

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Acceleration of Broadband Deployment	)	<b>WC Docket No. 11-59</b>
Expanding the Reach and Reducing the Cost	)	
of Broadband Deployment by Improving	)	
Policies Regarding Public Rights of Way and	)	
Wireless Facilities Siting	)	
_____	)	

**REPLY COMMENTS OF THE CITY OF HUNTINGTON BEACH**

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September 30, 2011

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**REPLY COMMENTS OF THE CITY OF HUNTINGTON BEACH**

The City of Huntington Beach (“City”) files these Comments in response to the Notice of Inquiry (“NOI”) the Commission released on April 7, 2011 in the above-entitled matter. The City’s Comments respond both to the allegations NextG Networks of California, Inc. (“NextG”) made against the City in its Comments filed on July 18, 2011, and generally to the NOI.

Before addressing the specific allegations of NextG, the City of Huntington Beach would like to call to the Commission’s attention that the NOI (at ¶9) stated that when specific governmental entities were named, they should be “able to respond to specific examples or criticisms.” Yet, NextG never served its Comments upon the City. It was only due to the efforts of the International Municipal Lawyers Association, and the City Attorneys Division of the League of California Cities that the City learned of NextG’s comments. This conduct leaves the City with little choice other than concluding that NextG is not engaging in the NOI process in good faith.

**1. NextG Does Not Have the Right to Free Access to the Right-of-Way.**

NextG's problems stem from a business model which premises its success on a faulty assumption of a right to use municipal right-of-way (“ROW”) without paying fair compensation. In support of this claim, NextG suggests that the City is not following California Public Utilities Code Section 7901, which NextG claims grants it free access to the ROW. (NextG Comments, p. 26, n. 29.)

At the Federal level, Congress made it patently clear that municipal governments are not required to give away their property. Instead, Congress specifically preserved the right of municipalities to require “fair and reasonable compensation from telecommunications providers . . . for use of public rights-of-way.” (47 U.S.C.A. § 253(c).) Nonetheless, the Commission has stated that it is concerned with the amount of the compensation charged for the ROW. (NOI, ¶¶9, 12.)

However, this dispute is not about the amount of the compensation, but whether there should be any compensation at all. Consequently, this Commission should decline NextG's invitation to examine and interpret state statutes, particularly because the California Courts are already addressing this dispute between the City and NextG.

NextG's claim to free access to the ROW turns on whether it is a “telephone corporation” within the meaning of California Public Utilities Code Sections 234 and 7901. Sections 234(a) and 7901 have remained unchanged since 1911, at the dawn of landline telephone service. At that time, the California Legislature granted free access to the ROW because landline telephone service required a physical wire line connection between every home and business telephone user directly to the telephone company's main switching office. This need to lay miles and miles of wires throughout urban areas meant that without access to the streets, sidewalks and rights-of-way, rapid deployment of telephone service would be impossible.

The Legislature's decision to allow free access to the ROW for telephone service was unique. Since 1911, the California Legislature has never granted any other technology free use of the ROW. For example, gas and electric utilities must pay a franchise fee of 1% of gross revenues to use the ROW. (*See*, “Franchise Act of 1937,” Cal. Public Utilities C. §6201, *et. seq.*) Similarly, not only must cable television pay a franchise fee, but also telephone corporations must pay 5% of their gross revenues as a franchise fee when they deliver cable television over their telephone lines. (*See*, the Digital Infrastructure and Video Competition Act of 2006, Cal. Public Utilities C. §5810, *et seq.*, §5840(a).)

By contrast, because mobile telephony relies on radio frequency emissions to provide service, there is no technological need for access to the ROW. Instead of wire line connections, transmitting antennas are relatively few and may be located anywhere.

Free access to the ROW merely serves NextG's business purpose of avoiding lease payments to locate an antenna on private property.

To date, no California Court has determined if Sections 234 and 7901 permit installation of a Distributed Antenna System ("DAS") like NextG's in the ROW.<sup>1</sup> However, NextG contends that by obtaining a certificate of convenience and necessity from the California Public Utilities Commission ("CPUC") and subsequently administratively obtaining authorization to install a DAS network on behalf of MetroPCS in the City of Huntington Beach, it may now use the ROW for free.

The City challenged NextG's claim by filing a Complaint in CPUC Case No. 08-04-037. After several procedural motions and rulings, NextG filed a new Application with the CPUC to construct its DAS network. The Complaint and Application were later consolidated. Ultimately, the CPUC adjudicated the dispute through two Decisions issued in late 2010 and early 2011 that together, held that NextG is a "telephone corporation" permitted to use the ROW. In response, the City is now seeking judicial review of the CPUC Decisions in the pending case entitled: *City of Huntington Beach v. California Public Utilities Commission*, Court of Appeal Case No. G044796.

In summary, NextG's Comments describe numerous law suits filed against California cities, including Huntington Beach. (NextG Comments, p. 13, n. 9.) However, at their heart, they present the principal question of whether NextG has free access to the ROW. These claims are beyond the jurisdiction of the Commission, particularly since Section 253 guarantees municipalities the right to require fair and reasonable compensation for access to the ROW. Instead, at least in the case of Huntington Beach, the issue is now being litigated in good faith in the State of California Court of Appeal. It follows that there is no reason for this Commission to intervene as to the compensation DAS providers pay for use of the ROW in California, since this is a matter reserved to the State itself.

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<sup>1</sup> See, *Sprint Telephony v. County of San Diego* (2006) 44 Cal.Rptr.3d 754, where the trial court held that Section 7901 did not grant wireless carriers access to the ROW, but the Court of Appeal reversed; the California Supreme Court then granted and later dismissed review, leaving the Court of Appeal decision unpublished. (49 Cal.Rptr.3d 653; 71 Cal.Rptr.3d 251; California Rule of Court 8.528(b)(3).

## **2. Local Concerns regarding Aesthetics Limit the Installation of Wireless Facilities in the Right-of-Way.**

The Commission asks how do localities satisfy “aesthetic, environmental, or historic preservation concerns, with goals of greater fixed and mobile broadband deployment and adoption through timely processing of permits, nondiscrimination, transparency, and reasonable charges?” (NOI, ¶22.) The Commission later asks what states and localities require in order to permit “the attachment of microcells, picocells, femtocells, and DAS antennas to existing infrastructure that is different from attaching any other antenna to a given structure?” (NOI, ¶24.)

These questions tie into the second dispute between NextG and the City regarding the City’s Utility Undergrounding Ordinance (City Municipal Code Chapter 17.64). This Ordinance has required since 1977 that all new utilities installed in the ROW be undergrounded.

In California, the decision was made long ago that – based upon aesthetics – all utilities in the ROW should be installed underground. The CPUC began this process in the 1960s when it required that all new telephone and electric lines be installed underground. (*See, Order Re Implementation of Assembly Bill 1149*, (2000) D.01-12-009, at pp. 4-5, attached as Exhibit 1.)

Consistent with this practice, the City enacted its Undergrounding Ordinance in 1977. The Ordinance provides that “all new public and private utility lines and distribution facilities” be installed underground. (Section 17.64.050, attached as Exhibit 2.) This means that pre-1977 above-ground utilities are grandfathered, and may be maintained. For example, when fiber optic technology became available, Verizon and Time Warner were permitted to overlash fiber optic cable to their pre-1977, twisted-copper and coaxial lines existing on utility poles. (Sec. 17.64.130(i).) However, where utilities’ existing lines are underground, they were required to underground any new, fiber optic lines.

As to antennas, they may be installed on existing antennas. (Sec. 17.64.130(f).) However, because no new utility poles may be installed, antennas may not be placed on new poles.

In summary, even assuming NextG has the right to install its DAS network in the ROW, it still must comply with the Undergrounding Ordinance. This means that NextG may install its antennas on existing utility poles, but its connecting fiber optic cable must be installed underground, and not hung on utility poles. Further, it may not install new poles in the ROW.

NextG claims these requirements are discriminatory as compared to grandfathered facilities. To the contrary, since 1977, the City has been gradually undergrounding existing utility lines and poles, pursuant to the procedures prescribed by the CPUC. (Ex. 1, pp. 5-7.) Today, Verizon maintains 266.47 miles of underground telephone lines, and 194.24 of aerial lines in the City. Time Warner Cable has approximately 214.75 miles of above ground or aerial plant and approximately 345.15 miles of underground plant. More importantly, at least since 2006 (the earliest City records go back), no new utility poles have been installed in the City ROW. Consequently, there is no discrimination because no one may install new poles in the ROW.

NextG also claims it should be permitted to install its fiber optic lines on pre-1977 utility poles. Today, on the pre-existing utility poles, there are at most, three sets of lines. Electric wires are on the top, with telephone lines approximately four feet below, and cable television lines another foot below telephone. NextG now seeks to install its new lines as a fourth tier of lines.

Adding another, new tier of lines has significantly greater aesthetic impacts than just the lines themselves. For example, adding a tier may trigger the need for replacing utility poles with taller utility poles or adding support poles, to support the weight of the lines. Further, NextG is not the only DAS provider. Allowing NextG to add a new set of lines will result in other DAS providers making identical demands.

As might be expected, NextG has also sued the City over its Undergrounding Ordinance, claiming discriminatory treatment with other telecommunications companies like Verizon and Time Warner.

Initially, on December 27, 2007, NextG sued the City in Federal Court, in the case entitled *NextG v. City of Huntington Beach*, U.S. District Court for the Central District of California, Case No. SACV 07-1471. The District Court issued two preliminary injunctions prohibiting the City from applying the Wireless Ordinance in its entirety, and a portion of the Undergrounding Ordinance. While the Federal injunctions were in force, NextG installed 8 of its proposed 15 antennas in the ROW. However, the City appealed the injunctions, and later, the Ninth Circuit reversed. Following the City's motion for judgment on the pleadings, the District Court dismissed NextG's complaint, directing NextG to file suit instead in State Court.

NextG obliged, and is suing the City over its Undergrounding Ordinance in *NextG v. City of Huntington Beach*, Orange County Superior Court, Case No. 30-2009-00119646. Currently, this second State Court suit is stayed, while the aforementioned Section 7901 question is resolved in the Court of Appeal.

Consequently, there is no reason for the Commission to intervene in pending State litigation.

More importantly, there is no basis for the Commission to intervene in local aesthetic determinations regarding whether the ROW should be cluttered with poles and utility lines. In a very similar case, the Ninth Circuit affirmed a local decision to disallow macro-wireless facilities in the ROW. In *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, 723, the Court explained that:

“The City's consideration of aesthetics . . . comports with PUC § 7901, which provides telecommunications companies with a right to construct WCFs [wireless communications facilities] ‘in such manner and at such points as not to incommode the public use of the road or highway.’ Cal. Pub. Util.Code § 7901. To ‘incommode’ the public use is to ‘subject [it] to inconvenience or discomfort; to trouble, annoy, molest, embarrass,

inconvenience’ or ‘[t]o affect with inconvenience, to hinder, impede, obstruct (an action, etc.).’ [citation] . . . The experience of traveling along a picturesque street is different from the experience of traveling through the shadows of a WCF, and we see nothing exceptional in the City's determination that the former is less discomforting, less troubling, less annoying, and less distressing than the latter. After all, travel is often as much about the journey as it is about the destination.”

In summary, the Commission should not intervene to enable NextG to reverse 50 years of efforts to eliminate the aesthetic plague of utility poles and wires littering City streets and highways, particularly when wireless sites outside the ROW are available.

### **3. The City’s Wireless Ordinance Complies with Federal Law.**

NextG alleges that the City improperly imposes the requirement that providers of wireless facilities demonstrate the “need” for facilities. (NextG Comments, pp. 25-26.) NextG is referring to Section 230.96 of the City’s Zoning Code, known as the “Wireless Ordinance,” which regulates the location and appearance of all wireless antennas. (Attached as Exhibit 3.)

The Wireless Ordinance provides for both administrative and discretionary approval of all wireless facilities. Initially, the wireless provider must “demonstrate that the antenna is located in the least obtrusive location feasible so as to eliminate any gap in service.” This information is sought to determine the necessity for the project, in light of the Telecommunications Act provision allowing reversal of zoning denials that prevent a mobile phone provider from remedying a gap in service.

With this information in hand, the Planning Director may administratively approve antennas found to be “architecturally compatible with surrounding buildings and land uses.” (Sec. 230.96.E.1.c.) However, if the Planning Director does not administratively approve the antenna, then the applicant must obtain a conditional use permit (“CUP”). (Sec. 230.96.E.2.)

Under this system, the Planning Department has received 109 development applications proposing new wireless facilities through 2010, resulting in 100 approvals. Notably, MetroPCS, which claims to need NextG’s DAS network, has applied for 12

wireless antennas, all of which have been approved, with eight approved administratively, without the necessity of a CUP.

Before addressing NextG's specific objections to this Ordinance, it must be emphasized that NextG has never applied for approval of any of its facilities pursuant to the Wireless Ordinance. Instead, NextG has sued the City, in the same State Court action now stayed while the Court of Appeal considers NextG's claim to protection under California Public Utilities Code Section 7901. Once again, NextG is implicitly asking this Commission to intervene in pending State litigation.

