Commercial Cable Leased Access Fees: Are FCC Regulations Being Followed?

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Abstract

This study examines the implicit per subscriber fee rates and technical/studio fees of four cable operators for analog stand-alone and digital tiered commercial cable leased access for compliance with the fee calculation procedures specified in 47 CFR 96.970 and likelihood of correspondence to recouping of actual costs of distribution, as required by the regulation. The regulation provides two algorithms for computation of implicit and highest fee rates, which are mathematically dependent on subscriber count and revenue from subscribers in system and tier. The Pearson chi square test of association was used to test for correlation between per subscriber fees quoted in cable operator rate cards and number of subscribers in system. Since cable operators hold subscriber revenue data proprietary, proxies for subscriber revenue rates were developed from U.S. Census data for 2000 and other measures; the Pearson chi square test of association was used to test for correlation between per subscriber fees quoted in cable operator rate cards and these variables. In only one case was a statistically significant relationship found: a relationship between lower rates and the system being in the New York or Los Angeles DMAs, among the only areas of the country with historically high levels of competition among cable operators. The absence of relationship between the per subscriber fees and either subscriber count per system or proxies for system revenues calls into question whether the method for calculation of such fees mandated by FCC regulation is being followed by cable operators. Additional evidence is presented that, in fact, the per subscriber fees charged by cable operators for commercial cable leased access are intentionally set as barriers to entry to leased cable carriage. A remedy for digital tiered commercial leased access is presented in the form of a flat rate based on the mean rate of systems in the New York and Los Angeles DMAs and prohibition of technical/studio fees imposed on leasees by cable operators.

Federal regulations specify several methods by which commercial cable leased access rates may be determined. The first applies to full-time channel placement on a tier either exceeding or not exceeding a subscriber penetration of fifty percent:

> 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).[1]

The method provided for calculation of the average implicit fee is:

> The average implicit fee identified in paragraph (c) 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

[1] 47 CFR 76.970(d).

> 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).[2]

The second next applies to commercial leased access as an a la carte service:

> 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.[3]

The method for calculating the highest implicit fee is specified:

> 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

[2] 47 CFR 76.970(e).
[3] 47 CFR 76.970(f).

> 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.[4]

Finally, "[c]able operators are permitted to negotiate rates below the maximum rates permitted in paragraphs (c) through (g) of this section."[5] Cable operators are further permitted to impose technical and studio costs fees on leasees.

It follows from the fact that these definitions involve calculation of rates based on specific relationships between number of subscribers in tier or system and the revenues derived from such subscribers (minus production costs) that one would expect there to be a mathematical correlation between number of subscribers and revenues from such subscribers, on the one hand, and the monthly per subscriber rates for commercial cable leased access calculated by these methods mandated by the FCC and the fees actually charged by the cable operators. This study examines whether such correlations occur and evaluates the implications of their non-occurrence.

The first data collected for this study were commercial cable leased access rates by system for several cable operators and obtained from their system rate cards. To facilitate availability of commercial cable leased access the regulations further impose an obligation on cable operators:

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[4] 47 CFR 76.970(g).
[5] 47 CFR 76.970(i)(5)(i).

> 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:
> (i) How much of the operator's leased access set-aside capacity is available;
> (ii) A complete schedule of the operator's full-time and part-time leased access rates;
> (iii) Rates associated with technical and studio costs; and
> (iv) If specifically requested, a sample leased access contract.[6]

While Cablevision, Time Warner, and Atlantic Broadband were generally compliant with this regulation, most Comcast systems exhibited extreme reluctance to provide the required information at all, much less in a timely fashion as required by the regulation. Out of twenty-five Comcast systems contacted, none replied positively to repeated requests for rate cards for commercial cable leased access, frequently informing the enquirer that such information was available only from another office, transferring the enquirer to that office, and then informing the enquirer that the only person with this information was "out of the office." Despite leaving repeated messages in each case, no call was ever returned by a Comcast representative.[7] Anecdotally, this experience appears to have been matched by similar enquiries by the National Conference of Catholic Bishops. The study would be completely absent any Comcast data if it had not been possible to obtain Comcast rate cards from lease applicants on five Comcast systems. The underrepresentation of Comcast in the sample directly reflects

[6] 47 CFR 76.970(i)(1).
[7] Out of seventy-two systems contacted, only three non-Comcast systems refused to provide at least digital tiered rate card data.

the obstructionist attitude of Comcast management toward anyone seeking commercial leased access and its defiant noncompliance with the relevant federal regulation.

