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 (2nd and 3rd 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

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

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

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Thank You

Any questions?

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