94TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 94-1630

REGULATIONS OF POLE ATTACHMENTS AND PENALTIES AND FORFEITURES

SEPTEMBER 20, 1976.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. STAGGERS, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 15372]

[Including cost estimate of the Congressional Budget Office]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H.R. 15372) to amend the Communications Act of 1934 to provide just and reasonable rates, terms, and conditions for the use of certain rights-of-way by persons desiring to lease space for wire communication, and with respect to penalties and forfeitures, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

REGULATION OF POLE ATTACHMENTS

SECTION 1. 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 a State or any political subdivision, agency, or instrumentality thereof, or the Federal Government 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 which is cooperatively organized, or any person owned by the Federal Goverment or any State or political subdivision, agency, or instrumentality thereof.

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

"(3) The term 'pole attachment' means any attachment for wire communication on a pole, duct, conduit, or other right-of-way owned or controlled by a utility.

"(b)(1) Except as otherwise provided in paragraph (3) of this subsection, the Commission shall regulate the rates, terms, and conditions for pole attachments. The Commission shall promulgate regulations to provide that such rates, terms, and conditions are just and reasonable.

"(2) Regulations promulgated under paragraph (1) shall not take effect until the expiration of the 9-month period which begins on the date of enactment of this section. Except as otherwise provided by law, the States shall have the opportunity, during such 9-month period and, consistent with the provisions of this section, at any time thereafter, to assert jurisdiction over the rates, terms, and conditions for pole attachments.

"(3) The Commission may not require any utility to provide any pole attachment if the utility has determined that any such attachment should not be permitted due to a matter not subject to the regulations issued under paragraph (1) of this subsection.

"(4) The Commission shall consult with the advisory board established pursuant to subsection (d) in the promulgation of the regulations under paragraph (1).

"(c)(1) Any State may apply to the Commission, in such form as the Commission shall prescribe, to exempt rates, terms, and conditions of pole attachments from the authority of the Commission under subsection (b)(1) and regulations promulgated by the Commission under such subsection. The Commission shall review any such application and make a final determination thereon not later than 3 months after the date of receipt by the Commission of such application. Failure of the Commission to make a final determination within 3 months after the date of receipt of such application shall be deemed to constitute approval for purposes of this section.

"(2) The Commission shall approve the application submitted under paragraph (1) and exempt the rates, terms, and conditions for pole attachments in any State from the authority of the Commission under subsection (b)(1) and regulations promulgated under such subsection if the Commission finds that such State regulates rates, terms, and conditions for pole attachments in a manner designed to provide just and reasonable rates, terms, and conditions for pole attachments in such State. In exercising its authority under this subsection, the Commission may not specify rates, terms, or conditions.

"(3) The Commission, upon request of an interested person, may review any State pole attachment regulatory program which has been exempted from the authority of the Commission under subsection (b)(1) and regulations promulgated under such subsection and, after affording notice and an opportunity for submission of written data, views, and arguments in accordance with section 553 of title 5, United States Code, withdraw such approval if it finds that such State no longer qualifies for exemption on the grounds stated in paragraph (2). For purposes of this paragraph, the term 'interested person' means any person who has made or seeks to make a pole attachment, or any utility.

"(d) The Commission shall establish an advisory board to assist the Commission in the promulgation of the regulations under subsection (b)(1). Such Board shall include—

"(1) the Chairman of the Federal Power Commission or his delegate; and

"(2) at least one representative of State regulatory authorities nominated by the national organization of State commissions, as referred to in section 410(c) of this Act, and approved by the Commission.".

PENALTIES AND FORFEITURES

SEC. 2. (a) Section 503(b) of the Communications Act of 1934 (47 U.S.C. 503 (b)) is amended to read as follows:

"(b)(1) Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection to have—

"(A) willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission;

"(B) willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act or under any treaty, convention, or other agreement to which the United States is a party and which is binding upon the United States;

"(C) violated any provision of section 317(c) or 509(a)(4) of this Act; or

"(D) violated any provision of section 1304, 1343, or 1464 of title 18, United States Code;

shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be in addition to any other penalty provided for by this Act; except that this subsection shall not apply to any conduct which is subject to forfeiture under title II, part II or III of title III, or section 507 of this Act.

"(2) The amount of any forfeiture penalty determined under this subsection shall not exceed $2,000 for each violation. Each day of a continuing violation shall constitute a separate offense, but the total forfeiture penalty which may be imposed under this subsection, for acts or omissions described in paragraph (1) of this subsection and set forth in the notice required under paragraph (3) or the notice of apparent liability required by paragraph (4) shall not exceed—

"(A) $20,000, if the violator is (i) a common carrier subject to the provisions of this Act, (ii) a broadcast station licensee or permittee, or (iii) a cable television operator; or

"(B) $5,000, in any case not covered by subparagraph (A).

The amount of such forfeiture penalty shall be assessed by the Commission, or its designee, by written notice. In determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account the nature, circumstances, extent, and gravity of the prohibited acts, committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

"(3)(A) At the discretion of the Commission, a forfeiture penalty may be determined against a person under this subsection after notice and an opportunity for a hearing before the Commission or an administrative law judge thereof in accordance with section 554 of title 5, United States Code. Any person against whom a forfeiture penalty is determined under this paragraph may obtain review thereof pursuant to section 402(a).

"(B) If any person fails to pay an assessment of a forfeiture penalty determined under subparagraph (A) of this paragraph, after it has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the Commission, the Commission shall refer the matter to the Attorney General of the United States, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the forfeiture penalty shall not be subject to review.

"(4) Except as provided in paragraph (3) of this subsection, no forfeiture penalty shall be imposed under this subsection against any person unless—

"(A) the Commission issues a notice of apparent liability, in writing, with respect to such person;

"(B) such notice has been received by such person, or the Commission has sent such notice to the last known address of such person, by registered or certified mail; and

"(C) such person is granted an opportunity to show, in writing, within such reasonable period of time as the Commission prescribes by rule or regulation, why no such forfeiture penalty should be imposed.

Such a notice shall (i) identify each specific provision, term, and condition of any Act, rule, regulation, order, treaty, convention, or other agreement, license, permit, certificate, instrument, or authorization which such person apparently violated or with which such person apparently failed to comply; (ii) set forth the nature of the act or omission charged against such person and the facts upon which such charge is based; and (iii) state the date on which such conduct occurred. Any forfeiture penalty determined by the Commission under this paragraph shall be recoverable pursuant to section 504(a) of this Act.

"(5) No forfeiture liability shall be determined under this subsection against any person, if such person does not hold a license, permit, certificate, or other authorization issued by the Commission, unless, prior to the notice required by paragraph (3) of this subsection or the notice of apparent liability required by paragraph (4) of this subsection, such person (A) is sent a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission

which is nearest to such person's place of residence; and (C) subsequently engages in conduct of the type described in such citation. The provisions of this paragraph shall not apply, however, if the person involved 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 one 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 one year prior to the date of issuance of the required notice or notice of apparent liability.".

(b) The first sentence of section 504(h) of such Act 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.".

(c) Section 504(b) of such Act is amended (1) by striking out "parts II and III of title III and section 503(b), section 507, and section 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,".

(d) Section 510 of such Act is repealed in its entirety.

EFFECTIVE DATES

SEC. 3. (a) The amendment made by section 1 of this Act shall take effect on the date of enactment of this Act.

(b) The amendments made by section 2 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.

PURPOSE AND SUMMARY OF THE BILL

The bill (H.R. 15372) would amend the Communications Act of 1934 (1) to provide just and reasonable rates, terms, and conditions for the use of certain rights-of-way by persons desiring to lease space for wire communication, and (2) with respect to penalties and forfeitures.

BACKGROUND AND NEED FOR LEGISLATION

POLE ATTACHMENTS

In the cable television (CATV) industry, the CATV system operator usually attaches his coaxial cable to existing utility company poles. These poles are usually owned by telephone companies and electric utilities which often enter into joint use or joint ownership agreements for the use of each other's poles. These agreements commonly reserve a portion of each pole for the use of communication services. Regardless of who owns the pole, telephone companies usually control the connection space set aside for communication services. It is a part of this portion of the pole that is leased to CATV system operators.

In many communities, because of the lack of available rights-of-way, environmental restrictions, or zoning laws, the CATV operator is unable to construct his own pole plant for the attachment of his coaxial cable. A CATV operator who is unable to use his own pole plant must seek to use existing utility company poles. If the operator is unable to negotiate an acceptable contract with the owners of these poles, he has no legal forum to hear his complaint except in those few States that have assumed jurisdiction over this issue.

The most egregious situation of an impasse in pole attachment rate negotiations occurred on June 8, 1976, when over 1,200 residents in the communities of Dunn, Irwin, Whiteville, and Chadborne, North Carolina, were deprived of CATV service. The concerned utility company forcefully disconnected from its poles the coaxial cable of the CATV operator which was used to provide these residents with CATV service. This bill will make available to parties such as these, a forum to hear their differences.

The Federal Communications Commission has had pending since 1966 the question of the nature and extent of its jurisdiction over CATV pole attachments. In 1973, the Commission terminated the evidentiary phase of these proceedings and invited comment on and designated for oral argument the issue of the nature and extent of the Commission's jurisdiction over the policies and practices of pole rental charges to CATV operators by telephone common carriers and other utilities.

On September 29, 1975, some of the interested parties to the proceedings on pole attachments at the Commission, the National Cable Television Association (NCTA) and the American Telephone and Telegraph Company (A.T. & T.), entered into an agreement respecting the pole attachment rates charged CATV companies. To aid interested parties who were not part of that settlement and who were negotiating or renegotaiting pole attachment agreements, the Commission released a formula which was devised by the Commission staff. Many parties were unable to reach mutual accord over pole rental charges.

