WG WILTSHIRE & GRANNIS LLP

March 17, 2011

Ex Parte Notice

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Implementation of Section 224 of the Act*, WC Docket No. 07-245; *A National Broadband Plan for Our Future*, GN Docket No. 09-51

Dear Ms. Dortch:

On March 16, 2011, Luisa Lancetti, Indra Chalk, Michele Thomas and Mark Whitlock (participating by telephone) of T-Mobile USA, Inc. ("T-Mobile"), and I, on behalf of T-Mobile, met with Zachary Katz, Legal Advisor to the Chairman, and Sharon Gillett, Marcus Maher, Jennifer Prime and Christy Shewman of the Wireline Competition Bureau to discuss the above-captioned proceeding. T-Mobile urges the Commission to take the following steps with respect to wireless attachments:

- Pursuant to Section 224 of the Communications Act and its prior rulings on this issue, incorporate language (similar to the statements made in the FCC's 2004 Public Notice) into the Commission's rules published in the Code of Federal Regulations that CMRS carriers have the same rights as any other telecommunications provider to access utility distribution poles, *including* pole tops;

- Adopt a rebuttable presumption that wireless attachments are safe if in compliance with applicable codes and governing regulations, including the National Electric Safety Code, the National Electrical Code, the Telcordia Blue Book—Manual of Construction Procedures, and the Occupational Safety and Health Administration;

- Apply the general make-ready timeline for "wired" services to wireless services;

- Require all utilities to adopt and make publicly available form agreements that provide for wireless pole attachments on a non-discriminatory basis at fair and reasonable rates, terms, and conditions; and

- Adopt enforcement procedures that are swift and provide appropriate penalties for noncompliance, including compensatory damages.

As the FCC's National Broadband Plan recognized, a crucial part of increasing broadband deployment and upgrading speed and capacity over wireless networks is the

deployment of more network antennas at more sites.[1] There are only a limited number of ways to increase the number of antenna sites – principally by installing more monopoles or by placing wireless antennas on or on top of utility distribution poles.[2] As the Commission is aware, siting and installing new monopoles can itself be a long and arduous process, even with the 150 day "shot clock" that the Commission has implemented.[3] Moreover, in some areas, local zoning precludes the installation of monopoles or there are simply no sites available (as is the case in many residential areas).

During the meeting, Mr. Whitlock provided examples of neighborhoods in Utah in which there was limited or no T-Mobile coverage before T-Mobile was able to secure access and place wireless facilities on utility distribution poles.[4] Wireless carrier access to utility poles pursuant to Section 224 is critical to deploying 3G and 4G wireless broadband services, and to augmenting network capacity and services as consumer bandwidth demand increases.

Utah is also an example of a state in which the introduction of timelines has made a substantial difference in the timeliness of pole attachments. Before the Utah Public Service Commission established mandatory timeframes for utility negotiations and make-ready arrangements, it could take months for T-Mobile to get a response to a request for pole access, and the process was uncertain. Now, T-Mobile gets a response within two weeks. The establishment of a timeline that covered all pole attachments[5] – whether wireless or wireline – has greatly accelerated the process of building new cell sites on distribution poles.[6]

In this regard, we noted that wireless attachments usually affect only a small number of poles – and thus should be able to be processed quickly in the same category as requests for

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1 National Broadband Plan, Connecting America, Chapter 6, Infrastructure at 127 ("Just as wireless networks use publicly owned spectrum, wireless and wired networks rely on cables and conduits attached to public roads, bridges, poles and tunnels. Securing rights to this infrastructure is often a difficult and time-consuming process that discourages private investment.")

2 *See* Declaration of Mark Whitlock, attached to Letter to Marlene H. Dortch, Secretary, FCC, from John T. Nakahata, Counsel for T-Mobile USA Inc. (dated March 17, 2011), ¶ 8 ("Whitlock Decl.")

3 *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, 24 FCC Rcd. 13994, 14005 ¶ 32 (2009), *reconsideration denied,* 25 FCC Rcd. 11157 (2010)(interpreting a "reasonable period of time" for acting on siting applications to be, presumptively, 150 days for applications other than those requesting collocations).

4 Whitlock Decl. at ¶ 9.

5 Utah Admin. Code R746-345-3(B), (C).

6 Whitlock Decl. ¶ 10.

small numbers of wireline attachments. These is no reason to differentiate between wireless and wireline attachments. Where, for example, a utility must change out a pole, the time needed for a pole change should not vary depending upon whether the requesting carrier is a wireline or a wireless carrier.

