

### § 76.963

### 47 CFR Ch. I (10–1–10 Edition)

from the date the Commission releases an order mandating a remedy.

(b) *Certification of compliance.* A cable operator must certify to the Commission its compliance with any Commission order mandating remedial requirements. Such certification shall:

(1) Be filed with the Commission within 90 days from the date the Commission releases an order mandating a remedy;

(2) Reference the applicable Commission order;

(3) State that the cable operator has complied fully with all provisions of the Commission's order;

(4) Include a description of the precise measures the cable operator has taken to implement the remedies ordered by the Commission; and

(5) Be signed by an authorized representative of the cable operator.

### § 76.963 Forfeiture.

(a) If any cable operator willfully fails to comply with the terms of any Commission order, including an order mandating remedial requirements after a finding of unreasonable cable programming service or equipment rates, or any Commission rule, the Commission may, in addition to other remedies, impose a forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. 503(b).

(b) A cable operator shall not be subject to forfeiture because its rate for cable programming service or equipment is determined to be unreasonable.

### § 76.970 Commercial leased access rates.

(a) Cable operators shall designate channel capacity for commercial use by persons unaffiliated with the operator in accordance with the requirement of 47 U.S.C. 532. For purposes of 47 U.S.C. 532(b)(1)(A) and (B), only those channels that must be carried pursuant to 47 U.S.C. 534 and 535 qualify as channels that are required for use by Federal law or regulation. For cable systems with 100 or fewer channels, channels that cannot be used due to technical and safety regulations of the Federal Government (e.g., aeronautical channels) shall be excluded when calculating the set-aside requirement.

(b) In determining whether an entity is an "affiliate" for purposes of commercial leased access, entities are affiliated if either entity has an attributable interest in the other or if a third party has an attributable interest in both entities.

(c) Attributable interest shall be defined by reference to the criteria set forth in Notes 1–5 to § 76.501 provided, however, that:

(1) The limited partner and LLC/LLP/RLLP insulation provisions of Note 2(f) shall not apply; and

(2) The provisions of Note 2(a) regarding five (5) percent interests shall include all voting or nonvoting stock or limited partnership equity interests of five (5) percent or more.

(d) The maximum commercial leased access rate that a cable operator may charge to programmers that predominantly transmit sales presentations or program length commercials for full-time channel placement on a tier exceeding a subscriber penetration of 50 percent is the average implicit fee for full-time channel placement on all such tier(s).

(e) The average implicit fee identified in paragraph (d) of this section for a full-time channel on a tier with a subscriber penetration over 50 percent shall be calculated by first calculating the total amount the operator receives in subscriber revenue per month for the programming on all such tier(s), and then subtracting the total amount it pays in programming costs per month for such tier(s) (the "total implicit fee calculation"). A weighting scheme that accounts for differences in the number of subscribers and channels on all such tier(s) must be used to determine how much of the total implicit fee calculation will be recovered from any particular tier. The weighting scheme is determined in two steps. First, the number of subscribers is multiplied by the number of channels (the result is the number of "subscriber-channels") on each tier with subscriber penetration over 50 percent. For instance, a tier with 10 channels and 1,000 subscribers would have a total of 10,000 subscriber-channels. Second, the subscriber-channels on each of these tiers

is divided by the total subscriber-channels on all such tiers. Given the percent of subscriber-channels for the particular tier, the implicit fee for the tier is computed by multiplying the subscriber-channel percentage for the tier by the total implicit fee calculation. Finally, to calculate the average implicit fee per channel, the implicit fee for the tier must be divided by the corresponding number of channels on the tier. The final result is the maximum rate per month that the operator may charge the leased access programmer for a full-time channel on that particular tier. The average implicit fee shall be calculated by using all channels carried on any tier exceeding 50 percent subscriber penetration (including channels devoted to affiliated programming, must-carry and public, educational and government access channels). In the event of an agreement to lease capacity on a tier with less than 50 percent penetration, the average implicit fee should be determined on the basis of subscriber revenues and programming costs for that tier alone. The license fees for affiliated channels used in determining the average implicit fee shall reflect the prevailing company prices offered in the marketplace to third parties. If a prevailing company price does not exist, the license fee for that programming shall be priced at the programmer's cost or the fair market value, whichever is lower. The average implicit fee shall be based on contracts in effect in the previous calendar year. The implicit fee for a contracted service may not include fees, stated or implied, for services other than the provision of channel capacity (e.g., billing and collection, marketing, or studio services).

(f) The maximum commercial leased access rate that a cable operator may charge for full-time channel placement as an a la carte service is the highest implicit fee on an aggregate basis for full-time channel placement as an a la carte service.

