

ORIGINAL

SAN DIEGO

Right-of-Way Use Agreement

THIS RIGHT-OF-WAY USE AGREEMENT (this "Use Agreement") is dated as of May 24, 2004 (the "Effective Date"), and entered into by and between the CITY OF SAN DIEGO, a California municipal corporation (the "City"), and NEXTG NETWORKS OF CALIFORNIA, INC., a Delaware corporation ("NextG").

Recitals

A. WHEREAS, NextG owns, maintains, operates and controls, in accordance with regulations promulgated by the Federal Communications Commission and the California Public Utilities Commission, a fiber-based telecommunications Network or Networks (as defined in § 1.9 below) serving NextG's wireless carrier customers and utilizing microcellular optical repeater Equipment (as defined in § 1.3 below) certified by the Federal Communications Commission; and

B. WHEREAS, the Public Rights-of-Way within the City are used by and useful to private enterprises engaged in providing telecommunications services to citizens, institutions, and businesses located in the City; and

C. WHEREAS, the right to occupy portions of the Public Rights-of-Way upon City owned infrastructure for limited times, for the business of providing telecommunications services, is a valuable economic privilege, the economic benefit of which should be shared with all the taxpayers of the City; and

D. WHEREAS, beneficial competition between providers of communications services can be furthered by the City's provision of grants of location and rights to use the Public Rights-of-Way on non-discriminatory and competitively neutral terms and conditions; and

E. WHEREAS, for purpose of operating the Network, NextG wishes to locate, place, attach, install, operate, control, and maintain Equipment in the Public Rights-of-Way (as defined below in § 1.11 below), on facilities owned by the City, as well as on facilities owned by third parties therein; and

F. WHEREAS, NextG is willing to compensate the City in exchange for a grant of location and the right to use and physically occupy portions of the Public Rights-of-Way, on Municipal Facilities owned by the City or both.

Agreement

Now, therefore, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree to the following covenants, terms, and conditions:

1. DEFINITIONS. The following definitions shall apply generally to the provisions of this Use Agreement:

1.1 City. "City" means the City of San Diego.

DOCUMENT NO. 1043281

FILED MAY 24 2004

OFFICE OF THE CITY CLERK

SAN DIEGO, CALIFORNIA

Right-of-Way Use Agreement
City of San Diego - NextG Networks of California, Inc.

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EXHIBIT 1

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1.2 Decorative Streetlight Pole. "Decorative Streetlight Pole" shall mean any streetlight pole that incorporates artistic design elements not typically found in standard steel or aluminum streetlight poles and does not have a mast arm for electroliner support. Decorative Streetlight Poles may not be used for the Network without prior written approval by City. The term Decorative Streetlight Pole includes any historically or architecturally significant or designated light poles owned by the City located on Public Rights-of-Way.

1.3 Equipment. "Equipment" means the optical repeaters, DWDM and CWDM multiplexers, antennae, fiber optic cables, wires, and related equipment, whether referred to singly or collectively, to be installed and operated by NextG hereunder. All Equipment and installation configurations have been pre-approved by the City of San Diego and are shown in the drawings and photographs attached hereto as Exhibit A and incorporated herein by reference. Any Equipment and installation configuration not contained within Exhibit A must receive written City approval before it may be used on any City Municipal Facility or placed on or in the Public Rights-of-Way.

1.4 Fee. "Fee" means any assessment, license, charge, fee, imposition, tax, or levy of general application to entities doing business in the City lawfully imposed by any governmental body (but excluding any utility users' tax, franchise fees, communications tax, or similar tax or fee).

1.5 Gross Revenue Fee. "Gross Revenue Fee" shall mean and include any and all income and other consideration collected, received, or in any manner gained or derived by NextG from or in connection with, the provision of Services, either directly by NextG or indirectly through a reseller, if any, to customers of such services within the City of San Diego, including any imputed revenue derived from commercial trades and barter equivalent to the full retail value of goods and services provided by NextG. Gross Revenue shall not include: (a) sales, ad valorem, or other types of "add on" taxes, levies, or fees calculated by gross receipts or gross revenues which might have to be paid to or collected for federal, state, or local government (exclusive of the Municipal Facilities Annual Fee paid to the City provided herein); (b) retail discounts or other promotions; (c) non-collectable amounts due NextG or its customers; (d) refunds or rebates; and (e) non-operating revenues such as interest income or gain from the sale of an asset.

1.6 Installation Date. "Installation Date" shall mean the date that the first Equipment is installed by NextG pursuant to this Use Agreement.

1.7 Laws. "Laws" means any and all statutes, constitutions, ordinances, resolutions, regulations, judicial decisions, rules, tariffs, administrative orders, certificates, orders, or other requirements of the City or other governmental agency having joint or several jurisdiction over the parties to this Use Agreement.

1.8 Municipal Facilities. "Municipal Facilities" means City-owned Streetlight Poles, Decorative Streetlight Poles, lighting fixtures, or electroliners located within the Public Way and may refer to such facilities in the singular or plural, as appropriate to the context in which used.

1.9 Network. "Network" or collectively "Networks" means one or more of the neutral-host, protocol-agnostic, fiber-based optical repeater networks operated by NextG to serve its wireless carrier customers in the City.

1.10 NextG. "NextG" means NextG Networks of California, Inc., a corporation duly organized and existing under the laws of the State of Delaware, and its lawful successors, assigns, and transferees.

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1.11 *Public Way, or Public Rights-of-Way.* "Public Way" or "Public Rights-of-Way" means the space in, upon, above, along, across, and over the public streets, roads, lanes, courts, ways, alleys, boulevards, and places, including all public utility easements and public service easements as the same now or may hereafter exist, that are under the jurisdiction of the City. This term shall not include any other property owned by the City or any property owned by any person or entity (e.g. county, state, or federal rights-of-way) other than the City, except as provided by applicable Laws or pursuant to an agreement between the City and any such person or entity.

1.12 *PUC.* "PUC" means the California Public Utilities Commission.

1.13 *Services.* "Services" means the RF transport telecommunications services provided through the Network by NextG to its wireless carrier customers pursuant to one or more tariffs filed with and regulated by the PUC.

1.14 *Streetlight Pole.* "Streetlight Pole" shall mean any standard-design concrete, fiberglass, or metal pole that has a mast arm for electroliner support and is used for streetlighting purposes.

2 **TERM.** This Use Agreement shall be effective as of the Effective Date and shall extend for a term of ten (10) years, unless it is earlier terminated by either party in accordance with the provisions herein. NextG shall have the option to renew the term of this Use Agreement one (1) additional term of five (5) years on the same terms and conditions as set forth herein by delivering written notice of renewal to the City at least ninety (90) days prior to the expiration of the then current term.

3 **SCOPE OF USE AGREEMENT.** Any and all rights expressly granted to NextG under this Use Agreement, which shall be exercised at NextG's sole cost and expense, shall be subject to the prior and continuing right of the City under applicable Laws to use any and all parts of the Public Way exclusively or concurrently with any other person or entity and shall be further subject to all deeds, easements, dedications, conditions, covenants, restrictions, encumbrances, and claims of title of record which may affect the Public Way. Nothing in this Use Agreement shall be deemed to grant, convey, create, or vest in NextG a real property interest in land, including any fee, leasehold interest, or easement.

3.1 **Attachment to Municipal Facilities.** The City hereby authorizes and permits NextG to enter upon the Public Way and to locate, place, attach, install, operate, maintain, control, remove, reattach, reinstall, relocate, and replace Equipment in or on identified Municipal Facilities for the purposes of operating the Network and providing Services. In addition, the City may deliver low-voltage or 120-230 VAC nominal to or at any City owned Streetlight Pole on which NextG may locate its Equipment. City shall not be responsible to provide any specified voltage or wattage of electricity that is compatible with any NextG Equipment. Subject to the provisions of § 4.3 below, NextG may have the right to draw compatible electricity for the operation of the Equipment from the power source associated with the Municipal Facility. NextG shall not connect its Equipment to nor draw any power from any traffic signal device. A denial of an application for the attachment of Equipment to Municipal Facilities shall not be based upon the size, quantity, shape, color, weight, configuration, or other physical properties of NextG's Equipment if the Equipment proposed for such application conforms to one of the pre-approved configurations and the Equipment specifications set forth in Exhibit A.

3.2 **Attachment to Third-Party Property.** Subject to obtaining the written permission of the owner(s) of the affected property, the City hereby authorizes and permits NextG to enter upon the Public Rights-of-Way and to attach, install, operate, maintain, remove, reattach, reinstall, relocate, and replace such number of Equipment in or on poles or other structures owned by public utility companies or other property owners located within the Public Way as may be

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permitted by the public utility company or property owner, as the case may be. NextG shall furnish to the City documentation of such permission from the individual utility or property owner responsible. A denial of an application for the attachment of Equipment to third-party-owned poles or structures in the Public Way shall not be based upon the size, quantity, shape, color, weight, configuration, or other physical properties of NextG's Equipment if the Equipment proposed for such application conforms to one of the pre-approved configurations and the Equipment specifications set forth in Exhibit A.

3.3 Preference for Municipal Facilities. In any situation where NextG has a choice of attaching its Equipment to either Municipal Facilities or third-party-owned property in the Public Way, NextG agrees to attach to the Municipal Facilities, provided that (i) such Municipal Facilities are at least equally suitable functionally for the operation of the Network and (ii) the rental fee and installation costs associated with such attachment over the length of the term are equal to or less than the fee or cost to NextG of attaching to the alternative third-party-owned property.

3.4 No Interference. NextG in the performance and exercise of its rights and obligations under this Use Agreement shall not interfere in any manner with the existence and operation of any and all public and private rights of way, sanitary sewers, water mains, storm drains, gas mains, poles, aerial and underground electrical and telephone wires, electroliners, cable television, location monitoring services, public safety and other telecommunications, utility, or municipal property, without the express written approval of the owner or owners of the affected property or properties, except as permitted by applicable Laws or this Use Agreement.

3.5 Compliance with Laws. NextG shall comply with all applicable Laws in the exercise and performance of its rights and obligations under this Use Agreement.

3.6 No Authorization to Provide Other Services. NextG represents, warrants and covenants that its Equipment installed pursuant to this Use Agreement will be utilized solely for rendering the Service identified herein and NextG is not authorized to and shall not use its Equipment to offer or provide any other services not specified herein. Failure to abide by this will constitute a material breach of this Use Agreement and the City, after providing NextG with written notice may levy fines in an amount not to exceed one thousand dollars (\$1000.00) per day until the breach is cured.

3.7 Nonexclusive Use Rights. Notwithstanding any other provision of this Use Agreement, any and all rights expressly or impliedly granted to NextG under this Use Agreement shall be non-exclusive, and shall be subject and subordinate to (1) the continuing right of the City to use, and to allow any other person or persons to use, any and all parts of the Public Rights-of-Way or Municipal Facilities, exclusively or concurrently with any other person or persons, and (2) the public easement for streets and any and all other deeds, easements, dedications, conditions, covenants, restrictions, encumbrances and claims of title (collectively "Encumbrances") which may affect the Public Rights-of-Way or Municipal Facilities now or at any time during the term of this Use Agreement, including, without limitation any Encumbrances granted, created or allowed by the City at any time.

4 COMPENSATION; UTILITY CHARGES. NextG shall be solely responsible for the payment of all lawful Fees in connection with NextG's performance under this Use Agreement, including those set forth below.

4.1 Annual Fee. In order to compensate City for NextG's entry upon and deployment within the Public Way and as compensation for the use of Municipal Facilities, NextG shall pay to the City

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an Municipal Facilities annual fee (the "Municipal Facilities Annual Fee") in the amount of Five Hundred Dollars (\$500.00) for the use of each Municipal Facility, if any, upon which Equipment has been installed pursuant to this Use Agreement. The aggregate Municipal Facilities Annual Fee with respect to each year of the term shall be an amount equal to the number of Equipment installed on Municipal Facilities during the preceding twelve (12) months multiplied by the Annual Fee, prorated as appropriate, and shall be due and payable not later than forty-five (45) days after each anniversary of the Effective Date. City represents and covenants that City owns all Municipal Facilities for the use of which it is collecting from NextG the Annual Fee pursuant to this § 4.1. In addition to the Municipal Facilities Annual Fee and in exchange for the use of the City's Public Rights-of-Way ("Right-of-Way Fee"), NextG agrees to pay to the City on a monthly basis, in lawful money of the United States, five percent (5%) of NextG's Gross Revenues received by NextG's from the provision of services or the sale of services within the City of San Diego market. Right-of-Way Fees payments made to the City by NextG pursuant to this Section shall not include City administrative fees such as inspection fees, business taxes, permit fees, other regulatory charges and the Municipal Facilities Annual Fee pursuant to this Agreement.

4.1.1 **CPI Adjustment.** Effective commencing on the fifth (5th) anniversary of the Effective Date and continuing on each fifth (5th) anniversary thereafter during the term, the Annual Fee with respect to the ensuing five-year period shall be adjusted by a percentage amount equal to the percentage change in the U.S. Department of Labor, Bureau of Labor Statistics Consumer Price Index (All Items, All Consumers, 1982-1984=100) which occurred during the previous five-year period for the San Diego Consolidated Metropolitan Statistical Area.

4.1.2 **Accounting Matters.** NextG shall keep accurate books of account at its principal office in Milpitas or such other location of its choosing for the purpose of determining the amounts due to the City under § 4.1 above. The City may inspect NextG's books of account relative to the City at any time during regular business hours on thirty (30) days' prior written notice and may audit the books from time to time at the City's sole expense, but in each case only to the extent necessary to confirm the accuracy of payments due under § 4.1 above. The City agrees to hold in confidence any non-public information it learns from NextG to the fullest extent permitted by Law.

4.2 **Services to City.** NextG agrees that at all times during the term of this Use Agreement it shall reserve one (1) wavelength of capacity in the fiber owned or operated by NextG in the City for the City's exclusive use in operating a noncommercial, City-owned Wi-Fi network or for any other noncommercial, City-operated data network or communications function.

4.3 **Electricity Charges.** NextG shall be solely responsible for the payment of all electrical utility charges to the applicable utility company based upon the Equipment's usage of electricity and applicable tariffs.

4.4 **Payment.** Gross Revenue payments due to the City under this Section shall be made on or before the 30th day after each calendar month during the term of this Agreement, and thirty (30) days after the expiration of the term of this Agreement. Checks should be made payable to the City Treasurer and mailed to the Office of the City Treasurer, City of San Diego, P.O. Box 2289, San Diego, California 92112-4165, or delivered to the Office of the City Treasurer, 1200 Third Avenue, First Floor, San Diego, California. The place and time of payment may be changed at any time by City upon thirty (30) days' written notice to NextG. Mailed rental payments shall be deemed paid upon the date such payment is postmarked by the postal authorities. If postmarks are illegible to read, the payment shall be deemed paid upon actual receipt by the City Treasurer.

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NextG assumes all risk of loss and responsibility for late payment charges if payments are made by mail. The initial monthly fee shall be due and payable not later than thirty (30) days after the calendar month in which NextG has established Service to commercial customers in the City.

4.5 Delinquent Payment. If NextG fails to pay any amounts due under this Section within thirty (30) days from the due date, NextG will pay, in addition to the unpaid fees, a sum of money equal to one percent (1%) of the amount due for each month and or fraction thereof during which the payment is due and unpaid.

4.6 Additional Remedies. The remedy provisions set forth in § 4.5 above are not exclusive, and do not preclude the City Manager or designee from pursuing any other or additional remedy in the event that payments become overdue by more than sixty (60) days.

5 CONSTRUCTION. NextG shall comply with all applicable federal, State, and City technical specifications and requirements and all applicable State and local codes related to the construction, installation, operation, maintenance, and control of NextG's Equipment installed in the Public Rights-of-Way and on Municipal Facilities in the City. NextG shall not attach, install, maintain, or operate any Equipment in or on the Public Rights-of-Way and/or on Municipal Facilities without the prior written approval of the City for each location.

5.1 Obtaining Required Permits. If the attachment, installation, operation, maintenance, or location of the Equipment in the Public Way shall require any permits, NextG shall, if required under applicable City ordinances, apply for the appropriate permits and pay any standard and customary permit fees. City shall promptly respond to NextG's requests for permits and shall otherwise cooperate with NextG in facilitating the deployment of the Network in the Public Rights-of-Way in a reasonable and timely manner.

5.2 Location of Equipment. The proposed locations of NextG's planned initial installation of Equipment shall be provided to the City promptly after NextG's review of available street light maps and prior to deployment of the Equipment. Prior to installation of the Equipment in the Public Rights-of-Way or upon any Municipal Facility, NextG shall obtain written approval for such installation in the Public Rights-of-Way or upon such Municipal Facility from the City. The City may approve or disapprove a location and installation, based upon reasonable regulatory factors, including but not limited to, the location of other present or future communication facilities, efficient use of scarce physical space to avoid premature exhaustion, potential interference with other communication facilities and services, the public safety and other critical services; provided however, that approval shall not be unreasonably conditioned, delayed, or withheld. Upon the completion of each installation, NextG promptly shall furnish to the City a current pole list and map showing the exact location of the Equipment in the Public Rights-of-Way and/or on Municipal Facilities.

5.3 Zoning Height Restrictions. Notwithstanding anything to the contrary in this Use Agreement (including the Specifications attached hereto at Exhibit A), no portion of NextG's Equipment shall extend higher than thirty feet (30') above grade with respect to attachments to Streetlight Poles and utility poles located in (a) the Coastal Height Overlay Zone west of I-5 and (b) the City's residential zones.

5.4 Street Furniture Cabinets. NextG understands that above-ground street furniture and equipment cabinets located in the Public Way are disfavored as a matter of City policy and that any such installation of above-ground street furniture or equipment cabinets will require a Conditional Use Permit under applicable ordinances. NextG agrees to comply with the City's

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current ordinances regarding such installations as well as any future regulations that may be adopted by the City respecting such installations.

5.5 Visual Impact of Cross-Arm Installations. NextG agrees that, in order to minimize the visual impact of its attachments on utility poles, in any instance where a cross-arm is set on a utility pole as the locus for attachment of Equipment, such Equipment shall be attached at the point on the cross-arm that is as close to the pole as possible consistent with the requirements of General Order 95 of the PUC.

5.6 Relocation and Displacement of Equipment. NextG understands and acknowledges that City may require NextG to relocate one or more of its Equipment installations. NextG shall at City's direction relocate such Equipment at NextG's sole cost and expense, whenever City reasonably determines that the relocation is needed for any of the following purposes: (a) if required for the construction, completion, repair, relocation, or maintenance of a City project; (b) because the Equipment is interfering with or adversely affecting proper operation of City-owned light poles, traffic signals, communications, or other Municipal Facilities; or (c) to protect or preserve the public health or safety. In any such case, City shall use its best efforts to afford NextG a reasonably equivalent alternate location. If NextG shall fail to relocate any Equipment as requested by the City within a reasonable time under the circumstances in accordance with the foregoing provision, City shall be entitled to relocate the Equipment at NextG's sole cost and expense, without further notice to NextG. To the extent the City has actual knowledge thereof, the City will attempt promptly to inform NextG of the displacement or removal of any pole on which any Equipment is located.

5.7 Relocations at NextG's Request. In the event NextG desires to relocate any Equipment from one Municipal Facility to another, NextG shall so advise City. City will use its best efforts to accommodate NextG by making another reasonably equivalent Municipal Facility available for use in accordance with and subject to the terms and conditions of this Use Agreement.

5.8 Damage to Public Way. Whenever the removal or relocation of Equipment is required or permitted under this Use Agreement, and such removal or relocation shall cause the Public Rights-of-Way to be damaged, NextG, at its sole cost and expense, shall promptly repair and return the Public Rights-of-Way in which the Equipment are located to a safe and satisfactory condition in accordance with applicable Laws, normal wear and tear excepted. If NextG does not repair the site as just described, then the City shall have the option, upon fifteen (15) days' prior written notice to NextG, to perform or cause to be performed such reasonable and necessary work on behalf of NextG and to charge NextG for the proposed costs to be incurred or the actual costs incurred by the City at City's standard rates. Upon the receipt of a demand for payment by the City, NextG shall promptly reimburse the City for such costs. The terms of this provision shall survive the expiration, completion or earlier termination of this Use Agreement.

