

CELL TOWER LEASES

J. PATRICK ROUSE, *San Antonio*
Langley & Banack, Inc.

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J. Patrick Rouse
Langley & Banack, Inc.
745 East Mulberry, Suite 700
San Antonio, Texas 78212
Telephone: 210-736-6600
Fax: 210-735-6889

Biographical Information

Patrick Rouse is a shareholder in the real estate and corporate sections of Langley & Banack, Inc. Mr. Rouse's real estate experience includes representation of both landlords and tenants in the negotiation of commercial leases and involvement with the purchase and sale of commercial property, including farms and ranches. He also has significant experience in asset-based and mortgage lending transactions, including the representation of state banks. Mr. Rouse's corporate practice focuses on all aspects of a business from entity formation through termination and dissolution. As part of his corporate practice, Mr. Rouse assists clients in their operations including the drafting and negotiation of various contracts and agreements, asset and stock purchase transactions, loan transactions, and other business-related matters.

In 2015, Mr. Rouse was selected as a member of the prestigious Leadership San Antonio. He was selected in 2014 as the winner of the San Antonio Young Lawyers Association's Outstanding Young Lawyer Award. Additionally, he has been named on multiple occasions as one of *SA Scene's* Outstanding Lawyers for Real Estate Transactions, Business & Corporate and Banking.

Education:

Johns Hopkins University – 2005, B.A., Economics
St. Mary's University School of Law – 2008, J.D., *Magna Cum Laude*

Professional and Community Activities:

Texas Bar Foundation, American Bar Association, San Antonio Bar Association
Leadership San Antonio – Class XL
The South Texas Blood and Tissue Center Foundation, Director – 2017 to present
San Antonio Young Lawyer's Association
Secretary, 2011-2012; 2012-2013; *Board of Directors*, 2010-2011

TABLE OF CONTENTS

I. INTRODUCTION	1
A. Overview	1
B. Background	1
C. Article Structure	1
II. CELL TOWER COMPANY TO END-USER.....	1
A. Agreement	1
B. Premises.....	1
C. Term	1
1. Effective Date to Rent Commencement Date.....	1
2. Rent Commencement Date to Expiration of Initial Term.....	2
3. Renewal Terms.....	2
D. Early Termination.....	2
E. Rent	2
F. Interference.....	2
G. Tower Loading and Equipment.....	2
H. Timing	3
I. Amendments.....	3
III. REAL PROPERTY OWNER TO CELL TOWER COMPANY.....	3
A. Agreement	3
B. Premises.....	3
C. Term	4
D. Early Termination.....	4
E. Rent	4
1. Fixed Rent	4
2. Percentage Rent	4
3. Blended.....	4
F. Additional Considerations.....	4
1. Due Diligence.....	4
2. Further Encumbrances.....	4
3. Assistance with Governmental Entities.....	4
4. Rental Stream Offer.....	5
5. Ownership of Towers and Consent to Pledge of Interest to Secure Financing	5
IV. MISCELLANEOUS	5
V. CONCLUSION.....	5

CELL TOWER LEASES

I. INTRODUCTION

A. Overview

Cell towers are a comparatively recent real estate development and we all rely on the connectivity they provide. As a result of the importance of these towers and their increasing numbers, real estate attorneys should understand cell tower development and leasing in order to advise a client involved in such a transaction and appreciate how cell towers impact a real estate acquisition or financing transaction. At their core, cell tower transactions are real property transactions and, for the most part, involve concepts that are familiar to real estate practitioners. However, these transactions have certain features that are unique which must be considered in order to ensure a successful relationship among the parties. This article explains key aspects of cell tower transactions to serve as a reference to real estate practitioners who represent clients involved in them.

B. Background

As a starting point, a unique aspect of cell tower transactions is that they typically involve *three* parties in *two* separate transactions. First, a *real property owner* allows a *cell tower company* to construct a tower on a portion of his or her property. Then, the cell tower company allows *multiple end-users* to install equipment on the tower and on the subject property to service the end-users' customers. The needs and requirements of the end-users who install equipment on the tower and on the subject property drive the transaction terms. Regardless of whom he or she represents, the practitioner must consider the end-users' needs and requirements when negotiating on behalf of any of the three parties to the transaction. This is true even as to the real property owner because if a cell tower company is unable to meet the needs and requirements of its end-users, the real property owner's property will not be useful to a cell tower company.

