

Motion Picture and Video Tape Production (SIC 7812),⁴¹⁴ and Theatrical Producers (Except Motion Pictures) and Miscellaneous Theatrical Services (SIC 7922).⁴¹⁵ These SBA definitions provide that a small entity in the cable television programming industry is an entity with \$21.5 million or less in annual receipts for SIC 7812, and \$5 million or less in annual receipts for SIC 7922.⁴¹⁶ Census Bureau data indicate the following: (a) there were 7,265 firms in the United States classified as Motion Picture and Video Production (SIC 7812), and that 6,987 of these firms had \$16.999 million or less in annual receipts and 7,002 of these firms had \$24.999 million or less in annual receipts;⁴¹⁷ and (b) there were 5,671 firms in the United States classified as Theatrical Producers and Services (SIC 7922), and that 5,627 of these firms had \$4.999 million or less in annual receipts.⁴¹⁸

152. Each of these SIC categories is very broad and includes firms that may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms exclusively produce and/or distribute programming for cable television or how many are independently owned and operated. Thus, we estimate that our rules may affect approximately 6,987 small entities that produce and distribute taped cable television programs and 5,627 small producers of live programs. In addition, as of May 31, 1996, there were 1,880 LPTV stations that may also be affected by our rules.⁴¹⁹

D. Reporting, Recordkeeping, and Other Compliance Requirements. This section specifies the reporting, recordkeeping and other related requirements of the regulations adopted, amended, modified, or clarified in this *Order*.

⁴¹⁴"Establishments primarily engaged in the production of theatrical and nontheatrical motion pictures and video tapes for exhibition or sale, including educational, industrial, and religious films. Included in the industry are establishments engaged in both production and distribution. Producers of live radio and television programs are classified in Industry 7922." *Standard Industrial Classification Manual, SIC 7812, Executive Office of the President, Office of Management and Budget (1987) (OMB SIC Manual)*.

⁴¹⁵"Establishments primarily engaged in providing live theatrical presentations, such as road companies and summer theaters. . . . Also included in this industry are producers of . . . live television programs." *OMB SIC Manual, SIC 7922*.

⁴¹⁶13 C.F.R. § 121.201.

⁴¹⁷U.S. Small Business Administration 1992 Economic Census Industry and Enterprise Report, Table 2D, SIC 7812, (U.S. Bureau of the Census data adapted by the Office of Advocacy of the U.S. Small Business Administration) ("SBA 1992 Census Report"). Because the Census data do not include a category for \$21.5 million, we have reported the closest increment below and above the \$21.5 million threshold. There is a difference of 15 firms between the \$16,999 and \$24,999 million annual receipt categories. It is possible that these 15 firms could have annual receipts of \$21.5 million or less and would therefore be classified as small businesses.

⁴¹⁸SBA 1992 Census Report, SIC 7922.

⁴¹⁹FCC News Release, *Broadcast Station Totals as of May 31, 1996*, Mimeo No. 63298 (released June 6, 1996). Given the nature of LPTV stations, we will presume that all LPTVs qualify as small entities.

153. *Maximum Rate Calculations:* Operators of cable systems subject to leased access requirements must calculate their maximum leased access rates in accordance with the rate formulas we have established herein. We do not believe that operators will need additional professional skills to perform these calculations.

154. *Accountant Reports:* A final accountant report that is completed as a result of a dispute concerning an operator's rate calculations must be filed in the operator's local public file.

155. *Provision of Initial Leased Access Information:* Within 15 calendar days of a leased access request, cable operators are required to provide the following types of information: (a) a complete schedule of the operator's full-time and part-time leased access rates, (b) how much of the cable operator's leased access set-aside capacity is available, (c) rates associated with technical and studio costs, and (d) if specifically requested, a sample leased access contract. An exception is provided for operators of systems entitled to small system relief, which are allowed 30 calendar days to provide the required information. In addition, these operators are not required to respond to a leased access request if the programmer does not provide the following information: (a) desired length of contract term, (b) time slot desired, (c) anticipated commencement date for carriage, and (d) the nature of the programming.

156. *Requirements for Leased Access Requests:* Leased access requests must be made in writing and must specify the date the request was sent to the operator.

