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Shared Services Arrangement Challenged By Public Interest Group

***Consolidated news operation violates
rules, according to complainant***

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Out in aloha-land, a citizen's media group has teamed up with a Georgetown University-based public interest law group to challenge an arrangement by the two licensees of three Honolulu TV stations. Under a Shared Services Agreement (SSA), the newsroom operations of the Honolulu affiliates of NBC, CBS and MyNetworkTV would be combined. According to Media Council Hawai'i, the deal would create a three-station combo in the market in violation of the Commission's multiple ownership rules. Unsurprisingly, the licensees disagree with that assessment.

We reported on SSAs generally back in the September, 2007 *Memo to Clients*. As we said there, when given the opportunity, the FCC has approved certain operational combinations in smaller television markets where the current media ownership rules wouldn't normally allow outright common ownership of the stations. Such approval normally comes only after close Commission scrutiny of the proposed arrangements and, in some cases, imposition of conditions of varying sorts.

The transactions we described typically involved sales of stations to friendly parties known as "sidecars", sales which included SSAs along with several other related agreements – in other words, situations where the SSA is an integral component of a transaction for which prior FCC approval is required. While the same technical standards apply to all SSAs whether or not they are formally presented to the FCC, many SSA situations avoid FCC scrutiny because they do not involve transactions that require prior agency approval. The Hawaii deal is such a case: the parties are not proposing that any station licenses change hands; instead, they have simply agreed to certain cooperative working relationships among their respective stations.

During the two years since our 2007 Intro to SSAs article, TV station profitability has dramatically declined. The global economic recession and increased siphoning-off of advertising revenue by new media sources have caused financial hardships at virtually

every commercial television station. Not coincidentally, there has been a recent flurry of SSA-type transactions, with reported combinations in Los Angeles, Syracuse, Peoria, El Paso and Augusta, in addition to the Hawaii station transaction. With the increased popularity of such deals, and the start of a new round of inquiries in the FCC's quadrennial review of its media ownership rules (*see* related article on Page 1), it will be interesting to see how the FCC responds to Media Council Hawai'i's complaint.

Ordinarily, the Hawaii SSA might never have popped up on anybody's regulatory radar. But that's where the Council comes in. A self-described "non-partisan, non-profit, non-governmental independent group", the Council "seeks to improve public access to information, strengthen public support for First Amendment rights and freedoms, broaden public understanding of the role of the media, and promote accurate and fair journalism in Hawaii." And it has set its sights on the proposed SSA with a 27-page complaint (accompanied by 60+ pages of exhibits).

The gist of the Council's complaint is that the SSA arrangement in Hawaii is effectively a transfer of control from one station owner to another. Since transfers of control require prior FCC approval, and the SSA parties haven't sought (much less obtained) such approval, the deal is unlawful, at least as the Council sees things. The Council also opined that operation of the three stations under the control of one company would exceed the limit under the FCC's media ownership rules in the Honolulu market, even if the parties had properly requested permission from the FCC. The Council claims that viewers in Honolulu will go from having four independent sources of local TV news to only three. Even though the combined news reporting operation of the three stations will be bigger than the prior operations at any one of the stations, all but four of the newsroom staffers were laid-off at the NBC affiliate in Hawaii.

Reportedly, the Council has also asked the US Justice Department's antitrust division to look into the matter.

The two companies that own the three Hawaii stations have formally responded (separately) to the Council's complaint, telling the FCC that their deal fully complies with the FCC's rules. Each company will remain completely responsible for the programming content broadcast on its respective station(s). Although the local news programs on one company's station will be prepared and provided by the other company's newsroom operation, this will amount to less than 15% of the total programming on the first station, which is below the threshold limit for creation of an "attributable" interest under the FCC's current media ownership rules. Moreover, the companies will be keeping separate advertising sales staffs – an uncharacteristic SSA approach. Most companies in similar SSA transactions enter into Joint Sales Agreements which result in combined sales staffs.

The two companies observe that numerous prior decisions by the FCC support their position that the Hawaii SSA does not require FCC approval and is perfectly legal. One of the companies has included (as an exhibit to its response) a redacted copy of the SSA document to prove that it contains the proper bells and whistles to meet the FCC's requirements for such contractual arrangements.

Media Council Hawai'i had requested FCC emergency action to prevent the SSA from taking effect, but the FCC didn't take action to stop the transaction before the companies combined their operations: according to local published reports, the merged newsroom operations began on Monday, October 26. Another report, however, indicates that the Commission did send a further inquiry to the licensees, asking for more information about their SSA arrangements.

Our lawyerly prediction is that, under the current ownership rules and past FCC interpretations of those rules, the Council's complaint will be dismissed by the FCC. However, as the trend toward more SSA-type arrangements continues, the FCC may try to impose more restrictions on these transactions.