

eNATOA: Negotiating Wireless Telecom Facilities (WTF) leases/licenses on your government's real estate



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- Admitted to practice law in California and New Mexico
- Admitted to practice law before the U.S. Supreme Court, 9th Cir. Court of Appeals; 10th Cir. Court of Appeals; Central District of California.; District of New Mexico.
- Licensed by FCC since early 70s (holds an excessive number of licenses & certs)
- 35+ years in telecom engineering/safety reviews
- (RF, broadband, fiber, outside plant safety, code compliance, RF safety)
- 33+ years consulting on telecom matters > 1,500 governments/firms;
- 25+ years of wireless leasing, siting, and planning matters >2,000 cases/matters
- Expert witness/trial advisor in 40+ wireless, wired telecom cases
- Co-author, Co-editor of FCC's "A Local Government Official's Guide to Transmitting Antenna RF Emission Safety: Rules, Procedures, and Practical Guidance"
- **Member:** NATOA's only twice Member of the Year; IMLA; Federal Communications Bar Association; Senior Member of the Society of Broadcast Engineers; ARRL Life member; Fellow, Society of Telecommunication Engineers (UK); Emeritus Sr. Member, Society of Telecommunications Engineers (US).
- **Education/Teaching**
 - Doctor of Law and Policy, Northeastern Univ., Boston
 - Master of Law *with distinction*, Strathclyde Univ. School of Law, Glasgow
 - Juris Doctor *cum laude*, Abraham Lincoln School of Law, Los Angeles
- **Instructor:** Regulatory Law and Policy, Northeastern University, Boston and Seattle campuses (Doctoral and Masters levels)

Jonathan's relatively current CV is at: www.TLFPC.com/dr-jonathan-l-kramer/

Before construction, right after any construction, and at least once annually go look at the site! Bring and use a quality measuring tape.

Again, before you consider signing on any follow-up dotted lines (renewal, amendment, sale, dispute, estoppel, etc.), go and carefully look at the site. Use a quality measuring tape.

Take and record measurements. Many measurements. Compare the measurements to the lease/license.

Measure twice; breach once. TM



Take photos. Lots of photos.

Photos from different angles. Photos close up on every sign. Photos pulled back from every cluster of antennas, cabinets, signs, etc.

When you think you have taken enough photos, take another dozen or so.

Turn on Date and Time Stamp.

Turn on GPS logging.

Max image size; check to make sure the photos are clear.

Save the photos where you can find them.

Photograph twice; breach once.TM

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Visualize this as a modern high-quality cell phone camera... better yet use a legit DSLR camera in the 16+ megapixel range.

Visualize this as your wireless site tenant waiting to hatch something against your agency.



Lease Life

- Negotiating the original Lease or License
- Lease Amendments initiated by Lessee, usually with one-sided stinker clauses
- Early Terminations (initiated mostly by Tenant)
- Lease term enforcements
- Rent 'Optimization' Threats/Move Out Threats (usually initiated by Tenant via surrogates – Black Dot; Lyle Co.; MD5; others)
- Lease/License Sales (maybe green, maybe real red)
- Negotiating the extension/new lease
- Expiration & Holdover
- Ejectment

Lease Elements

Typical Structure (finding buried bodies and Zombies)

1. Option to lease and option fee (depreciated)
2. Identification of Property and the Premises within property
3. Commencement date; approvals and term
4. Rights to use Premises for (nearly) any purpose, standby power
5. Rent, escalator, holdover and holdover rent
6. Return of land upon expiration or termination
7. Government permits, early carrier termination provisions
8. Insurance
9. Indemnifications, warranties
10. Interference
11. Environmental
12. Site access
13. Utility easement; utility services
14. Default, cure provisions
15. Assignment, subleases
16. Notices
17. Condemnation taking
18. Causality; rent vacation; abandonment after causality
19. No fixtures; return after end of agreement provisions
20. Taxes and payments due from tenant
21. Tenant's rights on property sale; right of first refusal
22. Tenant's rights on lease sale; right of first refusal
23. Tenant's rights to convert lease to easement on single payment
24. Relocation provisions
25. Subordination and non-disturbance provisions
26. Bankruptcy
27. Most favored nation (MFN) clause
28. No personal liability (elected officials, staff, others)
29. Public records act provisions
30. Government claims act provisions
31. Blah, blah, blah provisions (hide decaying bodies here)
32. Miscellaneous
 - a. E-911 expansions
 - b. Amendments in writing
 - c. Waiver provisions
 - d. Memorandum of lease (recording)
 - e. No consequential damages
 - f. Integration clause
 - g. Government law, venue, attorney's fees; court costs
 - h. Carrier's RF duties; Landlords RF duties
 - i. Tower lighting duties
 - j. Electronic signatures
 - k. Counterpart execution
 - l. Tenant self help provisions
 - m. Exhibits incorporation clause
 - n. Appointment of tenant as agent for permitting
 - o. Direct deposits
 - p. Waiver of jury trials
 - q. Other stuff I forgot to put in to this list

Exhibits:

- A. Property legal description
- B. Premises legal description (illustration; zoning level drawings)
- C. Memorandum of lease for recording (with exhibits)

Strategy!

