



PLANNING COMMISSION

AGENDA REPORT

VI. 4

MEETING DATE: MAY 14, 2012

ITEM NUMBER:

SUBJECT: ZONING CODE AMENDMENT CO-12-01 TO AMEND TITLE 19 OF THE COSTA MESA MUNICIPAL CODE RELATED TO WIRELESS TELECOMMUNICATIONS FACILITIES IN THE PUBLIC RIGHT-OF-WAY

DATE: MAY 3, 2012

PRESENTATION BY: FARIBA FAZELI, INTERIM CITY ENGINEER

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DESCRIPTION

Code Amendment CO-12-01 is an amendment to Title 19, Chapter I, Article 4, Sections 14 and 15, of the City of Costa Mesa Municipal Code to include requirements for telephone corporations, including wireless telecommunication providers, to obtain a **"Wireless Telecommunications Use Permit"** for certain wireless telecommunications facilities located within the public right-of-way.

Specifically, wireless telecommunications facilities which would be subject to Planning Commission review/approval would include:

Any wireless telecommunication facility that is located in the City's public right-of-way that meets any of the following criteria:

- a) If the antenna is greater than 12 inches in length;
- b) If the antenna is greater than 12 inches in height;
- c) If the volume of the Radio Box exceeds 1 cubic feet;
- d) If it requires an above ground equipment.
- e) If the antenna is located inside or within 500 feet of a residential zoning district.

The permitting process and additional regulations are specified in the draft Ordinance.

RECOMMENDATION

Recommend that City Council approve and give first reading to the ordinance.

BACKGROUND

California Public Utilities Code

Under State and Federal law, the City has regulatory authority over both the placement and appearance of wireless equipment in public rights-of-way. However, this authority is limited. California Public Utilities Code section 79011 ("PUC 7901") grants a general statewide right to telephone companies (including wireless providers) to install wireless cell phone equipment in public rights-of-way.

These wireless telecommunications facility applications must be processed within 90 days of a completed application for a colocation or within 120 days for a brand new structure/facility.

Federal Telecommunications Act of 1996

The Federal Telecommunications Act of 1996 ("TCA") renders unlawful the "effective prohibition" of wireless services, through the denial of permits for telecommunications equipment. However – within the very limited sphere of authority under state and federal law - the City can require CUPs - and permits in general - for all wireless facilities proposed to be placed in the public ROWs. Any regulation pursuant to State law must still be consistent with the Federal Telecommunications Act of 1996.

City Hearings

In October 2011, Planning Commission requested staff to process a Code Amendment which was forwarded to City Council for consideration.

On November 15, 2011, the City Council authorized work activity pursuant to the Planning Commission's direction to address telecommunication facilities in the public right-of-way, including discretionary review by the Planning Commission.

History of Approvals of Wireless Telecommunications Facilities in the City

Title 19 stipulates that telephone corporations, including telecommunication providers, apply and obtain a discretionary encroachment permit from the Public Services Department for installation of their facilities within the public right-of-way.

The permit applications are routed through other departments within the City for review and conditioning. Public Services Department staff compiles the comments from other departments and adds additional conditions/requirements to the permit. The Code does not require any public notification for these applications.

To date, the Public Services Department has issued the following three permits to telecommunication providers:

- Encroachment Permit No. PS10-00550 located at 1555 Santa Ana Avenue to NEXTG NETWORKS OF CALIFORNIA on 10-25-2010, Permit Fees: \$935.00
- Encroachment Permit No. PS10-00503 located at 1996 Tustin Avenue/ 396 20th Street to T-MOBILE on 01-03-2011, Permit Fees: \$935.00
- Encroachment Permit No. PS11-00507 located at 1598 Placentia Avenue to NEXTG NETWORKS OF CALIFORNIA on 11-29-2011, Permit Fees: \$825.00

ANALYSIS

Code Amendment CO-11-02

State law mandates that the City must generally allow wireless telecommunications equipment to be installed in any public right-of-way. Federal law prohibits the City from denying any permit application if by doing so the City is "effectively prohibiting" wireless service. Yet, the City may, within limits, regulate wireless communication equipment placed in public rights-of-way.

New Process and Regulations

For certain wireless telecom applications, the proposed Code amendment would create a new permit process and regulations as described below:

Table A
Comparison of Existing & New Procedures
for Wireless Telecommunications Facilities in the Public Right-of-Way

Existing Application Process (Administrative Process)	Proposed New Procedures (Discretionary Process)
Public Services Director (or designee) is the decision maker.	Planning Commission shall be the final review authority, unless appealed to City Council.
No Public Notice Required	Public Notification: <ul style="list-style-type: none"> • Newspaper • On-site posting • Mailed notice to property owners within 500-feet of site
No Public Hearing	Public Hearing required.
Encroachment Permit required	New "Telecommunications Use Permit" process and Encroachment Permit.
No time limit on approval	Sunset for approval period is 10 years.
No maximum height limit	Maximum height of 30 feet,

The redlined/strikeout exhibits are provided in Attachment 1 and the Draft Ordinance as Attachment 2.

Wireless Telecommunications Permit Requirement

Currently, Code requires that all wireless telecom facilities in the public ROW be processed as "over-the-counter" type permits with no public notice. The Code Amendment would require a public process.

Any wireless telecommunications facility that meets any of the following criteria shall require a Wireless Telecommunications Use Permit:

- (a) If the antenna is greater than 12 inches in length
- (b) If the antenna is greater than 12 inches in height
- (c) If the volume of the Radio Box exceeds 1 cubic feet.
- (d) If it requires an above ground equipment.
- (e) If the antenna is located inside or within 500 feet of a residential zoning district.

Planning Commission Action Required

Code does not currently require Planning Commission review of proposed applications.

Per the draft ordinance, the Planning Commission is authorized to act on and grant approvals of a discretionary application for a Wireless Telecommunications Facility Permit. The Municipal Code provisions related to the Planning Commission's authority are found in Title 10 and Title 13 of the Municipal Code.

The Planning Commission shall serve as the final decision authority for Wireless Telecommunications Facility Permits. An appeal or review of the Planning Commission's decision shall be according to the procedures set forth in Title 2, Chapter IX Appeal, Rehearing and Review Procedure, of the Municipal Code.

Valid for 10-year Period

Code does not currently set an expiration date on the encroachment permit.

Per the draft Ordinance, the Wireless Telecommunications Use Permit shall be valid for a maximum ten (10) year period from the date of approval, unless otherwise indicated in a condition imposed at the time of granting the application.

SURVEY OF SURROUNDING CITIES

City of Newport Beach Wireless Telecommunication Permit Requirements

The Planning Director is the decision maker for all Wireless Telecommunication Antennas that meet the City of Newport Beach's guideline and standards. Approval by the City Council of Newport Beach is required for the following Antennas:

- If the height of Antennas exceeds thirty five (35) feet.
- If the Antenna is located at
 - a) New false tree

- b) New "Slim Jim" monopole (i.e. with no antenna elements other than the pole itself)
- c) New standard monopole attached antenna elements
- d) New lattice tower
- e) On common area lots or other non-residential lots within residential districts
- f) Within any required setback established in the Zoning Code
- g) On multifamily structure on lots zoned Multi Family Residential

The City of Newport Beach is in the process of amending their Code regarding the Wireless Telecommunication requirements within the public ROW.

