

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:

(1) The open video system operator must satisfy the same public, educational and governmental access obligations as the local cable operator by providing the same amount of channel capacity for public, educational and governmental access and by matching the local cable operator's annual financial contributions towards public, educational and governmental access services, facilities and equipment that are actually used for public, educational and governmental access services, facilities and equipment. For in-kind contributions (e.g., cameras, production studios), the open video system operator may satisfy its statutory obligation by negotiating mutually agreeable terms with the local cable operator, so that public, educational and governmental access services to the community is improved or increased. If such terms cannot be agreed upon, the open video system operator must pay the local franchising authority the monetary equivalent of the local cable operator's depreciated in-kind contribution, or, in the case of facilities, the annual amortization value. Any matching contributions provided by the open video system operator must be used to fund activities arising under

Section 611 of the Communications Act.

(2) The local franchising authority shall impose the same rules and procedures on an open video system operator as it imposes on the local cable operator with regard to the open video system operator's use of channel capacity designated for public, educational and governmental access use when such capacity is not being used for such purposes.

(3) The local cable operator is required to permit the open video system operator to connect with its public, educational and governmental access channel feeds. The open video system operator and the cable operator may decide how to accomplish this connection, taking into consideration the exact physical and technical circumstances of the cable and open video systems involved. If the cable and open video system operator cannot agree on how to accomplish the connection, the local franchising authority may decide. The local franchising authority may require that the connection occur on government property or on public rights of way.

(4) The costs of connection to the cable operator's public, educational and governmental access channel feed shall be borne by the open video system operator. Such costs shall be counted towards the open video system operator's matching financial contributions set forth in paragraph (d)(4) of this section.

(5) The local franchising authority may not impose public, educational and governmental access obligations on the open video system operator that would exceed those imposed on the local cable operator.

(6) Where there is no existing local cable operator, the open video system operator must make a reasonable amount of channel capacity available for public, educational and governmental use, as well as provide reasonable support for services, facilities and equipment relating to such public, educational and governmental use. If a franchise agreement previously existed in that franchise area, the local franchising authority may elect either to impose the previously existing public, educational and governmental access

obligations or determine the open video system operator's public, educational and governmental access obligations by comparison to the franchise agreement for the nearest operating cable system that has a commitment to provide public, educational and governmental access and that serves a franchise area with a similar population size. The local franchising authority shall be permitted to make a similar election every 15 years thereafter. Absent a previous franchise agreement, the open video system operator shall be required to provide channel capacity, services, facilities and equipment relating to public, educational and governmental access equivalent to that prescribed in the franchise agreement(s) for the nearest operating cable system with a commitment to provide public, educational and governmental access and that serves a franchise area with a similar population size.

NOTE TO PARAGRAPH (d)(6): This paragraph shall apply, for example, if a cable operator converts its cable system to an open video system under § 76.1501.

(7) The open video system operator must adjust its system(s) to comply with new public, educational and governmental access obligations imposed by a cable franchise renewal; provided, however, that an open video system operator will not be required to displace other programmers using its open video system to accommodate public, educational and governmental access channels. The open video system operator shall comply with such public, educational and governmental access obligations whenever additional capacity is or becomes available, whether it is due to increased channel capacity or decreased demand for channel capacity.

(8) The open video system operator and/or the local franchising authority may file a complaint with the Commission, pursuant to our dispute resolution procedures set forth in § 76.1514, if the open video system operator and the local franchising authority cannot agree as to the application of the Commission's rules regarding the open video system operator's public, educational and governmental access obli-

gations under paragraph (d) of this section.

(e) If an open video system operator maintains an institutional network, as defined in Section 611(f) of the Communications Act, the local franchising authority may require that educational and governmental access channels be designated on that institutional network to the extent such channels are designated on the institutional network of the local cable operator.

(f) An open video system operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this subsection, provided, however, that any open video system operator may prohibit the use on its system of any channel capacity of any public, educational, or governmental facility for any programming which contains nudity, obscene material, indecent material as defined in § 76.701(g), or material soliciting or promoting unlawful conduct. For purposes of this section, "material soliciting or promoting unlawful conduct" shall mean material that is otherwise proscribed by law. An open video system operator may require any access user, or access manager or administrator agreeing to assume the responsibility of certifying, to certify that its programming does not contain any of the materials described above and that reasonable efforts will be used to ensure that live programming does not contain such material.

[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 § 76.1505, paragraphs (d)(1), (4), (6) and (8) were revised. This amendment contains information collection and record-keeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

§ 76.1506 Carriage of television broadcast signals.

(a) The provisions of Subpart D shall apply to open video systems in accordance with the provisions contained in this subpart.

(b) For the purposes of this Subpart S, television stations are significantly