On July 1, 1976, the Commission adopted a decision that (1) concluded the Commission lacks jurisdiction over pole attachment agreement for non-telephone utility poles and (2) instructed its staff to study the jurisdictional and economic issues involved in the charges, terms, and conditions by which space on telephone poles is leased to CATV systems. Several members of the Commission recognized that Congressional action was necessary in order to reach an ultimate and satisfactory resolution of the pole attachment problem. Approximately 50 per cent of the poles carrying CATV cables are power poles rather than telephone poles. Even if the Commission were to assert jurisdiction over the rental of communications space on telephone poles after its proposed study is finished, such action would still leave the pole attachment issue in an unsettled state. This Committee feels that H.R. 15372 will resolve the pole attachment issues.

The bill is designed to allow a State to assert jurisdiction during the 9-month period beginning on the date of enactment of this bill or any time thereafter, subject to Commission approval. After the termination of the 9-month period, the Commission rules and regulations shall apply in those States that have not commenced Commis-

sion approved regulatory programs. Upon application by a State, the Commission will review the State's regulatory plans in order to determine if the State regulates rates, terms, and conditions of pole attachments in a manner designed to provide just and reasonable rates, terms and conditions of pole attachments. In exercising this authority, the Commission may not specify rates, terms, or conditions. The Commission, upon request of an interested person, may review any State pole attachment regulatory program which was exempted from the authority of the Commission and may withdraw its approval if it finds that such State no longer qualifies for exemption from Commission authority and its rules and regulations.

The bill provides that the Commission may not require any utility to provide any pole attachment if the utility has determined that any such attachment should not be permitted due to a matter not subject to the regulations of the Commission. The Committee expects that the Commission will carefully monitor the pole attachment access situation to see that no de facto denial of access occurs due to any unreasonable rate, term, or condition that may be required by a utility of any person seeking such access. It was the view of the Committee that the Commission report to the Congress, within 3 to 6 months of the effective date of its rules, on the effect of its regulatory program on the CATV pole attachment issue.

PENALTIES AND FORFEITURES

The FCC sought legislation, as part of its legislative program for the 94th Congress, amending the Communications Act of 1934 to unify, simplify and make more effective the provisions of sections 503(b) and 510 relating to forfeitures. The legislation was introduced as H.R. 10620 in the House, and an identical bill, S. 2343, was introduced in the Senate. On June 11, 1976, the Senate passed S. 2343, as amended, and the bill was sent to the House and referred to this Committee. Section 2 of H.R. 15372 represents the bill as passed by the Senate except for certain technical changes. It is also substantially the same as H.R. 10620.

The objective of section 2 is to modernize certain of the forfeiture provisions of the Communications Act and to enlarge their scope to cover persons who are currently subject to the Act but not presently subject to the forfeiture provisions, such as cable television systems, users of certain experimental or medical equipment, and some communications equipment manufacturers. The changes made by Section 2 will also enable the FCC to enforce their rules more effectively.

The FCC is empowered to revoke station licenses or construction permits and to issue cease and desist orders for violations of the Act of a Commission rule (section 312) and to suspend operator licenses (section 303(m)). However, Congress recognized that the Commission needed an alternative enforcement tool which could be used to deal with violations which did not warrant the revocation or denial or renewal of a license. Thus, in 1960, Congress enacted legislation which gave the Commission the ability to impose forfeitures or monetary penalties for violations of the Act or a Commission rule by broadcast licensees or permittees (section 503(b), 74 Stat. 889). In 1962, Congress further amended the Act to allow the Commission to impose forfeitures in certain instances on non-broadcast radio licensees (section 510, 76 Stat. 68).

The amendments to the Act made by section 2 of H.R. 15372 are consistent with the policy of the Congress to enable the Commission to deal effectively with violations. The Committee has determined that the forfeiture authority of the FCC requires common procedures and uniform sanctions for dealing with broadcast entitles, cable television systems, common carriers, and other persons subject to its jurisdiction. In addition, non-broadcast radio licenses are brought under the provisions of section 503(b).

The Committee believes that the revisions contained in section 2 of H.R. 15372 are necessary in order that the FCC have the ability to enforce its rules in an effective yet flexible manner. Enforcement mechanisms other than forfeiture are time-consuming and involve expensive procedures, both for the person charged with a violation and for the Commission and the Government generally. In addition, the FCC has encountered some problems with the Justice Department in referring matters for prosecution (either for civil contempt or for criminal violations) because of the relatively low priority which those matters are afforded. As a result, these other enforcement mechanisms are not effective deterrents to certain types of misconduct.

H.R. 15372 carefully balances the Commission's need for an effective enforcement tool with the right to due process of those persons subject to the Commission's jurisdiction. Forfeiture liability arises only after there has been: (1) written notice of apparent liability (actual or constructive), (2) an opportunity to contest or mitigate liability in writing, (3) in the case of a person not holding a license or certificate from the Commission, an opportunity for personal interview, and (4) consideration of any response by the Commission prior to the issuance of an order of liability. If the person against whom the order runs desires to appeal, he has the option of refusing to pay and seeking de novo review in the Federal District Court. In addition to this streamlined procedure, the FCC can, within its discretion, set the matter for a full adjudicatory hearing in accordance with section 534 of the Administrative Procedure Act. Your Committee believes that either the "show-cause" procedure or the full adjudicatory hearing procedure adequately serves the rights of the persons involved.

Furthermore, forfeiture provides a less severe alternative to revocation or suspension of licenses and a more feasible alternative to cease and desist orders or judicial enforcement against persons who are not required to hold a license and against whom, therefore, license revocation or suspension is not an available penalty.

Your Committee believes that the Commission needs increased maximum fines in order to make the forfeiture procedure a more effective deterrent. The history of the Commission's use of its existing forfeiture authority suggests that it has tailored the fines levied to the nature of the offense and to the ability of the offender to pay. The Commission's policy has not been to assess forfeitures at the statutory maximum but rather to consider a series of mitigating factors such as those set forth in subsection (b)(2). Your Committee expects that the Commission will continue to exercise careful discretion.

There is concern on the part of some cable television system operators that they will be unfairly treated or harassed by the Commission. While the Committee found no evidence that the Commission or any other person has abused the forfeiture authority in the past, the Committee intends to watch closely to see that no such abuse takes place under the new authority provided by H.R. 15372. The Committee fully expects that the FCC will not use this authority in an arbitrary or capricious manner and has provided procedural safeguards accordingly. However, your Committee also expects that the Commission will vigorously enforce its rules and that all persons subject to Commission jurisdiction will observe those rules, so as not to frustrate and impede the policy and purposes of the Communications Act.

In sum, the expanded forfeiture authority contained in H.R. 15372 is imperative if the FCC is to carry out its mandate under the Communications Act. This comprehensive revision of the forfeiture provisions helps assure greater compliance with the law and substantially benefits persons regulated under the Act and the public as a whole.

Committee Action

The Committee, acting through its Subcommittee on Communications, held one day of hearings on July 28, 1976, on H.R. 10620, a bill submitted by the Federal Communications Commission dealing with penalties and forfeitures, and one day of hearings on September 1, 1976, on H.R. 15268, a bill dealing with pole attachments. In addition, the Subcommittee took testimony on pole attachments during hearings on July 28, 1976, on cable television. In the course of these hearings, testimony was taken from representatives of organizations and companies involved in the public utility industry and the CATV industry. Written comments were received from the FCC.

The Subcommittee on Communications met in open mark-up session on September 8, 1976, to consider H.R. 15372 and reported the bill, with amendments, to the full Committee.

H.R. 15372 was ordered reported to the House by the Committee on September 16, 1976, by a voice vote while a majority of the Committee was present.

Committee Amendment

The committee amendment was an amendment in the nature of a substitute to the text of H.R. 15372, as introduced. The text of the amendment is printed in italics in the reported bill.

Senate Action

The Senate passed S. 2343, a bill dealing with penalties and forfeitures, on June 11, 1976.

Section-by-Section Analysis

SECTION 1

The Communications Act of 1934 is amended by adding a new section (section 224). The Commission shall regulate the rates, terms, and conditions for pole attachments. The Commission shall promulgate

regulations to provide that such rates, terms, and conditions are just and reasonable. The regulations promulgated by the Commission shall not take effect until the expiration of the 9-month period which begins on the date of enactment of this section. Except as otherwise provided by law, the States shall have the opportunity, during this 9-month period, and at any time thereafter to assert jurisdiction over the rates, terms, and conditions for pole attachments subject to the approval of its State regulatory program by the Commission. The Commission may not require any utility to provide any pole attachment if the utility has determined that any such attachment should not be permitted due to a matter not subject to the regulations issued by the Commission. The Commission shall consult with an advisory board which shall include the Chairman of the Federal Power Commission or his delegate and at least one representative of State regulatory authorities nominated by the national organization of State commissions and approved by the Commission.

Any State may apply to the Commission, in such form as the Commission shall prescribe, to exempt the rates, terms, and conditions of pole attachments in its State from the authority of the Commission. The Commission shall review any such application and make a final determination on such application no later than 3 months after the date of receipt of said application. If the Commission fails to make a final determination within 3 months after such date, the application shall be deemed to have been approved by the Commission. In approving such application, the Commission shall determine if the State regulates rates, terms, and conditions for pole attachments in a manner designed to provide just and reasonable rates, terms, and conditions for pole attachments in that State. In exercising this review authority, the Commission may not specify rates, terms, or conditions. The Commission, upon request of an interested person, may review any State pole attachment regulatory program which has been exempted from the authority of the Commission. The Commission may withdraw such approval if it finds that the State no longer qualifies for exemption from Commission authority and its rules and regulations.

SECTION 2

Subsection (a)

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

Paragraph (1) modernizes the provisions of the Communications Act which govern liability for civil penalties (forfeitures). The paragraph provides that any person subject to FCC regulation is liable for a forfeiture. As a result, liability under the Communications Act for civil penalties is extended to many persons not currently liable. Examples include cable systems, users of industrial, scientific, or medical equipment subject to FCC regulation, persons illegally operating without a valid FCC license, and certain communications equipment manufacturers. Liability extends to those who: (1) willfully or repeatedly fail to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission, (2) willfully or repeatedly fail to com-

ply with any of the provisions of the Communications Act, or of any lawful rule, regulation, or order of the Federal Communications Commission, or (3) violate the criminal code as it relates to communication by wire or radio.

