

Drafting Telecom Services Agreements: Structuring Key Provisions, Anticipating Legal Pitfalls, Mitigating Risks

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DRAFTING TELECOM SERVICES AGREEMENTS: KEY PROVISIONS, LEGAL PITFALLS & RISKS

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Topics

- **Telecom Terminology/Lexicon for Attorneys**
- **Regulatory Overlay: Communications Act – What’s Regulated? What’s Not? Relevance to Enterprise Deals**
- **Telecom Services Agreements: Introduction**
- **Role of Consultants and RFPs**
- **MSA: Core Provisions**
- **Schedule-Specific Provisions**
- **Unique Aspects of Non-Core Services**
- **Questions**

Telecom Terminology/Lexicon for Attorneys

- Definitional Structure:
 - Largely borrowed from Communications Act of 1934 (47 U.S.C. § 153)
 - Definitions: “Telecommunications,” “Telecommunications Service,” “Information Service,” “Interconnected VOIP,” “CPNI,” “CMRS”
 - Supplemented by carrier and industry standards and “vernacular”
 - “SLAs,” “IP and SIP Trunking,” “MPLS,” “SDN WAN,” “WiFi,” “DAS,” “LTE,” Ethernet
 - And pricing / payment acronyms
 - MAC/MARC, MAD (moves, adds, changes), ETF, shortfall

Regulatory Overlay: Communications Act – What’s Regulated? What’s Not? Relevance to Enterprise Deals

- Regulation
 - Interstate and international telecommunications services subject to FCC regulation under Title II of the Communications Act
 - 10 % “*de minimis*” rule, FCC decisions (VoIP is an interstate service) and technology (Internet) have largely displaced state regulation that is limited to intrastate services
 - Nature of services, not location of facilities, determine jurisdiction
 - Wireless Service (“Title III”) – Radio licensing (Exclusive)
 - No state rate and entry regulation of Wireless (CMRS)
 - But excluding “other terms and conditions” of service
 - No FCC rate regulation
 - Unlicensed spectrum (*e.g.*, WiFi, LTE-U)
 - No licenses - but FCC regulates interference

Regulatory Overlay: Communications Act – What’s Regulated? What’s Not? Relevance to Enterprise Deals

- Transition from Tariffs to Commercial Agreements
 - Wireless services deregulated under 47 USC § 332
 - FCC exercised forbearance authority under Section 10 of the Communications Act to deregulate/de-tariff interexchange interstate and international telecommunications services (finalized in 2002)
 - Required telecommunications carriers to establish “service guides”
 - Information services (47 USC § 153 (24), historically viewed as encompassing Internet access service, not subject to exit, rate or entry regulation under Titles II/III
 - 2015 *Open Internet Order* reclassified consumer broadband service as a telecommunications service, now being revisited by FCC
 - Special access service largely deregulated in 2017 *Business Data Services Order*
 - TDM DS-1 and DS-3 services offered by price cap ILECs still regulated

Regulatory Overlay: Communications Act – What’s Regulated? What’s Not? Relevance to Enterprise Deals

- Universal Service Fund (USF) and State Transaction Taxes
 - Federal 47 U.S.C. § 254 (USF “contributions”)
 - Telecommunications carriers and providers of telecommunications (*e.g.*, private carriers, system integrators), includes Wireless carriers
 - Typically 15 – 20 % of interstate and international revenues
 - Assessed on provider by FCC (FCC Form 499-Q /499-A)
 - Pass-through to customers permitted
 - USF dilemma – Information services (MPLS) and Internet access services, not subject to USF contribution obligation, but wireless and wireline services providers’ revenues from Internet access and information services growing most rapidly
 - States often impose “little USF” contributions, other state surcharges such as E-911 and myriad of state transaction taxes, subject to Internet Tax Freedom Act

Telecom Services Agreements: Introduction

- Wireline
 - Voice, Internet, Data Services, Call Center Services, Managed Services
 - Scope: Domestic, International and/or Rest-of-World Services
 - Standalone Agreements or Schedules to Wireline Agreement
 - Dark Fiber
 - Content Delivery Network
 - Satellite Services
 - Data Center/Collocation
- Wireless
 - Mobile (Smartphone-based services)
 - IoT, DAS Arrangements

Telecom Services Agreements: Introduction (*Cont.*)

- How Telecom Agreements are Different:
 - Regulatory oversight which differs by location—particularly for rest-of-world services (services that do not originate or terminate in USA or its territories) but are often included in master services agreements
 - Agreements will incorporate service guides, tariffs, “acceptable use policies,” “privacy policies” and other web-based documents
- Complicated contract structure
 - Master Agreement with multiple service schedules and documents incorporated by reference
- Host of acronyms (which often differ from supplier to supplier)
 - See discussion on “telecom terminology” above

Telecom Services Agreements: Introduction (*Cont.*)

- Typical Contract Structure:
 - Master Service Agreement (MSA)
 - General “T’s & C’s”
 - *e.g.*, indemnities, confidentiality, liability limitations, choice of law
 - Carriers invariably demand their contracting documents be used
 - Rationale: Carrier contract administration cannot accommodate different MSAs for myriad customers
 - Understand carrier’s order of priority: MSA; Attachments (*e.g.*, “CSOA”); Schedules
 - Challenge: Carriers include indemnities and obligations throughout documents that should be in Master Ts and Cs

Telecom Services Agreements: Introduction (Cont.)