5.9 Change in Equipment. If NextG proposes to install Equipment which is different in any material way from the specifications attached hereto as Exhibit A, then NextG shall first obtain the approval for the use and installation of the equipment from the City of San Diego. In addition to any other submittal requirements, NextG shall provide "load" calculations for all Streetlight Poles it intends to install in the Public Rights-of-Way, notwithstanding original installation or by way of equipment type changes. The City may approve or disapprove of the use of the different equipment from the specifications set forth in Exhibit A, pursuant to the factors enumerated in 5.2 above, and such approval shall not be unreasonably withheld.

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5.10 Removal of Equipment. Upon sixty (60) days' written notice by the City pursuant to the expiration or earlier termination of this Use Agreement for cause, NextG shall promptly, safely and carefully remove the Equipment from all Municipal Facilities and Public Rights-of-Way. Such obligation of NextG shall survive the expiration or earlier termination of this Use Agreement. If NextG fails to complete this removal work on or before the sixty (60) days subsequent to the issuance of notice pursuant to this Section, then the City, upon written notice to NextG, shall have the right at the City's sole election, but the obligation, to perform this removal work and charge NextG for the actual costs and expenses, including, without limitation, reasonable administrative costs. NextG shall pay to the City actual costs and expenses incurred by the City in performing any removal work and any storage of NextG's property after removal within ten (10) business days of the date of a written demand for this payment from the City. After the City receives the reimbursement payment from NextG for the removal work performed by the City, the City shall promptly return to NextG the property belonging to NextG and removed by the City pursuant to this Section at no liability to the City. If the City does not receive reimbursement payment from NextG within such ten (10) business days, or if City does not elect to remove such items at the City's cost after NextG's failure to so remove prior to sixty (60) days subsequent to the issuance of notice pursuant to this Section, any items of NextG's property remaining on or about the Public Rights-of-Way, Municipal Facilities, or stored by the City after the City's removal thereof may, at the City's option, be deemed abandoned and the City may dispose of such property in any manner by Law. Alternatively, the City may elect to take title to abandoned property, provided that NextG shall submit to the City an instrument satisfactory to the City transferring to the City the ownership of such property. The provisions of this Section shall survive the expiration or earlier termination of this Use Agreement.

5.11 Risk of Loss. NextG acknowledges and agrees that NextG bears all risks of loss or damage of its Equipment and materials installed in the Public Rights-of-Way or on Municipal Facilities pursuant to this Use Agreement from any cause, and the City shall not be liable for any cost of repair to damaged Equipment, including, without limitation, damage caused by the City's removal of the Equipment, except to the extent that such loss or damage was solely caused by the willful misconduct or negligence of the City, including, without limitation, each of its elected officials, department directors, managers, officers, agents, employees, and contractors, subject to the limitation of liability provided in § 6.2 below.

6 INDEMNIFICATION AND WAIVER. NextG agrees to indemnify, defend, protect, and hold harmless the City, its council members, officers, and employees from and against any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgements, and all costs and expenses incurred in connection therewith, including reasonable attorney's fees and costs of defense (collectively, the "Losses") directly or proximately resulting from NextG's activities undertaken pursuant to this Use Agreement, except to the extent arising from or caused by the sole negligence or sole willful misconduct of the City, its council members, officers, employees, agents, or contractors.

6.1 Waiver of Claims. NextG waives any and all claims, demands, causes of action, and rights it may assert against the City on account of any loss, damage, or injury to any Equipment or any loss or degradation of the Services as a result of any event or occurrence which is beyond the reasonable control of the City.

6.2 Limitation of City's Liability. The City shall be liable only for the cost of repair to damaged Equipment arising from the sole negligence or sole willful misconduct of City, its employees, agents, or contractors and shall in no event be liable to indirect or consequential damages. City's total liability under this Use Agreement shall be limited to the annual aggregate (Municipal

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Facilities Annual Fee and Right-of-Way Fee) fees paid by NextG to the City in the year under which such liability arises.

7 SECURITY AND BOND. In order to secure its performance of its obligations under this Use Agreement, NextG agrees to provide for the following security instruments to the City:

7.1 Construction Period Performance Bond. Prior to the commencement of any work under this Use Agreement, NextG shall provide a construction performance bond running to the City, substantially in the form attached hereto at Exhibit B, in the penal sum of Two Thousand Five Dollars (\$2,500.00) for each Municipal Facility upon which Equipment is to be installed pursuant to § 5 this Use Agreement (the "Construction Bond"), conditioned upon the faithful performance of NextG of all the terms and conditions of this Use Agreement and upon the further condition that, in the event that NextG shall fail to comply with any law, ordinance, rule, or regulation governing this Use Agreement, there shall be recoverable jointly and severally from the principal and surety of the bond any damage or loss suffered by the City as a result, including the full amount of any compensation, indemnification, or costs of removal or abandonment of property of NextG, plus costs and reasonable attorney's fees up to the full amount of the Construction Bond. The City may require NextG to increase the amount of the Construction Bond if the City concludes that it is necessary to do so based upon the amount of construction in the Public Rights-of-Way being performed by NextG, or based upon the harm being caused by NextG to Public Rights-of-Way or Municipal Facilities. NextG agrees to keep the Construction Bond in place until the City has signed off on completion of the Network construction permitted by § 5 and until the Construction Bond has been replaced by a Performance Bond, as specified in § 7.2 below.

7.2 Continuing Faithful Performance Bond. Following the completion of the construction of the Network permitted by § 5 and until such time as NextG has liquidated all of its obligations with the City, NextG shall file with the Clerk of the City of San Diego and maintain throughout the Term of this Use Agreement a faithful performance bond running to the City (the "Performance Bond"), substantially in the form attached hereto at Exhibit B, in an amount to be negotiated in good faith by the parties and conditioned upon the faithful performance of NextG of all the terms and conditions of this Use Agreement and upon the further condition that, in the event NextG shall fail to comply with any law, ordinance, rule, or regulation governing this Use Agreement, there shall be recoverable jointly and severally from the principal and surety of the bond any damage or loss suffered by the City as a result, including the full amount of any compensation, indemnification, or cost of removal or abandonment of property of NextG, plus costs and reasonable attorney's fees up to the full amount of the bond.

7.3 Required Endorsement. The bonds shall be subject to the approval of the San Diego City Attorney and shall contain the following endorsement:

"It is hereby understood and agreed that this bond may not be canceled until sixty (60) days after receipt by the San Diego City Attorney, by registered mail, return receipt requested, of a written notice of intent to cancel or not to renew."

7.4 Reservation of City Rights. The rights reserved by the City with respect to the bonds herein are in addition to all other rights and remedies the City may have under this Use Agreement or any other law.

8 INSURANCE. NextG shall obtain and maintain at all times during the term of this Use Agreement Commercial General Liability insurance and Commercial Automobile Liability insurance protecting NextG in an amount not less than One Million Dollars (\$1,000,000) per occurrence (combined single

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limit), including bodily injury and property damage, and in an amount not less than Two Million Dollars (\$2,000,000) annual aggregate for each personal injury liability and products-completed operations. The Commercial General Liability insurance policy shall name the City, its council members, officers, and employees as additional insureds as respects any covered liability arising out of NextG's performance of work under this Use Agreement. Coverage shall be in an occurrence form and in accordance with the limits and provisions specified herein. Claims-made policies are not acceptable. Such insurance shall not be canceled, nor shall the occurrence or aggregate limits set forth above be reduced, until the City has received at least thirty (30) days' advance written notice of such cancellation or change. NextG shall be responsible for notifying the City of such change or cancellation.

8.1 Filing of Certificates and Endorsements. Prior to the commencement of any work pursuant to this Use Agreement, NextG shall file with the City the required original certificate(s) of insurance with endorsements, which shall state the following:

- (a) the policy number; name of insurance company; name and address of the agent or authorized representative; name and address of insured; project name; policy expiration date; and specific coverage amounts;
- (b) that the City shall receive thirty (30) days' prior notice of cancellation;
- (c) that NextG's Commercial General Liability insurance policy is primary as respects any other valid or collectible insurance that the City may possess, including any self-insured retentions the City may have; and any other insurance the City does possess shall be considered excess insurance only and shall not be required to contribute with this insurance; and
- (d) that NextG's Commercial General Liability insurance policy waives any right of recovery the insurance company may have against the City.

The certificate(s) of insurance with endorsements and notices shall be mailed to the City at the address specified in § 9 below.

8.2 Workers' Compensation Insurance. NextG shall obtain and maintain at all times during the term of this Use Agreement statutory workers' compensation and employer's liability insurance in an amount not less than One Million Dollars (\$1,000,000) and shall furnish the City with a certificate showing proof of such coverage.

8.3 Insurer Criteria. Any insurance provider of NextG shall be admitted and authorized to do business in the State of California and shall carry a minimum rating assigned by A.M. Best & Company's Key Rating Guide of "A" Overall and a Financial Size Category of "X" (i.e., a size of \$500,000,000 to \$750,000,000 based on capital, surplus, and conditional reserves). Insurance policies and certificates issued by non-admitted insurance companies are not acceptable.

8.4 Severability of Interest. Any deductibles or self-insured retentions must be stated on the certificate(s) of insurance, which shall be sent to and approved by the City. "Severability of interest" or "separation of insureds" clauses shall be made a part of the Commercial General Liability and Commercial Automobile Liability policies.

9 NOTICES. All notices which shall or may be given pursuant to this Use Agreement shall be in writing and delivered personally or transmitted (a) through the United States mail, by registered or certified mail, postage prepaid; (b) by means of prepaid overnight delivery service; or (c) by facsimile or email.

transmission, if a hard copy of the same is followed by delivery through the U. S. mail or by overnight delivery service as just described, addressed as follows:

if to the City:

CITY OF SAN DIEGO
Attn: Department of Information Technology & Communications
1200 Third Avenue, Suite 250
San Diego, CA 92101

if to NextG:

NEXTG NETWORKS OF CALIFORNIA, INC.
Attn: Contracts Administration
1759 South Main Street, Suite 128
Milpitas, CA 95035

9.1 Date of Notices; Changing Notice Address. Notices shall be deemed given upon receipt in the case of personal delivery, three (3) days after deposit in the mail, or the next business day in the case of facsimile, email, or overnight delivery. Either party may from time to time designate any other address for this purpose by written notice to the other party delivered in the manner set forth above.

10 TERMINATION. This Use Agreement may be terminated by either party upon forty five (45) days' prior written notice to the other party upon a default of any material covenant or term hereof by the other party, which default is not cured within forty-five (45) days of receipt of written notice of default (or, if such default is not curable within forty-five (45) days, if the defaulting party fails to commence such cure within forty-five (45) days or fails thereafter diligently to prosecute such cure to completion), provided that the grace period for any monetary default shall be ten (10) days from receipt of notice. Except as expressly provided herein, the rights granted under this Use Agreement are irrevocable during the term.

11 ASSIGNMENT. This Use Agreement shall not be assigned by NextG without the express written consent of the City, which consent shall not be unreasonably withheld, conditioned, or delayed. Notwithstanding the foregoing, the transfer of the rights and obligations of NextG to a parent, subsidiary, or other affiliate of NextG or to any successor in interest or entity acquiring fifty-one percent (51%) or more of NextG's stock or assets (collectively "Exempted Transfers") shall not be deemed an assignment for the purposes of this Agreement and therefore shall not require the consent of the City, provided that NextG reasonably demonstrates to the City's lawfully empowered designee the following criteria (collectively the "Exempted Transfer Criteria"): (i) such transferee will have a financial strength after the proposed transfer at least equal to that of NextG immediately prior to the transfer; (ii) any such transferee assumes all of NextG's obligations hereunder; and (iii) the experience and technical qualifications of the proposed transferee, either alone or together with NextG's management team, in the provision of telecommunications or similar services, evidences an ability to operate the NextG Network. NextG shall give at least thirty (30) days' prior written notice (the "Exempted Transfer Notice") to the City of any such proposed Exempted Transfer and shall set forth with specificity in such Exempted Transfer Notice the reasons why NextG believes the Exempted Transfer Criteria have been satisfied. The City Council of City shall have a period of thirty (30) days (the "Exempted Transfer Evaluation Period") from the date that NextG gives the City its Exempted Transfer Notice to object in writing to the adequacy of the evidence contained therein. Notwithstanding the foregoing, the Exempted Transfer Evaluation Period shall not be deemed to have commenced until the City has received from NextG any

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and all additional information the City may reasonably require in connection with its evaluation of the Exempted Transfer Criteria as set forth in the Exempted Transfer Notice, so long as the City gives NextG notice in writing of the additional information the City requires within fifteen (15) days after the City's receipt of the original Exempted Transfer Notice. If the City Council of City fails to act upon NextG's Exempted Transfer Notice within the Exempted Transfer Evaluation Period (as the same may be extended in accordance with the foregoing provisions), such failure shall be deemed an affirmation by the City Council that NextG has in fact established compliance with the Exempted Transfer Criteria to the City's satisfaction.

12 MISCELLANEOUS PROVISIONS. The provisions which follow shall apply generally to the obligations of the parties under this Use Agreement.

12.1 Waiver of Breach. The waiver by either party of any breach or violation of any provision of this Use Agreement shall not be deemed to be a waiver or a continuing waiver of any subsequent breach or violation of the same or any other provision of this Use Agreement.

12.2 Severability of Provisions. If any one or more of the provisions of this Use Agreement shall be held by court of competent jurisdiction in a final judicial action to be void, voidable, or unenforceable, such provision(s) shall be deemed severable from the remaining provisions of this Use Agreement and shall not affect the legality, validity, or constitutionality of the remaining portions of this Use Agreement. Each party hereby declares that it would have entered into this Use Agreement and each provision hereof regardless of whether any one or more provisions may be declared illegal, invalid, or unconstitutional.

12.3 Contacting NextG. NextG shall be available to the staff employees of any City department having jurisdiction over NextG's activities twenty-four (24) hours a day, seven (7) days a week, regarding problems or complaints resulting from the attachment, installation, operation, maintenance, or removal of the Equipment. The City may contact by telephone the network control center operator at telephone number 1-866-44-NEXTG (446-3984) regarding such problems or complaints.

12.4 Governing Law; Jurisdiction. This Use Agreement shall be governed and construed by and in accordance with the laws of the State of California, without reference to its conflicts of law principles. If suit is brought by a party to this Use Agreement, the parties agree that trial of such action shall be vested exclusively in the state courts of California, County of San Diego, or in the United States District Court for the Southern District of California.

12.5 Attorneys' Fees. Should any dispute arising out of this Use Agreement lead to litigation, the prevailing party shall be entitled to recover its costs of suit, including (without limitation) reasonable attorneys' fees.

12.6 Consent Criteria. In any case where the approval or consent of one party hereto is required, requested or otherwise to be given under this Use Agreement, such party shall not unreasonably delay, condition, or withhold its approval or consent.

12.7 Representations and Warranties. Each of the parties to this Agreement represents and warrants that it has the full right, power, legal capacity, and authority to enter into and perform the parties' respective obligations hereunder and that such obligations shall be binding upon such party without the requirement of the approval or consent of any other person or entity in connection herewith, except as provided in § 3.2 above.

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12.8 Amendment of Use Agreement. This Use Agreement may not be amended except pursuant to a written instrument signed by both parties.

12.9 Entire Agreement. This Use Agreement contains the entire understanding between the parties with respect to the subject matter herein. There are no representations, agreements, or understandings (whether oral or written) between or among the parties relating to the subject matter of this Use Agreement which are not fully expressed herein.

In witness whereof, and in order to bind themselves legally to the terms and conditions of this Use Agreement, the duly authorized representatives of the parties have executed this Use Agreement as of the Effective Date.

City: CITY OF SAN DIEGO, a California municipal corporation

By: [Signature]
Ray Arellano
(name typed)

Its: _____

Date: June 3, 2004

NextG: NEXTG NETWORKS OF CALIFORNIA, INC., a Delaware corporation

By: [Signature]
John B. Georges, CEO

Date: 3/22, 2004

I HEREBY APPROVE the form and legality of the foregoing Use Agreement this 4th day of June, 2004.

[Signature]
CASEY GWINN, City Attorney
By: [Signature]
Paul G. Edmonson, Deputy City Attorney

Exhibits:

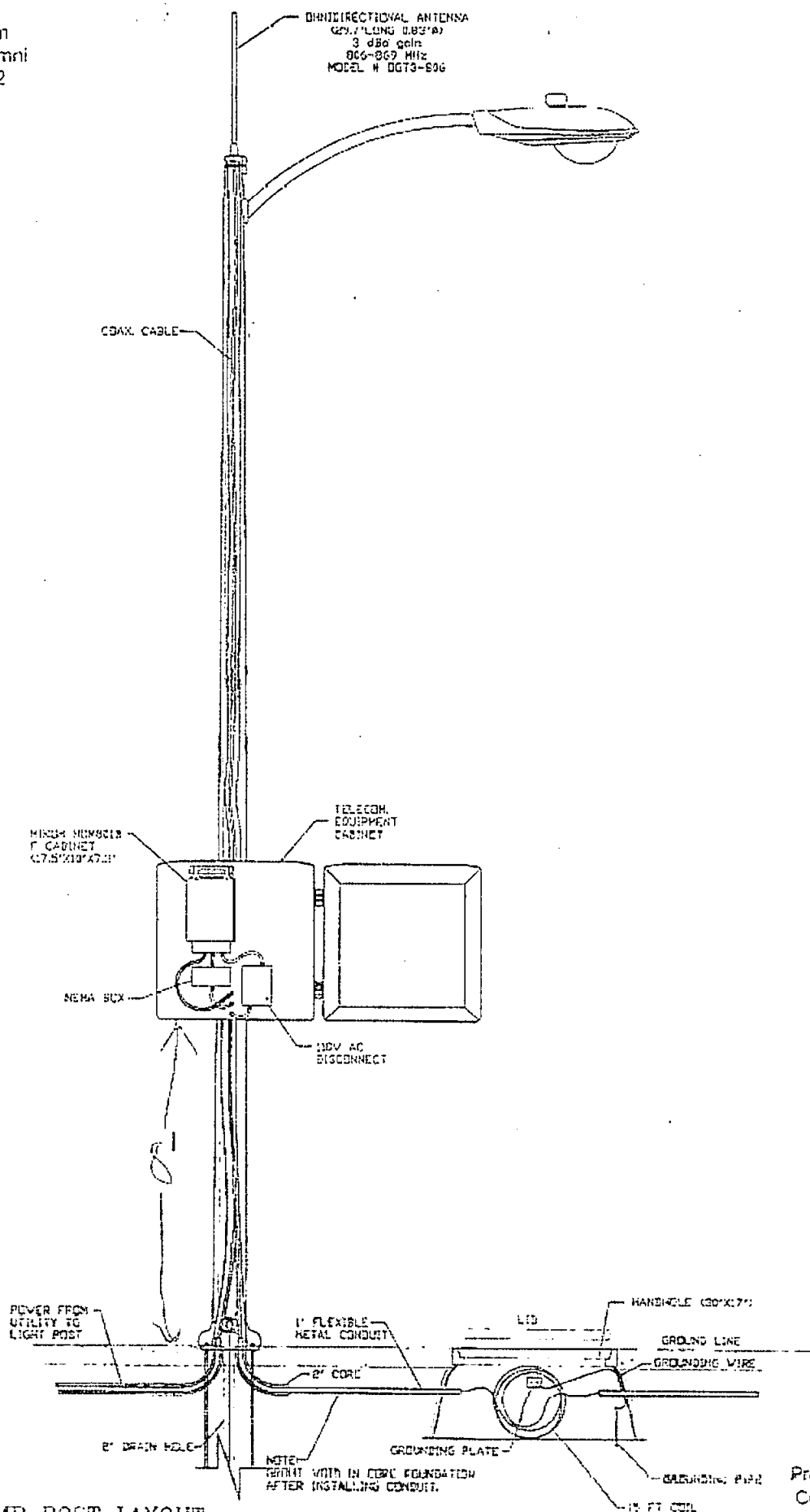
Exhibit A - Equipment

Exhibit B - Bond Form

EXHIBIT A

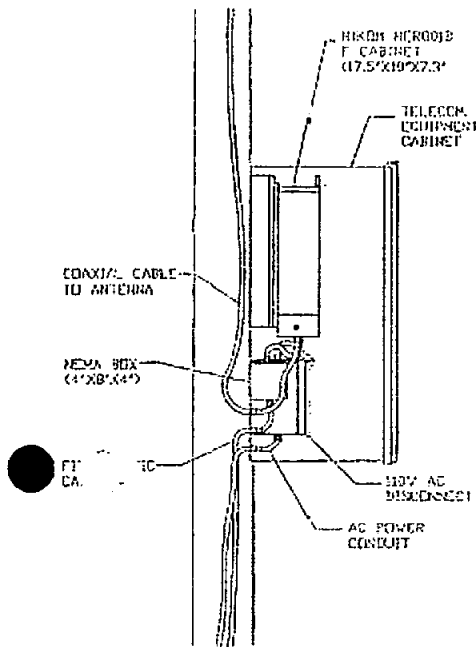


1 - PL Type - Telecom
Equipment Cabinet - Omni
Antenna - page 1 of 2

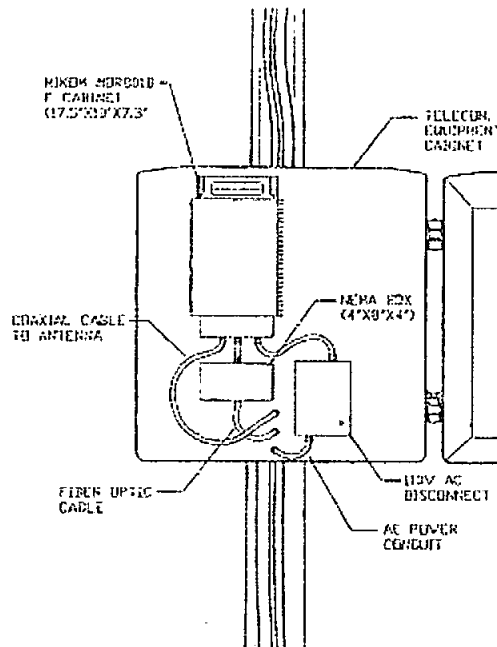


STREET LIGHT LAMP POST LAYOUT
SCALE 1/2" = 1'-0"