The liability for forfeitures by broadcasters is unchanged by this legislation. However, persons associated with broadcast activities are made liable for forfeitures for the first time. Examples of violations which would occasion such liability are participation in a rigged contest program (47 U.S.C. 509(a)(4)), the broadcast of lottery information (18 U.S.C. 1304), the commission of fraud by means of wire, radio, or television communications (18 U.S.C. 1343), and the use of obscene language on radio (18 U.S.C. 1464).

The paragraph continues existing law by providing that: (1) liability for forfeiture under section 503(b) is in addition to other penalties provided by the Communications Act, (2) conduct subject to other forfeiture provisions of the Act does not invoke liability under section 503(b). This includes the provisions of Title II (relating to common carriers), those of Title III, parts II and III (relating to radio equipment and operations on board ship and radio installations on vessels carrying passengers for hire), and Title 5, section 507 (relating to violation of the Great Lakes Agreement).

Paragraph (2) increases the maximum forfeiture for each violation to $2,000. Previously the maximum was $1,000 for broadcast licensees, $100 for those operating nonbroadcast radio stations, and, of course, nothing for those not previously covered by the forfeiture provisions.

Paragraph (2) also provides that each day of a continuing violation constitutes a separate offense. This is a change for nonbroadcast licensees who were previously subject to only a single forfeiture for any one type of violation, irrespective of the number of violations. However, paragraph (2) sets a limit on the total forfeiture penalty imposed for multiple violations set forth in a single notice of $20,000 for common carriers, broadcast station licensees, and cable operators and $5,000 for others.

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 its choice of using an adjudicatory hearing under section 554 of the Administrative Procedure Act or the traditional written "show cause" proceeding, under new paragraph (4). Under this 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 may seek judicial review pursuant to section 402(a) of the Communications Act, which is the 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.

Paragraph (4) describes the alternate forfeiture procedure available to the FCC. If the FCC chooses to invoke this procedure, no

forfeiture liability attaches unless a written notice of apparent liability is issued by the 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, license, 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 why he should not be held liable.

Paragraph (5) is new. It provides special procedural protection in addition to the provisions of paragraphs (3) and (4) to everyone except those persons who hold or are engaged in activities which require an FCC license, permit, certificate, or other authorization from the Commission or any person who is providing any service by wire subject to the Commission's jurisdiction.

The Commission must first send to such a person a citation of the violation and provide a reasonable opportunity for a personal interview with an FCC official at the FCC field office nearest the person's residence. No forfeiture liability under the amended subsection attaches 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 has already been sent a citation and given an opportunity for interview, no further citations need 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 periods for forfeiture liability. For persons holding a broadcast station license under Title III of the Communications Act, no forfeiture liability attaches for any violation occurring before the current license term or 1 year prior to the date the notice of apparent liability is issued, which ever 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 liability attaches to violations 1 year before the date of the notice issued.

Subsection (b)

This subsection conforms subsection 504(a) of the Communications Act to new subsection 503(b)(3). A trial de novo in the Federal District Court will not be necessary in the case of a 503(b)(3) adjudicatory proceeding.

Subsection (c)

This subsection amends existing subsection 504(b) of the Communications Act which gives the Federal Communications Commission authority to mitigate or remit forfeitures. The FCC is given authority to remit or mitigate common carrier forfeitures imposed under Title II of the Act. It conforms subsection 504(a) to reflect the repeal of section 510 accomplished by subsection (d) 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.

Subsection (d)

This subsection repeals existing section 510 of the Communications Act which currently provides for forfeitures by nonbroadcast licensees and operators.

All of the offenses enumerated in section 510 are consolidated in amended subsection 503(b). The notice, limitation, maximum forfeiture amount and show cause procedures are amended and consolidated in proposed subsection 503(b) as discussed above. The requirement that the FCC provide an opportunity for a personal field interview to nonbroadcast station licensees after issuing a notice of apparent liability is deleted.

SECTION 3

Section 1 of this bill shall take effect upon enactment. Section 2 of this bill shall take effect on the 30th day of enactment except that sections 503(b) and 510 of the Communications Act of 1934, as in effect on the date of enactment, shall continue to constitute the applicable law with respect to any act or omission which occurs prior to the 30th day.

Oversight Findings

There are no formal oversight findings by the Committee pursuant to clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives.

No oversight findings have been submitted to the Committee by the Committee on Government Operations pursuant to clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

Inflationary Impact Statement

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee makes the following statement regarding the inflationary impact of the reported bill:

The Committee is unaware that any inflationary impact on the economy will result from the passage of H.R. 15372.

Cost Estimate

Pursuant to Clause 7 of rule XIII of the Rules of the House of Representatives, the Committee estimates that there will be some costs involved in carrying out this bill in each of the five fiscal years following the enactment of this bill. The Committee was unable to determine the exact amount of these projected costs with the information available to it. The Committee is of the opinion that the annual costs involved will be less than those projected by the Congressional Budget Office due to the fact that the Commission has a number of presently unfilled positions which could be used to help in the implementation of this bill.

In regard to Clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee includes the following cost estimated submitted by the Congressional Budget Office relative to the provisions of H.R. 15372:

Congressional Budget Office

COST ESTIMATE, SEPTEMBER 16, 1976

1. Bill number: H.R. 15372.
2. Bill title: Amendments to the Communications Act of 1934.
3. Purpose of bill: This bill provides for the regulation, by the Federal Communications Commission (FCC), of rates, terms, and conditions for the attachment of communications wires to utility poles. It also establishes procedures by which states may assert jurisdiction for such regulation, and prescribes penalties for violations.
4. Cost Estimate:

[Thousand of dollars]

Fiscal year:	
1977	509
1978	540
1979	573
1980	608
1981	646

5. Basis for Estimate: This bill increases the regulatory responsibilities of the FCC, thus increasing its manpower requirements. It is assumed, however, that most of the regulatory function will be performed by the various states. The FCC will need to hire 20 additional public utility specialists, economists, lawyers and clerks in FY 1977 to develop and publish regulations and to review tariff complaints. At an estimated average cost per person of $25,455 in salaries and expenses, the additional staff would result in a FY 1977 cost of $509,000. In FY 1978, the cost would be $540,000 due to adjustments for inflation and manpower resources would be shifted from developing regulations to hearing tariff complaints.
6. Estimate comparison: None.
7. Previous CBO estimate: None.
8. Estimate prepared by: Jack Garrity.
9. Estimate approved by:

James L. Blum,
Assistant Director
for Budget Analysis.

Changes in Existing Law Made by the Bill, As Reported

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, 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 italics, existing law in which no change is proposed is shown in roman):

COMMUNICATIONS ACT OF 1934

* * * * * * *

TITLE II—COMMON CARRIERS

* * * * * * *

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 a State or any political subdivision, agency, or instrumentality thereof, or the Federal Government 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 which is cooperatively organized, or any person owned by the Federal Government or any State or political subdivision, agency, or instrumentality thereof.

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

(3) The term "pole attachment" means any attachment for wire communication on a pole, duct, conduit, or other right-of-way owned or controlled by a utility.

(b)(1) Except as otherwise provided in paragraph (3) of this subsection, the Commission shall regulate the rates, terms, and conditions for pole attachments. The Commission shall promulgate regulations to provide that such rates, terms, and conditions are just and reasonable.

(2) Regulations promulgated under paragraph (1) shall not take effect until the expiration of the 9-month period which begins on the date of enactment of this section. Except as otherwise provided by law, the States shall have the opportunity, during such 9-month period and, consistent with the provisions of this section, at any time, thereafter, to assert jurisdiction over the rates, terms, and conditions for pole attachments.

(3) The Commission may not require any utility to provide any pole attachment if the utility has determined that any such attachment should not be permitted due to a matter no subject to regulations under paragraph (1) of this subsection.

(4) The Commission shall consult with the advisory board established pursuant to subsection (d) in the promulgation of the regulations under paragraph (1).

(c)(1) Any State may apply to the Commission, in such form as the Commission shall prescribe, to exempt rates, terms, and conditions of pole attachments from the authority of the Commission under subsection (b)(1) and regulations promulgated by the Commission under such subsection. The Commission shall review any such application and make a final determination thereon not later than 3 months after the date of receipt by the Commission of such application. Failure of the Commission to make a final determination within 3 months after the date of receipt of such application shall be deemed to constitute approval for purposes of this section.

(2) The Commission shall approve the application submitted under paragraph (1) and exempt the rates, terms, and conditions for pole attachments in any State from the authority of the Commission under subsection (b)(1) and regulations promulgated under such subsection if the Commission finds that such State regulates rates, terms, and conditions for pole attachments in a manner designed to provide just and reasonable rates, terms, and conditions for pole attachments in such State. In exercising its authority under this subsection, the Commission may not specify rates, terms or conditions.

(3) The Commission, upon request of an interested person, may review any State pole attachment regulatory program which has been exempted from the authority of the Commission under subsection (b)(1) and regulations promulgated under such subsection and, after affording notice and an opportunity for submission of written data, views, and arguments in accordance with section 553 of title 5, United States Code, withdraw such approval if it finds that such State no longer qualifies for exemption on the grounds stated in paragraph (2). For purposes of this paragraph, the term "interested person" means any person who has made or seeks to make a pole attachment, or any utility.

(d) The Commission shall establish an advisory board to assist the Commission in the promulgation of the regulations under subsection (b)(1). Such Board shall include—

(1) the Chairman of the Federal Power Commission or his delegate; and

(2) at least one representative of State regulatory authorities nominated by the national organization of State commissions, as referred to in section 410(c) of this Act, and approved by the Commission.

