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December 8, 2004

Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: **Notice of Ex Parte Meeting** CC Docket Nos. 04-313, 01-338

Dear Ms. Dortch:

Pursuant to the Commission's rules, 47 C.F.R. § 1.1206, this will provide notice that on December 7, 2004, Michael P. Gallagher, Chief Executive Officer of FDN Communications Inc., Joshua M. Bobeck of this firm, and the undersigned, met with Jessica Rosenworcel, Legal Advisor to Commissioner Copps; Matthew Brill, Legal Advisor to Commissioner Abernathy; Christopher Libertelli, Legal Advisor to Chairman Powell; Scott Bergmann, Legal Advisor to Commissioner Adelstein and Daniel Gonzalez, Legal Advisor to Commissioner Martin.

In addition to providing the attendees with a copy of the attached presentation, FDN discussed a number of issues in the Commission's *TRO* Remand Proceeding that it considers critical for the preservation of sustainable facilities based competition.

DS1 Loops

First, FDN disputes the RBOCs' contention that there is no impairment of DS1 loops because CLECs have self-provisioned high capacity loops that are readily available for wholesale. To the contrary, that CLECs provide retail services to particular buildings or along particular routes does not mean they necessarily have the potential to reconfigure their networks and use those deployed facilities to offer wholesale services. Based on Mr. Gallagher's extensive experience building competitive telecommunications networks, there are at least three main reasons why a CLEC self provisioning loop facilities cannot readily transform themselves into wholesale suppliers of DS1 loops: 1) providing wholesale service requires deployment of building riser, or distribution cablings to provide DS1 capacity; 2) providing wholesale service

based on existing DS3 or OCn loops requires deployment of, at a minimum, Digital Access Cross Connect ("DACs") Equipment to groom DS1 circuits from DS3 and OCn facilities; 3) providing wholesale service requires OSS designed to support wholesale services which are vastly different than the OSS used for retail services. Each of these issues is explored below

1) Recabling for DS1 Service

While the RBOCs have ubiquitous access to riser cable, competitors do not. Competitors must either obtain access to existing cabling or deploy their own.[1] In order to serve a customer a CLEC providing retail service will typically obtain only that access they need to serve that customer. In other words rather than obtain access to all the riser cable in a multi-tenant building the CLEC will seek access only to the floor or suite where it will deliver service to the customer. The same limitation applies when the CLEC deploys its own riser cable. If the CLEC is providing a customer with a DS3, it builds coaxial or fiber riser cable to the customer premises but almost certainly would not deploy facilities for serving other tenants in the building. In order to provision DS1 services, the CLEC would need to augment its fiber optic transmission system with low speed T1 cards if they are not already present, and run CAT 5 type cabling up the building riser to the suite in question. There would be no business case for pre-wiring a building with T1 cable while serving DS3 or OCN level services in the hope of earning future business, especially when those facilities are already in place and owned by the ILEC.

2) Deployment of DACs

As a rule, CLECs providing DS3 or OCn level service do not always deploy the necessary DACs multiplexing equipment in the field that would permit the grooming of DS1 level circuits for handoff to another carrier who desires to purchase T1 level services. Moreover, it would require many separate DS1 users to justify the expense of such equipment.

3) OSS Designed to Provide Wholesale Service

Finally, retail providers do not typically have the OSS to offer capacity on a discrete circuit on a wholesale basis. Many wholesale fiber providers offer service at the optical, OCn or DS3 level, and their systems do not track or provision individual DS1 channels.

THE COMMISISON SHOULD ADOPT A MULTI YEAR TRANSITION FOR DS3 AND UNE DARK FIBER

FDN currently uses a combination of DS3 transport, dark fiber and self-provisioned facilities to carry traffic from its switch to its end office collocations where it aggregates loop traffic. To the extent the DS3 and dark fiber transport framework currently under consideration means that FDN will need to migrate some DS3 and dark fiber transport routes to self-provisioned facilities, a multi-year transition is necessary in order to avoid significant customer disruption. To replace UNE dark fiber transport, a CLEC must typically obtain financing to

[1] To the extent such access or deployment is available after protracted negotiations with building owner they frequently seek to extract monopoly rents from ILEC competitors.

deploy its own fiber and then develop a network design based on actual cable placement that in most cases requires physically "walking" the new cable route. To the extent the CLEC is trenching for cable placement, local and state permits must be acquired, a process that takes months to complete. For example, FDN currently has a critical dark fiber transport that passes under the St. John's Waterway in Jacksonville, Florida. Replacing this facility would involve the participation of government entities such as the Army Corp. of Engineers, the Waterway Authority, as well as state and local governments. The permitting process could take a year and the construction process could take another year.

In other situations, to the extent ILEC duct is available, locating and preparing that duct is a time intensive, manual process. It is not simply a question of ILEC cooperation either. In FDN's experience where its has pulled fiber through BellSouth duct, identifying where the duct is located requires engineers climbing into manholes to tag duct, clear blocked duct of mud and debris; repair collapsed duct, and removing retired copper that in many instances has become permanently affixed to the duct walls requiring repair and replacement of the duct. Indeed, when FDN pulls fiber through BellSouth duct, BellSouth is entitled to a free sub duct as part of its agreement with FDN and frequently retains such duct as part of the construction process.

