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to obtain capacity in increments of more than one full-time channel;

(B) Limit video programming providers from selecting the programming on more capacity than the amount of capacity on which the system operator and its affiliates are selecting the programming for carriage; and

(v) Notwithstanding the general prohibition on an open video system operator's discrimination among video programming providers contained in paragraph (a) of this section, a competing, in-region cable operator or its affiliate(s) that offers cable service to subscribers located in the service area of an open video system shall not be entitled to obtain capacity on such an open video system, except:

(A) Where the operator of an open video system determines that granting access to the competing, in-region cable operator is in its interests; or

(B) Where a showing is made that facilities-based competition will not be significantly impeded.

NOTE TO PARAGRAPH (c)(2)(v)(B): The Commission finds that facilities-based competition will not be significantly impeded, for example, where:

(1) The competing, in-region cable operator and affiliated systems offer service to less than 20% of the households passed by the open video system; and

(2) The competing, in-region cable operator and affiliated systems provide cable service to a total of less than 17,000 subscribers within the open video system's service area.

(3) Nothing in this paragraph shall be construed to limit the number of channels that the open video system operator and its affiliates, or another video programming provider, may offer to provide directly to subscribers. Co-packaging is permissible among video programming providers, but may not be a condition of carriage. Video programming providers may freely elect whether to enter into co-packaging arrangements.

NOTE TO PARAGRAPH (c)(3): Any video programming provider on an open video system may co-package video programming that is selected by itself, an affiliated video programming provider and/or unaffiliated video programming providers on the system.

[61 FR 28708, June 5, 1996, as amended at 61 FR 43176, Aug. 21, 1996; 62 FR 26239, May 13, 1997]

§ 76.1504 Rates, terms and conditions for carriage on open video systems.

(a) *Reasonable rate principle.* An open video system operator shall set rates, terms, and conditions for carriage that are just and reasonable, and are not unjustly or unreasonably discriminatory.

(b) *Differences in rates. (1) An open video system operator may charge different rates to different classes of video programming providers, provided that the bases for such differences are not unjust or unreasonably discriminatory.*

(2) An open video system operator shall not impose different rates, terms, or conditions based on the content of the programming to be offered by any unaffiliated video programming provider.

(c) *Just and reasonable rate presumption.* A strong presumption will apply that carriage rates are just and reasonable for open video system operators where at least one unaffiliated video programming provider, or unaffiliated programming providers as a group, occupy capacity equal to the lesser of one-third of the system capacity or that occupied by the open video system operator and its affiliates, and where any rate complained of is no higher than the average of the rates paid by unaffiliated programmers receiving carriage from the open video system operator.

(d) *Examination of rates.* Complaints regarding rates shall be limited to video programming providers that have sought carriage on the open video system. If a video programming provider files a complaint against an open video system operator meeting the above just and reasonable rate presumption, the burden of proof will rest with the complainant. If a complaint is filed against an open video system operator that does not meet the just and reasonable rate presumption, the open video system operator will bear the burden of proof to demonstrate, using the principles set forth below, that the carriage rates subject to the complaint are just and reasonable.

(e) *Determining just and reasonable rates subject to complaints pursuant to the imputed rate approach or other market based approach.* Carriage rates subject to complaint shall be found just

and reasonable if one of the two following tests are met:

(1) The imputed rate will reflect what the open video system operator, or its affiliate, ''pays'' for carriage of its own programming. Use of this approach is appropriate in circumstances where the pricing is applicable to a new market entrant (the open video system operator) that will face competition from an existing incumbent provider (the incumbent cable operator), as opposed to circumstances where the pricing is used to establish a rate for an essential input service that is charged to a competing new entrant by an incumbent provider. With respect to new market entrants, an efficient component pricing model will produce rates that encourage market entry. If the carriage rate to an unaffiliated program provider surpasses what an operator earns from carrying its own programming, the rate can be presumed to exceed a just and reasonable level. An open video system operator's price to its subscribers will be determined by several separate costs components. One general category are those costs related to the creative development and production of programming. A second category are costs associated with packaging various programs for the open video system operator's offering. A third category related to the infrastructure or engineering costs identified with building and maintaining the open video system. Contained in each is a profit allowance attributed to the economic value of each component. When an open video system operator provides only carriage through its infrastructure, however, the programming and packaging flows from the independent program provider, who bears the cost. The open video system operator avoids programming and packaging costs, including profits. These avoided costs should not be reflected in the price charged an independent program provider for carriage. The imputed rate also seeks to recognize the loss of subscribers to the open video system operator's programming package resulting from carrying competing programming.

NOTE TO PARAGRAPH (e)(1): Examples of specific ''avoided costs'' include:

(1) All amounts paid to studios, syndicators, networks or others, including but not limited to payments for programming and all related rights;

(2) Packaging, including marketing and other fees;

(3) Talent fees; and

(4) A reasonable overhead allowance for affiliated video service support.

(2) An open video system operator can demonstrate that its carriage service rates are just and reasonable through other market based approaches.

[61 FR 28708, June 5, 1996, as amended at 61 FR 43176, Aug. 21, 1996]

EFFECTIVE DATE NOTE: At 61 FR 43176, Aug. 21, 1996, in § 76.1504, paragraph (e) was revised. This amendment contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

§ 76.1505 Public, educational and governmental access.

(a) An open video system operator shall be subject to public, educational and governmental access requirements for every cable franchise area with which its system overlaps.

(b) An open video system operator must ensure that all subscribers receive any public, educational and governmental access channels within the subscribers' franchise area.

(c) An open video system operator may negotiate with the local cable franchising authority of the jurisdiction(s) which the open video system serves to establish the open video system operator's obligations with respect to public, educational and governmental access channel capacity, services, facilities and equipment. These negotiations may include the local cable operator if the local franchising authority, the open video system operator and the cable operator so desire.

(d) If an open video system operator and a local franchising authority are unable to reach an agreement regarding the open video system operator's obligations with respect to public, educational and governmental access channel capacity, services, facilities and equipment within the local franchising authority's jurisdiction: