

Negotiating Strategies for Enterprise MPLS and VoIP Agreements

**Laura McDonald
Levine, Blaszak, Block & Boothby LLP**



DISCLAIMER

This presentation is not meant to render legal advice to any person or corporation. Contract terms, individual needs, regulatory concerns, and other legal issues are contract-specific, and we recommend that parties seek legal advice prior to entering into any contract.

What will be Covered

- Negotiating MPLS/VoIP deals – from start to finish:
 - Overview of MPLS/VoIP
 - What Enterprise Customers should do in preparation for a MPLS or VoIP migration
 - Critical contract provisions that make it easier to manage a successful migration

MPLS/VoIP

- MPLS/VoIP solutions are growing –
 - Most carriers offer
 - Many enterprise customers are implementing (or considering for next procurement cycle)
- Why?

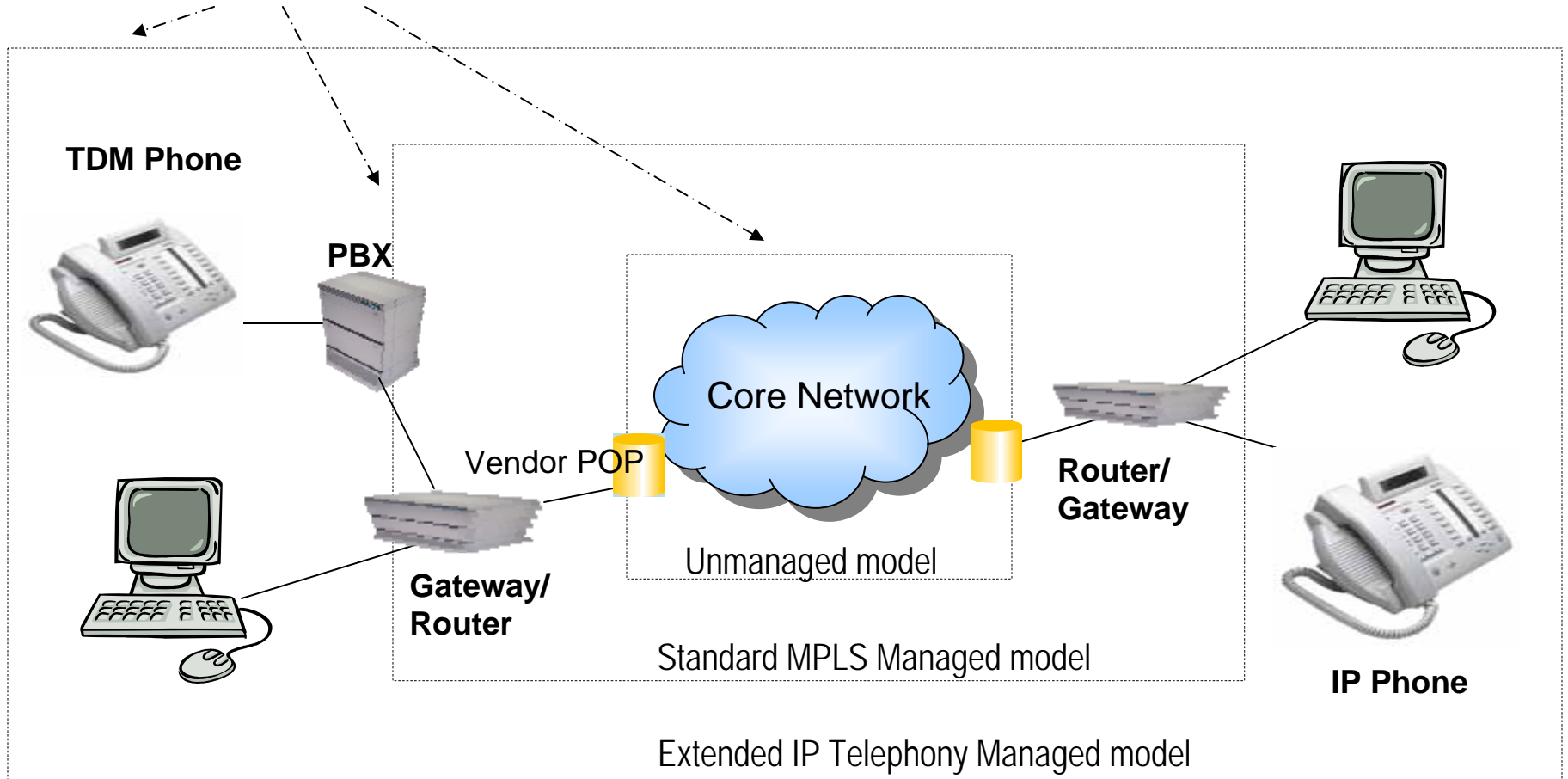
Convergence	Perceived savings
Any-to-any connectivity	Mobility and applications
Traffic prioritization and management	Equipment upgrades/end of life replacements
Disaster recovery	Market “excitement” and Vendor pressure