The same obstructionism was observed on Comcast's part to requests for information on technical and studio fees, despite an identical federal regulatory mandate. Cablevision and Atlantic Broadband were forthcoming with the data; Time Warner was dilatory and spotty in its responses. Compliance with 47 CFR 96.970(i)(1) on provision of both rate schedules and schedules of technical and studio fees remains an area which desperately requires FCC enforcement attention.

A suspicious pattern emerged with Time Warner, Atlantic Broadband, and two of five Comcast systems providing rates only for digital tiered commercial cable leased access. Cablevision generally provided rates for both stand-alone and digital tiered access, and three Comcast systems provided rates for only stand-alone access. As we shall see, this suggests ghettoization of commercial leased access to digital tiers, limiting access to a wider subscriber base.

In order to calculate a standard monthly per subscriber rate it was necessary to obtain subscriber data for each system for which a rate card had been obtained. The cable operators almost uniformly treat this data as proprietary and refuse to disclose it even to lease applicants. Atlantic Broadband was refreshingly helpful in straightforwardly providing this data for its Miami, Florida, system. Comcast provided subscriber data for one system in Florida. For the remaining Comcast systems, as well as those of Cablevision and Time Warner, the study relies on system subscriber data obtained from Nielsen Media Research.

The monthly per subscriber commercial cable leased access rates for stand-alone and digital tiered access were, thus, obtained for nine and forty-five systems, respectively, as shown in Table 1:

Table. 1
Monthly Commercial Cable Leased Access Rates Per Subscriber for Stand-Alone and Digital Tiered Access

		Monthly Leased Access Rate Per Subscriber ($)	
Cable Provider	Market	**Stand-Alone**	Digital Tiered
Atlantic Broadband	Miami, FL	-	0.1626
Cablevision	Elizabeth, NJ	1.5734	0.1288
Cablevision	Newark, NJ	1.3400	0.1205
Cablevision	Patterson, NJ	2.0173	0.1309
Cablevision	North Bergen, NJ	-	0.1613
Cablevision	Hauppauge, NY	2.0481	-
Cablevision	Woodbury, NY	2.6591	-
Cablevision	Eastern Long Island, NY	1.5346	0.1113
Cablevision	Bronx-Brooklyn, NY	-	0.1840
Comcast	Jersey City, NJ	-	0.2123
Comcast	Seattle, WA	-	0.3778
Comcast	Saraaota, FL	0.7469	-
Comcast	Tallahassee, FL	0.8964	-
Comcast	Lake County-Leesburg, FL	0.4741	-
Time Warner	New York, NY	-	0.1340
Time Warner	Los Angeles, CA	-	0.1668
Time Warner	Dallas-Ft. Worth, TX	-	0.3052

Table. 1 (Continued)[8]

[8] The monthly per subscriber rate was calculated by dividing the monthly rate specified by the cable operator's rate card for that system by the number of subscribers identified in that system either by the cable operator or by data

Monthly Commercial Cable Leased Access Rates Per Subscriber for Stand-Alone and Digital Tiered Access

Cable Provider	Market	Monthly Leased Access Rate Per Subscriber ($) Stand-Alone	Digital Tiered
Time Warner	Houston, TX	-	0.1599
Time Warner	Cleveland-Akron, OH	-	0.2059
Time Warner	San Diego, CA	-	0.2354
Time Warner	Charlotte, NC	-	0.2037
Time Warner	Raleigh-Durham, NC	-	0.3173
Time Warner	Kansas City, KS	-	0.3166
Time Warner	Milwaukee, WI	-	0.3633
Time Warner	Cincinnati, OH	-	0.3192
Time Warner	Columbus, OH	-	0.1351
Time Warner	San Antonio, TX	-	0.4277
Time Warner	Buffalo, NY	-	0.3253
Time Warner	Austin, TX	-	0.5188
Time Warner	Albany-Schenectady-Troy, NY	-	0.0902
Time Warner	Dayton, OH	-	0.3841
Time Warner	Honolulu, HI	-	0.2519
Time Warner	Rochester, NY	-	0.1946
Time Warner	Syracuse, NY	-	0.1048
Time Warner	Columbia, SC	-	0.5541
Time Warner	Waco-Temple-Bryan, TX	-	0.3746
Time Warner	El Paso, TX	-	0.4007
Time Warner	Youngstown, OH	-	0.1481
Time Warner	Myrtle Beach-Florence, FL	-	0.2710
Time Warner	Corpus Christi, TX	-	0.3967
Time Warner	Beaumont-Port Arthur, TX	-	0.4033
Time Warner	Erie, PA	-	0.1607
Time Warner	Wichita Falls-Lawton, TX-OK	-	0.3281
Time Warner	Terre Haute, IN	-	0.4263
Time Warner	Bangor, ME	-	0.2167
Time Warner	Binghampton, NY	-	0.1334
Time Warner	Yuma-El Centro, AZ	-	0.2258
Time Warner	Elmira, NY	-	0.0731
Time Warner	Laredo, TX	-	0.2617

