

Key Points For Negotiating 5G Cell Site Contracts

By **Walt Sapronov and Robert Turner III** (March 20, 2019, 1:31 PM EDT)

As mentioned in **a prior editorial**, the expected deployment of 5G networks is creating increased demand for robust wireless infrastructure: antennas, cell sites, pole attachments and fiber. This discussion will focus on 5G cell sites — and the (at times overlooked) real property issues associated with those agreements. As nationwide 5G deployment gathers steam, these issues will merit special attention.

What Is 5G?

5G is an abbreviation for the latest generation of mobile communications (earlier generations include 4G/LTE, 3G (UMTS) and so on).[1] The first 5G standards were promulgated by the 3rd Generation Partnership Project in late 2017 and mid 2018, allowing initial commercial network deployments, and 3GPP will issue its next release further refining the standard in late 2019.

The major wireless operators have been testing various versions of 5G at pace depending upon consumer device manufacturers and available spectrum. 5G networks will accommodate high-speed transmission of voice and data both in lower frequencies below 6 GHz and the higher, millimeter wave frequencies above 15 GHz.

How Does 5G Rollout Affect Cell Site Agreements?

The following is a summary of how 5G deployment may affect traditional cell site negotiations.

Cell site agreements are essentially long-term leases or licenses (the difference is an important one) permitting access to a property site upon which a tower or other mobile radio transmitting station is located. Wireless operators or third-party intermediaries (e.g., Crown Castle International Corp.) enter into such long-term agreements (often 20 to 25 years) for sites located in municipal rights of way, building rooftops, utility poles or private properties. As the operators deploy or “roll out” 5G networks, unexpired cell site agreements will have to be revisited and many new others will have to be negotiated.

There are a few technical reasons for this. First, current antenna structures cannot simultaneously support both existing wireless communications (such as LTE) and 5G. That means that the existing cell sites will require retrofitting or upgrades. Second, the ultra-high frequencies covered by 5G-NR will carry shorter signals, which in turn will require regeneration and thus many sites (such as small cells) and densification to support the required mobile transmission hardware.

This article discusses some key deal points that we believe are critical to negotiating 5G cell site contracts.

5G Cell Site Access: Leases, Licenses and Deal Points

First, a cell site tenant (whether a wireless operator or intermediary) will typically seek to protect its occupancy access rights through a leasehold interest or similar type of license.



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A lease is a property right that typically gives the lessee the right of occupancy^[2] upon the landlord's property. The lessee may also seek additional occupancy protection through a subordination nondisturbance attornment agreement (if the landlord has a third-party security interest in the property, such as a mortgage) or through recording of a memorandum of lease (which puts future occupiers on notice of the lessee's rights). A licensee, on the other hand, enjoys no such protection and its remedies for wrongful dispossession may well be limited to a damages action.

Leasehold rights, in short, will typically provide the tenant with some leverage in cell site upgrade negotiations. This can be distinguished from a licensee where the upgrade rights may be more limited. In both scenarios, the upgrade rights are truly dependent upon the terms of the agreement for each site.

To put a more fine point on the matter of upgrades, and whether this includes a broad enough scope for 5G equipment, the existing cell site agreement will define the operator's permitted use and any restrictions. Importantly, if equipment upgrades or other "improvements" require landlord consent, then the 5G upgrade may well trigger renegotiation of the broader lease terms (and the carriers should anticipate this to include the potential for additional consideration). Technology upgrade clauses that obligate the parties merely to "talk" are largely meaningless — and whether a rent increase for such an upgrade is opportunistic or a fair exchange is a matter of perspective.

In any event, unless expressly permitted, a major upgrade to permitted equipment or change to a narrowly defined permitted use will likely follow. More savvy landlords may also engage consultants who track "market" rates for such upgrades based on site location, proximity to other cell sites and other factors.

What Existing Cell Site Agreements Say or Don't Say

As part of the planning, investment and rollout of 5G infrastructure, careful pre-upgrade examination of the cell site agreement and all related documentation is required reading. However, this may not be so easy.

For instance, where the site's access rights include an easement or other grant of underlying rights from a municipality (or other governmental authority), those charter documents must be reviewed as well. Unfortunately, those rights of way agreements and municipal authority documents are not always so readily available.