Ultimately, NextG raises two objections to the Wireless Ordinance. First, NextG objects to demonstrating the "need" for the facility. However, the Federal Telecommunications Act provides that any local decision that has "the effect of prohibiting the provision of personal wireless service" is preempted. (42 U.S.C. §332(c)(7)(B)(i)(II).) The Ninth Circuit has interpreted this requirement to mean that a City is required to permit an antenna if there is a "significant gap" in service coverage" and no feasible alternative site. (*Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, 726, citing to *MetroPCS, Inc. v. City and County of San Francisco* (9th Cir. 2005) 400 F.3d 715, 731.)

Simply put, the City desires to comply with Federal law. The City does not want to deny a wireless facility, only to be preempted by a Federal Court. Consequently, the City seeks to consider as part of the zoning application the same "need" information that the Court would rely upon when considering whether to preempt the decision of the City to deny a wireless facility.

Second, NextG contends that the Wireless Ordinance is discriminatory because it does not apply to non-wireless telecommunications facilities. (NextG's Comments, p. 26.) To the contrary, the Wireless Ordinance applies to all antennas, regardless of whether they are located in or out of the ROW. However, landline telephone and cable companies need not comply with the Wireless Ordinance, because they do not install

antennas, while NextG's DAS network does install antennas.

**4. Conclusion.**

The City urges the Commission to conclude that the City's actions are not impeding broadband deployment. The City is well within its rights to dispute NextG's claim that California law grants it free access to the ROW. Likewise, the City's Undergrounding and Wireless Ordinances are designed to protect important local interests and have done so for many years.

Dated: September 30, 2011

Respectfully submitted,

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# **EXHIBIT 1**

**Mailed 12/12/2001**

ALJ/CAB/avs

Decision 01-12-009 December 11, 2001

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking Into  
Implementation of Assembly Bill 1149, Regarding  
Underground Electric and Communications  
Facilities.

Rulemaking 00-01-005  
(Filed January 6, 2000)

**INTERIM OPINION REVISING THE RULES FOR  
CONVERTING OVERHEAD LINES TO UNDERGROUND**

## TABLE OF CONTENTS

<b>Title</b>	<b>Page</b>
INTERIM OPINION REVISING THE RULES FOR CONVERTING OVERHEAD LINES TO UNDERGROUND .....	1
I. Summary .....	3
II. Background.....	4
III. Tariff Rules Governing the Conversion of Overhead Lines to Underground Lines.....	4
IV. Procedural History.....	7
A. Workshops .....	8
B. Public Participation Hearings.....	8
C. Letter to the Legislature in Lieu of a Report .....	11
V. Positions of the Parties.....	11
A. General Characterization of Parties' Positions .....	11
B. Municipalities.....	12
C. Utilities.....	15
D. Consumer Advocacy Groups.....	16
E. Telecommunications .....	18
F. Others.....	18
VI. Discussion.....	19
A. Commission Recommendations .....	20
1. Limited Expansion of the Definition of the Public Interest: .....	21
2a. Increased Leverage of 20A and 20B Funds: .....	21
2b. Allow Cities to Mortgage Rule 20A Allocations For Up to Five Years .....	22
3. Improve Communication on the Status of Undergrounding Projects:.....	22
4. Improve the Collection of Cost Data Through Standardized Reporting: .....	23
5. Improve Coordination Among the Utilities, the CPUC, Municipalities and the Residents Through an Updated Undergrounding Planning Guide .....	25
B. Issues for Phase 2 .....	25
VII. Public Review and Comment .....	26
Findings of Fact.....	27
Conclusions of Law .....	28

R.00-01-005 ALJ/CAB/avs

ATTACHMENT A  
ATTACHMENT B  
ATTACHMENT C

## **INTERIM OPINION REVISING THE RULES FOR CONVERTING OVERHEAD LINES TO UNDERGROUND**

### **I. Summary**

This Decision revises the rules governing the State’s program to convert overhead electric and communications distribution and transmission lines to underground. In brief, this order expands Rule 20A criteria; extends the use of rule 20A funds; allows cities to mortgage 20A funds for five years; requires standardized reporting from the utilities; improves communication between utilities and residents; and orders the creation of an up-dated Undergrounding Planning Guide.

This decision also identifies issues for a Phase 2 proceeding. In Phase 2, we will address issues that we were unable to fully cover in Phase 1 without hearings. Some issues we will explore in Phase 2 are: 1) whether or not to establish standards for conversion projects so third parties can competitively bid on projects with no compromise of quality, safety, or reliability; 2) whether incentive mechanisms are an effective cost management tool; 3) whether there should be a “breakpoint”<sup>1</sup> in allowing new overhead pole and line installations; or whether the current exemption process is working; 4) whether there are benefits to listing the charges for undergrounding as a line item on utility bills; 5) whether there is a fair and equitable, competitively neutral recovery mechanism for telecommunications carriers and cable companies to recover their

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<sup>1</sup> In this context, a break point would denote where there would be no further installations of overhead lines. The granting of exemptions for new construction is frustrating the overall goals of the program.

undergrounding costs; 6) whether adjustments in the Rule 20A allocation formula is appropriate; 7) whether there are reforms to the statewide conversion program that are more properly within the legislative domain.<sup>2</sup>

## **II. Background**

On January 6, 2000, the California Public Utilities Commission (CPUC/Commission) issued an Order Instituting Rulemaking (OIR), Rulemaking (R.) 00-01-005, to look into the implementation of Assembly Bill (AB) 1149, (Aroner) (Stats. 1999, Ch. 844).<sup>3</sup> This legislation requires the Commission to study ways to amend, revise, and improve the rules for the conversion of existing overhead electric and communications lines to underground service and to submit a report to the Legislature by January 1, 2001. While the Commission has yet to submit that report, Commissioner Duque, the Assigned Commissioner herein, submitted his own report to the Legislature in April 2001.

## **III. Tariff Rules Governing the Conversion of Overhead Lines to Underground Lines**

The current undergrounding program was instituted by the Commission in 1967 and consists of two parts. The first part, under Tariff Rules 15 and 16, requires new subdivisions (and those that were already undergrounded) to

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<sup>2</sup> Possible reforms to suggest to the legislature include the creation of an Ombudsperson to oversee all conversion projects; designing different financing mechanisms for communities for Rule 20B and C projects including addressing the tax implications associated with these projects; the funding of an appeal process at the Commission for any aspect of the conversion project; and identifying the state's goal for the undergrounding program and determining if the current level and method of funding the program is sufficient.

<sup>3</sup> Hereinafter AB 1149.

provide underground service for all new connections. The utilities, both electric and telephone, then bear the costs of cables, switches, and transformer, and developers bear other costs. Parties can seek an exemption from these rules by petitioning the Commission.

The second part of the program governs both when and where a utility may remove overhead lines and replace them with new underground service, and who shall bear the cost of the conversion. The ratepayers' current share of the cost of conversion appears to be between \$130 and \$180 million annually. At this current rate of expenditure, it could take many decades to underground the entire state's distribution system.

Underground conversion has been undertaken by the electric and telephone companies under the jurisdiction of the Commission. Pacific Gas and Electric Company's (PG&E)<sup>4</sup> Conversion Tariff, Rule 20, is the vehicle for the implementation of the underground conversion programs. Rule 20 dictates three levels, A, B, and C, of ratepayer funding for the projects.<sup>5</sup>

<b>Rule</b>	<b>Ratepayer Contribution<sup>6</sup> Through Utility Rates</b>	<b>Contribution of Customer Receiving Undergrounding</b>
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<sup>4</sup> For convenience, participants and CPUC personnel refer to all of the conversion tariffs as "Rule 20" since the other electric utilities have tariffs that mirror PG&E's Rule 20.

<sup>5</sup> Like all other utility investments, the utility does not collect from the ratepayers on undergrounding projects until the project is put into service. Under Rule 20, the Commission authorizes the utility to spend a certain amount of money each year on conversion projects, the utility records the cost of each project in its electric plant account for inclusion in its rate base upon completion of the project. Then, the Commission authorizes the utility to recover the cost from ratepayers until the project cost is fully depreciated.

<sup>6</sup> All percentages are gross approximations.

20A	80% plus	cost from street to residence
20B	20%	80%
20C	de minimus	100%

In summary, under Rule 20C, any electric customer may convert to undergrounding as long as it reimburses the utility for all costs, less the estimated net salvage value and depreciation of the replaced overhead facilities. The customer must make a non-refundable advance to the utility equal to the cost of the underground facilities, less the estimated net salvage value and depreciation of the replaced overhead facilities.

Rule 20B provides limited ratepayer funding for the cost of an equivalent overhead system, and any work on overhead facilities, but the balance of the costs, including cables, conduits, transformers, and structures, must be paid by the customer requesting undergrounding. Rule 20B projects must 1) be agreed to by all property owners served by the overhead lines; 2) include both sides of the street; and 3) extend for a minimum footage. Additionally, the lines must be along public streets and roads or other locations mutually agreed upon.

Under Rule 20A, however, the utility ratepayers bear most of the costs of the undergrounding conversion. Rule 20A funds are only available when undergrounding is “in the public interest” for one or more of the following reasons:

- a. Such undergrounding will avoid or eliminate an unusual heavy concentration of overhead electric facilities;
- b. The street or road or right-of-way is extensively used by the general public and carries a heavy volume of pedestrian or vehicular traffic ; and
- c. The street or road or right-of-way adjoins or passes through a civic area or public recreation area or an area of unusual scenic interest to the general public.

The determination of “general public interest” under these criteria is made by the local government, after holding public hearings, in consultation with the electric utility. Given the allocation of costs under Rule 20A and the delineation of serving the public interest, it should be of no surprise, that the demand for the Rule 20A funds is high and the potential for controversy is great.

#### **IV. Procedural History**

AB 1149 required the Commission to study ways to amend, revise, and improve the rules for the conversion of existing overhead electric and communications lines to underground. We were specifically asked to study ways to: 1) eliminate barriers to undergrounding and to prevent uneven patches of overhead facilities; 2) enhance public safety; 3) improve reliability; and 4) provide more flexibility and control to local governments.

On January 6, 2000, the Commission issued R.00-01-005 to implement this mandate. In R.00-01-005, the Commission process focused on hearing from interested parties. This was carried out in two ways. Initially, the Energy Division (ED) convened workshops to encourage discussion among parties on the required AB 1149 issues as well as to discuss which other issues should be addressed. Concurrently, eight public participation hearings were held throughout the state. We proceeded without hearings in this phase of our rulemaking in order to meet the legislative deadline, and to more quickly address those non-controversial actions the Commission could take in order to improve the undergrounding process. We defer to phase 2 of this rulemaking, the Commission’s ruling on such matters as third party bidding, incentive mechanisms, unbundled charges on the utility bill, and telecommunications recovery mechanisms because these clearly require hearings. Overtaking events

in the electric industry required the Commission to manage and control its resources such that these important issues had to be deferred to a later phase.

### **A. Workshops**

Attached to the initiating OIR, was a White Paper prepared by the ED. Respondents and interested parties were directed to submit pre-workshop comments on the White Paper, as these comments were going to help shape the scope of the workshops. ED held eight days of workshops where the attendees<sup>7</sup> included respondent utilities and telecommunications companies, as well as representatives from local governments, interest groups, and concerned citizens. The topics covered in the workshops included the following: 1) identifying the goals of the undergrounding program; 2) quantifying the costs and benefits of undergrounding; 3) identifying the resultant effects of undergrounding on telecommunication and electric competition; 4) exploring the impacts of completion delays; 5) identifying potential tariff rule changes to Rules 20 and 15; and 6) quantifying the funding and rate impacts of changes.

Following the ED workshops, participants were invited to submit comments on what issues the Commission should include in its report to the Legislature. The list of those who commented can be found in Attachment B.

### **B. Public Participation Hearings**

Concurrently with the ED workshops, the Assigned Commissioner and Administrative Law Judge (ALJ) held eight Public Participation Hearings (PPHs) in San Diego, Los Angeles, Fresno, Sacramento, Eureka, Monterey/Carmel, Oakland/Berkeley, and San Francisco. The CPUC jurisdictional utilities and

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<sup>7</sup> The list of workshop attendees can be found in Attachment A.

phone companies disseminated notice of these PPHs by way of billing inserts in their customers' monthly utility bills. Over 140 individuals and organizations presented comments orally at these PPHs and an equal number of people submitted written comments in response to the billing insert notices of the PPHs. These hearings were valuable as a tool to hear from citizens, utility workers, consumer advocacy groups, elected local officials, public works officials, and the utilities (both electric and telecommunication). In summary, the overwhelming percentage of participants spoke in favor of continuing but improving — the undergrounding program. The major concerns raised by the speakers were the cost of conversion projects and the equitable issue of how to balance those who receive the benefits of undergrounding against those who pay the cost. Other concerns were put forward concerning construction delays associated with the start and completion of underground conversion projects.

More particularly, the citizens talked about their desire to see more of their own neighborhoods and communities undergrounded for safety, reliability, and aesthetic reasons. The most frequent concern raised was the fear that downed power lines created fire and safety hazards as well as contributing to loss of service.

Other citizens discussed equitable issues. Some people complained that they will pay their entire lifetime as ratepayers for undergrounding, yet never live in a neighborhood that will qualify for Rule 20A funding. Other participants brought up the significant demographic and social equity issues that are involved in a city's choice as to what neighborhoods are chosen for Rule 20A funding.