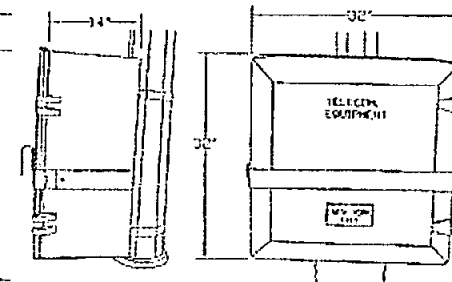
NextG
Proprietary &
Confidential



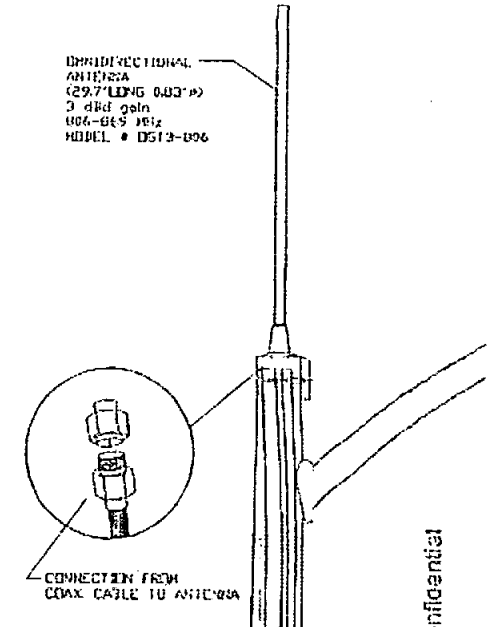
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CONNECTION SECTION DETAIL**
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**TELECOM EQUIPMENT
CONNECTION FRONT VIEW**
SCALE: 3/4" = 1'-0"

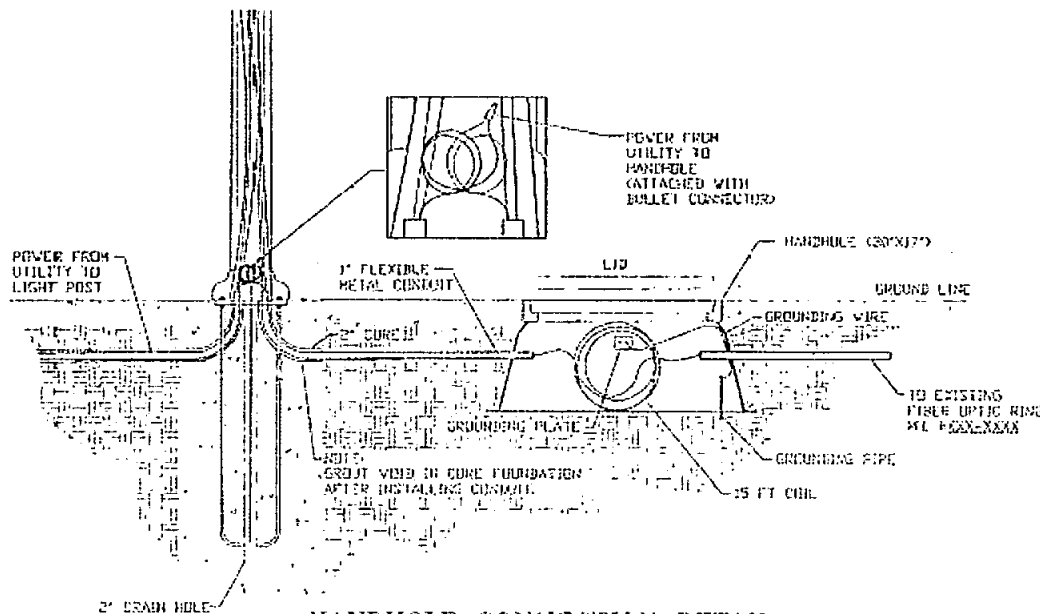


**TELECOM EQUIPMENT
CABINET**
NOT TO SCALE

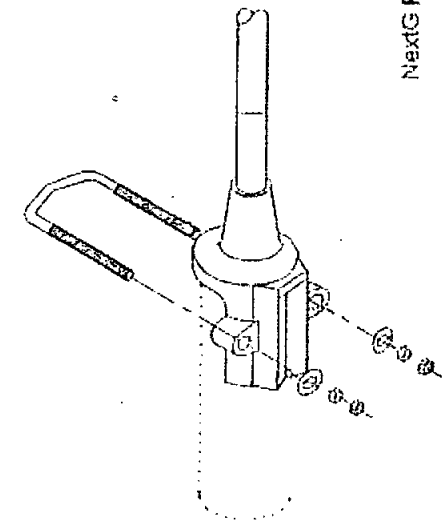


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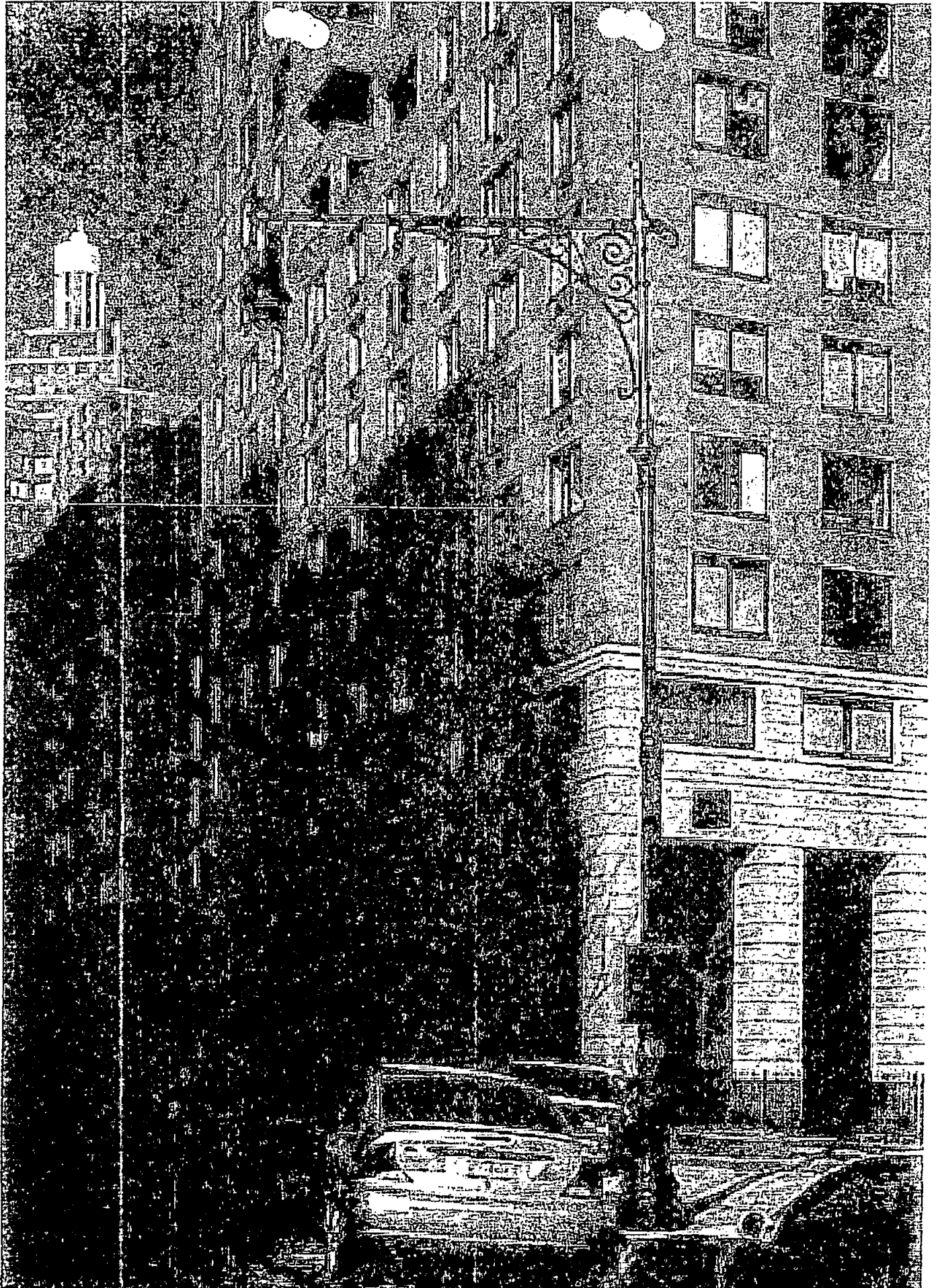
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Antenna - p. 2 of 2



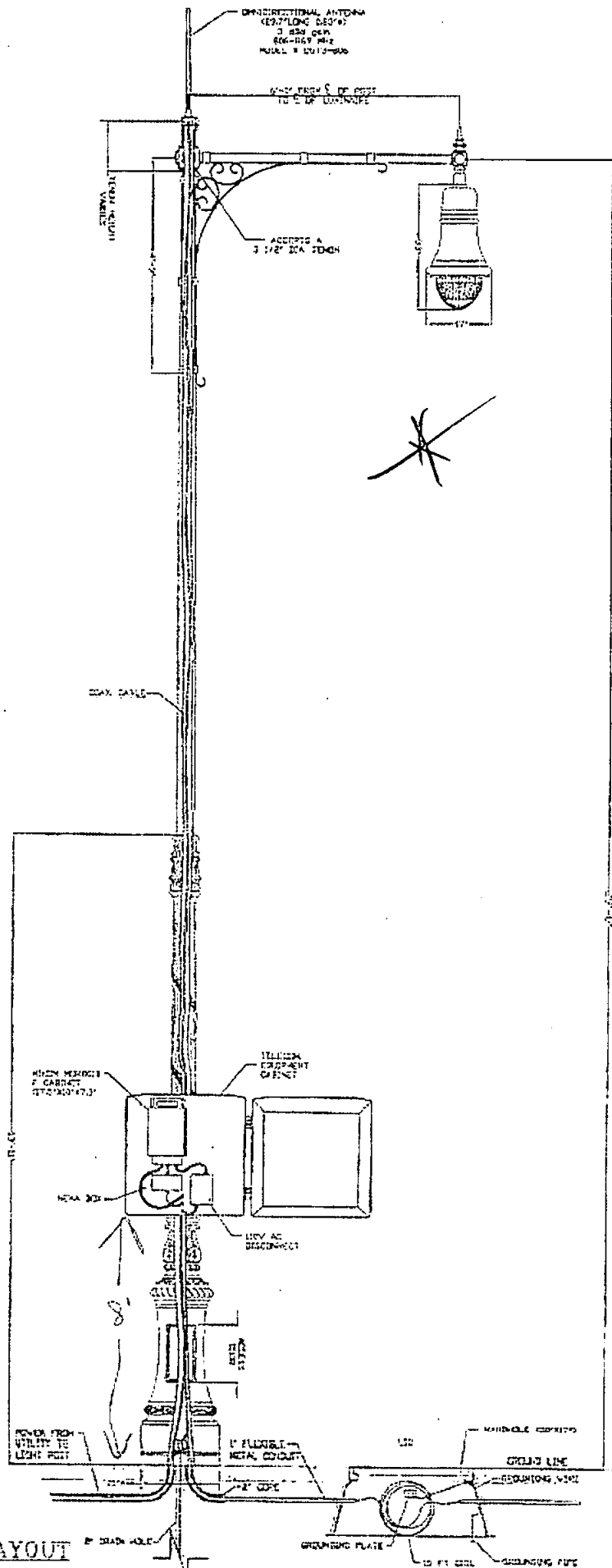
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SCALE: 1/2" = 1'-0"



ANTENNA MOUNTING BRACKET DETAIL
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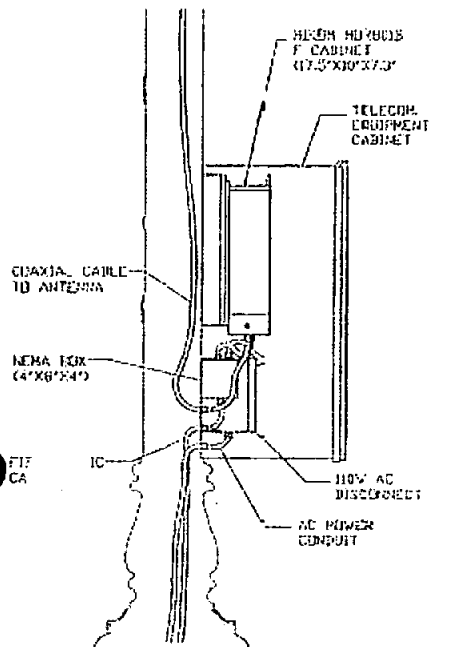


2 - L Type - Telecom
Equipment Cabinet -
Omni Antenna - page
1 of 2



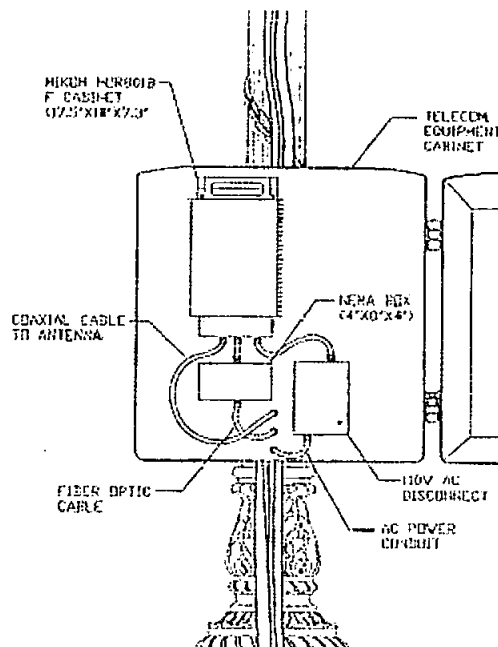
STREET LIGHT LAMP POST LAYOUT
SCALE: 3/8" = 1'-0"

NextG
Proprietary &
Confidential



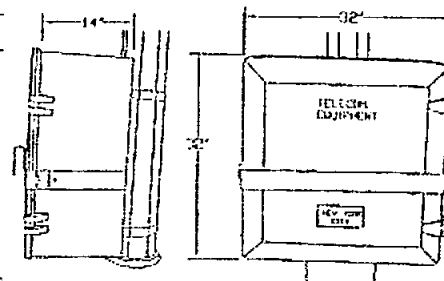
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CONNECTION SECTION DETAIL**

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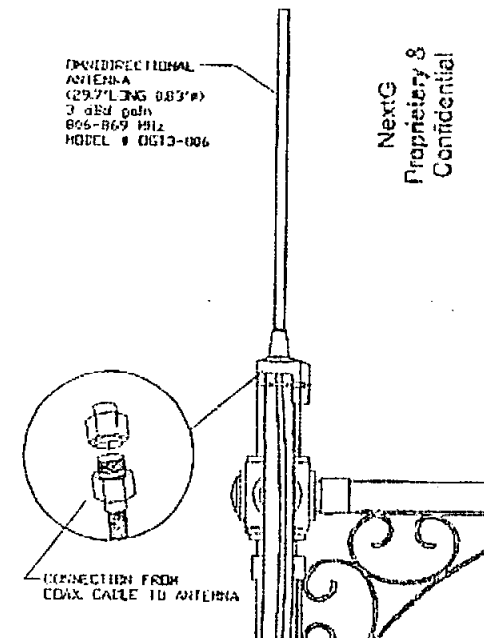
**TELECOM EQUIPMENT
CONNECTION FRONT VIEW**

SCALE: 3/4" = 1'-0"



**TELECOM EQUIPMENT
CABINET**

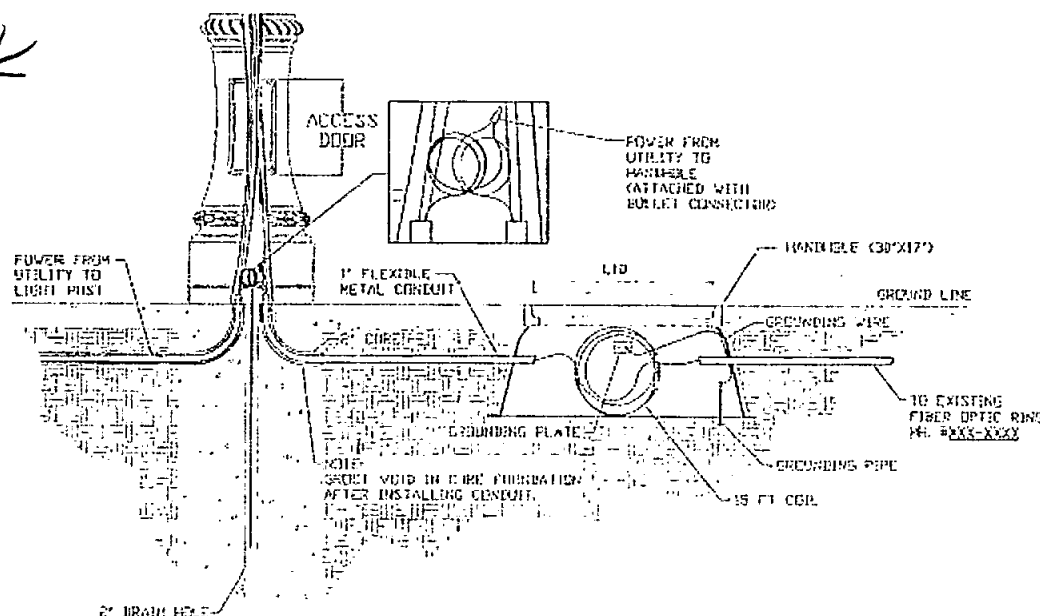
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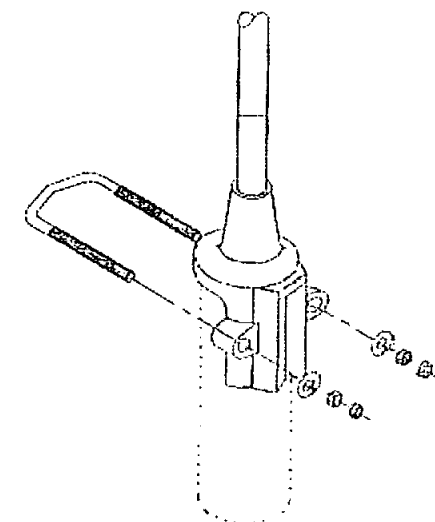
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NextG
Proprietary &
Confidential