E. Significant Alternatives and Steps Taken to Minimize the Significant Economic Impact on a Substantial Number of Small Entities Consistent with the Stated Objectives. This section analyzes the impact on small entities of the regulations adopted, amended, modified, or clarified in this *Order*.

157. *Information Collection Issues.* We are allowing operators of systems entitled to small system relief to respond to leased access requests within 30 calendar days, instead of the 15 calendar days required of other operators. In addition, we are not requiring these operators to respond to leased access requests unless the programmer provides the following information: (a) desired length of contract term, (b) time slot desired, (c) anticipated commencement date for carriage, and (d) the nature of the programming. These modifications to the Commission's rules should mitigate any disproportionate burdens that responding to a leased access request may create for small system operators.

158. *Rate Issues.* We do not believe that either full-time or part-time rates under our maximum rate formula will impose disproportionate burdens on small system operators. When calculated for a particular cable system, both the average implicit fee (for tiered services) and the highest implicit fee (for a la carte services) represent what current non-leased access programmers are implicitly paying for carriage on that system. Because the maximum rates under an implicit fee formula are tailored to each individual system, we disagree with SCBA that small system

operators should be allowed to charge market prices.⁴²⁰ For the following reasons, we also disagree with SCBA's various other proposals to modify the maximum rate formula for small systems.

(a) *Transaction Costs.* We do not agree with SCBA that small system operators should be allowed to include in their rates an additional sum of at least \$1,000 as compensation for transaction costs imposed by leased access because, as discussed in Section II.B.2.c., we believe that the recovery that operators may gain from subscriber revenue for leased access programming will sufficiently offset any additional transaction costs.⁴²¹

(b) *Technical Costs.* We decline to adopt modified rules for small system operators regarding the recovery of technical costs associated with leased access.⁴²² We believe that the rules described in Section II.K. will not disproportionately impact small system operators because the rules enable them to recover technical costs that are specific to leasing.

(c) *Transition Period.* SCBA argues that the Commission should phase in leased access obligations for small cable systems in order to minimize the displacement of existing programming services.⁴²³ We disagree. In light of our adoption of the average implicit fee methodology and our accommodations of the special needs of small systems, we believe that a transition period is unnecessary.

(d) *Advance Channel Designations.* SCBA argues that the Commission should not require small system operators to publicly file a list of their designated leased access channels.⁴²⁴ The Commission is not adopting such a requirement for any cable systems.

159. *Dispute Resolution Procedures.* To account for their more limited resources, we are allowing operators of systems entitled to small system relief 14 business days to select an independent accountant when an operator and a leased access programmer fail to agree on a mutually acceptable accountant to review the operator's rate calculations in the case of a dispute.

⁴²⁰SCBA Comments at 21-22. Since we are adopting an implicit fee formula, we do not need to address SCBA's argument that the proposed cost/market rate formula should allow small system operators to recover all operating costs reflected on FCC Form 1230, instead of using subscriber revenue as a surrogate for such costs. *Id.* at 19-20.

⁴²¹*Id.* at 9-13.

⁴²²*Id.* at 14-15, 18-19.

⁴²³*Id.* at 22-26.

⁴²⁴*Id.* at 32.

The general rule is that the parties must each select an independent accountant on the sixth business day if they cannot agree on a mutually acceptable accountant within five business days of the programmer's request for a review.

160. *Impact on Cable Programmers.* Leased access may impact existing programmers to the extent that operators displace them in order to accommodate leased access requests. However, we believe that displacement of existing programmers is inherent in Section 612(b)(4), which provides that a cable operator may no longer use unused leased access capacity once a written agreement is obtained by a leased access programmer.⁴²⁵ In addition, since it is within an operator's discretion to select which non-leased access programmers to carry (aside from must-carry and PEG access channels), our rules do not create a disproportionate impact on small non-leased access programmers. With respect to small leased access programmers, we believe that the impact of our revised rules generally will be positive, particularly since our rules will result in lower maximum rates for tiered services, permit resale, grant access to highly penetrated tiers, and require part-time rates to be prorated without a surcharge. Although permissible costs for insurance policies, technical equipment, and accountant reviews of rate calculations may impose a burden on small leased access programmers, we believe that such impacts are the normal costs of being a leased access programmer, and that no modifications are warranted.