C. Article Structure

Because end-user needs and requirements drive cell tower transactions, this article will first discuss specific terms of the agreement between the cell tower company and a typical end-user (i.e. cell phone company). Next, it will review the terms of the agreement between the real property owner and the cell tower company authorizing the cell tower company to construct the cell tower and allowing end-users to access the tower and premises. The article will provide an overview of issues for the practitioner's identification, consideration and, ultimately, application to specific facts. By the end of this article, the practitioner should have a base level of understanding of the entire cell

tower transaction structure and particular issues to consider when representing any party to the transaction.

II. CELL TOWER COMPANY TO END-USER

A. Agreement

A cell tower company must authorize a third party to (i) use the cell tower company's tower and a portion of real property to install necessary equipment; (ii) gain access to the tower and premises; and (iii) install any necessary utilities. Subject to conformance with the agreement between the real property owner and the cell tower company, described in detail later in this article, this agreement could take the form of a sublease or a sublicense. It also could take the form of an easement. No matter what form of agreement is used, the agreement should define the terms and conditions of use and preserve the right of the cell tower company to terminate for the end-user's breach of the agreement.

B. Premises

End-users typically will require each of the following in order to make use of the cell tower: (i) an access easement from a public right-of-way; (ii) a utility easement; (iii) the right to use a portion of the ground to install ground based equipment (think generators and conduit from the ground based equipment to the tower); and (iv) space on the tower for the installation of tower mounted equipment. Depending on the end-user, access and utility easements will need to be defined by metes and bounds but are usually non-exclusive with all other end-users. Access will need to be permitted 24 hours a day, 7 days a week. The ground space is usually depicted on a site plan attached as an exhibit to the agreement allowing for approximately 200-300 square feet of space for installation of ground based equipment. Space on the tower for installation of tower mounted equipment is usually defined at a certain height on the tower with specific equipment descriptions and is also typically identified on a site plan attached as an exhibit to the agreement. Typically, site plans are more specific than in other leasing contexts and can be a number of pages in length.

C. Term

One of the unique aspects to cell tower agreements is the term of the end-user agreement. Because of technology advancements, regulatory issues, service demands, industry consolidation (*see* proposed T-Mobile and Sprint merger) and a host of other factors, end-users require flexibility to the term of their agreements. A summary of some end-user timing requirements is as follows:

1. Effective Date to Rent Commencement Date

The first condition of most end-user agreements involves the period between the effective date (when the agreement is executed by all parties) and the "rent

commencement date” (i.e. when the end-user must start paying the cell tower company). Notwithstanding pre-development work typically handled by site acquisition firms, following execution of the agreement, the end-user typically has a number of additional due diligence items it must satisfy before installing equipment on the tower, including, but not limited to, local and federal permits and licenses. Additionally, the end-user may desire to perform certain structural investigations of the tower and will desire to initiate installation of its equipment on the premises and tower prior to commencement of its rent obligations. Notwithstanding the additional due diligence an end-user intends to perform prior to installation of its equipment on the premises, outside rent commencement dates typically are included to require rent to commence a few months after execution of the agreement in any event.

2. Rent Commencement Date to Expiration of Initial Term

Initial terms of end-user agreements are typically 5 or 10 years following the rent commencement date but could be negotiated to any length.

3. Renewal Terms

End-user agreements typically provide multiple renewal options. It is not uncommon to find an end-user agreement that could extend for 50 years or more. Many end-user agreements include automatic renewal unless the end-user sends written notice of non-renewal a certain period in advance of the expiration of then-current term of the agreement. As one can imagine, many end-users operate hundreds or even thousands of sites so automatic renewal is the preferred method of preserving these use agreements.