City of Irvine Wireless Telecommunication Permit Requirements

City of Irvine issues the following three types of permits for Wireless Telecommunication Facilities:

1. Wireless Communication Facility Permit (administrative, staff level review)
2. Minor Conditional Use Permit reviewed by Zoning Administrator
3. Major Conditional Use Permit reviewed by the Planning Commission

Applications for a Wireless Communications Facility requiring either a Wireless Communication Facility Permit or a conditional use permit are subject to the following procedures as determined by the classification of the antenna installation and the location of the installation site as indicated in the table below:

Table B
Review Procedure Matrix for City of Irvine

	Location of Proposed Cell Site			
	Inside or Within 150 feet of any Residential District	Inside or Within 150 feet of any Open Space District or Public Park	Non-Residential District Located Within 150 feet to 400 feet of a Residential or Open Space District or Public Park	Non-Residential District located Beyond 400 feet from Residential or Open Space District or Public Park
Class 1 Antenna Building Mount, Screened	PC	ZA	ZA	WCFP
Class 2 Antenna Monorock/Monoshrub	PC	ZA	WCFP	WCFP
Class 3 Antenna Pole Mount, Visible (Streetlights/Traffic Signals/Utility Poles)	PC	ZA	WCFP	WCFP
Class 4 Antenna Co-location	PC	ZA / PC	WCFP / ZA / PC	WCFP / ZA / PC

Class 5 Antenna Cell on Wheels (COW)	X	ZA	ZA	WCFP
	Location of Proposed Cell Site			
	Inside or Within 150 feet of any Residential District	Inside or Within 150 feet of any Open Space District or Public Park	Non-Residential District Located Within 150 feet to 400 feet of a Residential or Open Space District or Public Park	Non-Residential District located Beyond 400 feet from Residential or Open Space District or Public Park
Class 6 Antenna Pole Mount (Visible Field Lights/Utility Towers)	PC	PC	ZA	WCFP
Class 7 Antenna Flagpole Mount	PC	PC	PC	ZA
Class 8 Antenna Building Mount, Visible	X	PC	PC	ZA
Class 9 Antenna Monopole, Interior Mount (Enclosed Camouflaged Tower)	PC	PC	ZA	ZA
Class 10 Antenna Monopole, Exterior Mount (Monopalms/Monopines)	PC	PC	PC	PC
Class 11 Antenna Non-Camouflaged Monopole	X	X	X	PC

WCFP- Wireless Communication Facility Permit (administrative, staff level review)
 ZA – Zoning Administrator
 PC – Planning Commission
 X – Not Permitted

It should be noted that at the discretion of the Director of Community Facility Permit, any WCFP application may be forwarded to the Zoning Administrator for review and action and at the discretion of the Zoning Administrator any minor conditional use permit may be forwarded to the Planning Commission for review and action.

NEXTG NETWORKS OF CALIFORNIA PREFERRED ALTERNATIVE

Amend Cities Municipal Code, title 19 to require wireless telecommunications companies that are planning to install antennas in the City to enter into a "master agreement" with the City, submitting maximum of three different prototypes of antennas facilities that would likely be installed in the City.

The master agreement would require Planning Commissioners review and approval. Once the master agreement has been approved, the telecommunications company can pull out a permit from the Public Services Department for different locations. No additional discretionary review is required if the installation involves the pre-approved design prototypes that are contained in the master agreement. However, if the telecommunications company decides to revise an existing design in the approved Master Agreement or introduce a new design, it would have to go through the Planning Commission's review and approval process.

Public Notice

A display ad for this public hearing was published in the newspaper. Additionally, a mailer was sent to the following:

- 500 foot radius of property owners around the three permitted facilities
- Major telecommunications providers (NextG, AT&T, Sprint, etc.)
- California Wireless Industry
- Homeowner's Associations in Costa Mesa
- Utility providers

LEGAL REVIEW

The City Attorney's office has reviewed and approved the attached Ordinance as to form.

ALTERNATIVES

1. Recommend that City Council approve the Ordinance. The Ordinance will establish new regulations for telecommunications facilities in the public ROW.
2. Recommend that City Council receive and file the draft Ordinance. There will be no changes to the existing regulations.
3. Recommend that City Council approve Master Agreements with wireless telecommunication companies as recommended by NEXTG NETWORKS OF CALIFORNIA. The Ordinance will establish new regulations for telecommunications facilities in the public ROW. If Planning Commission selects this alternative, staff would return with an alternative ordinance or program.

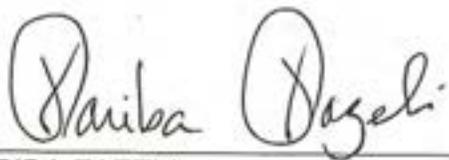
ENVIRONMENTAL DETERMINATION

The project has been reviewed for compliance with the California Environmental Quality Act (CEQA), the CEQA guidelines, and the City's environmental procedures, and has been found to be exempt pursuant to Section 15061 (b) (3) (general rule) of the CEQA Guidelines, in that it can be seen with certainty that there is no possibility that the proposed amendment to the Zoning Code will have a significant effect on the environment.

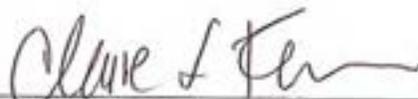
CONCLUSION

Code Amendment CO-12-01 is an amendment to Title 19 of the Costa Mesa Municipal Code to establish processing procedures and regulations for wireless telecommunications facilities

in the public right-of-way. For example, the Code amendment would establish a public hearing and notice procedure to process these types of applications.



FARIBA FAZELI
Interim City Engineer



CLAIRE FLYNN, AICP
Acting Asst. Development Svs. Director

- Attachments:
1. Redlined/Strikeout Exhibits
 2. Draft Ordinance
 3. Site Photos – Existing Facilities

cc:

- Deputy CEO / Economic & Development Services Director
- Sr. Deputy City Attorney
- Public Services Director
- City Engineer
- Transportation Services Manager
- Fire Protection Analyst
- Staff (4)
- File (2)

ATTACHMENT 1

Redlined/Strike-out Text

Title 19, Chapter 1, Article 4

Sec. 19-14. - Antennas for telecommunications services.

The city's zoning code sets forth the city's regulatory requirements relating to the siting and construction of various types of wireless telecommunications facilities that are commonly used in providing or receiving wireless telecommunications services on public and private property, excluding the public rights-of-way.

(Ord. No. 98-18, Â§ 1, 6-15-98)

Sec. 19-15. – Wireless telecommunications services provided by telephone corporations in the public rights-of-way.

(A)

The city council finds and determines as follows:

(1)

The Federal Telecommunications Act of 1996 ("FTCA") preempts and declares invalid all state rules that restrict entry or limit competition in both local and long-distance telephone service.

(2)

The California legislature has delegated to the Public Utilities Commission ("CPUC") is primarily responsible for the implementation of primary authority to regulate local telephone competition, and it issues to issue certificates of public convenience and necessity to new entrants that are qualified to provide competitive local telephone exchange services and related telecommunications service, whether using their own facilities or the facilities or services provided by other authorized telephone corporations. Section 7901 of the California Public Utilities Code applies equally to wireless carriers and wireless equipment. Wireless carriers have been determined by the courts to be included in the CPUC definition of "telephone corporation" in Section 7901, and the definition of "telephone line" in Section 7901 has been determined by the courts to be broad enough to include wireless equipment.

(3)

Section 234 (a) of the California Public Utilities Code defines a "telephone corporation" as "every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state."

