

**KRAMER TELECOM LAW FIRM**

A PROFESSIONAL CORPORATION

TELECOMMUNICATIONS  
TECHNOLOGY COUNSEL  
FOR GOVERNMENT AGENCIES  
AND PRIVATE INSTITUTIONS

2001 S. BARRINGTON AVENUE, SUITE 306  
LOS ANGELES, CALIFORNIA 90025-5379

MAIN TEL: +1 (310) 312-9900

MAIN FAX: +1 (310) 312-9909

TELECOMLAWFIRM.COM

**JONATHAN L. KRAMER**

ATTORNEY AT LAW

DIRECT TEL: +1 (310) 405-7333

DIRECT FAX: +1 (310) 473-5900

KRAMER@TELECOMLAWFIRM.COM

OUR FILE REFERENCE:  
CA SB 1252

**CALIFORNIA LEGISLATIVE ACTION ALERT — SB 1252**

To: Local Government Attorneys and Local Government Agency Attorneys in California  
From: Jonathan L. Kramer, Esq.   
Date: May 26, 2008  
RE: SB 1252 (Wireless Telecommunications)

T-Mobile, the wireless telephone carrier, has sourced a Bill carried by Sen. Alex Padilla (D-Los Angeles, 20<sup>th</sup> District) that would, during proclaimed emergencies or upon the declaration of an emergency by the President, allow wireless telecommunications carriers to enter onto public property and set up emergency replacement cell sites for existing sites that are “significantly impaired or rendered inoperable by the conditions causing that emergency” (although neither term is defined, and presumably are up to the wireless carrier to self-determine).

Under Gov. Code § 830 ‘Public property’ means real or personal property owned or controlled by the public entity, but does not include easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity. Generally speaking, public property includes all real property owned by the local government or public agency including, for example, a local government’s offices; a public agency’s offices; schools; corporation and maintenance yards; pump stations; wells, water tanks; parks; open space; police and fire stations; government training facilities; jails; municipal airports; etc.

Emergency wireless sites allowed under SB 1252 would be “temporary” installations, however the term ‘temporary’ is not time-defined in the Bill. There is a minimal (and potentially ineffective) prior notice requirement of the wireless carrier’s entry of the public property. There is a post-occupancy notice requirement, and a permit process commencement requirement, but no procedure other than judicial to eject an uncooperative occupying carrier if the permit is denied.

The Bill provides a severely time-restricted opportunity for a limited class of public property owners to opt out of the requirements of SB 1252 at existing radio sites, but not at all public property sites. The time restriction is limited to within 6 hours of the declaration or proclamation of an emergency. To be effective, the actual notice must be *received* by the wireless carrier within that time.

There is no compensation requirement for the carrier’s occupancy of the public property.

The Bill provides that the wireless carrier will indemnify and hold harmless a limited class of public property owners, but no defense of the public property owner is provided for in the Bill.

This Bill has cleared the California Senate, and is now in the Assembly, where it is currently being held at the desk.

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As of May 14, 2008, the following groups have officially supported the Bill: T-Mobile (source); California Chamber of Commerce; CTIA - The Wireless Association; the League of California Cities; and the Sheriff-Coroner of San Bernardino County.

Below is a section-by-section analysis of the proposed legislation.