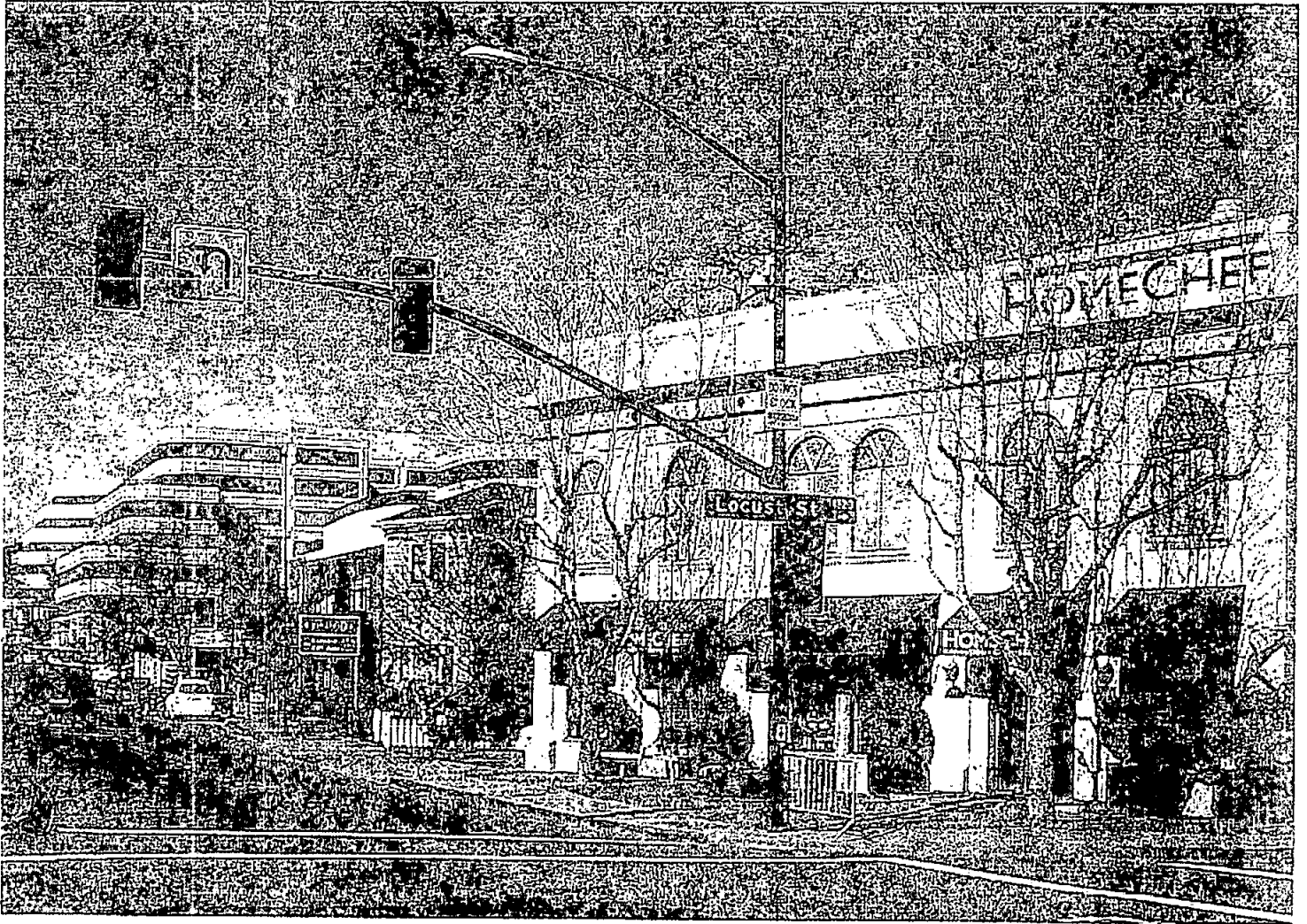
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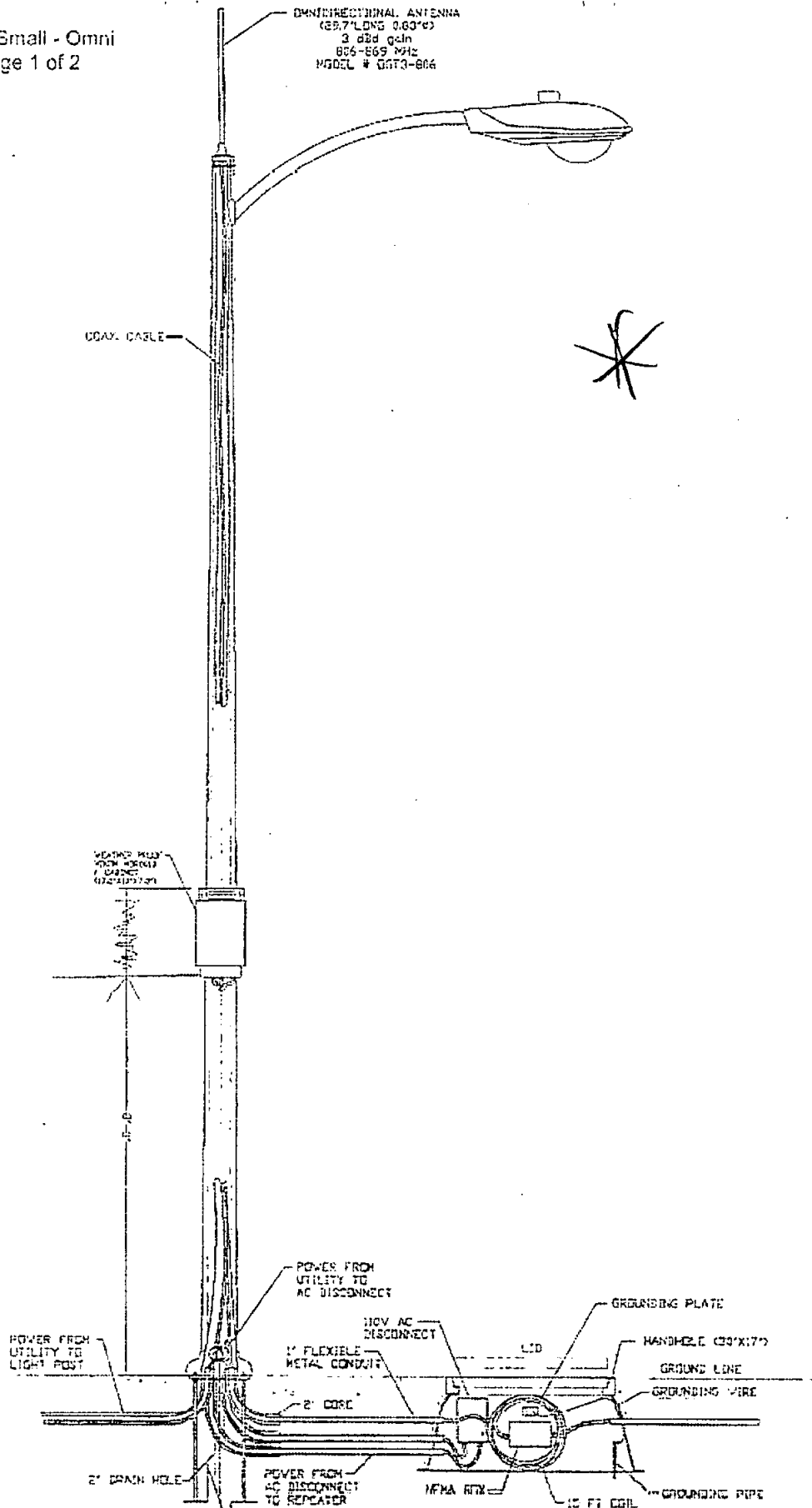


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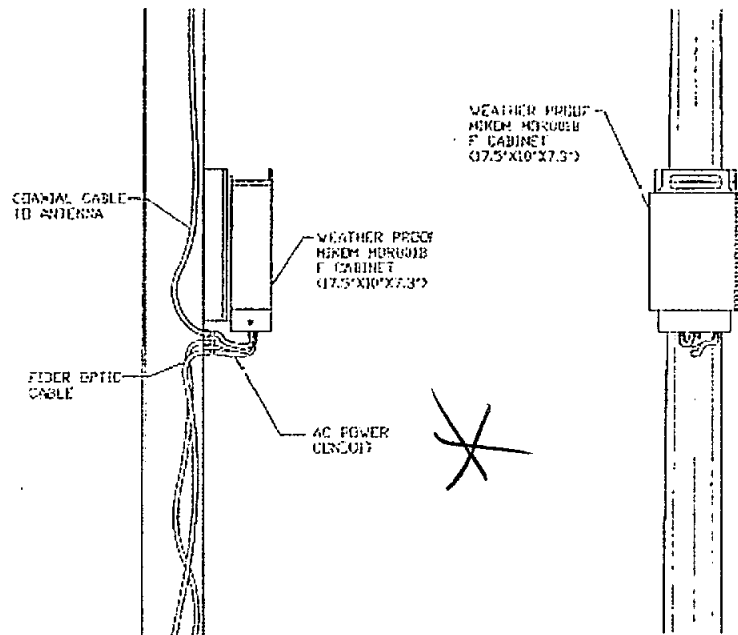
4 - PL Type - M Small - Omni
Antenna - page 1 of 2



STREET LIGHT LAMP POST LAYOUT
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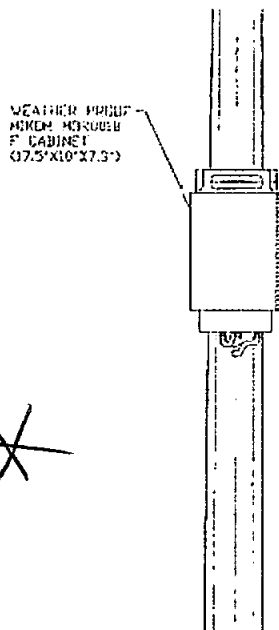
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NextG Proprietary & Confidential



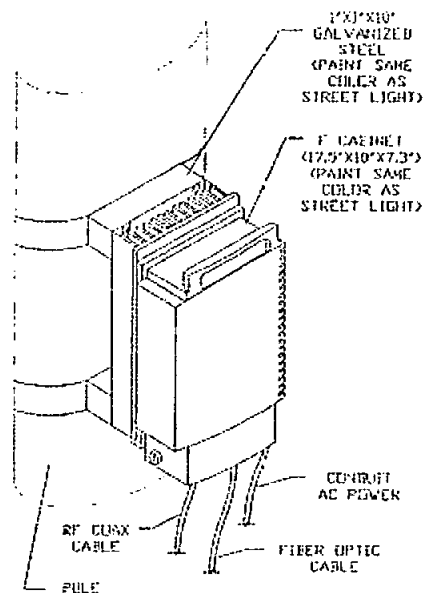
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POLE CONNECTION
SECTION DETAIL**

SCALE: 3/4\" = 1'-0"



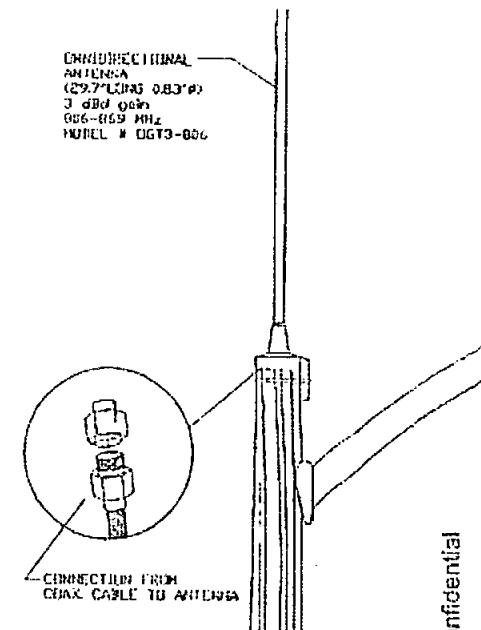
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POLE CONNECTION
FRONT VIEW DETAIL**

SCALE: 3/4\" = 1'-0"



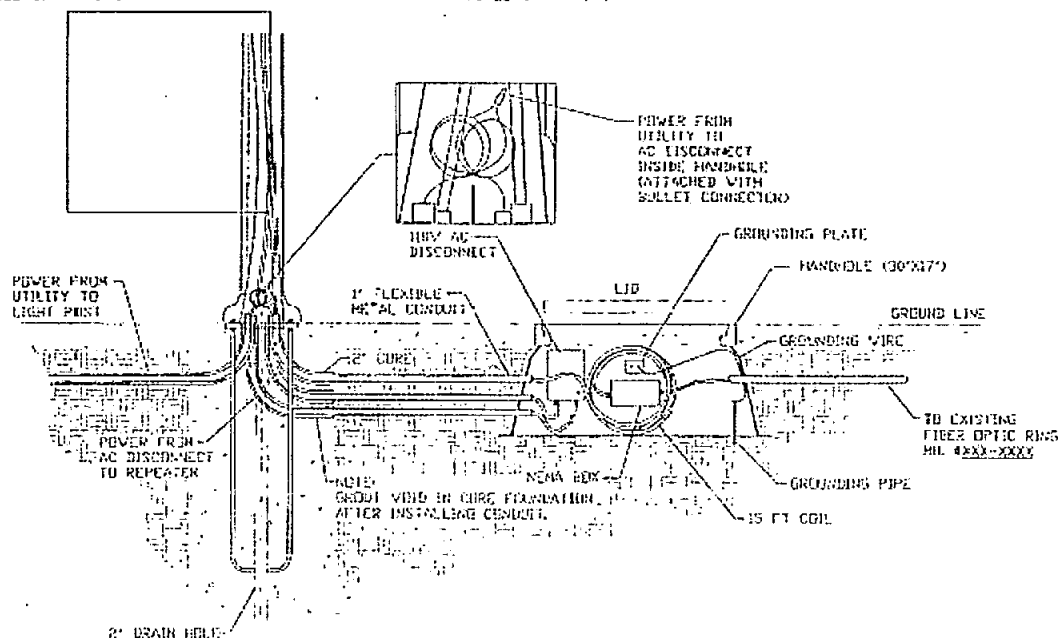
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POLE CONNECTION DETAIL**

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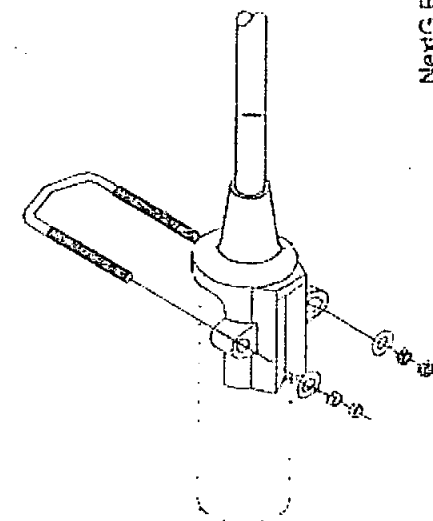
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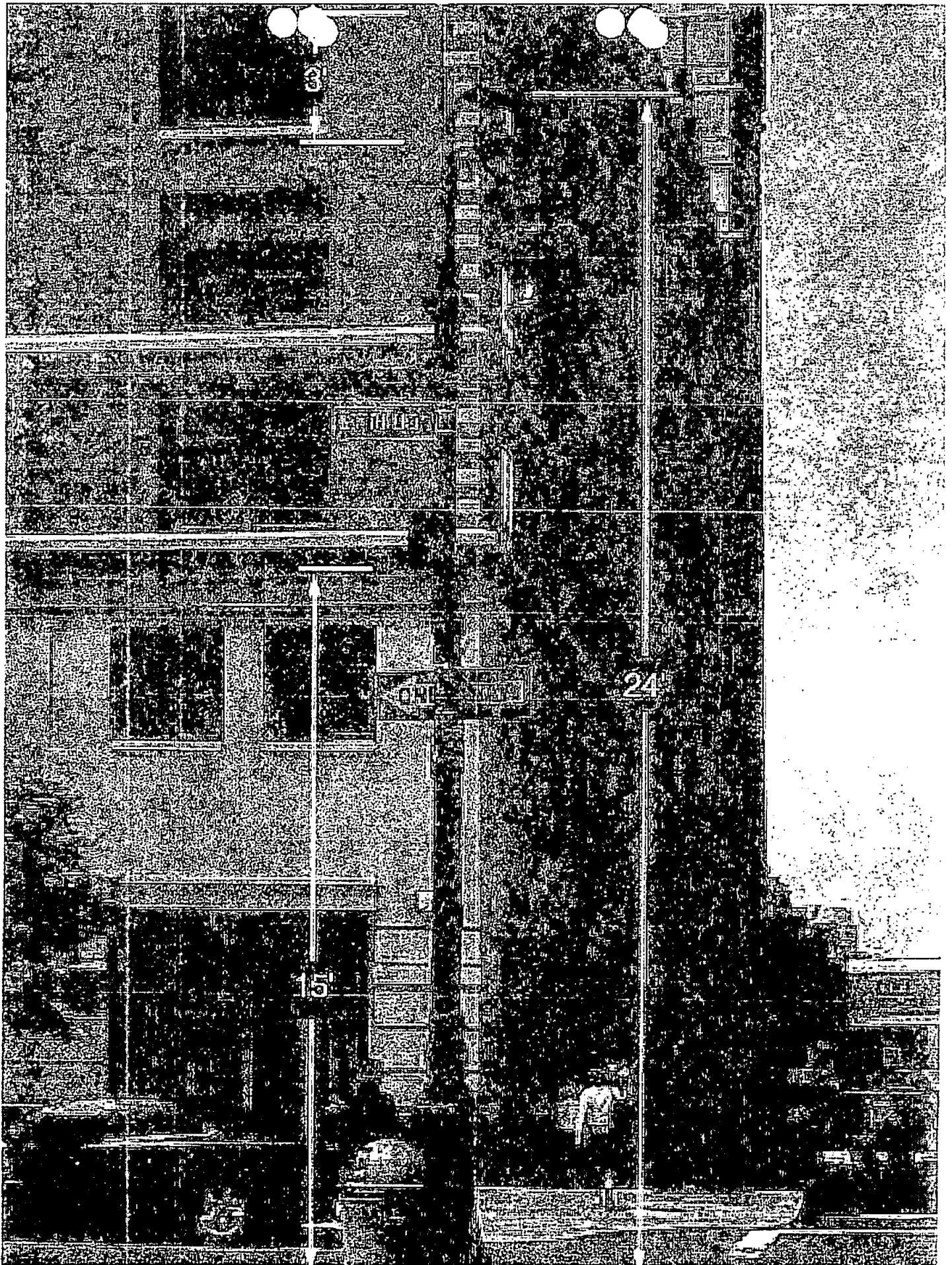
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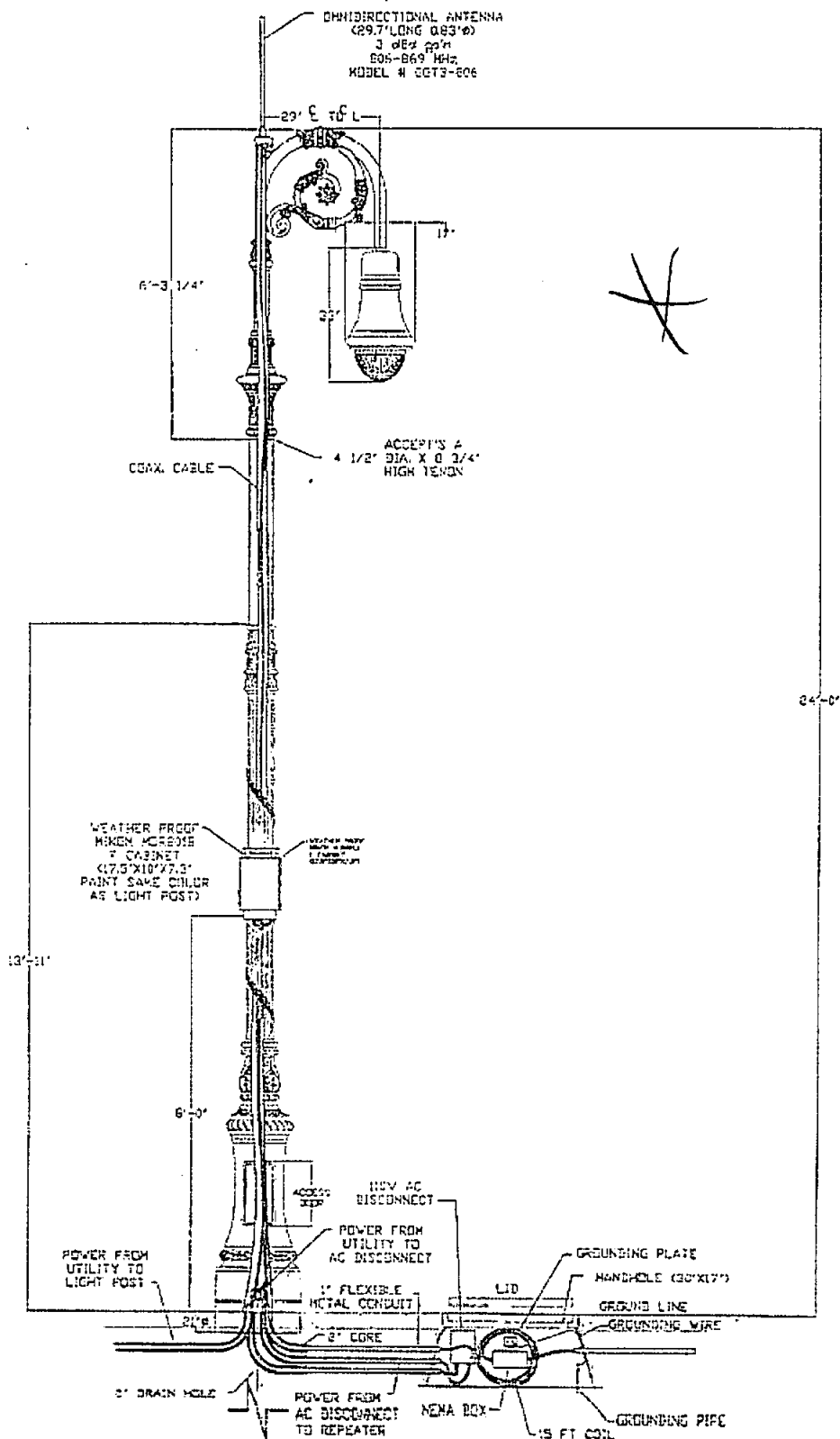
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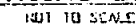
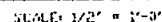
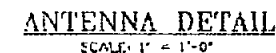
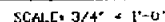
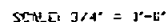


