OUTSIDE PLANT ENGINEERING HANDBOOK

August 1994

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Developed by
AT&T Network Systems Customer Education & Training

Section 9

BURIED PLANT

PLANNING AND DESIGN GUIDELINES

AT&T 917-356-001

Buried plant is recommended as the first choice of providing outside plant (OSP) facilities beyond the underground network.

Selecting Placing Locations

- Select a permanent location for all buried plant, considering such factors as right-of-way limitations, soil type, natural obstacles (that is, rocks and trees), other underground utilities, and possible future excavation, such as that involved in road widening, fences, or ditching.
- Comply with all ordinances and regulations. Where required, secure permits before placing, excavating on private property, crossing streams, pushing pipe, or boring under streets and railways.
- Determine location of existing underground utilities.

Urban and Suburban Residential Areas

AT&T 917-356-100

Place distribution cables along the front property line or in a utility easement along the rear property line. Factors to be considered in selecting cable location are:

- Soil and subsurface conditions
- Natural obstacles such as rocks, trees, and unfavorable terrain
- Location of other utilities and the possibility of joint construction

COMMUNICATIONS ACT AMENDMENTS OF 1978

P.L. 95-234, see page 92 Stat. 33

**House Report (Interstate and Foreign Commerce Committee)
No. 95-721, Oct. 19, 25, 1977 [To accompany H.R. 7442]**

**Senate Report (Commerce, Science, and Transportation Committee)
No. 95-580, Nov. 2, 1977 [To accompany S. 1547]**

Cong. Record Vol. 123 (1977)

Cong. Record Vol. 124 (1978)

DATES OF CONSIDERATION AND PASSAGE

**House October 25, 1977; February 1, 6, 1978
Senate January 31, February 6, 1978**

The House bill was passed in lieu of the Senate bill after amending its language to contain much of the text of the Senate bill.

The Senate Report is set out.

SENATE REPORT NO. 95-580

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The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1547) to amend the Communications Act of 1934, as amended, with respect to penalties and forfeitures, and to authorize the Federal Communications Commission to regulate pole attachments, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

Summary and Purpose

The bill (S. 1547) serves two purposes:

(1) To unify, simplify, and enlarge the scope of the forfeiture provisions of the Communications Act of 1934; and

(2) To establish jurisdiction within the Federal Communications Commission (FCC) to regulate the provision by utilities to cable television systems of space on utility poles, ducts, conduits, or other rights-of-way owned or controlled by those utilities.

PENALTIES AND FORFEITURES

S. 1547, as reported, would unify and simplify the forfeiture provisions in the Communications Act of 1934, enlarge their scope to cover all persons subject to the act, provide more practical limitations periods and more effective deterrent levels of forfeiture authority, and would generally afford the Federal Communications Commission greater flexibility in the enforcement of the Communications Act and rules and regulations promulgated thereunder.

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The Communications Act of 1934 now imposes monetary civil penalties on certain individuals who fail to comply with the Communications Act, FCC regulations, or related matters. These civil liabilities

include the forfeiture provisions in section 503(b) (relating to the broadcast services) and section 510 (applicable to nonbroadcast radio stations). S. 1547 would enlarge the scope of forfeiture liability under these sections to cover other persons subject to the Communications Act—such as cable television systems, users of experimental or medical equipment emitting electromagnetic radiation, persons operating without a valid radio station or operator's license, and some communications equipment manufacturers.

S. 1547, as reported, would make three alterations in the existing forfeiture provisions. First, it would extend the limitations period within which notices of liability must be issued: for persons not previously subject to forfeiture liability, 1 year; for nonbroadcast licensees, from the present 90 days to 1 year; and for broadcast licensees, from the present 1 year to 1 year or the current license term, whichever is longer, not to exceed 3 years. Second, the maximum forfeiture that could be imposed for a single violation would be raised to $2,000; for multiple violations, within any single notice of liability, $20,000 for a common carrier, broadcast licensee, or cable system operator, and $5,000 in the case of all other persons. Third, the bill would authorize the Commission to mitigate or remit common carrier forfeitures in the same way as it now may with respect to all other forfeitures. Furthermore, the Commission would be given its choice of using the traditional "show cause" procedure for imposing a forfeiture or alternatively holding an adjudicatory hearing under section 554 of the Administrative Procedure Act.

POLE ATTACHMENT REGULATION

S. 1547, as reported, would empower the Commission to hear and resolve complaints regarding the arrangements between cable television systems and the owners or controllers of utility poles. A pole attachment, for purposes of this bill, is the occupation of space on a utility pole by the distribution facilities of a cable television system—coaxial cable and associated equipment—under contractual arrangements whereby a CATV system rents available space for an annual or other periodic fee from the owner or controller of the pole—usually a telephone or electric power company. The Commission would prescribe regulations to provide that the rates, terms, and conditions for pole attachments are just and reasonable. For a period of 5 years after enactment of this act, the Commission would employ a specified rate-setting formula in determining whether a particular pole attachment rate is just and reasonable. The formula describes a range between marginal and a proportionate share of fully allocated costs within which pole rates are to fall.

Any State which chooses to regulate pole attachments may do so at any time, and will preempt the Commission's involvement in pole attachment arrangements in that State simply by notifying the FCC that it regulates the rates, terms, and conditions for such attachments. S. 1547 in no way limits or restricts the powers of the several States to regulate pole attachments.

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The jurisdictional restrictions of section 2(b) of the act (47 U.S.C. 152(b)) are modified to permit the FCC to regulate practices of intrastate communications common carriers as they relate to pole attach-

ments. Utilities owned by the several States or their political subdivisions, and utilities owned by the Federal Government, are exempt from FCC pole attachment regulation. In like manner, the provisions of S. 1547 do not apply to any cooperative electric or telephone utility, or any railroad.

Background and Need

S. 1547 was introduced by Senator Hollings on May 17, 1977. The committee held hearings on the bill on June 23 and 24, 1977. Additional written submissions were received from interested parties, who expressed their views on the bill in its form as introduced, on a study of pole attachment problems of the Commission's Office of Plans and Policy, and on alternative pole attachment legislation suggested by the FCC's Common Carrier Bureau. That portion of S. 1547 relating to forfeiture authority is identical to S. 2343, which the Senate passed in June 1976 during the 94th Congress.

FORFEITURES

The FCC has long had forfeiture authority over common carriers and maritime radio stations. The FCC was given forfeiture authority over broadcasters in 1960. Section 503(b) of the Communications Act of 1934 was added to make broadcast licensees subject to some "middle ground" remedy other than license revocation (74 Stat. 889—Public Law 86-752, Sept. 13, 1960). In 1962, section 510 (76 Stat. 68—Public Law 87-448, May 11, 1962) was added to permit the Commission to impose forfeitures on nonbroadcast radio licensees for certain specific kinds of misconduct.

The Federal Communications Commission has testified to the committee that its existing forfeiture authority is inadequate to enforce effectively the Communications Act of 1934 in three principal respects:

(1) Not everyone now subject to the act is subject to forfeiture authority;

(2) The limitations period within which a notice of liability must be issued is unrealistic in light of the necessary preliminary field investigations required; and

(3) The maximum amount of forfeitures permitted for single and multiple violations is unrealistically low to be an effective deterrent for highly profitable communications entities or to provide sufficient penalty to warrant the Attorney General's or the various U.S. district attorneys' attention for prosecuting forfeitures within the Federal district courts.

The Commission argues that certain procedural requirements contained in existing forfeiture provisions compel misallocation of Commission assets and prevent the FCC from getting full benefit of extremely limited FCC field resources in the Commission's effort to encourage individuals to comply fully with the Communications Act of 1934. In this connection the Commission notes that there are now over 11 million authorizations in the safety and special radio services—under which falls the citizens band radio service—alone.

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A forfeiture is a civil penalty authorized under the Communications Act for certain violations of that act or related communications statutes, treaties, rules, or regulations. Whenever the Federal Communi-

cations Commission finds that grounds exist to support a suit for collection of forfeiture authorized under the Communications Act of 1934, a written notice of apparent liability is issued by the Commission to the violator. That notification specifies the violation and the amount of the forfeiture. The suspected offender has several alternatives, including immediate payment of the amount specified, a right to show cause in writing why he or she should not be held liable, or admission of liability with the right to argue that the amount of the forfeiture is excessive. If the person who receives the notice of apparent liability submits a statement in writing citing reasons against being held liable, the FCC then must proceed to an order, declaring nonliability or establishing the amount of the forfeiture. If the suspected violator then fails to pay the forfeiture to the Treasury, the case may be referred by the Federal Communications Commission to the Attorney General for appropriate civil action to recover the forfeiture in accordance with section 504(a) of the Communications Act. Section 504(a) authorizes the Attorney General to proceed in the Federal District Court in a trial de novo and to seek judgment for the amount of forfeiture.

S. 1547, as reported, amends this forfeiture procedure by giving the FCC a choice to use either a full adjudicatory hearing before the FCC or the less formal written "show cause" proceeding described above to determine a forfeiture liability. Under S. 1547, as reported, the Commission has full discretion to choose the appropriate proceeding, and may issue either a notice with an opportunity for hearing under section 503(b)(3)(A) or a notice of apparent liability with an opportunity to show in writing why the suspected violator should not be held liable under section 503(b)(4). The choice of the type of proceeding is exclusively the Commission's, and it is determined by the character of the notice the FCC chooses to issue a suspected violator.