* * * * * * *

TITLE V—PENAL PROVISIONS—FORFEITURES

* * * * * * *

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,

[(B) willfully or repeatedly fails to observe any of the provisions of this Act or of any rule or regulation of the Commission prescribed under authority of this Act or under authority of any treaty ratified by the United States,

[(C) fails to observe any final cease and desist order issued by the Commission,

[(D) violates section 317(c) or section 509(a)(4) of this Act, or

[(E) violates section 1304, 1343, or 1464 of title 18 of the United States Code,

shall forfeit to the United States a sum not to exceed $1,000. Each day during which such violation occurs shall constitute a separate offense.

Such forfeiture shall be in addition to any other penalty provided by this Act.

[(2) No forfeiture liability under paragraph (1) of this subsection (b) shall attach unless a written notice of apparent liability shall have been issued by the Commission and such notice has been received by the licensee or permittee or the Commission shall have sent such notice by registered or certified mail to the last known address of the licensee or permittee. A licensee or permittee so notified shall be granted an opportunity to show in writing, within such reasonable period as the Commission shall by regulations prescribe, why he should not be held liable. A notice issued under this paragraph shall not be valid unless it sets forth the date, facts, and nature of the act or omission with which the licensee or permittee is charged and specifically identifies the particular provision or provisions of the law, rule, or regulation or the license, permit, or cease and desist order involved.

[(3) No forfeiture liability under paragraph (1) of this subsection (b) shall attach for any violation occurring more than one year prior to the date of issuance of the notice of apparent liability and in no event shall the forfeiture imposed for the acts or omissions set forth in any notice of apparent liability exceed $10,000.]

(b) (1) Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have—

(A) willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission;

(B) willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act or under any treaty, convention, or other agreement to which the United States is a party and which is binding upon the United States;

(C) violated any provision of section 317(c) or 509(a)(4) of this Act; or

(D) violated any provision of section 1304, 1343, or 1464 of title 18, United States Code;

shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be in addition to any other penalty provided for by this Act; except that this subsection shall not apply to any conduct which is subject to forfeiture under title II, part II or III of title III, or section 507 of this Act.

(2) The amount of any forfeiture penalty determined under this subsection shall not exceed $2,000 for each violation. Each day of a continuing violation shall constitute a separate offense, but the total forfeiture penalty which may be imposed under this subsection, for acts or omissions described in paragraph (1) of this subsection and set forth in the notice required under paragraph (3) or the notice of apparent liability required by paragraph (4) shall not exceed—

(A) $20,000, if the violator is (i) a common carrier subject to the provisions of this Act, (ii) a broadcast station licensee or permittee, or (iii) a cable television operator; or

(B) $5,000, in any case not covered by subparagraph (A).

The amount of such forfeiture penalty shall be assessed by the Commission, or its designee, by written notice. In determining the amount

of such a forfeiture penalty, the Commission or its designee shall take into account the nature, circumstances, extent, and gravity of the prohibited acts, committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

(3) (A) At the discretion of the Commission, a forfeiture penalty may be determined against a person under this subsection after notice and an opportunity for a hearing before the Commission or an administrative law judge thereof in accordance with section 554 of title 5, United States Code. Any person against whom a forfeiture penalty is determined under this paragraph may obtain review thereof pursuant to section 402(a).

(B) If any person fails to pay an assessment of a forfeiture penalty determined under subparagraph (A) of this paragraph, after it has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the Commission, the Commission shall refer the matter to the Attorney General of the United States, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the forfeiture penalty shall not be subject to review.

(4) Except as provided in paragraph (3) of this subsection, no forfeiture penalty shall be imposed under this subsection against any person unless—

(A) the Commission issues a notice of apparent liability, in writing, with repsect to such person;

(B) such notice has been received by such person, or the Commission has sent such notice to the last known address of such person, by registered or certified mail; and

(C) such person is granted an opportunity to show, in writing, within such reasonable period of time as the Commission prescribes by rule or regulation, why no such forfeiture penalty should be imposed.

Such a notice shall (i) identify each specific provision, term, and condition of any Act, rule, regulation, order, treaty, convention, or other agreement, license, permit, certificate, instrument, or authorization which such person apparently violated or with which such person apparently failed to comply; (ii) set forth the nature of the act or omission charged against such person and the facts upon which such charge is based; and (iii) state the date on which such conduct occurred. Any forfeiture penalty determined by the Commission under this paragraph shall be recoverable pursuant to section 504(a) of this Act.

(5) No forfeiture liability shall be determined under this subsection against any person, if such person does not hold a license, permit, certificate, or other authorization issued by the Commission, unless, prior to the notice required by paragraph (3) of this subsection or the notice of apparent liability required by paragraph (4) of this subsection, such person (A) is sent a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission which is nearest to such person's place of residence; and (C) subsequently engages in conduct of the type described in such citation.

The provisions of this paragraph shall not apply, however, if the person involved 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 one 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 one year prior to the date of issuance of the required notice or notice of apparent liability.

PROVISIONS RELATING TO FORFEITURES

SEC. 504. (a) The forfeitures provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable *, except as otherwise provided with respect to a forfeiture penalty determined under section 503(b)(3) of this Act,* in a civil suit in the name of the United States brought in the district where the person or carrier has its principal operating office or in any district through which the line or system of the carrier runs: *Provided*, That any suit for the recovery of a forfeiture imposed pursuant to the provisions of this Act shall be a trial de novo: *Provided further*, That in the case of forfeiture by a ship, said forfeiture may also be recoverable by way of libel in any district in which such ship shall arrive or depart. Such forfeitures shall be in addition to any other general or specific penalties herein provided. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures under this Act. The costs and expenses of such prosecutions shall be paid from the appropriation for the expenses of the courts of the United States.

(b) The forfeitures imposed by [parts II and III of title III and section 503(b), section 507, and section 510] *title II, parts II and III of title III, and sections 503(b) and 507* of this Act shall be subject to remission or mitigation by the Commission[, upon application therefor,] under such regulations and methods of ascertaining the facts as may seem to it advisable, and, if suit has been instituted, the Attorney General, upon request of the Commission, shall direct the discontinuance of any prosecution to recover such forfeitures: *Provided, however*, That no forfeiture shall be remitted or mitigated after determination by a court of competent jurisdiction.

(c) In any case where the Commission issues a notice of apparent liability looking toward the imposition of a forfeiture under this Act,

that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order has become final.

* * * * * * *

[FORFEITURE IN CASES OF VIOLATIONS OF CERTAIN RULES AND REGULATIONS

[SEC. 510. (a) Where any radio station other than licensed radio stations in the broadcast service or stations governed by the provisions of parts II and III of title III and section 507 of this Act—

[(1) is operated by any person not holding a valid radio operator license or permit of the class prescribed in the rules and regulations of the Commission for the operation of such station;

[(2) fails to identify itself at the times and in the manner prescribed in the rules and regulations of the Commission;

[(3) transmits any false call contrary to regulations of the Commission;

[(4) is operated on a frequency not authorized by the Commission for use by such station;

[(5) transmits unauthorized communications on any frequency designated as a distress or calling frequency in the rules and regulations of the Commission;

[(6) interferes with any distress call or distress communication contrary to the regulations of the Commission;

[(7) fails to attenuate spurious emissions to the extent required by the rules and regulations of the Commission;

[(8) is operated with power in excess of that authorized by the Commission;

[(9) renders a communication service not authorized by the Commission for the particular station;

[(10) is operated with a type of emission not authorized by the Commission;

[(11) is operated with transmitting equipment other than that authorized by the Commission; or

[(12) fails to respond to official communications from the Commission;

the license of the station shall, in addition to any other penalty prescribed by law, forfeit to the United States a sum not to exceed $100. In the case of a violating of clause (2), (3), (5), or (6) of this subsection, the person operating such station shall, in addition to any other penalty prescribed by law, forfeit to the United States a sum not to exceed $100. The violation of the provisions of each numbered clause of this subsection shall constitute a separate offense: *Provided*, That $100 shall be the maximum amount of forfeiture liability for which the licensee or person operating such station shall be liable under this section for the violation of the provisoins of any one of the numbered clauses of this subsection, irrespective of the number of violations thereof, occurring within ninety days prior to the date the notice of apparent liability is issued or sent as provided in subsection (c) of this section: *And provided further*, That $500 shall

be the maximum amount of forfeiture liability for which the licensee or person operating such station shall be liable under this section for all violations of the provisions of this section, irrespective of the total number thereof, occurring within ninety days prior to the date such notice of apparent liability is issued or sent as provided in subsection (c) of this section.

[(b) The forfeiture liability provided for in this section shall attach only for a willful or repeated violation of the provisions of this section by any licensee or person operating a station.

[(c) No forfeiture liability under this section shall attach after the lapse of ninety days from the date of the violation unless within such time a written notice of apparent liability, setting forth the facts which indicate apparent liability, shall have been issued by the Commission and received by such person, or the Commission has sent him such notice by registered mail or by certified mail at his last known address. The person so notified of apparent liability shall have the opportunity to show cause in writing why he should not be held liable and, upon his request, he shall be afforded an opportunity for a personal interview with an official of the Commission at the field office of the Commission nearest to the person's place of residence.]

* * * * * * *

SEPTEMBER 12, 1975.

AGENCY REPORTS

Hon. CARL ALBERT,
Speaker of the House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: The Commission has adopted as part of its legislative program for 94th Congress a proposal to amend the Communications Act of 1934, as amended, with respect to forfeiture.

The proposal, which bears the reference 94–2 would unify and simplify the forfeiture provisions as well as enlarge their scope to cover persons subject to the act, but not subject to forfeiture, such as community antenna (CATV) systems.