obtained from Nielsen Media Research.

Table. 1 (Continued)
Monthly Commercial Cable Leased Access Rates Per Subscriber for Stand-Alone and Digital Tiered Access

Cable Provider	Market	Monthly Leased Access Rate Per Subscriber ($) Stand-Alone	Digital Tiered
Time Warner	Lima, OH	-	0.6206

The mean monthly per subscriber rate for stand-alone access is $1.4767 (the standard deviation is 0.7002); the mean monthly per subscriber rate for digital tiered access is $0.2610 (the standard deviation is 0.1319).

As indicated above, the formulae prescribed by the FCC for the calculation of monthly average implicit fee and highest implicit fee rates for commercial cable leased access imply that there should be a relationship between number of subscribers and the monthly per subscriber rate. This flows from the fact that the Commission's rules require cable operators to compute the rate in terms of the number of subscribers. A Pearson chi-square test of association[9] was conducted for both stand-alone and digital tiered monthly per subscriber rates against subscriber data and no statistically significant relationship was observed.

Again, because the formulae prescribed by the FCC for the calculation of monthly average implicit fee and highest implicit fee rates for commercial cable leased access imply that there should be a relationship between

[9] The Pearson chi square test of association is defined by the formula $X^2 = \sum^{k}_{i=1}(O_i - E_i)^2 / E_i$, where O_i is the observed frequency of *I* and E_i is the expected frequency of *i*. It is a standard tool used to determine whether a relationship exists between possible economic variables.

revenues from subscribers and the monthly per subscriber rate, the failure to find a relationship between the per subscriber rates and subscriber data indicates either a failure of the Commission's rate formula to produce reliable results or evidence that cable operators do not comply with the Commission's rate formula. To test this hypothesis further, and eliminate the possibility that some other explanation could account for such significant variances, I also examined the relationship between per subscriber rates and subscriber revenues.

Since the cable operators hold revenue data as proprietary, it was necessary to investigate proxies for revenue from subscribers per system. Various measures of economic prosperity were selected or calculated from the U.S. Census for 2000 for each cable system area: cable penetration (subscribers/households), mean and median income, number of telephones, and proportion of minority population.[10] Additionally, rate cards were obtained for broadcast television advertising rates for commercial network affiliates in the areas covered by each cable system and mean advertising rates were calculated for each. A Pearson chi-square test of association was conducted for both stand-alone and digital tiered monthly per subscriber rates against cable penetration (subscribers/households), mean and median income, number of telephones, proportion of minority population, and mean

[10] Since cable system areas and U.S. Census statistical areas do not always map directly, U.S. Census data was mapped by zip code onto cable system areas.

commercial network affiliate broadcast advertising rates per system area. No statistically significant relationship between any variables was observed.

Only one statistically significant relationship to the monthly per subscriber commercial cable leased access digital tiered rate was observed. When the rates were grouped into five equal intervals and divided between those in the New York and the Los Angeles DMAs and those not in those DMAs a Pearson chi-square of 48.562 (df=4), $p < .0001$, was observed. Several factors may explain this relationship. For example, this geographic association may be an artifact of these two DMAs being among the few in the country with greater than duopoly competition among cable providers prior to the Adelphia/Comcast/Time Warner transaction. The ability to compare the rates on neighboring systems in a confined geographic area may have created sufficient market transparency to allow leased access programmers to either negotiate better rates, or credibly threaten to invoke enforcement proceedings. Alternatively, the relationship may be explained by the presence of competitive overbuilders, or an unusual abundance of significant programming entities capable of producing high-quality programming and cooperating with one another to create greater transparency in the market. The relationship did not appear related to market density, as analysis of urban markets comparable densities did not produce similar results. Whatever the reason, however, it has little impact on the overall conclusion of the study. If anything, it supports the proposition that greater transparency can improve rates and require rates to better reflect actual costs.