F. Report to Congress

161. The Commission shall send a copy of this Final Regulatory Flexibility Analysis, along with this *Order*, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this FRFA will also be published in the Federal Register.

VI. PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

162. The requirements adopted in this *Order* have been analyzed with respect to the Paperwork Reduction Act of 1995 (the "1995 Act") and found to impose new or modified information collection requirements on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget ("OMB") as prescribed by the 1995 Act. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and OMB to comment on the information collections contained in this *Order* as required by the 1995 Act.⁴²⁶ OMB comments are due 60 days from date of publication of this *Order* in the Federal Register. Comments should address: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (2) the accuracy of the Commission's burden estimates; (3) ways to enhance the quality, utility, and

⁴²⁵Communications Act § 612(b)(4), 47 U.S.C. § 532(b)(4).

⁴²⁶Pub. L. No. 104-13.

clarity of information collected; and (4) ways to minimize the burden of collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

163. Written comments by the public on the proposed and/or modified information collections are due on or before 30 days after publication of this *Order* in the Federal Register. Written comments must be submitted by OMB on the proposed and/or modified information collections on or before 60 days after publication of this Order in the Federal Register. A copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236, NEOB, 725-17th Street, N.W., Washington, D.C. 20502 or via the Internet to fain_t@al.eop.gov For additional information concerning the information collections contained herein contact Dorothy Conway at 202-418-0217, or via the Internet at dconway@fcc.gov.

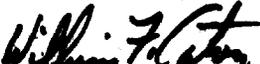
VII. ORDERING CLAUSES

164. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Sections 4(i), 4(j), and 612 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 532, the Petitions for Reconsideration in CS Docket No. 96-60 are GRANTED IN PART and DENIED IN PART, as provided herein.

165. IT IS FURTHER ORDERED that, pursuant to the authority granted in Sections 4(i), 4(j), and 612 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 532, Part 76 of the Commission's rules IS HEREBY AMENDED as shown in Appendix D. The amendments set forth in Appendix D shall become effective 30 days after publication in the Federal Register, except those that impose information collection requirements shall become effective upon approval by the Office of Management and Budget, but no sooner than 30 days after publication in the Federal Register.

166. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 *et seq.* (1981).

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

APPENDIX A**Comments:**

A&E Television Networks, The Courtroom Television Network, NBC Cable, Ovation
("A&E, et al.")
Access Television Network ("Access TV")
Adelphia Communications Corp., Century Communications Corp., Falcon Holding Group,
L.P., Insight Communications, Inc., Lenfest Communications, Inc. ("Adelphia, et al.")
Adirondack Television Corporation ("Adirondack")
Ambassadors for Christ Institute
Asiavision, Inc. ("Asiavision")
Association of America's Public Television Stations and the Public Broadcasting Service
("Assn. of Public TV/PBS")
BCB Broadcasting, Inc. ("BCB Broadcasting")
Beach TV Properties, Inc. ("Beach TV")
Blab Television Network, Inc. ("Blab TV")
Broadcasting Systems, Inc. ("Broadcasting Systems")
Bruno Goodworth Network, Inc. d/b/a WBGH-TV ("WBGH-TV")
Buckeye Cablevision, Inc. ("Buckeye")
Car TV Productions, Inc. ("Car TV")
Center for Media Education, Alliance for Community Media, Association of Independent
Video and Filmmakers, Consumer Federation of America, National Association of
Artists' Organizations, United States Catholic Conference ("CME, et al.")
Comcast Cable Communications, Inc. ("Comcast")
Community Broadcasters Association ("CBA")
Continental Cablevision, Inc. ("Continental")
Cox Communications, Inc. ("Cox")
Daniels Communications, Inc., Greater Media, Inc., Helicon Corporation, Marcus Cable
Partners, L.P., Prime Cable, Scripps Howard Cable Company, TCA Cable TV, Inc.,
Texas Cable and Telecommunications Association, Allen's TV Cable Service, Inc.,
Halcyon Communications Partners, James Cable Partners, L.P., Moffat
Communications Limited ("Daniels, et al.")
The Honorable Lincoln Diaz-Balart, U.S. House of Representatives
Discovery Communications, Inc. ("Discovery")
E! Entertainment Television, Inc., Television Food Network, America's Health Network,
NorthWest Cable News, The Providence Journal Company ("E!, et al.")
Encore Media Corporation ("Encore")
Erwin Scala Broadcasting Corporation ("Erwin Scala")
ESPN, Inc. ("ESPN")
Eternal Word Television Network ("Eternal Word")
The Faith & Values Channel ("Faith & Values")
The Game Show Network, L.P. ("Game Show Network")
Hispanic Information and Telecommunications Network, Inc. ("HITN")
Home & Garden Television ("Home & Garden")
Intermedia Partners and Armstrong Utilities, Inc. ("Intermedia/Armstrong")

