



# Enterprise Services and Dark Fiber Agreements: A Primer

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# Dark Fiber



## Background: What is “Dark Fiber”?

- ▶ An unactivated fiber optic strand, one of many within a fiber optic cable
- ▶ The right to activate or “light” a fiber optic strand can be distinct from the ownership interest in the underlying physical facility
- ▶ The owner of the facility may grant an IRU or leasehold interest in dark fiber. Grantee/lessee may then activate and use the fiber to transmit information
- ▶ A dark fiber transaction involves a right to use a physical facility, not a service; not “telecommunications”

# Why Dark Fiber

## ▶ Grantee:

- ▶ Obtain essential element at relatively low cost, fixed price
- ▶ Control:
  - ▶ Grantee provisions / configures / manages / upgrade electronics
  - ▶ Ability to expand capacity
  - ▶ Generally, a long-term commitment by Grantor
  - ▶ Reduced network security risk

## ▶ Grantor:

- ▶ Monetize an unused, surplus asset
- ▶ Potential swap component
- ▶ Common element of P3 deals

# Common Providers of Dark Fiber

- ▶ Regional network operators (but not large incumbents)
- ▶ Electric cooperatives
- ▶ Metro-area networks (possibly as anchor tenants)
  - ▶ Municipally owned utilities
  - ▶ Municipal broadband initiatives: (Westminster, MD, Huntsville, AL, etc.)
- ▶ Some cable operators
- ▶ Zayo, Uniti, Lumen, Crown Castle, etc.
- ▶ Investor-owned electric utilities (less so for last-mile)
- ▶ Typically *not* available from:
  - ▶ Major wireline carriers (AT&T, VZ, CenturyLink)
  - ▶ Major wireless carriers
  - ▶ Major cable operators

## Principal Dark Fiber Customers

- ▶ Wireless carriers
- ▶ Wireline service providers (2<sup>nd</sup> and 3<sup>rd</sup> tier)
- ▶ Major technology companies, enterprises
- ▶ State R&E/nonprofit networks (middle mile)
- ▶ Geographically concentrated health care facilities
- ▶ Schools and libraries
- ▶ Municipal P3 arrangement

# Dark Fiber Transactions

- ▶ IRU: “Indefeasible Right of Use”
  - ▶ Long term, for usable life of the asset (typically 20 years)
  - ▶ \$ mostly upfront (hence “indefeasible”)
  - ▶ Ownership may transfer at end of term
  - ▶ Normally able to be treated as a capital cost, not operating expense
  - ▶ Almost a sale
  - ▶ Bankruptcy implications (favorable for grantee)
- ▶ Lease
  - ▶ More flexibility on term length
  - ▶ Payment can be spread over time
  - ▶ Treated as opex
- ▶ License
  - ▶ Less common in dark fiber context
  - ▶ Less protective of grantee rights
- ▶ *Terminology is not dispositive.*



## Key terms: IRU vs. Lease

Contract Provision	IRU	Lease
Term and Renewal	20+ year term; renewals vary; title may transfer	1-5-year term; multiple renewals available; subject to termination by either party at end of term
Use of fibers; physical access	Grantee sole right to use; network operator/owner often sole right of physical access	Lessee sole right to use; network operator/owner sole right of physical access
Payments	Grantee typically pays 50% + upfront	Lessee may pay NRC for construction; plus periodic rent
Physical maintenance	Typically by network operator; may be annual maintenance fee	By network operator, typically part of lease fee/rent
Network operator's bankruptcy	Grantee retains IRU as equitable property interest	Part of bankrupt's estate; may be revoked
Relocation	Cost may be shared with others in cable pro rata	Cost typically absorbed by Lessor

## Other Terms

- ▶ Underlying rights
  - ▶ Easements, ROW access, property access, attachment rights, permits
- ▶ Construction terms
  - ▶ Route delineation, acceptance, testing (OTDR), premises entries, demarcation points
  - ▶ Handholds, slack cable
- ▶ Warranty
  - ▶ ITU compliant fibers; cable/fiber manufacturer's specs., disclaimer of implied warranties
- ▶ Incident response terms
- ▶ Risk of loss
- ▶ Indemnification
- ▶ Use conditions/acceptable use policies

# Typical Fiber Agreement Structure

- ▶ Master Agreement

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- ▶ Attachments:

- ▶ Route order (route description, pricing, delivery date)
- ▶ Acceptance criteria
- ▶ Warranty
- ▶ Maintenance obligations
- ▶ Collocation addendum
- ▶ Etc.

