STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

In re Northern New England Telephone Operations, LLC — Tariff Filing to Implement Certain Provisions of the Order on Remand	DT 12-337

CANNE'S MOTION FOR CLARIFICATION

The CLEC Association of Northern New England, Inc. ("CANNE") respectfully moves for clarification of the Order Reclassifying Certain Wire Centers and Extending Transition Period, Order No. 25,580 (October 7, 2013) ("Order").[1] Specifically, CANNE requests that the Commission specify the definition and characteristics of an "Indefeasible Right of Use" (IRU) in the context of determining whether a collocation arrangement is a "fiber based collocation" under the applicable wire center impairment criteria. Further, CANNE requests that the Commission specify that the procedures for future wire center reclassifications to be developed pursuant to the Order must include scrutiny of the facts underlying claims that an arrangement is an IRU, including but not limited to examination of underlying documents purporting to be IRUs, to ensure that asserted IRUs meet the definition and characteristics.

Need for the Clarification. The requested clarification is necessary and appropriate because for the first time, wire center reclassification decisions will be based on use of IRUs. Prior to the Order, the definition of IRU was not crucial to any wire center non-impairment determination. In the March 2006 Order Classifying Wire Centers in DT 05-083, the

[1] http://www.puc.nh.gov/Regulatory/Docketbk/2012/12-337/ORDERS/12-337%202013-10-07%20ORDER%20NO%2025,580.PDF

Commission did not reach the issue whether use of dark fiber obtained on an IRU basis from a competitive provider would qualify a collocation arrangement as a fiber-based collocation. *In re Verizon New Hampshire — Wire Center Investigation*, DT 05-083, 06-012, Order Classifying Wire Centers and Addressing Related Matters, Order No. 24,598, at 48 (March 10, 2006) ("March 2006 Order")[2]; *see* Order at 17-18. Further, neither FairPoint nor its predecessor, Verizon, has ever offered dark fiber on an IRU basis. Accordingly, there was no need for the Commission to define "IRU" in this context or to determine whether a particular arrangement in fact was an IRU.

Even in the Order, it is not clear what criteria the Commission applied when determining that an IRU for competitive dark fiber existed, so as to form the basis to reclassify the wire centers at issue. The Order's discussion of use of competitive dark fiber on pages 17-20 does not define "IRU" or attempt to specify what is an IRU and what is some other, non-IRU arrangement. Neither of the Staff memoranda (August 12[3] and October 3, 2013[4]) defines "IRU." The Staff's July 25, 2013 Second Data Requests sought information on use of competitive IRU dark fiber, but also did not provide a definition or criteria for respondents to apply when answering the data requests.

Thus, the determination of whether an IRU exists has been left to self-definition by parties responding to the Staff's data requests. Respectfully, that is inappropriate. Substantial rights of collocating carriers are affected by characterization of an arrangement as an "IRU," but, because of the confidentiality of the underlying information, those carriers have no way to

[2] http://www.puc.nh.gov/Regulatory/Orders/2006orders/24598t.pdf

[3] http://www.puc.nh.gov/Regulatory/Docketbk/2012/12-337/LETTERS-MEMOS-TARIFFS/12-337%202013-08-12%20STAFF%20MEMO%20RECOMMENDATION.PDF

[4] http://www.puc.nh.gov/Regulatory/Docketbk/2012/12-337/LETTERS-MEMOS-TARIFFS/12-337%202013-10-03%20STAFF%20MEMO%20RECOMMENDATION.PDF

scrutinize or challenge another party's representations. Accordingly, to establish regulatory certainty on this important issue and provide for application of fair and consistent criteria going forward, the Commission should specify a definition or criteria for future determinations of what constitutes an IRU in the context of wire center reclassifications.

Characteristics of IRUs. The FCC has described an IRU as the conveyance of an ownership interest commensurate with the useful life to the facility, such that an IRU:

> confers on the grantee substantially all of the risks and rewards of ownership for the estimated economic life of the asset. IRUs typically include the following elements: (i) payment of a substantial fee up front to enter into the IRU contract; (ii) a minimum total duration of 10 years... and (vi) no unreasonable limit on the right of the grantee to use the asset as it wishes (*e.g.*, the grantee shall be permitted to splice into the IRU fiber, though such splice points must be mutually agreed upon by grantor and the grantee of the IRU).

