



Legal Panel:

What Do Owners and Providers Want? What Can They Do?



Left to right: Dan Glivar, an attorney with Holland & Hart; Linda Trickey, Senior Legal Counsel for Cox Communications; Mary Kane, Senior Counsel at Comcast; Art Hubacher, lawyer from Costlow & Hubacher; Mark Farrell, Counsel at AT&T; and Ian Davis, lawyer at Munsch Hardt Kopf & Harr.

Comcast senior counsel Mary Kane moderated a spirited panel on the fine art of negotiating agreements with service providers. On the panel were: Dan Glivar, an attorney with Holland & Hart who does work for clients that include Time Warner, Linda Trickey, Senior Legal Counsel for Cox Communications; Art Hubacher, at Costlow & Hubacher (who normally works for property owners); Mark Farrell, Counsel at AT&T; and Ian Davis, lawyer at Munsch Hardt Kopf & Harr.

Davis: When you solicit proposals at your client's behest you will, of course, find out that everyone is trying to end-around you to negotiate the least painful route to access.

Farrell: AT&T is one of the incumbent LECs to deploy fiber. We're spending \$8 billion in next three years. AT&T has a shell agreement [used as a starting point for negotiation with property owners], and I'd ask for it orally to start the negotiation process. That saves a lot of [billable legal] time

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because you can start negotiating [with it as a basis] right away.

Trickey: We're not hearing a lot of discussion about easements these days. But easements for communications wiring are no different than getting an easement for water or power. I never heard of a case where a deal fell through because of an easement with the cable company.

Hubacher: Just as a quick counterpoint, there have been some bad experiences

with easements. I have not had trouble negotiating a reasonable easement. But you should not give blanket access to the property forever.

Henry Pye of JPI Partners, from the floor: Are easements the best legal document or is licensing the better deal?

Hubacher: Easements should be limited to external parts of the property. A license properly drafted can give the provider the protection he needs.

Kane: What about exclusivity?

Trickey: "Cox does not ask for exclusive access, only exclusive marketing. But there is good justification for providers doing so. If a buildout is very, very expensive, a provider may have to ask for exclusive access."



Farrell: "With regard to terms of exclusive access, those terms are becoming under increasing scrutiny in states like California, Texas, South Carolina, Virginia, and New Jersey. The public policy behind those laws is that they want video competition."

Trickey: Cox does not ask for exclusive access, only the protection he needs to be profitable. But there is good justification for providers doing so. If a buildout is very, very expensive, a provider may have to ask for exclusive access.

Davis: What about situations in between?

Farrell: With regard to terms of exclusive access, those terms are coming under increasing scrutiny in states like California, Texas, South Carolina, Virginia, and New Jersey. The public policy behind those laws is that they want video competition.

Hubacher: I see a number of requests by private cable operators for exclusivity. They are out there and you have to be careful. Exclusivity can be part of the negotiation; those agreements are enforceable as it stands right now. I have seen a resurgence in people asking for them in the past three months, perhaps in response to Verizon's trying to get them banned.

Trickey: The real danger of an owner relying on it is that they've negotiated the exclusive access for years. We don't ask for exclusive access but do private property owners have the right to have an exclusive because, perhaps, they really like a specific provider?

Hubacher: There's a question from the floor about what do we do about WiMAX across a property, or EVDO. When we grant exclusivity we have exclusions for things we can't guarantee. From a contractual standpoint I want to protect owners from being in breach.

Trickey: With regard to wiring installations, we provide materials or specs. That way we know the quality.

Glivar: Be very careful when there is an e-911 service running; it can't be unplugged.

Davis: With regard to marketing contracts, I've seen some creative uses. There are contract conditions for providers who have specified billboards on the roof, door hangers for missed service appointments.

Hubacher: Except where there is some

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exclusivity the owner does not want to be seen as pushing a bad service.

Farrell: More important than service level agreements is whom you are doing business with. You want a company that's been around a long time that has repairmen that can come out and fix it. But often, you do get chronic complainers and the business office folks call to complain about your response. Thus service-level agreements should not be based simply on the number of complaints.

Davis: I'll expand on our take: Every agreement in my opinion, every service you bring into the project is owned by the owner – even when it is not. Anyone you are letting into the property impacts your relation-

ship with your residents. For each one chronic call you get at AT&T, the manager gets two or three. In a service-level agreement, it is OK to expressly exclude viruses and user error. AT&T does a good job traditionally, but there are projects where half the project got DSL and half didn't.

Hubacher: The easiest, least costly, most efficient way is to call the provider without getting an attorney involved. Eighty percent of the time you can solve the problem without looking at the contract. A lot of contracts were written three or four owners or providers ago, and you can't figure them out, so you amend or write a new contract anyway.

Glivar: I never had a contract go bad. But if you are building to sell, disclose the deal with the cable operator to the buyer. Are you taking an

up-front door fee and encumbering a new owner for nine years? That's not necessarily fair. Also, owners may be concerned about how income is classified, REITs especially, or properties for income-sensitive, government-subsidized tenants where the government may want the revenue stream [for video] reported. We have done deals on income-sensitive properties, and they are bulked, but I don't know about the reporting obligation.

Hubacher: On tax credit properties, in Veterans Administration law there is weird landlord tenant statute. You can't get paid for access to the property but you can be paid a marketing fee or get rent for the property occupied by the provider.