What are the Carriers Offering?

- Unmanaged Service
 - Carriers provide no CPE
 - SLAs generally limited
 - VoIP is self-provisioned/self-managed
- Managed Service
 - Carriers provide and manage routers and potentially other equipment
 - SLAs may be more expansive
- End-to-end Managed IP Telephony
- Hybrid Offerings

Service Models

Service Boundaries



Transitioning to MPLS and VoIP

- Migrating to a MPLS or VoIP solution is not a simple hot cut
- Successful migrations require:
 - Investigation and planning
 - Option evaluation and comparison
 - Focused and diligent negotiations
 - A meaningful and enforceable contract

What you don't know will hurt you

Investigation and Planning

- The basics:
 - What do you have?
 - What do you want?
 - What are your short and long term goals?

What Do You Have?

- Technology/Network
Understand your traffic and network design (complete traffic studies, application usage, growth forecasts, access structure). Determine:
 - What technology are you replacing?
 - What are the advantages/disadvantages of the current network?
 - What equipment is in place that you will need to upgrade?
 - What are your current (and anticipated) capacity needs?
 - How are you staffed?

What Do You Have?

- Contract obligations/options:
 - What are your existing commitments?
 - What is the likely impact of a migration on your spend?
 - Do you have existing contract rights (such as a technology change clause) or obligations that might affect your decision or flexibility?

What Do You Have?

- How competitive are your prices for legacy services?
- Does the vendor have any stated plans (or contract rights) to eliminate your legacy services?
- Do you have any managed services or equipment that would either have to be replaced or need to interconnect?
- What are your traffic patterns and how will that affect costs and capacity needs?

What Do You Need?

- Do you need any-to-any connectivity?
- What are your timeframes/internal pressure points?
- What applications do you need/want?
- What do you have and need in the way of security and e-911 protection?

What Do You Need?

- Determine what you want to buy:
 - Unmanaged MPLS only? MPLS plus VoIP (and if so when)?
 - Managed service?
 - IP Telephony (and if so, will it be managed)?
 - Equipment
 - MPLS-vendor provided and/or managed?
 - Third-party managed, managed internally?
 - Existing legacy services?