The lack of statistical association between monthly per subscriber stand-alone or digital tiered commercial cable leased access rates and either subscriber numbers or multiple proxies for subscriber revenues is disturbing. It suggests that the rates being quoted by cable operators are not being calculated in accordance with the FCC-mandated formulae. Alternatively, it might suggest that costs of distribution differ across providers and systems in economically irrational ways. To eliminate the likelihood of this alternative explanation, I compared the mean per subscriber license fees paid by cable operators to basic tier cable networks for programming the cable operator voluntarily pays to license. If the cost of distribution varied significantly between system operators to produce the results seen for leased cable access, one would expect to see similar variations in per subscriber revenue for licensed programming – since the variances in the expense of distribution should alter the profit-per-subscriber and require changes in licensing fees.

Analysis of the license fees paid demonstrated no such relationship. Instead, analysis of license fees paid by cable operators to programmers for desired programming demonstrated a pattern consistent with a more uniform cost of distribution than could have produced the results for leased access rates. This data is provided for ten basic tier cable networks in Table 2:

Table 2.[11]
Mean Per Subscriber License fees Paid by Cable Operators for Programming

Cable Network	Basic Tier	Mean Per Subscriber License

	Fee
BET	0.15
Bravo	0.15
Comedy Central	0.10
C-Span	0.05
Discovery-Health	0.11
Food Network	0.07
HGTV	0.09
MSNBC	0.12
The Weather Channel	0.10
TV Land	0.09

The mean per subscriber license fees paid by cable operators for programming do correlate positively with Nielsen Media Research ratings for programming on these networks and advertising rates charged by cable operators on local systems for time on those networks.[12] This suggests that the cable operators carefully evaluate the profitability of carriage of these networks and that subscriber popularity and potential advertising revenue generated is a significant component of the amount which cable operators will pay to programmers for programming, all evidence of economic rationality in cable operator decision making. Furthermore, if distribution costs differed wildly between systems within provider and across providers, one would expect that subscription prices would vary accordingly to recoup system-specific costs. However, little regional variation is observed in subscription fees charged by cable operators. It is, therefore, extremely unlikely that costs of distribution of commercial cable leased access programming differ irrationally over providers and systems. The question therefore arises: why, then, do the monthly per subscriber fee rates exhibit no correlation to subscriber numbers or the proxies for subscriber revenues?

The simplest explanation for why the monthly per subscriber fee rates exhibit no correlation to subscriber numbers or the proxies for subscriber revenues is that the fee rates being quoted to potential leasees are not being calculated in accordance with the mandated FCC formulae, but are rather being set arbitrarily high to erect barriers to leased access carriage. This cannot be definitively proven, but it is a plausible hypothesis given the extreme lack of transparency in cable operator interactions with potential leasees. Rate cards are frequently difficult to obtain, the costs underlying the computations of implicit fees are undisclosed, subscriber data is rarely provided by the operator to potential leasees, and technical/studio fees are unexplained. Despite rules allowing leased access programmers to challenge the rates, the lack of transparency makes it extremely difficult for a leased access programmer to make a preliminary determination whether to engage in the additional expense of challenging the rate. Such challenges may well exhaust the financial capacity of a leased access programmer, and the inability to asses the likelihood of success by ascertaining the basis for the rate *before* filing a challenge acts a significant disincentive to leased access programmers. The use of non-disclosure agreements (NDAs) further diminishes the ability of leased access programmers to determine in advance of bringing a challenge the likelihood of success or the possible scope of relief attainable.

This is particularly deplorable in that FCC regulations require cable operators to maintain much of this data:

> 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.[13]

Making such data available to leased access programmers, rather than requiring leased access programmers to file a challenge with the Commission to obtain the data needed to assess the reasonableness of the rates, would go far to increase the transparency of such transactions.

The tendency of cable operators to seek to ghettoize leased access to specific leased channels on specific digital tiers also tends to support the hypothesis that barrier to commercial leased access carriage are being erected by cable operators. The difficulty in obtaining analog stand-alone access quotes for this study, and the relative ease in obtaining digital tiered quotes, reflects this ongoing process. To the extent that commercial leased access is seen as less profitable, both as programming per se and because cable operators do not have a financial interest in leasees (a potential leasee in which a cable operator held a financial interest would be seeking regular carriage, not leased access), cable operators have incentive to seek to limit access and, thus, erect entry barriers.