The proposal would also provide for more effective enforcement of the forfeiture provisions. The limitation period for issuance of a notice of apparent liability would be extended from ninety days to one year for non-broadcast licensees and from one year for broadcast station licensees to one year or the remainder of the current license term, whichever is greater. All other persons would be subject to a one year statute of limitations. The maximum amount of forfeiture that could be imposed for a single offense would be $2,000, and the maximum for multiple offenses would be $20,000, for broadcast licensees, permittees and common carriers, and, CATV systems. The maximum forfeiture for all other persons would be $5,000.

The Commission's draft bill to accomplish these revisions and the explanation of the draft bill have been submitted to the Office of Management and Budget for their consideration. We have now been advised that from the standpoint of the Administration's program, there is no objection to our submitting the draft bill to Congress for its consideration.

The Commission would appreciate consideration of the proposed amendments to the Communications Act of 1934 by the House of Representatives. If the House or the Committee to which this bill may be referred would like any further information on it, the Commission will be glad to provide it upon request.

Sincerely,

RICHARD E. WILEY, *Chairman.*

A BILL To amend the Communications Act of 1934, as amended, with respect to penalties and forfeitures

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That

SEC. 1. Section 503(b) of the Communications Act of 1934 as amended (47 U.S.C. § 503(b)), is amended to read as follows:

"(b)(1) Any person who—

"(A) willfully or repeatedly fails to operate a radio station substantially as set forth in a license, permit or other instrument or authorization;

"(B) willfully or repeatedly fails to observe any of the provisions of this Act or of any certificate, rule, regulation, or order of the Commission prescribed under authority of this Act or under authority of any agreement, treaty or convention binding on the United States;

"(C) voilates section 317(c) or section 509(a)(4) of this Act; or

"(D) violates sections 1304, 1343, or 1464 of title 18 of the United States Code;

shall forfeit to the United States a sum not to exceed $2,000. Each act or omission constituting a violation shall be a separate offense for each day during which such act or omission occurs. Such forfeiture shall be in addition to any other penalty provided by this Act; *provided*, however, that such forfeiture shall not apply to conduct which is subject to forfeiture under title II of this Act; *and provided further*, that such forfeiture shall not apply to conduct which is subject to forfeiture under part II or part III of title III or section 507 of this Act.

"(2) No forfeiture liability under paragraph (1) of this subsection (b) shall attach to any person unless a written notice of apparent liability shall have been issued by the Commission, and such notice has been received by such person or the Commission shall have sent such notice by registered or certified mail to the last known address of such person. A notice issued under this paragraph shall not be valid unless it sets forth the date, facts and nature of the act or omission with which the person is charged, and specifically identifies the particular provision or provisions of the law, rule, regulation, agreement, treaty, convention, license, permit, certificate, other authorization, or order involved. Any person so notified shall be granted an opportunity to show in writing, within such reasonable period as the Commission shall by rule or regulation prescribe, why he should not be held liable.

"(3) No forfeiture liability under paragraph (1) of this subsection (b) shall attach to any person who does not hold a license, permit, certificate, or other authorization from the Commission unless prior to the written notice of apparent liability required by paragraph (2) above, such person has been sent a notice of the violation, has been given reasonable opportunity for a personal interview with an official of the Commission at the field office of the Commission nearest to the

person's place of residence and thereafter has engaged in the conduct for which notice of the violation was sent; *provided*, however, that the requirement of this subsection for a notice of the violation and opportunity for a personal interview shall not apply if the person is engaging in activities for which a license, permit, certificate, or other authorization is required or is providing any service by wire subject to the Commission's jurisdiction; *and provided further*, that any person who has been sent a notice of the violation, has been given a reasonable opportunity for a personal interview and thereafter engages in the conduct for which the notice was sent shall not be entitled to a further notice for the same conduct and may be subject to forfeiture for the initial and all subsequent violations.

"(4) No forfeiture liability under paragraph (1) of this subsection (b) shall attach for any violation—

"(A) by any person holding a broadcast station license under title III of this Act if the violation occurred (i) more than one year prior to the date of the issuance of the notice of apparent liability or (ii) prior to the date beginning the current license term, which date is earlier, or

"(B) by any other person if the violation occurred more than one year prior to the date of issuance of the notice of apparent liability.

"(5) In no event shall the total forfeiture imposed for the acts or omissions set forth in any notice of apparent liability issued hereunder exceed—

"(A) in the case of (i) a common carrier subject to this Act, (ii) a broadcast station licensee or permittee, or (iii) a person engaged in distributing to the public broadcast signals by wire or engaged in distributing to the public other program services by wire if such activity is the subject of Commission regulation, $20,000;

"(B) in the case of any other person, $5,000.

SEC. 2. Section 510 of the Communications Act of 1934, as amended (47 USC § 510), is hereby repealed.

SEC. 3. Section 504(b) of the Communications Act of 1934, as amended (47 USC § 504(b)), is amended by deleting the words "parts II and III of title III and section 503(b), section 507, and section 510" and substituting the words "title II and parts II and III of title III and sections 503(b) and 507", and by deleting the phrase ", upon application therefore,".

SEC. 4. Any act or omission which occurs prior to the effective date of this Act and which incurs liability under the provisions of sections 503(b) or 510 as then in effect will continue to be subject to forfeiture under the provisions of sections 503(b) and 510 as then in effect.

SEC. 5. The amendments made by this Act shall take effect on the thirtieth day after the date of its enactment.

EXPLANATION OF PROPOSED AMENDMENTS TO THE COMMUNICATIONS ACT OF 1934 TO UNIFY AND STRENGTHEN CERTAIN PROVISIONS FOR THE USE OF FORFEITURES AND PENALTIES

The Federal Communications Commission recommends the amendment of the Communications Act of 1934, as amended, to unify, simplify and make more effective the forfeiture provisions of sections

503(b) and 510. Section 503 provides forfeitures where a broadcast licensee or permittee violates the terms of his license, the Communications Act, a Commission regulation, a cease and desist order issued by the Commission, or specified provisions of title 18 of the United States Code. Section 510 provides separately for forfeitures applicable to non-broadcast radio stations where any one of twelve specified offenses occurs. It also provides for the imposition of a forfeiture upon the operator of the station in particular cases. It is proposed to amend section 503(b) and repeal section 510 to place all of these classes of forfeiture under section 503(b), which would be expanded to apply to all persons (other than where ship or common carrier forfeitures are otherwise provided for) who violate the Communications Act, a Commission rule or order prescribed under the Communications Act or a treaty, the terms of a license permit, certificate, or other instrument of authorization, or the obscenity, lottery, or fraud provisions of title 18 of the United States Code.

The principal objective of the proposed legislation is to unify and simplify the forfeiture provisions; to enlarge their scope to cover persons subject to the Act but not now under the forfeiture provisions—such as cable systems (CATV), users of Part 15 or Part 18 devices, communications equipment manufacturers, and others also subject to Commission regulations who do not hold licenses issued by the Commission; and to provide for more effective enforcement.

Prior to 1960 the Commission was empowered to revoke station licenses or station construction permits and to issue cease and desist orders to any person violating the Communications Act or a Commission rule (see section 312 of the Act) and to suspend operator licenses (see section 303(m) of the Act). There was no provision for a penalty of lesser magnitude than revocation or denial of renewal of station licenses. Because a penalty affecting the license was not warranted for all violations, the Commission needed an alternative for dealing with those who should continue to hold licenses.

Therefore, in 1960 section 503(b), 74 Stat. 889, was enacted to give the Commission the enforcement alternative of imposing forfeitures in the case of broadcast licensees or permittees; and in 1962, section 510, 76 Stat. 68, was added to permit the Commission to impose forfeitures on non-broadcast radio licensees for twelve specific kinds of misconduct. These forfeitures have proved to be useful enforcement tools.

However, after 13 years of experience and reevaluation under this enforcement scheme, the Commission has concluded that common procedures with uniform sanctions for common carriers, broadcast entities, and other electronic communications businesses subject to our jurisdiction are required to deal effectively with the many forms of misconduct that impede the policy and purposes of the Communications Act. Moreover, there is a need in addition to make forfeitures applicable to the many forms of non-broadcast radio licensee misconduct that are not now covered by the twelve categories in section 510. In light of these problems, the Commission recommends that non-broadcast radio licensees no longer be governed by section 510, which should be repealed, and that they be governed instead according to the provisions of section 503(b), which should be expanded. This comprehensive and uniform treatment would mean that the misconduct which

is now subject to forfeiture under section 510 would become subject to forfeiture under the proposed section 503(b).

The proposed amendments would make three additional material alterations in the Communications Act's existing forfeiture provisions. First, the forfeiture sanction would be made available against all persons who have engaged in proscribed conduct. Therefore, the amended section 503(b) would reach not only the broadcast station licensees and permittees now covered by section 503(b) and the other station licensees and operators now covered by section 510, but also any person subject to any provisions of the Communications Act [1] or the Commission's rules as well as those persons operating without a valid station or operator's license, those operators not required to have a license, and those licensed radio operators who are now subject only to suspension under section 303(m).

Second, the limitations period of the issuance of notices of apparent liability would be extended for broadcast station licensees from the present one year to one year or the current license term, whichever is greater, and for non-broadcast radio station licensees from the present ninety days to one year. For all other persons subject to forfeiture under the proposal, the limitations period would be one year.

Third, the maximum amount of forfeiture that could be imposed for the acts or omissions set forth in any single notice of apparent liability would be modified as follows: (1) the maximum forfeiture that could be imposed for a single offense would be $2,000; and (2) the maximum forfeiture that could be imposed for multiple offenses would be (a) $20,000 in the case of a common carrier, a broadcast station licensee or permittee, or a person engaged in distributing to the public broadcast signals by wire or engaged in distributing to the public other program services by wire if such activity is the subject of Commission regulation, and (b) $5,000 in the case of all other persons. Existing section 503(b) provides for a maximum of only $1,000 for single offenses by a broadcast station and $10,000 for multiple offenses. Those persons subject to existing section 510(a) are liable only for $100 for single offenses and a maximum of $500 for multiple offenses.