D. **Early Termination**

As noted above, there are a number of factors impacting the term of end-user agreements. Industry consolidation (*see* proposed T-Mobile and Sprint merger) is a large factor as are regulatory issues, technology advancements and service demands, each of which changes the need for the number of towers upon which an end-user installs equipment. As such, end-users will desire to preserve a right to terminate their use of a site prior to the expiration of the then-current term. While end-users make material investments in each location from the perspective of due diligence costs, site improvement costs, and equipment purchases, negotiation of the circumstances allowing for early termination is an area for attention. Many agreements allow for early termination by an end-user if governmental approvals are not obtainable or are terminated or if the site becomes obsolete or unnecessary; however, cell tower companies will seek to incorporate an early termination fee into their agreements to protect against early termination,

compensate for lost leasing opportunities, and preserve the benefit of their bargain. These fees can take many different forms, but 1 year of rent or more is not atypical.

E. **Rent**

Obviously, dependent upon a number of market factors such as total space needed, tower height, location, title matters, and end-user financial capabilities, rent typically is payable monthly or annually for a fixed sum and could range from a few hundred dollars per month to a few thousand dollars a month. Rents typically escalate by a few percentage points either on an annual basis or with each renewal period.

PRACTICAL NOTE: While a few hundred dollars per month to a few thousand dollars per month does not sound like a lot of money, recall that cell towers typically have multiple end-users such that a successful tower could generate revenues in excess of \$10,000 per month.

F. **Interference**

As many tower sites will have multiple end-users, signal interference is an issue that must be considered. Typically, end-user agreements provide that the end-user will not interfere with any existing user on the tower, but that the cell tower company will not allow, or will exercise commercially reasonable efforts not to allow, a subsequent user to interfere with the end-user’s frequency. Essentially, it is a first-in-time, first-in-right arrangement. To the extent interference exists or develops, the party responsible bears the obligation to remedy. Cell tower agreements should preserve the right of the cell tower company to require the end-user to turn off the interfering equipment during such time as the interference exists until the interference is corrected.

G. **Tower Loading and Equipment**

While the technical aspects of tower loading exceed the scope of this article, all parties should be cognizant of tower loading limitations as the towers have inherent structural limitations. While cell towers are typically structurally sound, high winds and geographic events with multiple installations at varying heights need to be considered by a structural engineer and any equipment approved for installation. Because of the sensitivity to tower loading limits, the agreement between the cell tower company and end-user typically will incorporate an exhibit identifying the specific equipment the end-user intends to install on the tower and require the cell tower company’s approval to any amendments or modifications to such equipment.

PRACTICAL NOTE: As one could reasonably anticipate given the rate of technology advances, requests to modify equipment with more powerful or

efficient equipment are fairly routine. There is some movement in the industry to move away from consent to frequent and time-consuming equipment modification requests to a system of pre-approval so long as tower and wind loading limits are not increased.

H. Timing

Tower leasing not a model of efficiency. It is not unusual for a cell tower agreement to take upwards of six (6) months to negotiate. As a practice point, the practitioner would be advised to maintain good notes of discussions with his or her client and the counterparty.

I. Amendments

Cell tower agreements are frequently amended to address a number of items, but amendments typically focus on equipment modifications and address changes. With an end-user's request to modify equipment installations on the tower, cell tower companies sometimes will use the amendment process as an opportunity to extend the term of the agreement or increase rent.

PRACTICE NOTE: Practitioners would be well advised to create a "standard" amendment form to reference for consistency. From the cell tower company advisor's perspective, three provisions the author likes to incorporate are: (i) counterpart and electronic execution; (ii) estoppel and waiver protections relating to the cell tower company's compliance with the terms of the underlying agreement; and (iii) a disclaimer of plan review when equipment modifications are requested. Some suggested language on disclaimer of plan review is as follows:

Sublessor's approval of the location and description of the equipment and facilities attached hereto shall not be construed as a representation or warranty by Sublessor that the equipment and facilities described therein, or the plans therefor, comply with sound architectural and/or engineering practices or with all applicable laws, rules or regulations, nor shall Sublessor's approval to the location and description of the equipment and facilities be construed as an acceptance or waiver of the terms, conditions, covenants, or agreements contained in the Agreement, including, but not limited to, the load and interference provisions set forth therein, or Sublessor's right to enforce the same as set forth therein.

