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March 16, 1998

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BY HAND

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Ex Parte Presentation
Mount Mansfield Television, Inc.
Second Further Notice of Proposed Rulemaking,
Review of the Commission's Regulations
Governing Television Broadcasting, Television
Satellite Stations Review of Policy and Rules,
MM Docket No. 91-221

Dear Ms. Salas:

Pursuant to 47 C.F.R. §1.1206(b), this letter is submitted in duplicate to advise that on March 16, 1998, the undersigned and Mr. Peter Martin, Executive Vice President and General Manager of Mount Mansfield Television, Inc., licensee of WCAX-TV, Burlington, Vermont, met with Commissioner Furchgott-Roth and Helgi Walker of his office, in connection with the above-referenced proceeding. The enclosed memorandum was given to meeting attendees, and the topics in that memorandum were discussed.

Any questions regarding this matter should be directed to the undersigned.

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Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, PLC

By _____
Tillman L. Lay
Counsel for Mount Mansfield Television, Inc.

Enclosure

cc: Commissioner Harold Furchgott-Roth
Helgi Walker, Esq.

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MOUNT MANSFIELD TELEVISION, INC:

MARKET DEFINITION, LMA ATTRIBUTION AND SATELLITE WAIVER ISSUES PRESENTED BY THE SECOND FNPRM IN MM DKT. 91-221

I. The Burlington, Vt./Plattsburgh, N.Y. Market.

A. The Burlington/Plattsburgh DMA is ranked 91st with 292,870 TV households. (Source: 1997 Television and Cable Factbook.)

B. There are only five commercial TV stations licensed to the Burlington/Plattsburgh DMA:

1. WCAX-TV (3) (Burlington) (CBS)

2. WVNY (22) (Burlington) (ABC)

3. WPTZ (5) (North Pole, N.Y.) (NBC)

4. WNNE (31) (Hartford, Vt.) (NBC)

5. WFFF (44) (Burlington) (Fox)

C. Three out of five of these stations -- WPTZ, WNNE and WFFF -- are currently owned or managed by the same entity (first Heritage, now Sinclair, soon STC, thereafter Hearst/Argyle).

1. WNNE is a satellite of WPTZ and has been since 1990.

2. Since 8/3/95, WFFF is party to an LMA with the owner of WPTZ (originally Heritage, but LMA was assigned to Sinclair along with WPTZ, will soon be assigned to STC and then operated by Hearst/Argyle under an arrangement with STC). Under the LMA the owner of WPTZ is given the right to program "substantially all" of WFFF's air time.[1]

D. This "triopoly" gives Sinclair (and its successors) substantial market power in the Burlington/Plattsburgh DMA and substantially reduces diversity of programming

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[1] The WFFF LMA expires on 4/1/99, but automatically renews for two 5-year renewal terms unless the owner of WPTZ terminates on 180 days' notice before end of term or renewal term. In other words, if Sinclair or its successors wish, they have the unilateral ability to program WFFF for at least 11 more years.

sources in a market already characterized by relatively few media voices.

II. Applying the Proposals in the Second FNPRM in MM 91-221 to Smaller Markets like the Burlington/Plattsburgh DMA.

A. DMA-Based Market Definition: The Second FNPRM tentatively -- and properly -- concluded (at ¶15) that "DMAs are designed to reflect actual household viewing patterns and advertising markets -- critical ingredients for determining a station's geographic market, both for competition and diversity purposes."

1. Many commenters supported this view. DOJ (at 17-18), for instance, generally concludes that the various kinds of advertising media (TV, radio, print) are not good substitutes for one another, and thus each is a separate relevant product market.

- The Second FNPRM's "alternative" proposal (at ¶26) to allow common ownership within a DMA where there is no Grade B overlap makes no sense. If, as the Second FNPRM concludes, the DMA is the best geographic market definition, allowing common ownership within a DMA simply because there is no Grade B overlap serves only to decrease competition and diversity in the relevant market. The "alternative" thus ignores marketplace reality, particularly considering the effects of cable carriage, which typically is based on DMA (or DMA-like) factors, not Grade B contours. To the extent that the alternative proposal is intended to deal with the "few" existing intra-DMA combinations that would be prohibited by a shift to the DMA test, that issue should be considered (if at all) only in the grandfathering context (discussed below), not as an inherently inconsistent addition to the market-based (DMA) nature of the substantive rule.

2. Ironically, Sinclair (2/7/97 Comments at 11) took the position that the duopoly rule could be modified to allow a single operator to own up to 50% of the stations in a DMA, as long as only one of the stations is a VHF station. Sinclair referred to "larger DMA's" as those with more than 6 stations, so Burlington/Plattsburgh would seem to be a smaller DMA under its logic.

- If the WPTZ/WFFF LMA is attributed (as we believe it clearly should be (see below)), the WPTZ/WNNE/WFFF combination would fail even Sinclair's own liberal 50% test.

