant winner in 40 years
10/20/95	Rally on the Square	Half hour life coverage of Cleveland's celebration of their World Series appearance
12/31/95	Fanfare for Cleveland: A Bicentennial	One hour, ten minute special featuring exclusive live coverage of Cleveland's New Year's Eve celebration to kick off their 200th birthday as a city
3/28/96	Romona's Kids Special	Half hour primetime program hosted by anchor Romona Robinson featuring extra-ordinary stories about Cleveland area children
9/3/96	Building Blocks to Healthier Kids	Half hour special featuring Medical Reporter Dr. Rose Gabrielle focusing on medical issues that involve children
11/4/96	Election Coverage	Both stations geared up with comprehensive, competitive election coverage

11/27/96	In Your Face with Ronnie Duncan	Half hour special with Sports Anchor Ronnie Duncan, featuring one-on-one exclusive interviews with notable local sports personalities
To be aired 3/29/97	Jazzed Up: The Tri-C (Cleveland Community College) Jazz Festival	Half hour local jazz special hosted by Malrite's Mike Olszewski, and featuring local jazz musicians

9. Malrite believes that absent the WOIO/WUAB time brokerage agreement, few, if any, of the specials noted above might have been produced. Plain and simply, a start-up news operation is an extremely difficult and expensive investment for any television broadcaster to make. Indeed, in the Cleveland market, we believe that since 1949, no licensee has launched a local news of equal size and scope until Malrite was able to combine the operations of WOIO-TV and WUAB-TV. The combining of forces allowed Malrite to purchase remote vehicles to cover increased amounts of local, live news and to employ investigative staff reporters. The difference between the newscasts before and after the time brokerage agreement is of great consequence. Prior to the time brokerage agreement, WUAB-TV's once-a-day newscast generally tracked news gathered by other broadcast facilities. That is no longer the case, and the extent of the

newscasts now aired on both WOIO-TV and WUAB-TV is set forth in our comments, p. 18, fn. 11. Indeed, given the VHF market competition from national media empires such as Scripps Howard, Newscorp and Gannett, the quality and breadth of newscasts that are now provided by Malrite, an independent, small, local owner, is remarkable. Needless to say, this would not have been the case absent the economies which are derived from the time brokerage. It is likely that the 10:00 P.M. newscasts aired on WUAB-TV would have been deleted without the relationship. Thus, it is reasonable to conclude that the time brokerage has actually brought a new voice to the market.

10. Apart from programming considerations, there are advantages that accrue to the community, itself, as a result of the relationship between the two licensees. The time brokerage agreement has surely added to the revitalization of downtown Cleveland. Before the relationship was implemented, WUAB-TV and WOIO-TV were headquartered at relatively obscure suburban locations, and each licensee operated with only modestly equipped facilities. As a result of the time brokerage agreement, the stations were able to relocate, upgrade their equipment, and to contribute to the growth of a vibrant, downtown Cleveland. The high visibility site, which never would have been chosen but for

the existence of the time brokerage agreement, is convenient to greater Cleveland. A storefront studio has been constructed which looks out on a busy downtown street. It is totally dedicated to producing local public affairs programming! Our ability to bring forward many different "voices" to the people of the Cleveland market is directly attributable to the enhanced competition that derives from the relationship between the two licensees. Moreover, the operating expense savings that results from the time brokerage agreement can be used to shore-up programming as never before.

11. This information is not intended to "blow Malrite's horn". Even without the time brokerage agreement, WOIO-TV would have separately met its responsibilities to the community and to the market as a Commission licensee. What is important, however, is the multitude of new services that the viewing area is now able to enjoy, and which might not have been in existence absent the time brokerage agreement. The same market benefits would accrue under the combined ownership of a UHF duopoly.

12. After reviewing several of the comments filed in response to the Second Further Notice, Malrite commissioned National Economic Research Associates (NERA) to analyze the comments and to provide further information regarding the

economic benefits that might result from the common operation of local television stations, either through duopoly or LMA. Annexed hereto is the result of NERA's analysis which shows, among other things, the manifest consumer benefits that arise from efficient combinations. These benefits include increased diversity and economic benefits to the community.

13. This matter of "diversity" is important. If, by diversity, we mean a wider choice of quality programming offered in the market, then undoubtedly duopolies and LMAs are potentially significant diversity enhancements. Other important byproducts of the WOIO/WUAB relationship amplified by the NERA study, include new jobs which, themselves, bring substantial benefits to the entire Cleveland area. Indeed, as the NERA analysis recites, the incremental $5.5 million of additional payroll added by the existing time brokerage agreement results in approximately $9.9 million in additional earnings in the Cleveland metropolitan area! It also leads to more than 200 additional jobs in the local area and, ultimately, increased household income in the region. These are not small items, and there is no reason to believe that similar effects could not be brought to other cities in much the same way that they have been brought to Cleveland.