The committee believes the FCC needs the alternative of an adjudicatory hearing for the exceptional forfeiture case, where urgency, precedent value, or convenience of the Commission warrants a proceeding exclusively under the Commission's control until a final judgment on appeal is obtained. The Justice Department's only involvement in an adjudicatory hearing before the Commission under new section 503(b)(3) would be to pursue a collection action after final judgment if the violator failed to pay the fine.

OTHER FCC ENFORCEMENT MECHANISMS

Forfeiture is one of several law enforcement mechanisms available to the FCC to enforce its rules and regulations. However, the Commission has argued that other enforcement alternatives are cumbersome and time-consuming procedures which are inappropriate for relatively minor violations. The Commission may enter a cease-and-desist order followed by a civil contempt proceeding which the Department of Justice must agree to prosecute. The cease-and-desist order is particularly cumbersome because the violator is entitled to an FCC order to show cause why a cease and desist order should not be issued. There is then a reply period of at least 30 days with the opportunity for a full

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evidentiary hearing. Only then can the FCC issue a cease and desist order which must specify findings, grounds and reasons, and the effective date. (See section 312 (B) and (C).) Failure to obey that order

then becomes subject to civil contempt proceedings by the Department of Justice in a U.S. district court.

Another enforcement alternative is criminal prosecution. Title 18 of the United States Code and the Communications Act of 1934 impose criminal liability for certain specified acts. However, criminal enforcement is exclusively in the hands of the Department of Justice.

An additional enforcement mechanism available to the FCC in certain instances is the authority to suspend or revoke broadcast and nonbroadcast radio station licenses (see section 303(m), section 312 (a)). This suspension and revocation authority has the obvious limitation of not reaching unlicensed operators or persons who are not required to be licensed by the FCC. Moreover, as license revocation constitutes a death sentence for any commercial entity dependent upon its radio license, the FCC is naturally reluctant to use this extreme remedy for behavior which merits only a reprimand or small penalty.

Another enforcement alternative is a "writ of mandamus" issued by a U.S. district court, "commanding such person to comply with the provisions of" the Communications Act of 1934 (see section 401 (a)). It can only be issued by a district court upon application by the Department of Justice at the request of the Federal Communications Commission.

The final enforcement alternative available to the FCC is an accounting order imposed against a common carrier (see section 407). This mechanism is available to the Commission in the case of a common carrier tariff increase. The Commission can permit a tariff increase to go into effect subject to an accounting order, pending final Commission resolution of the lawfulness of the tariff increase. If the tariff is eventually found to be unlawful, the Commission can order the amount subject to the accounting order to be returned to the persons for whose benefit the order was imposed by the FCC. Those individuals must enforce their rights under an accounting order—by suing in the district court or State court with jurisdiction.

Each of these enforcement authorities has severe limitations. Few are applicable to all persons subject to the Communications Act. All are extremely prolonged and expensive procedures, both for the persons charged with the violations and for the Government. Many have limited applicability to certain specific kinds of offenses in the Communications Act. All are relatively low priority matters to the Department of Justice.

EXTENSION OF FORFEITURE SANCTIONS TO ALL PERSONS SUBJECT TO THE COMMUNICATIONS ACT

S. 1547, as reported, extends the forfeiture sanction to all persons who engage in FCC-proscribed conduct. New section 503(b) reaches not only the broadcast station licensees covered by present section 503 (b) and other nonbroadcast radio station licensees and operators covered by present section 510, but extends forfeitures to any person subject to any provisions of the Communications Act or the Commission's rules, including those persons operating without a valid radio

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station license or operator's license, those persons not required to have licenses, and persons such as cable television operators, users of medical and experimental radio equipment not required to be licensed, but

subject to FCC regulation under part 15 or part 18 of FCC rules and regulations, and some communications equipment manufacturers.

There are a number of situations which typically involve the violation of FCC rules for which speedy remedy is not now available to the Commission, including:

(*a*) Failure to conduct annual performance tests required by FCC rules;

(*b*) Failure to file financial and ownership reports and forms required by FCC rules;

(*c*) Unlicensed operations in the increasingly popular citizens band radio service;

(*d*) Interference, obscenity, or other improper conduct by a nonbroadcast radio station which may not fall within 1 of the 12 prohibitions enumerated in present section 510;

(*e*) Initiating cable television relay services without a license or construction permit, or failing to adhere to conditions specified in the construction permit; and

(*f*) Violation of certain other cable television rules.

The committee believes that forfeiture authority is a much more effective sanction than cease-and-desist orders or criminal prosecution for reaching the small number of persons who fail to abide by FCC rules and engage in these types of activities.

S. 1547, as reported, also brings under the Commission's forfeiture authority users of incidental and restricted radiation devices, such as radio receivers, and users of industrial, scientific, and medical equipment, such as industrial heating equipment, which incorporate radio-frequency oscillators. These devices are not subject to FCC licensing provisions, but must be operated in accordance with FCC rules designed to minimize interference with regular radio communication services. The only effective remedy the Commission currently has against such users is cease-and-desist authority which, in the committee's view, is not an effective deterrent to misconduct.

EXPANDED AUTHORITY FOR IMPOSING FORFEITURES

S. 1547 would expand the grounds for forfeiture against nonbroadcast licensees and all other persons subject to FCC regulation to parallel the conduct presently proscribed in section 503(b)(1) for broadcast licensees.

The standard for liability for violations of FCC authorizations and licenses is a substantiality standard. A licensee or cable operator must willfully or repeatedly fail to comply substantially with the license or authorization. The standard for liability for violations of specific FCC rules is also "willful or repeated" but is not a substantiality test. Forfeiture liability arises simply from repeated or willful behavior.

New subparagraphs (A) and (B) of section 503(b)(1) retain the existing standards of law with respect to the burdens of proof necessary to impose a forfeiture by requiring a finding of willful or repeated behavior. Arguments were made before the committee that this

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should be changed to a willful and repeated, or alternatively, a willful or negligent standard. The committee believes no change is warranted in the "willfully or repeatedly" standard. A "willfully and repeatedly"

standard would substantially reduce the FCC's forfeiture authority by imposing a test of willfulness in every case of forfeiture. Substituting a "negligent" standard for the "repeatedly" standard would frustrate the purpose of the forfeiture mechanism. The current law makes it clear that the burden is on the licensees to exercise every possible diligence to comply with the FCC rules. The committee believes that other persons wishing to use the electromagnetic energy spectrum for their own commercial or personal benefit must be willing to accept the same responsibilities commensurate with the privilege.

In summary, the committee does not believe that it is appropriate to change existing law as it applies to broadcast licensees with respect to the general standard of conduct subject to forfeiture liability. Therefore, S. 1547, as reported, retains the test of "willfully or repeatedly" violative behavior as subject to forfeiture liability. This permits forfeiture for a single, willful act, or for inadvertent violations which are repeated. It carries out the underlying philosophy of S. 1547 to treat alike all persons subject to the Communications Act.

LIMITATIONS PERIOD FOR THE ISSUANCE OF NOTICES OF APPARENT LIABILITY

For broadcast licensees S. 1547, as reported, makes the limitations period within which the FCC must issue a notice of forfeiture liability 1 year from the date on which the violation occurred, or within the current license term, whichever is the longer period, but not to exceed 3 years. In the case of any other person, the limitation period is 1 year from the date on which the violation occurred. After that period, the Commission could not begin a forfeiture proceeding. Section 503(b)(6)(A) makes clear that no broadcast station licensee can be subject to forfeiture for a violation which occurred more than 3 years prior to the issuance of the notice, even if the broadcast license term began more than 3 years before the date of the notice.

A longer limitations period is necessary in the area of broadcast regulation. While some violations may be found during regular station inspections by FCC field personnel, the majority of violations of FCC rules are discovered at the time of broadcast license renewal. In most instances, a 1-year period for imposing a forfeiture will have lapsed by the time a station's broadcast license comes up for renewal. Under present law the Commission is left with the sole alternative of revoking a license when a forfeiture would be a much more appropriate response.

The committee believes that an extension of the time limitation for nonbroadcast licensees is also necessary. Usually, violations of the Commission's rules in the nonbroadcast services are detected through field office monitoring. When an apparent violation is found, the field office, as a matter of practice, issues a citation and offers an opportunity to comment on the alleged misconduct. These notices are routinely sent to Washington where they are checked against the licensee's records. In those cases where there is a history of repeated misconduct, or where the misconduct appears to be willful or sufficiently serious, the notice

of forfeiture liability is issued. The increasing workloads in the nonbroadcast services—over 11 million authorizations are outstanding in the safety and special radio services alone—and the limited number

of staff personnel to review possible violations have made it impossible, in many cases, to issue notices within the 90-day period of present law for nonbroadcast radio licensees. In those cases the Commission is faced with the dilemma of either imposing no sanction for detected violations or resorting to the more stringent sanction of license revocation.