- Moreover, Sinclair's 50% test is far too liberal in smaller DMAs like Burlington/Plattsburgh. Allowing one entity to own or (through an LMA) manage 2 out of 4 (or 3 out of 5) stations in one DMA, including 2 of the 4 major network stations, would substantially reduce competition and diversity in precisely those markets that can least afford it: DMAs that, because of their small size, will always be afflicted with less competition and diversity even if a strict "one-to-a-DMA" rule were followed.

B. <u>The FCC Should Prohibit or Sharply Restrict Grandfathering of Existing Combinations Not Complying with DMA-Based Rule.</u>

1. The <u>Second FNPRM</u> (at ¶28) seeks comment on whether existing combinations complying with the current Grade B test but not complying with the proposed DMA/Grade A test should be grandfathered and, if so, whether the grandfather should be limited and non-transferrable.

2. Any grandfathering would be inconsistent with the <u>Second FNPRM</u>'s recognition (at ¶12) that DMAs are a "more appropriate measure" of the relevant geographic market for competition and diversity purposes. By definition, this means that any grandfathering will necessarily involve a sacrifice of competition and diversity. Thus, the <u>only</u> justification for grandfathering is to avoid upsetting any legitimate expectation interests of existing owners whose combinations comply with current rules but would fail the proposed DMA/Grade A test.

3. No party has a legitimate expectation -- at least not in perpetuity -- that FCC rules will remain unchanged. To accept any contrary proposition would be tantamount to accepting the untenable notion that parties, through private contracts, may unilaterally limit or circumscribe the FCC's authority under the Act.

4. Moreover, given the Second FNPRM's (proper) finding that DMAs are the best proxy of the relevant geographic market, any existing intra-DMA combinations allowed by the current Grade B rule inherently pose a significant risk to the interests of competition and diversity, and thus merit case-by-case Commission scrutiny. Since rational firms, if unconstrained by any legal prohibition, will combine not only when efficiencies occur but also where market power can be realized and maximized, it follows that some (if not most) existing intra-DMA, non-Grade B combinations may have been motivated (at least in part) by the prospect of enhancing market power.

5. Thus, the FCC either should not allow grandfathering or, at most, restrict the grandfather to a reasonable term (say, 3 years) and prohibit the transfer or assignment of the grandfather, including any pending or contemplated transfers (such as that for WPTZ/WNNE/WFFF). Given the outstanding Second FNPRM, no party can plausibly claim any legitimate expectation interest in any transfer or assignment of an existing combination that has either occurred, or been agreed to or contemplated since 11/96.

C. The FCC Should Revise Its Satellite Waiver Policy to be Consistent with the Second FNPRM Proposals.

1. The Second FNPRM (at ¶30) sought comment on whether to revise the satellite exemption to the duopoly rule but also tentatively suggested (at ¶¶35-37) that there seemed to be no reason to change the satellite exemption.

2. In fact, the Second FNPRM's proposal to adopt a DMA/Grade A test, together with the rationale underlying some of the FCC's recent satellite exemption decisions (like Heritage Media Services, FCC 98-6 (rel. Jan. 23, 1998)), demonstrate the need to revise the satellite exemption policy to conform to any change in the duopoly rule.

3. The Second FNPRM suggests (at ¶37) that the existing satellite policy rests "in significant part" on a station's questionable financial viability as a standalone station. We agree. But in some cases like Heritage Media Services, the FCC has not followed that rationale, but instead based its decision on the very Grade B market definition test that it now proposes to abandon:

(a) The Heritage decision was based solely on a finding of de minimis Grade B overlap; there was no finding at all that WNNE is currently non-viable financially as a standalone station. (Indeed, given the dramatically improved condition of the Burlington/Plattsburgh economy since the initial WNNE satellite waiver was granted in 1990, there is substantial reason to believe that the local economic circumstances on which the initial waiver was based no longer apply.)

(b) Reliance on the de minimis Grade B overlap test for satellite waivers makes no sense if, as the Second FNPRM tentatively concludes, DMAs rather than Grade B overlap represent a better measure of the relevant geographic market.

(c) Further, to the extent that standalone financial viability is (as we believe it should be) the primary issue in satellite waivers, that test would seem to be at best duplicative of, and at worst potentially inconsistent with, the "failed (or failing) station" test discussed in the Second FNPRM (at ¶41).

(d) Finally, because the Second FNPRM specifically asked for comments on whether to revise the satellite waiver policy and because, as noted above the proposals in the Second FNPRM, if adopted, logically should require modification of the satellite waiver policy, satellite waivers granted in the interim like Heritage (and certainly any subsequent transfers of the WNNE satellite waiver) should be subject to any changes in the duopoly rule made in this proceeding. See Abilene Radio & Television Co., DA 98-255 (rel. Feb. 12, 1998) (request for permanent waiver of duopoly rule denied).

D. The FCC can and should attribute LMAs and sharply restrict grandfathering of LMAs, at least in smaller DMAs like Burlington/Plattsburgh.