The proposed amendments to broaden the Commission's forfeiture authority would alleviate the difficulties caused by the lack of forfeiture authority against CATV systems (or other communications businesses that may become subject to our jurisdiction), users of incidental and restricted radiation devices, users of devices which contain radio frequency oscillators,[2] communications equipment manufacturers, persons operating without holding a required license, and others subject to Commission regulations. Except for the Commission's cease and desist authority, which is not an effective deterrent to misconduct, enforcement of the Act or Commission rules or orders against such

[1] A person subject to a forfeiture under title II or parts II or III of title III or section 507 of the Act would not, however, be subject to a forfeiture under the proposed section in section 510.

[2] Part 15 of the Commission's rules governs the use of devices which only incidentally emit radio frequency energy and restricted radio devices such as radio receivers. Part 18 of the Commission's rules governs the use of industrial, scientific and medical equipment, such as industrial heating equipment, all of which incorporate radio frequency oscillators. Such devices are permitted to operate without issuance of an individual license provided that they are operated in accordance with the provisions in the rules designed to minimize interference to regular radio communications services.

persons now must be by judicial action under section 401 or criminal prosecution under sections 501 and 502.

In extending the forfeiture procedures to licensed operators, the proposed amendment would provide an administrative alternative to the sometimes unduly harsh penalty of license suspension now authorized in section 303(m). License suspension may be unduly harsh if it denies the offender his customary means of livelihood for the suspension period. License suspension may also cost the offender permanent loss of his job, or of his customers if he operates a mobile radio service maintenance business. The proposed extension of the section 503(b) forfeiture provisions to licensed operators would afford the Commission an effective medium for obtaining compliance by operators, but would not cause the secondary detriments which often stem from license suspension. The administrative penalty of forfeiture would also provide a more feasible alternative to cease and desist orders or judicial enforcement under sections 401, 501 or 502, against operators who are not required to hold a license and against whom, therefore, a license suspension is not an available penalty.

Under the proposal, forfeiture liability would arise only after (1) a person has been served personally with or been sent by certified or registered mail to his last known address a notice of apparent liability; (2) he has been given an opportunity to show in writing why he should not be held liable; and (3) if he has submitted a written response, the Commission has considered his response and issued an order of forfeiture liability.

In addition to these procedural protections applicable to all persons subject to our jurisdiction, we have provided special procedural protection for members of the public at large who may be unaware of the Commission's regulation of equipment they may be operating. For example, there may be concern that a person would be subject to forfeiture for willful maloperation of an electronic device such as a garage door opener, an electronic water heater, or electronic oven, when he may be unaware of the applicability of the Communications Act or the Commission's rules and regulations.[3]

In these circumstances, no forfeiture could attach unless prior to the notice of apparent liability the Commission has sent such person a notice of the violation and has provided him an opportunity for a personal interview and the person has thereafter engaged in the conduct for which notice of the violation was sent. It should be noted that the special protection provisions do not apply to persons engaged in an activity that require the holding of a license, permit, certificate, or other authorization from the Commission or to one providing any service by wire subject to the Commission's jurisdiction.

It should be noted that this special procedure would not have to be accorded a second time to a person who subsequently engaged in the same conduct; and such person may be liable to a forfeiture not only for the conduct occurring subsequently but also for the conduct for which notice of a violation was sent and opportunity for a personal interview given.

[3] Should the maloperation of any such device create hazards to life or property, the Commission would still have authority under section 312 to issue a cease and desist order.

Under existing provisions of the statute, which would not be changed, any person against whom a forfeiture order runs may challenge the order by refusing to pay. If the United States institutes a collection action, the issue of forfeiture liability would be reheard in a trial de novo in a U.S. District Court.

The second major modification in the Commission's proposal, the extension of the present time limitations for the issuance of notices of apparent liability is necessary if the Commission's forfeiture authority is to be an effective sanction. Because of increasing workloads and personnel shortages the ninety-day limitation in the non-broadcast services and the one-year limitation in the broadcast services are often substantial impediments to the use of the forfeiture sanction in appropriate cases. The Commission proposes that the statute of limitations for all persons holding broadcast radio station licenses under title III be extended to one year or the current license term, whichever is greater; for all other persons, the statute of limitations would be one year.

With over 32,000 authorizations in the broadcast services, more than 15,000 authorization in the common carrier serves, and over 2,000,000 authorizations in the safety and special services, it is impossible for Commission field office personnel to make regular inspections in all these services. Violations of the Communications Act or of the Commission's rules in the nonbroadcast services are sometimes detected by station inspection but more generally through our field office monitoring. Monitoring usually requires transcription of tapes which in itself is a time-consuming process. Thereafter, as a matter of practice, the field office issues a notice of violation to the licensee and offers an opportunity to him to comment on or explain the alleged misconduct. In the overwhelming majority of cases, the nature and extent of the violation or the licensee's explanation thereof are such as to require no further action and the matter is closed. However, these notices of violation are also checked through the Commission's office in Washington and against licensee records, and in those instances where the licensee has a history of repeated misconduct or where the instant misconduct is willful and sufficiently serious, it may be determined that the imposition of a forfeiture is called for as an appropriate deterrent against future violations.

Our experience since the enactment of the Commission's forfeiture authority in the nonbroadcast services demonstrates that with the imbalance between the number of violation cases and the number of staff personnel to review them, it is often impossible to issue the notice of apparent liability for forfeitures within the ninety-day period provided in the present statute. Considering the very great number of authorizations in the nonbroadcast services, plus the great number of persons who are permitted to operate radio frequency equipment in accordance with our regulations but without holding an instrument of authorization, we believe a one year statute of limitations for notices of apparent liability is entirely reasonable and necessary to enable the Commission to invoke more frequently the forfeiture provisions Congress has provided and thus to secure greater compliance with the Act.

Similarly, a longer statute of limitations is necessary in the broadcast field in order to enable the Commission to reach violations of the Act. The existing one-year limitations period is usually sufficient in cases arising from regular station inspection by field office personnel. However, personnel shortages do not permit more than one inspection during a three-year license term. Although violations may be disclosed and considered by the Commission during its review of license renewal applications, the comparatively minor character of such violations does not warrant denial of renewal and often the one-year period has elapsed before a notice of apparent liability can be issued. Further, in many instances, misconduct by broadcast licensees is not uncovered in regular station inspections by field office personnel, but comes to light as the result of complaints and other information received by the Commission staff in Washington. These complaints and other information may require detailed and time-consuming investigation of station operations before a determination can be made that there may have been misconduct. Subsequent to the investigation the licensee has an opportunity to comment on or explain the alleged misconduct. Thus, it is often impossible for the Commission to consider questions as to apparent culpability and appropriateness of a forfeiture sanction and then to issue the required notice of apparent liability within the one-year limitation period now provided in section 503(b). Here again the legislative objective in vesting forfeiture authority in the Commission is often frustrated by the present time limitations.

Further, the one-year limitation for the issuance of notices of apparent liability in the broadcast field sometimes produces results which are self-defeating. Thus, in one instance the Commission received information that a radio station broadcast an allegedly rigged contest. Field investigation of the station initiating the program was begun as promptly as possible. The intricacies of the alleged misconduct required a time-consuming inquiry. During the course of the inquiry Commission investigators unearthed information revealing an earlier broadcast of another rigged contest concerning which there was extensive and conclusive evidence. However, upon completion of the field investigation, the Commission was able to impose a forfeiture for only the most recent misconduct because the earlier violation had occurred more than one year before. In such a case it is still possible of course to designate the license renewal application for hearing. We stress, nevertheless, that because refusal to renew the license was the only sanction available because of the short statute of limitations, the legislative purpose of section 503(b) of the Act could not be fully implemented. The Commission needs to be able to exercise its forfeiture authority during the entire span of a broadcast license term for minor violations occurring during that license term.

The Commission is therefore proposing for broadcast licensees a statute of limitations of one year or its current license term, whichever is greater. The proposal would permit the Commission to issue notices of apparent liability to broadcast station licensees (1) for any misconduct which occurs during a current license term and (2) for any misconduct which occurs during the last part of the prior license term if the notice of apparent liability is issued within a year of the time of the alleged misconduct.

The third major amendment the Commission is proposing is an increase in the maximum forfeitures. The currently available forfeitures are unrealistic and inadequate. In many situations the maximums are too low to permit the Commission to fashion an effective deterrent against large communications businesses. For example, the current maximum forfeiture available against a multimillion dollar broadcast licensee is $1,000 for a single violation up to a maximum of $10,000 for multiple violations. The proposal would provide more realistic forfeiture maximums for large broadcast interests, large common carriers, and other large communications businesses. Other persons would be subject to lower maximums. With the proposed maximums, the Commission would still retain the discretion to impose smaller forfeitures for offenses of lesser gravity. The Commission fully recognizes the necessity of tailoring forfeitures to the nature of the offense and the offender and has done so within the present statutory authority. Furthermore, the Commission would still have the authority to mitigate or remit forfeitures after considering a request for such relief.

One relatively minor amendment is also being proposed. By deleting section 510 as proposed, the Commission would be relieved of the obligation to provide a personal interview at the request of a non-broadcast station licensee or operator who receives a notice of apparent liability. Proposed section 503(b)(2), which incorporates much of the substance of section 510, does not include the interview provision. The Commission's experience is that only ten to fifteen percent of the persons to whom a notice of apparent liability has been issued avail themselves of the interview opportunity. Furthermore, seldom does an interview elicit any data which the licensee has not already furnished to the Commission, either in response to the notice of a violation or to the notice of apparent liability.

