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## **Cable Operators Complain of Retrans 'Arbitrage'**

### **Clauses That Boost Rates for Acquisitions, Shared Services Agreements Come Under Fire By John Eggerton -- Multichannel News, 5/28/2012 12:01:00 AM EDT**

Washington — Cable operators large and small — but particularly the smaller ones — are complaining of what they said is a growing trend: “after-acquired” clauses in retransmission-consent contracts.

The clauses deal with how those agreements apply to stations — or cable systems — that may be acquired by either an MSO or a broadcaster during the duration of the deals.

A variant of the clause, one that cable firms say is becoming more popular, gives a broadcaster the ability to potentially increase retransmission fees for any stations it acquires by bundling them into existing deals.

Smaller and midsized cable companies call the practice retransmission arbitrage to secure local-market- area or group retransmission consent deals.

#### **MARKET-POWER PLAY**

A broadcast lawyer experienced in retransmission-consent negotiations called that laughable, saying they are simply negotiable provisions that no cable operator has to agree to.

“We saw them a little bit in the last round of retransmission-consent negotiations, and then in the most recent round they proliferated,” said Chris Cinnamon, partner at Cinnamon Mueller and outside counsel to the American Cable Association, which represents smaller independent cable operators across the country.

“The way these clauses work, it is not just the case of a broadcaster’s buying another station,” he added. “It is if the station enters into a management agreement or an agreement where a broadcaster can exercise retransmission rights for another station, it is not even ownership or control. It is just a transaction for retransmission-consent rights.”

Cable operators have been pushing the Federal Communications Commission to limit such retransmission proxy negotiations, arguing they represent undue market power and are a way to skirt local TV-ownership limits.

“It is one thing when a company says, ‘OK, I am going to have the responsibility of a broadcast licensee and all that entails,’ ” Cinnamon said. “But that is not what is going on. They are just cutting a deal to charge higher retransmission consent fees and split the difference with the station.”

It’s not just smaller operators complaining about the clauses.

Mike Heimowitz, spokesman for the American Television Alliance, said he has talked to some of his members and they say it is a growing trend.

“This is just another tactic they are using to take advantage of the regulations to squeeze more money” from cable operators, he said. “They are shopping their deals to other stations and group owners so they can try to jack the price up. So, either it is done

through an acquisition or they get some kind of clause in the contract where they may not be commonly owned, but are able to leverage their power to increase rates.”

Broadcast attorney Jack Goodman said the arbitrage suggestion “does not pass the laugh test.”

“I can’t know what is in everybody’s heart when they do an LMA, but these are huge deals and represent substantial financial commitments on the part of the parties to essentially integrate two TV stations, and they are usually very long-term deals,” he said.

Goodman suggested that no one is forced to agree to the clauses, though cable operators argue that in many cases the clauses are non-negotiable, and that just as they have to pay increased fees to keep broadcasters from removing their signals, they must also agree to the after-acquired provisions.

“Nobody enters into one of these things without seeing what they are, and if somebody doesn’t want to agree to it they don’t have to,” Goodman said. “They work both ways, though. There are also provisions that say what happens if another cable operator acquires another cable system.”

### **CHAIRMAN IS WATCHING**

The FCC is paying special attention to bundled retransmission negotiations, chairman Julius Genachowski told cable operators last week at the Cable Show in Boston.

He said that while it was perfectly proper for broadcasters to be seeking compensation for their programming — cable operators would argue the government’s thumb is on the scale via the must-carry and retransmission consent regime — what was more problematic was a shared-services agreement that turns negotiation for a “permissible” duopoly into three stations negotiating together for retrans.

“That raises real issues, and it is something we are looking at closely at the FCC,” Genachowski said, to an amen from NCTA chief Michael Powell, followed by a “can I have another” call for Congress to step in.

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