(4)

Section 616 of the California Public Utilities Code provides that a telephone corporation "may condemn any property necessary for the construction and maintenance of its telephone line."

(5)

Section 2902 of the California Public Utilities Code authorizes municipal corporations to retain their powers of control to supervise and regulate the relationships between a public utility and the general public in matters affecting the health, convenience, and safety of the general public, including matters such as the use and repair of public streets by any public utility and the location of the poles, wires, mains, or conduits of any public utility on, under, or above any public streets.

(6)

Section 7901 of the California Public Utilities Code ("Section 7901") authorizes telephone and wireless telegraph corporations to construct telephone telegraph or wireless telecommunication lines along and upon any public road or highway, along or across any of the waters or lands within this state, and to erect poles, posts, piers, or abatements for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.

(7)

Section 7901.1 of the California Public Utilities Code confirms the right of municipalities to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed, which control must be applied to all entities in an equivalent manner, and may involve the imposition of fees. Specifically, it has been determined by the courts that a municipality has authority to regulate the placement and appearance of telecommunications equipment installed on its public rights-of-way, and that a municipality need not grant wireless providers blanket permission to install their equipment throughout a municipality, but may require wireless providers to go through a site-specific permitting process provided it is not so burdensome that it runs afoul of Section 7901.

(8)

Section 50030 of the California Government Code provides that any permit fee imposed by a city for the placement, installation, repair, or upgrading of telecommunications facilities, such as lines, poles, or antennas, by a telephone corporation that has obtained all required authorizations from the CPUC and the FCC to provide telecommunications services, must not exceed the reasonable costs of providing the service for which the fee is charged, and must not be levied for general revenue purposes.

(9)

Section 1455 of Title 47 of the United States Code mandate approval by local agencies of certain eligible facilities requests for modification of an existing wireless tower or base

station that does not substantially change the physical dimensions of such wireless tower or base station.

(B)

In recognition of and in compliance with the statutory authorizations and requirements set forth above in paragraph (A), the following regulatory provisions are applicable to users of telecommunications equipment in the public right-of-way ("PROW") a telephone corporation, including but not limited to wireless telecommunications providers, which desire to provide telecommunications service by means of facilities that are proposed to be constructed within the city's public rights-of-way:

(1)

~~The telephone corporation~~ Users of telecommunications equipment in the PROW must apply for and obtain, the following required permits:

(a) A discretionary "Wireless Telecommunications Use Permit" is required for certain specified wireless telecommunications structures pursuant to the criteria set forth in Subsection (C) below; and

(b) As may be applicable, an excavation permit, an encroachment permit, or a building permit ("ministerial permit.")

(2)

In addition to the information required by this Code in connection with an application for any required ministerial permit, a telephone corporation must submit to the city the following supplemental information:

(a)

A copy of the certificate of public convenience and necessity issued by the CPUC to the applicant, and a copy of the CPUC decision that authorizes the applicant to provide the telecommunications service for which the facilities are proposed to be constructed in the city's public rights-of-way; provided, however, that these requirements may be waived by the city where the applicant has submitted these documents in connection with a prior application, and there have been no amendments or supplements to these documents.

(b)

If the applicant has obtained from the CPUC a certificate of public convenience to operate as a "competitive local carrier," the following additional requirements are applicable:

(i)

As required by Decision No. 95-12-057 of the CPUC, the applicant must establish that it has timely filed with the city a quarterly report that describes the type of construction and the location of each construction project proposed to be undertaken in the city during the calendar quarter in which the application is filed, which information is sufficient to enable the city to coordinate multiple projects, as may be necessary.

(ii)

If the applicant's proposed construction project will extend beyond the utility rights-of-way ~~into undisturbed areas or other rights-of-way~~, the applicant must establish that it has filed a petition with the CPUC to amend its certificate of public convenience and necessity and that the proposed construction project has been subjected to a full-scale environmental analysis by the CPUC, as required by Decision No. 95-12-057 of the CPUC.

(iii)

The applicant must inform the city whether its proposed construction project will be subject to any of the mitigation measures specified in the Negative Declaration ["Competitive Local Carriers (CLCs) Projects for Local Exchange Communication Service throughout California"] or to the Mitigation Monitoring Plan adopted in connection with Decision No. 95-12-057 of the CPUC. The city's issuance of a ministerial permit will be conditioned upon the applicant's compliance with all applicable mitigation measures and monitoring requirements imposed by the CPUC upon telephone corporations that are designated as "competitive local carriers."

~~(C)~~

~~In recognition of the fact that numerous excavations in the public rights-of-way diminish the useful life of the surface pavement and for the purpose of mitigating the adverse impacts of numerous excavations on the quality and longevity of public street maintenance within the city, the following policies and procedures are adopted:~~

~~(1)~~

~~The city manager is directed to ensure that all public utilities, including telephone corporations, comply with all local design, construction, maintenance and safety standards that are contained within, or are related to, a ministerial permit that authorizes the construction of facilities within the public rights-of-way.~~

~~(2)~~

~~The city manager is directed to coordinate the construction and installation of facilities by public utilities, including telephone corporations, in order to minimize the number of excavations in the public rights-of-way. In this regard, based upon projected plans for street construction or renovation projects, the city manager is authorized to establish on a quarterly basis one (1) or more construction time periods or "windows" for the installation of facilities within the public rights-of-way. Telephone corporations and other public utilities that submit applications for ministerial permits to construct facilities after a predetermined date may be required to delay that construction until the next quarterly "window" that is established by the city.~~

~~(C)~~

~~The purpose of this section is to establish the parameters for discretionary review of a "Wireless Telecommunications Use Permit" and to identify processing procedures and regulations for this permit.~~

- (1) Any wireless telecommunications facility that is to be installed within the public right-of-way shall require a Public right-of-way encroachment permit.
- (2) Except as provided in Subsection (D) any wireless telecommunication facility that is located in the city's public right-of-way and meets any of the following criteria shall require a Wireless Telecommunications Use Permit:
 - (a) If the antenna is greater than 12 inches in length;
 - (b) If the antenna is greater than 12 inches in height;
 - (c) If the volume of the Radio Box exceeds 1 cubic feet;
 - (d) If it requires an above ground equipment,
 - (e) If the antenna is inside or within 500 feet of any residential neighborhood
- (3) The Wireless Telecommunications Use Permit application shall be subject to the same planning application review process as for a Conditional Use Permit as set forth in Title 13, Chapter III, Planning Applications, of the Municipal Code, except as otherwise indicated in this section. This application process includes, but is not limited to, a completed application, applicable processing fees, public hearing, public notice, and appeals process. The application processing fee is a user fee that shall be adopted by City Council by resolution.
- (4) The Planning Commission is authorized to act on and grant approvals of a discretionary application for a Wireless Telecommunications Facility Permit. The Municipal Code provisions related to the Planning Commission's authority are found in Title 10 and Title 13 of the Municipal Code. The Planning Commission shall serve as the final decision authority for Wireless Telecommunications Facility Permits. An appeal or review of the Planning Commission's decision shall be according to the procedures set forth in Title 2, Chapter IX Appeal, Rehearing and Review Procedure, of the Municipal Code.
- (5) The City Engineer is authorized to act on and grant approvals of ministerial permits related to wireless telecommunications facilities that do not meet the thresholds identified in Section (C) 2 (a), (b), (c), (d) and (e). At the discretion of the City Engineer any ministerial permit may be forwarded to the Planning Commission for review and action.
- (6) Review criteria for the Wireless Telecommunications Use Permit application shall consist of the following:
 - (a) The final review authority shall limit their review to the factors allowed under federal and state law, including the following:
 - (i) Compatible and harmonious relationship between the proposed facility and site development or use(s), that exists or has been approved for the general neighborhood.