T-Mobile also believes that it will speed the pole attachment process for wireless carriers if the Commission would codify in its rules its previous orders ruling that wireless carriers are "telecommunications carriers" entitled to nondiscriminatory access to poles under Section 224. As a practical matter, although FCC Orders and rules are of equal legal dignity, rules are given greater credence, and T-Mobile has encountered jurisdictions and individual utilities that have resisted following existing FCC pronouncements in this area. In addition, the Commission should codify the Wireless Telecommunications Bureau's 2004 Public Notice[7] which made clear that wireless carriers are not limited to the so-called "communications space" on a telephone pole, but have access to pole tops as well under Section 224. Nowhere in Section 224 is the right of nondiscriminatory access to poles limited to the "communications space," as the Bureau's 2004 Public Notice made clear.[8] The Commission has not wavered from this position since 1999, and it should not do so now; it should make this requirement clear in the body of the C.F.R.

In addition, T-Mobile addressed the fact that allegations that pole top wireless attachments are categorically unsafe are simply untrue.[9] To the contrary, T-Mobile has hundreds of pole-top wireless attachments nationwide, and there has been no indication that these attachments are unsafe. There are established codes, including the NESC, that address pole top wireless attachments. Some utilities have incorporated these standards in order to gain approvals from state utility commissions for their own use of pole top mounted antennas.[10] Compliance

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[7] Public Notice, Wireless Telecommunications Bureau Reminds Utility Pole Owners Of Their Obligations To Provide Wireless Telecommunications Providers With Access To Utility Poles At Reasonable Rates, DA 04-4046, 19 FCC Rcd. 24930 (Dec. 23, 2004)

[8] *Id.* at 24930 ("[W]e take this opportunity to reiterate that the Commission declined, in Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, Order on Reconsideration, 14 FCC Rcd 18049, 18074 ¶ 72 (1999), to establish a presumption that space above what has traditionally been referred to as "communications space" on a pole may be reserved for utility use only.")

[9] *See* Whitlock Decl. ¶¶ 11-14, 19-26.

[10] CASE 03-M-1578, *Joint Petition of Niagara Mohawk Power Corporation and National Grid Communications Inc. for Approval of a Pole Attachment Rate for Certain Wireless Attachments to Niagara Mohawk's Distribution* Poles, Joint Petition Exhibit 2, License Amendment and Addendum to Distribution Pole Attachment, Exhibit 4, GS1169 at p. 1; wherein, Niagara Mohawk justified the safety of pole top wireless attachments on the basis that "all installations shall be made in compliance with all applicable codes including the

with these standards should be rebuttably presumed to be safe. This is the approach that New York has followed: the New York Public Service Commission places the burden of imposing standards that exceed the NESC on the pole owners themselves.[11] T-Mobile adheres to all safety codes in this area and has negotiated and executed pole attachment agreements with utilities that include corresponding indemnification provisions.[12] The statute does not require utilities to permit a demonstrably unsafe attachment, but when an attachment satisfies applicable codes, the utility should bear the burden of showing that the proposed attachment is, in fact, unsafe.

Attached as examples are pictures of various T-Mobile wireless attachments, both pole-top and mid-pole.[13] When its pole-top attachments require work in or above the energized electrical wires, T-Mobile either uses the electric utility's personnel or contractors approved by that utility.[14] Exhibit 1 is a picture of electric utility workers completing the migration of lines for a prior pole to a new pole as part of make-ready for a wireless pole-top attachment (which had a pole change-out). In all cases, the necessary work has been done at T-Mobile's expense.

NESC and NEC," and that maintenance and installation safety would be assured because any work performed in the electrical space would be done only by qualified electrical workers.

[11] CASE 03-M-0432 – Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues, Order Adopting Policy Statement on Pole Attachments (2004) at 7. ("The general standards prescribed by the National Electric Safety Code (NESC) and conventional manuals of construction practices and procedures cover most situations regarding the safe and reliable installation and operation of telecommunications facilities. NESC is a minimum safety standard. Some pole Owners may impose standards that are stricter than NESC. If an Attacher questions a stricter standard, Owners shall explain why they have adopted a stricter practice than NESC.")

[12] Whitlock Decl. ¶¶ 11-12.

[13] Exhibits 1 - 9 are attached. A detailed exhibit list is appended to these comments.

[14] *See* Whitlock Decl. ¶ 25

Please contact me if you have any questions.

