

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 programming. It excludes fees for services other than the provision of channel capacity, such as marketing, and ex-

cludes 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.

(3) On systems with available leased access capacity sufficient to satisfy

current leased access demand, cable operators shall be required to accommodate as expeditiously as possible all leased access requests for programming that is not obscene or indecent. On systems with insufficient available leased access capacity to satisfy current leased access demand, cable operators shall be permitted to select from among leased access programmers using objective, content-neutral criteria.

(4) Cable operators that have not satisfied their statutory leased access requirements shall accommodate part-time leased access requests as set forth in this paragraph. Cable operators shall not be required to accept leases for less than one half-hour of programming. Cable operators may accommodate part-time leased access requests by opening additional channels for part-time use or providing comparable time slots on channels currently carrying leased or non-leased access programming. The comparability of time slots shall be determined by objective factors such as day of the week, time of day, and audience share. A cable operator that is unable to provide a comparable time slot to accommodate a part-time programming request shall be required to open an additional channel for part-time use unless such operator has at least one channel designated for part-time leased access use that is programmed with less than 18 hours of part-time leased access programming every day. However, regardless of the availability of partially programmed part-time leased access channels, a cable operator shall be required to open an additional channel to accommodate any request for part-time leased access for at least eight contiguous hours, for the same time period every day, for at least a year. Once an operator has opened a vacant channel to accommodate such a request, our other leased access rules apply. If, however, the operator has accommodated such a request on a channel already carrying an existing full-time non-leased access programmer, the operator does not have to accommodate other part-time requests of less than eight hours on that channel until all other existing part-time leased access chan-

nels are substantially filled with leased access programming.

(b) Cable operators may not apply programming production standards to leased access that are any higher than those applied to public, educational and governmental access channels.

(c) Cable operators are required to provide unaffiliated leased access users the minimal level of technical support necessary for users to present their material on the air, and may not unreasonably refuse to cooperate with a leased access user in order to prevent that user from obtaining channel capacity. Leased access users must reimburse operators for the reasonable cost of any technical support actually provided by the operator that is beyond that provided for non-leased access programmers on the system. A cable operator may charge leased access programmers for the use of technical equipment that is provided at no charge for public, educational and governmental access programming, provided that the operator's franchise agreement requires it to provide the equipment and does not preclude such use, and the equipment is not being used for any other non-leased access programming. Cable operators that are required to purchase technical equipment in order to accommodate a leased access programmer shall have the option of either requiring the leased access programmer to pay the full purchase price of the equipment, or purchasing the equipment and leasing it to the leased access programmer at a reasonable rate. Leased access programmers that are required to pay the full purchase price of additional equipment shall have all rights of ownership associated with the equipment under applicable state and local law.

(d) Cable operators may require reasonable security deposits or other assurances from users who are unable to prepay in full for access to leased commercial channels. Cable operators may impose reasonable insurance requirements on leased access programmers. Cable operators shall bear the burden of proof in establishing reasonableness.

(e) Cable operators may not set terms and conditions for commercial leased access use based on content, *except*:

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(1) To the limited extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person; or

(2) To comply with 47 U.S.C. 532 (h), (j) and § 76.701.

(f)(1) A cable operator shall provide billing and collection services for commercial leased access cable programmers, unless the operator demonstrates the existence of third party billing and collection services which in terms of cost and accessibility, offer leased access programmers an alternative substantially equivalent to that offered to comparable non-leased access programmers.

(2) If an operator can make the showing required in paragraph (f)(1) of this section, it must, to the extent technically feasible make available data necessary to enable a third party to bill and collect for the leased access user.

(g) Cable operators shall not unreasonably limit the length of leased access contracts. The termination provisions of leased access contracts shall be commercially reasonable and may not allow operators to terminate leased access contracts without a reasonable basis.

(h) Cable operators may not prohibit the resale of leased access capacity to persons unaffiliated with the operator, but may provide in their leased access contracts that any sublessees will be subject to the non-price terms and conditions that apply to the initial lessee, and that, if the capacity is resold, the rate for the capacity shall be the maximum permissible rate.

[58 FR 29753, May 21, 1993, as amended at 61 FR 16401, Apr. 15, 1996; 62 FR 11381, Mar. 12, 1997]

§ 76.972 Customer service standards.

(a)(1) A cable system operator shall maintain a contact name, telephone number and e-mail address on its Web site and available by telephone of a designated person to respond to requests for information about leased access channels.

(2) A cable system operator shall maintain a brief explanation of the leased access statute and regulations on its Web site.

(b) Cable system operators shall provide prospective leased access programmers with the following information within three business days of the date on which a request for leased access information is made:

(1) The cable system operator's process for requesting leased access channels;

(2) The geographic and subscriber levels of service that are technically possible;

(3) The number and location and time periods available for each leased access channel;

(4) Whether the leased access channel is currently being occupied;

(5) A complete schedule of the operator's statutory maximum full-time and part-time leased access rates;

(6) A comprehensive schedule showing how those rates were calculated;

(7) Rates associated with technical and studio costs;

(8) Whether inclusion in an electronic programming guide is available;

(9) The available methods of programming delivery and the instructions, technical requirements and costs for each method;

(10) A comprehensive sample leased access contract that includes uniform terms and conditions such as tier and channel placement, contract terms and conditions, insurance requirements, length of contract, termination provisions and electronic guide availability; and

(11) Information regarding prospective launch dates for the leased access programmer.

(c) A bona fide proposal, as used in this section, is defined as a proposal from a potential leased access programmer that includes the following information:

(1) The desired length of a contract term;

(2) The tier, channel and time slot desired;

(3) The anticipated commencement date for carriage;

(4) The nature of the programming;

(5) The geographic and subscriber level of service requested; and

(6) Proposed changes to the sample contract.

(d) All requests for leased access must be made in writing and must