Concern has been expressed to the committee that the extension from 3 months to 1 year for issuances of notices of apparent liability will result in significant lapses of time between detection by the FCC of a violation and the issuance of a notice of violation. Long lapses in time, it is claimed, would make it difficult for nonbroadcast licensees to respond, since it is not generally their practice to keep detailed engineering or other logs pertaining to station operation. Reliance must often be placed on the recollection of radio operators. The Commission has responded that it does not generally contemplate changes in procedures to lengthen the time period to issue notices of apparent liability if the statutory period is lengthened. Rather, such an extension to 1 year will permit the issuance of notices of apparent liability in those cases where the present 90-day period makes issuance impossible.

INCREASES IN THE AMOUNT OF FORFEITURE WHICH CAN BE IMPOSED

S. 1547, as reported, increases the maximum amount of forfeiture which can be imposed for violations: (1) The maximum forfeiture that could be imposed for a single violation would be $2,000; and (2) the maximum forfeiture that could be imposed for multiple violations in any single notice would be $20,000 in the case of a broadcast licensee, broadcast permittee, common carrier, or community antenna television system, and $5,000 in the case of any other person. Currently, broadcast stations are liable only for $1,000 for a single violation and $10,000 for multiple violations specified in any single notice. Those persons subject to forfeiture in existing section 510(a) are liable only for $100 for any single type of violation and a maximum of $500 for multiple violations.

The committee received testimony opposing the large increase in the amount of forfeitures to which nonbroadcast licensees will be subject under S. 1547. The committee believes that the increases are appropriate to protect more effectively the electromagnetic spectrum and its use. The current forfeiture limits are unrealistic and totally inadequate to deter large communications businesses. The same is equally true in the case of individuals. The new forfeiture limits are maximum amounts. The committee does not believe that these maximum penalties are appropriate for every case. The Commission must take into account the facts and culpability of the violator in each case before setting the amount of the forfeiture. The Commission would still retain the discretion to impose small forfeitures for offenses of lesser gravity. The committee notes that it is not FCC policy to fix the amount of forfeitures at the maximum of the statutory limit, but to consider several factors including seriousness of the violation, circumstances, duration, and financial condition of the licensee. (See, for example,

Williams County Broadcasting Station, Inc., 34 R.R. 2d 105 (1975); *Radio Beaumont, Inc.*, 13 FCC 2d 965, 968 (1968); *Larry Association*, 27 FCC 2d 870 (1961).)

NOTICE REQUIREMENTS

S. 1547, as reported, requires that forfeiture liability could arise only after a person has been served personally or by certified or registered mail with a notice. In addition, it contains a special procedural protection comparable to existing law for those persons who will be made subject to forfeiture liability for the first time and who are presumed to be unaware of Commission regulations. For persons who are not required to hold a license, permit, certificate, or other authorization issued by the Commission, no forfeiture may attach unless prior to the issuance of any notice the Commission has sent a citation for the violation and has provided an opportunity for a personal interview and the person has thereafter engaged in the prohibited conduct. This special citation procedure and interview requirement protects persons who would otherwise be subject to immediate forfeiture for willful violations such as altering electronic devices which emit electromagnetic radiation (such as garage door openers or electronic water heaters or electronic ovens) in violation of FCC rules. Such a person could not be subject to forfeiture until there was clear evidence through the issuance of a citation of violation and interview opportunity that he or she was aware of the applicability of the Commission's rules and regulations governing the proscribed behavior. Only if he or she thereafter engaged in the conduct for which the citation of violation was sent could a notice of liability be issued. In such an event, forfeiture liability would attach not only for the conduct occurring subsequently but also for the conduct for which the citation of violation was originally sent.

Under existing law (section 510), the Commission is obligated to provide a personal interview to any nonbroadcast station licensee or operator who requests an interview after he or she receives a notice of apparent liability. S. 1547, as reported, alters this interview requirement by relieving the Commission of the unnecessary burden of conducting interviews with persons who are licensed or required to hold licenses or other authorizations from the Commission.

The Commission has testified that the elimination of the personal interview as proposed in S. 1547, as reported, is warranted in view of experience gained by the Commission's Field Operations Bureau in conducting interviews under section 510 during the past several years. According to the Commission, little more is accomplished by personal interview than by a written showing of why such forfeiture penalty should not be imposed. The interview is often mistaken to be a hearing. In fact, it serves mainly an internal FCC informational purpose. The usual course of the interview is as follows: Information is presented verbally by the person subject to the Notice of Apparent Liability to the Engineer in Charge (EIC) of the local FCC office, who in turn relays that information in writing to decisionmaking staff located in the appropriate Commission bureau. The participation of the EIC is limited to merely receiving, putting in writing, and forwarding the

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information to appropriate Commission staff. Thus, the same result could be accomplished by corresponding directly with the Commission in Washington.

INCREASED AUTHORITY IN THE FCC TO MITIGATE OR REMIT FORFEITURES

The FCC currently has express authority to mitigate or remit forfeitures under parts II and III of title III, and sections 503(b), 507, and 510 of the Communications Act. S. 1547, as reported, would amend this provision to eliminate the requirement that the person subject to the forfeiture seek the remission or mitigation of the forfeiture.

S. 1547, as reported, would also extend the authority of the FCC to allow remission or mitigation of title II—common carrier—forfeitures. Current law provides the FCC with no express authority to remit, mitigate, or otherwise redo a forfeiture imposed under the common carrier forfeiture provision of the Communications Act. The Commission does have such express authority with respect to all other general forfeiture provisions in the Communications Act. The committee believes this discretion should extend to common carrier forfeitures.

CATV ISSUES

The committee received testimony from cable television interests objecting to any extension of the civil penalty forfeiture authority of the Communications Act as it applies to cable television operators. The committee concurs with the recommendations of the FCC that appropriate forfeiture authority over cable television operators is necessary. The U.S. Supreme Court has affirmed FCC jurisdiction over cable television to the extent that such authority is reasonably ancillary to the Commission's responsibilities for broadcast regulation (*United States* v. *Southwestern Cable Co.*, 392 U.S. 157(1968)[1]; *United States* v. *Midwest Video Corp.*, 406 U.S. 649(1972))[2]. The full extent of the FCC's ancillary jurisdiction has not been specifically defined either by statute or judicial decision, but the committee believes that is not a valid reason to deny the agency the necessary enforcement authority to insure compliance with its proper regulations. If any particular aspect of FCC regulation exceeds the agency's authority, the remedy is judicial appeal, not across-the-board denial of adequate enforcement powers.

The committee appreciates the concern expressed by some cable operators that the small or rural operator will be fined for violations of technical standards with which it is difficult to comply or which may have only insignificant impact on other services or on cable subscribers.

Such concern is directed in particular to the case where older cable television equipment fails to meet one or more of the technical standards adopted by the Commission in 1972. If, for example, a cable television system constructed not long before 1972 were providing generally acceptable service but failed to meet the 1972 technical standards in some specific way, it might be unreasonable to require replacement of major portions of the cable plant before the end of the anticipated life of the equipment. Therefore, even though the Commission did allow 5 years for systems existing in 1972 to bring themselves into compliance with the technical standards, we would expect

1. 88 S.Ct. 1994, 20 L.Ed.2d 1001.
2. 92 S.Ct. 1860, 32 L.Ed.2d 390, rehearing denied 93 S.Ct. 95, 409 U.S. 898, 34 L.Ed.2d 157.

the Commission to consider the practical financial aspects of plant replacement in determining the appropriateness of forfeitures for noncompliance due solely to characteristics of pre-1972 equipment.

The committee wishes to make clear, however, that such special consideration for systems with older equipment should not excuse inadequate maintenance and engineering practices. If it is feasible to modify, adjust or maintain older equipment to meet the Commission's technical standards, then an operator failing to do so would be subject to forfeitures just as though his or her equipment were more modern. Nor would we expect consideration for older equipment to extend past the useful life of such equipment.

Further, it is the committee's position that certain technical standards relating to prevention of radio interference must prevail over considerations of cable equipment age and replacement costs. Standards, rules, and regulations designed to prevent harmful interference—as defined in FCC rules—to radio navigation and safety services clearly must take precedence.

The Commission has stated that while compliance with the technical standards may involve some difficulty for systems that are providing substandard service, the standards are realistic and, in fact, generally conservative in terms of the ability of the cable industry to comply. The Commission adopted its technical standards in 1972, and undertook a review of these standards later that year to determine the impact of its technical standards performance tests on smaller cable television systems. (*Notice of Inquiry and Proposed Rulemaking in Docket 19659*, 38 FCC 2d 506. 37 Federal Register 28307 (1973).) At the conclusion of this proceeding some changes in the rules were made to ease compliance. However, the Commission concluded that, while it was appropriate to make some distinctions between new and old systems, no such rational breakdown between large and small systems could be developed that would continue to assure that subscribers to small systems received good quality cable service and those persons near small systems were not subject to radio interference as a result of signal leakage. (*Report and Order in Docket 19659*, 47 FCC 2d 769, 38 Federal Register 29083 (1973).)