Words Count. Framing Counts.

- Framing **Rights** v. **Privileges** (Negotiations 101)
 - **Tenant**: The carrier needs all sorts of rights in the lease
 - **You**: Let's discuss the valuable privileges they want that might become their rights *later* in the signed agreement
 - **Tenant**: "The Carrier *must have* the right to terminate the lease at will."
 - **You**: "That's a very unusual and extremely valuable privilege especially with you say the landlord can't also terminate at will? Let's talk about that request and accord it a proper dollar value in the agreement..."

Who?

Their Water Carrier... Keeping Tenants at Arms Length

- 90%+ chance you'll be approached by an independent rep for XYZ wireless or ABC TowerCo (we'll call them "**REPCo.**")
- **REPCo** lacks any real authority to negotiate beyond pre-scoped parameters.
- Get to the **real decision makers**: The carrier's/tower company's Project Manager and the legal counsel
- Recommendation: 'Wiggle' to get past **RepCo.**
 - 'Based on the terms shown in our draft, the rent rate looks okay, but that could change if XYZ/ABC wants more stuff.'

5G & Rent

'Cell sites are less valuable'

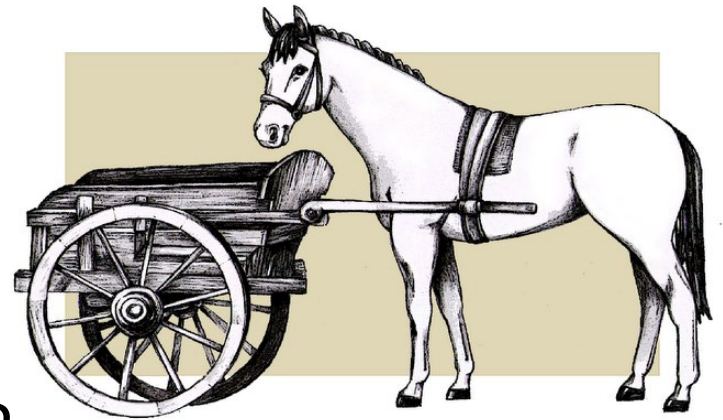
- **RepCo**: 'Monthly rents for new and renewing tower sites like yours are lower because of those '5G thangs' on poles in the PROW.'
- Reality! No: pole sites are for spot/block coverage within ~500 feet of the site (**fixed wireless**).
- Existing and new macrocell sites will be 5G, too, but are all about '**umbrella coverage**' over thousands of feet from the tower; they fill in small cell gaps.
- **Dish Network** to deploy new macrocells at existing Crown Castle/TMUS tower sites

5G & Rent

‘Cell Sites Now Require Less Stuff’

- RepCo: ‘New sites take **less equipment** to operate, so lower rents are appropriate. It’s a 5G thang.’
- Don’t be **suckered** into the ‘count only the equipment’; not count the square footage. You rent square feet, not equipment cabinets. **You have no profit participation!**
- Generally new building and ground ‘small cell’ sites (including standby generators; cable runs; etc.) are still occupying 600+ square feet, **essentially the same** as before.

Who's On First?



- First leasing, then zoning?
- First zoning, then leasing?
- Simultaneous leasing and zoning?

Appointed agent at the local gov for all things? 
Some things?

Site visits, soil drilling before insurance? Listen for
“A and E site visit.” Get their insurance certs naming
Landlord as an additional insured **before** start.

Strategy

Option (depreciated) Option Fee, Signing Bonus

- Options typically are in two 1-year blocks

Better to avoid the option and go right for the lease
(**Rent Commencement Date?**) Often 3-6 months.

Signing Bonus is **NOT** the Option Fee: Signing bonus to offset lessor's costs because of the tenant's early term rights

- Who signs first? (**Hint: *THEY ALWAYS SIGN FIRST BECAUSE...***)

Strategy

Signing Bonus/Admin Fee

- Recover your lease grant/renewal costs immediately on signing, NEVER over time!
 - Gov: “With a lessee’s ‘at will termination provision’ we must immediately recover our costs to do the lease.”
 - RepCo: “Why? XYZ Wireless will be on your property for the next 25 years!”
 - Gov: “Okay, then there’s no need for your termination-at-will **privilege** in the lease.”
 - RepCo make sucking sounds: “Ah...but...well...shucks... XYZ Wireless still requires that **right**.”

Lease Elements

Early termination provisions

- Landlord: Only on uncured breach after notice to tenant and tenant's opportunity to cure.
- Tenant: 30 days for tenant for virtually any/no reason + (sometimes) an annual right of termination (**Practice Pointer: Early Termination Fee ~2 budget years or balance of current 5-year term if less than 2 years**) Why? Budget impacts!



