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.

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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-

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.

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).

CHANGES IN EXISTING LAW

In compliance with subsection (4) of Rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets; new matter is printed in italic; existing law in which no change is proposed is shown in roman):

COMMUNICATIONS ACT OF 1934

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SEC. 2.(a)

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(b) [Subject] *Except as provided in section 224 and subject* to the provisions of section 301, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 through 205 of this Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4).

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REGULATIONS OF POLE ATTACHMENTS

Sec. 224. (a) As used in this section:

(1) The term "utility" means any person whose rates or charges are regulated by the Federal Government or a State and who owns

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or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communication. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

(2) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof.

(3) The term "State" means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, on instrumentality thereof.

(4) The term "pole attachment" means any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(b)(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of title III of the Communications Act of 1934, as amended.

(2) Within 180 days from the date of enactment of this section the Commission shall prescribe by rule regulations to carry out the provisions of this section.

(c)(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions for pole attachments in any case where such matters are regulated by a State.

(2) Any State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that it regulates the rates, terms, and conditions for pole attachments.

(d)(1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(2) As used in this subsection, the term "usable space" means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

(e) Upon the expiration of the 5-year period that begins on the date of enactment of this Act the provisions of subsection (d) of this section shall cease to have any effect.

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SEC. 503.(a)

[(b)(1) Any licensee or permittee of a broadcast station who—

(A) willfully or repeatedly fails to operate such station substantially as set forth in his license or permit,

is engaging in activities for which a license, permit, certificate, or other authorization is required. Whenever the requirements of this paragraph are satisfied with respect to a particular person, such person shall not be entitled to receive any additional citation of the violation charged, with respect to any conduct of the type described in the citation sent under this paragraph.

"(6) No forfeiture penalty shall be determined or imposed against any person under this subsection if—

"(A) such person holds a broadcast station license issued under title III of this Act and if the violation charged occurred—

"(i) more than 1 year prior to the date of issuance of the required notice or notice of apparent liability; or

"(ii) prior to the date of commencement of the current term of such license,

whichever is earlier so long as such violation occurred within 3 years prior to the date of issuance of such required notice; or

"(B) such person does not hold a broadcast station license issued under title III of this Act and if the violation charged occurred more than 1 year prior to the date of issuance of the required notice or notice of apparent liability.".

SEC. 3. (a) The first sentence of section 504(a) of the Communications Act of 1934 (47 U.S.C. 504(a)) is amended by inserting immediately after "recoverable" the following: ", except as otherwise provided with respect to a forfeiture penalty determined under section 503(b)(3) of this Act,".

(b) Section 504(b) of such Act is amended (1) by striking out "parts II and III of title III and section 503(b), sections 507, and 510" and inserting in lieu thereof "title II, parts II and III of title III, and sections 503(b) and 507"; and (2) by striking out ", upon application therefor,".

SEC. 4. Section 510 of the Communications Act of 1934 (47 U.S.C. 510) is repealed in its entirety.

SEC. 5. Section 2(b) of the Communications Act of 1934 (47 U.S.C. 152(b)) is amended by striking the word "Subject" and inserting in lieu thereof the following "Except as provided in section 224 and subject".

SEC. 6. Title II of the Communications Act of 1934 is amended by adding at the end thereof the following new section:

"REGULATIONS OF POLE ATTACHMENTS

"SEC. 224. (a) As used in this section:

"(1) The term 'utility' means any person whose rates or charges are regulated by the Federal Government or a State and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communication. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

"(2) The term 'Federal Government' means the Government of the United States or any agency or instrumentality thereof.

"(3) The term 'State' means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

"(4) The term 'pole attachment' means any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

"(b)(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of title III of the Communications Act of 1934, as amended.

"(2) Within 180 days from the date of enactment of this section the Commission shall prescribe by rule regulations to carry out the provisions of this section.

"(c)(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions for pole attachments in any case where such matters are regulated by a State.

"(2) Any State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that it regulates the rates, terms, and conditions for pole attachments.

"(d)(1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

"(2) As used in this subsection, the term 'usable space' means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

"(e) Upon the expiration of the 5-year period that begins on the date of enactment of this Act the provisions of subsection (d) of this section shall cease to have any effect.".

SEC. 7. The amendments made by this Act shall take effect on the thirtieth day after the date of enactment of this Act; except that the provisions of sections 503(b) and 510 of the Communications Act of 1934, as in effect on such date of enactment, shall continue to constitute the applicable law with respect to any act or omission which occurs prior to such thirtieth day.

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