Sincerely,

John T. Nakahata
Counsel to T-Mobile USA, Inc.

cc: Zachary Katz
Sharon Gillett
Marcus Maher
Jennifer Prime
Christy Shewman
John Giusti
Margaret McCarthy
Christine Kurth
Angela Kronenberg
Charles Matthias
Brad Gillen

Attachment

EXHIBIT LIST

EXHIBIT 1: Picture of a Utah residential-area electric utility distribution pole incorporating pole top mounted panel antennas on a new replacement/extended utility distribution pole. Picture captured during coordinated efforts between electric utility contractors and T-Mobile employees to move facilities from older pole to new pole. New shed constructed at base of pole for power and telco equipment/meters.

EXHIBIT 2: Pole top omni-directional antenna mounted on electric utility distribution pole in residential area in Massachusetts.

EXHIBIT 3: Pole top canister antenna mounted on electric utility distribution pole located in residential area in Virginia.

EXHIBIT 4: Pole top mounted panel antennas located on a new replacement/extended electric utility distribution pole that also includes primary electric and telco facilities for a school in Utah.

EXHIBIT 5: Pole top mounted panel antennas located on a new replacement/extended electric utility distribution pole in residential area in Utah. New garage/shed for power and telco equipment/meters in background. Picture captured prior to the subsequent removal of the older distribution pole.

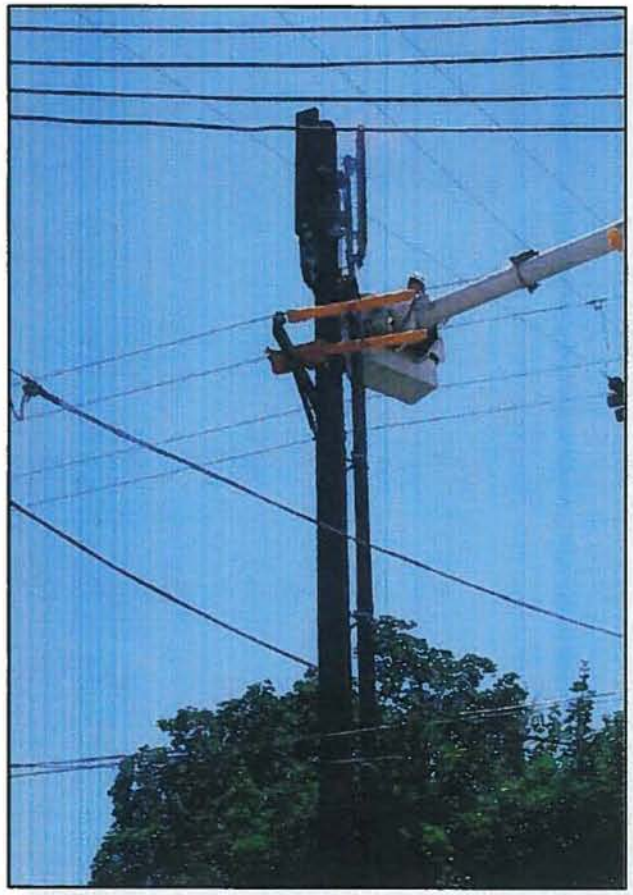
EXHIBIT 6: Utah residential area pole top mounted panel antennas located on a new replacement/extended electric utility distribution pole which also incorporates a municipal street light.

