STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

DT 12-337

Northern New England Telephone Operations, LLC d/b/a FairPoint Communications - NNE Tariff Filing to Implement Certain Provisions of the Order on Remand

OBJECTION TO MOTION FOR CLARIFICATION

NOW COMES Northern New England Telephone Operations, LLC d/b/a FairPoint Communications - NNE ("FairPoint") and hereby submits the following Objection to the Motion for Clarification of the CLEC Association of Northern New England, Inc. ("CANNE").

I. OBJECTION TO MOTION

FairPoint respectfully requests that the Commission reject CANNE's pleading because it is really a "Petition for Declaratory Ruling" improperly disguised as a "Motion for Clarification." CANNE clearly admits that the Commission has yet to address the definition of an indefeasible right of use ("IRU"). It cites the original *2005 Wire Center Order*,[1] observing that "the 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."[2] CANNE further observes that the *2013 Wire Center Order*[3] did not address this issue either, explaining that "[t]he 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-

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[1] DT 05-083, Order No. 24,598 Classifying Wire Centers and Addressing Related Matters (March 10, 2006) ("*2005 Wire Center Order*").

[2] CANNE Motion at 2.

[3] DT 12-337, Order No. 25,580 Reclassifying Certain Wire Centers and Extending Transition Period, (October 7, 2013)("*2013 Wire Center Order*").

IRU arrangement."[4] Clearly, then, there appears to be no dispute that the Commission has never rendered a decision on how an IRU should be defined for purposes of determining wire center impairment. Consequently, without a decision, there is nothing to clarify, and without anything to clarify, CANNE's Motion to Clarify is moot. Accordingly, FairPoint respectfully requests that the Commission dismiss the Motion or, short of that, either docket it separately as a Petition for Declaratory Ruling, pursuant to Rule Puc 207.01, so that a true record can be developed on which to base a decision, or enter it in the current docket as unsolicited comments that can inform the Commission's ongoing inquiry while requiring no other action from the Commission.

However, in the event that the Commission intends to render a substantive decision on the CANNE Motion, FairPoint replies as follows.

II. REPLY TO MOTION

First, it is important to place this issue in the proper context and emphasize that an IRU is *not* a fundamental element of the definition of a fiber based collocator ("FBC") and is *not* an element of any of the wire center impairment decisions that the Commission has made so far. An IRU is only a qualifier for one instance of facility ownership, *i.e.* ILEC dark fiber.

Stripped to its essentials, the transmission facility characterizing an FBC must meet three criteria, none involving an IRU *per se.* It must be 1) fiber-optic cable or comparable, 2) operated by the FBC, and 3) not owned by the ILEC.[5] Moreover, the *only* situation in which the facility must be an IRU is when it is dark fiber obtained from the ILEC, and only the ILEC.[6]

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[4] CANNE Motion at 2.

[5] To be perfectly clear, the non-ILEC owner need not even be the FBC. *See, e.g.* Verizon Pa., Inc. v. Pa. Pub. Utils. Comm'n, 484 Fed.Appx. 735, 2012 WL 1995025 (3d. Cir. 2012) (not selected for publication) ("Nowhere in the text of the 'fiber-based collocator' definition is there a requirement that a carrier own the facility it operates to qualify; the facility must only be owned by a party other than the ILEC in whose wire center the carrier collocates.")

[6] *See* 47 C.F.R. § 51.5 which provides that a fiber based collcator is:

None of the Commission's impairment decisions to date have pivoted on the definition of an IRU. Notwithstanding, CANNE asserts that "substantial rights of collocating carriers are affected by characterization of an arrangement as an 'IRU'" and, citing several FCC orders, suggests the following definition of an IRU:

- 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]

FairPoint maintains that this definition is too expansive, does not conform to the spirit of the impairment inquiry, and invites gaming.

No party will argue that in the Triennial Review proceeding, the FCC was vague regarding the definition of an IRU for purposes of determining wire center impairment. Nonetheless, FairPoint believes that care should be taken when attempting to remedy this vagueness by importing the definition of an IRU from other FCC proceedings, particularly when the IRU is being used as a proxy for something else. For example, in the Triennial Review proceedings, the FCC looked at IRUs to develop a proxy for the level of infrastructure

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> any carrier, unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that
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> (1) Terminates at a collocation arrangement within the wire center;
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> (2) Leaves the incumbent LEC wire center premises; and
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> (3) Is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator. For purposes of this paragraph, the term affiliate is defined by 47 U.S.C. 153(1) and any relevant interpretation in this Title.