III. REAL PROPERTY OWNER TO CELL TOWER COMPANY

As was mentioned at the beginning of this article, cell tower transactions are integrated meaning that, to avoid disputes or unforeseen consequences, the transaction from real property owner to cell tower company to end-user must work together as a unified whole. As such, the issues raised in the foregoing section relating to the cell tower company and end-user agreement are all pertinent to the negotiation of the agreement between the real property owner and the cell tower company. Unfortunately, many real property owners do not have experience with cell tower agreements and therefore, some education may be necessary by the cell tower company to explain end-user needs and the corresponding justification for the provisions in the real property owner agreement with the cell tower company.

A. Agreement

As with the end-user agreement, will the parties enter into a lease, license, easement or other agreement? From a real property owner's perspective, a lease or license would appear to be the more favored approach as easements have certain legal limitations with respect to enforcement and termination and, if not carefully drafted to limit duration, could result in a perpetual interest in real property in favor of the cell tower company. Cell tower companies will likely present their preferred form of agreement to the real property owner and, while there may be some negotiation on whether the agreement will be in the form of a lease or a license, practically speaking, there is not much difference.

PRACTICE NOTE: If the "master" agreement is a lease, the corresponding agreement between the cell tower company and end-user would be a sublease. If the "master" agreement is a license, the corresponding agreement between the cell tower company and end-user would be a sublicense. The terms of the "master" agreement will necessarily be incorporated into the end-user agreement and will either be disclosed prior to execution of, or attached to, the end-user agreement and incorporated therein.

B. Premises

The cell tower company will require each of the following in order to make use of the real property for purposes of a cell tower: (i) an access easement from a public right-of-way; (ii) a utility easement; (iii) an area within which to construct the tower and related improvements large enough to facilitate end-user installation of their equipment; (iv) occasionally, a temporary construction easement; and (v) the ability to grant end-user's the right to enter the premises and install their equipment (i.e. through a sublease or sublicense). As with all easements, clearly defining the

location of access and utility easements by metes and bounds descriptions is preferable. From the cell tower company's perspective, defining these access and utility easements by metes and bounds is also preferable from a marketing perspective as some end-users will require it as part of due diligence and site consideration. Access will need to be 24 hours a day, 7 days a week.

C. Term

Similar to end-user agreements, agreements between the real property owner and cell tower company will contain an initial term of 5 or 10 years followed by multiple renewal options for upwards of 50, 60 or 70 years. Usually, renewal terms are automatic unless the cell tower company delivers written notice of non-renewal a certain period in advance of the expiration of then-current term of the agreement. From the cell tower company's perspective, it is imperative that the underlying agreement between the real property owner and cell tower company have a term that extends at least as long as the agreements between the cell tower company and its end-users.

D. Early Termination

Because end-users will almost always demand the option of terminating their use of a site (even with the payment of an early termination fee) and the fact that a cell tower company may therefore find their previously desirable location as uneconomical or unnecessary, agreements with real property owners typically will include an early termination option in favor of the cell tower company. The terms of an early termination right are subject to negotiation but, at a minimum, will involve advance written notice and the cell tower company's continued payment of rent until expiration of the agreement.

E. Rent

As a cell tower lease provides a real property owner with an opportunity to monetize a relatively small portion of his or her property, rent is almost always the single most important issue to real property owners. Unlike rent between the cell tower company and end-users, rent from a cell tower company to a real property owner can be fixed, a percentage of end-user revenues, or a blend of the two.

1. Fixed Rent

The obvious benefit of fixed rent is that it will be owed every month regardless of end-user use of, or access to, the premises. Fixed rents will vary by location, premises size, cell tower company needs and a host of other factors but could be as low as a few hundred dollars a month to a thousand dollars or more.

2. Percentage Rent

Percentage rents can be negotiated between the real property owner and cell tower company in lieu of fixed rent. Percentage rents can range from a few percentage points up to 20-25% of tower revenue. Normal considerations need to be given to what constitutes revenue for purposes of percentage rent determination as well as audit rights. While percentage rents can result in significant income to the real property owner if the tower is successful, the ability of end-users to quickly terminate their leases, market consolidation and competition can result in uncertain revenue streams.

3. Blended

It is not uncommon to see a blended fixed and percentage rent. This can come in the form of a fixed base rent with a percentage rent above and beyond similar to retail leasing or could also be negotiated as the lesser of a fixed rent or a percentage rent. Either option provides the real property owner with potential upside if the cell tower is successful while securing a minimum revenue stream.