In The Matter of Special Access For Price Cap Local Exchange Carriers, WC Dkt. No. 05-25, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-153, 27 F.C.C. Rcd. 16318, 16361-62 (December 18, 2012).[5]

Elsewhere the FCC has stated that a typical IRU has a duration of at least 20 years and confers ownership rights: "An IRU is an indefeasible right to use facilities for a certain period of time that is commensurate with the remaining useful life of the asset (usually 20 years, although the parties may negotiate a different term). As a contract law matter, an IRU differs from a lease because it confers on the grantee the vestiges of ownership." *In The Matter Of Rural Health Care Support Mechanism*, WC Dkt. No. 02-60, Report and Order, FCC 12-150, 27 F.C.C. Rcd. 16678, 16737 n.342 (December 21, 2012).[6] Further indicating the "ownership" aspect of an IRU, as an accounting matter, IRUs are characterized as capital assets and their acquisition is a capital event rather than an operational expense.

[5] http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-12-153A1_Rcd.pdf

[6] http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-12-150A1_Rcd.pdf

> It is standard practice in the telecommunications industry for a provider of broadband service to receive a long-term IRU for strands of dark fiber to correspond to the useful life of the strands. Such IRUs are often, but not always, for 20 year period. IRUs purchasers pay for the full cost of the IRU in advance, and treat the purchase of the IRU as a capital event, and the IRU as a capital asset under Generally Accepted Accounting Principles.

Id., Notice of Proposed Rulemaking, FCC 10-125, 25 F.C.C. Rcd. 9371, 9395 n.116 (July 15, 2010).[7]

Accordingly, the term of an IRU and the remaining useful life of the asset are intertwined. Thus, IRUs are long-term arrangements with a typical duration of 20 years. Further, under an IRU, the grantee can treat the facilities in many respects as if the grantee owned them. Further characteristics reflecting the ownership aspect of an IRU is the accounting treatment as a capital asset. Other means of acquiring the use of dark fiber, such as master service agreements (MSAs) or long-term lease arrangements, typically do not convey rights like those of ownership, and are treated as expenses, capital assets or events.

Future Proceedings. The Order has left a regulatory grey area regarding how to determine whether an IRU exists. To achieve some measure of regulatory certainty, CANNE respectfully requests that the Commission establish a definition or criteria for IRUs that will be applied in future wire center classification proceedings. At a minimum, such definition or criteria should specify that an IRU must:

- Be long-term, with a duration in the range of twenty years, commensurate with the life of the asset;
- Carry indicia of ownership, such as the ability to splice;
- Require payment of all or a substantial part of the cost up front;
- Be treated as a capital asset on the user's books.

[7] http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-10-125A1_Rcd.pdf

Further, CANNE respectfully requests that the Commission direct that the Staff investigate beneath the surface of claims that an arrangement is an IRU. In evaluating whether an arrangement constitutes an IRU, the Commission and/or Staff should request and review the underlying contracts to ensure that an IRU arrangement has been established in light of the foregoing criteria. It is not sufficient to rely on the unspecified definitions of respondents to data requests, particularly when no one knows what definition or criteria the respondent has applied. Instead, as part of its investigation and evaluation process, the Staff should request, obtain, and review any purported IRU documentation to be sure that the characteristics set forth above are present such that the arrangement may properly be characterized as an IRU. If necessary, the Staff should investigate and evaluate how the alleged fiber-based collocator carries the IRU on its books to ensure that they are being treated as capital assets and not expense items.

Conclusion. Whether an arrangement for use of dark fiber constitutes an IRU is now an important determinant of a wire center's impairment status. However, a regulatory grey area exists because the Commission has not defined what is and what is not an IRU. The Commission's articulating a definition or criteria will help alleviate that regulatory uncertainty. Further, the Commission should specify that in future proceedings, claims of IRU status will be fully investigated by examining relevant underlying documentation, such as contractual documentation and accounting books and records, to ensure compliance with the applicable definitions and criteria.

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Respectfully Submitted,

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