The Commission affirmed this general conclusion in stating to this committee:

> We are aware that some cable operators, both small and large, may be particularly apprehensive that the enactment of forfeiture legislation will result in a crackdown on cable systems that are leaking radiation in excess of that permitted by the rules. While we are sensitive to the concern of cable operators that the Commission may impose its authority indiscriminately, we see no alternative in this area to a reliance on the normal processes of administration and law to assure reasonable application of necessary standards and rules.
>
> Radiation standards apply not only to cable television systems but to other entities that may be engaged in incidental radiation, and are an essential part of the Commission's effort to make the most efficient possible use of the available radio frequency space. Radiation from a cable system pollutes the radio environment around the system, potentially inter-

fering with the right of nonsubscribers to the quiet enjoyment of their own radio and television reception. And, unlike the service a system provides to its own subscribers, there are few, if any, marketplace incentives for such leakage to be repaired. The individual subject to the interference may have no idea that the poor quality picture he receives is anything other than the result of natural propagation difficulties and general radio noise. While there may well be cable operators in rural areas and backwoods hills and hollows whose radiation seems at this time to cause no injury to anyone, we see no practical way of differentiating in the rules between this minority and the majority of cable operations whose leakage has a potential for creating real reception problems.

The FCC's present enforcement tools of cease and desist and revocation of certificates of compliance are totally inadequate in the cable television area. The forfeiture alternative is essential. The purpose of S. 1547, as reported, is to treat all parties subject to the Communications Act equitably and fairly and is not exclusively aimed at CATV. Any exception for CATV would work great unfairness on other industries which are less likely than cable operators to be familiar with FCC rules and regulations but are nevertheless subject to forfeiture authority.

The committee notes that S. 1547, as reported, is prospective in its effect for cable operators. Section 7 of the bill, as reported by the committee, specifically provides that any act or omission which occurs prior to the effective date of this act shall incur liability under the provisions of existing forfeiture authority as then in effect. Therefore, cable operators will not be subject retroactively to increased forfeitures for violations which occurred prior to the effective date of S. 1547.

POLE ATTACHMENT REGULATION

It is the general practice of the cable television (CATV) industry in the construction and maintenance of a cable system to lease space on existing utility poles for the attachment of cable distribution facilities (coaxial cable and associated equipment). These leasing agreements typically involve the rental of a portion of the communications space on a pole for an annual or other periodic fee as well as reimbursement to the utility for all costs associated with preparing the pole for the CATV attachment. The FCC estimates that there are currently over 7,800 CATV pole attachment agreements in effect. Approximately 95 percent of all CATV cables are strung above ground on utility poles, the remainder being placed underground in ducts, conduits, or trenches. These poles, ducts, and conduits are usually owned by telephone and electric power utility companies, which often have entered into joint use or joint ownership agreements for the use of each other's poles. It is estimated that approximately 70 percent of all utility poles owned by either telephone or electric utilities are actually jointly used. These joint utility agreements commonly reserve a portion of each pole for the use of communications services (telephone, telegraph, CATV, traffic signaling, municipal fire and police alarm systems, et cetera). This communications pole space is usually under the control of the telephone company.

Owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate CATV poles or entrenching CATV cables underground, there is often no practical alternative to a CATV system operator except to utilize available space on existing poles. The number of poles owned or controlled by cable companies is insignificant, estimated to be less than 10,000, as compared to the over 10 million utility-owned or controlled poles to which CATV lines are attached.

Sharing arrangements minimize unnecessary and costly duplication of plant for all pole users, utilities as well as cable companies. Nevertheless, pole attachment agreements between utilities which own and maintain pole lines, and cable television systems which lease available space have generated considerable debate. Conflict arises, understandably, from efforts by each type of firm to minimize its share of the total fixed costs of jointly used facilities. Of the more than 10 million poles on which cable operators lease space, fewer than half are controlled by telephone companies, while 53 percent are controlled by power utilities, public and private. Most CATV systems lease space from more than one utility. An estimated 72 percent of all cable systems lease pole space from Bell Telephone operating companies, approximately 65 percent have agreements with investor-owned power companies, an additional 21 percent lease space from independent telephone companies, while 10 percent attach to poles owned by REA cooperatives and 14 percent acquire space from utilities owned by municipalities.

Due to the local monpoly in ownership or control of poles to which cable system operators, out of necessity or business convenience, must attach their distribution facilities, it is contended that the utilities enjoy a superior bargaining position over CATV systems in negotiating the rates, terms and conditions for pole attachments. It has been alleged by representatives of the cable television industry that some utilities have abused their superior bargaining position by demanding exorbitant rental fees and other unfair terms in return for the right to lease pole space. Cable operators, it is claimed, are compelled to concede to these demands under duress. The Commission's Office of Plans and Policy, in a staff report released in August 1977, concluded that, "[a]lthough the reasonableness of current pole attachment rates remains open to question, public utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents from cable TV systems in the form of unreasonably high pole attachment rates" (page 34).

The committee received testimony that the introduction of broadband cable services may pose a competitive threat to telephone companies, and that the pole attachment practices of telephone companies could, if unchecked, present realistic dangers of competitive restraint in the future. The Commission has investigated the competitive interrelationships of telephone and cable companies in various proceedings and contexts, and has taken action to curtail potential anticompetitive practices in several instances. (See for example, *Common Carrier Tariffs for CATV Systems*, 4 FCC 2d 257 (1966); *General Telephone Co. of California*, 13 FCC 2d 448, *af'd.* 413 F. 2d 390 D.C. Cir. *cert. denied*, 396 U.S. 888 (1969). See also, *General Telephone Co. of the Southwest* v. *United States*, 449 F. 2d 846, 857 (5th cir. 1971).)

The pole attachment policies and practices of utilities owning or controlling poles are generally unregulated at the present time. Currently only one State—Connecticut—actually regulates pole attachment arrangements, while in another eight States, regulatory authority apparently exists but has not been exercised—California, Hawaii, Nevada, Alaska, Rhode Island, Vermont, New Jersey, and New York. According to a recent survey conducted by the Commission's Cable Television Bureau, entitled "Cable Television Pole Attachment—State Law and Court Cases," very few States have specific statutory provisions governing attachments to utility poles. Only 15 States, including the District of Columbia, appear to have enacted statutory authority which may be of sufficient breadth to permit regulation by an appropriate State body.

JURISDICTIONAL BASIS FOR FCC REGULATION

Moreover, the Federal Communications Commission has recently decided that it has no jurisdiction under the Communications Act of 1934, as amended, to regulate pole attachment and conduit rental arrangements between CATV systems and nontelephone or telephone utilities. (*California Water and Telephone Co., et al.*, 40 R.R. 2d 419 (1977).) This decision was the result of over 10 years of proceedings in which the Commission examined the extent and nature of its jurisdiction over CATV pole attachments. The Commission's decision noted that, while the Communications Act conferred upon it expansive powers to regulate all forms of electrical communication, whether by telephone, telegraph, cable or radio, CATV pole attachment arrangements do not constitute "communication by wire or radio," and are thus beyond the scope of FCC authority. The Commission reasoned:

> The fact that cable operators have found in-place facilities convenient or even necessary for their businesses is not sufficient basis for finding that the leasing of those facilities is wire or radio communications. If such were the case, we might be called upon to regulate access and charges for use of public and private roads and right of ways essential for the laying of wire, or even access and rents for antenna sites.

In addition the Commission concluded that there was no reason to separate resolution of the purely legal question of jurisdiction on the basis of whether the party owning or controlling the pole was a telephone or nontelephone company.

The committee believes that S. 1547, as reported, will resolve this jurisdictional impasse, by creating within the FCC an administrative forum for the resolution of CATV pole attachments disputes and by prompting the several States, should they wish to involve themselves in these matters, to develop their own plans free of Federal prescriptions.

The committee believes that Federal involvement in pole attachment arrangements should serve two specific, interrelated purposes: To establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public.

The basic design of S. 1547, as reported, is to empower the Federal Communications Commission to exercise regulatory oversight over the arrangements between utilities and CATV systems in any case where the parties themselves are unable to reach a mutually satisfactory arrangement and where a State or more local regulatory forum is unavailable for resolution of disputes between these parties. S. 1547, as reported, accomplishes this design in the most direct and least intrusive manner. Federal involvement in pole attachments matters will occur only where space on a utility pole has been designated and is actually being used for communications services by wire or cable. Thus, regardless of whether the owner or controller of the pole is an entity engaging in the provision of communications service by wire, if provision has been made for attachment of wire communications a communications nexus is established sufficient to justify, in a jurisdictional sense, the intervention of the Commission. The underlying concept of S. 1547, as reported, is to assure that the communications space on utility poles, created as a result of private agreement between nontelephone companies and telephone companies, or between nontelephone companies and cable television companies, be made available, at just and reasonable rates, and under just and reasonable terms and conditions, to CATV systems.