- (ii) Safety and compatibility of the design of the proposed facilities, relevant structures, landscaping, luminaries and other site features which may include functional aspects of the site development.
 - (iii) Compliance with any performance standards for wireless telecommunications facilities as prescribed elsewhere in the ~~this Zoning Code~~, Municipal Code, or by City policy;
 - (iv) Consistency with the General Plan.
 - (b) The final review authority may not consider any impact on the health, safety and welfare, or any information, evidence, or consideration which exceeds the authority allowed to it under federal or state law.
- (7) Condition(s) of approval for the Wireless Telecommunications Use Permit shall assure compliance with the applicable provisions of state and federal laws, assure compatibility with surrounding properties and uses and protect the public health, safety and general welfare. These conditions shall be within the authority allowed to the City pursuant to federal and state law.

Prior to processing an application for a Wireless Telecommunications Use Permit, the Applicant shall furnish documentation from the CPUC that the listed items below have been meet.

- (a) When the applicant is leasing access to an existing facility that CPUC approval has been processed in accordance with Public Utilities Code Section 851.
 - (b) When the applicant plans deployment of their facility over existing utility Rights of Way, that they have completed the necessary CPUC review under the California Environmental Quality Act (CEQA) for any such proposed build-out.
- (8) When granting an application for a Wireless Telecommunications Use Permit, the final review authority shall find that the evidence presented in the administrative record substantially meets any required conditions listed below.
- (a) The location and placement of wireless telecommunications facilities in the public right-of-way are reasonably considered along with the California Public Utilities Code provisions for right of access to the public right-of-way.
 - (b) The proposed wireless telecommunications facility is substantially compatible with developments and uses in the same general area and would not be substantially detrimental to developments or uses within the general area.

- (c) The proposed wireless telecommunications facility will not be materially detrimental to the health, safety and general welfare of the public in so far as the local agency is authorized to determine under federal and state law.
- (d) Antennas and any poles or other structures erected to support antennas shall be visually compatible with surrounding building and vegetation. The final review authority may require that the antenna be painted in a neutral color to complement the existing natural and built environment.
- (9) The Wireless Telecommunication Use Permit shall be valid for a ten (10) year period from the date of approval, unless otherwise indicated in a condition imposed at the time of granting the application or unless otherwise exempted under federal or state law. Prior to the expiration of the permit, the applicant may apply for a ten-year extension of time. If notice was required for the original application, and a public hearing on the extension is allowed under federal and state law, notice of the public hearing for a time extension shall be given according to the procedures set forth in this section.

(10) The city reserves all rights that it now possesses or may later acquire with respect to the regulation of any cable or telecommunications service that is provided, or proposed to be provided, by a telephone corporation. These reserved rights may relate, without limitation, to the imposition of reasonable conditions in addition to or different from those set forth in this section, the exaction of a fee or other form of consideration or compensation for use of public rights-of-way, execution of a leasing agreement, and related matters; provided, however, that such regulatory rights and authority must be consistent with federal and state law that is applicable to cable or telecommunications services provided by telephone corporations.

- (11) The maximum height of the telecommunication facilities allowed within the public right of way shall not exceed thirty (30) feet (above the nearest top of curb elevation grade level), unless such extension is required to comply with applicable federal or state health and safety laws. (i.e. CPUC General Order 95).

(D) Pursuant to Title 47 United States Code Section 1455 and notwithstanding any provision of this Section to the contrary, a request for a modification of an existing wireless tower or base station for the collocation of new transmission equipment or removal or replacement of existing transmission equipment shall be approved ministerially without the processing of a discretionary use permit provided that such modification does not substantially change the physical dimensions of such tower or base station from the dimensions approved as part of the original discretionary permit for the tower or base station. However, any modification to a wireless tower or base station which substantially changes the physical dimensions of either the tower or base station, and any other modification to a wireless telecommunications facility that does not qualify as a

wireless tower or base station (as defined in this section) shall be subject to the permits and authorizations required by this article.

(E)

For purposes of this section, the following definitions shall apply:

- (1) "Wireless telecommunications facility" shall have the same meaning as that set forth in California Government Code 65850.6(d)(2) as may be amended from time to time.
- (2) "Wireless tower" means any structure built for the sole purpose or primary purpose of supporting antennas and their associated facilities used to provide services licensed by the FCC. A Distributed Antenna System installed pursuant to a Certificate of Public Convenience and Necessity issued by the California Public Utilities Commission, a water tower, utility tower, street light, or other structure built primarily for a purpose other than supporting services licensed by the FCC, including any structure installed pursuant to California Public Utility Code Section 7901, is not a wireless tower for purposes of this definition.
- (3) "Base station" means the power supplies, electronic equipment housed in cabinets and antennas at an existing wireless tower site that together comprise a wireless tower, Distributed Antenna System installed pursuant to a Certificate of Public Convenience and Necessity issued by the California Public Utilities Commission is not a base station for purposes of this definition.
- (4) "Substantially change the physical dimensions" means any of the following, and refers to a single change, or a series of changes over time (whether made by the same or different entities) viewed against the initial approval for the tower or base station that individually or cumulatively have any of the effects described below:
 - (a) Changing any physical dimension of the wireless tower or base station in a manner that creates a safety hazard, whether from wind loading, stress on the wireless tower, or in any other manner.
 - (b) Changing the physical dimension of a wireless tower where the changes would be inconsistent with the design of the wireless tower, or make the wireless towers more visible
 - (c) Changing the physical dimensions would require work that would intrude upon the Public Right of Way, or any environmentally sensitive area.

- (d) Increasing by more than 10% any of the following: the height or width in any direction of the wireless tower, or the area required for structures required to support the wireless tower, such as guy wires as approved and constructed through the discretionary permit process; provided that in no event shall the height exceed the maximum height permitted under the city's regulations.
- (e) Increasing by more than 10% any of: the height or area encompassed within any structure or object enclosing the wireless tower, such as a fence or line of bushes.
- (f) Increasing any of an existing antenna array's depth, circumference or horizontal radius from the wireless tower in any direction by more than 10%.
- (g) Adding more than two antenna arrays to an existing wireless tower, or adding antenna arrays that, if the array were an existing array, would be of such depth, circumference or radius as to fall outside of subsection (F)(3)(f) unless such arrays were approved pursuant to Government Code Section 65850.6
- (h) The mounting of the new or replacement transmission equipment would involve installing new equipment cabinet(s) not permitted under the initial approval and that will not fit within the existing enclosure for the wireless tower or base station or would require installation of a new cabinet or enclosure, excluding new equipment and cabinets that will be installed inderground.

(F)

Each application submitted under Subsection (D) of this Section shall be accompanied by:

- (1) a detailed description of the proposed modification to the existing facilities;
- (2) a photograph or description of the wireless tower as originally constructed, if available, and, a photograph of the existing wireless tower and/or base station, and a graphic depiction of the wireless tower and/or base station after modification, showing all relevant dimensions;
- (3) a description of all construction that will be performed in connection with the proposed modification; and

- (4) a signed statement by a professional engineer, licensed and qualified in California, attesting that the modifications to be performed will not trigger discretionary review under this section.