Mayors, city council members, fire chiefs, public works directors, and other city officials attended and advocated giving the local governing agencies

more authority to implement undergrounding within their jurisdiction. Not everyone, however, was in favor of giving the cities more flexibility and control over Rule 20A funds. The utilities and consumer advocates expressed a widely held worry that the cities would direct the funds to the benefit of neighborhoods where influential private individuals resided.

Numerous participants, from all of the groups represented at the PPHs — especially the local governments — voiced their opinion that more undergrounding could be accomplished within the current ratepayer allocations if competitive bidding was allowed for the design, engineering, and construction of undergrounding projects. The utilities' primary expressed concern with competitive bidding was ensuring quality control since the utility is responsible for maintenance, safety, and reliability of the project once it is put into service.

The consumer advocacy groups wanted the Commission to consider the temporal, distributive, and demographic inequities involved in the current Rule 20A criteria, as well as the equitable issues that would arise with many of the proposed revisions to the criteria. In summary, their message was that since Rule 20A and B funds come from all distribution ratepayers throughout the state, the funds must be used for the benefit of the public good, and not for the enhancement of private property.

The utilities themselves, though present at all of the PPHs, did not participate as speakers. Instead, they reserved their suggestions for the written comments.

Following the final PPH, a Preliminary Summary of Issues was distributed by hand and via mail. Parties were invited to submit comments on the summary, as well as to propose suggested amendments to the existing underground rules. A list of those filing comments is included as Attachment B.

### **C. Letter to the Legislature in Lieu of a Report**

On April 24, 2001, Commissioner Duque submitted a letter to every legislator with his recommendations and a summary of the study results. This is included as Attachment C. The letter proposes four recommendations for legislative consideration and lists actions the Commission could undertake quickly to improve the current UG program. Finally, it highlights the topics ripe for Commission exploration in phase 2 of this proceeding.

### **V. Positions of the Parties**

After reviewing the draft workshop report prepared by ED, the transcripts from the eight PPHs, and the comments and reply comments submitted by the participants, we can generalize some of the recurring themes expressed. In brief, the municipalities want more autonomy; the utilities want to keep control to ensure that local control is exercised within the framework of a statewide policy and that there is quality control on the projects; and the consumer advocates want 1) to insure demographic and social equity; 2) to explore cheaper ways to achieve undergrounding; and 3) to achieve the aesthetic advantage, along with the perceived safety and reliability benefits — but at no additional rate payer cost.

#### **A. General Characterization of Parties' Positions**

Munis want more control
Utilities want control
Consumers want more beauty at no more cost
Others want a chance to do the work at cheaper cost

This section represents only an overview and does not attempt to capture all of the variations or nuances presented by individual participants. It

should also be recognized that positions evolved during this process. For example, many individuals initially advocated increasing the amount ratepayers would contribute to the statewide conversion program, but by the last round of comments, there was almost no promotion of increasing ratepayer contributions. Instead, the emphasis shifted to using the current allotment of funds in a more efficient and cost-effective manner. The overview below is intended to provide a flavor of the debate, rather than a definitive presentation of each party's position.

Many parties, in addition to participating in the proceeding and providing comments, also filed comments and replies to the Draft Decision.<sup>8</sup> The input furnished in these papers provided the Commission with further guidance on the wording and issues for the interim order, and presented additional topics for consideration in Phase 2. Many of the suggestions from the comments and replies are incorporated in this revised decision. Some of the recommendations were echoed by numerous parties, while others were proposed by a single party. Because of the large number of comments and replies, specific reference to the author of the adopted changes was not practical.

## **B. Municipalities**

Oakland: On June 19, 2000, Oakland filed a Petition to Amend Electric Tariff Rule 20 (Rule 20) that set forth proposed changes to expand the criteria for Rule 20A (20A) projects and give the local governing agencies more flexibility and control.<sup>9</sup> Specifically, Oakland proposes relaxing and expanding the existing

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<sup>8</sup> The list of those filing comments and replies in on pages 26 and 27.

<sup>9</sup> Many parties filing comments focused on Oakland's Petition as a springboard for their comments. The Commission did not rule on the Petition, but indicated that it would consider the issues raised in the Petition in its report.

20A criteria to include public safety, service reliability, economic development, and aesthetics, and to give local agencies sole discretion for the allocation of 20A funds within their jurisdiction.

Oakland also advocates 1) annual reporting requirements for the utilities; 2) regular meetings between utilities and the local governments in their jurisdiction; 3) the creation of undergrounding districts; 4) an Ombudsperson position for problem-solving; 5) allowing local governments to accrue 20A funds over several years; and 6) using redevelopment money towards placing utilities underground.

Anaheim: Anaheim has its own local publicly owned utility, and therefore is in a unique posture relative to California's other cities. Anaheim suggests that the Commission require the utilities to participate in programs in communities (such as Anaheim) in which it has no retail customers, but has overhead facilities that serve and benefit its customers in adjoining communities. In addition, Anaheim recommends that the legislature adopt alternative funding mechanisms to provide an ongoing and predictable source of funds for conversion projects.

Berkeley: Berkeley, like its neighbor Oakland, proposes that the Commission add service reliability, economic development, aesthetics, and public safety to 20A criteria. Berkeley suggests more flexibility so 20A funds could be used in the following ways: 1) to assist low income residents with their share of costs; 2) to subsidize low-income 20B projects with 20A funds, with a lien on the property to repay the expended 20A funds at the time of sale; 3) to apportion 20A funds among the conversion recipients with residents paying a proportional share based on their economic ability, so that residents who can pay more, will; 4) to put together city-wide plans for undergrounding, subject to

Commission approval; and 5) to use 20A funds for lateral extensions, panel conversions, design and inspection services, street light conversions, undergrounding of transformers, and engineering studies. In addition, Berkeley recommends that the Commission promote cooperation and coordination between electric and telecommunications utilities, audit utilities' records to determine how conversion funds were spent and to identify delays, and asks the legislature to increase sources of funding for conversion projects.

San Diego: San Diego already has a funding mechanism in place to provide for long term planning and defined undergrounding projects. Based on its experience with undergrounding projects, San Diego urges the Commission to amend 20A criteria to 1) allow cities to make 20A determinations and prioritizations without any veto by the utilities; 2) permit cities to mortgage future 20A allotments as cities see fit; 3) authorize cities to use a competitive bidding process for the design and construction aspects of the project; and 4) build in incentives for utilities to undertake and complete projects in a timely fashion.

City and County of San Francisco: The City and County of San Francisco advocates more accountability from the utilities for maintaining adequate staffing for undergrounding projects and adhering to schedules; having the utilities spend all money allocated for undergrounding; and giving more authority and discretion to the local governing body to make 20A determinations and prioritizations.

City of San Ramon: The City of San Ramon proposes that the Commission 1) review the actual costs of conversion projects; 2) allow 20A funds to be leveraged for implementing larger projects that realize economies of scale; 3) encourage competitive bidding for the design and construction of conversion

projects — with Commission guidelines/standards; 4) investigate the equity of having transmission customers contribute to undergrounding; 5) allow the transfer of 20A funds between cities and counties, with a repayment plan; and 6) establish a “breakpoint” for requiring conversion of burdened overhead lines to underground.

League of California Cities: The League supports the municipalities’ position that local governments should have more control to prioritize projects based on public safety, aesthetic, and economic and community development considerations. In addition, the League proposes the following changes: 1) 20A funds should be allowed for design and inspection expenses, street light conversion, and undergrounding of transformers and can be leveraged with other funds, including public and private sources; 2) increase cost effectiveness through innovative design and construction practices; 3) require the utilities and cities to meet once a year (including telecommunication utilities) to discuss potential and ongoing projects; 4) direct the utilities to send annual reports on undergrounding projects to cities and CPUC; 5) allow cities to mortgage allocations for up to five years; and 6) provide incentives to all utilities to adhere to undergrounding schedules.

### **C. Utilities**

PG&E, Southern California Edison Company (Edison), and San Diego Gas & Electric Company (SDG&E) filed Joint Comments, raising the concern that a “reasonable balance [must] be maintained between gaining the advantages of underground service and controlling expenditures so that unreasonable burdens do not fall upon the general ratepayer.” (67 CPUC 490, 510.) In this context, the utilities were cautious about giving the cities more flexibility and control and cautioned that public funds should not be spent purely for private benefit.

In light of these considerations, the utilities rewrote 20A expanding the public interest criteria to include collector roads and intersecting block patches.

The utilities also suggested that the Commission explore the following:

- 1) revisiting the current allocation formula; 2) allowing 20A funds to fund 20B project engineering costs, with the 20A account reimbursed if the project is completed, or charged against the 20A account if the project is abandoned;
- 3) allowing cities to leverage three years worth of allocation; 4) allowing 20A funds for street light conversions that are owned by the utilities; 5) addressing cost-recovery ratemaking for telecommunications and cable companies so that their funding constraints do not cause any delays to conversion projects;
- 6) encouraging cities to work with Rule 20B and C neighborhoods to coordinate Rule 20A projects; 7) having regular meetings between utilities and cities; and
- 8) when undergrounding projects are underway, having meetings to establish a completion date, discuss delays, and meet and confer on any issue thwarting timely completion.

#### **D. Consumer Advocacy Groups**

CAUSE: California Alliance for Utility Safety and Education (CAUSE) wants hearings on complete line life cycles so consumers can know whether the costs of undergrounding are justified on safety and reliability grounds. CAUSE also suggests that 20A criteria should be expanded to include schools, sensitive areas, tree-lined streets, and historic districts; urges a new Planning Guide;<sup>10</sup> the

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<sup>10</sup> Many participants favor the rewriting and reissuance of the Underground Utilities Conversion Planning Guide, prepared in 1996 by the League of California Cities, PG&E, and Pacific Bell (PacBell). The original authors have already agreed to collaborate and write a new, updated version of the Planning Guide that is more helpful to cities and residents.

creation of an Ombudsperson program; the development of an audit procedure; and a review of any utility waivers on undergrounding new construction projects.

CCAЕ and FUND: Citizens Concerned About EMFS (CCAЕ) and Fund for the Environment (FUND) advocate the following: 1) require the utilities to keep data on undergrounding costs, life cycle costs, service reliability, and safety; 2) allow local governments to be the sole determiners of what projects are in the “general public interest;” 3) approve the merger of 20A and B funds as long as they are distributed fairly to the rich and poor neighborhoods; 4) permit cities to engage in competitive bidding and to choose lowest bidder; and 5) the legislature should promote alternative sources of financing.

The Utility Reform Network (TURN), California Small Business Roundtable (CSBRT), and California Small business Association (CSBA), filed a Joint Comment and Joint Reply: In its comments TURN, CSBRT, and CSBA suggest having the utilities identify the monthly charge for undergrounding on each customer’s bill as a separate line item and allocating the conversion costs on a cents per kilowatt hour basis. In general, they reject any proposals that could lead to cost increases for ratepayers, or break down the critical differences between 20A and B projects [public interest], and instead encourage the Commission to focus on ways to reduce costs and improve accountability.

OFFICE OF RATEPAYER ADVOCATES (ORA): ORA recommends a moratorium on any rate increase in this current time of high electric rates, and in fact, suggests that conversion projects should be tied to rates — when rates are low, conversion can go forward, when high, impose a moratorium. ORA voices support for the Commission considering the following proposals that were suggested by others: 1) establishing a flat universal 20% credit for 20B projects;

2) revamping revenue allocation formulas so that 20A funds are based on overhead meters; 3) allowing cities to trade allocated funds with a referendum vote; 4) requiring a city to use, or lose, designated funds within a five year period; 5) using a generation-based collection method for funds; 6) giving new communities a credit [since they have already paid for their own undergrounding]; 7) permitting affected telecommunication carriers to seek rate recovery for undergrounding as a limited exogenous expense; 8) having the Commission promote coordination and cooperation by establishing loose guidelines; 9) providing an appeal process for delays and performance problems, and some redress for citizens affected by delays in 20B and C projects; and 10) authorizing competitive bidding for projects as long as the utilities have control of the design and specifications and all projects are subject to utility review and approval.

#### **E. Telecommunications**

PacBell; California Cable Television Association; AT&T Communications of California, Inc. and Worldcom, Inc.; and Verizon California Inc., and Verizon West Coast: Each of the above telecommunications and cable companies submitted individual comments. However, the sum and substance of the individual comments was that the Commission needs to devise a competitively neutral compensation mechanism to ensure that all service providers that incur conversion costs are compensated.

#### **F. Others**

Comments from others, including private citizens of community and neighborhood groups, ranged from concerns over downed power lines in fire and earthquakes disasters and their impediment to emergency response, to advocating competitive bidding for the engineering, design, and construction of

conversion projects. Additional issues raised by these commenters include allowing 20A money to be pooled with other public and private funds; authorizing the increase of 20B funding from 20% to 80%; allowing 20A funds to seed 20B projects; allowing ratepayer money to seed the first 25% of any conversion project (A, B, or C); and exploring alternative methods of financing conversion projects. Many questioned why overhead pole and line installation is still continuing, and in fact, proceeding at a faster pace than conversion projects, which results in a sum loss each year of undergrounding. In addition, some inquired into whether 20A funds were ever intended for purely residential streets, or whether the primary purpose was always public interest.