The International Cable Channel Partnership, Ltd. ("International Channel")
Island Broadcasting Co. ("Island Broadcasting")
Mark Kliem
Landmark Broadcasting Ltd. ("Landmark")
Liberty Sports, Inc. ("Liberty Sports")
Lifetime Television ("Lifetime")
Lorilei Communications, Inc. ("Lorilei")
Metropolitan Dade County, Florida ("Dade County")
The Motion Picture Association of America, Inc. ("MPAA")
Multimedia Cablevision, Inc. and Susquehanna Cable Co. ("Multimedia/Susquehanna")
National Cable Satellite Corporation (C-SPAN and C-SPAN 2) ("C-SPAN")
National Cable Television Association, Inc. ("NCTA")
Outdoor Life Network, Speedvision Network, The Golf Channel, BET on Jazz ("Outdoor Life, et al.")
PBS Horizons Cable ("PBS Horizons")
Pennsylvania Cable Network ("Penn. Cable Network")
Plunkett Family
Prevue Networks, Inc. ("Prevue Networks")
Prime Radiant Productions, Inc. ("Prime Radiant")
R.K. Production Company ("RK Production")
Rainbow Programming Holdings, Inc. ("Rainbow")
Sherjan Broadcasting Co., Inc. ("Sherjan")
Shop at Home, Inc. ("Shop at Home")
Small Cable Business Association ("SCBA")
Strategic Video
Summit Communications, Inc. ("Summit")
Sunbelt Video, Inc. ("Sunbelt")
Tele-Communications, Inc. ("TCI")
Tele-Media Corporation of Delaware ("Tele-Media of Delaware")
Time Warner Cable ("Time Warner")
The Travel Channel ("Travel Channel")
Turner Broadcasting System, Inc., News Corporation, Ltd., C-Span ("Turner, et al.")
TV-61 San Diego, Inc. ("TV-61")
U S West
USA Networks
United Broadcasting Corporation, d/b/a Telemiami ("Telemiami")
The Vacation Channel, Inc. ("Vacation Channel")
ValueVision International, Inc. ("ValueVision")
Viacom Inc. ("Viacom")
Video Information Providers for Non-discriminatory Access ("VIPNA")
Viking Communications, Inc. ("Viking")
Visual Media Productions, Inc. ("Visual Media")
Vernon Watson WBOP TV-12 (WBQP-LP) ("WBQP-LP")
WEVU-LP (Tamiami Ft. Myers, Inc.) ("WEVU-LP")
WZBN TV-25 (W25AW) ("WZBN TV-25")

Reply Comments:

A&E Television Networks, The Courtroom Television Network, NBC Cable, Ovation
("A&E, et al.")

Adelphia Communications Corp., Century Communications Corp., Falcon Holding Group,
L.P., Insight Communications, Inc. & Suburban Cable TV Co., Inc. (Adelphia, et al.)

Blab Television Network, Inc. ("Blab TV")

Center for Media Education, Alliance for Community Media, Association of Independent
Video and Filmmakers, Consumer Federation of America, Consumer Project on
Technology, Media Access Project, National Alliance for Media Arts and Culture,
National Association of Artists' Organizations, National Council on La Raza, Office of
Communication of the United Church of Christ, People for the American Way ("CME,
et al.")