1. As the Second FNPRM, the DOJ and several other commenters noted, failing to attribute LMAs for crossownership purposes -- at least LMAs like the WPTZ/WFFF LMA that allow programming of

"substantially all of the broadcast station's broadcast day on a daily basis" -- exalts form over substance. See, e.g., Second FNPRM at ¶82; DOJ comments at 21-22.[2]

2. Small-market LMAs pose far greater risks of loss of competition and diversity than larger market LMAs. Consequently, both in deciding whether to attribute LMAs and whether (and for how long) to grandfather any existing LMAs, the Commission should recognize that in smaller markets, competition and diversity concerns will inevitably weigh more heavily in favor of attribution and against grandfathering. This is particularly true of any LMA (like the WPTZ/WFFF LMA) entered into after the FCC's 12/15/94 TV Ownership Further Notice, 10 FCC Rcd 3524, 3583-84, released 1/17/95, which placed all parties on notice that LMAs entered into after that time might be subject to attribution.

3. The FCC should not grandfather nonattribution of any LMA entered into after January, 1995. Alternatively, if the FCC grandfathers LMAs at all, it should do so for a period of no more than 3 years from the original execution of the LMA, and it should prohibit the transfer or assignment of any grandfathered LMA.

4. The FCC clearly has authority under the 1996 Act to attribute LMAs and to limit any grandfathered nonattribution of LMAs. In addition to the arguments in the Second FNPRM and in the comments (see, e.g., Mt. Mansfield Comments at 5-6 & n.16), a careful review of §202 of the 1996 Act compels this result:

   (a) Section 202(g) must be read in context of the balance of Section 202, which it purports to clarify. Since § 202(g) says on its face

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[2] That is not to say that LMAs do not, in certain circumstances, provide important efficiency benefits. So do outright station ownership combinations. But whether a particular LMA offers offsetting efficiency benefits is a separate issue from whether an LMA does in fact reduce the number of independent voices and competitors in a market -- which it clearly does. These issues should be considered separately in each case and balanced against one another, not (as opponents of LMA attribution suggest) blurred together in a "one size fits all" national standard.

that it is referring only to the balance of §202, the first place to look to ascertain the meaning of §202(g) is in the balance of §202, not in the Conference Report.

(b) §§202 (a), (b) and (c) all loosen, but also simultaneously place limits on, common ownership or management of radio and TV stations, with such common ownership or management variously defined as "own, operate or control," and "directly or indirectly own, operate or control, or have any cognizable interest in ..."

(c) Section 202(c)(2), in particular, also refers to an FCC rulemaking that can either "retain, modify, or eliminate" the duopoly rules.

(d) Absent §202(g), these provisions -- and their references to "operate or control" and to "modify[ing]" existing duopoly rules -- might be construed as conclusively answering the LMA attribution question rather than leaving it up to the FCC. In other words, absent §202(g) these provisions might be read as compelling the FCC to conclude that LMAs do count against the new limits in §§202(a), (b) and (c), because LMAs fall within Congress' language of "operate or control."

(e) When viewed in this light, §202(g) merely serves to clarify that Congress was not purporting to require the FCC to treat LMAs as stations that are commonly "operated or controlled" and subject to the limits of §§202(a), (b) and (c).

(f) The statutory language, not only of §202(g), but of §202 as a whole, controls over any conflicting language in the Conference Report. That is particularly true where the Conference Report language purports to transform §202(g) into an affirmative grant of LMA immunity far beyond the scope of §202 -- a reading flatly at odds with the "nothing in this section" language of §202(g), which on its face clearly provides only a limiting rule of construction for the balance of §202, not an affirmative grant of anything.

III. Conclusion and Summary.

A. The FCC should adopt the DMA/Grade A test proposed in the Second FNPRM. It should not adopt the "alternative" proposal of allowing a no-Grade B-overlap exception to the DMA/Grade A test.

B. The FCC should strongly disfavor any waivers of a DMA-based duopoly rule in smaller DMAs with fewer than 6 commercial stations.

C. The FCC should not grandfather any existing intra-DMA combinations or, at most, limit grandfathering to 3 years and prohibit the transfer or assignment of any grandfather.

D. The FCC should revise its satellite exemption policy to be consistent with the Second FNPRM's proposed changes to the duopoly rule. Specifically, the de minimis Grade B overlap test should be abandoned, with all intra-DMA satellite waivers being assessed under a case-by-case public interest analysis. That analysis should be based primarily on a contemporaneous assessment of standalone financial viability each time a satellite waiver is granted, transferred or assigned.

E. LMAs -- at least those allowing the brokering station to program substantially all of the brokered stations's airtime -- should be attributable under the duopoly rules.

F. The FCC should not grandfather any LMA entered into after January, 1995. Alternatively, the FCC should grandfather LMAs for no more than 3 years after their original date of execution, and it should prohibit the transfer or assignment of any grandfathered LMA.

G. Under no circumstances should the FCC allow one entity to operate or control, through ownership or through an LMA, 3 commerical stations (including any satellite station) in a DMA with fewer than 6 commercial stations.

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