14. The Commission must reject the Media Access Project notion that duopoly waivers should be supported by an enforceable promise regarding the public interest program benefits resulting from a grant. Malrite's Cleveland experience shows that its time brokerage agreement could have as effectively enhanced the public interest if the subject stations were owned in common. The improved WOIO/WUAB programming service utterly diminishes Media Access Project's content argument. Over the years, the Commission has loosened its hold on the regulation of broadcast programming; consequently, Media Access Project's proposal would reverse years of legitimate content deregulation and thereby place the Commission in the unwanted and unnecessary role of censor. Malrite's real world experience demonstrates the overarching benefits to the public that have been achieved without unnecessary Commission intervention. Our experience is not unique. Duopolies and LMAs will stabilize the television industry and allow independent programming decisions to further the public interest as never before.

15. Media Access Project urges the Commission to accept an extremely myopic view in analyzing diversity. It contends that such analysis must implicate only full service broadcast television stations, but this transcends reason, and must be

rejected. Over the years, the Commission has identified many media alternatives which have significantly increased the prospect of competition for information and entertainment and which are largely derived from emerging technologies. See, e.g., Annual Assessment of the Status of Competition on the Market for the Delivery of Video Programming, CS Docket No. 95-61, 11 FCC Rcd 2060 (1995). Notwithstanding several of the comments filed, the growth of content-oriented technologies clearly reduces the prospect of a concentration of control that would be inimical to the public interest. The universe of information choices which have become available demonstrates that all significant media in a particular market must be considered before it can be determined whether or not a particular transaction carries with it the potential to stifle a diversity of ideas.[1]

16. Any given market includes a substantial amount of competition which is often classified as "market power". One

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[1] A reasonable roster of media which offsets the potential for concentration of control consists of: cable television, multi-point distribution service, UHF and VHF television, AM and FM radio, direct broadcast satellites, newspapers, magazines, low power television, video cassette and video disc players, computer services (including Internet and computer-generated media products, web pages and on-line services), direct mail, telephone yellow pages, outdoor advertising, motion picture advertisements on the actual screen).

measure of market power can be realized by simply counting the number of independent outlets available in a given geographic area. In this way, one can perceive which media services are substitutes for conventional broadcast outlets as well as the geographic scope of the relevant market. A very small number of outlets may be sufficient to neutralize an ownership problem.

17. It is a Commission mandate to encourage the widest possible range of media ideas to serve the public and to therefore provide a broad choice of informational outlets. See, e.g., United States v. Storer Broadcasting Co., 351 US 192 (1956); 99 US App. D.C. 369, 240 F.2d 55 (1956). If a particular media source has the potential to reach a consumer, it should be considered a diversity enhancing source of information and/or entertainment. To fail to consider the full latitude of the media listed, supra, is to reject both present forces and the advance of technology into the twenty-first century.

18. Some commenters have failed to pinpoint the position of local consumers. For instance, a cable system adds much more diversity than does a single television station. A cable system is strictly the distribution means by which much programming is ultimately presented. Thus, counting a cable system in the same manner as a television station makes no sense and underestimates

the likelihood of diverse ideas getting through to the public. From the point of view of competition in the advertising market, the greater capacity of a cable system vis-a-vis a television station is important. Much the same can now be said for DBS and even for computer services such as the Internet. A narrowly-argued definition of "market" which would exclude alternative media grossly neglects actual competition. If all television channels, all newspapers, all radio stations, and all cable systems and their program products, constitute independent voices, and if allowance is made for the availability of other media, then it is likely that only the smallest markets will be deemed non-competitive as a result of certain acquisitions or relationships between licensees. Restrictions on ownership should therefore apply only to those markets reasonably shown to be insufficiently competitive.

19. The proliferation of media, both electronic and otherwise, diminishes the once vital concept of spectrum scarcity as a standard of concentration of control. The various media set forth, supra, all have currency in our marketplaces, and a number of those media do not depend upon available spectrum. This latter category furthers competition and surely negates the

objectionable concentration of control that has, in the past, restricted broadcast transactions.

20. No matter what media market we may work in, we are confronted with an almost dizzying array of sources from which we can gain both entertainment and information. Any scrutiny of diversification and the affect of duopolies and LMAs upon the market, must take into consideration the full panoply of media, including all those identified in this reply. To narrowly construe market forces, as does Media Access Project, is to badly underestimate the proliferation of ideas that now exist and which are transmitted through various media.

21. Some commenters, in particular, the Media Access Project, argue that duopoly waivers might be justified only in situations of "extreme circumstances" that involve a failed station. We submit that such a position is unsupportable. If, as Media Access Project contends, duopoly waivers could only be sought after a station has been dark for a year, the process would devolve into "black" or "white" and deprive the Commission of the ability to literally save a station that was in difficulty, but not yet technically "failed".