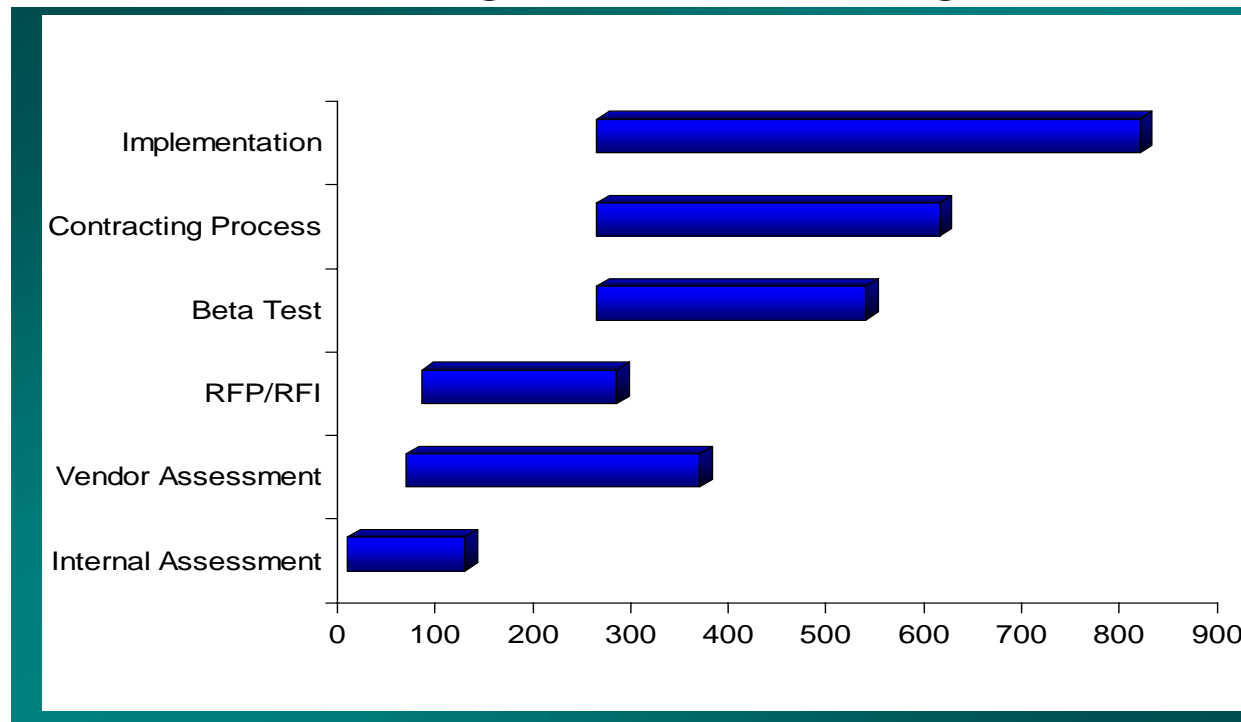
What are Your Short and Long Term Goals?

- Cost reduction
- Applications enhancement
- Improved Vendor management
- Preserving leverage
- Dual/redundant providers

If you fail to plan, you plan to fail

The Planning Stage

Don't underestimate the time required to investigate, test, negotiate, and migrate



Devise a Plan That Gets You What You Need

- Develop a reasonable time line
- Take advantage of an RFP (or RFI or informal presentations)
 - Include key business and legal issues
- Establish a framework for comparison
 - Products often defy apples to apples comparisons
- Don't settle for ambiguous answers or marketing fluff
- Avoid time crunches and unpleasant surprises – involve the lawyers in early in the process

The Art of Comparison

“Our similarities are different”

- Dale Berra

Effective Evaluation and Comparison

- You're not crazy, the carrier's offerings are different
- Your goal is to create mechanisms that allow you to better compare and evaluate the carrier's offerings
- Tools:
 - RFP/RFI
 - Beta test/pilot programs
 - Consultants/Internal support

Vendor Assessment

- To help compare vendor offerings evaluate:
 - Vendor reach (number of MPLS PoPs)
 - Components of vendor pricing
 - CoS
 - SLA
 - “Gotchas”
 - Experience

Vendor Assessment - Price

To get valid and comparable pricing, you must:

- Avoid Pricing and SLA deficiencies via artful RFP requests
- Provide the service providers with an explicit MPLS design
- Understand:
 - How Vendors price their underlying components (don't assume they are the same, they are not)

Traps for the Unwary – Pricing

- CoS pricing
- Site-specific pricing
- Bundled pricing
- Pricing which looks stabilized, but is not
- Discount games and “promo” promises
- Minimum commitments for individual components
- Failure to know the alternatives
- Hidden charges, such as:
 - Price changes for design changes
 - Disconnect charges
 - Access
 - High MACD charges
 - Leaky PBX surcharges

Traps for the Unwary – SLAs

- SLAs that are insufficient or non-existent
- SLA exceptions that eliminate any meaningful protection or remedy
- SLA remedies that are time limited and meaningless
- SLAs that are limited to the core network

“Don’t confuse facts with reality”

– Robert D. Ballard

Consider a Beta Test/Pilot Program

- Advantages:
 - Allows test of a Service or application (such as VoIP) on a limited scale and/or at a limited number of locations
 - Allows evaluation of providers with limited or no commitments