<b>Bill Text</b>	<b><i>Jonathan Kramer's Analysis and Comments</i></b>
SECTION 1. Section 8316 is added to the Government Code, to read:	
8316. (a) After the proclamation of a state of emergency or local emergency, as described under subdivisions (b) and (c) of Section 8558, or an emergency declared by the President of the United States, a wireless telecommunications carrier, whose wireless telecommunications facilities and equipment have been significantly impaired or rendered inoperable by the conditions causing that emergency, may enter public property, without otherwise required permits, to repair damaged wireless telecommunications equipment or facilities or to install temporary wireless telecommunications equipment or facilities.	<p><i>Section 8558 says in relevant part:</i></p> <p><i>“(b) ‘State of emergency’ means...air pollution, fire, flood, storm, epidemic, riot, drought, sudden and severe energy shortage, plant or animal infestation or disease, the Governor’s warning of an earthquake or volcanic prediction, or an earthquake, or other conditions, other than conditions resulting from a labor controversy or conditions causing a ‘state of war emergency...’</i></p> <p><i>“(c) ‘Local emergency’ means...within the territorial limits...air pollution, fire, flood, storm, epidemic, riot, drought, sudden and severe energy shortage, plant or animal infestation or disease, the Governor’s warning of an earthquake or volcanic prediction, or an earthquake, or other conditions, other than conditions resulting from a labor controversy...”</i></p> <p><i>As used in the Bill, the phrase “significantly impaired or rendered inoperable” is undefined. The wireless carrier is, presumably, the party to interpret the phrase on an emergency-by-emergency basis, and then on a site-by-site basis.</i></p> <p><i>Gov. Code § 830: “‘Property of a public entity’ and ‘public property’ mean real or personal property owned or controlled by the public entity, but do not include easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity.”</i></p> <p><i>As the definition of public property includes the personal property owned or controlled by the public entity, the Bill would conceivably permit a wireless carrier to attach its emergency replacement antennas and cables to, for example, a government’s existing radio tower.</i></p>
(b) (1) This section shall not be interpreted to otherwise affect any authority of a local governmental agency to require permits for wireless carriers to install wireless telecommunications equipment or facilities on public property or as authorizing a permanent installation of wireless telecommunications equipment or fa-	<i>The “otherwise” exclusion makes it clear that the normal local process for permitting wireless site on public property (if it is allowed by the local government) remains intact, presumably during any non-emergency period.</i>

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ilities on public property.	<i>The second portion of the section (“or as authorizing the permanent installation of wireless telecommunications equipment or facilities on public property”) appears intended to ensure that no permanent installation of an ‘emergency wireless site’ is permitted under this Bill. As discussed below, however, there is no maximum term for a ‘temporary’ site.</i>
(2) This section shall not apply if the wireless carrier has an agreement with a local governmental permitting agency detailing the procedures for repairing or installing wireless telecommunications equipment or facilities during an emergency.	<i>This is an opt-out clause that permits a local government <u>permitting agency</u> and a wireless carrier to enter into an agreement (effectively in advance of an emergency) which governs emergency siting of replacement cell sites. If the agreement is in place, the rights under this law in the particular community and for the particular carrier are replaced with the local agreement.</i>
(c) A wireless telecommunications carrier acting under the authority set forth in subdivision (a) shall do all of the following:	
(1) Immediately prior to entering the public property, notify any local emergency operations center and any point of contact designated to the wireless carrier by the local permitting agency as the person or entity to inform when entering public property to repair wireless telecommunications equipment or facilities.	<i>The carrier’s notification requirement is to notify <u>any</u> local EOC of the impending entry. For example, a wireless carrier’s notification to a police EOC of its intent to immediately enter onto the public property of a school district would be valid.</i>  <i>Note that the Bill does not provide a right of refusal to the public property owner, but merely a notice (and as discussed just above, not necessarily to the actual agency impacted by the pending entry).</i>  <i>The Bill places the burden on the local government permitting agency to designate a “point of contact” <u>and</u> to transmit that designation to the carrier.</i>
(2) Within 24 hours of entering the public property, notify the applicable local governmental permitting agency of the wireless carrier’s entrance onto the public property.	<i>Within 24 hours after the entry has occurred, the wireless carrier must notify the agency-owner of the entry.</i>
(3) Within 72 hours of entering the public property, commence any required process to obtain a permit.	<i>Within 72 hours after the entry has occurred, the wireless carrier must “commence” the process to obtain the permit. Presumably, this obligation may be satisfied by the carrier’s representative coming to the counter and requesting the permit application.</i>  <i>There is no time limit by when the completed permit application must be tendered.</i>  <i>There is no explicit process to eject a wireless site placed pursuant to this Section where the permit process is not completed, or the permit is rejected. Presumably an ejection action would be necessary to dislodge an uncooperative wireless carrier.</i>