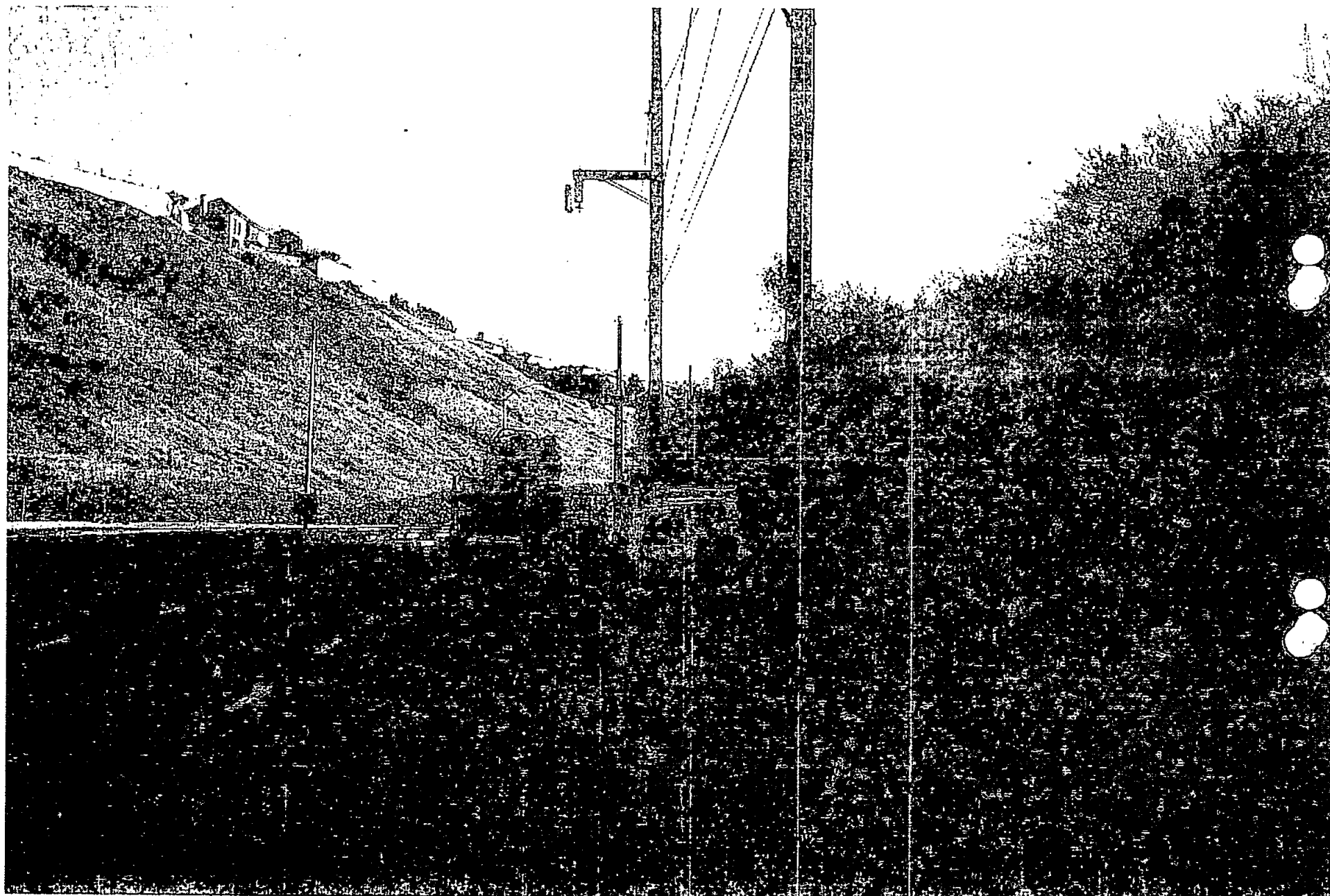
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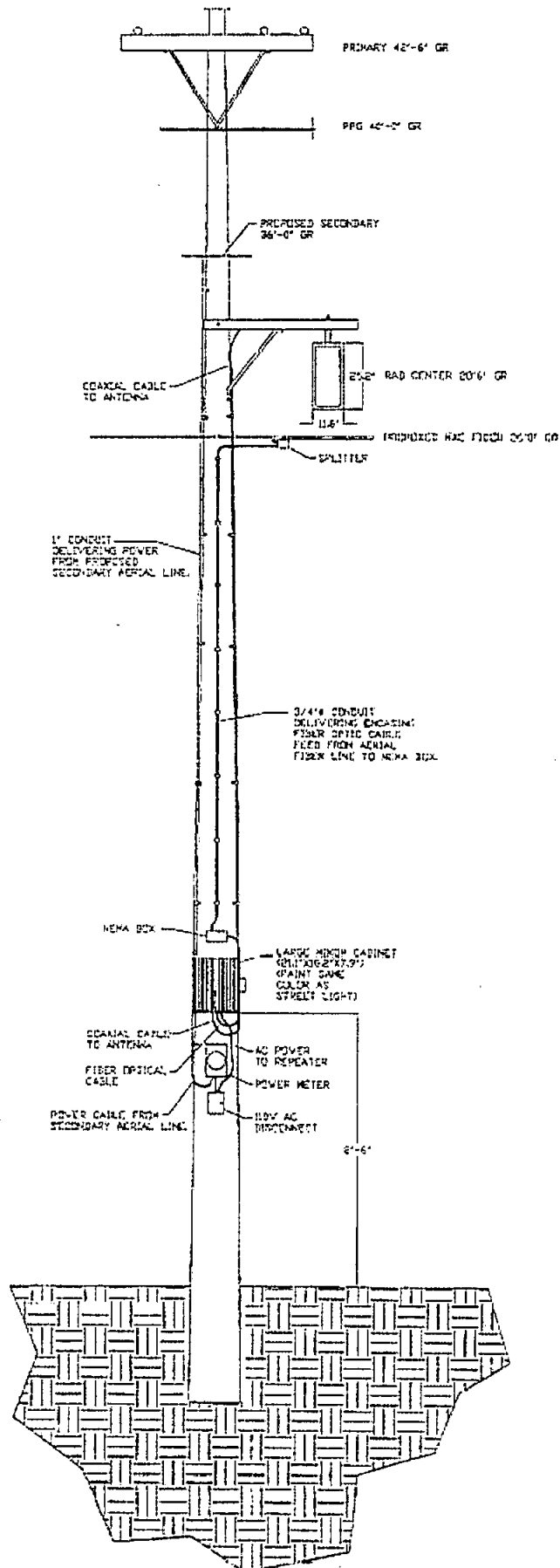
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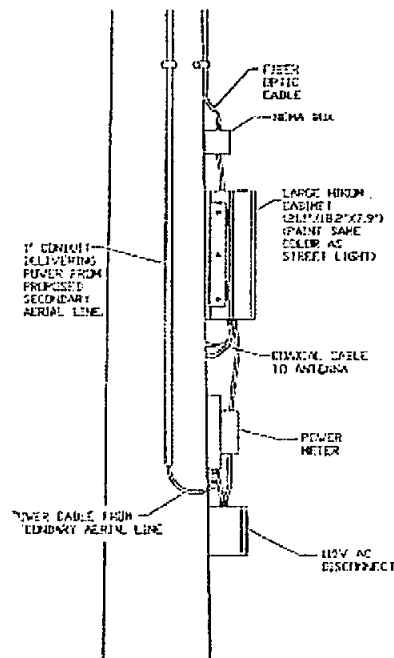








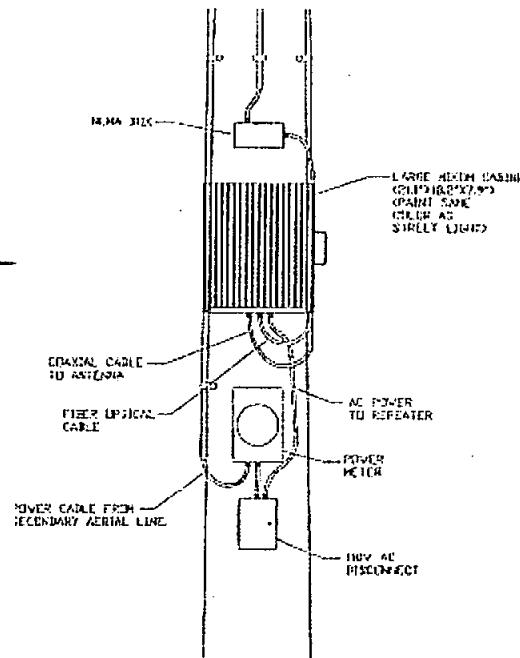




**F-CABINET/AC DISCONNECT
POLE CONNECTION
SECTION DETAIL**

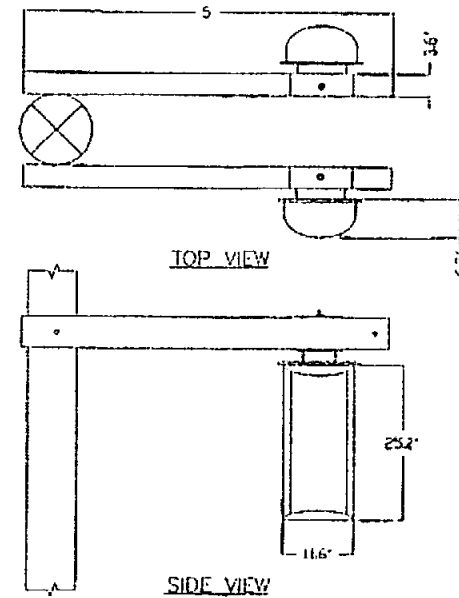
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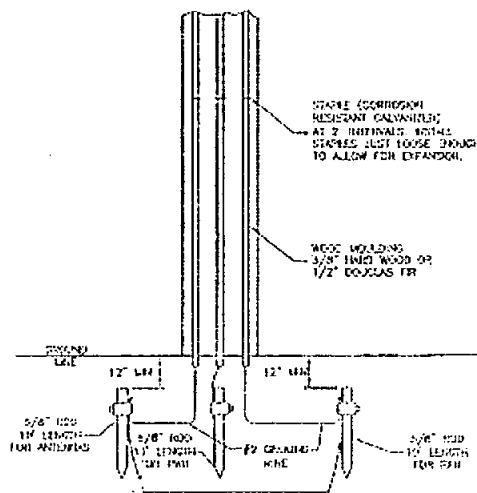
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POLE CONNECTION
FRONT VIEW DETAIL**

SCALE: 1/2" = 1'-0"



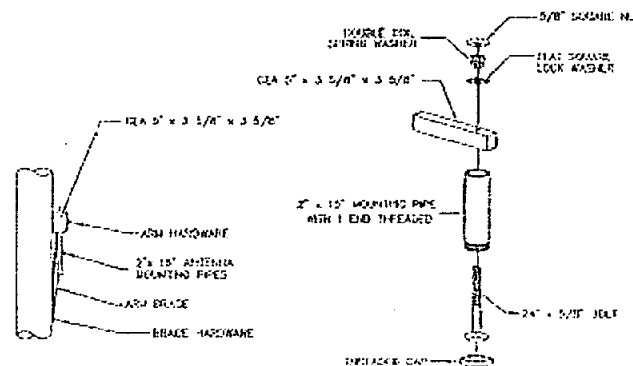
ANTEL RWA-80010 ANTENNA DETAIL

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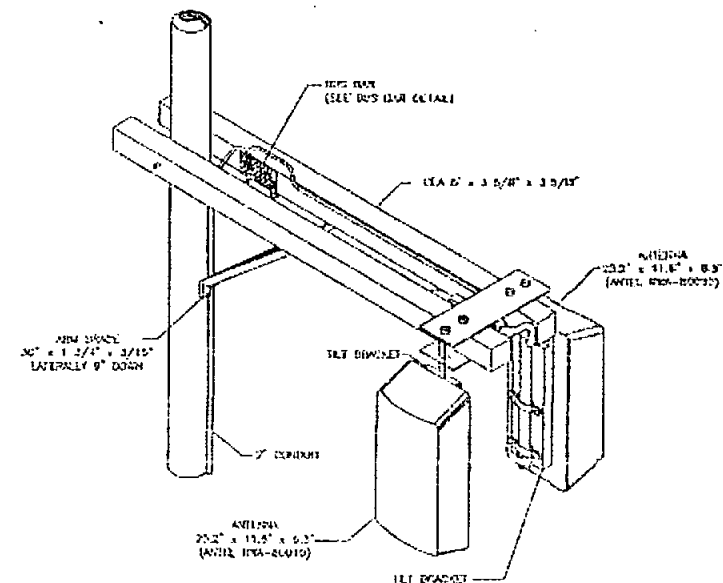
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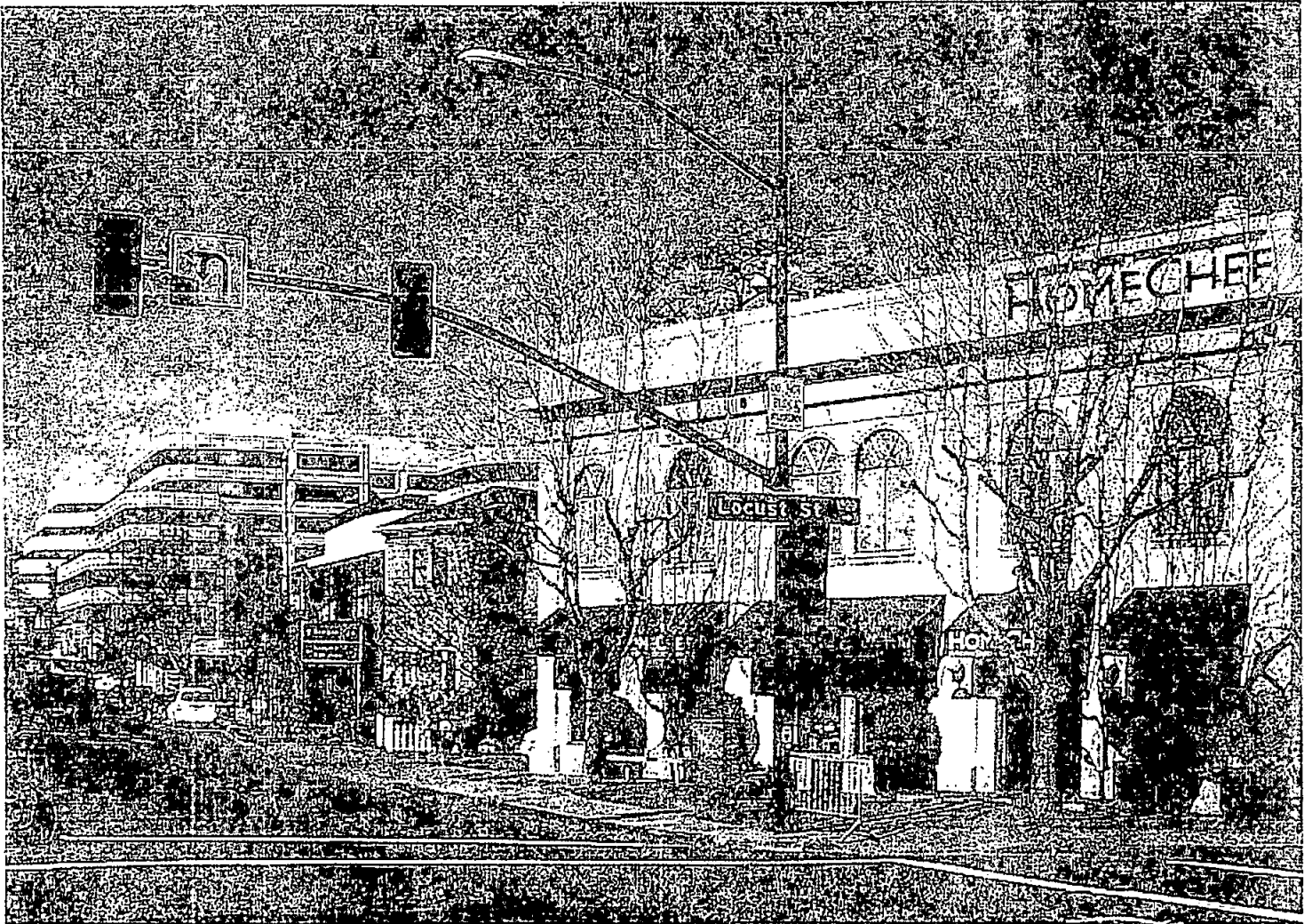
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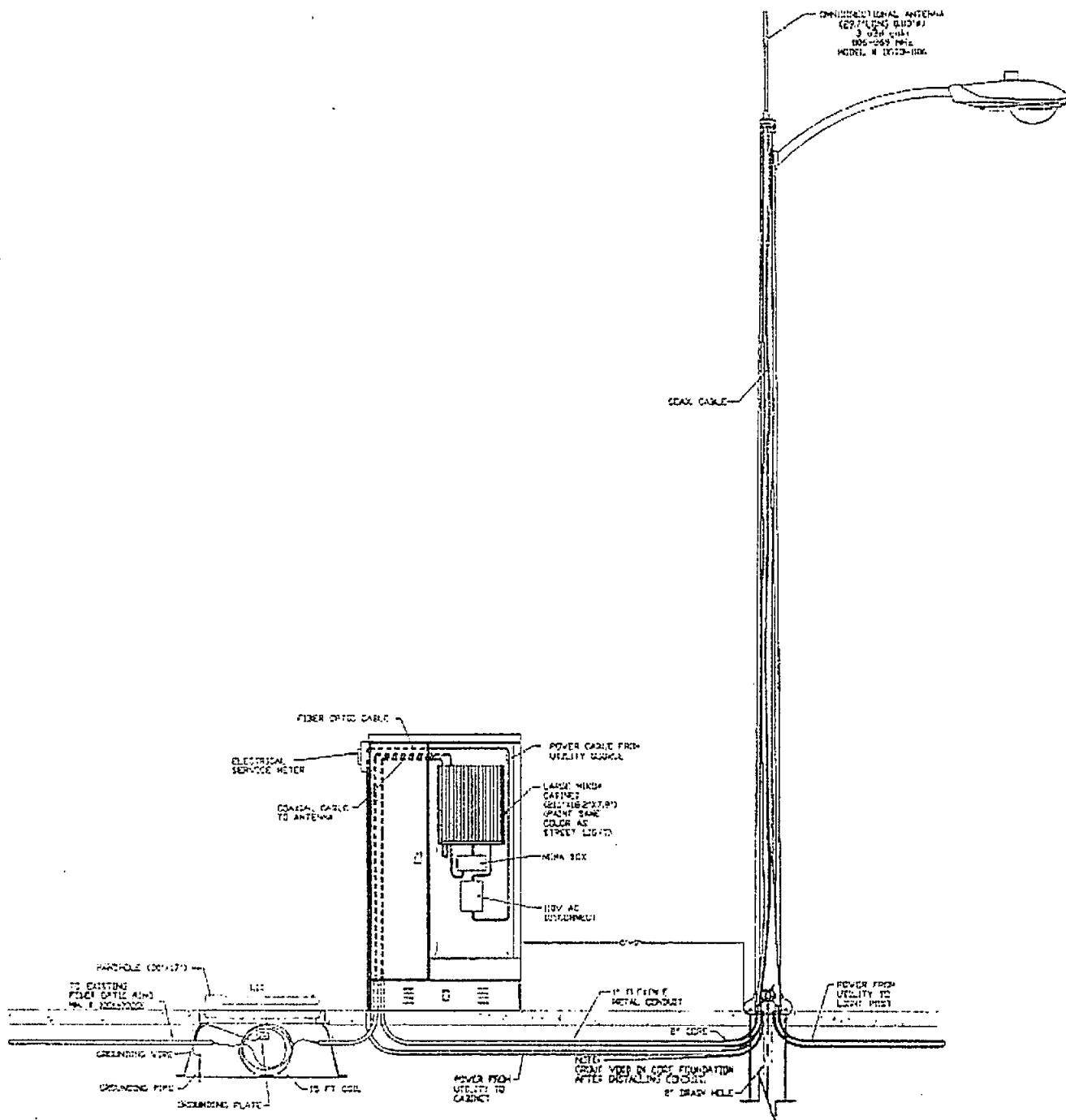
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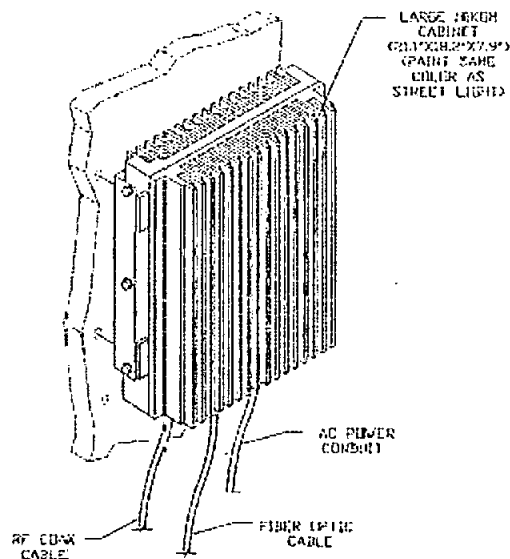
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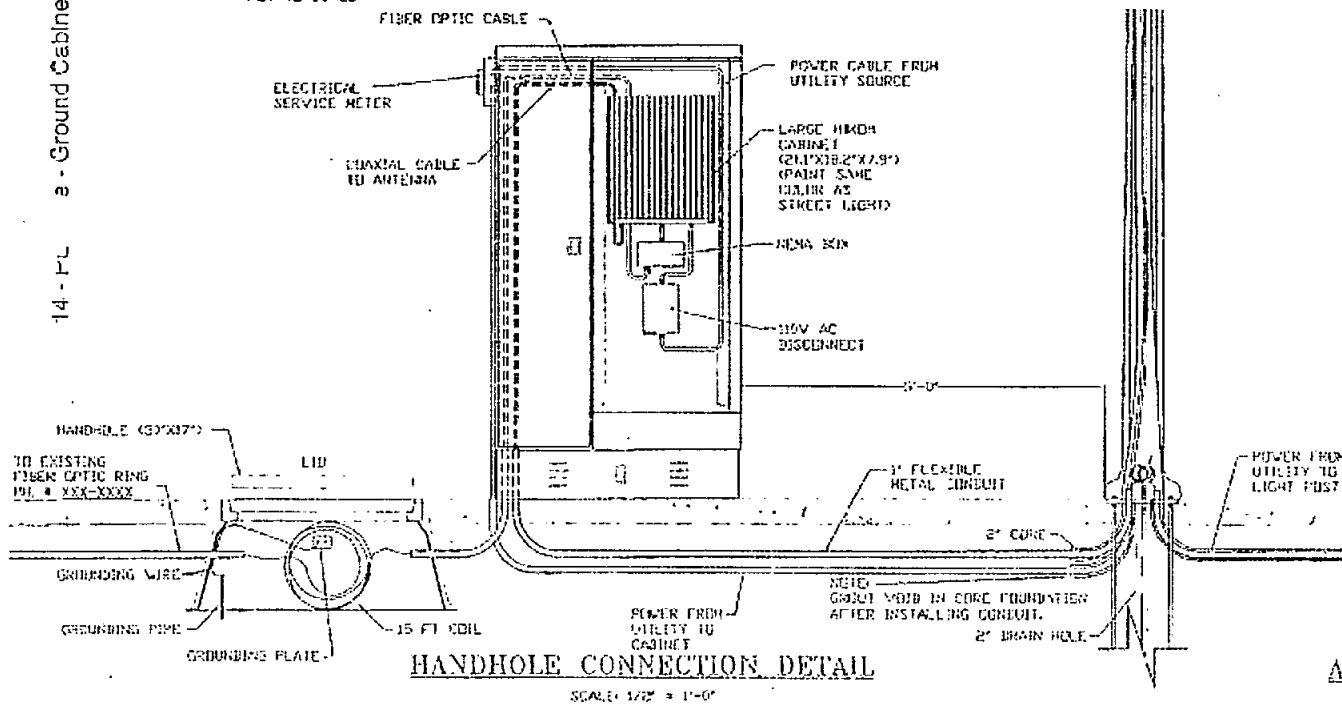