Consider a Beta Test/Pilot Program

- A pilot allows enterprises to:
 - Understand what is actually needed to make the service work
 - Test existing equipment and upgrades
 - Uncover hidden “challenges” and pricing issues
 - Better compare vendor offerings
 - Kick the tires and test compatibility (time to identify and iron out problems found in InterOp testing)
- But don’t confuse a pilot with an LOI, and
- Give your company adequate time to test

Key Elements of a Beta Test

- Make sure that you preserve your options, both on paper and in reality
 - No hidden termination charges
 - Continue the procurement process and planning
 - Plan for redundancy – multiple carriers, multiple networks, or just multiple services?
 - Develop a back-up plan
 - Confirm right to use with third-party monitoring solutions, and then test compatibility
- Conducting a pilot test while negotiating provides a reality check, but remember, the vendor is still in “sales mode”

**It is easy to agree - until you have to put
it in writing**

You Get What You Negotiate (and put in the contract)

- The final steps to successful negotiation of an MPLS or VoIP solution are often the most overlooked:
 - The Contract
 - The Implementation Plan
- Make sure your plans and the vendor's promises are captured by your contract

It's In the Contract

- Use the contracting process as a final check on what you need and what the vendor will provide
- Contract costs are not all in the pricing – many costs (and the keys to successful implementation over the long term) are in the terms and conditions

Key Terms to Include



Checklist

- Business/Technical
- Management
- Legal/Regulatory

What is in Scope?

- The contract should clearly state what is the service the vendor is providing and, if applicable, managing.
- In determining whether the contract contains the correct information ask:
 - What is included in the managed (or unmanaged) service?
 - Network elements (physical scope and ownership of the network)
 - Equipment
 - Reporting
 - Management of 3rd party suppliers/vendors
 - Service demarks

What is in Scope?

- The physical reach and description of the service
 - Location of PoPs
 - Access
 - Backhaul
 - Calling and other capabilities (VoIP)
- Management during the migration period

Scope of Work – Key Areas of Responsibility (additional checklist)

- Design parameters/requirements
- Change control procedures and management
- Interconnection and integration with other systems and vendors
- Business continuity and disaster recovery
- Implementing end-user devices
- Project management & monitoring
- Fault management
- Network map/sites
- Training
- Help desk

Treatment of Equipment and Software

- Lease, buy or rent?
- Acceptance rights
- Interoperability obligations
- Treatment of upgrades (from updating translation tables to new software releases and technology improvements)
- Installation and collocation obligations
- Warranty coverage
- Maintenance coverage (including availability of spare parts)
- Liability/risk of loss
- Mitigate software license restrictions



Performance Standards & Service Levels

- Some important principles
 - The difference between “objectives” and required performance
 - The fine print is important!!!
 - How often is the vendor’s performance measured, and over what period?
 - What constitutes a performance failure?
 - Limit carve-outs, limitations and exceptions

Performance Standards & Service Levels

- SLA basics
 - Choose the right criteria. If you can't measure it, you won't get it
 - Develop ways to track and ensure continual improvement (i.e., periodic reviews/adjustment)
 - Establish SLAs and set out exactly how (and when) they are measured and reported
 - Latency
 - Packet Loss
 - Response time
 - Installation/
time provisioning
 - Jitter
 - Availability
 - Time to repair/restore
 - Voice Quality (e.g., mean opinion scores "MOS") and lost calls

Performance Standards & Service Levels

- Remedies
- Termination rights
- Service credit caps

Rates and Charges

- Clear, inclusive and stabilized
- Waivers and discounts
- Watch for hidden “gotchas”
 - term commitments for individual components are a carrier favorite
- MACD charges
- Regulatory surcharges
- Rate review
- Reasonable Payment terms

Implementation Plan

- The Implementation plan should include:
 - Phased implementation
 - A realistic deployment schedule
 - Key contacts and escalation provisions
 - Meaningful remedies
 - Risk mitigation
 - Fail-over alternatives (short term solution)
 - Fallback (long term solution)
 - Number portability

Contract Management and Staffing

- Governance and relationship management
 - Retain control over technology direction
 - Key “active” and oversight personnel
 - Who, How many, Expertise, Scope of responsibilities
 - Meetings and reports
 - Multi-vendor problem identification and resolution
 - Documenting operations and procedures
 - Contract changes and control
 - Subcontractors
 - Network optimization and “stewardship” clauses

Term and Transition Rights

- Term – what is the term of the agreement?
 - Avoid separate minimum term commitments for underlying services or leased equipment
 - Keep the term reasonable
- Post-termination rights
 - What must the Vendor do to assist in the migration?
 - What rights to you have?