Comcast Cable Communications, Inc. and Cox Communications, Inc. ("Comcast/Cox")

Community Broadcasters Association ("CBA")

Continental Cablevision, Inc. ("Continental")

Daniels Communications, Inc., Greater Media, Inc., Helicon Corporation, Marcus Cable
Partners, L.P., Prime Cable, Scripps Howard Cable Company, TCA Cable TV, Inc.,
Texas Cable and Telecommunications Association, Allen's TV Cable Service Inc.,
Community Antenna Systems, Fibervision, Inc., Halcyon Communications, Inc., James
Cable Partners, L.P., Moffat Communications Limited ("Daniels, et al.")

Denver Area Educational Telecommunications Consortium, Inc. ("Denver Area Ed.")

The Disney Channel ("Disney Channel")

E! Entertainment Television, Inc., Television Food Network, America's Health Network,
NorthWest Cable News, The Providence Journal Company ("E!, et al.")

Encore Media Corporation ("Encore")

ESPN, Inc. ("ESPN")

The Faith & Values Channel ("Faith & Values")

The Game Show Network, L.P. ("Game Show Network")

General Instrument Corporation ("General Instrument")

Hispanic Information and Telecommunications Network, Inc. ("HITN")

Intermedia Partners and Armstrong Utilities, Inc. ("Intermedia/Armstrong")

International Cable Channel Partnership, LTD. ("International Channel")

Liberty Sports, Inc. ("Liberty Sports")

Lifetime Television ("Lifetime")

National Cable Satellite Corporation (C-SPAN & C-SPAN 2) ("C-SPAN")

National Cable Television Assoc., Inc. ("NCTA")

Outdoor Life Network, Speedvision Network, The Golf Channel, BET on Jazz
("Outdoor Life, et al.")

Paradise Television Network, Inc. ("Paradise")

Sherjan Broadcasting Co., Inc. ("Sherjan")

Small Cable Business Association ("SCBA")

South Central Communications Corp. ("South Central")

Tele-Communications, Inc. ("TCI")

Time Warner Cable ("Time Warner")

The Travel Channel ("Travel Channel")

Turner Broadcasting System, Inc., News Corporation, LTD., C-Span ("Turner, et al.")
U S West
USA Networks
United Broadcasting Corporation, d/b/a/ Telemiami ("Telemiami")
ValueVision International, Inc. ("ValueVision")
Viacom Inc. ("Viacom")
Video Information Providers for Non-discriminatory Access ("VIPNA")

Comments on the Initial Regulatory Flexibility Act Analysis:

Small Cable Business Association ("SCBA")

Comments on Information Collection Requirements:

National Cable Television Assoc., Inc. ("NCTA")
Small Cable Business Association ("SCBA")

APPENDIX B

Petitions for Reconsideration:

Daniels Communications, Inc., Greater Media, Inc., Helicon Corporation, Marcus Cable Partners, L.P., Prime Cable, Scripps Howard Cable Company, TCA Cable TV, Inc., Texas Cable and Telecommunications Association, Allen's TV Cable Service Inc., Community Antenna Systems, Fibervision, Inc., Halcyon Communications, James Cable Partners, L.P., Moffat Communications Limited ("Daniels, et al.")
Intermedia Partners and Armstrong Utilities, Inc. ("Intermedia/Armstrong")
Tele-Communications, Inc. ("TCI")

Note: Daniels, et al. and TCI each combined their comments and petition for reconsideration into one document. When referencing these documents, we separately designate their subparts as "Comments" or "Petition for Reconsideration," depending on the context.

Oppositions to Petitions for Reconsideration:

ValueVision International, Inc. ("ValueVision")

APPENDIX CExample of Average Implicit Fee Calculation

	BST	CPST
Subscriber Tier Charge	\$15.00	\$10.00
Monthly Programming Costs Per Subscriber	\$ 4.00	\$ 5.00
Number of Channels	30	20
Number of Subscribers	100,000	90,000

Assuming these two tiers are the only tiers with more than 50% subscriber penetration, the average implicit fee (AIF) for a full-time channel on each of these tiers can be computed as follows:

STEP 1. Compute the combined subscriber revenue for both tiers:

