



Contractual Obligations

When entering into a broadband service agreement, be sure to include certain necessary clauses.

by Pamela V. Rothenberg

Stated simply, a real estate owner's goal in contracting with an Internet service provider (ISP) is to find an experienced and dependable vendor capable of bringing state-of-the-art broadband services to the owner's assets and tenants via a "future-proofed" building infrastructure backed by a redundant system.

Sounds like utopia, right? Owners may find these ambitious objectives difficult to achieve. However, they should set their sights high and strive to do business with ISPs with a proven track record of reliable service.

An ISP should satisfy the following minimum criteria:

- Reliable high-speed data services for the owner's specific asset type;
- Consistent customer service;
- Competitive pricing structure;
- Ability to meet owner-specified technical and design criteria and satisfy required performance standards; and
- Willingness to enter into a revenue-sharing arrangement in exchange for exclusive rights to serve the owner's assets.

Broadband service agreements should include a specific definition of the broadband communication services to be delivered, as well as a detailed description of the required building infrastructure. Owners should also

insist upon service level assurances that the building will be provided with direct Internet access through an "always-on" network. These assurances can take the form of guarantees or "best efforts" clauses and should state the specific optimal download and upstream speeds (i.e., "throughput") and specified bandwidth.

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Verification rights, which permit the owner to independently verify ISP compliance with the contract's stated bandwidth and throughput standards, are crucial to enforce any service level assurances. Equally essential are "performance over time" clauses that afford the owner the right to terminate the exclusivity provisions if the ISP chronically fails to meet the covenants in the contract.

Contracts must also address a

number of risks, including:

- Building or community-wide network failures caused by tenant-introduced viruses;
- Security breaches from viruses and other harmful components;
- Damages due to unsolicited offensive material or failed/interrupted transmissions; and
- Abuse of service engaged in by tenants, such as "Napsteresque" copyright violations.

Both the owner and ISP should expressly acknowledge that neither party controls any information, products or services on the Internet and neither party accepts responsibility for harm a tenant may suffer resulting from exposure to such materials. Additionally, the ISP should fully release the owner from all claims relating to any abuse of service or legal violations by tenants.

The delivery of broadband service is relatively new phenomenon, and the risks owners face in providing these services are continually evolving. Owners should be vigilant about both doing business only with dependable ISPs and staying on top of issues so that their contracts include the necessary protective provisions. □

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