Any permit issued under Subsection (D) of this Section will be conditioned, and may be revoked and the wireless telecommunication facility required to be removed if (a) any statement made with respect to the WTF is not accurate f; or (b) the City Engineer finds that the modifications necessitated discretionary review.

ORDINANCE NO. 12-_____

AN ORDINANCE OF THE CITY COUNCIL OF THE
CITY OF COSTA MESA TO AMEND TITLE 19,
CHAPTER 1, ARTICLE 4, SECTIONS 19-14 AND 19-
15 REGARDING TELECOMMUNICATIONS
FACILITIES IN THE PUBLIC RIGHT OF WAY.

THE CITY COUNCIL OF THE CITY OF COSTA MESA DOES HEREBY ORDAIN AS
FOLLOWS:

SECTION 1: TITLE 19 CODE AMENDMENT. Title 19, Chapter 1, Article 4 of the
Costa Mesa Municipal Code is hereby amended to read as follows:

A. Section 19-14 is amended to include to read as follows:

"Sec. 19-14. - Antennas for telecommunications services.

The city's zoning code sets forth the city's regulatory requirements relating to the siting and construction of various types of wireless telecommunications facilities commonly used in providing or receiving wireless telecommunications services on public and private property, excluding the public rights-of-way.

(Ord. No. 98-18, Å§ 1, 6-15-98)

Sec.19-15. – Wireless telecommunications services provided by telephone corporations in the public rights-of-way.

(A)

The city council finds and determines as follows:

(1)

The Federal Telecommunications Act of 1996 ("FTCA") preempts and declares invalid all state rules that restrict entry or limit competition in both local and long-distance telephone service.

(2)

The California legislature has delegated to the Public Utilities Commission ("CPUC") its primary authority to regulate local telephone competition, and to issue certificates of public convenience and necessity to new entrants that are qualified to provide competitive local telephone exchange services and related telecommunications service, whether using their own facilities or the facilities or services provided by other authorized telephone corporations. Section 7901 of the California Public Utilities Code applies equally to wireless carriers and wireless equipment. Wireless carriers have been determined by the courts to be included in the CPUC definition of "telephone corporation" in Section 7901, and the definition of "telephone line" in Section 7901 has been determined by the courts to be broad enough to include wireless equipment.

(3)

Section 234 (a) of the California Public Utilities Code defines a "telephone corporation" as "every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state."

(4)

Section 616 of the California Public Utilities Code provides that a telephone corporation "may condemn any property necessary for the construction and maintenance of its telephone line."

(5)

Section 2902 of the California Public Utilities Code authorizes municipal corporations to retain their powers of control to supervise and regulate the relationships between a public utility and the general public in matters affecting the health, convenience, and safety of the general public, including matters such as the use and repair of public streets by any public utility and the location of the poles, wires, mains, or conduits of any public utility on, under, or above any public streets.

(6)

Section 7901 of the California Public Utilities Code ("Section 7901") authorizes telephone and wireless corporations to construct telephone or wireless telecommunication lines along and upon any public road or highway, along or across any of the waters or lands within this state, and to erect poles, posts, piers, or abatements for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.

(7)

Section 7901.1 of the California Public Utilities Code confirms the right of municipalities to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed, which control must be applied to all entities in an equivalent manner, and may involve the imposition of fees. Specifically, it has been determined by the courts that a municipality has authority to regulate the placement and appearance of telecommunications equipment installed on its public rights-of-way, and that a municipality need not grant wireless providers blanket permission to install their equipment throughout a municipality, but may require wireless providers to go through a site-specific permitting process provided it is not so burdensome that it runs afoul of Section 7901.

(8)

Section 50030 of the California Government Code provides that any permit fee imposed by a city for the placement, installation, repair, or upgrading of telecommunications facilities, such as lines, poles, or antennas, by a telephone corporation that has obtained all required authorizations from the CPUC and the FCC to provide telecommunications services, must not exceed the reasonable costs of providing the service for which the fee is charged, and must not be levied for general revenue purposes.

(9)

Section 1455 of Title 47 of the United States Code mandate approval by local agencies of certain eligible facilities requests for modification of an existing wireless tower or base

station that does not substantially change the physical dimensions of such wireless tower or base station.

(B)

In recognition of and in compliance with the statutory authorizations and requirements set forth above in paragraph (A), the following regulatory provisions are applicable to users of telecommunications equipment in the public right-of-way ("PROW"), including but not limited to wireless telecommunications providers, which desire to provide telecommunications service by means of facilities that are proposed to be constructed within the city's public rights-of-way:

(1)

Users of telecommunications equipment in the PROW must apply for and obtain, the following required permits:

(a)

A discretionary "Wireless Telecommunications Use Permit" is required for certain specified wireless telecommunications structures pursuant to the criteria set forth in Subsection (C) below; and

(b)

As applicable, an excavation permit, an encroachment permit, or a building permit ("ministerial permit").

(2)

In addition to the information required by this Code in connection with an application for any required permit, a telephone corporation must submit to the city the following supplemental information:

(a) A copy of the certificate of public convenience and necessity issued by the CPUC to the applicant, and a copy of the CPUC decision that authorizes the applicant to provide the telecommunications service for which the facilities are proposed to be constructed in the city's public rights-of-way; provided, however, that these requirements may be waived by the city where the applicant has submitted these documents in connection with a prior application, and there have been no amendments or supplements to these documents.

(b)

If the applicant has obtained from the CPUC a certificate of public convenience to operate as a "competitive local carrier," the following additional requirements are applicable:

(i)

As required by Decision No. 95-12-057 of the CPUC, the applicant must establish that it has timely filed with the city a quarterly report that describes the type of construction and the location of each construction project proposed to be undertaken in the city during the calendar quarter in which the application is filed, which information is sufficient to enable the city to coordinate multiple projects, as may be necessary.

(ii)

If the applicant's proposed construction project will extend beyond the utility rights-of-way, the applicant must establish that it has filed a petition with the CPUC to amend its certificate

of public convenience and necessity and that the proposed construction project has been subjected to a full-scale environmental analysis by the CPUC, as required by Decision No. 95-12-057 of the CPUC.

(iii)

The applicant must inform the city whether its proposed construction project will be subject to any of the mitigation measures specified in the Negative Declaration ["Competitive Local Carriers (CLCs) Projects for Local Exchange Communication Service throughout California"] or to the Mitigation Monitoring Plan adopted in connection with Decision No. 95-12-057 of the CPUC. The city's issuance of a ministerial permit will be conditioned upon the applicant's compliance with all applicable mitigation measures and monitoring requirements imposed by the CPUC upon telephone corporations that are designated as "competitive local carriers."

(C)

The purpose of this section is to establish the parameters for discretionary review of a "Wireless Telecommunications Use Permit" and to identify processing procedures and regulations for this permit.

(1) Any wireless telecommunications facility that is to be installed within the public right-of-way shall require a Public right-of-way encroachment permit.

(2) Except as provided in Subsection (D) any wireless telecommunication facility that is located in the city's public right-of-way and meets any of the following criteria shall require a Wireless Telecommunications Use Permit:

- (a) If the antenna is greater than 12 inches in length;
- (b) If the antenna is greater than 12 inches in height;
- (c) If the volume of the Radio Box exceeds 1 cubic feet;
- (d) If it requires an above ground equipment.
- (e) If the antenna is inside or within 500 feet of any residential neighborhood

(3) The Wireless Telecommunications Use Permit application shall be subject to the same planning application review process as for a Conditional Use Permit set forth in Title 13, Section 13-29, of the Municipal Code, except as otherwise indicated in this section. This application process includes, but is not limited to, a completed application, applicable processing fees, public hearing, public notice, and appeals process. The application processing fee is a user fee that shall be adopted by City Council by resolution.

