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To: Interested Parties
From: Jonathan L. Kramer, Esq. 
Date: June 10, 2008
RE: SB 1252 (Wireless Telecommunications)

The comments below reflect the currently-identified concerns of a number of local governments. Local governments and public agencies are welcome to ‘borrow’ from this analysis in support of their own oppositions to SB 1252.

| Current Bill Text | Analysis and Comments |
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| 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>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. This is problematic as there is not consistent standard, or way to apply it.</i></p> <p style="text-align: center;">* * *</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 facilities on public property. | |

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| <p>(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.</p> | <p><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. The reference to permitting agency should be deleted in favor of the local government designating what entity, whether permitting, radio department, other another department to enter into the agreement, if any.</i></p> <p><i>The current language also contains an ambiguity. If such an agreement allows the carrier to enter public property to repair existing facilities, but is silent regarding "installing" new temporary facilities, will the carrier then have the right to install new temporary facilities under SB 1252? This section should be written to clarify that a local agreement controls, unless it contains no express procedures for entering the property during an emergency.</i></p> |
| <p>(c) A wireless telecommunications carrier acting under the authority set forth in subdivision (a) shall do all of the following:</p> | |
| <p>(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.</p> | <p><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></p> <p><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></p> <p><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></p> <p><i>During a major emergency, having carriers' staffs making entry onto sensitive public properties, especially those that are fenced and secured (i.e., major water tanks; maintenance yards; pump stations; remote radio sites; etc.) could be dangerous for the carriers, and the local governments. Would SB 1252 allow the carriers to use bolt cutters to gain entry? On its face, there is no restriction on how or which public properties can be entered, or by whom within each carrier.</i></p> <p><i>A pre-emergency badge issuance process might be a solution to the 'who' part of the problem, but not to the where or how portion.</i></p> |

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| <p>(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.</p> | <p><i>Again, the permitting agency may not be the correct agency to notify. A better approach would be to notify the permitting agency, or any other agency or department prior-designated by the local government would be better.</i></p> |
| <p>(3) Within 72 hours of entering the public property, commence any required process to obtain a permit.</p> | <p><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></p> <p><i>There is no time limit by when the completed permit application must be tendered.</i></p> <p><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 from the public property.</i></p> <p><i>It would be better to have an explicit requirement that obligates a carrier to vacate on 10 days written notice, or sooner if necessary in an emergency situation affecting the owner of the public property.</i></p> |
| <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>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 ("...within 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 telecommunica-</i></p> |

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| | <p><i>tions 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> <p><i>The bottom line is that a notice within six hours of declared or proclaimed is not realistic.</i></p> |
| <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><i>As currently written, a city/county could be liable for a carrier-caused dangerous condition of public property if the city/county had notice a sufficient time to correct the condition (Government Code Section 835(b)). Additionally, the bill does not appear to give cities/counties the legal authority to correct a dangerous condition caused by a carrier's temporary facilities -- and yet, cities/counties could still be liable for that dangerous condition.</i></p> <p><i>The bill should be amended in subdivision (e) to call out specific reference to the entire Section 835, and to pass all dangerous condition liability on to carriers pertaining to their temporary facilities installed under the bill.</i></p> |

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| <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 judgments or information usually within the sole control of the affected wireless carrier. Moreover, there may be situations where permanent restoration of service to the same levels may not be desirable, or even be possible.</i></p> <p><i>A time limit on ‘temporary’ is called for here or elsewhere in the Bill.</i></p> |

/jlk