22. It makes no sense, whatsoever, to insist that a station be dark for a period of one year before a prospective buyer could seek a duopoly waiver. Not only would a year off-the-air risk the loss of a license and the need to open up the frequency to competing applications, but no good reason exists to delay the rescue of a station in the process of failing. A contrary rationale would force stations to enter possibly years of decline before the economies of scale that result from duopolies could resuscitate the facility. In its prior comments, Malrite urged the Commission to allow UHF/UHF television duopolies without waiver, a matter which we believe is reasonable because of the continued UHF television disadvantage. But even if it were ultimately determined that a waiver were necessary in all duopoly circumstances, it would be harsh indeed to insist, as does the Media Access Project, upon the total loss of community service as the basis for a waiver request. What about the existing jobs that would be lost and the harmful result to the community? Similarly, it makes little sense to reserve failed station duopoly waivers for particular segments of the population. For instance, minorities and females still find it difficult to raise

the kind of capital necessary to purchase broadcast facilities, even failed ones. It seems particularly mean spirited to strap such parties with stations that may already have two strikes against them, and it is well established that it is extremely difficult to obtain financing for failed stations. Surely, there are other ways to increase female and minority ownership of broadcast facilities than in the manner suggested by the Media Access Project.

CONCLUSION

23. The opposing commenters have not persuasively argued that duopolies and LMAs should be restricted, nor have they diminished the validity of Malrite's initial comments. Duopoly and/or LMA combinations reduce costs that allow additional monies to manifestly increase the variety of programming available to viewers in the market. Modifications to the duopoly rule are badly needed because of the changing nature of the competitive

marketplace and the continued disadvantage that UHF telecasters face. Malrite urges the Commission to adopt the points raised in its comments to the Second Further Notice.

Respectfully submitted,

MALRITE COMMUNICATIONS GROUP, INC.

By: ______________________
Bruce A. Eisen
Its Attorney

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March 21, 1997

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To: Bruce A. Eisen, Esq., Kaye Scholer Fierman Hays & Handler, LLP

From: P. Beutel, H. Kitt

Re: Federal Communications Commission, Second Notice of Proposed Rule Making, MM Docket No. 91-221

Date: March 20, 1997

I. ASSIGNMENT

NERA was retained by counsel to Malrite Communications Group, Inc. ("Malrite") to provide certain economic analyses in connection with the Reply phase of the Federal Communications Commission's ("FCC" or "Commission") *Second Further Notice of Proposed Rule Making* ("Second Notice").[1] Specifically, we were asked to provide an assessment of the economic benefits that can result from allowing common ownership of — or local management agreements ("LMAs") between — local television stations.

We understand that a number of parties have filed comments in connection with the Second Notice. As we understand it, several have argued against the creation of what the FCC defines as "duopolies" (which, of course, differs from its use in economics) or relaxing the current duopoly and LMA regulations. While we have not had the opportunity to review all of these comments, we understand that those filed by Post-Newsweek and the Media Access Project, et al. are two such examples.[2] In its filed comments, Post-Newsweek alleges, among

[1] *In the Matter of Review of the Commission's Regulations Governing Television Broadcasting, Second Further Notice of Proposed Rule Making*, Federal Communications Commission, FCC 96-438, MM Docket No. 91-221, Adopted November 5, 1996, Released November 7, 1996.

[2] *Comments of Post-Newsweek Stations, Inc.*, February 7, 1997. Comments of Media Access Project, *et al.*, February 7, 1997.

other things: "Diversity of voices in local markets declines when stations that otherwise would be independently managed are controlled by other stations that likely exist in the very same market. The public interest suffers when there are fewer voices in local markets." (p. 6) Similarly, MAP alleges: "Authorization of local TV duopolies would be a severe blow to the public's right to receive information. There is no indication that the profitability of … combinations will in any way redound to the benefit of viewers." (p. iii) As we discuss below, we believe these arguments to be incorrect.

II. THE FCC'S COMPETITION AND DIVERSITY OBJECTIVES

The FCC's mandate with respect to broadcast television has been to promote the public interest. Historically, it has pursued this goal by promulgating regulations that are intended to promote both diversity and competition. In pursuing the first, the FCC traditionally has focused on, among other things, outlet diversity, by assuming that an increase or decrease in the number of separately owned outlets would result in a corresponding change in the range of viewpoints transmitted over the airwaves.

With respect to the latter, the Commission's objective is relatively straightforward. Competition, as a general matter, promotes consumer welfare and the efficient use of resources: Consequently, the FCC has a policy of encouraging competition among broadcast television stations and, as well, among competing sellers of (local and national video) advertising time and competing video program producers and distributors.

III. POTENTIAL BENEFITS

Other things equal, consumers benefit from combinations that tend to increase the efficiency of the partners' operations — *e.g.*, through the realization of economies of scale, scope or specialization, or the ability of the combined firm to offer products or services that otherwise would not be made available. The same principles apply to common ownership of — or LMAs between — local television stations: The benefits that can result from such combinations typically fall into three broad, overlapping categories: (1) increased diversity; (2) economic benefits to the community; and (3) realization of economic efficiencies. As we