NextG Proprietary &
 Confidential

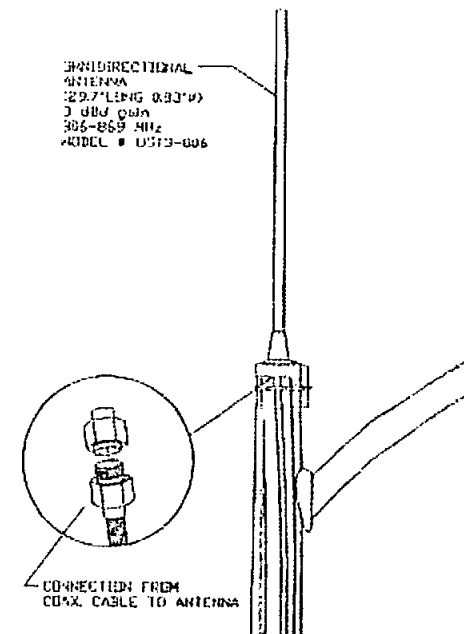
STREET LIGHT LAMP POST LAYOUT
 SCALE: 3/8" = 1'-0"



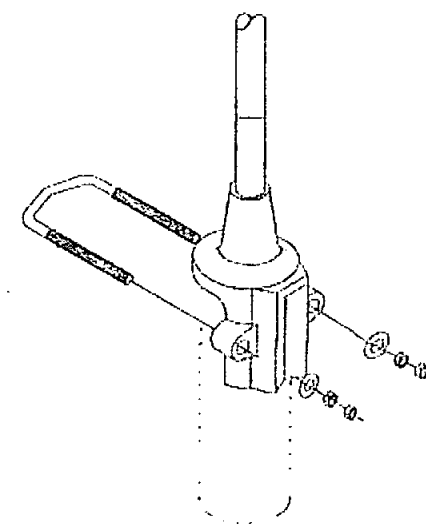
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POLE CONNECTION DETAIL**
NOT TO SCALE



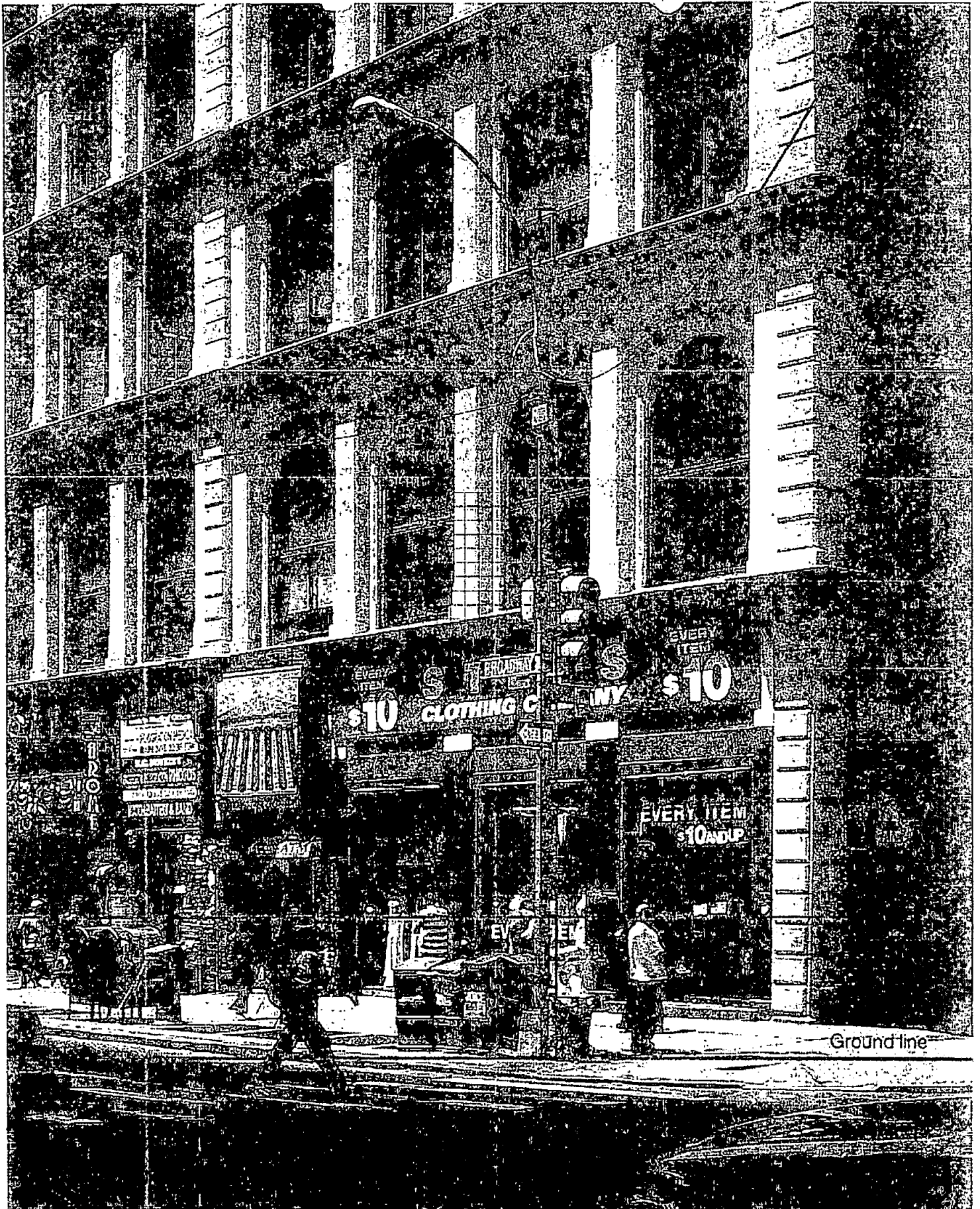
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ANTENNA
(29.7' LONG 0.33" Ø)
3 DBD GAIN
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KIDEL # UST3-006

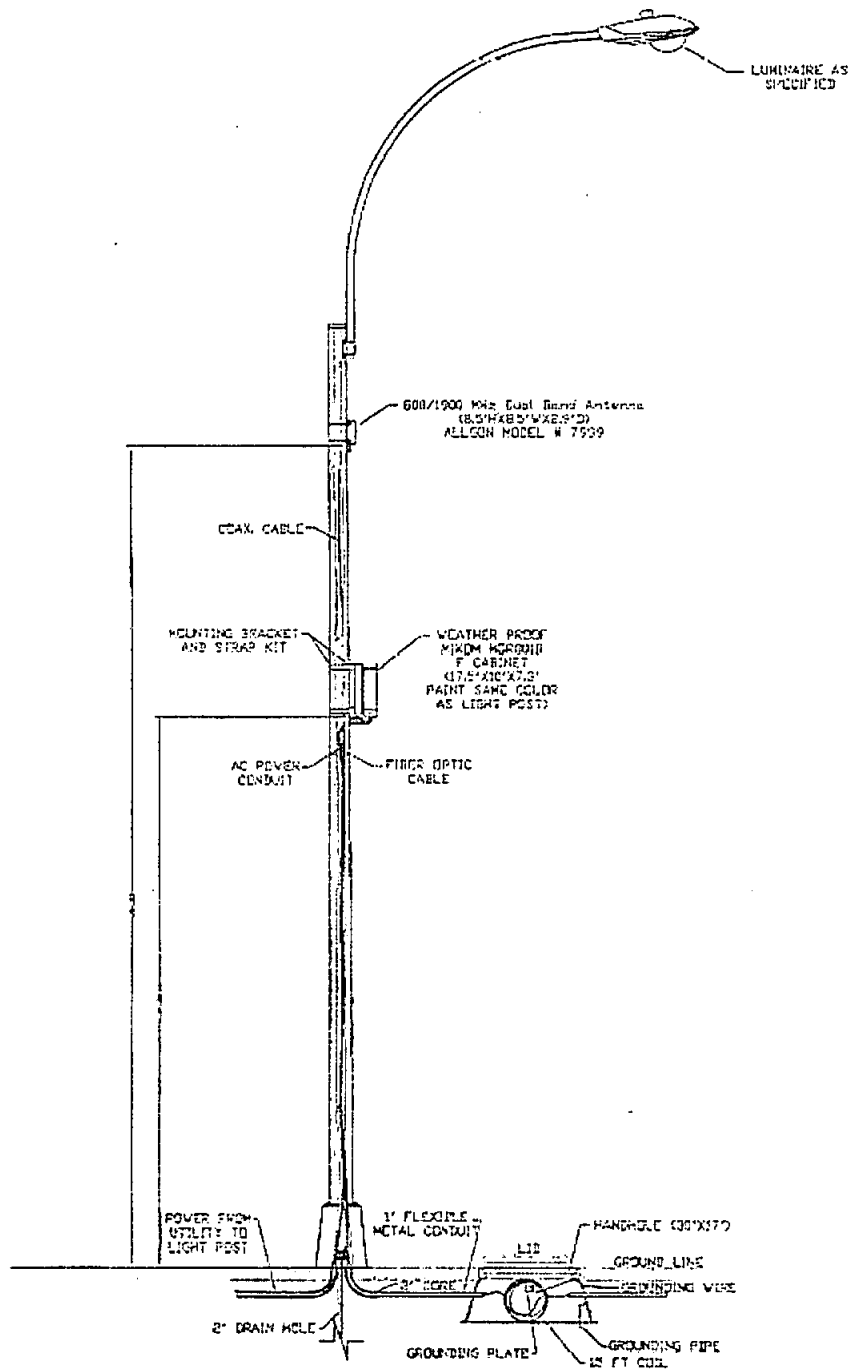


ANTENNA DETAIL
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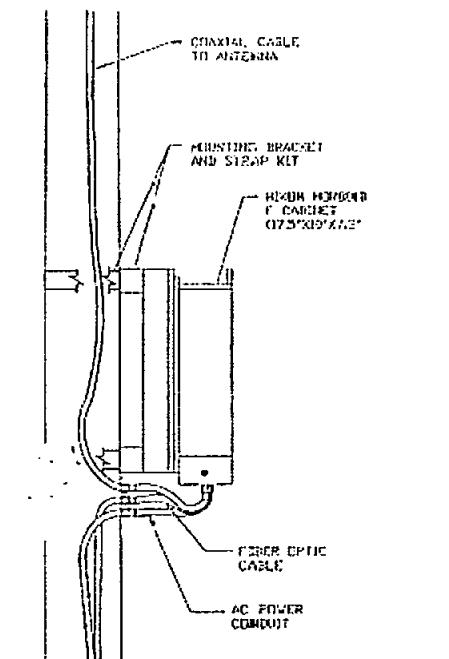


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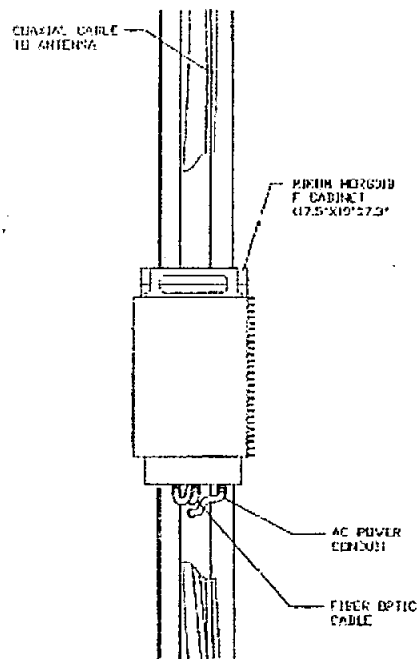




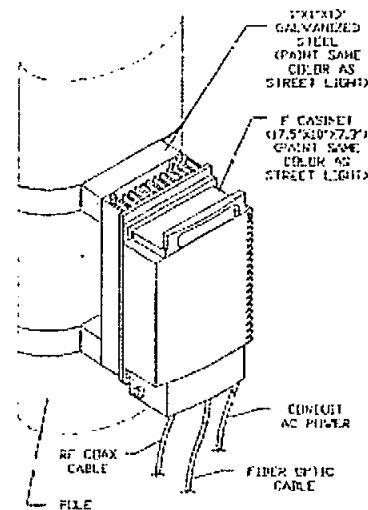
STREET LIGHT LAMP POST LAYOUT
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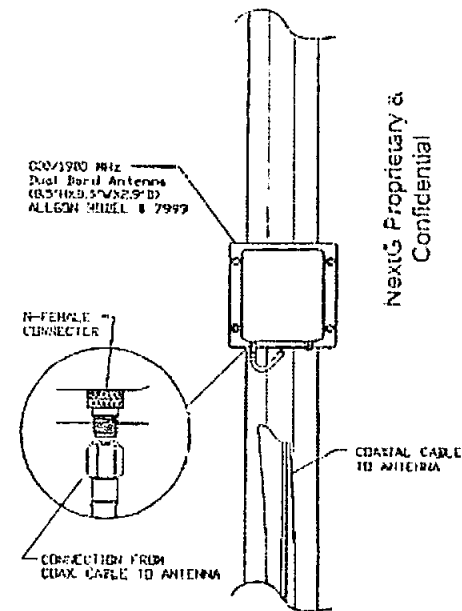
**TELECOM EQUIPMENT
CONNECTION SECTION DETAIL**
SCALE: 1" = 1'-0"



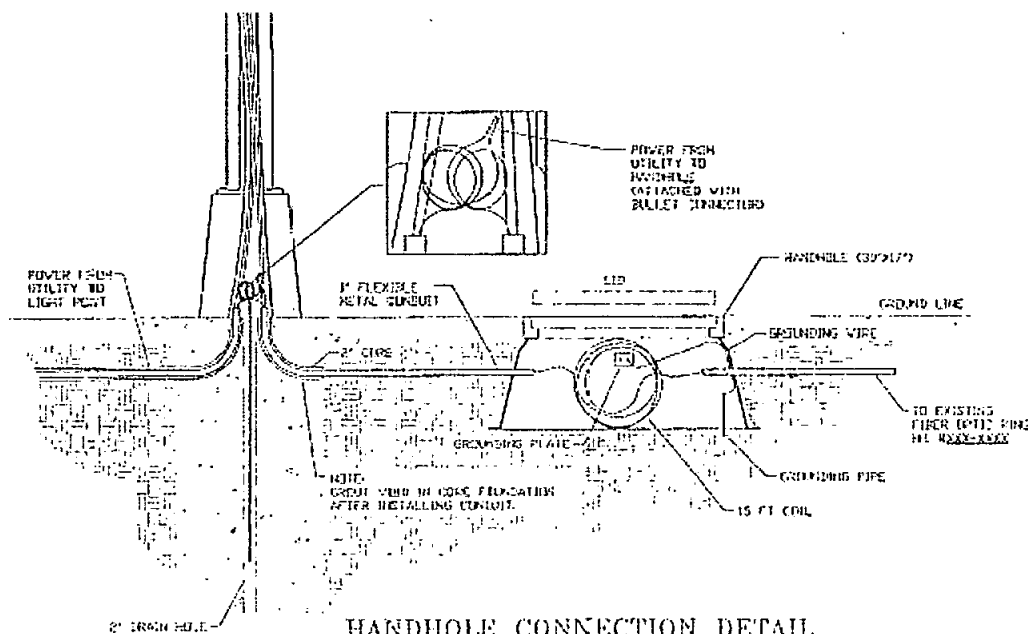
**TELECOM EQUIPMENT
CONNECTION FRONT VIEW**
SCALE: 1" = 1'-0"