Further, private use of city rights-of-way for fiber access to the cell site may well have required an ordinance or other special action or consent by a municipality. Tracking down those official grants is not always easy. However, failing to review those records (to understand what is permitted within the grant) before embarking on a major infrastructure upgrade at affected cell sites would be akin to purchasing a house without a title search.

The review of any municipal grants underlying a cell site agreement may be further complicated if the cell site portfolios have been outsourced to third parties such as American Tower, Crown Castle, and other intermediaries that "roll up" such agreements in bulk. Such third party aggregators and portfolio managers such as these cannot grant more rights than those available to the original tenant or licensee. Thus, before undertaking (or investing in) a 5G upgrade, the tenant (or other interested party) must first review all underlying agreements permitting or associated with the use of each site. Failure to secure any required notices or consents before commencing the 5G upgrade could trigger a lease default.

All of this review and analysis will require time. Consequently, the preparation for 5G cell site upgrade should commence well before the parties commence negotiations. Here are some preliminary steps.

How to Begin?

The first critical step is to review the applicable agreements and underlying rights. One of the first elements to evaluate is the duration of the unexpired term of each site agreement — along with renewal options. If a 5G upgrade is permitted, then the question of whether the unexpired lease term

is long enough to justify the capital expenditure becomes a factor. If not, then perhaps the agreement merits renegotiation, not just renewal with an amendment of the use restriction (and corresponding price adjustment).

The next is timing and delay anticipation. If landlord approval is required (as is likely to be the case), securing it may cause delay as the notice provisions in the agreement may or may not require the landlord's timely response — or any at all, for that matter. Meanwhile, while the parties squabble over rental increases and other new issues, construction may be delayed — with temporary agreements and interim construction easements a possible consideration.

For wireless operators undertaking such an upgrade on a regionwide or other multisite basis, a recommended concurrent step is to conduct a site inventory based on the existing portfolio of sites under control. While certain sites in a portfolio may require 5G upgrades, others may be eligible for decommissioning — and thus obviating the need for continued occupancy at the decommissioned sites.

For any decommissioning, this consideration will include some additional complications, requiring review of how much unexpired time is left on the lease, and whether there are other income-producing tenants having collocated antennae at the site. If there are income producing subtenants on a site, the landlord may not wish to see it vacated (and thus be forced to give up the additional income). Unless permitted under the third-party's lease, relocation of collocated equipment at the site to be decommissioned will require still another negotiation — and possible a buyout to the collocated third party.

Regulatory Delays Should Be Expected

Finally, there may be regulatory delays — including permitting, zoning and other compliance with local law. Depending on the age of any sites that are in close proximity to each other, consideration should be given to any differences in local laws and approvals that may slow down the upgrade process (or put another way: where the permitting process may be more efficient).

In September 2018, the Federal Communications Commission adopted measures placing limits on local zoning and other decisions that might slow 5G deployment.[3] But those measures only went into effect on Jan. 14, 2019, and are subject to an appeal in the United States Court of Appeals for the Ninth Circuit. Thus, it has yet to be determined how different municipalities will react across local jurisdictions while the appeal is pending. Review of local laws will be required in any event.

In short, negotiating 5G upgrades will be time-consuming, but the trend is clear: The FCC has made 5G deployment its highest priority, auctioning spectrum for that purpose and vowing to remove local entry barriers. For wireless operators, intermediaries, investors and existing cell site owners, planning this upgrade effort should start sooner rather than later.

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[1] See generally, <https://en.wikipedia.org/wiki/5G>; <https://www.sdxcentral.com/5g/definitions/5g-standards/>.

[2] 11 U.S.C. § 365(h)(1)(A)(ii) (granting a non-debtor lessee of real property a statutory holdover right upon the landlord's rejection of an unexpired lease). In some jurisdictions, however, a lender's foreclosure rights will trump the lessee's occupancy right. See generally, Saprnov & Associates, P.C. Client Alert, "Telecom Tenants at Risk," available upon request at info@wstelecomlaw.com.

[3] Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, et al., Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088 (2018).