- Typical Contract Structure:
 - Attachments and Schedules
 - Attachments: typically include service descriptions, SLAs
 - Schedules: include pricing, credits, term commencement
 - Incorporation by reference (from carrier websites “Service Guides”):
 - Acceptable Use Policies (AUP); Privacy Policy
 - Standard pricing schedules
 - General Terms and Conditions
 - Will serve as MSA if one is not negotiated
 - Major Challenge: Services providers reserve right to modify Service Guide

Role of Consultants and RFPs

- Who are these consultants?
 - Specialized, modest-sized firms staffed by former carrier sales staff and technology subject matter experts
 - Fees paid on an hourly basis or on a “percentage of savings” basis
- Role of consultants in the procurement process
 - Possess knowledge of market rates and carrier services, RFP templates refined over time, carrier technology transition strategies, and relationships with carriers
 - Develop customer demand sets for usage-based services (voice) and all other services
 - Business terms, services and pricing in RFP typically understood by customer
 - Inclusion of Legal Ts and Cs can be problematic; counsel should review ahead of time
 - Risk: Carrier pushback against more aggressive Legal Ts and Cs if it previously “accepted” Ts and Cs in RFP

Role of Consultants and RFPs (Cont.)

- Importance of RFPs and Timing Considerations
 - Well-conceived RFPs demonstrate to incumbent and prospective carriers that customer is interested in new services, better pricing and/or better support
 - A comprehensive RFP entails substantial review of existing services, traffic levels and technology direction of customer
 - Transitioning wireline services from one provider or set of providers to another is a time-consuming, costly process
 - If RFP not issued in a timely manner (6 to 12 months prior to expiration or renewal of current agreement) carriers will conclude customer is not serious about changing carriers—carriers will submit less than aggressive bids

MSA: Core Provisions

- Contracting Parties (capturing affiliates/joint ventures)
 - Identify Parties in preamble
 - Typically “party” will be entity responsible for payment
 - Expressly provide that carrier will “cause” its affiliates to provide service
 - Distinguish party from “authorized users”
 - Include enterprise’s affiliate as authorized users (but not “parties”)
 - Exclude third party beneficiaries – especially enterprise’s customers
- Special provisions for venture partners (*e.g.*, franchisor/franchisees, PE firms)
 - Permitted to purchase (usage contributes to “MAC”)
 - But not after divestiture or spin-off
 - Consider inter-company indemnity agreements with JV entities

MSA: Core Provisions (Cont.)

- Term
 - Typically three-year initial term, with customer option to renew for one or two additional one-year renewal terms; preferably month-to-month at negotiated pricing with no minimum revenue commitment
 - Risk: Without extended pricing stability, rates revert to “rack rates” in pricing guide
 - Services discontinued upon customer notice of discontinuance and service removed
- Transition @ Expiration and @ Early Termination
 - Telecommunications services cannot be interrupted for business
 - Transition clause provides upon expiration of term or any earlier termination for cause (agreement or specific service) customer has up to 6 mos. to transition to replacement services during which negotiated rates apply
 - Right to terminate service or agreement is impractical unless carrier continues to offer service

MSA: Core Provisions (Cont.)

- Early termination of Agreement (by customer)
 - Fixed % of remaining Minimum Revenue Commitment
 - Service-specific payments if customer has not satisfied minimum service period
 - Possibly credits granted by
 - Often specified as carrier's liquidated damages if it terminates the agreement for cause
- Termination of Agreement/Partial Termination (either party)
 - For cause, including breach of customer support commitments made by carrier
 - Not limited to SLA deficiencies
 - Ensure disputed billing amounts may be withheld by customer
 - Partial terminations provide a proportional reduction in remaining revenue commitment
- Disclaimer of consequential damages (mutual)
- Carriers standard damage cap/limitation typically too low

MSA: Core Provisions (Cont.)

- Indemnities
 - Mutual indemnity for all alleged claims for personal injury, property damage, and damage to environment—defend, indemnify and hold harmless
 - Carrier intellectual property, violations of law and limited privacy indemnities
 - Carriers' typical response is that they have no PII of customer
 - Customers should reject indemnities for violations of AUP and Privacy Policy and other indemnities carriers add to service schedules and all online documents
 - Careful review by counsel necessary
- Insurance
 - Customer-specific requirements often accepted by carriers that often seeks to self-insure

MSA: Core Provisions (Cont.)