On the other hand, interviews in only ten to fifteen percent of these instances impose substantial burdens upon field offices. Critical engineering personnel must be diverted from regular pressing duties to interview the suspected violator and must then submit detailed reports to the Commission's main office in Washington, D.C. Commission personnel at the Washington, D.C. office then must coordinate all of the documents relevant to a given notice of apparent liability that may have been accumulated in several field offices and transmit the documents to the field office where the interview is scheduled. On balance, the Commission believes that the public, and the non-broadcast licensees and operators themselves, would best be served by the deletion of the field office interview provision from the forfeiture section.

Furthermore, it would be impossible for the Commission to continue interviews with non-broadcast licensees and at the same time provide personal interviews to members of that group who would now be subject to forfeitures for the first time and for whom special procedural protections are being proposed in section 503(b)(3). As between the two groups the Commission believes the public interest would be better served by the interviews that would be required under proposed section 503(b)(3).

Lastly, the Commission is seeking authority to mitigate or remit forfeitures imposed under title II of the Communications Act concerning common carriers. The Commission now has no express authority to remit, mitigate, or otherwise reduce a forfeiture imposed under these common carrier provisions, although section 504(b) provides express authority to mitigate or remit forfeitures under parts II and III of title III, and sections 504(b), 507 and 510. Since the Commission has this authority with respect to all other forfeitures which it can summarily impose, there is no reason not to include within this authority the common carrier forfeitures in title II. Moreover, it is reasonable to permit the Commission to exercise its authority to mitigate or remit on its own motion rather than awaiting an application for action. The Commission should be able to exercise its judgment before imposing a fine if the circumstances warrant a reduction or cancellation of a forfeiture.

In conclusion, the more uniform, comprehensive, and higher forfeiture provisions and the related modifications which the Commission now seeks should contribute substantially to greater compliance with the law and better administrative enforcement of the law.

Adopted: October 9, 1974.

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., September 7, 1976.

HON. LIONEL VAN DEERLIN,
Chairman, Subcommittee on Communications, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This letter is in response to your request for the Commission's comments on H.R. 15268. This bill, which was introduced on August 25, 1976, would amend the Communications Act to provide for the regulation of rates for the attachment of interstate communications wires to utility poles. As you know, for the last month the Commission's Office of Plans and Policy has been engaged in a study of the jurisdictional and economic issues involved with regard to pole line attachments. In view of the fact that this study will not be completed until the middle of October and, in light of the extremely limited time afforded to prepare these comments, they cannot be as detailed or fully considered as they might otherwise be. However, we hope that they will be of some value to you in your deliberations.

The Commission has been concerned for several years with issues relating to the attachment of cable television cables to the utility poles of telephone and electric power companies. Because of a strong feeling on the Commission's part that additional regulation should be undertaken only when other alternatives have failed and because of significant questions as to the Commission's jurisdiction in this area, we have sought to encourage the industries involved to find a voluntary means of resolving their disputes. Regardless of the outcome of the proposed legislation, we believe that our efforts in this area have been beneficial to the public.

We believe that a number of questions are raised by the specific provisions of H.R. 15268. For example, section 224 of the proposed act provides the Commission with authority to promulgate rules and regulations which shall assure just and reasonable rates, terms, and conditions for pole attachments and to promulgate minimum standards

which a state must meet or exceed if it wishes to continue or commence regulation of pole attachments. In addition, it further provides that the Commission shall accomplish both of these tasks within three months after the date of enactment of the legislation. This extremely short time frame for the promulgation of rules and standards is simply unrealistic in our belief. In fact, our staff's best estimate of the time necessary to conclude an orderly rulemaking on this complicated subject is in the neighborhood of at least one year.

Questions are also raised by the bill's lack of specificity as to the intent of a number of its provisions. The bill is, for example, silent with respect to the manner as well as the form which pole attachment regulations by the Commission might take. In this regard, it is unclear whether the bill envisions the adoption by regulation of a ratemaking formula by the Commission which would merely provide for recovery of certain costs and be applied across the board or whether the proposed inclusion of pole line attachment regulation in Title II of the Communications Act implies an intent that the Commission provide a regulatory plan which would require numerous tariff filings. Further, the bill does not provide any answer with respect to the legislative intent as to the "minimum standards" which states would have to "meet or exceed" to take jurisdiction over pole attachment rates. Would it be adequate, for example, for a state simply to charge an agency with the duty of insuring that pole attachment rates are "just and reasonable"? We believe that explanatory language which would provide guidance on these and other issues would be of help to both the Commission and to the states.

A number of other somewhat more technical questions are raised by the specific provisions of H.R. 15268. For example, the term "wire communications" which is defined in section 3 of the Communications Act is a fairly broad term which includes all forms of wire communications, not merely cable television. Thus, under the proposed bill, the Commission might be involved in assuring just and reasonable rates for the use of poles by not only cable television system operators, but also by many other users of wire communications. We understand that, in addition to cable systems, a large number of other entities utilize space on utility poles. These include public safety uses such as police, fire and traffic signalling, in addition to use by communications common carriers such as Western Union. For many years, Western Union and electric utility companies have maintained reciprocal arrangements with the Bell System whereby each is permitted to make use of the other's poles. In addition to these major users, there are lease arrangements involving railroad signalling, the operation of coal companies and numerous other commercial and noncommercial uses (some involving only one or two poles, and others which are far more extensive in nature). It seems certain that the scope of a regulatory program designed to insure just and reasonable rates for the leasing of pole space by all of these entities would be much larger than that necessary to insure just rates for cable systems. We would recommend therefore that if the legislative intent of this bill is merely to remedy pole attachment problems which are of importance to the cable television industry, then its application should be so limited, preferably

by inserting the term "cable television system" as defined by 47 C.F.R. 76.5(a) in lieu of "wire communication."

Considerable problems might also be caused by the definition of "state" in proposed section 224(a)(2). In that section, the term "state" is defined to include "any State or political subdivision, agency, or instrumentality thereof" which is incidentally somewhat more inclusive than the definition of that term which is found in section 3 of the Communications Act. It is important to bear in mind that under the more inclusive definition appearing in the proposed bill, municipalities, counties, and other political subdivisions theoretically could apply under section 224(c)(1) for authorization to regulate pole attachment rates. This may present the possibility of different, overlapping, and contradictory rate structure procedures at the state level.

Section 224 also provides that the Commission shall establish an advisory board composed of the Chairman of the Federal Power Commission and the Interstate Commerce Commission and at least one representative of State regulatory authorities to assist in the promulgation of rules and minimum standards. Since these persons and their agencies of course would have the opportunity to participate in rulemaking proceedings initiated by the Commission, the establishment of a formal advisory board may be unnecessary. Further, establishment of such a board might seriously complicate the process of developing rulemaking proceedings, particularly in light of the limited time frame allowed by H.R. 15268.

There also appears to be some question whether the proposed legislation would cover the municipally-owned utility companies in the United States which rough estimates indicate exceed 2,300 in number. Section 224(a)(1) defines the term "utility" as follows:

"Any person whose rates or charges are regulated by a State or the Federal Government and who owns or control poles, ducts, conduits, or rights-of-way uses, in whole or in part, for wire communication. . . ."

The term "person" as defined in section 3(i) of the Communications Act does not mention municipalities although it does include "any corporation joint-stock company, or associate." It is is not clear whether municipally-owned companies could be viewed as "regulated" as that term is used in section 224(a)(1) and thus whether they come under the definition of "utility." Presumably, these questions could be clarified in the reports accompanying the bill.

Finally, we note that while the time frame in which the Commission's comments on this legislation has allowed us to come to only tentative and somewhat speculative conclusions as to possible new manpower needs which will be engendered by the legislation, our initial analysis suggests the possibility that a substantial number of new personnel may be needed—at least if the Commission is to engage in a Title II regulatory plan which conceivably could require thousands of individual tariff filings. Regardless of the speculative nature of such conclusions, we strongly urge that the Committee consider the possible budgetary impact of enactment of this legislation. In this regard, we further suggest that the Committee might consider the possibility of providing the Commission with the authority and flexibility to provide exemptions from regulations to those small entities who, because of their class or size, it may not be cost effective to regulate.

This letter was adopted by the Commission on September 7, 1976, Commissioner Lee concurring and Commissioner Hooks absent.

By direction of the Commission,

RICHARD E. WILEY, *Chairman.*

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., September 7, 1976.

Hon. LIONEL VAN DEERLIN,
Chairman, Subcommittee on Communications, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The majority's letter does a creditable job of clinically analyzing some of the substantive and definitional aspects of H.R. 15268. The majority letter, however, comments on the questions of the advisability or necessity of legislation of this bent.

Because of the problems (*e.g.*, summary disconnection orders, unregulated increases for attachments) with which you and your colleagues have become familiar during the present round of hearings, it is clear that pole attachment charges must be subject to oversight so as not to unfairly burden either the telephone or cable TV rate payers.

It is my view that the FCC presently has jurisdiction over telephone company pole rates under Title II of the Communications Act, and specifically § 202(a):

"It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

The law has made it clear that cable is an interstate service and any charges for an interstate communication service over common carrier facilities is within the FCC province.

At the present time, I do not believe that the Communications Act provides authority for the regulation of rates charged by other utilities.

H.R. 15268 would clarify and remedy the present situation. The federal-deferring-to-state (and local) mechanism for establishing due process standards and providing a forum for rate adjudications is well conceived.

There should be no reasonable objection to legislation of this purpose and I support the concept without reservation. The charges for pole attachments should represent only a proper share of installation, maintenance, depreciation and other legitimate expenses. It is understood that the Commission will require the personnel and resources to administer this legislation and I am certain that the Congress will be sensitive to the practical consequences thereof.

Thank you for the opportunity to comment on this matter.

Sincerely,

BENJAMIN L. HOOKS, *Commissioner.*

OFFICE OF TELECOMMUNICATIONS POLICY,
EXECUTIVE OFFICE OF THE PRESIDENT,
Washington, D.C., September 3, 1976.