## **VI. Discussion**

With very few exceptions, the public favors undergrounding for safety, reliability, aesthetic benefits, and property value increases. The value of the workshops and the PPHs was to affirm the reasonableness of the current undergrounding program, and to identify some non-controversial measures that would immediately improve the current program administration of undergrounding. While some parties initially proposed increasing the funding for conversion projects once the energy crisis took hold, there was no further discussion of increasing ratepayer contributions to the program. It makes sense to revisit this topic after the Commission obtains better cost data in phase 2 of this proceeding.

The conversion of existing overhead lines to underground is historically expensive. The alleged cost is \$1 million per mile, and under the current funding

mechanism, 130 to 180 miles are converted each year.<sup>11</sup> At the current rate, it will take many, many decades to underground the entire state's distribution system. In phase 2 of this proceeding, we will evaluate the cost data and explore whether or not more undergrounding could be performed if we adopted incentive mechanisms or third party bidding. These issues could not be resolved without hearings.

Currently, the state is facing an energy crisis, with ratepayers seeing increased electric and gas bills. The Commission, therefore, is interested in ways to improve the existing system without increasing the cost to ratepayers. Although the actions contemplated in this decision would not increase the current funding amounts, it is likely they will increase the costs and rates; but only within the limits of the existing funding level.

#### **A. Commission Recommendations**

Following the year-long study, the Commission determines that the underground conversion program should continue. Because the study did not include any evidentiary hearings, the Commission proposes a two-phase strategy for improving the current undergrounding program. In this order we propose reforms that can be enacted based on the information already in the record of the proceedings. We reserve for phase 2, those actions or proposed changes that could benefit from evidence, testimony, and cross-examination.

What we propose in this order is to 1) expand the Rule 20A criteria; 2) extend the use of rule 20A funds by allowing cities to a) leverage funds with

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<sup>11</sup> The actual cost per mile of undergrounding conversion projects is disputed and the Commission has not held evidentiary hearings to reach a consensus on this issue. This is an issue ripe for consideration in Phase 2.

20B funds and b) mortgage 20A funds for five years; 3) improve the communication between the utilities and residents; 4) require standardized reporting from the utilities; and 5) order the creation of an up-dated Undergrounding Planning Guide.

**1. Limited Expansion of the Definition of the Public Interest:**

Because the demand for Rule 20A funds is greatest, there was much focus on this particular rule. Much of the debate and discussion among interested parties was finding the right balance between creating expanded options for cities to define public interest projects versus imposing those program costs on ratepayers. Consumer groups were concerned with granting cities too much freedom for public interest programs because they might be applied unfairly. As a result of the debate, it is reasonable to expand Rule 20A criteria to include a few more areas within the definition of public interest. It makes sense to allow for the application of Rule 20A funds for arterial streets or major collectors.<sup>12</sup>

**2a. Increased Leverage of 20A and 20B Funds:**

In response to the cities' concerns about wanting to accomplish more undergrounding with the same money, it makes sense to allow Rule 20A funds to be used in combination with Rule 20B funds. The value of creating this flexibility might be to allow the following to happen: Rule 20A funds could be used to seed Rule 20B projects;<sup>13</sup> utility owned streetlights and transformers

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<sup>12</sup> As defined in the Governor's Office of Planning and Research (OPR) Guidelines used by cities and counties as a reference tool for drafting General Plans.

<sup>13</sup> Rule 20A funds could even be used to help fund the required initial engineering study for Rule 20B projects, with the Rule 20A funds to be reimbursed if the conversion

*Footnote continued on next page*

could be undergrounded; the amount of money apportioned among all affected homeowners could be reduced; and low-income property owners could be subsidized.<sup>14</sup>

**2b. Allow Cities to Mortgage Rule 20A Allocations For Up to Five Years**

Cities are currently allowed to mortgage their undergrounding allocations for three years. Cities have argued that extending that to a five year period would increase the number of large projects they could pursue. Once a city has established a master undergrounding plan and identified a specific project area, the city may mortgage its allotment for a total of five years, whether the funds are retroactive or prospective.

**3. Improve Communication on the Status of Undergrounding Projects:**

Almost all of the non-utility participants expressed frustration with the current program. Parties felt that they were unable to tap into a knowledgeable utility person who could tell them about project delays, or where they were in the queue, let alone general information about the program. It makes sense that each utility would provide a staff person to help customers and local officials understand the conversion process. Therefore, the involved utility and the city shall meet at least once every six months<sup>15</sup> with residents who are in the queue for conversion projects and meet at least once every other month

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project goes forward. Property owners will be asked to advance a fixed percentage of the initial engineering study (the amount of the percentage to be determined in Phase 2) with the owners reimbursed when the project goes forward.

<sup>14</sup> The city would then have a lien on the property to recover the rule 20A funds when the property is sold.

<sup>15</sup> Or more often if requested by the utility, city or residents.

with residents once a conversion project is under way to insure that there is a continuing dialogue concerning the progress of the project, anticipated and unanticipated delays, and a completion date. The city will facilitate the meetings by providing a venue and noticing the affected residents. Once the utility commits to a conversion project, within thirty days of the commitment, the utility must appoint a “point” person who will be readily available to answer questions from residents and the local government and be present at the monthly progress meeting. This access to information and the status of projects will go a long way towards helping customers understand the program and how it is going to affect them. In addition to the above in-person meetings and point person, the utility will also provide a web site for each committed conversion project that will be updated regularly to provide information on the progress of the project.

**4. Improve the Collection of Cost Data Through Standardized Reporting:**

One of the surprises that surfaced during the course of workshops and PPHs was the lack of data on the program. This severely limited the options for Commission consideration in this phase of the proceeding. Among the categories of data lacking were: per mile data, data about the correlation of undergrounding and reliability, and the tracking of the varying technologies that had been implemented. Without this data, the Commission could not pursue such policy determinations as to whether or not third parties could perform undergrounding cheaper, if undergrounding improves reliability, or which technologies should be pursued because they achieved the greatest cost/benefit.

Therefore, the three electric investor owned utilities (utilities) must meet and confer and design a standardized reporting mechanism. Many interested parties, including cities, want to have some input in the design of this

mechanism. Therefore, to begin the process, the utilities shall schedule a workshop, within 90 days of the date this decision issues, and invite the service list to attend. Following the workshop, the utilities, along with Commission staff, will meet, within 90 days of the workshop, and work together to design a standardized data collection and reporting system incorporating ideas from the workshop. Following the meet and confer, the utilities shall file a Joint Statement setting an agreed upon data tracking mechanism that incorporates the key points specified in this order.

This standardized form or mechanism, applicable to all utilities involved in undergrounding conversion projects, will keep data on each circuit, including the percentage of overhead and underground lines, what technology is used, and the age of the equipment. The utilities will then file the data annually with the Commission Energy Division, by March 31, and use the data as the basis for annual reports to the local governments regarding current and pending Rule 20A projects in their local. The goal of the data tracking and standardized reporting is to allow the utilities, the Commission, and interested parties to track the safety, service reliability, and lifetime costs for both overhead and underground projects and make valid and reliable comparisons between systems.

**5. Improve Coordination Among the Utilities, the CPUC, Municipalities and the Residents Through an Updated Undergrounding Planning Guide**

Pacific Gas & Electric, Pacific Bell, and the League of California Cities<sup>16</sup> are ordered to meet and confer on the drafting an updated Undergrounding Planning Guide, and report to the Energy Division as to when the update could be available, both in hard copy, and on the CPUC website.<sup>17</sup>

Such a resource would be valuable to everyone in understanding the process, who to contact, and how the program flows. Much of the updating effort is already underway because of the workshops.

**B. Issues for Phase 2**

A number of topics were raised as being significant to improving the current underground conversion program, but the Commission was not able to rule on them at this time. As a result, the Commission will schedule hearings to create a record to develop recommendations on such policy matters as incentives versus competitive bidding, etc. Therefore, the assigned ALJ will notice a Prehearing Conference (PHC) in this proceeding for the purpose of scheduling evidentiary hearings and dates for the service of Phase 2 testimony. The subjects that will be explored in Phase 2 will include, but not be limited to, the following:

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<sup>16</sup> Many cities expressed an interest in participating in the planning of the updated Guide, but the Commission is assured that the League of California Cities will adequately represent the interests of its member cities in this process.

<sup>17</sup> PG&E participated in the drafting of the 1996 Underground Utilities Conversion Planning Guide and represented during the OIR that it was willing to participate in a new draft. If the other electric utilities (SDG&E and or Edison) want to cooperate in the new draft, they are welcome to coordinate their participation with PG&E, PacBell and the League.

- whether or not to establish standards for conversion projects so that third parties can competitively bid on projects with no compromise of quality, safety, or reliability;
- whether incentive mechanisms are a better way to manage costs and encourage timely completion of projects;
- investigate whether there should be a “breakpoint” in allowing new overhead pole and line installation or whether the current exemption process is working;
- explore the value of charging for undergrounding via a line item on utility bills; and
- the creation of a fair, equitable, and competitively neutral recovery mechanism for telecommunications carriers and cable companies to recover their undergrounding costs.
- whether adjustments in the Rule 20A allocation formula is appropriate.
- are there reforms to the undergrounding program that are more properly within the legislative domain.

## **VII. Public Review and Comment**

The draft decision of the Administrative Law Judge in this matter was mailed to the parties in accordance with Pub. Util. Code §311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on October 24, 2001, and reply comments were filed on November 16, 2001.

Comments were received from City of Berkeley, California Alliance for Utility Safety and Education (CAUSE) California Cable Television Association and AT&T Communications of California Inc. (CCTA/AT&T), Citizens Concerned About EMFS and Fund for the Environment (CCAE/FUND), County of Los Angeles, City of Del Mar, League of California Cities, Town of Los Altos Hills, 19<sup>th</sup> Street Neighbors, City of Oakland (Oakland), Office of Ratepayer

Advocates (ORA), Pacific Bell Telephone Company, Polaris Group, Pacific Gas and Electric Company (PG&E), Margit Roos-Collins, City of San Ramon, San Diego Gas & Electric Company (SDG&E), City and County of San Francisco, Southern California Edison Company (Edison), The Utility Reform Network (TURN), and Verizon California Inc.

Reply comments were received from CAUSE and CCAE, CCTA/AT&T, Oakland, ORA, PG&E, SDG&E, Edison, and TURN.

### **Findings of Fact**

1. On January 6, 2000, the Commission issued an Order Instituting Rulemaking (OIR.) 00-01-005, to implement AB 1149. AB 1149 required the Commission to study ways to amend, revise, and improve the rules for the conversion of existing overhead electric and communications lines to underground service.
2. PG&E's Tariff Rule 20 is the vehicle for the implementation of the underground conversion program.
3. As part of the OIR, The Commission conducted workshops, held public participation hearings, and received comments and reply comments from participants.
4. Following the completion of the initial phase of the study, the Commission determined that the conversion program should continue.
5. The reforms set forth in this interim order are reforms that can be enacted based on the information already in the record of the proceedings.
6. Suggested changes that could benefit from evidence, testimony, and cross-examination will be explored in Phase 2 of this proceeding.

## Conclusions of Law

1. We will adopt a model Tariff Rule 20 that will amend, improve, and revise the current rules for conversion of overhead lines to underground.
2. PG&E, SDG&E, and SoCal Edison should meet and confer to draft a model Tariff Rule 20, that will be applicable to the three electric utilities, and incorporates the key changes in the attached Interim Order.

## INTERIM ORDER

### **IT IS ORDERED** that:

1. Pacific Gas & Electric Company (PG&E), San Diego Gas & Electric Company, and Southern California Edison Company immediately shall meet and confer to draft a model Tariff Rule 20, that will be applicable to the three electric utilities, and incorporates the key changes in this Interim Order.<sup>18</sup>
2. The utilities shall file an Advice Letter with the Energy Division, within 30 days of this order, setting forth the proposed Model Tariff Rule 20. Parties will then have an opportunity to comment on the proposed Model Rule. The Model Rule shall include the following:
  - expanding Rule 20A criteria to includes arterial streets or major collectors;
  - allowing Rule 20A funds to be used in combination with Rule 20B funds to promote more conversion projects; and
  - allowing cities to mortgage Rule 20A allocations for up to five years.

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<sup>18</sup> If possible, the Commission would like the three utilities to file a Joint Recommendation as to the Proposed Model Tariff Rule 20, but if the utilities cannot agree on a joint proposal, separate proposals will be accepted.

3. The utilities shall create a formalized process whereby a point person at each of the utilities will meet, at least once every six months, with the city and residents who are in the queue for conversion projects, and meet, at least once every other month, with residents and the city once a conversion project is under way. It is incumbent upon the utility to insure that there is a continuing dialogue concerning the progress of the project, anticipated and unanticipated delays, and a completion date.

4. The utilities shall meet and confer and design a standardized reporting mechanism by which all utilities involved in conversion projects will keep data on each circuit, including the percentage of overhead and underground lines, what technology is used, and the age of the equipment, and file the data annually with the Commission Energy Division. Before the meet and confer, the utilities will schedule a workshop to solicit input from interested parties as to what should be contained in this data collection and reporting system. The goal of the data tracking and standardized reporting is to allow the utilities, the Commission, and interested parties, to track the safety, service reliability, and lifetime costs for both overhead and underground projects and make valid and reliable comparisons between systems. Following the meet and confer, the utilities shall file a Joint Statement setting an agreed upon data tracking mechanism that incorporates the key points specified in this order.