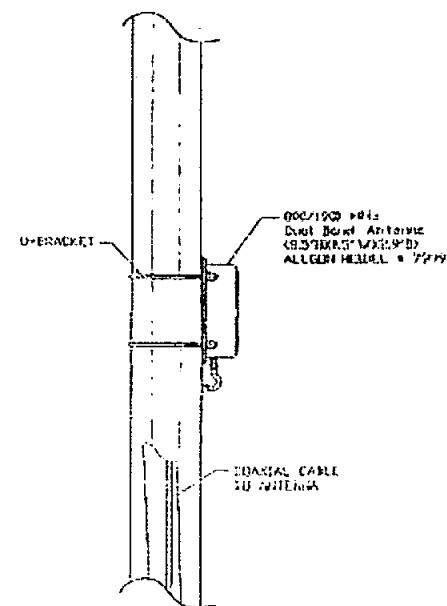
**TELECOM EQUIPMENT
CABINET**
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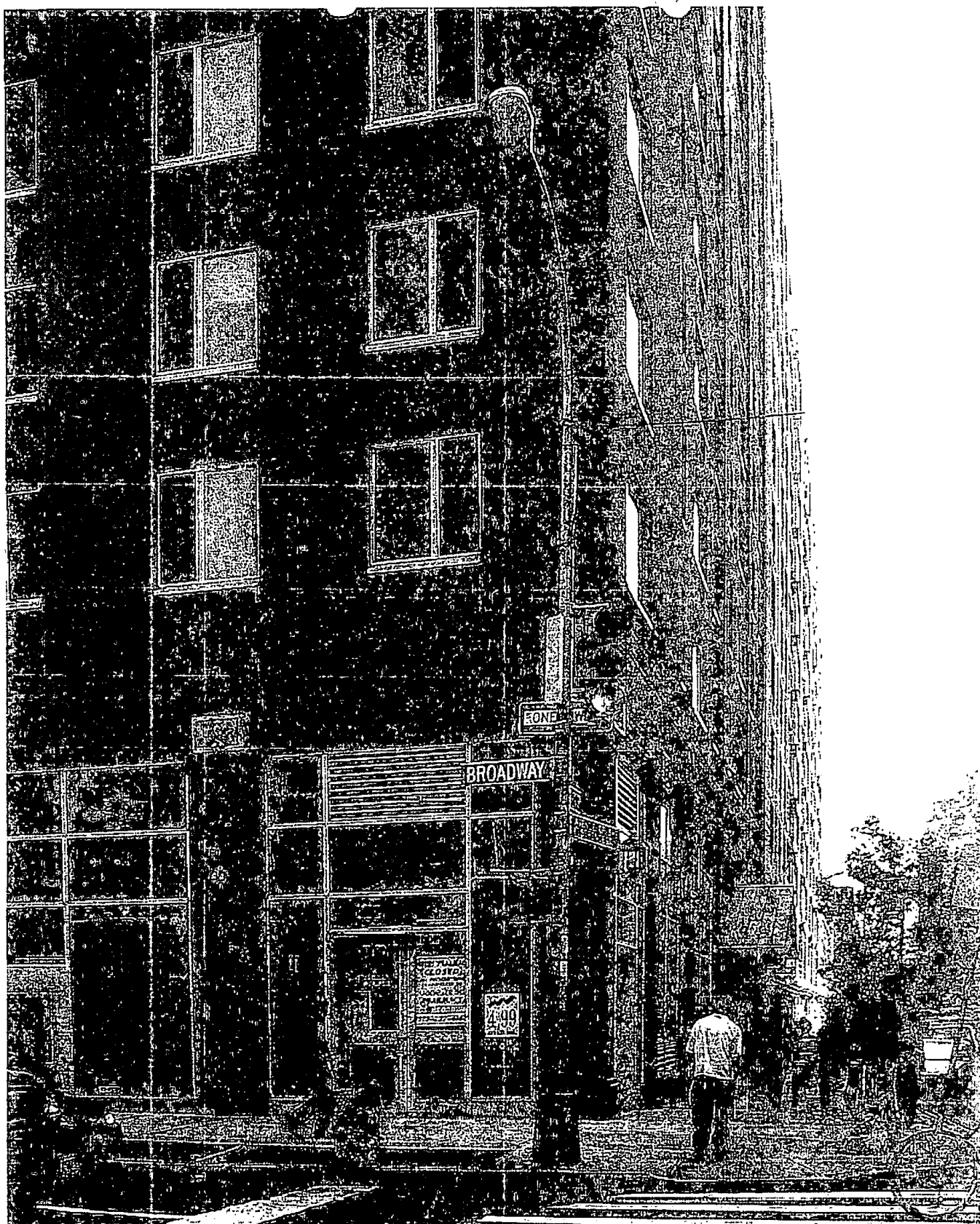
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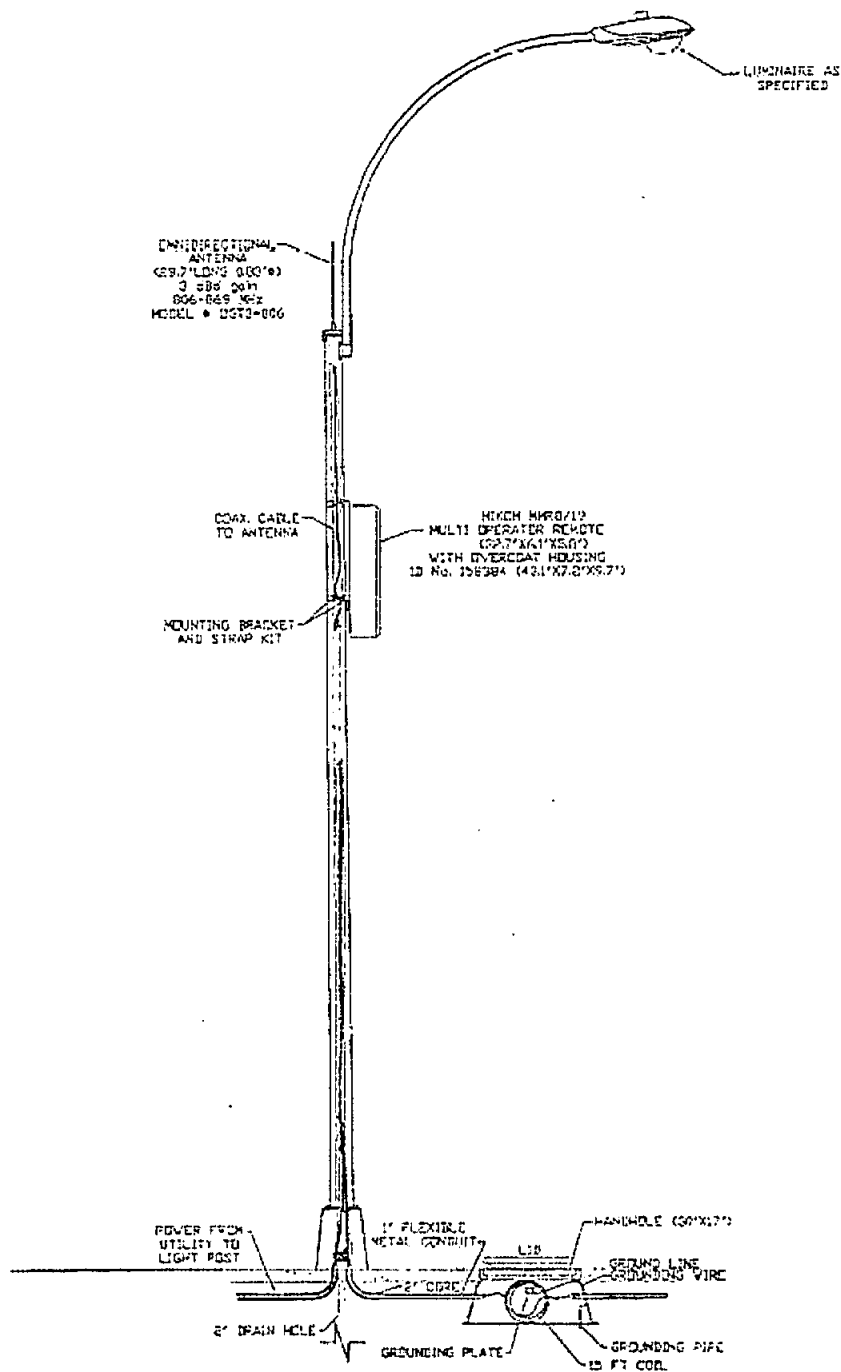


HANDHOLE CONNECTION DETAIL
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ANTENNA MOUNTING BRACKET DETAIL
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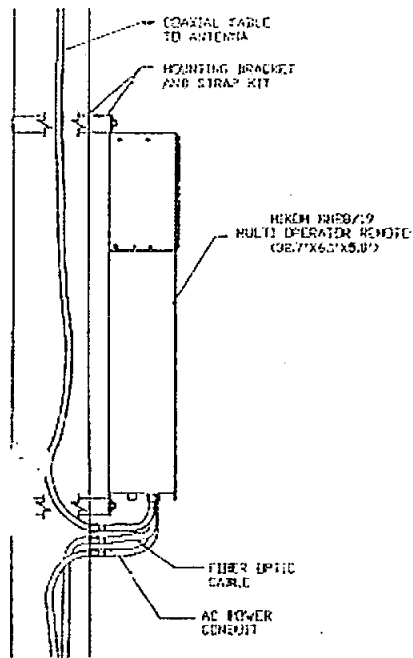




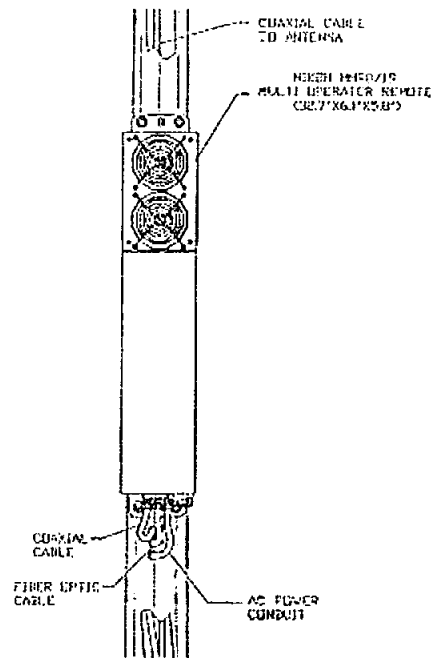
STREET LIGHT LAMP POST LAYOUT

SCALE: 1/4" = 1'-0"

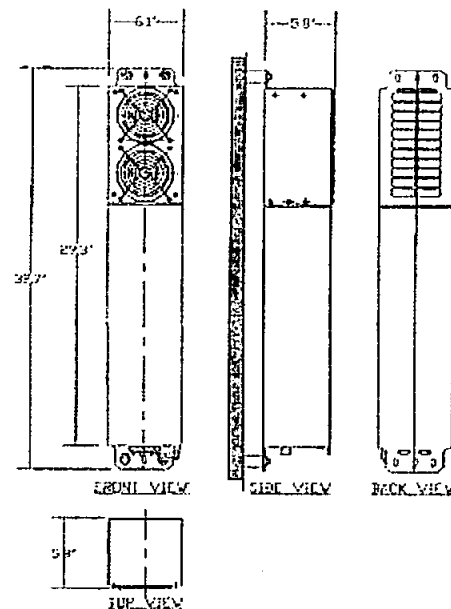
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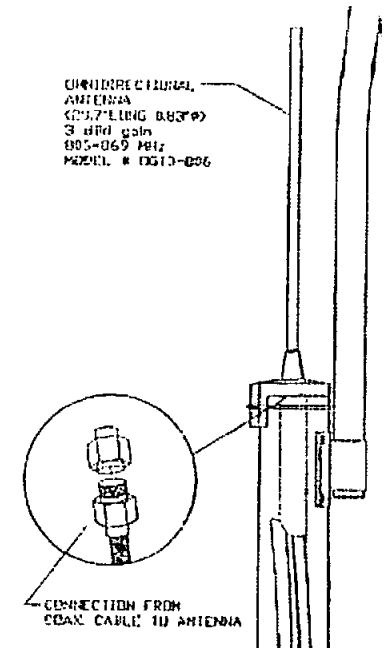
**MMR8/19 REMOTE UNIT
POLE CONNECTION
SECTION DETAIL**
SCALE: 1" = 1'-0"



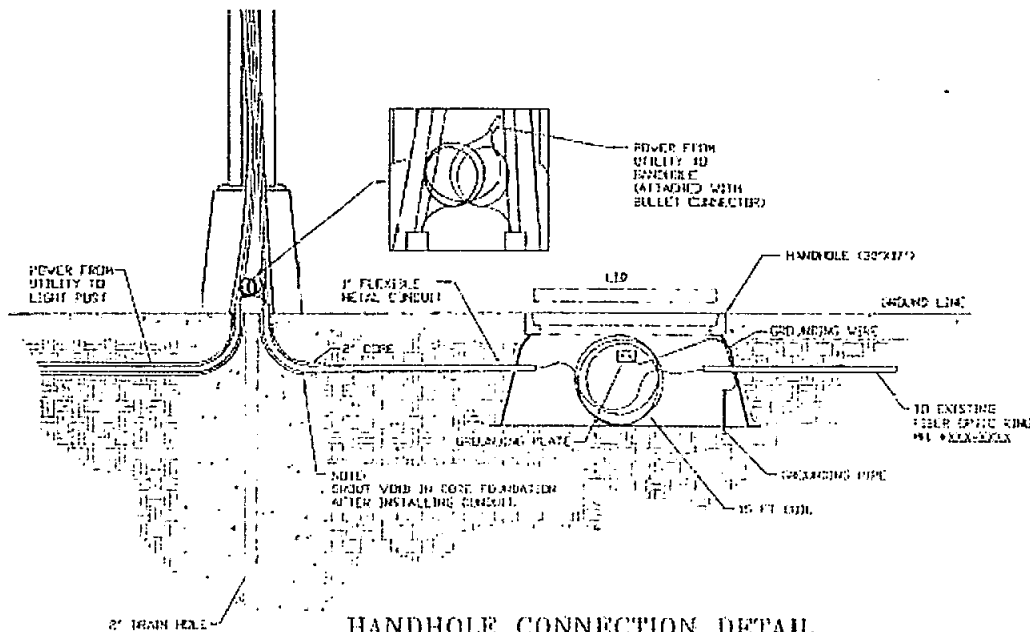
**MMR8/19 REMOTE UNIT
POLE CONNECTION
FRONT VIEW DETAIL**
SCALE: 1" = 1'-0"



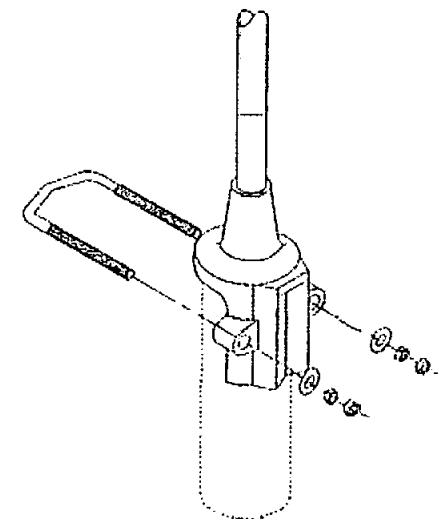
**MMR8/19 REMOTE UNIT
DETAIL**
SCALE: 1" = 1'-0"



ANTENNA DETAIL
SCALE: 1" = 1'-0"



HANDHOLE CONNECTION DETAIL
SCALE: 1/2" = 1'-0"



ANTENNA MOUNTING BRACKET DETAIL
SCALE: 1" = 1'-0"



Midtown
New York, NY

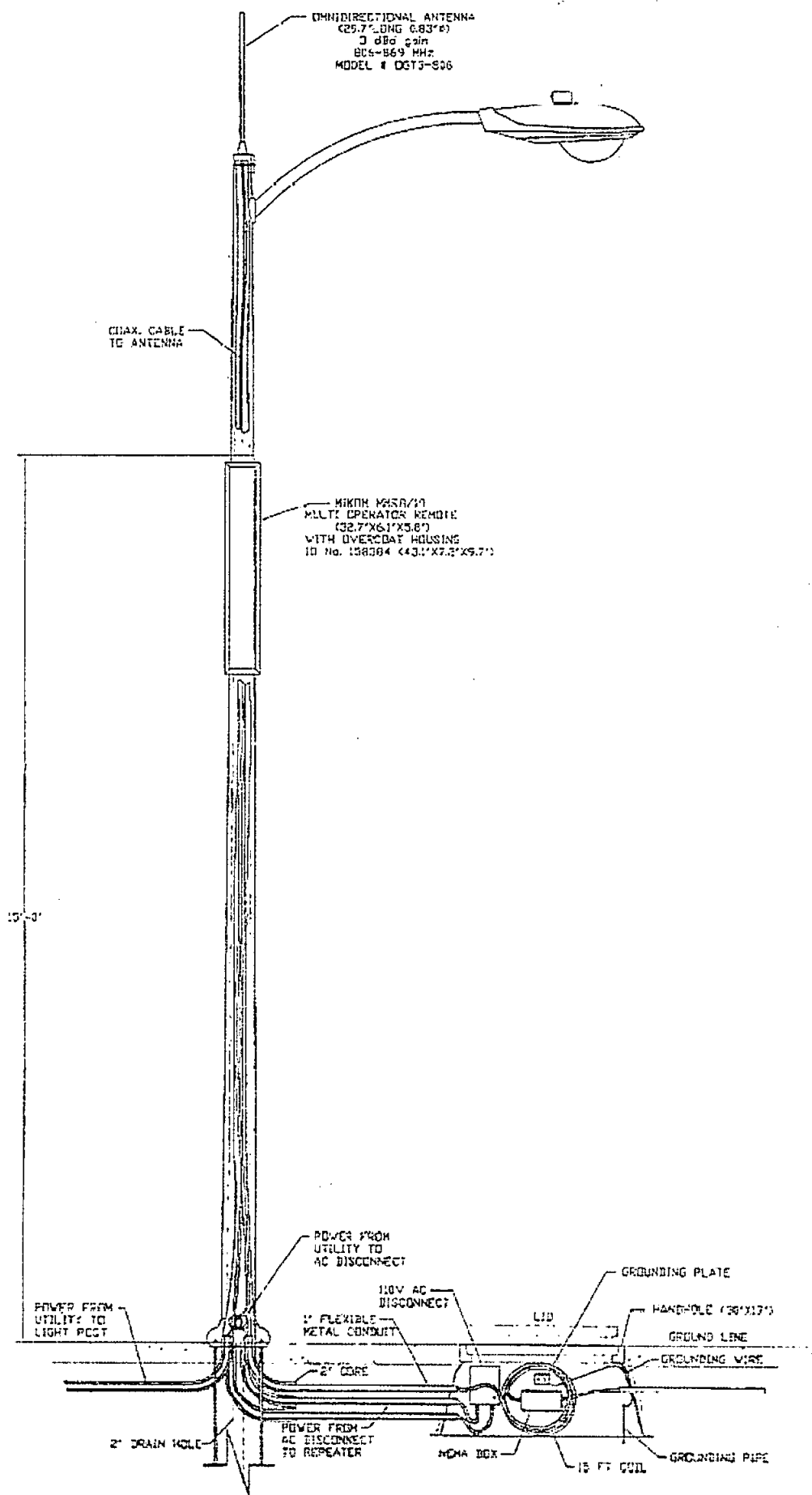


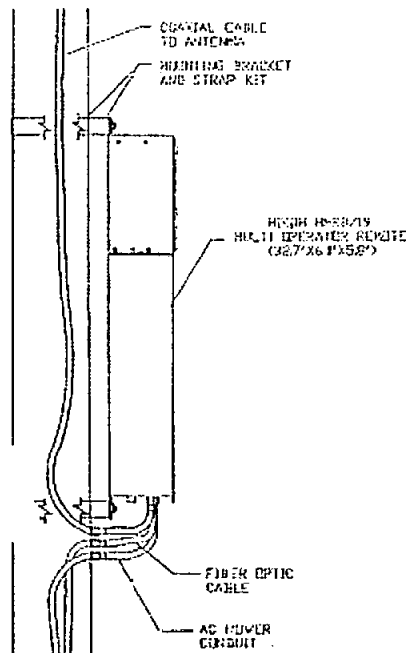
NextG Networks

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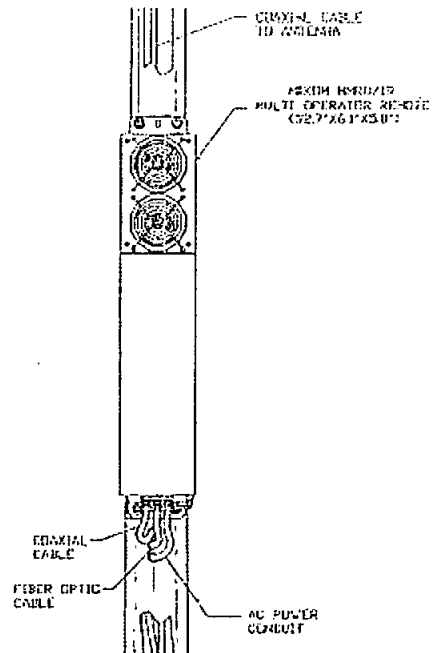
Photosimulation by Applied Imagination 510 014-0000