S. 1547, as reported, stops short of declaring the provision of pole space to CATV "wire or radio communications" per se, or that poles constitute "instrumentalities, facilities, apparatus," et cetera incidental to wire communications (as used in section 3(a) of the Communications Act, 47 U.S.C. 153(a)). However, S. 1547, as reported, does expand the Commission's authority over entities not otherwise subject to FCC jurisdiction (such as electric power companies) and over practices of communications common carriers not otherwise subject to FCC regulation (principally the intrastate practices of interstate or intrastate telephone companies). This expansion of FCC regulatory authority is strictly circumscribed and extends only so far as is necessary to permit the Commission to involve itself in arrangements affecting the provision of utility pole communications space to CATV systems. Even in this instance S. 1547, as reported, does not contemplate a continuing direct involvement by the Commission in all CATV pole attachment arrangements. FCC regulation will occur only when a utility or CATV system invokes the powers conferred by S. 1547, as reported, to hear and resolve compaints relating to the rates, terms, and conditions of pole attachments. The Commission is not empowered to prescribe rates, terms, and conditions for CATV pole attachments generally. It may, however, issue guidelines to be used in determining whether the rates, terms, and conditions for CATV pole attachments are just and reasonable in any particular case.

Moreover, the Commission's jurisdictional reach extends only to those entities which participate in the provision of communications space on utility poles. Thus, an electric power company which owns or controls a utility pole would be subject to FCC jurisdiction only if two preconditions are met: (1) the power company shares its pole with a telephone company, or other communications entity; and (2) a cable television system shares the communications space on the pole with the telephone utility or other communications entity, or occupies the communications space alone. An electric power company owning or

controlling a pole on which no communications space has been designated would not be subject to FCC jurisdiction. S. 1547, as reported, does not vest within a CATV system operator a right to access to a utility pole, nor does the bill, as reported, require a power company to dedicate a portion of its pole plant to communications use.

It has been made clear in testimony by CATV industry representatives to this committee that access to utility poles does not in itself constitute a problem, among other reasons because CATV offers an income-producing use of an otherwise unproductive and often surplus portion of plant. CATV industry representatives estimate that about 15 percent of all utility poles owned or controlled by electric power companies are not occupied by telephone companies as well, and that CATV systems are already attached to a high percentage of these power poles in communities served by cable television.

While S. 1547, as reported, does not legislate a guarantee of access by CATV systems to utility poles, the committee recognizes that it is conceivable that a nontelephone utility which currently provides CATV pole attachment space might discontinue such provision simply in order to avoid FCC regulation. The committee believes that under S. 1547, as reported, the Commission could determine that such conduct would constitute an unjust or unreasonable practice and take appropriate action upon a finding that CATV pole attachment rights were discontinued solely to avoid jurisdiction.

Furthermore, S. 1547, as reported, would not require the Commission, as it stated in its *California Water and Telephone Co.* decision, noted above, "to regulate access and charges for use of public and private roads and right-of-ways essential for the laying of wire, or even access and rents for antenna sites." The communications space must already have been established, meaning that FCC jurisdiction arises only where a pole, duct, conduit, or right-of-way has already been devoted to communications use, and the communications space must already be occupied by a cable television system. Hence any problems pertaining to restrictive easements of utility poles and wires over private property, exercise of rights of eminent domain, assignability of easements or other acquisitions of right-of-way are beyond the scope of FCC CATV pole attachment jurisdiction. Any acquisition of any right-of-way needed by a cable company is the direct responsibility of that company, in accordance with local laws. S. 1547, as reported, is not intended to disturb such matters in any way.

STATE OR LOCAL CATV POLE ATTACHMENT REGULATION

S. 1547, as reported, permits any State which regulates the rates, terms, and conditions for CATV pole attachments to preempt the Federal Communications Commission's regulation of pole attachments in that State. The committee considers the matter of CATV pole attachments to be essentially local in nature, and that the various State and local regulatory bodies which regulate other practices of telephone and electric utilities are better equipped to regulate CATV pole attachments. Regulation should be vested with those persons or agencies most familiar with the local environment within which utilities and cable television systems operate. It is only because such State

or local regulation currently does not widely exist that Federal supplemental regulation is justified.

However, the framework for such State and local regulation is already in place. CATV systems and electric power and telephone utilities are subject, in varying degrees, to local or State regulation in numerous ways. State and local public service commissions and other agencies already possess a wealth of experience in regulating intrastate power and telephone companies. CATV systems are granted franchise permits from the officials in the communities in which they operate. Several States have cable television commissions which perform regulatory functions in addition to those performed by the community franchising authorities.

Nevertheless, in the absence of regulation by these State and local authorities of CATV pole attachments, the Federal Communications Commission should fill the regulatory vacuum to assure that rates, terms, and conditions otherwise free of governmental scrutiny are assessed on a just and reasonable basis. The committee looks to a replacement of interim FCC jurisdiction by the States and localities concerned with the orderly growth of cable television. Since this is a relatively novel issue in many States, there will be a time before many assert CATV pole attachment jurisdiction. Most States will require special legislation in order to empower their utility commissions with the requisite authority. Some States may wish to conduct studies of local needs prior to considering legislative action. There is, too, the possibility that some States may not choose to regulate in this area.

S. 1547, as reported, establishes a simple notification process whereby a State may recapture CATV pole attachment jurisdiction by certifying to the Commission that it regulates the rates, terms, and conditions for CATV pole attachments. The bill as reported makes clear that the Commission shall be foreclosed from regulation with respect to pole attachments in any State which has so certified to the Commission. Receipt of such a certification from the State shall be conclusive upon the Commission. The FCC shall defer to any State regulatory program operating under color of State law, even if debate or litigation at the State level is in progress as to the authority of the State or local body to carry out a CATV pole attachment regulatory program. However, since the purpose of the bill as reported is to create a forum that is, in fact, available to adjudicate pole attachment disputes, State preemption of FCC jurisdiction would not occur if a State only had authority to regulate in this area but was not actually implementing that authority. Thus, if a State is regulating, or is prepared to regulate upon a proper request, the FCC is preempted. Litigation challenging the State's authority would not affect that preemption unless the reviewing court or other authority had imposed a stay of State regulation pending outcome of the litigation.

S. 1547, as reported, unlike the bill as introduced, imposes no rate-setting formula upon the States. The committee believes that the States should have maximum flexibility to develop a regulatory response to pole attachment problems in accordance with perceived State or local needs and priorities. The committee is of the opinion that no Federal formula could accommodate all the various local needs and priorities

in an entirely satisfactory manner. As noted above, the committee believes that familiarity with the specific operating environment of the utilities and cable television systems within a State, as well as the needs and interests of State or local constituents, is indispensable to efficient and equitable regulation.

Furthermore, imposition of a Federal ratesetting formula on the States would discourage State regulation by leaving only ministerial functions to the State public utility commissions or other regulatory agencies of the States or localities. The committee wishes to facilitate the replacement of FCC regulation in this area, not to vest within the Commission permanent nationwide pole attachment duties.

Ultimately, CATV pole attachment ratesetting involves equity considerations. Decisions regarding the allocation of pole costs among users should reflect in some rough sense the ability of cable subscribers and the utilities' customers to pay for costs which are passed along to them. Another significant equity consideration is the relative importance of each of the respective services to the communities served. Considerations of equity should turn on the needs and interests of local constituents. Given the fact that State public service commissions or local regulatory bodies are better attuned to these needs and interests than a Federal agency, jurisdiction over CATV pole attachments should rest with non-Federal officials.

Because the pole rates charged by municipally owned and cooperative utilities are already subject to a decisionmaking process based upon constituent needs and interests, S. 1547, as reported, exempts these utilities from FCC regulation. Presently cooperative utilities charge the lowest pole rates to CATV pole users. CATV industry representatives indicate only a few instances where municipally owned utilities are charging unsatisfactorily high pole rental fees. These rates presumably reflect what local authorities and managers of customer-owned cooperatives regard as equitable distribution of pole costs between utilities and cable television systems.

As to municipally owned utilities, in many cases the same local entity—the city council—is responsible finally for granting CATV franchises, and setting pole rates and electric and CATV subscriber rates. There are today approximately 2,228 local jurisdictions owning local public power systems. Of these, about 2,112 have the authority to grant CATV franchises as well, and about half or 1,008 of these municipal power systems have granted cable franchises. Thus these localities are in the best position to determine the respective responsibilities of pole users for the costs of erecting and maintaining these facilities.

Cooperatively owned utilities, by and large, are located in rural areas where often over-the-air television service is poor. Thus the customers of these utilities have an added incentive to foster the growth of cable television in their areas. Many stockholders of power or electric cooperatives also subscribe to cable television systems. Moreover, the Rural Electrification Administration of the Department of Agriculture advises this committee that over 60 percent of existing REA loan recipient plant is buried underground, mostly in trenches, and that approximately 95 percent of all new plant is being buried underground. Therefore, as to most cooperative utilities, CATV pole attachment arrangements are unnecessary since there are no leasing agreements associated with use of trenches.

Railroads likewise play an insignificant role in CATV pole attachment matters and are also exempt from FCC regulation under S. 1547, as reported. It is not the committee's intention that S. 1547, as reported, should affect in any way existing circumstances regarding CATV pole attachments on Indian lands.

FCC INTERIM RATE-SETTING FORMULA

S. 1547, as reported, sets forth a rate-setting formula to be employed by the Commission in determining whether the rates for CATV pole attachments in any particular case are just and reasonable. The formula describes a range of permissible rates between "additional costs" and a proportionate share of the "operating expenses and actual capital costs" of the utility pole. In essence, the standard permits the contracting parties, or the Commission, to determine a CATV pole attachment rate somewhere between avoidable costs and fully allocated costs.