5. PG&E, Pacific Bell, and the League of California Cities shall meet and confer on the drafting of an updated Undergrounding Planning Guide, and

report to the Energy Division as to when the update will be available, both in hard copy, and on the CPUC website.<sup>19</sup>

6. The Interim Order revising the rules governing the state's program to convert overhead electric and communications lines to underground will stay in place until further order of the Commission.

This order is effective today.

Dated December 11, 2001, at San Francisco, California.

LORETTA M. LYNCH  
President  
HENRY M. DUQUE  
RICHARD A. BILAS  
CARL W. WOOD  
GEOFFREY F. BROWN  
Commissioners

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<sup>19</sup> PG&E participated in the drafting of the 1996 Underground Utilities Conversion Planning Guide and represented during the OIR that it was willing to participate in a new draft. If the other electric utilities (SDG&E and or Edison) want to cooperate in the new draft, they are welcome to coordinate their participation with PG&E, Pacific Bell and the League.

**ATTACHMENT A**  
**(Page 1 of 3)**

Summary of workshop participants

Partial List of Participants in Undergrounding Workshops [OIR 00-01-005],  
including CPUC staff.

(We have the sign up sheets for 6 of the 8 workshops)

<b>Name</b>	<b>Organization (if any)</b>
Bill Adams	
Jack Biggins	California Cable Television Association (CCTA)
Garth Black	Cooper, White, & Cooper and 7 Local Exchange Carriers (LECs)
Scott Blaising (CMUA)	California Municipal Utilities Association
Ellenmarie Blunt	GTE California
Derik Broekhoff	City of San Diego
Lee Burdick California	Prima Legal, counsel for Cox Communications
Patricia Butcher	SCWC (Bear Valley Electric District)
Manuel Camara	Pacific Gas and Electric Company (PG&E)
John Cannon	City of San Jose
John Capstaff	Pacific Bell
Jerry Carlin	City of Berkeley
Larry Chow	GTE
Rocco Colicchia	PG&E
John Dawsey	San Diego Gas & Electric Company (SDG&E)
Holly Duncan	
Connie Easterly	Utility Design Inc. (UDI)
Dennis Evans	Pacific Bell
Johan Fadeff Works	City of San Francisco—Department of Public
Gerald Finnell	City of Del Mar
Janice Frazier-Hampton	PG&E
Peter Frech Fields (EMFs)	Citizens Concerned About Electro-Magnetic
Margot Friedrich	GTE
William Gaffney	Energy Division, CPUC

**ATTACHMENT A**  
**(Page 2 of 3)**

David Geier	SDG&E
Eileen Golde	19 <sup>th</sup> Street Neighbors
Ellen Stern Harris	Fund for the Environment
Michael Herz	PG&E
Elroy Holtman	City of Berkeley
Louis Irwin	Office of Ratepayer Advocates (ORA), CPUC
Ed Jeffers	Modesto Irrigation District (MID)
Karen Johanson	California Alliance for Utility Safety and Education (CAUSE)
Larry E. Jones	Southern California Edison (SCE)
L.J. Keller	
Caroline Kelsey	SDG&E
Tom Kimball	MID
Chuck Lewis	PG&E
David K. Lee	Energy Division, CPUC
Carl Lower	The Polaris Group
Lesla Lehtonen	CCTA
Daniel Markels	AT&T
Frank Marsman	SDG&E
Dan McLafferty	PG&E
Michael McKinney	SCE
Karen Norene Mills	California Farm Bureau
Jacqueline Mittlestadt	City of San Diego, City Attorney
Bill Monsen	MRW and Associates
Margie Moore	Sempra Energy
John Morgan	San Diego Office, CPUC
Robert Munoz	MCI World Com
Jeff Nahigian	JBS Energy & TURN
Steve Nelson	SDG&E
Todd Novak	Safety Branch, CPUC
Kevin O'Connor	SCE
Lauri Ortenstone	Pacific Bell
Virginia Oskovi	City of San Diego
Al Oxonian	City of San Jose
Carlos Parente	SCE
Richard Pontius	City of Oakland

**ATTACHMENT A**  
**(Page 3 of 3)**

Roger Poynts	UDI
Jonathan Radin	Citizens Communications
Steven Rahon	Sempra Energy
Mejgan Raouf	CPUC
Wayne Reimer	AT&T
Margit Roos-Collins	
Cindy Sage	Sage Associates
Gayatri Schilberg	JBS Energy for TURN
Brian Schumacher	Energy Division, CPUC
Glenn Semow	CCTA
Dave Siino	SDG&E
John Sirugo	SCE
Paul Stein	TURN
Michael Sullivan	Friends of the Urban Forest
Steve Sullivan	SCE
Susan Sutton	19 <sup>th</sup> Street Neighbors
Clayton Tang	Energy Division, CPUC
Tina L. Taverner	County of Orange
Jeff Trace	SDG&E
Tom Trimbur	City of San Francisco
Joan Tukey	CAUSE
Hal Tyvoll	CAUSE
David Van Iderstein	SCE
Greg Walters	SDG&E
Janine Watkins-Ivie	SCE
Dan Weaver	San Francisco Beautiful
Steven Weissman	CAUSE
Dick White	City of Berkeley
Tony Wilson	SCE
Bob Woods	SCE
Esmerelda Yans	City of San Diego
Jason Zeller	ORA, CPUC
Phil Zellers	SDG&E
Mark Ziering	Energy Division, CPUC

**(END OF ATTACHMENT A)**

**ATTACHMENT B**

Summary of those who filed written comments

Cities:

Oakland  
Anaheim  
Berkeley  
San Diego  
San Francisco  
San Ramon  
League of California Cities

Electric Utilities:

Pacific Gas and Electric  
Southern California Edison  
San Diego Gas and Electric

Telecommunications Utilities and Companies:

Pacific Bell  
AT&T Communications  
WorldCom Inc  
Verizon  
California Cable Television Association

Consumer Advocates:

California Alliance for Utility Safety and Education  
Citizens Concerned about EMF's  
Fund for the Environment  
The Utility Reform Network  
The Office of Ratepayer Advocates  
California Small Business Roundtable  
California Small Business Association

Others:

William Adams  
Polaris Group  
Margit Roos-Collins  
Kensington Improvement Club  
19<sup>th</sup> Street Neighbors

**(END OF ATTACHMENT B)**

**ATTACHMENT C**  
**Page 1 of 3**

Letter to the Legislature

April 24, 2001

The Honorable «FirstName» «LastName»  
«JobTitle»  
«Company»  
State Capitol  
10<sup>th</sup> & L Streets, «Address1»  
Sacramento, CA 95814

Dear «JobTitle» «LastName»:

Assembly Bill (AB) 1149 required the California Public Utilities Commission (CPUC) to study ways to amend, revise, and improve the rules for the conversion of existing overhead electric and communications lines to underground and submit a report to the legislature by January 1, 2001.<sup>20</sup> While the CPUC has yet to issue a formal report, I wish to provide my recommendations as the assigned Commissioner in the undergrounding proceeding<sup>21</sup>.

We heard from citizens, municipalities—including elected and appointed officials and representatives from public work departments, the utilities, utility workers, consumer advocacy groups, and neighborhood/community organizations. In summary, the overwhelming percentage of people spoke in favor of continuing, and escalating, the

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<sup>20</sup>The Commission was to study ways to 1) eliminate barriers to undergrounding and to prevent uneven patches of overhead facilities; 2) enhance public safety; 3) improve reliability; and 4) provide more flexibility and control to local governments.

<sup>21</sup>On January 6, 2000, the CPUC issued an Order Initiating Rulemaking (OIR) R.00-01-005 to implement this mandate. Under the OIR, the Energy Division conducted eight days of workshops, the assigned Commissioner and administrative law judge held eight Public Participation Hearings (PPH) throughout the state, and comments were solicited from the electric and telecommunications utilities, municipalities, consumer advocates, and other interested parties. Evidentiary hearings were not possible given that the attention of Commission staff, the utilities, cities, and ratepayers has been focused on the energy crisis.

**ATTACHMENT C**

**Page 2 of 3**

underground conversion program for aesthetic, safety, and reliability reasons. The repeated concerns raised were 1) the costs; 2) lack of accurate information; 3) lack of response and accountability from utilities and cities; and 4) and the demographic and social equity issues involved in the choice of what areas are chosen for Rule 20A

funding.<sup>22</sup> My legislative and CPUC recommendations are cost effective and designed to address safety as well as aesthetic concerns. In Attachment A, you will find the recommendations I will bring before the CPUC in upcoming decisions.

My list of legislative recommendations is:

- provide funding for an undergrounding ombudsperson position and staff to oversee all conversion projects;
- create different financing mechanisms for communities for Rule 20B and C projects;
- fund an appeals process at the CPUC for complaints from citizens and communities on any aspect of the undergrounding process; and
- increase the current level of funding for undergrounding, or add taxpayer funds.

**Ombudsperson:**

The need for an ombudsperson became clear when parties discussed their frustration with “getting the run-around” at the utilities, municipalities, and the CPUC. There is no one source of knowledge, no responsibility or accountability, and a total lack of coordination between the necessarily involved parties. The ombudsperson would meet with all involved parties—cities, utilities, residents and community groups—and facilitate the

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<sup>22</sup>Tariff Rule 20 for the major utilities dictates three levels, A, B, and C, of utility company funding for conversion projects. Under Rule 20A the ratepayers pay almost all of the costs—but only for projects which are in the “public interest.” Rule 20A funds are very limited, the demand for them is high, and the potential for controversy over these funds is great.

**ATTACHMENT C**  
**Page 3 of 3**

initiation of conversion projects and serve as a coordinator and trouble-shooter once a project was underway.

**Financing Options:**

The need for creating more financing options became clear when cities expressed their frustration with the current limits on the use of funds especially for Rule 20B and C projects. Options such as bonds, low-interest loans, and how cities can fairly deal with hold-out neighbors need to be addressed. The funding process needs to be streamlined and any unnecessary barriers removed. The ombudsperson would assist communities in creating undergrounding districts and exploring financing options.

**Complaint Resolution:**

In order for conversion projects to proceed seamlessly, there needs to be an appeals process at the CPUC for citizen complaints on allocation of Rule 20 funds; delays by the utilities in starting and completing conversion projects; unresponsiveness by utilities and local governments; and other undergrounding issues.

**Additional Funds**

It became clear that even with improvements to the management and financing of the current undergrounding program, without increasing the present level of spending, the state's goal of universal undergrounding is not possible within the foreseeable future. Many ratepayers will contribute their entire lives to Rule 20 funds, yet never reap the benefit of conversion projects in their community or neighborhood.

I offer these recommendations to the legislature while I pursue a two-phase process at the CPUC. It is anticipated that in Phase 1, the CPUC will issue an Interim Order that adopts the proposals set forth in Attachment A, and in Phase 2, the CPUC will schedule hearings on the topics that can benefit from evidence, testimony, and cross-examination

Cordially,

Henry M. Duque

**(END OF ATTACHMENT C)**

## **ATTACHMENT A OF ATTACHMENT C**

### **Page 1 of 2**

#### **Phase 1 Interim Order**

- expand Rule 20A criteria to add more areas within the definition of public interest (i.e. arterial streets or major thoroughfares, and areas of fire hazard and earthquake risk);
- expand the use of Rule 20A funds to allow more flexibility to the cities to use the funds in combination with Rule 20B funds to promote more conversion projects;
- improve communication links between the utilities and the residents before and during undergrounding projects;
- require standardized reporting from the utilities on the expenditure of funds;
- allow cities to mortgage Rule 20A allocations for up to five years;
- order the creation of an updated Undergrounding Planning Guide; recommend coordination between the League of California Cities, Pacific Bell, and Pacific Gas and Electric Company; and placing the final document on the CPUC website in a timely manner.

#### **Phase 2 Topics Subject to Evidentiary Hearings**

- explore the creation of universal standards for conversion projects so that third parties could competitively bid on projects without compromise of quality, safety, or reliability;
- investigate whether there should be a “breakpoint”<sup>\*</sup> in allowing new overhead pole and line installation;
- explore incentives for utilities so that they will be motivated to engage in conversion projects and to complete them on time and within budget;

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<sup>\*</sup> breakpoint – in this context, a breakpoint would denote where there would be no further installations of overhead lines. The granting of exemptions for new construction are frustrating the overall goals of the program.