- a. Subscriber Revenue for BST = \$15 x 100,000 subs = \$1,500,000
 b. Subscriber Revenue for CPST = \$10 x 90,000 subs = \$ 900,000
 c. Combined Subscriber Revenue = \$1,500,000 + \$900,000 = \$2,400,000

STEP 2. Compute the combined programming costs for both tiers:

- a. BST Programming Costs = \$4 x 100,000 subs = \$400,000
 b. CPST Programming Costs = \$5 x 90,000 subs = \$450,000
 c. Combined Programming Costs = \$400,000 + \$450,000 = \$850,000

STEP 3. Compute the total implicit fee for both tiers by subtracting the combined programming costs (STEP 2.c.) from the combined subscriber revenue (STEP 1.c.):

$$\$2,400,000 - \$850,000 = \$1,550,000$$

STEP 4. Determine the weighting scheme for allocating the total implicit fee (STEP 3) to each tier:

First, multiply the number of subscribers to each tier by the corresponding number of channels on each tier (the result is the number of "subscriber-channels" on each tier).

- a. BST = 100,000 subs x 30 channels = 3,000,000 subscriber-channels
- b. CPST = 90,000 subs x 20 channels = 1,800,000 subscriber-channels
- c. Total = 4,800,000 subscriber-channels

Second, divide the subscriber-channels on each tier by the total subscriber-channels on both tiers.

- d. Percentage of subscriber-channels on BST = $3,000,000/4,800,000 = 62.5\%$
- e. Percentage of subscriber-channels on CPST = $1,800,000/4,800,000 = 37.5\%$

STEP 5. Compute the implicit fee for each tier based on the percentage of subscriber-channels on each tier (STEPS 4.d. and 4.e.):

- a. BST = $\$1,550,000 \times .625 = \$968,750$
- b. CPST = $\$1,550,000 \times .375 = \$581,250$

STEP 6. Compute the AIF for a full-time channel on each tier by dividing the implicit fee for the tier (STEPS 5.a. and 5.b.) by the corresponding number of channels on the tier:

- a. AIF per channel on BST = $\$968,750/30 \text{ channels} = \$32,292$
- b. AIF per channel on CPST = $\$581,250/20 \text{ channels} = \$29,063$

In this example, \$32,292 and \$29,063 are the maximum amounts per month that an operator can charge a leased access programmer for a full-time channel that is carried on the BST and CPST, respectively.

APPENDIX D

Revised Rules

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 76 -- CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.970 is amended by revising paragraphs (a), (b), (c), (d), (e) and (f), and adding paragraphs (g) and (h) to read as follows:

Sec. 76.970 Commercial leased access rates.

(a) * * * 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 a party is an "affiliate" for purposes of commercial leased access, the definitions contained in the notes to Section 76.501 shall be used, provided, however that:

(1) The single majority shareholder provision of Note 2(b) to Section 76.501 and the limited partner insulation provisions of Note 2(g) to Section 76.501 shall not apply; and

(2) The provisions of Note 2(a) to Section 76.501 regarding five (5) percent interest shall include all voting or nonvoting stock or limited partnership equity interest of five (5) percent or more.

Actual working control, in whatever manner exercised, shall also be deemed a cognizable interest.

(c) The maximum commercial leased access rate that a cable operator may charge 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).

(d) The average implicit fee identified in paragraph (c) for a full-time channel on a tier with a subscriber penetration over 50% 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 subtract 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%. 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% 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).

(e) 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.

(f) 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 channel 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.

(g) 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.

(h) Cable system operators shall provide prospective leased access programmers with the following information within 15 calendar days of the date on which a request for leased access information is made: (1) how much of the operator's leased access set-aside capacity is available; (2) a complete schedule of the operator's full-time and part-time leased access rates; (3) rates associated with technical and studio costs; and (4) if specifically requested, a sample leased access contract. Operators of systems subject to small system relief shall provide the above information within 30 calendar days of a bona fide request from a prospective leased access programmer. For these purposes, systems subject to small system relief are systems that either (1) qualify as small systems under § 76.901(c) and are owned by a small cable company as defined under § 76.901(e), or (2) have been granted special relief. All requests for leased access must be made in writing and must specify the date on which the request was sent to the operator. Bona fide requests, as used in this section, are defined as requests from potential leased access programmers that have provided the following information: (1) the desired length of a contract term; (2) the time slot desired; (3) the anticipated commencement date for carriage; and (4) the nature of the programming. 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.