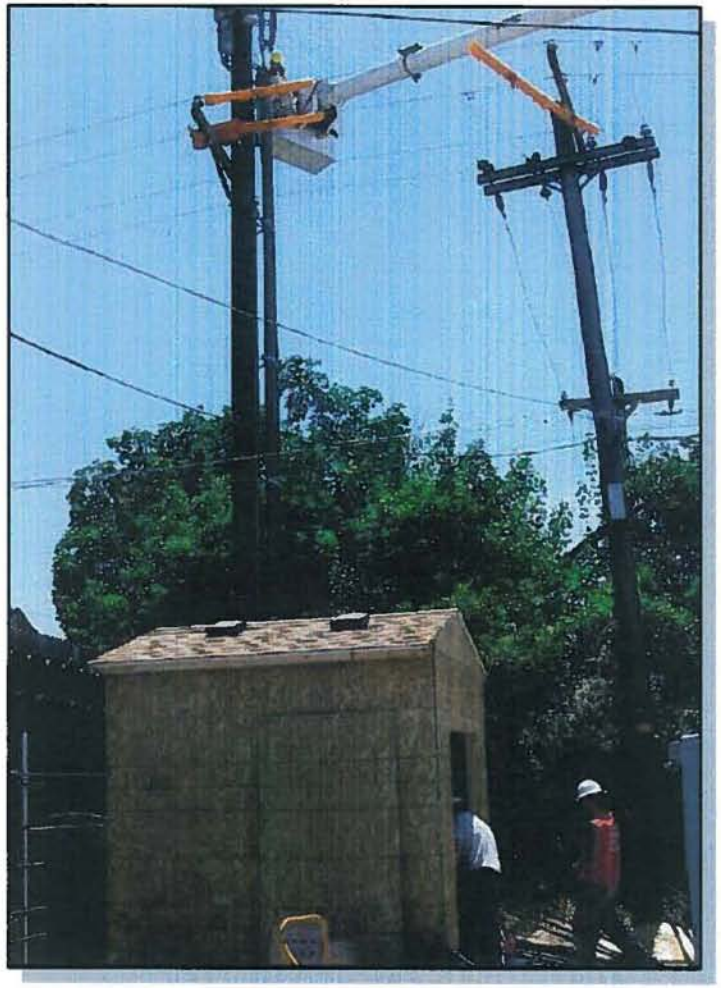
EXHIBIT 7: A collaborative effort between T-Mobile and utility to design and construct a custom electric utility distribution pole for locating in Pennsylvania.

EXHIBIT 8: Panel mounted antennas below electric space on a new replacement/extended electric utility distribution pole in residential area of Utah.

EXHIBIT 9: Panel mounted antennas below electric space on a new replacement/extended electric utility distribution pole in residential area of Utah. Equipment cabinet located on property leased from adjacent landowner, the Utah Department of Transportation.

EXHIBIT 1





Picture of a Utah residential-area electric utility distribution pole incorporating pole top mounted panel antennas on a new replacement/extended utility distribution pole. Picture captured during coordinated efforts between electric utility contractors and T-Mobile employees to move facilities from older pole to new pole. New shed constructed at base of pole for power and telco equipment/meters.