The level of pole attachment fees is intimately connected with the terms and conditions of pole space leasing agreements. The reasonableness of a utility's pole attachment practices must be judged with reference to the compensation that it receives from cable companies for the service provided. For example, a pole attachment fee designed to recover all of the utility's fully allocated costs might justify giving cable operators all of the rights with respect to poles as other utility users, subject only to the higher priority that exists for the maintenance of telephone and electric service. Alternatively, a fee designed to recover only the utility's avoidable costs, which could be expected to be minimal since most of those costs are the outlays that should be fully recovered in the make-ready charges, would justify treating cable as a clearly secondary use subordinate in every respect to the provision of electric and telephone service. This interim formula reflects a belief that the annual pole attachment fee should be set somewhere between avoidable and fully allocated costs in order to avoid inhibiting the growth of cable television and to insure that cable operators and their subscribers make some equitable contribution to the fixed costs of the utility systems they use.

The term "additional costs" means those costs which would not be incurred by the pole owner or controller "but for" the CATV attachment. Within this category would fall such items as preconstruction survey costs and engineering, make-ready, and change-out costs incurred in preparing the utility pole for the CATV attachment. Make-ready costs are those necessary to rearrange existing telephone and power lines to maintain clearances between different pole lines required by individual utility construction and safety standards and national electrical safety codes and to reinforce poles when necessary to increase load capacity. In a few limited instances it may be necessary for the utility to replace an existing pole with a larger facility in order to accommodate the CATV user. In those cases it would be appropriate to charge the CATV user a certain percentage of these pole "change-out" replacement costs, sometimes referred to as the "nonbetterment costs." All of these costs arise solely by virtue of the CATV occupation of space within the communications space on the pole.

The term "operating expenses and actual capital costs of the utility," as used in S. 1547, as reported, refers to the costs to the utilities, irre-

spective of the CATV attachment, of owning and maintaining poles. Such costs include interest on debt, return on equity (profit), depreciation, taxes, administrative and maintenance expenses. There will remain some dispute, it is anticipated, as to whether a particular capital or expense item is "attributable" to the pole or whether a determination of rates based on future as opposed to embedded costs is appropriate. For example, maintenance expenses of utility pole crews may be difficult to assign where the same crew performs functions other than maintaining utility poles. Likewise, general office salaries and expenses may not be susceptible to clear attribution to pole maintenance categories. Further, there may be some difficulty in determining the components of "actual" capital costs. As to some of these factors the committee expects that the Commission will have to make its best estimate of some of the less readily identifiable actual capital costs. Special accounting measures or studies should not be necessary.

The committee is advised that the majority of cost and expense items attributable to utility pole plant are already established and that publicly available accounts reflecting total annual pole costs are filed by utilities with the various regulatory agencies with ratemaking jurisdiction over their activities. Since the rate-setting formula set forth in S. 1547, as reported, merely establishes a methodology for assigning pole costs, however determined, under applicable accounting procedures, the committee sees no need for the Commission to establish a separate system of accounting to determine operating expenses and capital costs attributable to poles, or to reexamine on its own initiative, the reasonableness of the cost methodology made by the utilities and sanctioned by State or local regulatory agencies.

Once these expense items and capital costs are determined, the formula provides a method for determining a maximum portion of these total pole costs which may be assigned to the CATV system. The allocation formula provides that a cable system may bear a proportionate share of the total pole costs in exactly the same proportion that its attachment and attendant clearances take up usable space. By way of example, on a typical utility pole 35 feet in length there are 11 feet of usable space (that space above minimum grade level clearance used to attach cable, telephone, and electric wires and associated equipment). By what is virtually a uniform practice throughout the United States, cable television is assigned 1 foot out of the 11 feet of usable space. (While cable only physically occupies approximately 1 inch of this space, the clearance space between CATV and the next adjacent pole user is attributed to CATV.) Cable's share of the total capital costs and operating expenses for the entire 35-foot pole would be one-eleventh. Cable would pay its share of not just the costs of the 11 feet of usable space but of the total costs of the entire pole, including the unusable portion (below grade level, and between grade and minimum clearance levels). This allocation formula reflects the concept of relative use of the entire facility. To the extent that a pole is used for a particular service in greater proportion than it is used for another service, the relative costs of that pole are reflected proportionately in the costs of furnishing the service which has the greater amount of use.

In regard to the rate-setting formula set forth in S. 1547, as reported, the committee wishes to make one point very clear. The particular

methodology selected in this bill is only one of many plausible approaches to assigning pole costs to a CATV system, and should not be considered to reflect the committee's judgment that allocation of pole costs according to relative use is the optimal methodology. The committee's decision to incorporate a specific rate-setting formula in S. 1547, as reported, is based entirely on the following considerations: To assist the Federal Communications Commission during the first few years of regulation in this new area; and to provide the Commission with a sense of congressional intent as to the meaning of the term "just and reasonable rate," so as to avoid lengthy initial proceedings at the Commission to determine what just and reasonable CATV pole attachment rates should be. The rate-setting formula of S. 1547, as reported, should be regarded as an interim measure only, having no precedential effect whatsoever on other rate-setting responsibilities of the Commission. Nor should this interim formula be deemed to reflect the committee's preference that the Commission indefinitely employ this particular methodology or the underlying concept of relative use in the instant case of CATV pole attachments. A 5-year termination of this formula is imposed to afford the Commission greater leeway to select a more appropriate methodology should experience and changed conditions so dictate. After this 5-year period the Commission would be guided by the "just and reasonable" statutory standard.

The bill as reported sets forth no specific guidelines to the Commission to determine whether any term or condition for CATV pole attachments is just and reasonable. Such terms and conditions usually include matters relating to inspections, extent and duration of license, liability for a portion of future capital costs, insurance, surety bonds, lease revocation, and like matters. The committee believes that the open standard of "just and reasonable" is at the same time sufficiently precise and flexible to permit the Commission to make determinations when presented with specific contractual provisions alleged to be excessively onerous or unfair. In any event, the fairness of any term or condition of a CATV pole-leasing agreement will have to be judged in relation to other contract provisions, prevailing practices in the industries involved, and the particular pole rate charges, matters which cannot be precisely translated into statutory language.

FCC CATV POLE ATTACHMENT REGULATORY PROCEDURES

The committee desires that the Commission institute a simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation.

Since S. 1547, as reported, does not define the provision of pole attachments as a common carrier service, the full panoply of regulatory procedures and enforcement mechanisms provided in title II of the Communications Act of 1934, as reported, would not automatically extend to utilities subject to FCC pole attachment regulation. The bill as reported affords the Commission discretion to select the regulatory tools necessary to carry out its new responsibilities, consistent with the simple complaint procedure specified in the bill, as reported. S. 1547, as reported, charges the Commission to develop, after an appropriate

rulemaking proceeding, a flexible program to adjudicate complaints relating to CATV pole attachment rates, terms, or conditions. The Commission's adjudicatory authority would not come into play until a complaining party has brought a matter to the Commission's attention. After hearing the complaint and responsive pleadings, if the Commission determines that a particular rate, term, or condition is unjust or unreasonable, it shall take any action it deems appropriate and necessary, including ordering the parties to undertake further negotiations to arrive at a just and reasonable settlement of the dispute to their mutual satisfaction. Alternatively, the Commission may order a party to show cause why it should not cease and desist from practices found to be unjust or unreasonable.

The Commission may by rulemaking establish regulations governing the form and content of complaints relating to CATV pole attachments, including requirements that the complaining party establish prima facie the unjustness or unreasonableness of any rate, term, or condition and show that the parties involved are unable to resolve the matter themselves and that all available State or local administrative remedies have been exhausted. To assist parties in their private resolution of CATV pole attachment disputes, the Commission may publish guidelines to be used in determining whether a particular rate, term, or condition would be just and reasonable.

The Commission may also prescribe such rules as it deems appropriate relating to the conduct of the complaint procedure established by the bill as reported. Such rules may include such matters as assignment of the burden of proof on contested rates, terms, and conditions, or on such documentation offered by a utility to justify any rate, term, or condition under challenge.

In determining the lawfulness of a utility's rates, terms, and conditions for CATV pole attachments, the Commission may accept in whole or in part the depreciation rates, property valuations, systems of accounts, rates of return and the like established or determined by any State or local agency or any agency of the Federal Government. It is not the intent of S. 1547, as reported, to require the Commission to embark upon a large-scale ratemaking proceeding in each case brought before it, or by general order. It would be extremely difficult for the Commission to attempt such a task. The annual charges for poles vary from one region of the country to another, from one company to another within a region, and within one company by reason of particular historical patterns of development, acquisition, accounting and construction practices, and the varying terms of joint user agreements with other utilities. Any general ratemaking principles which did not take into account such factors would be inherently inefficient, as well as unfair. Rather, the FCC is to focus more narrowly on the just and reasonable assignment of utility pole costs to the CATV user. Among those costs are the utility's rate of return and other capital cost factors, which will already have been established by a State or local agency. There is no need for the Commission to make independent determinations as to each element of a utility's annual pole costs, as S. 1547, as reported, merely requires the Commission to follow, for an interim period of 5 years, a method for assigning pole costs, however determined under applicable accounting procedures.