Hon. LIONEL VAN DEERLIN,
Chairman, Subcommittee on Communications, Communications on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. VAN DEERLIN: This is in response to your letter of August 26, 1976, wherein you request the preliminary views of this Office respecting H.R. 15268, a bill to amend the Communications Act of 1934. The bill would lodge primary jurisdiction over the poles, ducts, conduits, or other rights of way used or controlled by a regulated utility, in whole or in part for wire communications, in the Federal Communications Commission. It would require that agency by regulation to: (1) insure just and reasonable rates, terms, and conditions of use by persons desiring to lease such space for wire communications; and (2) provide minimum Federal standards, pursuant to which state regulation of poles and ducts may be enacted.

As a conceptual matter, OTP recognizes that the presence of inherent monopoly structures in utility enterprises may justify and necessitate regulation in order to insure public access to facilities and services at equitable rates. A significant preliminary question is, whether a compelling case can be made that utilities are abusing their positions and are engaging in a pattern of monopoly behavior involving predatory pricing, etc., to such extent that the subject legislation is necessary. While we are aware of particular episodes that appear to support this contention, it is not clear to us that the problem has become national in scope. We shall presume to answer this question in the affirmative, however, for the purposes of discussing the legislation.

It must then be asked whether such regulation, long applied to the services provided by public utilities, may be applicable as well as to the facilities by which such services are delivered. As a matter of policy, we believe regulation of access to public utility facilities may be justified on the same grounds which warrant regulation of the services rendered by these same facilities. That is, utility services are authorized, and monopoly status typically is conferred, by public law, to serve a greater public good; i.e., a guaranteed service availability. Public rights-of-way are provided for this purpose. It is difficult to see how, from an esthetic, environmental, economic or efficiency standpoint, the public would benefit by the proliferation of conduits, poles, and ducts by all parties needing such facilities.

It seems reasonable, therefore, to require those in a monopoly position to provide for the shared use of facilities utilizing public rights of way under fair rates, terms and conditions. Thus, we are generally sympathetic to the overall objectives of this legislation.

We have three general concerns with this legislative approach, however. First, we question whether the Federal Communications Commission should be authorized to regulate the poles and ducts of non-communications utilities. Second, we question the extent to which the FCC should be authorized to preempt state authority in this area, and third we question whether this bill provides adequate guidance to the Commission to carry out the congressional objectives.

With respect to the first question we are concerned with the efficacy and propriety of delegating jurisdiction over electric companies and other noncommunications utilities to the Commission. The provision of pole line space by power companies appears to us to be a "public service" just as their provision of power is a service. If the FCC is to be accorded jurisdiction over the former, why by the same logic should it not be allowed to regulate the provision of power to cable companies; or the Federal Power Commission (FPC) allowed to regulate telephone service to power companies for that matter? We do not believe that jurisdiction over a consumer, which the FCC admittedly has with respect to cable and telephone carriers, implies the need for specific jurisdiction over the supplier.

Moreover, we doubt that the Commission has, or could develop in the time periods specified in this legislation, the requisite expertise to determine what reasonable charges are for noncommunications common carrier owned facilities would be. The Commission would be unfamiliar forum to communications carriers, as well, in any Commission rate proceedings. Thus, OTP believes that if it is necessary to regulate the pole attachment practices of power utilities in the public interest in order to facilitate interstate commerce in cable communications, jurisdiction should not be conferred on the FCC.

We note also as a technical matter that this legislation reaches only the poles and ducts used in whole or in part for wire communications and owned by a regulated utility. Excluded from FCC regulation thereby would be the poles and ducts owned by a municipality (for street lighting, for example) or by a utility providing no space on its poles for wire communications. For reasons similar to those expressed above with respect to power utilities, we believe this exclusion to be proper.

With respect to the second question, we recognize that cable's deprivation of pole attachment access on a nationwide basis could adversely affect interstate commerce in cable communications, which would justify Federal intervention. We are concerned, nevertheless, that Federal intervention be limited to that which is demonstrably necessary to assure national interests. Regulation of poles and ducts typically has been a function of state agencies which because of their experience and proximity to the problem can flexibly particularize regulation to account for problems, conditions, and exigencies unique to a locale. Preemptive and expansive Federal regulation would sacrifice such flexibility, and the need for such regulation must be carefully assessed.

Related to the foregoing is our third concern, that this bill provides inadequate guidance to the Commission governing its regulation of poles and ducts. For example, although the bill authorizes state regulation, it provides almost no statutory standards therefore, but confers blanket authority on the Commission to oversee state regulation. Such a legislative approach appears inconsistent with previous initiatives providing for or encouraging state regulation. (See, for example, Federal Coal Mine, Health, and Safety Act of 1969, Pub. L. 91-173, 30 U.S.C. 801 et seq., (1971), Food, Drug and Cosmetic Act, 21 U.S.C §§ 451–470, (1972), Occupational Safety and Health Act, 29 U.S.C. 655, (1975) and Fair Housing Act, 42 U.S.C. 3602 et seq. (1973)).

Of particular concern is the fact that while the bill provides a floor, incremental cost, beyond which state pole rates may not be reduced, there is no comparable statutory standard other than the "just and reasonable" requirement respecting a rate ceiling. We would suggest consideration of a legislative approach which authorized the Commission to establish a range of permissible rates up to a maximum, within which state utility agencies could establish particular rates upon petition and proof by the utility. The Commission could review the maximum rate periodically (every 3 or 5 years for example) in order to account for inflation or other factors. This approach would minimize the need for intrusive Federal regulation and a large FCC staff while preserving state initiative and flexibility. It would be analogous to existing procedures by which utilities seek service rate increases, in that the burden of proof for a pole rate increase would be on the utility who would petition the appropriate State commission. Hopefully, such an approach would meet the cable industry's needs while causing the least amount of disruption to utilities and existing rate procedures.

As another alternative, could not a legislative approach be considered that would authorize Commission review of state policy or regulation respecting pole attachment access without authorizing rate regulation by the Commission itself? The sufficiency of state regulation, and Commission oversight thereof, might be made a condition of cable certification, for example. The Federal interest in facilitating interstate commerce in communications would thus be protected, while the advantages inherent in state regulation would be preserved. Of course, these suggestions, offered as constructive alternatives to H.R. 15268, reflect only a preliminary analysis of the problem in view of your need for an expeditious response.

As a final example of the need for adequate statutory guidelines, we note that the bill's statement of purpose indicates the congressional intent to regulate the "rates, terms, and conditions for the use of communication space on poles, ducts . . . ", etc. The operative amendments to Title II, however, provide only that the "Commission shall promulgate—(A) regulations which shall assure just and reasonable rates, terms, and conditions for pole attachments." It is unclear, therefore, what authority the Commission has to require the expansion of communications space on a utility pole or duct when it is filled up, or to require access to such pole or duct in the first place when there is no such space allocated.

OTP recognizes the great benefits that cable television can confer on the public through its expanded communications capacity. We support also, as a general matter, the need to insure reasonable access by cable television to the poles and ducts owned and operated by regulated utilities. We question, however, for the reasons stated above, whether this legislation properly disposes of the issue at hand. Additionally, we fear that premature or precipitous action could create more regulatory problems than would be eliminated by this legislation.

The Office of Management and Budget advises that it has no objection to the submission of this report.

All best wishes.

THOMAS J. HOUSER.

ADDITIONAL VIEWS OF HON. TIMOTHY E. WIRTH

As the author of this bill and its predecessor, H.R. 15268, I would like to expand on the Committee's statements in this report explaining Section 1 of this legislation.

H.R. 15372 is intended to provide a forum either at the State or Federal level to regulate the rates, terms, and conditions for pole attachments. It was introduced as a result of the Federal Communications Commission's decision that it lacks authority over pole attachment rates charged by power and electric utilities and the fact that many State regulatory bodies have also disclaimed jurisdiction over the rental of space on poles of telephone and electric utilities.

This legislation requires the Federal Communications Commission to regulate the rates, terms, and conditions for pole attachments. It further provides that the Commission shall promulgate regulations to ensure that such rates, terms, and conditions are just and reasonable. Such regulations, however, shall not take effect until nine months after the date of enactment of this bill.

In the intervening nine-month period or at any time thereafter, the States shall have the opportunity to assert jurisdiction over pole attachments. All State regulatory programs, whether adopted before the enactment of the bill, during the nine month period, or at any time thereafter, must be approved by the FCC. The Commission shall grant approval if it finds the State regulates pole attachments in a manner designed to provide just and reasonable rates, terms and conditions for pole attachments.

In determining whether the manner of State regulation is designed to provide just and reasonable rates, the Commission must first ask whether the agency or tribunal established by the State is impartial. Among the factors the Commission should look at in making its determination is whether such agency or tribunal has been charged with the responsibility of regulating the reasonableness of pole attachment rates, terms and conditions to protect the interests of *both* the consumers of utility services and the consumers of the wire communications involved in the pole attachments. Accordingly, I would expect the Commission to disapprove a regulatory program where a State PUC says that it has the power to regulate pole attachment rates which are too *low* (to protect consumers of utility services) but not the power to regulate pole attachment rates which are too *high* (to protect consumers of wire communications).

In my view, the Commission must do more, however, than merely find that the agency or tribunal established by the State is impartial and ostensibly affords all parties due process. It must also look to see whether the State agency or tribunal has taken into account all relevant factors involved in the provision of pole attachments such as the portion of the poles' total usable space which is occupied by each user,

the relative weight of the pole attachments and the legal status of each user. Thus, if a State were to adopt regulations whereby the costs of owning and maintaining poles were simply divided equally among all users, the FCC could and should find that such State does not regulate pole attachments "in a manner designed to provide just and reasonable rates," even though such State regulations were adopted in a proceeding affording due process to all parties.

In reviewing a state regulatory program though, the Commission may not specify rates, terms or conditions. However, since the benchmark for both the FCC and the States is the regulation of pole attachment rates on a "just and reasonable" basis, I would expect the States' regulatory programs generally to be consistent with the Commission's approach.

TIMOTHY E. WIRTH.

O