F. Additional Considerations

1. Due Diligence

All cell tower companies will need to conduct extensive due diligence including, but not limited to, survey and title review, environmental investigations, engineering studies, and ultimately permit approval. Cell tower companies will need to either do this in advance of lease execution or during an option period.

2. Further Encumbrances

As a cell tower company will be making a significant capital commitment in the premises and will itself have contractual obligations to allow end-users to use the premises, the cell tower company will seek to limit the real property owner's ability to rezone the premises or further encumber or restrict the use of the premises. Real property owner's will need to be cognizant of any limitation in a cell tower agreement on their future use of the premises and counsel to real property owners should review the terms of cell tower agreements prior to redevelopment or encumbrance of any property to avoid an unknowing breach of the cell tower agreement.

3. Assistance with Governmental Entities

Cell tower companies will need a number of local, state and federal permits to lawfully construct and operate a cell tower. As such, a real property owner will need to provide assistance to the cell tower company in obtaining permits attributed to the real property, presumably all at the cell tower company's sole cost and expense. Permits could include building permits, TxDOT driveway permits, and FCC and FAA authorizations.

4. Rental Stream Offer

The cell tower industry has a secondary market for rental streams. Specifically, real property owners will be approached by third parties willing to acquire the rental income attributed to the cell tower lease at a discounted present value determination. Oftentimes, this is an attractive option to real property owners, but somewhat problematic to the cell tower companies as it bifurcates the lease between revenue rights and lease obligations. As such, it is not unusual for a cell tower company to include a right of first refusal in their agreement with respect to real property owner's proposed transfer of the rental stream attributed to the cell tower. A sample rental stream offer is as follows:

If at any time after the date of this Lease, Lessor receives a bona fide written offer from a third party seeking an assignment or transfer of Rent payments associated with this Lease ("Rental Stream Offer"), Lessor shall immediately furnish Lessee with a copy of the Rental Stream Offer and any documents submitted in connection therewith. Lessee shall have the right within twenty (20) days after it receives such copy to match the Rental Stream Offer and agree in writing to match the terms of the Rental Stream Offer. Such writing shall be in the form of a contract substantially similar to the Rental Stream Offer. If Lessee chooses not to exercise this right or fails to provide written notice to Lessor within the twenty (20) day period, Lessor may assign the right to receive Rent payments pursuant to the Rental Stream Offer, subject to the terms of this Lease. If Lessor attempts to assign or transfer Rent payments without complying with this Section, the assignment or transfer shall be void.

5. Ownership of Towers and Consent to Pledge of Interest to Secure Financing

Typically, an agreement between a real property owner and cell tower company will provide that all improvements made by the cell tower company shall remain the property of the cell tower company with an obligation imposed upon the cell tower company to remove their equipment following expiration or termination of the use agreement. Furthermore, because some cell tower companies will require third party financing to construct a new cell tower at a cost of \$250,000 or more, cell tower companies may require the ability to pledge their interest in the improvements and premises to secure one or more credit facilities. As such, real property owner's, and their lenders, will need to consent to the pledge of the cell tower company's

interest and recognize the cell tower company lender's interest following foreclosure similar to tenant ground lease financings.

IV. MISCELLANEOUS

As was mentioned at the beginning of the article, at their core, cell tower agreements are real property transactions. Concepts such as acceptance of the premises; landlord/tenant work to be performed; insurance requirements; ad valorem tax payments; compliance with laws; maintenance of premises and equipment; indemnification; condemnation; casualty; default, cure rights and remedies; subordination; and removal of improvements following expiration of the term of the agreement all are pertinent in cell tower leasing. Many other concepts can be brought from "standard" real property leasing transactions with ease to the cell tower context. With that said, end-user requirements must always be considered as their use of the tower will make or break the transaction. Therefore, practitioners will need to use their professional judgment in advising clients on what additional protections are advisable and which are unnecessary given client demands and market considerations.

V. CONCLUSION

Cell towers can be profitable for all parties to the transaction. Understanding the interrelationship between the real property owner, cell tower company and end-user will help the practitioner in their representation of their client and help secure a successful transaction for all parties.