## Dark Fiber Pricing

- ▶ Most commonly: per strand, per mile, for a set term
- ▶ Wide variation among markets, and among carriers in the same market
- ▶ Route-specific, location-specific, and sometimes arbitrary
- ▶ Colocation, splicing, make-ready may be added on top
- ▶ Metro-area vs. Long-haul
- ▶ Existing network vs. new construction vs. network extension
- ▶ Fiber count in cable
- ▶ Physical route challenges
- ▶ Rates generally not publicly available



# Telecommunications Services Agreements

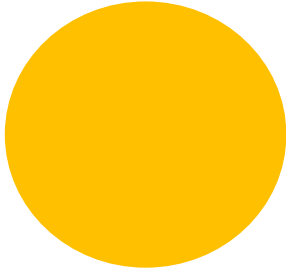


# Contents

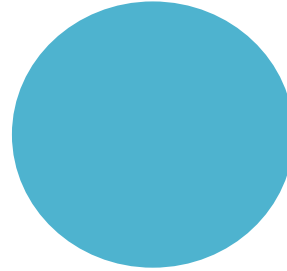
- ▶ Introduction
- ▶ Procurement Process
- ▶ The Business Deal
- ▶ Agreement Structure
- ▶ Terms and Conditions

# Introduction

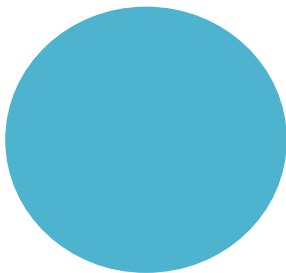
Reliability



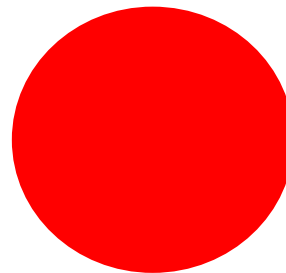
Optimum Price



Optimum Technology



Network Security



## Introduction (2)

- ▶ Telecom services agreements are episodic; three-year deals often extended up to 10 years
  - ▶ Enterprise-wide agreements preferred vs. “each business unit for itself deals”
- ▶ Telecom services agreements are “Master Purchase Agreements”
  - ▶ Encompass domestic, International, or “rest-of-world” services
  - ▶ Cover new/different services during the term of agreement
- ▶ Procurements initiated for several reasons
  - ▶ Better pricing
  - ▶ Expanded requirements due to acquisitions or major growth spurt
  - ▶ Migration to new technology
  - ▶ Dissatisfaction with current service provider(s)
- ▶ Primary and secondary carriers are common



# Introduction (3)

## Transmission Services

- ▶ Wireline Voice Services (VoIP/SIP)
- ▶ Data Services
  - ▶ Special Access (Ethernet & TDM)
  - ▶ Private Line (Ethernet & TDM)
  - ▶ MPLS
- ▶ Dedicated Internet Access
- ▶ *Impact of USF surcharges, state transaction taxes and state surcharges*

## Managed Services

- ▶ SD-WAN
- ▶ IVRS (Call Center Technology)
- ▶ Router Management
- ▶ Security Services
  - ▶ Firewall
  - ▶ DDOS
  - ▶ Intrusion Detection
  - ▶ Proxy Server Service

# Procurement Process

- ▶ Threshold Question: Exclusive reliance on in-house procurement and IT departments or engage consultants to support the procurement
  - ▶ Telecom Consultants' value:
    - ▶ Current knowledge of market pricing
    - ▶ Carriers' business drivers
    - ▶ More experience in Telecom Service Procurements
- ▶ Comprehensive RFP
  - ▶ Current locations, circuit/port capacities and voice usage = Current Inventory
  - ▶ Projected capacity/usage requirements
  - ▶ Preferred technologies
  - ▶ Preferred business and legal terms and conditions

## Procurement Process (2)

- ▶ Timely RFP – Why is this important??
  - ▶ Two reasons
- ▶ RFP should include business and legal terms and conditions; counsel should review legal Ts and Cs
- ▶ Roles of consultant and enterprise staff and counsel vary in negotiations with carriers
- ▶ Consider cost/duration of transition process
  - ▶ Orders must be placed, processed, new services installed, and tested
  - ▶ Incumbent provider's services must be disconnected
  - ▶ Connectivity to locations cannot be disrupted during service provider transitions