(g) The highest implicit fee on an aggregate basis for full-time channel placement as an a la carte service shall be calculated by first determining the total amount received by the operator in subscriber revenue per month for each non-leased access a la carte chan-

nel on its system (including affiliated a la carte channels) and deducting the total amount paid by the operator in programming costs (including license and copyright fees) per month for programming on such individual channels. This calculation will result in implicit fees determined on an aggregate basis, and the highest of these implicit fees shall be the maximum rate per month that the operator may charge the leased access programmer for placement as a full-time a la carte channel. The license fees for affiliated channels used in determining the highest implicit fee shall reflect the prevailing company prices offered in the marketplace to third parties. If a prevailing company price does not exist, the license fee for that programming shall be priced at the programmer's cost or the fair market value, whichever is lower. The highest implicit fee shall be based on contracts in effect in the previous calendar year. The implicit fee for a contracted service may not include fees, stated or implied, for services other than the provision of channel capacity (e.g., billing and collection, marketing, or studio services). Any subscriber revenue received by a cable operator for an a la carte leased access service shall be passed through to the leased access programmer.

(h) The maximum commercial leased access rate that a cable operator may charge for part-time channel placement shall be determined by either prorating the maximum full-time rate uniformly, or by developing a schedule of and applying different rates for different times of the day, provided that the total of the rates for a 24-hour period does not exceed the maximum daily leased access rate.

(i) The maximum commercial leased access rate that a cable operator may charge for full-time channel placement, except to programmers that predominantly transmit sales presentations or program length commercials, is the lower of the marginal implicit fee for a full-time channel placement on the tier where the leased access programming will be placed or \$0.10 per subscriber per month.

(j)(1)(i) The marginal implicit fee identified in paragraph (i) of this section for a full-time channel shall be

calculated by first determining the mark-up of the tier where the leased access programming will be placed. The mark-up is calculated by determining the total amount the operator receives in subscriber revenue per month for the tier, and dividing by the total amount it pays in affiliation fees for the channels located on the tier. The resulting figure is the mark-up. In cases where the cost and channels of one tier are implicitly incorporated into a larger tier, the larger tier price is equal to the larger tier price minus the smaller tier price and the channels on the larger tier are those that are not available on the smaller tier.

(ii) The monthly gross subscriber revenue per channel is obtained by multiplying the monthly per subscriber affiliation fee for each channel by the mark-up for the tier. The net subscriber revenue per channel per month for each channel is the difference between the monthly gross subscriber revenue per channel and the monthly per subscriber affiliation fee paid for that channel by the cable operator. This value represents the implicit fee for the individual channel.

(iii) To determine the marginal channels on the tier for systems with 55 or more activated channels, multiply the number of non-mandated channels on the tier by 0.15 and round to the nearest number. To determine the marginal channels on the tier for systems with 54 or less activated channels, multiply the number of non-mandated channels on the tier by 0.10 and round to the nearest number. That is the number of marginal channels. Next identify the channels with the lowest implicit fee until that number is reached. These are the marginal channels.

(iv) Finally, calculate the marginal implicit fee by taking the mean of the implicit fees of the marginal channels by summing the implicit fees of the marginal channels and dividing by the number of marginal channels. The result is the marginal implicit fee.

(2) The affiliation fees for channels used in determining the marginal implicit fee are the contractual license fee or retransmission consent fee representing the compensation per subscriber per month paid to the programmer for the right to carry the pro-

gramming. It excludes fees for services other than the provision of channel capacity, such as marketing, and excludes revenues. The affiliation fees for channels used in determining the marginal implicit fee shall reflect the prevailing affiliation fees offered in the marketplace to third parties. If a prevailing affiliation fee does not exist, the affiliation fee for that programming shall be priced at the programmer's cost or the fair market value, whichever is lower. The marginal implicit fee calculation shall be based on affiliation fees in contracts in effect in the previous calendar year. The implicit fee for a contracted service may not include fees, stated or implied, for services other than the provision of channel capacity (e.g., billing and collection, marketing, or studio services).

(3) Operators shall maintain, for Commission inspection, sufficient supporting documentation to justify the scheduled rates, including supporting contracts, calculations of the implicit fees, and justifications for all adjustments.

(4) Cable operators are permitted to negotiate rates below the maximum permitted rates.

[73 FR 10690, Feb. 28, 2008]

EFFECTIVE DATE NOTE: At 73 FR 10890, Feb. 28, 2008, § 76.970 was revised. Paragraph (j)(3) of this section contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

**§ 76.971 Commercial leased access terms and conditions.**

(a)(1) Cable operators shall place leased access programmers that request access to a tier actually used by most subscribers on any tier that has a subscriber penetration of more than 50 percent, unless there are technical or other compelling reasons for denying access to such tiers.

(2) Cable operators shall be permitted to make reasonable selections when placing leased access channels at specific channel locations. The Commission will evaluate disputes involving channel placement on a case-by-case basis and will consider any evidence that an operator has acted unreasonably in this regard.