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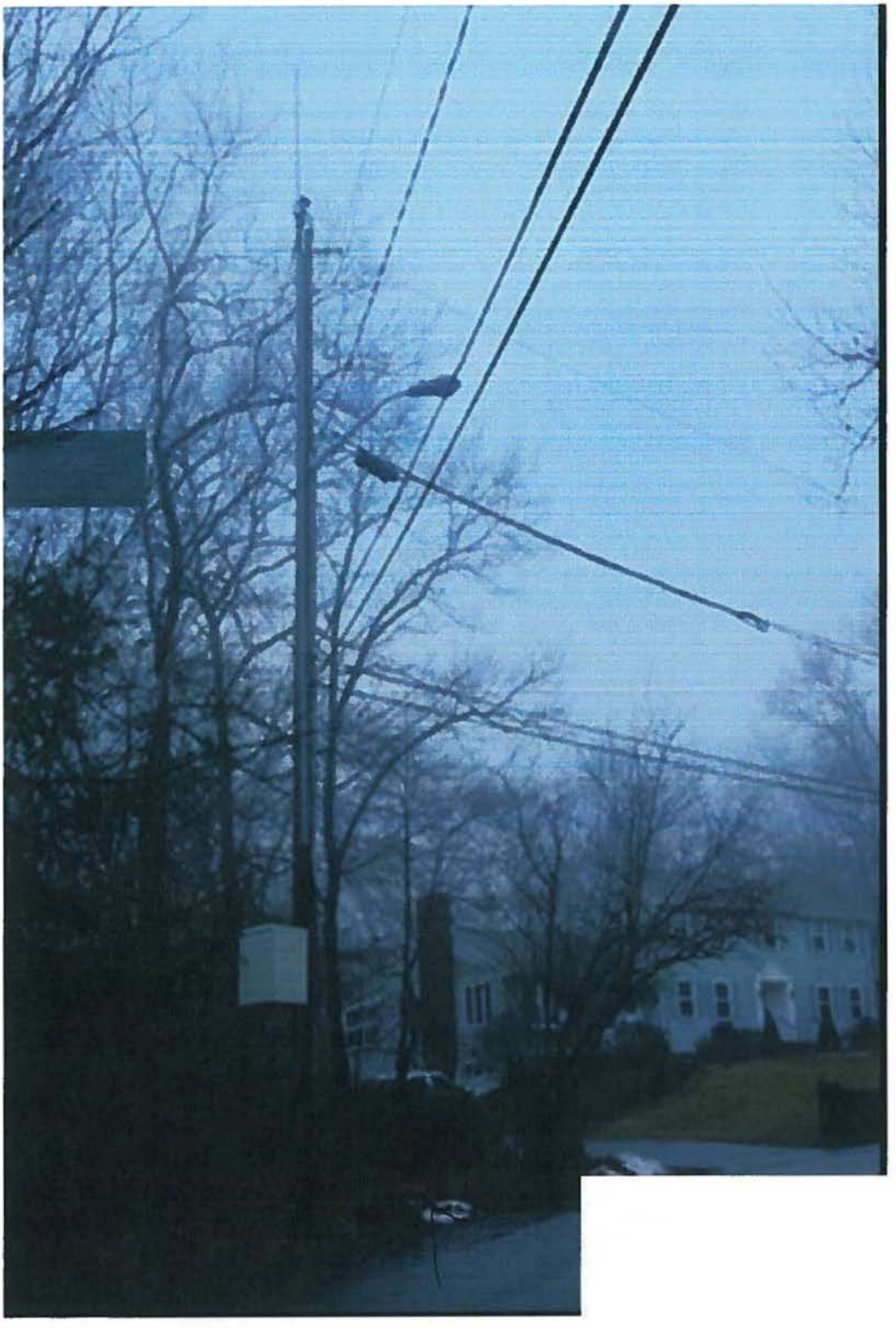
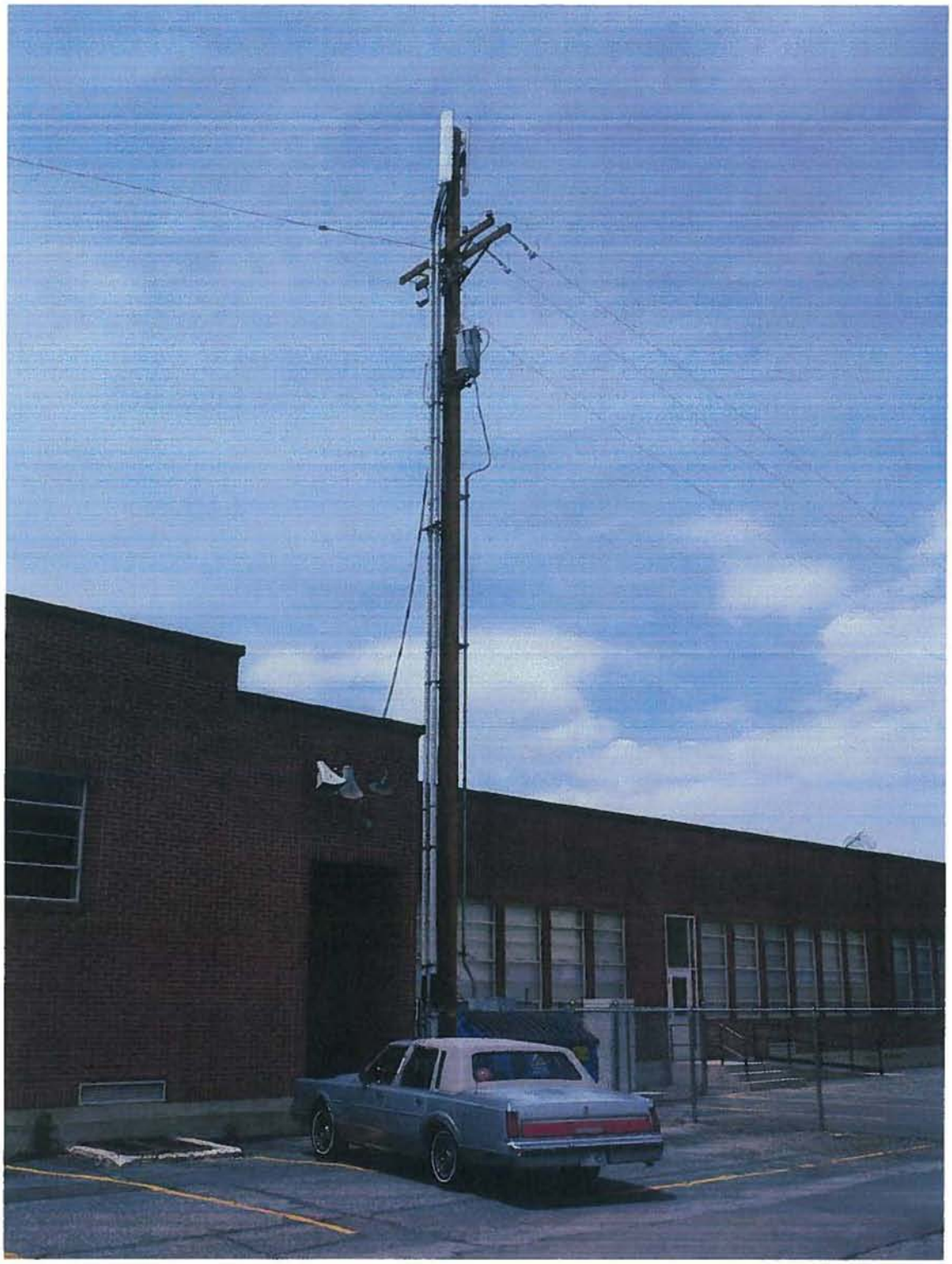