Finally, the apparently arbitrary and capricious way in which cable operators handle technical and studio fees, which the regulations permit them to impose, indicates intentional erection of barriers to entry. Such fees vary from a twenty-five dollar fee per program insertion imposed by Cablevision on all its systems to a $58.31 per hour technical fee imposed by Atlantic Broadband. This translates into additional costs ranging from $9,000 to $293,882.40 per month *over and above* the implicit monthly fees the Commission's rules assume will constitute the primary charge for access. Furthermore, like the implicit monthly fee, the costs for the services purportedly covered by these fees do not correlate statistically significantly with the implicit monthly per subscriber fees, nor with subscriber numbers, nor with the proxies for subscriber revenue.[14] Furthermore, it is difficult to imagine why, if the costs of distribution significantly vary across systems, these technical/studio fees remain generally uniform across providers. In short, they behave very much like monopoly or duopoly rents imposed because the monopolist or duopolists can impose them – and want to impose them to discourage leased access carriage.[15] This hypothesis tends to be confirmed by the fact that fees, like the rates themselves are lowest in the New York and Los Angeles DMAs, where the presence of multiple cable operators (until the Adelphia/Time Warner/Comcast transaction) within the same DMA increased transparency by allowing leased access programmers to compare the costs and fees demanded by similarly situated systems.

In light of the evidence that monthly per subscriber fee quotes to potential commercial leasees do not conform to the formulae mandated by the FCC and represent arbitrary imposition of barriers to entry to leased carriage it is reasonable to propose an alternative to the current system which would be more likely to produce the objectives indicated by Congress and the FCC in making commercial cable leased access available.[16] There is evidence of significant distortion of implicit fees by monopoly and duopoly power, particularly for digital tiered commercial leased access, in the form of the significant difference between rates in New York and Los Angeles, where there has historically been multiple similarly situated cable operators permitting leased access programmers to compare prices and potentially challenge rates, in contradistinction to the rest of the country.

Because cable operators have a demonstrated ability to obstruct leased access programmers from acquiring needed information, the Commission should consider imposing a flat rate. A flat rate of the mean implicit per subscriber fee for digital tiered access in markets in the New York and Los Angeles DMAs, $0.15, represents a fair compensation to cable operators, particularly if the technical/studio fees which appear to have no relationship to actual costs of distribution were simultaneously prohibited. In fact, this flat rate probably overestimates cable operators actual costs of distributing leased access, but in the absence of publicly available documentation of such actual costs it is incumbent on the cable operators to make the case for a higher rate on the public record.

Certainly if cable operators provide detailed, positive evidence on the public record for a higher rate or for actual costs associated with regional variation by system, the FCC should take such evidence into account in arriving at a fair rate of compensation for provision of commercial leased access. But the FCC must also directly address the problem of market transparency if it intends to rely on challenges brought by leased access programmers rather than by cable operators. It is simply not rational to expect a leased access programmer, subject to possible retaliation by a cable system operator during the course of an appeal and where resolution of appeals may take years, to challenge a rate if the leased access programmer cannot determine in advance whether the proposed rate is reasonable. Perhaps because the current system requires leased access programmers to make precisely such an expensive "shot in the dark," few leased access programmers have made use of the procedures provided by the FCC. Until the FCC resolves the issue of market transparency, or the FCC shifts away from its reliance on leasees to bring complaints, the current state of affairs appears likely to continue.

CONCLUSION

Absent data held by the cable operators as proprietary, it is impossible to determine with certainty what would constitute an appropriate rate that fully compensated cable operators without imposing unnecessary fees or creating artificial barriers to entry for leased access programmers. Based on the data available, however, it is clear that the Commission's current regulations do not achieve this goal. The absence of any rational economic correlation between subscriber rates offered leased access programmers across systems, while other fees and revenues associated with cable programming display expected economically rational relationships, strongly suggests that the current regulations permit cable operators to charge rates and fees in excess of the maximum permitted rates, or that the FCC's rules are so vague and imprecise that cable operators acting in good faith produce wildly inconsistent results. Either outcome should be unacceptable under Section 612 of the Communications Act, and the FCC should move expeditiously to increase transparency, eliminate unnecessary fees, and set a reasonable and economically rational rate.