Termination: Exit Strategies

- Even the best-laid plans can go awry
 - Termination of the Agreement
 - Termination for Cause
 - Material breach
 - Partial termination
 - SLA failures
 - “No-Fault” Termination (*i.e.*, not for cause, but no termination charges)
 - Long-term *force majeure* event
 - Change of control

Termination for Convenience

- Most vendors will require a termination fee to recoup the substantial start-up costs and some of the expected profits
- The charge should not be unduly punitive, but also should not substantially deprive the vendor of the legitimate benefit of its bargain
- Make sure that the termination fee ramps down and does not apply to any extension or transition periods

Market and Technology Changes

- Upgrades and patches
- Carrier discontinuance
- Performance review

Legal and Regulatory Compliance

- Evaluate and address any country-specific restrictions on use
- Contracts should require the vendor to comply with changes in the law
- Vendor should rep and covenant that it can and will provide services in all designated locations and that it will take the necessary steps to ensure that the agreement is enforceable
 - Be wary of clauses that allow the vendor to increase the price if the law changes
- Emergency/911 service

Incorporation By Reference – Know What You Are Signing

- Watch for cross-references to incorporated “guides” or “schedules”
- These are not just engineering standards – the guides often contain:
 - Restrictive provisions that are not “customer-friendly”
 - Limitations on how much time you have to dispute a bill or bring an action against the vendor
 - The right to change the terms and conditions in the guide (including changes in the service itself) without notice and without regard to impact on the customer
 - Limits on the vendor’s obligations and the availability of service



Risk Allocation – Infringement

- The vendor should:
 - Indemnify customer against IP and other potential third-party claims
 - Accept liability and acknowledge customer's reliance on the technology; limits on liability must be realistic and workable
- Avoid fall out of pending lawsuits regarding the carriers' use of VoIP. Customers need:
 - Reasonable indemnification clauses covering use of VoIP services for their intended purpose
 - Alternative voice communication solution (at no additional cost) if use is enjoined (or customer becomes reasonably squeamish)
 - Right of customer to terminate and/or reduce commitment if likely to be sued or enjoined
 - Price protection

Risk Allocation

- Risk allocation should be fair and reasonable
- Confidentiality –
 - Customer needs expanded rights to disclose vendor information if necessary or directly related to the IP telephony solution
- Security
- Industry specific requirements (e.g., HIPPA, PCI, GLB)

Acceptable Use Policies

- Overreaching Acceptable Use Policies (“AUPs”)
 - AUPS were designed to allow data network providers to qualify for statutory safe harbors
 - But AUPs go much, much further, prohibiting a wide array of customer conduct, with draconian penalties
 - AUPs are typically Web-based documents subject to change by the provider
 - Common solutions can fix some (although not all) AUP problems

Key Points to Take Home

The keys to a successful migration are:

- Good planning and accurate information
- Realistic time lines and effective time and carrier management
- A good contract -- the best RFP is meaningless without a good contract

**Good contracts take time,
determination, and leverage**

About LB3

- Levine, Blaszak, Block & Boothby, LLP (LB3) is a communications boutique law firm that represents large users in connection with:
 - Internet, MPLS, IP-VPN, VoIP, network management, outsourcing, e-business, local, long distance, and other telecom/data deals
 - FCC rulemakings and involvement in proceedings of other telecommunications regulatory bodies
 - Deal work-outs, mediations, arbitrations, litigation, and carrier bankruptcy proceedings



QUESTIONS?

Contact:

Laura McDonald

lmcdonald@lb3law.com

202-857-2550