**ATTACHMENT A OF ATTACHMENT C**

**Page 2 of 2**

- explore whether unbundled charges for undergrounding should appear as a line item on utility bills.
- investigate if there is a fair and equitable competitively neutral recovery mechanism for telecommunications carriers to recover their undergrounding costs;

**(END OF ATTACHMENT C)**

# **EXHIBIT 2**

## Chapter 17.64

### UNDERGROUNDING OF UTILITIES

(2222-12/77, 2382-7/79, 2975-12/88, 3635-5/04, 3783-10/07)

#### Sections:

- 17.64.010 Definitions
- 17.64.020 Underground utilities coordinating committee established
- 17.64.030 Duties
- 17.64.040 Planning Commission review
- 17.64.050 Underground public utilities facilities
- 17.64.060 Overhead installation
- 17.64.070 Conversion of overhead facilities
- 17.64.080 Underground trenches
- 17.64.090 Public hearing by Council
- 17.64.100 Council may designate underground utility districts by resolution
- 17.64.110 Unlawful to erect or maintain overhead utilities within district
- 17.64.120 Exceptions--Emergency or unusual circumstance declared exception
- 17.64.130 Exceptions to this chapter
- 17.64.135 Abandoned/non-use – notice to City
- 17.64.140 Community antenna television service
- 17.64.150 Director of Public Works--Authority of
- 17.64.160 Director of Planning--Authority of
- 17.64.170 City Council--Appeal to
- 17.64.180 Notice to property owners and utility companies
- 17.64.190 Responsibility of utility companies
- 17.64.200 Responsibility of property owners
- 17.64.210 Responsibility of city
- 17.64.220 Extension of time

**17.64.010 Definitions.** The following terms or phrases as used in this chapter shall, unless the context indicates otherwise, have the respective meanings herein set forth:

- (a) "Commission" shall mean the Public Utilities Commission of the state of California.
- (b) "Underground utility district" or "district" shall mean that area in the city within which poles, overhead wires and associated overhead structures are prohibited as such area is described in a resolution adopted pursuant to the provision of section 17.64.110 of this chapter.
- (c) "Poles, overhead wires and associated overhead structures; shall mean poles, towers, supports, wires, conductors, guys, stubs, platforms, crossarms, braces, transformers, insulators, cutouts, switches, communication circuits, appliances, attachments and appurtenances located aboveground within a district and used, or useful, in supplying electric, communication or similar or associated service.
- (d) "Utility" shall include all persons or entities supplying electric, communication or similar or associated service by means of electrical materials or devices. (2222-12/77)

**17.64.020 Underground utilities coordinating committee--Established.** There is hereby established an underground utilities coordinating committee, appointed by the City Council, which said committee shall consist of five (5) members as follows: (2222-12/77, 2382-7/79, 2975-12/88)

- (a) Director of Public Works;
- (b) Director of Planning; (3783-10/07)
- (c) One city employee appointed by the City Administrator;
- (d) District representative, Southern California Edison Company; and
- (e) Senior engineer, Public Improvements, Verizon. (3783-10/07)

**17.64.030 Duties.** It shall be the duty of the committee to advise the City Council with respect to all technical aspects of the undergrounding of public utilities within the city of Huntington Beach and in that regard the committee shall:

- (a) Determine the location and priority of conversion work within the city;
- (b) Recommend specific projects and methods of financing;
- (c) Recommend time limitation for completion of projects and extensions of time;
- (d) Develop a long-range plan for establishing underground utilities districts;
- (e) Perform such other duties as may be assigned to it by the City Council.

The Director of Public Works shall be chairperson of said committee. A majority of the members of the committee, or their authorized representatives, present at any meeting shall constitute a quorum. Said committee shall meet upon call of the chairperson. Members of the committee shall serve at the pleasure of the City Council and without compensation. (2222-12/77, 3783-10/07)

**17.64.040 Planning Commission review.** Prior to submitting reports to the City Council, the committee shall submit all undergrounding plans to the Planning Commission in order to ascertain its recommendations with respect to comprehensive planning for the city, and the effect of such proposed undergrounding plans thereon. (2222-12/77)

**17.64.050 Underground public utilities facilities.** All new public and private utility lines and distribution facilities, including but not limited to electric, communications, street lighting, and cable television lines, shall be installed underground, except that surface-mounted transformers, pedestal-mounted terminal boxes, meter cabinets, concealed ducts in an underground system and other equipment appurtenant to underground facilities located on private property or installed pursuant to a franchise or other agreement need not be installed underground, and provided further that cable television lines may be installed on existing utility poles within subdivisions developed with overhead utility lines. (3783-10/07)

This section shall not apply to main feeder lines or transmission lines located within the public right-of-way of an arterial highway as shown in the circulation element of the general plan. (2222-12/77)

**17.64.060 Overhead installation.** Installation of overhead utility lines is permitted for the following:

- (a) Relocation and/or the increase of the size of service on a lot when it does not necessitate any increase in the number of existing overhead lines and/or utility poles;
- (b) Any new service when utility poles exist along abutting property lines prior to February 15, 1967, and which are not separated by any alley or public right-of-way and no additional utility poles are required;
- (c) Temporary uses, including directional signs, temporary stands, construction poles, water pumps, and similar uses;
- (d) Oil well services. (2222-12/77)

**17.64.070 Conversion of overhead utilities.** Any new overhead service which is permitted by these provisions shall have installed a service panel to facilitate conversion to underground utilities at a future date. (2222-12/77)

**17.64.080 Underground trenches.** All underground utility lines in residential developments which are installed on private property shall be located along lot lines. However, the trench for service lines may curve from the lot line to the building at the nearest, most practical location.

This provision is intended to reduce conflicts which may occur in future construction because of existing underground utility lines. (2222-12/77)

**17.64.090 Public hearing by Council.** The Council may from time to time call public hearings to ascertain whether the public necessity, health, safety or welfare requires the removal of poles, overhead wires and associated overhead structures within designated areas of the city and the underground installation of wires and facilities for supplying electric, communication, or similar or associated service. Prior to holding such public hearing, the City Engineer shall consult with all affected utilities and shall prepare a report for submission at such hearing, containing, among other information, the extent of such utilities participation and estimates of the total costs to the city and affected property owners. Such report shall also contain an estimate of the time required to complete such underground installation and removal of overhead facilities. The City Clerk shall notify all affected property owners as shown on the last equalized assessment roll and utilities concerned by mail of the time and place of such hearings at least ten (10) days prior to the date thereof. Each such hearing shall be open to the public and may be continued from time to time. At each such hearing all persons affected shall be given an opportunity to be heard. The decision of the Council shall be final and conclusive. (2222-12/77)

**17.64.100 Council may designate underground utility districts by resolution.** If, after any such public hearing the Council finds that the public necessity, health, safety or welfare requires such removal and such underground installation within a designated area, the Council shall, by resolution adopted by affirmative vote of at least five (5) members of the City Council, declare such designated area an underground utility district and order such removal and underground installation. Such resolution shall include a description of the area comprising such district, the reason for placing public utilities underground (see Public Utilities Commission Rule 20), and shall fix the time within which such affected property owners must be ready to receive underground service. A reasonable time shall be allowed for such removal and underground installation, having due regard for the availability of labor, materials and equipment necessary for such removal and for the installation of such underground facilities as may be occasioned thereby. (2222-12/77)

**17.64.110 Unlawful to erect or maintain overhead utilities within district.** Whenever the Council creates an underground utility district and orders the removal of poles, overhead wires and associated structures therein, as provided in section 17.64.100 hereof, it shall be unlawful for any person or utility to erect, construct, place, keep, maintain, continue, employ or operate poles, overhead wires and associated overhead structures in the district after the date when said overhead facilities are required to be removed by such resolution, except as said overhead facilities may be required to furnish service to an owner or occupant of property prior to the performance by such owner or occupant of the underground work necessary for such owner or occupant to continue to receive utility service as provided in section 17.64.200 hereof, and for such reasonable time as may be required to remove said facilities after said work has been performed, and except as otherwise provided in this chapter. (2222-12/77)

**17.64.120 Exceptions--Emergency or unusual circumstance declared exception.** Notwithstanding the provisions of this chapter, overhead facilities may be installed and maintained for a period not to exceed ten (10) days without authority of the Council in order to provide emergency service. In such case, the Director of Public Works shall be notified in writing prior to the installation of the facilities. The Council may grant special permission on

such terms as the Council may deem appropriate in cases of unusual circumstances, without discrimination as to any person or utility, to erect, construct, install, maintain, use or operate poles overhead wires and associated overhead structures. (2222-12/77)

**17.64.130 Exceptions to this chapter.** The following shall be excluded from the provisions of this chapter unless otherwise provided in the resolution designating the underground utilities district:

- (a) Poles or electroliers used exclusively for street lighting.
- (b) Overhead wires (exclusive of supporting structures) crossing any portion of a district within which overhead wires have been prohibited, or connecting to buildings on the perimeter of a district, when such wires originate in an area from which poles, overhead wires and associated overhead structures are not prohibited.
- (c) Poles, overhead wires and associated overhead structures used for the transmission of electric energy at nominal voltages in excess of 34,500 volts.
- (d) Any municipal facilities or equipment installed under the supervision and to the satisfaction of the City Engineer.
- (e) Overhead wires attached to the exterior surface of a building by means of a bracket or other fixture and extending from one location on the building to another location on the same building or to an adjacent building without crossing any public street.
- (f) Antennas used by a utility for furnishing communication services. (3783-10/07)
- (g) Equipment appurtenant to underground facilities, such as surface-mounted transformers, pedestal-mounted terminal boxes and water cabinets and concealed ducts.
- (h) Temporary poles, overhead wires and associated overhead structures used or to be used in conjunction with construction projects. (2222-12/77)
- (i) Utilities with existing on-pole services as of the date of this ordinance, where the utility is not the sole user of the poles, and where the utility is replacing one single wire, cable, or line with another or adding an additional smaller wire, cable or line, provided that utility will be placed underground at the time the other utility utilizing the poles places its service underground. (3635-5/04)

**17.64.135 Lines not in use – notice to City.** At any time a line, cable or wire is taken out of service, or abandoned or is otherwise no longer used, the utility shall give notice of non-use to the City. Within six (6) months of the time upon which the line, cable or wire ceases to be used (the notice date) the utility shall remove the line, cable or wire from the poles. (3635-5/04)

**17.64.140 Community antenna television service.** Distribution lines and individual service lines for community antenna television (CATV) service shall be installed underground in all new developments within the city. All new CATV installations in said new developments shall be made in accordance with specifications adopted by City Council resolution. Said improvements within the public right-of-way, upon completion, shall be dedicated to the city of Huntington Beach. (2222-12/77)

**17.64.150 Director of Public Works--Authority of.** The Director of Public Works shall have the authority to waive the requirements of section 17.64.140 with respect to improvements within the public right-of-way when, in his or her judgment, it is determined to be in the best interest of the city so to do, based upon the following criteria: (3783-10/07)

- (a) Whenever engineering plans and specifications are not required.
- (b) Where existing improvements such as curbs and gutters, sidewalks, streets, etc. would have to be removed and replaced.
- (c) The location of existing overhead facilities.
- (d) The location of existing structures.
- (e) The condition of existing street improvements.
- (f) The amount of lineal footage of CATV facilities involved. (2222-12/77)

**17.64.160 Director of Planning--Authority of.** The Director of Planning shall have the authority to waive the on-site requirements, as set out in section 17.64.140, when, in his or her judgment, it is determined to be in the best interest of the city so to do, based upon the following criteria: (2975-12/88, 3783-10/07)

- (a) Where existing improvements would have to be removed and replaced.
- (b) The location of existing overhead facilities.
- (c) The location of existing structures.
- (d) The condition of existing improvements.
- (e) The amount of lineal footage of CATV facilities involved.
- (f) The interface of the new development to the existing development on the site.
- (g) The interface to similar facilities required off site. (2222-12/77)

**17.64.170 City Council--Appeal to.** Any landowner or developer affected may appeal the determination of the Director of Public Works or the Director of Planning to the City Council. (2222-12/77, 3783-10/07)

**17.64.180 Notice to property owners and utility companies.** Within ten (10) days after the effective date of a resolution adopted pursuant to section 17.64.110 hereof, the City Clerk shall notify all affected utilities and all person owning real property within the district created by said resolution, of the adoption thereof. Said City Clerk shall further notify such affected property owners of the necessity that if they or any person occupying such property desire to continue to receive electric, communication or similar or associated service, they or such occupant shall provide all necessary facility changes on their premises so as to receive such service from the lines of the supplying utility or utilities at a new location. (2222-12/77)

**17.64.190 Responsibility of utility companies.** If underground construction is necessary to provide utility service within a district created by any resolution adopted pursuant to section 17.64.110 hereof, the supplying utility shall furnish that portion of the conduits, conductors and associated equipment required to be furnished by it under its applicable rules, regulations and tariffs on file with the commission. (2222-12/77)

**17.64.200 Responsibility of property owners.**

- (a) Every person owning, operating, leasing, occupying or renting a building or structure within a district shall construct and provide that portion of the service connection on his property between the facilities referred to in section 17.64.190, and the termination facility on or

within said building or structure being served. If the above is not accomplished by any person within the time provided for in the resolution enacted pursuant to section 17.64.110 hereof, the City Engineer shall give notice in writing to the owner thereof as shown on the last equalized assessment roll, to provide the required underground facilities within thirty (30) days after receipt of such notice.