[7] CANNE Motion at 4.

development that "signals that significant revenues are available from customers served by that wire center sufficient to justify the deployment of transport facilities."[8] On the other hand, in the Special Access proceeding that CANNE references,[9] the FCC looked at IRUs as an indicator of the scope of the special access market, and appeared to equate IRUs with *both* fully owned facilities *and* CLEC provisioned UNEs:

> We intend to assess the market structure for special access market(s). By this, we mean that we intend to examine comprehensive data on the situs and type of facilities capable of providing special access, by sold and potential capacity and ownership, and the proximity of such facilities to sources of demand. Specifically, we require each provider to submit data and information for connections that are owned by the provider, leased under an indefeasible right of use (IRU), or, *for competitive providers, obtained from an incumbent LEC as an unbundled network element (UNE) to provide a dedicated service* . . . .[10]

As CANNE notes, the definition of an IRU in that Order specifies a substantial up-front payment and a duration of 10 years (*not* the 20 years that CANNE recommends), but even then, the FCC waffles. In a footnote that CANNE has overlooked, the FCC qualifies the definition by reducing the necessary up-front payment, creating a situation that resembles a large non-recurring charge with periodic lease payments thereafter:

> To enter into an IRU contract, grantees are usually required to pay the total amount due under the terms of that contract. However, some IRU contracts require a smaller initial payment, with installment payments throughout the duration of the contract. At a minimum, a grantee typically pays at least 25 percent of the total amount due under the IRU contract upfront (excluding operations and maintenance fees), with commitments to make regularly scheduled installment payments, to qualify as an IRU.[11]

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[8] *Unbundled Access to Network Elements*, WC Docket No. 04-313, Order on Remand, 20 FCC Rcd 2533 ¶ 97 (2005) ("*TRRO*").

[9] CANNE Motion at 3.

[10] *Special Access For Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318 ¶ 31 (2012) ("*Special Access Order*") (emphasis supplied).

[11] *Special Access Order*, App. A, n. 4.

Then, there is the *Rural Health Care Order* that CANNE references,[12] which adds further nuance, to put it mildly. The text that CANNE quoted in its Motion may appear to distinguish between IRUs and leased facilities, but in a concluding sentence that CANNE omitted, the FCC actually goes on to explain that *there is no difference*, at least for the purposes of that particular order. The full text of that passage, including the omitted language is:

> 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. For purposes of the e-rate program, however, the Commission has chosen to treat IRU purchase agreements as "leases." *We similarly treat IRUs and leases as interchangeable* for purposes of the Healthcare Connect Fund, especially with respect to upfront payments.[13]

About the only conclusion that can be drawn from these examples is that the FCC's definition of an IRU tends to be fluid and situational. In general, an IRU connotes a long term commitment, but apparently so do other methods of obtaining transmission facilities, at least based on FCC precedent. The question for the Commission, then, is whether -- in this situation -- an appropriate level of commitment can be demonstrated by a so-called "IRU" with terms that are more flexible than those proposed by CANNE. In other words, how invested must a carrier be for that investment to "constitute [a] prox[y] for where sufficient revenue opportunities exist to justify the high fixed and sunk costs of transport deployment?"[14] FairPoint submits that this is well short of the pre-paid twenty year term that CANNE proposes, and can be accomplished without the Commission having to conduct audits of contracts, provisioning records, and

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[12] CANNE Motion at 3.

[13] *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Report and Order, 27 FCC Rcd 16678 n.342 (2012) ("*Rural Health Care Order*") (emphasis supplied).

[14] *TRRO* ¶ 93.

accounting records, as CANNE proposes.[15] This would be unreasonably invasive, exhausting and resource depleting for the Commission, and would impose unreasonable delay in the process.

It may be instructive to review why, in the first place, the FCC chose dark fiber IRUs for an element of the FBC definition. Interestingly, the FCC's chief consideration was to avoid gaming, presumably by the ILEC exploiting a momentary peak in dark fiber UNEs to then establish that the competitive facilities threshold had been crossed in a particular wire center. In the original *Triennial Review Order*, back when the FCC established its (since-remanded) "self-provisioning" triggers, it explained that

> For purposes of the "own facilities" prong of the Self-Provisioning Trigger, a competitive carrier that has obtained dark fiber transmission facilities from the incumbent LEC on a long-term IRU basis will be considered to operate its own unaffiliated facilities. *We believe that dark fiber IRU type contracts protect against short-term gaming by the incumbent LEC.* Moreover, we do not want to foreclose incumbent LECs from negotiating long term dark fiber leases with competitive LECs.[16]

By the same token, however, FairPoint believes that the ILEC should also be protected from *long-term* gaming by competitive carriers. For example, under the definition that CANNE proposes, a competitive carrier could provision a dark fiber UNE transport facility for successive one, five, or ten year terms, in perpetuity, and that facility would never be considered an IRU, no matter how long the competitive carrier operated the facility from that wire center, or how many other carriers in that wire center adopted that strategy.

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[15] CANNE Motion at 5.

[16] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 n. 981 (2003) (*TRO*), *corrected by* Errata, 18 FCC Rcd 19020 (2003), *vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) *cert. denied*, 125 S.Ct. 313, 316, 345 (2004) (emphasis supplied).

This implies that there must be a length of time – not too long, not too short – after which dark fiber is considered to be "obtained on an IRU basis" by a competitive carrier. FairPoint proposes that the appropriate length of time is five years, and that it should immaterial as to terms of payment. This period of time is sufficient for the competitive carrier to validate its business decision to establish that circuit, yet is short enough that it does not discourage the facilities-based competition that the Telecommunications Act is intended to foster.

WHEREFORE, FairPoint respectfully requests that the Commission

a) DISMISS the Motion for Clarification or, in the alternative;

b) REJECT CANNE's proposed definition of an IRU and its proposed procedure for future proceedings.

Respectfully submitted,

NORTHERN NEW ENGLAND TELEPHONE OPERATIONS LLC, D/B/A FAIRPOINT COMMUNICATIONS-NNE

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