18 - PL Type - M
 Long - Omni
 Antenna - page 1 of 2

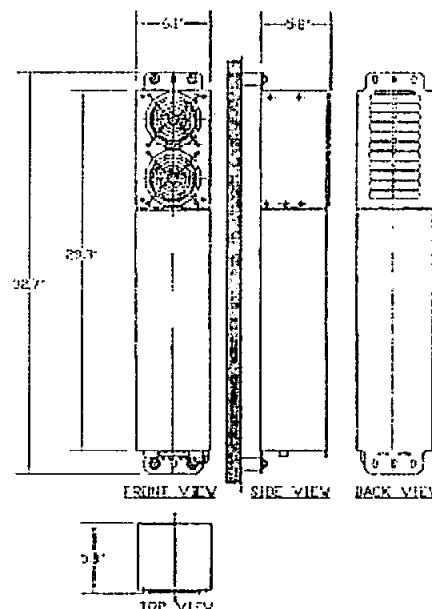




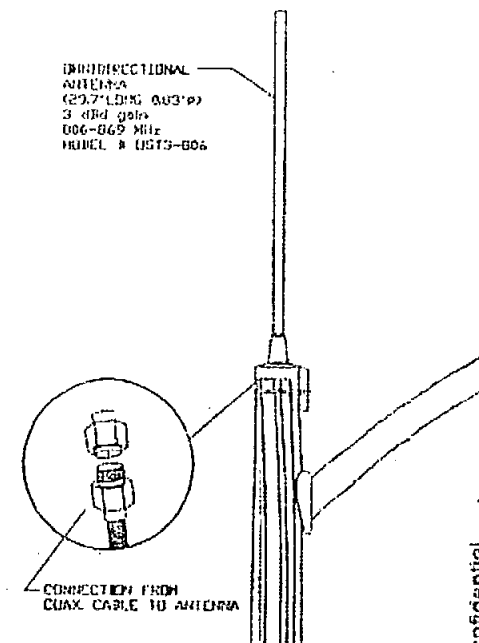
**MMR8/19 REMOTE UNIT
POLE CONNECTION
SECTION DETAIL**
SCALE: 1" = 1'-0"



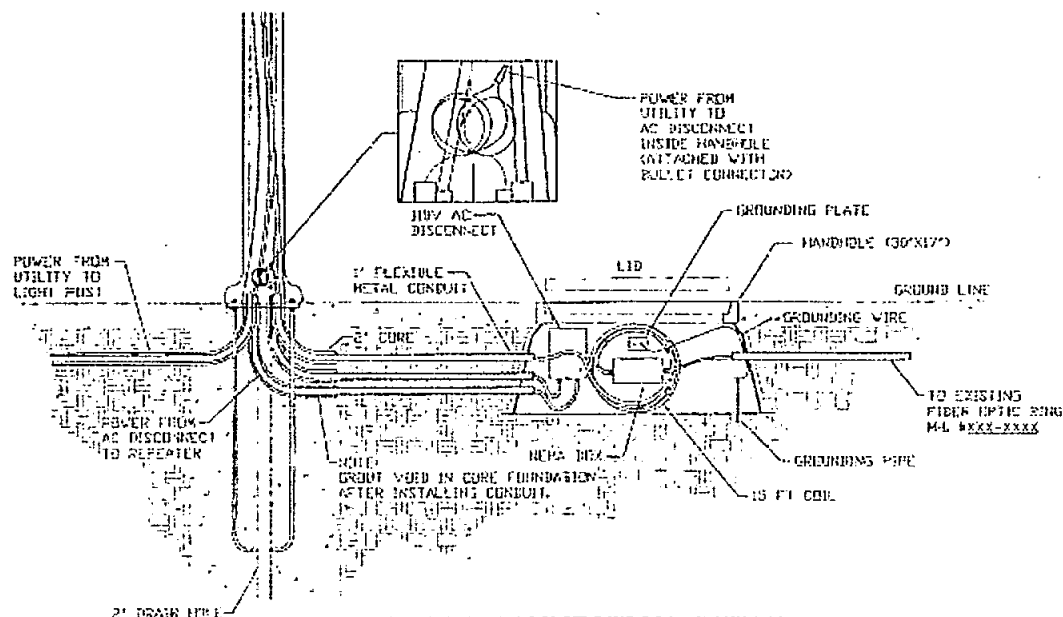
**MMR8/19 REMOTE UNIT
POLE CONNECTION
FRONT VIEW DETAIL**
SCALE: 1" = 1'-0"



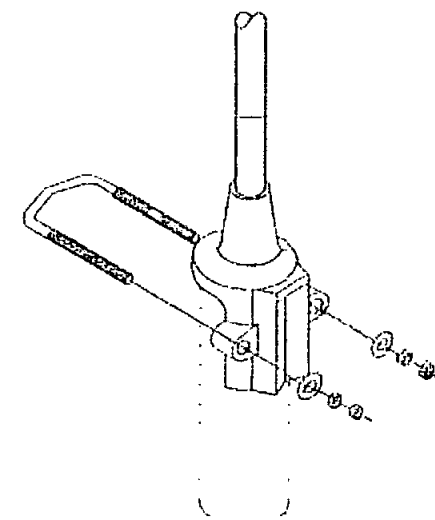
**MMR8/19 REMOTE UNIT
DETAIL**
SCALE: 1" = 1'-0"



ANTENNA DETAIL
SCALE: 1" = 1'-0"



HANDHOLE CONNECTION DETAIL
SCALE: 1/2" = 1'-0"



ANTENNA MOUNTING BRACKET DETAIL
NOT TO SCALE

[EXHIBIT 8]

[FORM OF SURETY BOND]

Bond Number: _____

Surety Bond

Know all men by these presents:

That _____ as Principal, and _____, incorporated under the laws of the State of _____, and authorized to execute bonds and undertakings as sole Surety, are held and firmly bound unto _____ as Obligee, in the sum of _____; for the payment thereof, well truly to be made, said Principal and Surety bind themselves, their administrators, successors, and assigns, jointly and severally, firmly by these presents.

The condition of the foregoing obligation is such that:

Whereas, the above bounden Principal is about to enter into a certain agreement with the Obligee for the following: _____ the execution and delivery of which said agreement was made to the Principal by the Obligee on _____.

Now, therefore, if the Principal shall well, truly, and faithfully perform its duties, all the undertakings, covenants, terms, conditions, and provisions of said agreement during the original term thereof and any extensions thereof which may be granted by the Obligee, with or without notice to the Surety, and if it shall satisfy all claims and demands incurred under such agreement and shall fully indemnify and save harmless the Obligee from all costs and damages which it may suffer by reason of failure to do so and shall reimburse and repay the Obligee all outlay and expenses which the Obligee may incur in making good any default, then this obligation shall be void; otherwise to remain in full force and effect.

Provided, further, that the said Surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration, or addition to the terms of the agreement or to the work to be performed thereunder or the specifications

X

accompanying the same shall in any way affect its obligation on this bond, and it does hereby waive notice of any such change, extension of time, alteration, or addition to the terms of the agreement or to the work or to the specifications.

Provided, however, this bond is issued subject to the following express conditions:

1. This bond shall be deemed continuous in form and shall remain in full force and effect until canceled under § _____, after which all liability ceases, except as to any liability incurred or accrued prior to the date of such cancellation.
2. The aggregate liability of the Surety hereunder on all claims whatsoever shall not exceed the penal sum of this bond in any event.
3. The surety reserves the right to withdraw as surety from this bond, except as to any liability incurred or accrued, and may do so upon giving the Obligee not less than sixty (60) days' written notice.

Signed and sealed this _____ day of _____

Principal:

Surety:

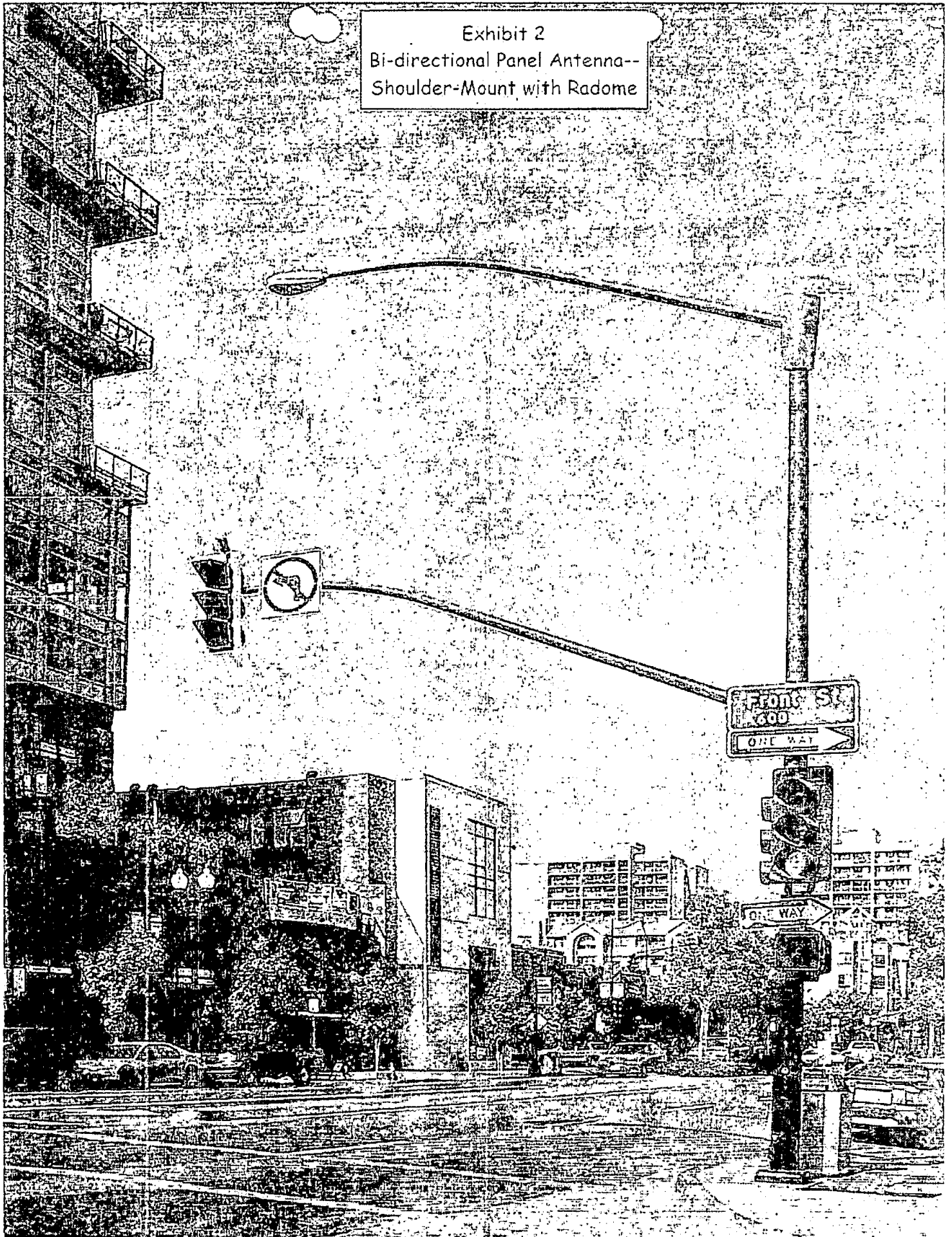
By: _____
Its: _____

By: _____
Its: _____
Address: _____
Telephone: _____

(Affix Corporate Seals)

(Attach Acknowledgments of both Principal and Surety signatures)

Exhibit 2
Bi-directional Panel Antenna--
Shoulder-Mount with Radome



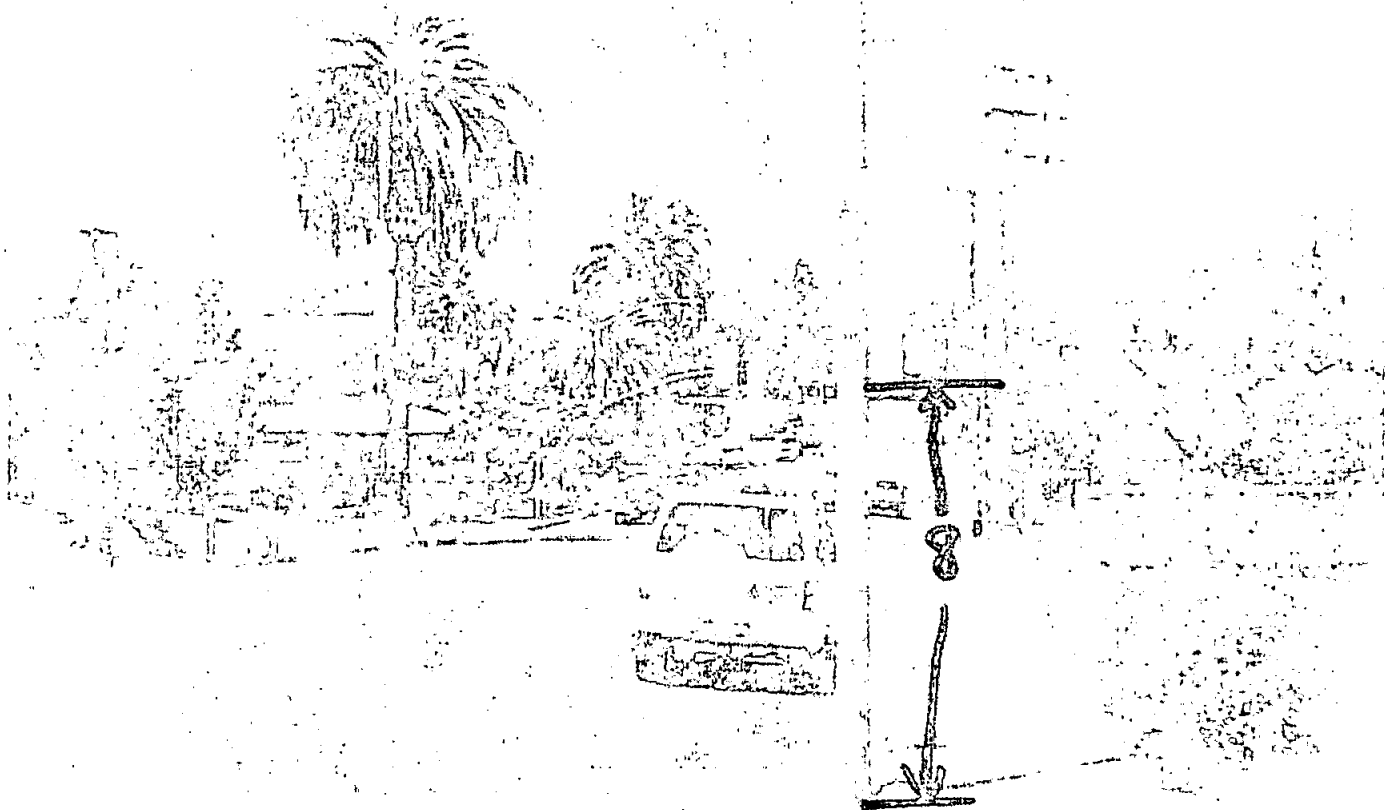


Exhibit 2
2 of 2

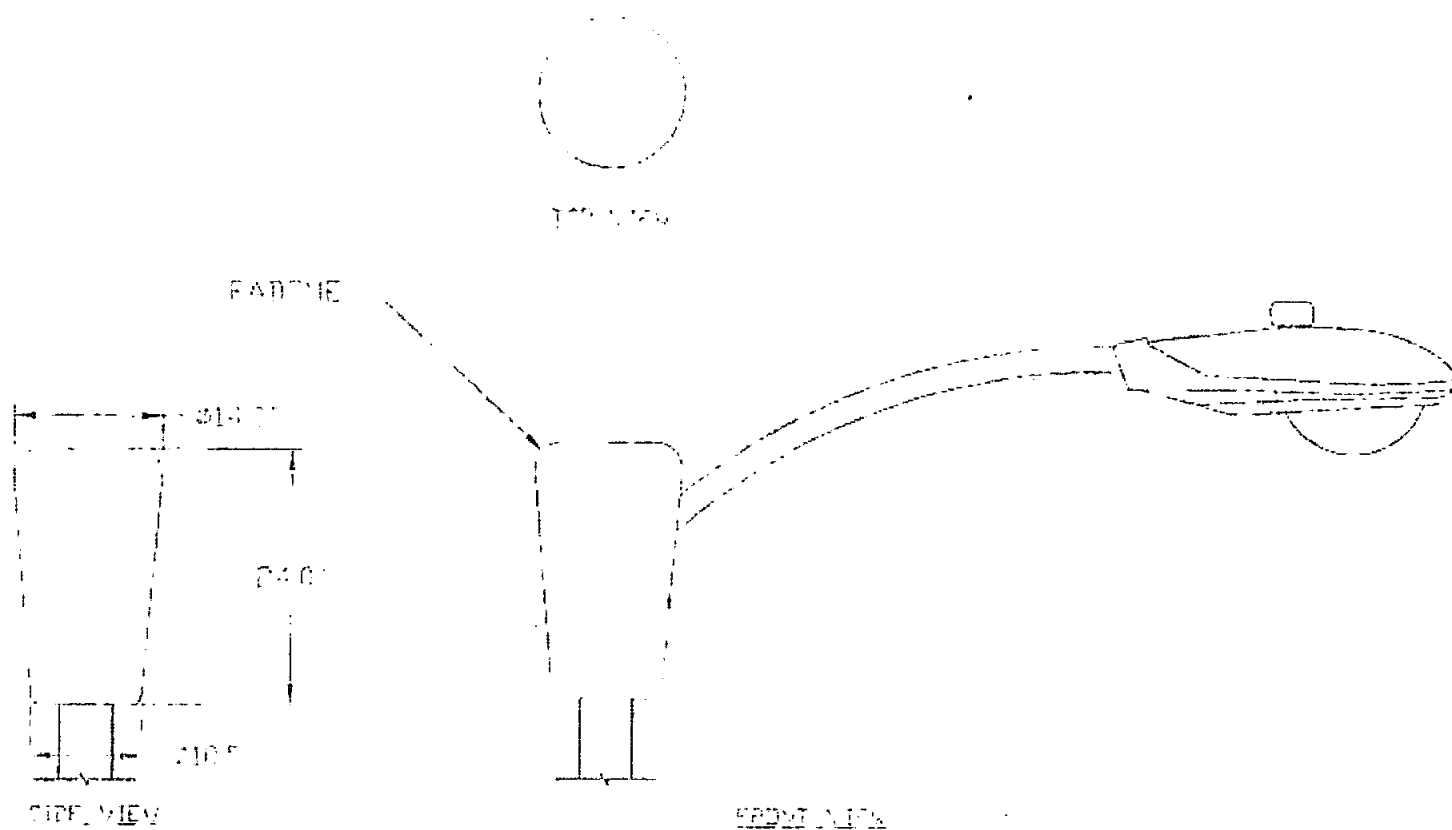


FIG. 1. MECHANICAL PART. (RADIUS MEANS VALVE RADIUS)

EXHIBIT 2

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