- (b) The notice to provide the required underground facilities may be given either by personal service or by mail. In case of service by mail on either of such persons, the notice must be deposited in the United States mail in a sealed envelope with postage prepaid, addressed to the person in possession of such premises, and the notice must be addressed to such owner's last known address as the same appears on the last equalized assessment roll, and when no address appears, to General Delivery, city of Huntington Beach. If notice is given by mail, such notice shall be deemed to have been received by the person to whom it has been sent within forty-eight (48) hours after the mailing thereof. If notice is given by mail to either the owner or occupant of such premises, the City Engineer shall, within forty-eight (48) hours after the mailing thereof, cause a copy thereof, printed on a card not less than 8" x 10" in size, to be posted in a conspicuous place on said premises.
- (c) The notice given by the City Engineer to provide the required underground facilities shall particularly specify what work is required to be done, and shall state that if said work is not completed within thirty (30) days after receipt of such notice, the City Engineer will provide such required underground facilities, in which case the cost and expense thereof will be assessed against the property benefited and become a lien upon such property.
- (d) If upon the expiration of the thirty (30) days, the said required underground facilities have not been provided, the City Engineer shall forthwith proceed to do the work, provided, however, if such premises are unoccupied and no electric or communications services are being furnished thereto, the City Engineer shall in lieu of providing the required undergrounding facilities, have the authority to order the disconnection and removal of any and all overhead service wires and associated facilities supplying utility service to said property. Upon completion of the work by the City Engineer, he shall file a written report with the City Council setting forth the fact that the required underground facilities have been provided and the cost thereof, together with a legal description of the property against which such cost is to be assessed. The Council shall thereupon fix a time and place for hearing protests against the assessment of the cost of such work upon such premises, which said time shall not be less than ten (10) days thereafter.
- (e) The City Clerk shall forthwith, upon the time for hearing such protests having been fixed, give a notice in writing to the person in possession of such premises, and a notice in writing thereof to the owner thereof, in the manner hereinabove provided for the giving of the notice to provide the required underground facilities, of the time and place that the Council will pass upon such report and will hear protests against such assessment. Such notice shall also set forth the amount of the proposed assessment.
- (f) Upon the date and hour set for the hearing of protests, the Council shall hear and consider the report and all protests, if there be any, and then proceed to affirm, modify or reject the assessment.
- (g) If any assessment is not paid within fifteen (15) days after its confirmation by the Council, the amount of the assessment shall become a lien upon the property against which the assessment is made by the City Engineer, and the City Engineer is directed to turn over to the assessor and tax collector a notice of lien on each of said properties on which the assessment has not been paid, and said assessor and tax collector shall add the amount of said assessment to the next regular bill for taxes levied against the premises upon which said assessment was not paid. Said assessment shall be due and payable at the same time as said property taxes are due and payable, and if not paid when due and payable, shall bear interest at the rate of 6 percent per annum. (2222-12/77)

**17.64.210 Responsibility of city.** City shall remove at its own expense all city-owned equipment from all poles required to be removed hereunder in ample time to enable the owner or user of such poles to remove the same within the time specified in the resolution enacted pursuant to section 17.64.110 hereof. (2222-12/77)

**17.64.220 Extension of time.** In the event that any act required by this chapter or by a resolution adopted pursuant to section 17.64.110 hereof cannot be performed within the time provided because of shortage of materials, war, restraint by public authorities, strikes, labor disturbances, civil disobedience, or any other circumstances beyond the control of the actor, then the time within which such act will be accomplished shall be extended for a period equivalent to the time of such limitation. (2222-12/77)

# **EXHIBIT 3**

## Chapter 230 Site Standards

(3249-6/95, 3301-11/95, 3334-6/97, 3410-3/99, 3455-5/00, 3482-12/00, 3494-5/01, 3525-2/02, 3568-9/02, EMG 3594-11/02, EMG 3596-12/02, Resolution No. 2002-129 -12/02, Resolution No. 2004-80-9/04, 3687-12/04, 3710-6/05, 3724-02/06, 3730-03/06, Interim Urgency Ordinance 3748-8/06, Resolution No. 2006-62-9/06, 3764-3/07, 3779-10/07, 3827-4/09, 3829-6/09, 3835-7/09, Resolution No. 2009-36 effective 9/09 per California Coastal Commission certification, 3861-2/10, 3879-6/10, 3903-12/10 must be certified by the California Coastal Commission)

Note: Ordinance No. 3827 (expired 4/15/10) and Ordinance No. 3879, effective from 5/3/10 to 5/3/11, temporarily defer the payment of certain Development Impact Fees.

### Sections:

#### 230.02 Applicability

#### Residential Districts

- 230.04 Front and Street Side Yards in Developed Areas
- 230.06 (Deleted) (3724-02/06)
- 230.08 Accessory Structures
- 230.10 Accessory Dwelling Units
- 230.12 Home Occupation in R Districts
- 230.14 Affordable Housing Density Bonus
- 230.16 Manufactured Homes
- 230.18 Subdivision Sales Offices and Model Homes
- 230.20 Payment of Park Fee
- 230.22 Residential Infill Lot Developments
- 230.24 Small Lot Development Standards
- 230.26 Affordable Housing
- 230.28 (Reserved)
- 230.30 (Reserved)

#### Non-Residential Districts

- 230.32 Service Stations
- 230.34 Housing of Goods
- 230.36 Transportation Demand Management
- 230.38 Game Centers
- 230.40 Helicopter Takeoff and Landing Areas
- 230.42 Bed and Breakfast Inns
- 230.44 Recycling Operations
- 230.46 Single Room Occupancy
- 230.48 Equestrian Centers
- 230.50 Indoor Swap Meets/Flea Markets
- 230.52 Emergency Shelters
- 230.54 (Reserved)
- 230.56 (Reserved)
- 230.58 (Reserved)
- 230.60 (Reserved)

#### All Districts

#### 230.62 Building Site Required

- 230.64 Development on Substandard Lots
- 230.66 Development on Lots Divided by District Boundaries
- 230.68 Building Projections into Yards and Courts
- 230.70 Measurement of Height
- 230.72 Exceptions to Height Limits
- 230.74 Outdoor Facilities
- 230.76 Screening of Mechanical Equipment
- 230.78 Refuse Storage Areas
- 230.80 Antennae
- 230.82 Performance Standards for All Uses
- 230.84 Dedication and Improvements
- 230.86 Seasonal Sales
- 230.88 Fencing and Yards
- 230.90 Contractor Storage Yards/Mulching Operations
- 230.92 Landfill Disposal Sites
- 230.94 Carts and Kiosks
- 230.96 Wireless Communication Facilities

**230.02 Applicability**

This chapter contains supplemental land use and development standards, other than parking and loading, landscaping and sign provisions, that are applicable to sites in all or several districts. These standards shall be applied as specified in Title 21: Base Districts, Title 22: Overlay Districts, and as presented in this chapter.

**Residential Districts**

**230.04 Front and Street Side Yards in Developed Areas**

Where lots comprising 60 percent of the frontage on a blockface in an R district are improved with buildings that do not conform to the front yard requirements, the Planning Commission may adopt by resolution a formula or procedure to modify the front and street side yard setback requirements. The Planning Commission also may modify the required yard depths where lot dimensions and topography justify deviations. Blocks with such special setback requirements shall be delineated on the zoning map. Within the coastal zone any such setback modifications adopted by the Planning Commission shall be consistent with the Local Coastal Program. (3334-6/97)

**230.08 Accessory Structures**

For purposes of applying these provisions, accessory structures are inclusive of minor accessory structures, except where separate provisions are provided in this section. (3710-6/05)

A. Timing. Accessory structures shall not be established or constructed prior to the start of construction of a principal structure on a site, except that construction trailers may be placed on a site at the time site clearance and grading begins and may remain on the site only for the duration of construction.

Location. Except as provided in this section, accessory structures shall not occupy a required front, side or street side yard or court, or project beyond the front building line of the principal structure on a site. An accessory structure shall be setback 5 feet from the rear property line except no setback is required for accessory structures, excluding garages and carports, which abut an alley. (3710-6/05)

5. The prices of items sold from a cart or kiosk must appear in a prominent, visible location in legible characters. The price list size and location shall be reviewed and approved by the Planning Director. (3249-6/95; 3525-2/02)
  6. The sale of alcoholic beverages shall be prohibited. (3249-6/95)
  7. The number of employees at a cart or kiosk shall be limited to a maximum of two (2) persons at any one time. (3249-6/95)
  8. Fire extinguishers may be required at the discretion of the Fire Department. (3249-6/95)
  9. All cart and kiosk uses shall be self contained for water, waste, and power to operate. (3249-6/95)
  10. A cart or kiosk operator shall provide a method approved by the Planning Director for disposal of business related wastes. (3249-6/95; 3525-2/02)
- D. **Parking.** Additional parking may be required for cart or kiosk uses by the Planning Director. (3249-6/95, 3525-2/02)
- E. **Review; Revocation.** The Planning Department shall conduct a review of the cart or kiosk operation at the end of the first six (6) month period of operation. At that time, if there has been a violation of the terms and conditions of this section or the approval, the approval shall be considered for revocation. (3249-6/95; 3525-2/02)
- F. **Neighborhood Notification.** Pursuant to Chapter 241. (3525-2/02, 3710-6/05)

### **230.96 Wireless Communication Facilities**

- A. **Purpose.** The purpose of this Section is to encourage and facilitate wireless communications throughout the City, while preventing visual clutter by locating wireless communication facilities outside of residential zones and where they are invisible to pedestrians, and co-located with other facilities. All wireless communication facilities shall comply with these regulations with regard to their location, placement, construction, modification and design to protect the public safety, general welfare, and quality of life in the City of Huntington Beach. (3779-10/07)
- B. **Definitions.** For the purpose of this section, the following definitions for the following terms shall apply: (3568-9/02)
1. **Accessory Structure.** Any structure or equipment that is to be located ancillary to an antenna or antennas in the establishment and operation of a wireless communication facility. (3568-9/02)
  2. **Co-Location or Co-Located.** The location of multiple antennas which are either owned or operated by more than one service provider at a single location and mounted to a common supporting structure, wall or building. (3568-9/02)
  3. **Completely Stealth Facility.** Any stealth facility that has been designed to completely screen all aspects of the facility including appurtenances and equipment from public view. Examples of completely stealth facilities may include, but are not limited to architecturally screened roof-mounted antennas, façade mounted antennas treated as architectural elements to blend with the existing building, flagpoles, church steeples, fire towers, and light standards. (3568-9/02, 3779-10/07)

4. Ground Mounted Facility. Any wireless antenna that is affixed to a pole, tower or other freestanding structure that is specifically constructed for the purpose of supporting an antenna. (3568-9/02, 3779-10/07)
5. Microwave Communication. The transmission or reception of radio communication at frequencies of a microwave signal (generally, in the 3 GHz to 300 GHz frequency spectrum). (3568-9/02)
6. Pre-existing Wireless Facility. Any wireless communication facility for which a building permit or conditional use permit has been properly issued prior to the effective date of this ordinance, including permitted facilities that have not yet been constructed so long as such approval is current and not expired. (3568-9/02)
7. Roof Mounted. Any wireless antenna directly attached or affixed to the roof of an existing building, water tank, tower or structure other than a telecommunications tower. (3568-9/02)
8. Stealth Facility or Techniques. Any wireless communication facility, which is designed to blend into the surrounding environment, typically, one that is architecturally integrated into a building or other concealing structure. See also definition of completely stealth facility. (3568-9/02)
9. Utility Mounted. Any wireless antenna mounted to an existing above-ground structure specifically designed and originally installed to support utilities such as but not limited to electrical power lines, cable television lines, telephone lines, non-commercial wireless service antennas, radio antennas, street lighting but not traffic signals, recreational facility lighting, or any other utility which meets the purpose and intent of this definition. (3568-9/02, 3779-10/07)
10. Wall Mounted. Any wireless antenna mounted on any vertical or nearly vertical surface of a building or other existing structure that is not specifically constructed for the purpose of supporting an antenna (including the exterior walls of a building, an existing parapet, the side of a water tank, the face of a church steeple, or the side of a freestanding sign) such that the highest point of the antenna structure is at an elevation equal to or lower than the highest point of the surface on which it is mounted. (3568-9/02, 3779-10/07)
11. Wireless Communication Facility or Facility. An antenna structure and any appurtenant facilities or equipment that transmits electronic waves or is used for the transmission or receipt of signals that are used in connection with the provision of wireless communication service, including, but not limited to digital, cellular and radio service. (3568-9/02, 3779-10/07)

C. Applicability.

1. All wireless communication facilities which are erected, located, placed, constructed or modified within the City of Huntington Beach shall comply with these regulations provided that: (3568-9/02, 3779-10/07)
  - a. All facilities, for which permits were issued prior to the effective date of this section, shall be exempt from these regulations and guidelines. (3568-9/02, 3779-10/07)
  - b. All facilities for which Building and Safety issued building permits prior to the effective date of section 230.96 shall be exempt from these regulations and guidelines, unless and until such time as subparagraph (2) of this section applies. (3568-9/02)