SECTION-BY-SECTION ANALYSIS

Section 1

This section sets forth the short title of the bill—the "Communications Act Amendments of 1977".

Section 2

This section amends subsection (b) of section 503 of the Communications Act of 1934 (47 U.S.C. 503(b)), to provide as follows:

Paragraph (1) simplifies and unifies the provisions of the Communications Act which invoke civil penalty (forfeiture) liability. It enlarges the category of those subject to forfeiture liability for violations of the Communications Act, the criminal code as it relates to communication by wire or radio, or the rules and regulations of the Federal Communications Commission. The paragraph provides that any person subject to FCC regulation is subject to forfeiture liability. It thus extends forfeiture liability under the Communications Act to many persons not currently subject to any type of forfeiture liability, such as cable systems, users of part 15 or part 18 devices (radio frequency or industrial, scientific, and medical equipment subject to FCC regulation), persons operating without a valid FCC license, and some communications equipment manufacturers. Any person is liable for forfeiture who (1) willfully or repeatedly fails to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Federal Communications Commission; or (2) willfully or repeatedly fails to comply with any of the provisions of the Communications Act, or any rule, regulation, or order of the Federal Communications Commission if such FCC rule, regulation, or order was lawful under either the authority of the Communications Act or the authority of any international treaty, agreement, or convention binding on the United States.

The actions by broadcasters which are subject to forfeiture liability are unchanged. However, people associated with broadcast activities are now subject to forfeiture liability for violations which were formerly enforceable only against the broadcast station licensee, including:

(1) Section 509(a)(4) of the Communications Act which makes it unlawful for any person to participate in any way in a rigged contest program;

(2) Section 1304 of the Criminal Code (18 U.S.C.) which makes it a crime for anyone to broadcast or permit the broadcast of lottery information;

(3) Section 1343 of the Criminal Code (18 U.S.C.) which makes it a crime for anyone to commit fraud by means of wire, radio, or television communications; or

(4) Section 1464 of the Criminal Code (18 U.S.C.) which makes it a crime for anyone to use obscene language on any type of radio.

The amended subsection continues present law by stating that forfeiture under this section shall be in addition to other penalties provided by the Communications Act, and by exempting from the general forfeitures in section 503(b) conduct subject to other forfeiture provisions in title II (Common Carriers) or parts II (Radio Equipment and Radio Operations on Board Ship) and III (Radio Installa-

tions on Vessels Carrying Passengers for Hire) of title III or section 507 (Violation of the Great Lakes Agreement) of the Communications Act.

Paragraph (2) increases the maximum forfeiture liability under section 503(b) from $1,000 to $2,000 for broadcast licensees, from $100 to $2,000 for persons operating nonbroadcast radio stations and to $2,000 for persons not previously covered by the forfeiture provisions.

A continuous violation is made a separate offense each day it occurs and so becomes "repeated" on the second day of the violation. A repeated forfeiture can then be imposed on the second day of a continuing violation and multiple forfeitures can be imposed beginning on the third day of the continuing violation. For nonbroadcast licensees, this represents a significant change in existing law which specifies that multiple liabilities cannot be imposed for any one type of violation irrespective of the number of violations thereof.

Paragraph (2) also sets a maximum on the total forfeiture penalty that can be imposed for multiple liabilities set forth in any single notice, as follows: (1) $20,000 in the case of a broadcast licensee or permittee, common carrier subject to the Communications Act, or community antenna television operator (CATV), and (2) $5,000 in the case of all other persons. The Commission is directed to take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and the violator's culpability, prior offenses, ability to pay and other matters as justice may require when it sets the amount of the forfeiture.

Paragraph (3) gives the FCC the discretion to use a new procedure to enforce forfeiture penalties. The FCC is given its choice of using a full adjudicatory hearing under section 554 of the Administrative Procedure Act or the traditional written "show cause" proceeding, under new paragraph (4). Under this new procedural alternative, the FCC must issue a notice and grant an opportunity for a hearing before the Commission or an administrative law judge. Once the Commission has reached a final judgment on a forfeiture penalty, the violator has a right to seek judicial review of that penalty pursuant to section 402 (a) of the Communications Act, which is the standard appellate procedure applicable to any final FCC order. Any person who fails to pay the forfeiture penalty after it has become final and unappealable is subject to a collection action in the appropriate district court of the United States brought by the Attorney General. The validity and appropriateness of the final order of a forfeiture penalty are not subject to judicial review in such an action.

Paragraph (4) describes the alternate forfeiture procedure available to the FCC. If the FCC chooses to invoke this procedure, no forfeiture liability shall attach unless a written notice of apparent liability was issued by the Federal Communications Commission and either was actually received or was sent by registered or certified mail to the person's last known address. The notice must specifically identify the particular provision of law, rule, regulation, agreement, treaty, convention, licensee, permit, certificate, or other authorization or order involved. Additionally, the paragraph retains the current requirement that any person notified be granted an opportunity to show in writing within a reasonable period as set by FCC rule why he or she should not be held liable.

Paragraph (5) is new. It provides a special procedural protection in addition to the provisions of paragraphs (3) and (4). It applies to everyone except those persons who hold or are engaged in activities which require FCC license, permit, certificate, or other authorization from the Federal Communications Commission or any person who is providing any service by wire subject to the Commission's jurisdiction. Under this additional procedure, the Commission must first send the person a citation of the violation and provide a reasonable opportunity for personal interview with an FCC official at an FCC field office nearest the person's residence. No forfeiture liability under the amended subsection will attach unless the person has thereafter engaged in the conduct for which the citation of violation was sent. When a person subsequently engages in the same conduct for which he or she has already been sent a citation and given an opportunity for interview, a second citation need not be sent. Any subsequent notice and forfeiture may extend not only to the conduct occurring subsequent to the citation of violation, but also to the initial conduct for which the notice of violation was sent and opportunity for personal interview given.

Paragraph (6) amends the present forfeiture limitation periods. It establishes two different limitation periods for forfeiture under the amended subsection. For persons holding a broadcast station license under title III of the Communications Act, no forfeiture liability shall attach for any violation occurring before the current license term or 1 year prior to the date the notice of apparent liability is issued, whichever is earlier. In no event can a notice be issued more than 3 years after the date of the violation. For everyone else, no forfeiture may attach to violations 1 year before the date of the notice issued.

Section 3.

This section conforms section 504(a) of the Communications Act to new section 503(b)(3). A trial de novo in the Federal District Court by the Justice Department will not be necessary in the case of a section 503(b)(3) adjudicatory proceeding. This section also amends existing section 504(b) of the Communications Act which gives the Federal Communications Commission authority to mitigate or remit forfeitures. The FCC would be given new authority to remit or mitigate common carrier forfeitures imposed under title II of the Act. This would be in addition to existing authority to mitigate or permit forfeitures under parts II and III under title III (Maritime Radio Stations), new section 503(b) (General Forfeiture Provisions) and section 507 (Violations of the Great Lakes Agreement). It conforms section 504(a) to reflect the repeal of section 510 and it makes the decision to mitigate or remit forfeitures solely a function of the Commission's discretion by deleting the existing requirement that the person liable must apply for mitigation or remission.

Section 4.

This section repeals existing section 510 of the Communications Act of 1934 (47 U.S.C. 510), which provides for forfeitures applicable to nonbroadcast licensees and operators.

All of the offenses enumerated in section 510 are consolidated in amended section 503(b). The notice, limitation, maximum forfeiture

amount and show cause procedures are amended and consolidated in proposed section 503(b) as discussed above. The requirement that the FCC provide an opportunity for a personal field interview to non-broadcast station licensees after issuing a notice of apparent liability is deleted.

Section 5.

This section modifies existing section 2(b) of the Communications Act of 1934 (47 U.S.C. 152(b)) which limits the jurisdiction of the Commission over connecting carriers to sections 201 through 205 of title II of the act. Since section 6 of S. 1547, as reported, would give the Commission CATV pole attachment regulatory authority over connecting communications common carriers otherwise exempt from the provisions of the 1934 act as noted above, a conflict arises between the limitation on the Commission's jurisdiction of section 2(b) and its duty to regulate under proposed new section 224, set forth in section 6 of S. 1547, as reported. Section 5 of S. 1547, as reported, removes this conflict by removing the jurisdictional limitations of section 2(b) as they would otherwise apply to proposed section 224.

Section 6.

This section adds a new section 224 to title II of the Communications Act of 1934, as amended, relating to regulation by the Commission of the provision of pole attachment space to cable television systems by owners and controllers of utility poles. Subsection (a) of proposed section 224 sets forth definitions of terms used in the succeeding subsections. The term "utility" is defined to include entities such as electric power and telephone companies whose rates or charges are regulated by Federal, State, or local bodies. If such a utility owns or controls utility poles used for wire communication, it is subject to the jurisdiction of the FCC for purposes of section 224. "Wire communication" is defined in section 3(a) of the 1934 act (47 U.S.C. 153(a)). Certain of such utilities are exempted from the provisions of section 224: Railroads, municipally owned power systems, electric and telephone cooperative companies, and like entities owned by the Federal Government, any State, or any political subdivision, agency or instrumentality of any State. The term "pole attachment" is defined to mean the attachment of the cables of a CATV system to a pole or occupation of a duct or conduit, or other right-of-way owned or controlled by a utility. Duct or conduit systems consist of underground reinforced passages for electric and communications facilities as well as underground dips, lateral members, hand holes, splicing boxes, or pull boxes.