3. Section 76.971 is amended by revising paragraphs (a), (c), (d), (f) and (g) and adding paragraph (h) to read as follows:

Sec. 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 channels are substantially filled with leased access programming.

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(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 impose reasonable insurance requirements on leased access programmers. Cable operators shall bear the burden of proof in establishing reasonableness.

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(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) * * *

(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.

4. Section 76.975 is amended by revising paragraphs (b), (c), (d) and (e) to read as follows:

Sec. 76.975 Commercial leased access dispute resolution.

* * * * *

(b) (1) Any person aggrieved by the failure or refusal of a cable operator to make commercial channel capacity available or to charge rates for such capacity in accordance with the provisions of Title VI of the Communications Act, or our implementing regulations, Sections 76.970 and 76.971, may file a petition for relief with the Commission. Persons alleging that a cable operator's leased access rate is unreasonable must receive a determination of the cable operator's maximum permitted rate from an independent accountant prior to filing a petition for relief with the Commission.

(2) Parties to a dispute over leased access rates shall have five business days to agree on a mutually acceptable accountant from the date on which the programmer provides the cable operator with a written request for a review of its leased access rates. Parties that fail to agree

on a mutually acceptable accountant within five business days of the programmer's request for a review shall each be required to select an independent accountant on the sixth business day. The two accountants selected shall have five business days to select a third independent accountant to perform the review. Operators of systems subject to small system relief shall have 14 business days to select an independent accountant when an agreement cannot be reached. For these purposes, systems subject to small system relief are systems that either (1) qualify as small systems under § 76.901(c) and are owned by a small cable company as defined under § 76.901(e), or (2) have been granted special relief. The final accountant's report must be completed within 60 days of the date on which the final accountant is selected to perform the review. The final accountant's report must, at a minimum, state the maximum permitted rate, and explain how it was determined without revealing proprietary information. The report must be signed, dated and certified by the accountant. Such information shall be filed in the cable system's local public file.

(3) If the accountant's report indicates that the cable operator's leased access rate exceeds the maximum permitted rate by more than a *de minimis* amount, the cable operator shall be required to pay the full cost of the review. If the final accountant's report does not indicate that the cable operator's leased access rate exceeds the maximum permitted rate by more than a *de minimis* amount, each party shall be required to split the cost of the final accountant's review, and to pay its own expenses incurred in making the review.

(4) Parties may use alternative dispute resolution (ADR) processes to settle disputes that are not resolved by the final accountant's report.

(c) * * * Where a petition is based on allegations that a cable operator's leased access rates are unreasonable, the petitioner must attach a copy of the final accountant's report. In proceedings before the Commission, there will be a rebuttable presumption that the final accountant's report is correct.

(d) A petition must be filed within 60 days of completion of the final accountant's report, or within 60 days of the termination of ADR proceedings. Aggrieved parties must certify that their petition was filed within 60 days of the termination of ADR proceedings in order to file a petition later than 60 days after completion of the final accountant's report. Cable operators may rebut such certifications.

(e) The cable operator or other respondent will have 30 days from the filing of the petition to file a response. If a leased access rate is disputed, the response must show that the rate charged is not higher than the maximum permitted rate for such leased access, and must be supported by the affidavit of a responsible company official. If, after a response is submitted, the staff finds a *prima facie* violation of our rules, the staff may require a respondent to produce additional information, or specify other procedures necessary for resolution of the proceeding.

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5. Section 76.977 is amended by revising the second sentence of paragraph (a) to read as follows:

Sec. 76.977 Minority or educational programming used in lieu of designated commercial leased access capacity.

(a) * * * The channel capacity used to provide programming from a qualified minority programming source or from any qualified educational programming source pursuant to this Section may not exceed 33 percent of the channel capacity designated pursuant to 47 U.S.C. 532 and must be located on a tier with more than 50 percent subscriber penetration.

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