Pole top omni-directional antenna mounted on electric utility distribution pole in residential area in Massachusetts.

EXHIBIT 3

Pole top canister antenna mounted on electric utility distribution pole located in residential area in Virginia.

EXHIBIT 4



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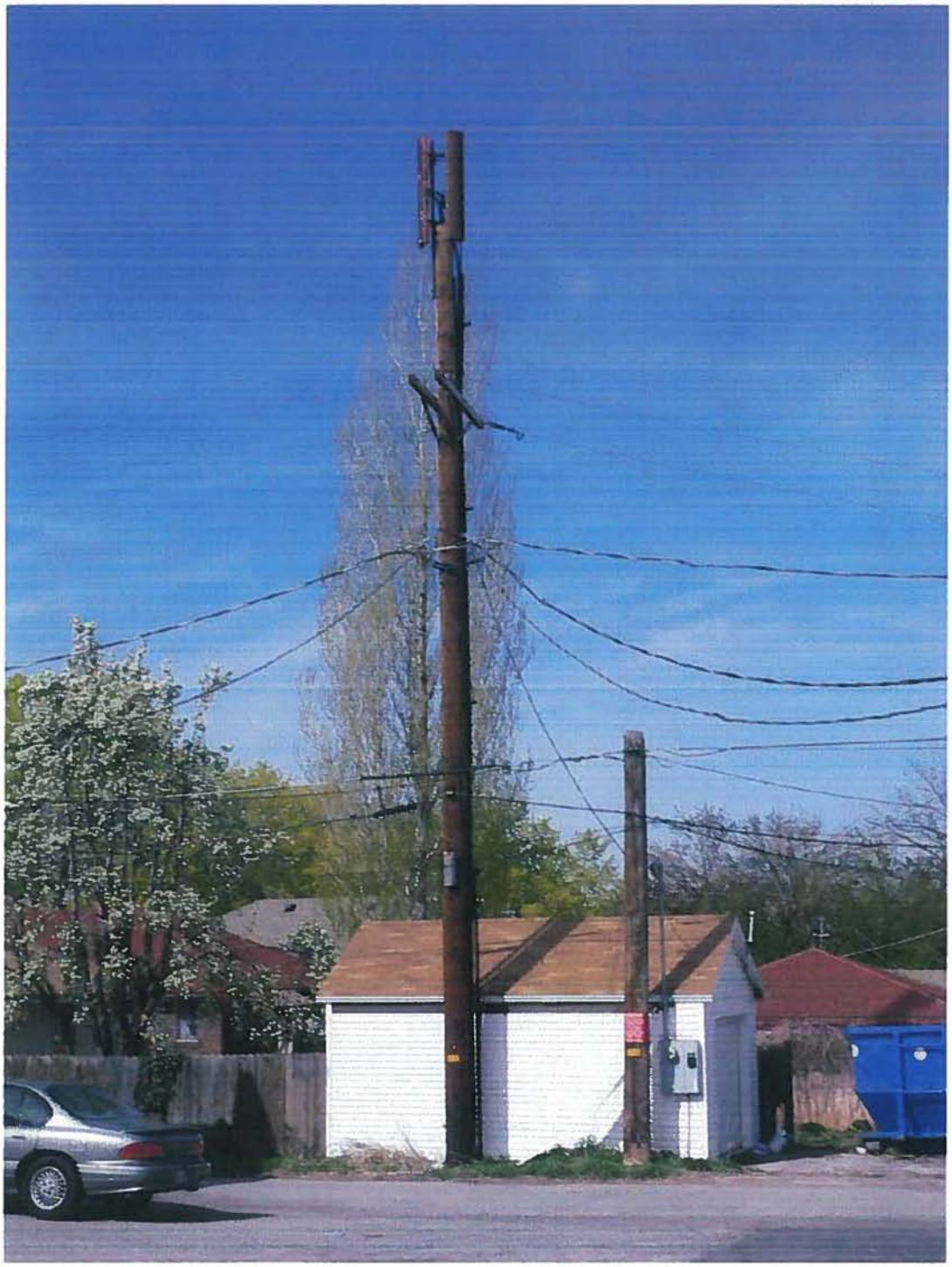
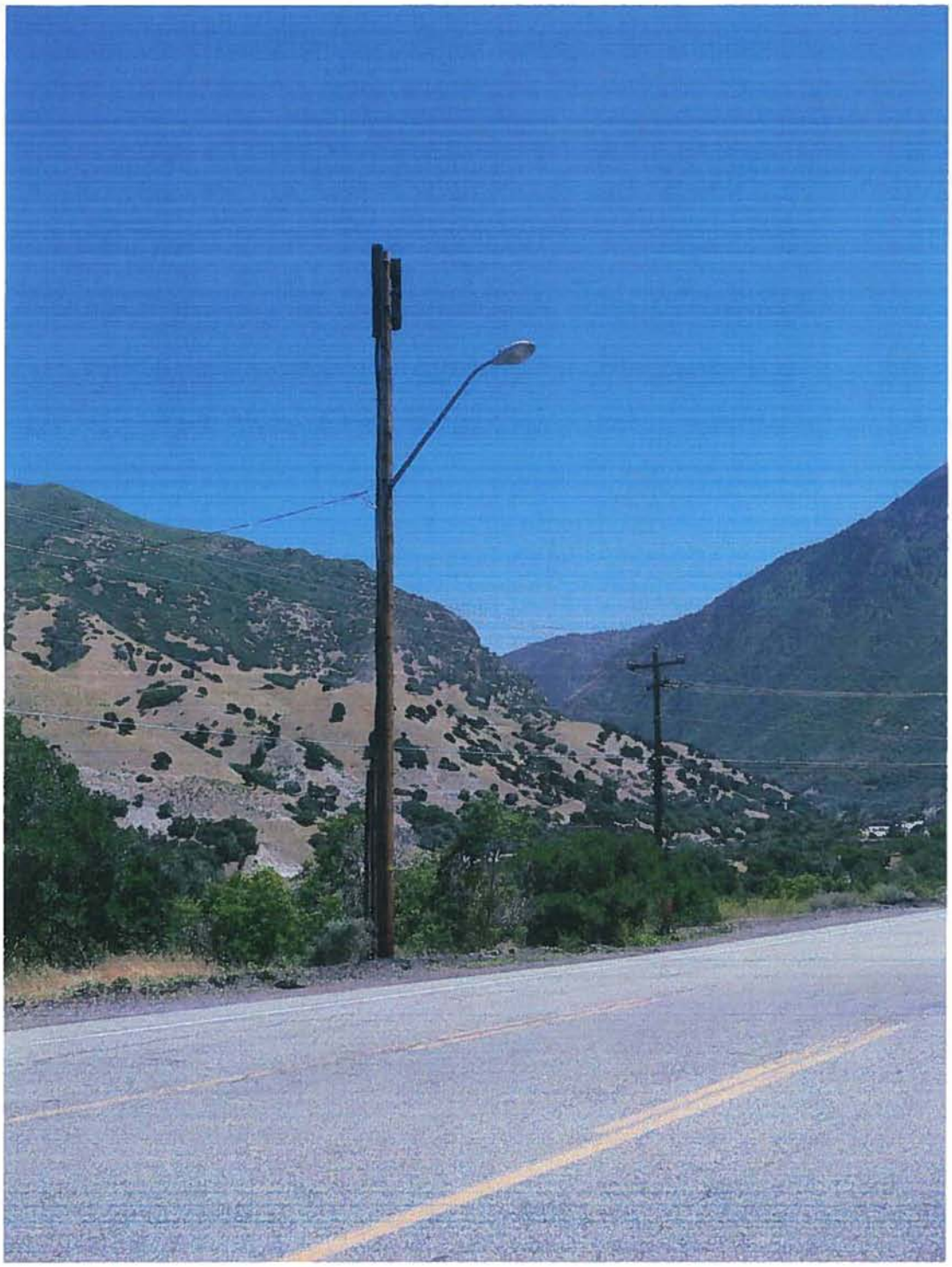