Subsection (b) of this section directs the Commission to regulate the rates, terms, and conditions whereby CATV systems attach their cable distribution facilities to poles owned or controlled by utilities. The Commission regulations shall provide that such matters are just and reasonable to all pole users. Subsection (b) also directs the Commission to adopt rules and regulations to implement its regulatory authority within 180 days from the date of enactment. This subsection requires the Commission to adopt procedures to adjudicate complaints relating to CATV pole attachments and directs the Commission to take appropriate action upon a finding that a particular rate, term, or condition for pole attachments is unjust or unreasonable. Among other ac-

tions the Commission may order a party violating the provisions of this section to cease and desist from further violation, pursuant to existing cease and desist provisions of the Communications Act of 1934, as amended.

Subsection (c) of this section restricts the jurisdictional reach of the Commission's pole attachment authority. The Commission shall have no such authority in any State which regulates the rates, terms, and conditions for pole attachments. A State may recapture pole attachment jurisdiction at any time simply by notifying the Commission that it regulates the matters encompassed by this section. Such notification would have the effect of automatically preempting the Commission's authority as to CATV pole attachments in that State.

Subsection (d) of this section defines the term "just and reasonable rate" by describing a range within which a reasonable and just CATV pole attachment rate must fall. The lower end of this range would be a rate which reimburses the utility for its costs borne to accommodate the CATV pole attachment, costs which it would not have incurred but for the presence of CATV cable on its poles. The upper end of this range is expressed in terms of a charge to the CATV pole user which reflects its proportionate share of the total costs of the pole, such total costs being the recurring operating expenses and capital costs attributable to the utility pole. Cable's proportionate share would be calculated by determining the percentage of usable space used by the CATV system (i.e. the actual physical attachment plus clearance space between the CATV attachment and adjacent attachments) and multiplying that percentage by the total of the capital costs and operating expenses of the entire pole.

Subsection (e) of this section limits the effectiveness of the rate-setting formula set forth in subsection (d) to 5 years. Thereafter the Commission shall be guided by the "just and reasonable" standard set forth in subsection (b) of this section.

Section 7.

This section provides that these amendments shall take effect 30 days after the date of enactment. Any act or omission which occurs prior to the effective date of this act shall continue to be subject to forfeiture under the provisions of section 503(b) and 510 as then in effect.

Regulatory Impact Statement

S. 1547, as reported, would expand the scope of the Commission's regulation in several significant respects. As to that portion of the bill relating to forfeitures, the Commission's authority to fine persons or businesses found to violate the provisions of the Communications Act of 1934, Commission rules, and related matters, would extend to entities not previously subject to such forfeiture authority. The Commission already exercises regulatory oversight of the activities of most of these entities. S. 1547, as reported, provides the Commission with an additional enforcement mechanism to assure compliance by these entities with existing rules and regulations applicable to their communications-related activities.

As to the pole attachment regulation sections of S. 1547, as reported, the Commission would be granted regulatory authority over entities

and persons not previously subject to FCC jurisdiction, such as electric power companies, and would expand the scope of the Commission's existing jurisdiction over communications entities (telephone companies) whose interstate practices are already subject to FCC regulatory supervision. Railroads and several types of entities which fall within the overall categories of electric power and telephone utility companies are exempted from the Commission's pole attachment regulation (publicly owned power companies, cooperatively organized telephone and power companies). It is estimated that at least 122 investor-owned electric power companies presently have pole attachment agreements with cable television systems. In addition to the Bell System operating companies, there are an estimated 1,600 independent telephone companies which may fall under FCC pole attachment jurisdiction. The Federal Communications Commission estimates that currently there are 7,800 CATV pole attachment contracts in effect, most of which involve entities not specifically exempted from S. 1547, as reported.

S. 1547, as reported, contemplates the assumption by the States of CATV pole attachment regulation, resulting concurrently in preemption by such States of FCC involvement in CATV pole attachment matters in those States. Accordingly, the extent of the Commission's regulatory responsibilities in this area should gradually diminish. It is not possible at this time to estimate the number of States which will eventually recapture CATV pole attachment jurisdiction from the Commission. At present there are about 15 States which could take such action without enacting special legislation or taking other necessary initial steps.

The committee has been unable to obtain specific predictions of the economic impact on businesses or individuals affected by this bill. The committee has no reason to believe that there will be any impact on personal privacy of businesses or individuals as a result of enactment of S. 1547, as reported. FCC paperwork requirements would not be substantially increased as a result of granting the Commission expanded forfeiture authority. While the Commission's new CATV pole attachment authority might require some increased paperwork as a result of regulations prescribed pursuant to this bill, the committee estimates that such paperwork will gradually diminish as the Commission's initial implementation of CATV pole attachment regulation becomes settled, and as the States act to implement their own CATV pole attachment regulatory plans, thereby replacing FCC involvement in situations where State plans exist.

No additional recordkeeping requirements would be imposed on entities subject to expanded FCC forfeiture authority as a result of this bill. No significantly increased recordkeeping burdens would necessarily fall on entities subject to FCC CATV pole attachment jurisdiction. The bill contemplates that the Commission may accept all relevant data and records which affected electric power and telephone companies file or maintain with the various State or local public utility commissions which otherwise regulate the practices of these entities. Furthermore, the bill directs the Commission to institute a simple complaint procedure to adjudicate CATV pole attachment matters on a case-by-case basis, and does not require the Commission to engage in a large scale regulatory program.

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ESTIMATED COSTS

In compliance with section 403 of the Congressional Budget Act of 1974, the committee requested the Congressional Budget Office to prepare a cost estimate for S. 1547, as reported, which is included in its entirety as follows:

CONGRESSIONAL BUDGET OFFICE,
U.S. CONGRESS,
Washington, D.C., October 17, 1977.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for S. 1547, the Communications Act Amendments of 1977.

Should the committee so desire, we would be pleased to provide further details on the attached cost estimate.

Sincerely,

ALICE M. RIVLIN, *Director.*

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

OCTOBER 17, 1977.

1. Bill number: S. 1547.
2. Bill title: Communications Act Amendments of 1977.
3. Bill status: As ordered reported by the Senate Committee on Commerce, Science, and Transportation, October 11, 1977.
4. Bill purpose: This bill provides for the regulation, by the Federal Communications Commission (FCC), of rates, terms, and conditions for the attachment of cable television systems to utility poles, conduits, or right-of-way owned or controlled by a utility. It also amends the rules regarding forfeiture liabilities and penalties.
5. Cost estimate:

[In thousands of dollars]

Fiscal year:	*Estimated costs*
1978	173
1979	575
1980	635
1981	697
1982	765

The costs of this bill fall within budget function 400.

6. Basis of estimate: This bill increases the regulatory responsibilities of the FCC, thus increasing its manpower requirements. It is assumed, however, that some of the regulatory functions will be performed by the various States. It is estimated that the FCC will need to hire 20 additional lawyers, economists, and clerks to first develop attachment regulations and then process complaints. Additional lawyers, engineers, and clerks will also be required to enforce forfeiture regulations (estimated at five in the first year of operation and five more over the next 5 years).

For the purpose of this estimate, it is assumed that this bill will be enacted on or about April 1, 1978. On this basis, these personnel re-

quirements will result in an estimated cost of $173,000 during the latter part of fiscal year 1978, increasing to $575,000 when fully implemented in fiscal year 1979. Costs in the following years reflect the increase in personnel for forfeiture regulation, inflation, and shifts in manpower resources as actual processing of complaints begins.

7. Estimate comparison: None.
8. Previous CBO estimate: None.
9. Estimate prepared by: Mark Berkman (225-7760).
10. Estimate approved by:

C. G. NUCKOLS,
(For James L. Blum,
Assistant Director for Budget Analysis).

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AUTHORIZATION, APPROPRIATION—URANIUM MILL TAILINGS—RADIATION EXPOSURE

P.L. 95-236, see page 92 Stat. 38

Senate Report (Energy and Natural Resources Committee) No. 95-72, Mar. 29, 1977 [To accompany S. 266]

House Report (Interstate and Foreign Commerce Committee) No. 95-649(I), Sept. 29, 1977 [To accompany S. 266]

House Report (Interior and Insular Affairs Committee) No. 95-649(II), Oct. 17, 1977 [To accompany S. 266]

Cong. Record Vol. 123 (1977)

Cong. Record Vol. 124 (1978)

DATES OF CONSIDERATION AND PASSAGE

Senate April 4, 1977; February 7, 1978
House January 24, 1978

The House Report (Parts I and II, this page and p. 143, respectively) is set out.

HOUSE REPORT NO. 95-649—PART I

[page 1]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (S. 266) to amend Public Law 92-314 to authorize appropriations to the Energy Research and Development Administration for financial assistance to limit radiation exposure from uranium mill tailings used for construction, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

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