- MSA Pricing Provisions
 - Fixed rates v. % discount of standard rates in service guide (that are subject to unilateral change by carrier)
 - Minimum revenue commitments (see terminology discussion above)
 - Aggregate “incentive” expenditure credits
 - Competitive Pricing Reviews
 - “Most favored customer” clause of little use
 - Enforceable competitive review provision more practical
 - With partial discontinuance/alternative supplier leverage
 - Frequency of pricing reviews

MSA: Core Provisions (Cont.)

- Precedence of Documents/Online Documents (see Previous Slides)
- Carrier change of online documents should trigger “MAE” (Material Adverse Effect) condition and remedies
 - Right to terminate, discontinue purchase, etc., if change is “adverse”
 - Carriers’ exclude increases in rates in pricing guide from MAE
- Privacy policies and AUP generally non-negotiable—violations may trigger service suspension
 - Limit carrier termination right or indemnity obligation for violations
 - Notice and cure opportunity and resumption of service upon cure
 - Resumption of service upon cure
- Technology Transition Rules (Notice, pricing and testing)

MSA: Core Provisions (Cont.)

- Customer Proprietary Network Information 47 U.S.C. §222
 - What is CPNI?
 - Information that relates to the technical configuration, type, capacity, usage, destination, locations of “telecommunications services” used by a customer.
 - Absent customer consent, CPNI may only be used by the telecommunications carrier in connection with the telecommunications services being provided.
 - Most carriers use the “opt-out” option
 - Customer may change its election at any time
 - Carriers prefer to share this information with affiliates and 3rd parties for marketing other services
 - FCC rules adopted in 2016 extending Section 222 CPNI to high speed Internet access service disapproved by Congress under the Congressional Review Act

MSA: Core Provisions (Cont.)

- Dispute Resolution
 - Venue, Choice of Law, Litigation or Arbitration
 - Choice of law - typically New York
 - Well established body of commercial case law
 - Include UCC if equipment purchase included (*e.g.*, DAS)
 - Incorporate Article II buyer “gap filler” remedies
 - Litigation v. Arbitration:
 - Enterprise preference varies (pros and cons to both)
 - Discuss with corporate and litigation counsel
 - If arbitration, include AAA commercial rules (including emergency provisions)

MSA: Core Provisions (Cont.)

- Dispute Resolution
 - Arbitration advantages
 - Select arbitrator familiar with telecom arcana
 - Courts generally not familiar with telecom terminology / technology
 - Regulatory Issues
 - If litigated, court may remove case to FCC under primary jurisdiction
 - Regulatory issues and removal to FCC is rare
 - Good practice to include separate, informal billing dispute procedures
 - No service cut-off during pendency of dispute
 - Payment cure period if dispute resolved in carrier's favor
 - Chronic billing issues should remain grounds for termination

Schedule-Specific Provisions

- Service descriptions and service-specific rules and regulations
- Service Pricing
 - All recurring and non-recurring charges (fixed or discounted % of Pricing Schedule rates)
 - Enforceable competitive review provision more practical
 - Most favored customer” clause of little use
 - With partial discontinuation/alternative supplier leverage
 - Service-specific commitments and incentive targets
 - Hidden commitments (service term, service guides, exclusivity)
 - Credits/disgorgement for early termination

Schedule-Specific Provisions (Cont.)

- Service Level Agreements (Standard or Negotiated)
 - Metrics and minimum requirements
 - Availability/definition of an “outage”
 - Quality and data service degradation (jitter/data delivery ratio/latency)
 - Quality and voice service degradation (MOS and R-Factor/jitter/data delivery ratio/latency)
 - Installation intervals and related provisioning/repairs (time to respond, time to repair (MTTR)); moves, adds changes and deletions or disconnects (MACD))
 - Domestic SLAs often most favorable to customer, international and rest-of-world service SLAs sometimes not as aggressive
 - Chronic Problems

Schedule-Specific Provisions(*Cont.*)

- Service Level Agreements (*Cont.*)
 - Conditions/Exceptions
 - Maintenance and scheduled downtime
 - Should provide for notice, limited windows, limits on hours and number of times per month
 - “Emergency maintenance”
 - Force Majeure events
 - Procedures to report / request credits
 - Customer must report outages and request credits within specific time. Vendor controls data and evaluation. Document data sources, methodology and retention periods.

Schedule-Specific Provisions (Cont.)

- Remedies
 - Service credits – typically a percentage of minimum revenue commitment (MRC)
 - Chronic problems need remedies beyond credits
 - Expedited escalation; increased credits; substituted service; root cause analysis; right to terminate service/location
 - Avoid/limit “sole and exclusive remedy” language

Unique Aspects of Non-Core Services

- Managed Services
- Data Center/Collocation
- Dark Fiber
- Wi-Fi
- Satellite
- IoT
- DAS

THANK YOU!

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