# The Business Deal

- ▶ Pricing Principles and Mechanisms
  - ▶ Fixed rates vs. % Discounts of Service Guide rates
  - ▶ Non-recurring vs. recurring charges
- ▶ Minimum Commitments
  - ▶ Central to service provider's business case
    - ▶ Min. commitment and projected spend
    - ▶ Exclusivity commitments are the exception
  - ▶ Annual, Term, or Service-Specific
  - ▶ Achievement Credits
- ▶ Periodic Pricing Reviews
- ▶ Business Downturn Provision

## The Business Deal (2)

- ▶ Service Level Agreements
  - ▶ Service-specific
  - ▶ Found in Service Guides; Substance rarely negotiable
  - ▶ Service issues must be reported
  - ▶ Credits offered as exclusive remedy
- ▶ What may be negotiable?
  - ▶ Escalated remedies for recurring problems generally or at core locations
- ▶ Service Level Metrics
  - ▶ Latency
  - ▶ Jitter
  - ▶ Packet Loss
  - ▶ Provisioning
  - ▶ Availability/MTTR
- ▶ Challenges of contract/service termination
  - ▶ Unplanned transition is problematic for customer
  - ▶ Carrier cap on damages

## Master Agreement

- ▶ Service provider's standard documents (including online documents)
  - ▶ Service provider's standard terms and conditions
    - ▶ May not include customer-friendly provisions "accepted" in RFPs
    - ▶ Links to online documents – AUP, Privacy Policy, and Standard Rates, SLAs, Standard Agreements
    - ▶ Service provider's precedence provision
  - ▶ Negotiated pricing and rates in attached pricing schedules
  - ▶ SLAs attached as schedules or posted online

# Agreement Components

- ▶ Standard terms, policies and rules for all services/agreements generally posted in service provider's online Service Guide
  - ▶ Standard terms and conditions
  - ▶ Service pricing schedules ("Rack rates")
  - ▶ Service Level Agreements (SLAs)
  - ▶ Acceptable Use Policy (AUP)
  - ▶ Privacy Policy
  - ▶ Network Security Policy \*\*

**Beware of carrier's reservation of right to change online documents and customer's standard limited remedy.**

# What's Negotiable? The Business Deal

- ▶ Fixed rates, not percentage discounts
  - ▶ Pricing for current and projected primary services
- ▶ Term and Transition Clause
- ▶ Minimum Commitment; Mitigation clause for failing to meet minimum commitment
- ▶ Competitive pricing reviews
  - ▶ When, with who's assistance, consequences for failing to agree
- ▶ Confidentiality
- ▶ Minimum service period necessary to waive non-recurring charges
- ▶ Informal billing dispute resolution clause
- ▶ Modifications to standard SLA remedies
- ▶ Technology upgrade provision (a drafting challenge)
  - ▶ Carriers typically do not object to service substitution (MPLS to Internet access)
  - ▶ Carriers concerned with loss of revenue and migrating service to another provider



# Service Provider's Acceptable Use Policy

<https://www.centurylink.com/aboutus/legal/acceptable-use-policy.html>

<https://www.verizon.com/about/terms-conditions/acceptable-use-policy>

# Service Provider's Privacy Policy

<https://www.centurylink.com/aboutus/legal/privacy-notice/centurylink-enterprise-customer-privacy-notice.html>

[https://about.att.com/ecms/dam/csr/privacy/ATT\\_MOW-Business-Customer-Privacy-Notice.pdf](https://about.att.com/ecms/dam/csr/privacy/ATT_MOW-Business-Customer-Privacy-Notice.pdf)

# Collection and Use of Customer Information

- ▶ Different types of information
  - ▶ Confidential information
  - ▶ Customer data
  - ▶ Customer Proprietary Network Information (CPNI)
- ▶ Data security
- ▶ Limitations on access and use
- ▶ Limitations on sharing

## What's Negotiable – Terms and Conditions

- ▶ Customer's standard technology agreements are useful guide/starting point for responding to service provider's standard terms and conditions
- ▶ Carriers unlikely to modify standard damages cap/remedies, indemnities, or warranties
- ▶ Limit consequences of non-compliance with AUP
- ▶ IP warranty unlikely; carrier's IP indemnity warrants close look
- ▶ Confidentiality clause should preserve confidentiality of aggregate info on company locations and customer-data in RFP and network design
- ▶ Understand precedence of "contract" over Service Guide and Online Policies
  - ▶ Modify accordingly
- ▶ Focus on partial termination rights to address recurring service problems
- ▶ Choice of law, ADR or not, and venue—a priority for international and foreign services
- ▶ Signatory vs. entities providing services

# Thank You

Any questions?

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