- c. Any facility, which is subject to a previously approved and valid conditional use permit, may be modified within the scope of the applicable permit without complying with these regulations and guidelines. Modifications outside the scope of the valid conditional use permit will require submittal of a Wireless Permit application. (3568-9/02, 3779-10/07)
2. The following uses shall be exempt from the provisions of section 230.96 until pertinent federal regulations are amended or eliminated. See Section 230.80 (Antennae) for additional requirements. (3568-9/02, 3779-10/07)
- a. Any antenna structure that is one meter (39.37 inches) or less in diameter and is designed to receive direct broadcast satellite service, including direct-to-home satellite service for television purposes, as defined by Section 207 of the Telecommunication Act of 1996, Title 47 of the Code of Federal Regulations, and any interpretive decisions thereof issued by the Federal Communications Commission (FCC). (3568-9/02)
  - b. Any antenna structure that is two meters (78.74 inches) or less in diameter located in commercial or industrial zones and is designed to transmit or receive radio communication by satellite antenna. (3568-9/02)
  - c. Any antenna structure that is one meter (39.37 inches) or less in diameter or diagonal measurement and is designed to receive Multipoint Distribution Service, provided that no part of the antenna structure extends more than five (5) feet above the principle building on the same lot. (3568-9/02)
  - d. Any antenna structure that is designed to receive radio broadcast transmission. (3568-9/02)
  - e. Any antenna structure used by authorized amateur radio stations licensed by the FCC. (3568-9/02)
- D. Wireless Permit Required. No wireless communication facility shall be installed anywhere in the City without submission of a Wireless Permit Application that demonstrates that the antenna is located in the least obtrusive location feasible so as to eliminate any gap in service and also includes the following information: (3779-10/07)
- 1. Demonstrate existing gaps in coverage, and the radius of area from which an antenna may be located to eliminate the gap in coverage. (3779-10/07)
  - 2. Compatibility with the surrounding environment or that the facilities are architecturally integrated into a structure. (3779-10/07)
  - 3. Screening or camouflaging by existing or proposed topography, vegetation, buildings or other structures as measured from beyond the boundaries of the site at eye level (six feet). (3779-10/07)
  - 4. Massing and location of the proposed facility are consistent with surrounding structures and zoning districts. (3779-10/07)
  - 5. No portion of a wireless communication facility shall project over property lines. (3779-10/07)
  - 6. Interference: To eliminate interference, the following provisions shall be required for all wireless communication facilities regardless of size: (3779-10/07)

- a. Prior to issuance of a building permit, the applicant shall submit the following information to the Police Department for review: (3779-10/07)
  - i. All transmit and receive frequencies; (3779-10/07)
  - ii. Effective Radiated Power (ERP); (3779-10/07)
  - iii. Antenna height above ground, and (3779-10/07)
  - iv. Antenna pattern, both horizontal and vertical (E Plane and H Plane). (3779-10/07)
- b. At all times, other than during the 24-hour cure period, the applicant shall comply with all FCC standards and regulations regarding interference and the assignment of the use of the radio frequency spectrum. The applicant shall not prevent the City of Huntington Beach or the countywide system from having adequate spectrum capacity on the City's 800 MHz voice and data radio frequency systems. The applicant shall cease operation of any facility causing interference with the City's facilities immediately upon the expiration of the 24-hour cure period until the cause of the interference is eliminated. (3779-10/07)
- c. Before activating its facility, the applicant shall submit to the Police and Fire Departments a post-installation test to confirm that the facility does not interfere with the City of Huntington Beach Public Safety radio equipment. The Communications Division of the Orange County Sheriff's Department or Division-approved contractor at the expense of the applicant shall conduct this test. This post-installation testing process shall be repeated for every proposed frequency addition and/or change to confirm the intent of the "frequency planning" process has been met. (3779-10/07)
- d. The applicant shall provide to the Planning Department a single point of contact (including name and telephone number) in its Engineering and Maintenance Departments to whom all interference problems may be reported to insure continuity on all interference issues. The contact person shall resolve all interference complaints within 24 hours of being notified. (3779-10/07)
- e. The applicant shall insure that lessee or other user(s) shall comply with the terms and conditions of this permit, and shall be responsible for the failure of any lessee or other users under the control of the applicant to comply. (3779-10/07)

E. Additional Permit Required.

1. Administrative approval by the Director may be granted for proposed wireless communication facilities (including but not limited to ground mounted, co-located, wall, roof, or utility mounted) that are: (3779-10/07)
  - a. Co-located with approved facilities at existing heights or that comply with the base district height limit for modified facilities, and compatible with surrounding buildings and land uses by incorporating stealth techniques; or (3779-10/07)
  - b. Completely stealth facilities that comply with the base district height limit; or (3779-10/07)
  - c. Facilities in non-residential districts that are in compliance with the maximum building height permitted within the zoning district; and (3779-10/07)
    - i. Screened from view and not visible from beyond the boundaries of the site at eye level (six feet); or (3779-10/07)
    - ii. Substantially integrated with the architecture of the existing building or structure to which it is to be mounted; or (3779-10/07)

- iii. Designed to be architecturally compatible with surrounding buildings and land uses by incorporating stealth techniques. (3779-10/07)
  - 2. Following submission of a Wireless Permit Application, a Conditional Use Permit approval by the Zoning Administrator shall be required for all proposed wireless communication facilities (including but not limited to ground mounted, co-located, wall, roof or utility mounted) that are: (3779-10/07)
    - a. Exceeding the maximum building height permitted within the zoning district; or
    - b. Visible from beyond the boundaries of the site at eye level (six feet); or
    - c. Not substantially integrated with the architecture of the existing building or structure to which it is to be mounted; or
    - d. Not designed to be architecturally compatible with surrounding buildings and land uses.
    - e. As a condition of the Conditional Use Permit, the Zoning Administrator shall minimize significant adverse impacts to public visual resources by incorporating one or more of the following into project design and construction: (3779-10/07)
      - i. Stealth installations; (3779-10/07)
      - ii. Co-location and locating facilities within existing building envelopes; (3779-10/07)
      - iii. Minimizing visual prominence through colorization or landscaping; (3779-10/07)
      - iv. Removal or replacement of facilities that become obsolete. (3779-10/07)
  - 3. Design review shall be required for any wireless communication facilities located in redevelopment areas, on public right-of-ways, in OS-PR and PS zones, in areas subject to specific plans, on or within 300 feet of a residential district, and in areas designated by the City Council. Design review is not required for wireless communication facilities that comply with subsection 1.

F. Facility Standards: The following standards apply to all wireless communication facilities: (3779-10/07)

1. Aesthetics:

- a. Facility: All screening used in conjunction with a wall or roof mounted facility shall be compatible with the architecture of the building or other structure to which it is mounted, including color, texture and materials. All ground mounted facilities shall be designed to blend into the surrounding environment, or architecturally integrated into a building or other concealing structure. (3568-9/02)
- b. Equipment/Accessory Structures: All equipment associated with the operation of the facility, including but not limited to transmission cables, shall be screened in a manner that complies with the development standards of the zoning district in which such equipment is located. Screening materials and support structures housing equipment shall be architecturally compatible with surrounding structures by duplicating materials and design in a manner as practical as possible. If chain link is used, then it must be vinyl coated and not include barbed wire. (3568-9/02)
- c. General Provisions: All Wireless Communication Facilities shall comply with the Huntington Beach Urban Design Guidelines. (3568-9/02)

2. Building Codes: To ensure the structural integrity of wireless communication facilities, the owners of a facility shall ensure that it is maintained in compliance with standards contained in applicable state or local building codes and the applicable standards for facilities that are published by the Electronic Industries Association, as amended from time to time. (3568-9/02)
3. Conditions of Approval: Acceptance of conditions by the applicant and property owner shall be ensured by recordation of the conditions on the property title. (3568-9/02)
4. Federal Requirements: All Wireless Communication Facilities must meet or exceed current standards and regulations of the FCC, and any other agency of the state or federal government with the authority to regulate wireless communication facilities. (3568-9/02)
5. Lighting: All outside lighting shall be directed to prevent “spillage” onto adjacent properties, unless required by the FAA or other applicable authority, and shall be shown on the site plan and elevations. (3568-9/02, 3779-10/07)
6. Maintenance: All facilities and appurtenant equipment including landscaping shall be maintained to remain consistent with the original appearance of the facility. Ground mounted facilities shall be covered with anti-graffiti coating. (3568-9/02, 3779-10/07)
7. Monitoring: For all wireless communication facilities, the applicant shall provide a copy of the lease agreement between the property owner and the applicant prior to the issuance of a building permit. (3568-9/02, 3779-10/07)
8. Signs: The facility shall not bear any signs or advertising devices other than owner identification, certification, warning, or other required seals of signage. (3568-9/02, 3779-10/07)
9. Facilities on Public Property: Any wireless communication facility to be placed over, within, on, or beneath City property shall obtain a lease or franchise from the City prior to applying for a Wireless Permit and an administrative or conditional use permit. (3779-10/07)
10. Landscaping: Landscape planting, irrigation and hardscape improvements may be imposed depending on the location, the projected vehicular traffic, the impact on existing facilities and landscape areas, and the visibility of the proposed facility. Submittal of complete landscape and architectural plans for review and approval by the Directors of Public Works and Planning may be required. (3779-10/07)
11. Utility Agreement: If the proposed facility will require electrical power or any other utility services to the site, the applicant will be required to furnish the City’s Real Estate Services Manager either a drafted utility franchise agreement between the City of Huntington Beach and the applicant to place those lines in the public right-of-way, or a written statement from the utility company that will be supplying the power or other services, that they accept all responsibility for those lines in the public right-of-way. (3779-10/07)
12. Facilities in the Public Right-of-Way. Any wireless communication facility to be placed over, within, on or beneath the public right-of-way shall comply with the following standards: (3568-9/02, 3779-10/07)
  - a. Any wireless communication facilities to be constructed on or beneath the public right-of-way must obtain an encroachment permit from the City and the applicant must provide documentation demonstrating that the applicant is a state-franchised telephone corporation exempt from local franchise requirements. (3568-9/02, 3779-10/07)

- b. All equipment associated with the operation of a facility, including but not limited to cabinets, transmission cables but excepting antennas, shall be placed underground in those portions of the street, sidewalks and public rights-of-way where cable television, telephone or electric lines are underground. At no time shall equipment be placed underground without appropriate conduit. (3568-9/02, 3779-10/07)
- c. The City Engineer shall approve the location and method of construction of all facilities located within public rights-of-way and the installation of facilities within the public rights-of-way must comply with Title 12 of the Huntington Beach Municipal Code, as the same may be amended from time to time. (3568-9/02, 3779-10/07)
- d. All wireless communication facilities shall be subject to applicable City permit and inspection fees, including, but not limited to, those pertaining to encroachment permits, administrative or conditional use permits, and all applicable fees. (3568-9/02, 3779-10/07)
- e. Any wireless communication facility installed, used or maintained within the public rights-of-way shall be removed or relocated when made necessary by any "project." For purposes of this section, project shall mean any lawful change of grade, alignment or width of any public right-of-way, including but not limited to, the construction of any subway or viaduct that the City may initiate either through itself, or any redevelopment agency, community facility district, assessment district, area of benefit, reimbursement agreement or generally applicable impact fee program. (3568-9/02, 3779-10/07)
- f. If the facility is attached to a utility pole, the facility shall be removed, at no cost to the City, if the utility pole is removed pursuant to an undergrounding project. (3568-9/02, 3779-10/07)
- g. The service provider shall enter into a franchise agreement with the City. As of March 17, 2007, the California Supreme Court, in the case entitled Spring Telephony PCS v. County of San Diego, will determine whether California Public Utilities Code § 7901 grants a state-wide franchise to use the public rights-of-way for the purpose of installation of wireless communications facilities. Pending resolution of this legal question, any applicant seeking to use the public right-of-way must enter into a City franchise to install wireless communications facilities. The franchise shall provide that the franchise fee payments shall be refunded to the applicant and the franchise become null and void if and when the California Supreme Court establishes that the provider has a state-wide franchise to install a wireless communications facility in the public right-of-way. (3568-9/02, 3779-10/07)

13. Facility Removal.

- a. Wireless communication facilities affecting the public view and/or located in areas designated Water Recreation, Conservation, Parks and Shoreline, and Public Right of Ways shall be removed in its entirety within six (6) months of termination of use and the site restored to its natural state. (3779-10/07)
- b. Cessation of Operation: Within thirty (30) calendar days of cessation of operations of any wireless communication facility approved under this section, the operator shall notify the Planning Department in writing. The facility shall be deemed abandoned pursuant to the following sections unless: (3568-9/02, 3779-10/07)
  - 1. The City has determined that the operator has resumed operation of the wireless communication facility within six (6) months of the notice; or (3568-9/02, 3779-10/07)

2. The City has received written notification of a transfer of wireless communication operators. (3568-9/02, 3779-10/07)

- c. Abandonment: A facility that is inoperative or unused for a period of six (6) continuous months shall be deemed abandoned. Written notice of the City's determination of abandonment shall be provided to the operator of the facility and the owner(s) of the premises upon which the facility is located. Such notice may be delivered in person, or mailed to the address(es) stated on the facility permit application, and shall be deemed abandoned at the time delivered or placed in the mail. (3568-9/02, 3779-10/07)
- d. Removal of Abandoned Facility: The operator of the facility and the owner(s) of the property on which it is located, shall within thirty (30) calendar days after notice of abandonment is given either (1) remove the facility in its entirety and restore the premises, or (2) provide the Planning Department with written objection to the City's determination of abandonment. (3779-10/07)

Any such objection shall include evidence that the facility was in use during the relevant six- (6) month period and that it is presently operational. The Director shall review all evidence, determine whether or not the facility was properly deemed abandoned, and provide the operator notice of its determination. (3568-9/02, 3779-10/07)

- e. Removal by City: At any time after thirty-one (31) calendar days following the notice of abandonment, or immediately following a notice of determination by the Director, if applicable, the City may remove the abandoned facility and/or repair any and all damage to the premises as necessary to be in compliance with applicable codes. The City may, but shall not be required to, store the removed facility (or any part thereof). The owner of the premises upon which the abandoned facility was located, and all prior operators of the facility, shall be jointly liable for the entire cost of such removal, repair, restoration and/or storage, and shall remit payment to the City promptly after demand thereof is made. The City may, in lieu of storing the removed facility, convert it to the City's use, sell it, or dispose of it in any manner deemed appropriate by the City. (3568-9/02, 3779-10/07)