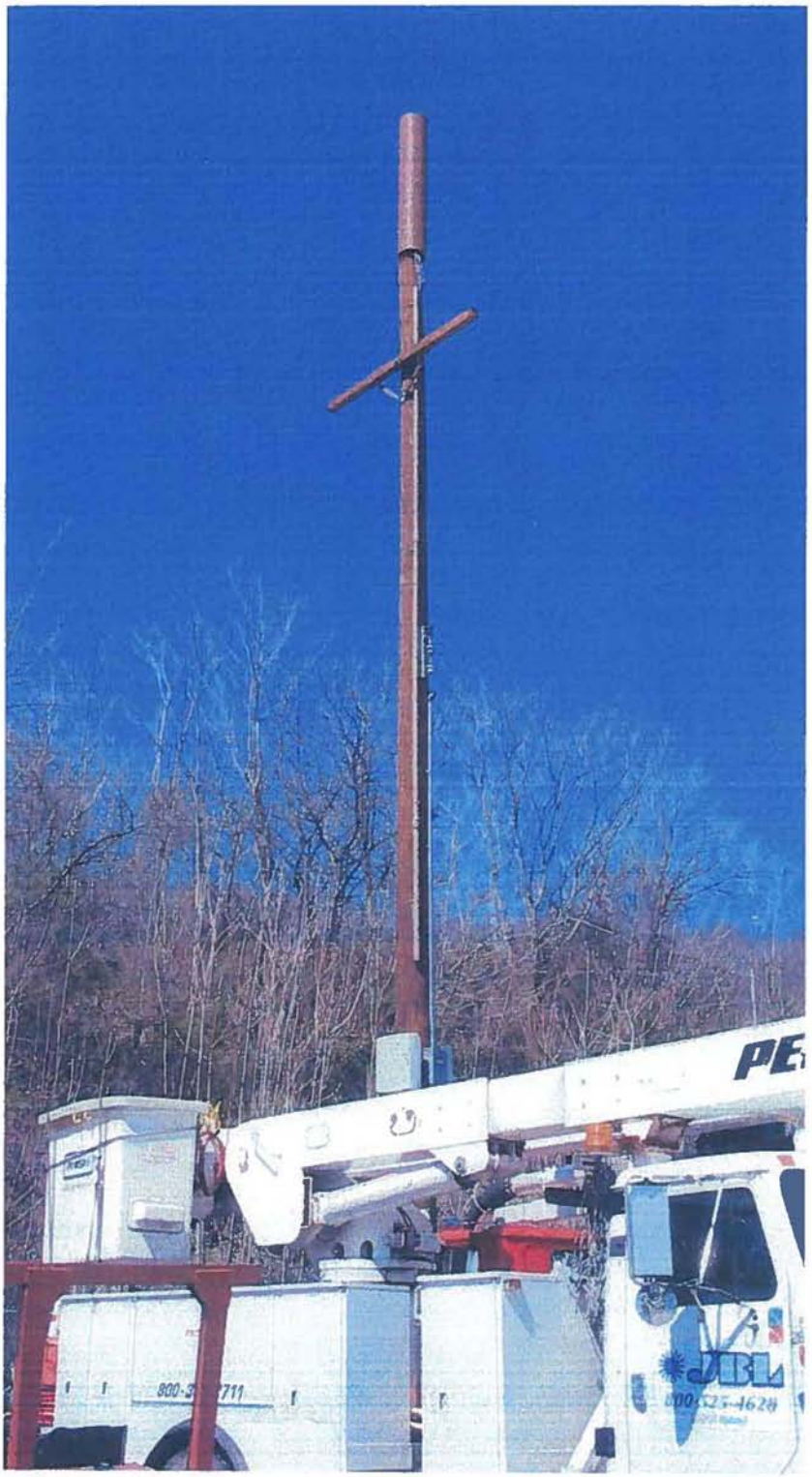
Pole top mounted panel antennas located on a new replacement/extended electric utility distribution pole in residential area in Utah. New garage/shed for power and telco equipment/meters in background. Picture captured prior to the subsequent removal of the older distribution pole.

EXHIBIT 6



Utah residential area pole top mounted panel antennas located on a new replacement/extended electric utility distribution pole which also incorporates a municipal street light.

EXHIBIT 7



A collaborative effort between T-Mobile and utility to design and construct a custom electric utility distribution pole for locating in Pennsylvania.

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