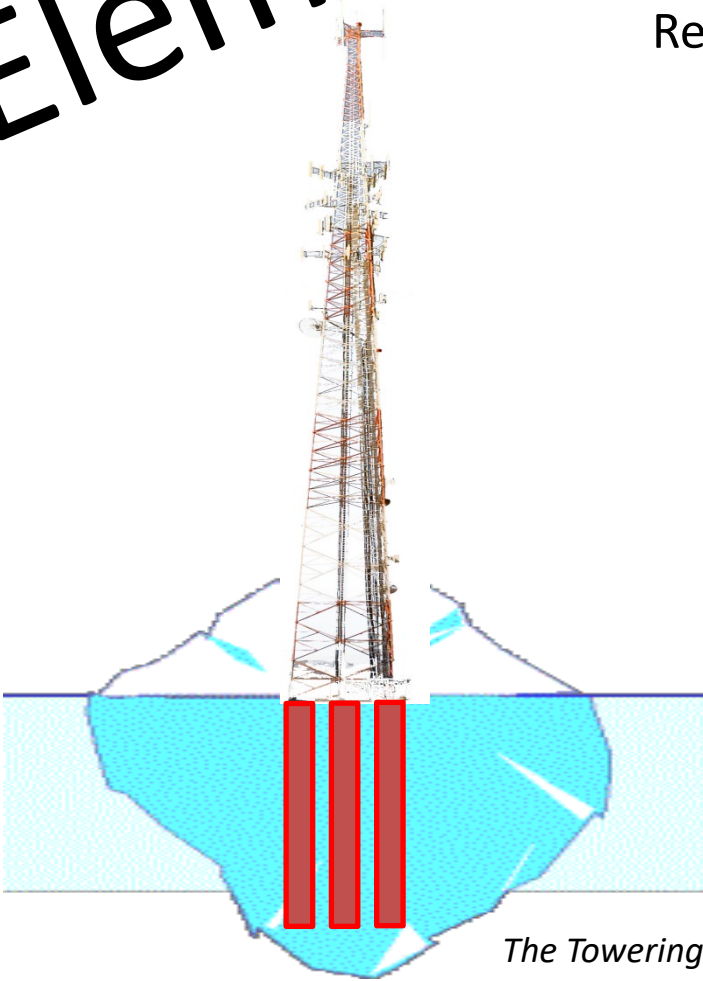
I'm the
Zombie
Lender!

License with Zombie Clause:

Only on uncured breach after notice to tenant and tenant's opportunity to cure, and only then after notice to Tenant's lender, and Lender's opportunity to cure, and only then if Lease terminates Landlord agrees to enter into an identical lease with Lender.

(Practice Pointer: **Kill all Zombies!**)

Lease Elements



*The Towering Iceberg:
Tons of rebar re-enforced concrete.*

Return of land upon expiration, termination

- They want: Clear out everything within XX days after expiration at no rent. Anything left is abandoned.
- They want: Minus wear and tear; grind tower base and other foundations to only about 3 to 5 feet below grade

(Practice Pointers: Require full subsurface removal, not just 3 feet; Rent to continue until full physical return, **AND** recording release/quitclaim on the MOL. No abandoning of their **KA-KA**.)

**RELOCATION PROVISION SHOULD INCLUDE
PROVISION TO BRING IN TEMPORARY
CELL SITE DURING MOVE...RENT CONTINUES**



Photo credit: **John Pestle**

At the end, don't forget to consider what the design will look like at your property!



Telecom Law Firm, P.C. Resources Page

Dr. Kramer's CV (January 2021) is available at
www.TLFPC.com/dr-jonathan-l-Kramer/

Dr. Kramer's Wireless Blog: <http://Wireless.Blog.Law>

John Pestle's Wireless Page:
<http://www.varnumlaw.com/blogs/cell-phone-tower/>

~3,000 Cell Site Example Photographs:
<http://www.CellTowerPhotos.com>
(free license for government use)

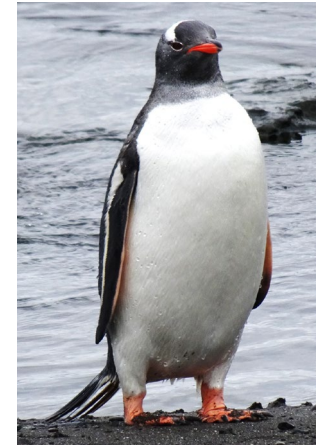
“A Practical Guide to Radio Frequency Emissions Safety”
Cal Bar Public Law Section Journal Article

“What Landlords Should Know About Cell Site Leasing”
Cal Bar Real Property Section Journal Article

Cell Tower Site Leasing: Avoiding Bear Traps
New Mexico Lawyer – May 2018 Vol 12 No. 2

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