(4) The Planning Commission is authorized to act on and grant approvals of a discretionary application for a Wireless Telecommunications Facility Permit. The Municipal Code provisions related to the Planning Commission's authority are found in Title 10 and Title 13 of the Municipal Code. The Planning Commission shall serve as the final decision authority for Wireless Telecommunications Facility Permits. An appeal or review of the Planning Commission's decision shall be according to the procedures set forth in Title 2, Chapter IX Appeal, Rehearing and Review Procedure, of the Municipal Code.

- (5) The City Engineer is authorized to act on and grant approvals of ministerial permits related to wireless telecommunications facilities that do not meet the thresholds identified in Section (C) 2 (a), (b), (c), and (d). At the discretion of the City Engineer any ministerial permit may be forwarded to the Planning Commission for review and action.
- (6) Review criteria for the Wireless Telecommunications Use Permit application shall consist of the following:
 - (a) The final review authority shall limit their review to the factors allowed under federal and state law, including the following:
 - (i) Compatible and harmonious relationship between the proposed facility and site development or use(s), that exists or has been approved for the general neighborhood;
 - (ii) Safety and compatibility of the design of the proposed facilities, relevant structures, landscaping, luminaries and other site features which may include functional aspects of the site development;
 - (iii) Compliance with any performance standards for wireless telecommunications facilities as prescribed elsewhere in the Municipal Code, or by City policy;
 - (iv) Consistency with the General Plan.
 - (b) The final authority may not consider any impact on the health, safety and welfare, or any information, evidence, or consideration which exceeds the authority allowed to it under federal or state law.
- (7) Condition(s) of approval for the Wireless Telecommunications Use Permit shall assure compliance with the applicable provisions of state and federal laws assure compatibility with surrounding properties and uses and protect the public health, safety and general welfare. These conditions shall be within the authority allowed to the City pursuant to federal and state law.

Prior to processing an application for a Wireless Telecommunications Use Permit, the Applicant shall furnish documentation from the CPUC that the listed items below have been meet.

- (a) When the applicant is leasing access to an existing facility that CPUC approval has been processed in accordance with Public Utilities Code Section 851.
 - (b) When the applicant plans deployment of their facility over existing utility Rights of Way, that they have completed the necessary CPUC review under the California Environmental Quality Act (CEQA) for any such proposed build-out.
- (8) When granting an application for a Wireless Telecommunications Use Permit, the final review authority shall find that the evidence presented in the administrative record substantially meets any required conditions listed below.

- (a) The location and placement of wireless telecommunications facilities in the public right-of-way are reasonably considered along with the California Public Utilities Code provisions for right of access to the public right-of-way.
 - (b) The proposed wireless telecommunications facility is substantially compatible with developments and uses in the same general area and would not be substantially detrimental to developments or uses within the general area.
 - (c) The proposed wireless telecommunications facility will not be materially detrimental to the health, safety and general welfare of the public in so far as the local agency is authorized to determine under federal and state law.
 - (d) Antennas and any poles or other structures erected to support antennas shall be visually compatible with surrounding building and vegetation. The final review authority may require that the antenna be painted in a neutral color to complement the existing natural and built environment.
- (9) The Wireless Telecommunication Use Permit shall be valid for a ten (10) year period from the date of approval, unless otherwise indicated in a condition imposed at the time of granting the application or unless otherwise exempted under federal or state law. Prior to the expiration of the permit, the applicant may apply for a ten-year extension of time. If notice was required for the original application, and a public hearing on the extension is allowed under federal and state law, notice of the public hearing for a time extension shall be given according to the procedures set forth in this section.
- (10) The city reserves all rights that it now possesses or may later acquire with respect to the regulation of any cable or telecommunications service that is provided, or proposed to be provided, by a telephone corporation. These reserved rights may relate, without limitation, to the imposition of reasonable conditions in addition to or different from those set forth in this section, the exaction of a fee or other form of consideration or compensation for use of public rights-of-way, execution of a leasing agreement, and related matters; provided, however, that such regulatory rights and authority must be consistent with federal and state law that is applicable to cable or telecommunications services provided by telephone corporations.
- (11) The maximum height of the telecommunication facilities allowed within the public right of way shall not exceed thirty (30) feet (above the nearest top of curb elevation grade level), unless such extension is required to comply with applicable federal or state health and safety laws. (i.e. CPUC General Order 95).

(D) Pursuant to Title 47 United States Code Section 1455 and notwithstanding any provision of this Section to the contrary, a request for a modification of an existing wireless tower or base station for the collocation of new transmission equipment or removal or replacement of

existing transmission equipment shall be approved ministerially without the processing of a discretionary use permit provided that such modification does not substantially change the physical dimensions of such tower or base station from the dimensions approved as part of the original discretionary permit for the tower or base station. However, any modification to a wireless tower or base station which substantially changes the physical dimensions of either the tower or base station, and any other modification to a wireless telecommunications facility that does not qualify as a wireless tower or base station (as defined in this section) shall be subject to the permits and authorizations required by this article.

(E)

For purposes of this section, the following definitions shall apply:

- (1) "Wireless telecommunications facility" shall have the same meaning as that set forth in California Government Code 65850.6(d)(2) as may be amended from time to time.
- (2) "Wireless tower" means any structure built for the sole purpose or primary purpose of supporting antennas and their associated facilities used to provide services licensed by the FCC. A Distributed Antenna System installed pursuant to a Certificate of Public Convenience and Necessity issued by the California Public Utilities Commission, a water tower, utility tower, street light, or other structure built primarily for a purpose other than supporting services licensed by the FCC, including any structure installed pursuant to California Public Utility Code Section 7901, is not a wireless tower for purposes of this definition.
- (3) "Base station" means the power supplies, electronic equipment housed in cabinets and antennas at an existing wireless tower site that together comprise a wireless tower, Distributed Antenna System installed pursuant to a Certificate of Public Convenience and Necessity issued by the California Public Utilities Commission is not a base station for purposes of this definition.
- (4) "Substantially change the physical dimensions" means any of the following, and refers to a single change, or a series of changes over time (whether made by the same or different entities) viewed against the initial approval for the tower or base station that individually or cumulatively have any of the effects described below:
 - (a) Changing any physical dimension of the wireless tower or base station in a manner that creates a safety hazard, whether from wind loading, stress on the wireless tower, or in any other manner.
 - (b) Changing the physical dimension of a wireless tower where the changes would be inconsistent with the design of the wireless tower, or make the wireless towers more visible
 - (c) Changing the physical dimensions would require work that would intrude upon the Public Right of Way, or any environmentally sensitive area.