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<p>(d) A city, county, or city and county that operates emergency communications facilities or equipment at the same site where a wireless telecommunications carrier has facilities or equipment, and the equipment or facilities of the city, county, or city and county are not collocated, as defined in Section 65850.6, the city, county, or city and county may notify the wireless telecommunications carrier within six hours of a proclamation or declaration of emergency set forth in subdivision (a) that the wireless telecommunications carrier may not proceed under subdivision (a) without prior authorization from the city, county, or city and county. If the wireless telecommunications carrier does not receive this notification within six hours of the declaration or proclamation, the wireless telecommunications carrier may proceed under subdivision (a). This subdivision shall only apply if the wireless telecommunications carrier has no independent contractual authority to enter the property.</p>	<p><i>Where a local government (but <u>not</u> an independent public agency such as a water district or school district) operates emergency communications facilities or equipment (these terms are undefined, but presumably generally describe a two-way radio site), and a wireless carrier has its own facilities in a separate location on the same property (but not collocated), then that local government may elect to notify a wireless carrier that it may not enter onto that public property to construct an emergency replacement site as would otherwise be authorized by subdivision (a) of the Bill without the local government's prior permission.</i></p> <p><i>This section requires that the local government make the notification to each wireless carrier within six hours of the declaration of the emergency <u>and</u> that the wireless carrier actually receives the notification within the same six hour window. Interestingly, under the plain reading of the rule the notification could come within six hours before the declaration of the emergency, or six hours afterwards ("...<b>within</b> six hours of the declaration or proclamation..." (Emphasis added)). A general or standing notification in advance of a declared emergency would be ineffective given the specific six-hour notice requirement.</i></p> <p><i>The form of the notification, and to whom it must be made are undefined by the Bill. One may presume that during the six hours lead up to or the first six hours after a declared emergency, a local government's elected, executives, and staff will have more pressing issues than to try and contact each wireless carrier that may be located, but not collocated, at each government radio site.</i></p> <p><i>It's useful to note that "Collocated" is not a defined term in Gov. Code § 65850.6, however, 65850.6(d)(1) says "'Collocation facility' means the placement or installation of wireless facilities, includes antenna, and related equipment, on, or immediately adjacent to, a wireless telecommunications collocation facility." 65850.6(d)(3) says, "'Wireless telecommunications collocation facility' means a wireless telecommunications facility that includes collocation facilities."</i></p> <p><i>65850.6(d)(2) says, "'Wireless telecommunications facility' means equipment and network components such as towers, utility poles, transmitters, base stations, and emergency power systems that are integral to providing wireless telecommunications services." The term, "wireless telecommunications services" is not defined in 65850.6.</i></p>

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<p>(e) A wireless telecommunications carrier shall indemnify and hold harmless a city, county, or city and county, and its elected or appointed officials and employees, from and against all liabilities arising from negligent or intentional acts or omissions of the wireless telecommunications carrier or its officers, employees, agents, or contractors in connection with the wireless telecommunications carrier's entry onto the public property pursuant to this section. This section shall not prohibit a city, county, or city and county from using any existing remedies to prevent or cure an unauthorized entry onto public property by a wireless telecommunications carrier.</p>	<p><i>This indemnification and hold harmless clause is facially limited to cities, counties, and city and counties. Independent public agencies such as school districts and water districts would not benefit from the protections offered here.</i></p> <p><i>Regardless of who is benefited, the indemnification and hold harmless clause lacks a defense obligation. It would appear that the expense of defense of any action brought against the government would rest on the shoulders of the defendant, although a indemnification/hold harmless claim could be filed with the wireless carrier</i></p> <p><i>The second portion of this subsection is likewise facially limited to cities, counties, and city and counties. Once more, independent agencies such as school districts and water districts would not benefit from the protections offered here.</i></p>
<p>(f) For purposes of this section, "temporary wireless telecommunications equipment or facilities" is equipment or facilities that are necessary to temporarily restore service while actions are taken to permanently restore service to the same level of service prior to the damage caused by the condition causing the emergency.</p>	<p><i>Restoration of service to the "same level of service prior to the damage caused by the condition causing the emergency" is difficult to quantify, and will rely on information usually solely within the control of the affected wireless carrier. Moreover, there may be situations where permanent restoration of service to the same levels may not be desirable, occur, or even be possible.</i></p>

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This guidance and analysis was prepared by Jonathan L. Kramer, Esq. on May 26, 2008. It is intended to be informational only. It is not intended to provide specific legal advice in any particular matter or situation. You should seek the opinion of qualified legal counsel regarding your specific situation before acting on the information provided here.

Updates regarding SB 1252 may be found at <http://www.TelecomLawFirm.com> (links to the Kramer Telecom Law Firm P.C. website).

The Bill and related legislative information are available online at: <http://tinurl.com/6cu5fk> (links to the legislature.ca.gov site for this Bill).

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