- (d) Increasing by more than 10% any of the following: the height or width in any direction of the wireless tower, or the area required for structures required to support the wireless tower, such as guy wires as approved and constructed through the discretionary permit process; provided that in no event shall the height exceed the maximum height permitted under the city's regulations.
- (e) Increasing by more than 10% any of: the height or area encompassed within any structure or object enclosing the wireless tower, such as a fence or line of bushes.
- (f) Increasing any of an existing antenna array's depth, circumference or horizontal radius from the wireless tower in any direction by more than 10%.
- (g) Adding more than two antenna arrays to an existing wireless tower, or adding antenna arrays that, if the array were an existing array, would be of such depth, circumference or radius as to fall outside of subsection (F)(3)(f) unless such arrays were approved pursuant to Government Code Section 65850.6
- (h) The mounting of the new or replacement transmission equipment would involve installing new equipment cabinet(s) not permitted under the initial approval and that will not fit within the existing enclosure for the wireless tower or base station or would require installation of a new cabinet or enclosure, excluding new equipment and cabinets that will be installed underground.

(F)

Each application submitted under Subsection (D) of this Section shall be accompanied by:

- (1) a detailed description of the proposed modification to the existing facilities;
- (2) a photograph or description of the wireless tower as originally constructed, if available, and, a photograph of the existing wireless tower and/or base station, and a graphic depiction of the wireless tower and/or base station after modification, showing all relevant dimensions;
- (3) a description of all construction that will be performed in connection with the proposed modification; and
- (4) a signed statement by a professional engineer licensed and qualified in California, attesting that the modifications to be performed will not trigger discretionary review under this section.

Any permit issued under Subsection (D) of this Section will be conditioned, and may be revoked and the wireless telecommunication facility required to be removed if (a) any

statement made with respect to the WTF is not accurate; or (b) the City Engineer finds that the modifications necessitated discretionary review.

SECTION 2: ENVIRONMENTAL DETERMINATION. The project has been reviewed for compliance with the California Environmental Quality Act (CEQA), the CEQA guidelines, and the City's environmental procedures, and has been found to be exempt pursuant to Section 15061 (b) (3) (general rule) of the CEQA Guidelines, in that the City Council hereby finds that it can be seen with certainty that there is no possibility that the passage of this ordinance amending the Zoning Code will have a significant effect on the environment..

SECTION 3: INCONSISTENCIES. Any provision of the Costa Mesa Municipal Code or appendices thereto inconsistent with the provisions of this ordinance, to the extent of such inconsistencies and or further, is hereby repealed or modified to the extent necessary to affect the provisions of this ordinance.

SECTION 4: SEVERABILITY. If any provision or clause of this ordinance or the application thereof to any person or circumstances is held to be unconstitutional or otherwise invalid by any court of competent jurisdiction, such invalidity shall not affect other provisions or clauses or applications of this ordinance which can be implemented without the invalid provision, clause or application; and to this end, the provisions of this ordinance are declared to be severable.

SECTION 5: PUBLICATION. This Ordinance shall take effect and be in full force thirty (30) days from and after the passage thereof, and prior to the expiration of fifteen (15) days from its passage shall be published once in the DAILY PILOT, a newspaper of general circulation, printed and published in the City of Costa Mesa or, in the alternative, the City Clerk may cause to be published a summary of this Ordinance and a certified copy of the text of this Ordinance shall be posted in the office of the City Clerk five (5) days prior to the date of adoption of this Ordinance, and within fifteen (15) days after adoption, the City Clerk shall cause to be published the aforementioned summary and shall post in the office of the City Clerk a certified copy of this Ordinance together with the names and member of the City Council voting for and against the same.

PASSED AND ADOPTED this _____ day of _____ 2012.

ERIC R. BEVER
Mayor of the City of Costa Mesa

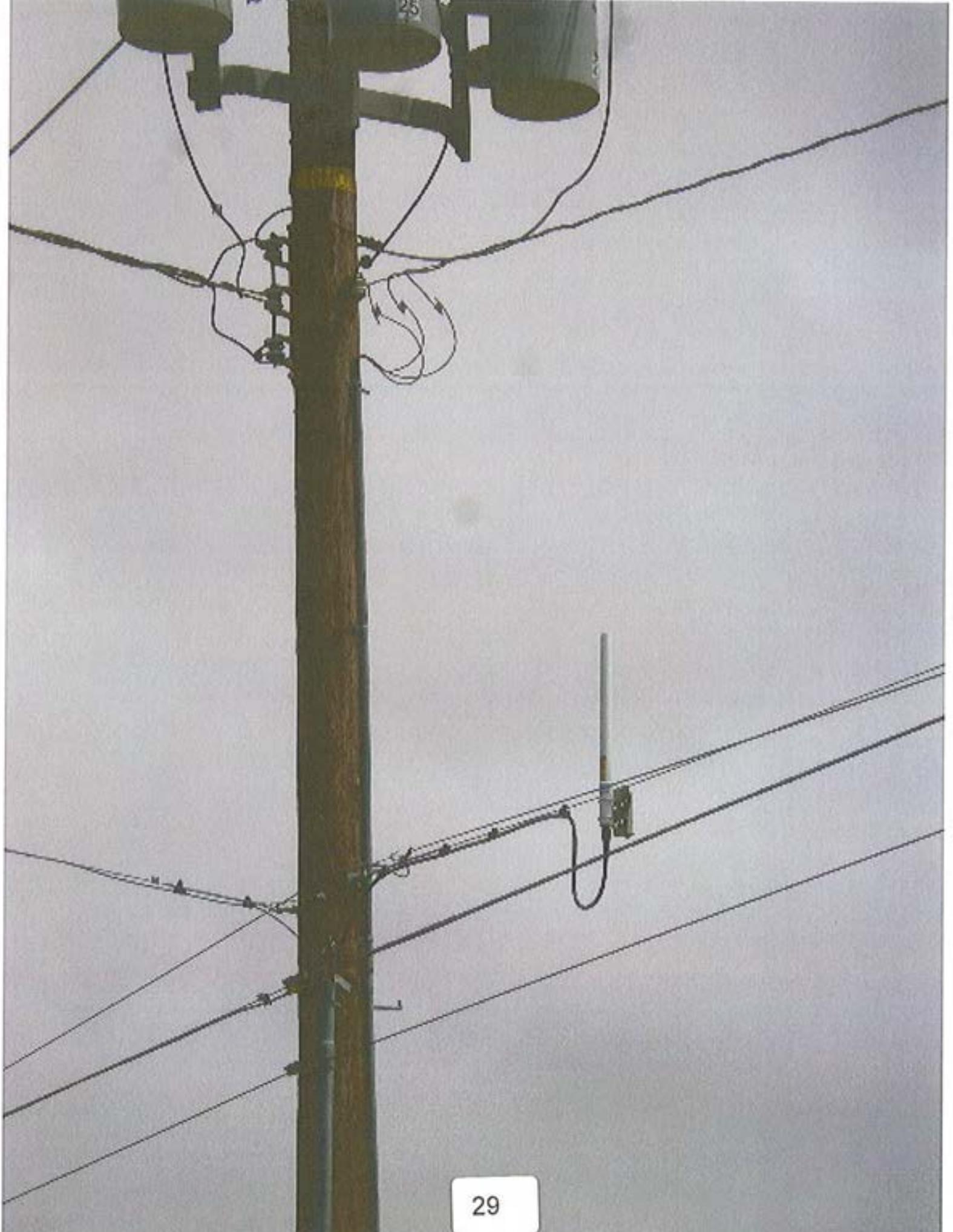
ATTEST:

APPROVED AS TO FORM:

Acting Deputy City Clerk of the City of Costa
Mesa

City Attorney



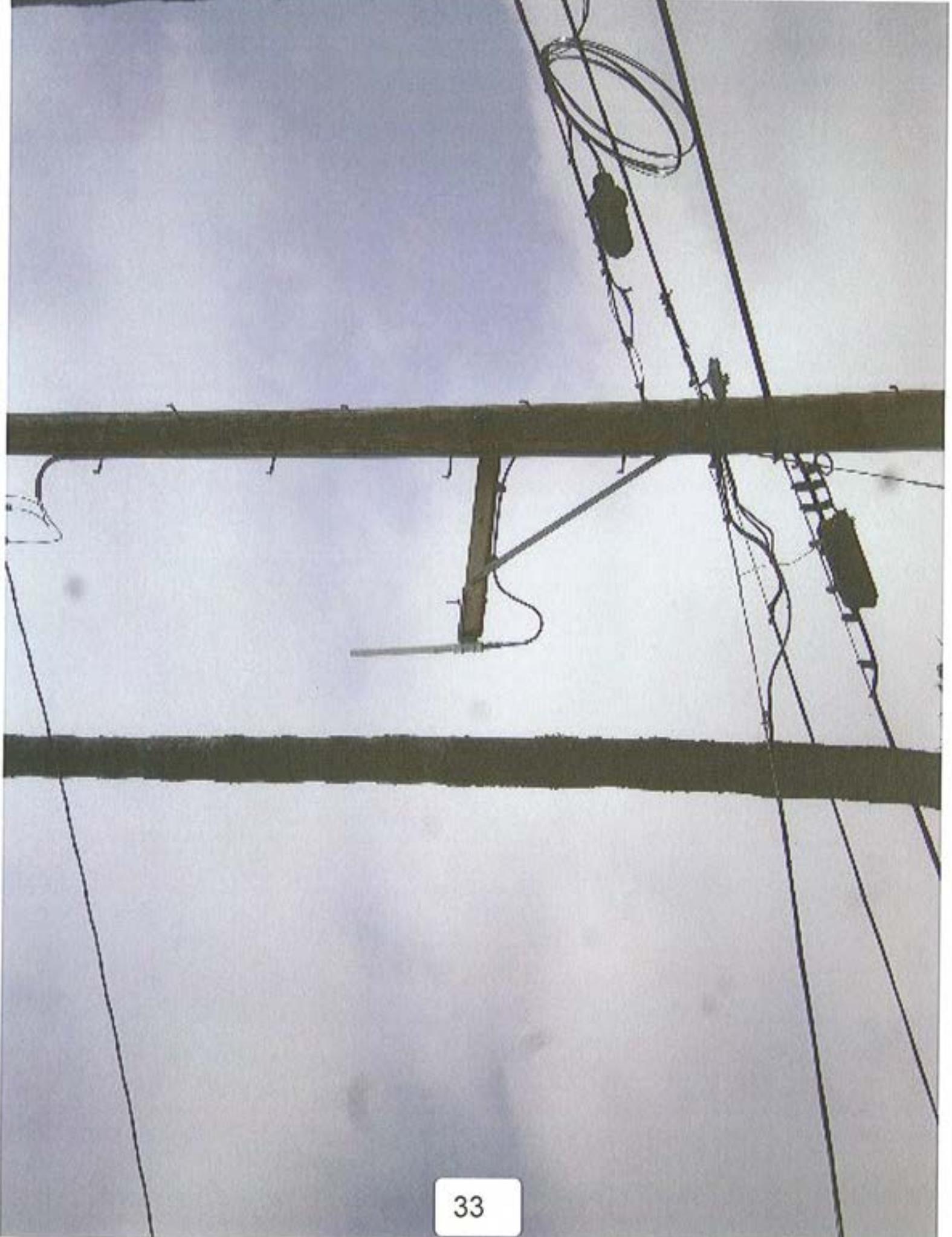








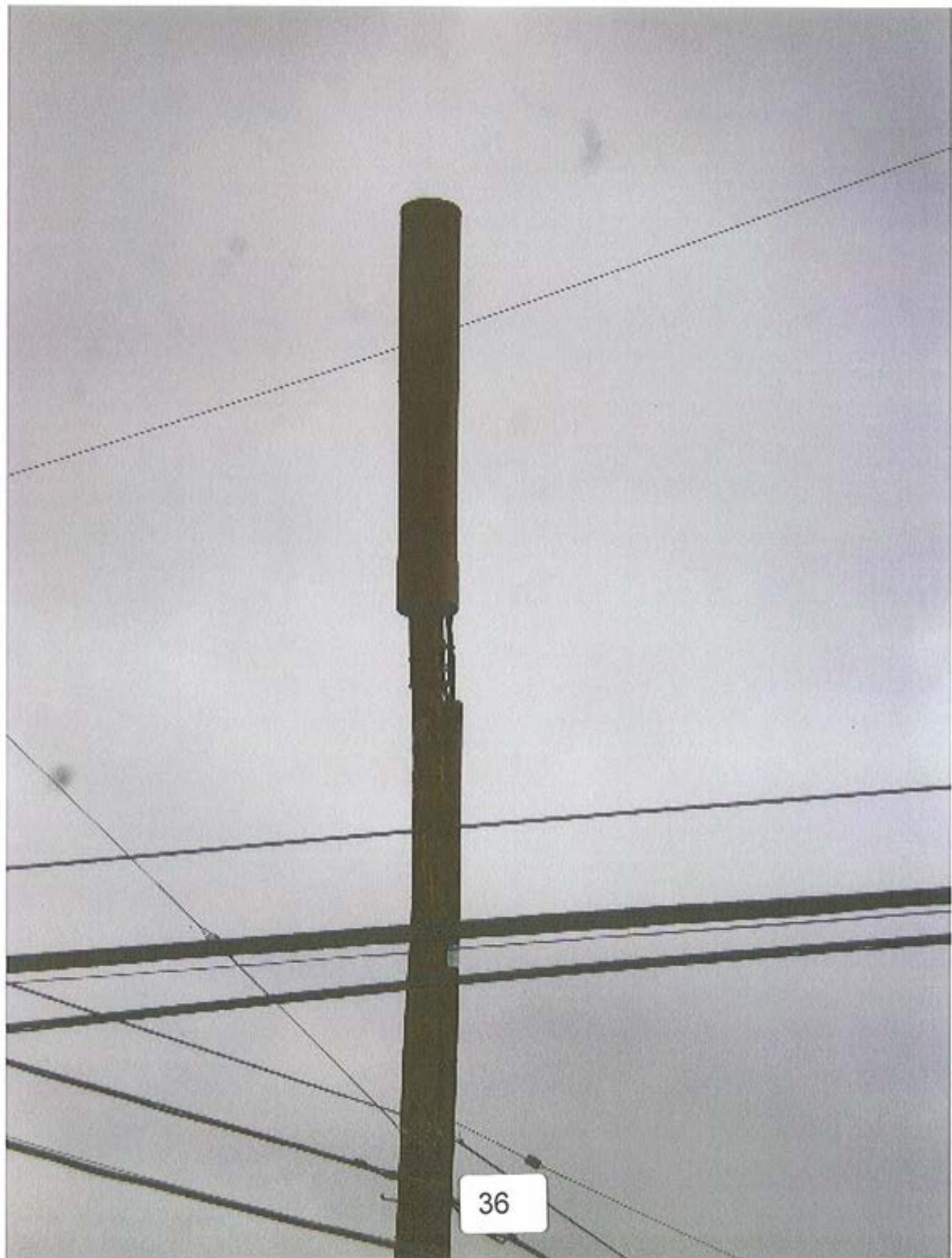
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