Even after the CLEC fiber is in place, hot cuts from UNE dark fiber to self-deployed fiber require customer coordination, often within narrow time constraints outlined in customer contracts. Without a rational transition period that accounts for the manual and time intensive nature of fiber deployment there is a significant chance of service disruptions because replacement facilities may not be available to replace UNEs. The Commission has repeatedly adopted transitional regimes to avoid flash cuts to avoid customer disruption and should adopt a three year transition for CLECs that must deploy fiber to replace lost UNEs, particularly dark fiber UNEs.

EXTENDING EEL ELIGIBILITY CRITERIA TO STAND-ALONE UNE LOOPS WOULD BE UNLAWFUL

Although the EEL eligibility requirements have previously survived court review, the Commission does not have unlimited ability to apply or extend them to all UNEs, as we understand it is currently considering. Under the terms of the Act, as interpreted by *USTA II*, the Commission may only deny carriers access to UNEs where it finds that such carriers would not be impaired without the requested UNE.[2] Accordingly, the Commission may continue to apply eligibility rules to deny UNE EELs to carriers providing solely interexchange services if the Commission determines that such carriers are not impaired. Applying these EEL eligibility criteria to stand-alone loops, however, would unlawfully and inappropriately preclude legitimate uses of UNE loops by carriers despite Commission findings of impairment; for instance for carriers providing local exchange access, high capacity circuits, xDSL services, or data services.

The record clearly demonstrates that carriers seeking to provide local exchange access or data services remain impaired without access to stand-alone loops. Because the facilities used

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[2] *USTA v. FCC*, 359 F.3d 554, 591-592 (D.C. Cir 2004) ("*USTA II*").

for providing exchange access and non-voice services are the same physical facilities that CLECs use to provide voice service, there is no justification for allowing use for one service but not the other. The physical and economic barriers to duplicating those facilities are the same for all carriers regardless of the service provided using the loop facility. In other words, the impairment analyses for each of these services are so closely intertwined that a finding of impairment for one service precludes the opposite result for other services.

It is unclear what problem the Commission seeks to address in considering a potentially unlawful extension of eligibility rules to stand-alone loops. There is no record evidence of any "misuse" of stand-alone loops or even any risk that such misuse could occur that would warrant imposing eligibility criteria. In the *TRO*, the Commission found that the record did not indicate concern over misuse of stand-alone loops to provide non-qualifying services.[3] The Commission noted the lack of controversy with respect to UNEs other than EELs and the greater administrative burdens of applying EEL criteria to stand-alone UNEs.[4] Nothing has changed since these findings to warrant the radical and extremely harmful step of applying EEL-type use restrictions to stand-alone UNE loops. As the Commission observed in the *TRO*, adopting use restrictions on stand-alone UNE loops, which would affect all facilities-based carriers that offer local services competing directly with services that the ILECs have traditionally dominated, simply "to avoid speculative concerns about access charge bypass by a few carriers would be a vastly over-inclusive solution in search of a very narrow, speculative problem."[5] In light of the total lack of record support for this radical and harmful step, FDN submits that it would be arbitrary and capricious for the Commission to apply EEL criteria to stand-alone loops.

Nor is there any record evidence suggesting that CLECs could or would use UNE loops (as opposed to EELs) to avoid ILEC special access. CLECs such as FDN that use stand-alone UNE loops typically access those UNE loops in the end offices serving the customer loop locations. By contrast, IXCs access loops (or the special access equivalent, *i.e.* channel terminations) using EELs or special access circuits and interoffice mileage between the customer's serving wire center and other ILEC wire centers. In other words, there is no danger of a flash cut from special access to stand alone UNE loops because the IXCs lack the collocation presence to obtain access to stand alone loops. This is evident from the fact that the availability of stand-alone UNE loops for the past eight years has not led to conversions of access circuits to stand-alone loops

Under rules in effect since 1996, IXCs have been able to convert special access channel terminations for end-user customer premises to stand-alone UNE loops, yet there is nothing in the record suggesting that they have done so. While the Commission has relieved the

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[3] *TRO*, ¶ 592.

[4] *Id.*

[5] *TRO*, n. 1824 (citing Covad Jan. 21, 2003 *Ex Parte* Letter at 3). To the extent the Commission remains concerned about the hypothetical prospects of IXC access charge bypass in the stand-alone loop context, the Commission can always exercise its enforcement authority to address speculative problems when and if they actually arise.

commingling restriction, thus allowing CLECs to combine UNE loops with tariffed interoffice access service, such commingled combinations are subject to the same eligibility criteria as UNE EELs.[6] The Commission specifically applied the EEL restrictions to commingled combinations to "avoid the possibility of across-the board-loop arbitrage, yet protect access to the UNE portion of a circuit."[7] The Commission further explained that this rule ensures that "interexchange carriers would be unable to obtain the remaining loop base of special access circuits because of the service eligibility criteria."[8] Because the Commission already has safeguards against IXC gaming in place there is no basis to extend the EEL restrictions to stand-alone UNE loops.

Moreover, applying EEL criteria to stand-alone UNE loops would also harm facilities-based competition. As noted, the Commission established the criteria to encourage facilities-based competition and prevent carriers that do not offer local services from using UNEs to provide long distance service.[9] The Commission explained in the *TRO* that "[b]y gaming our eligibility criteria, we mean the case of a provider of exclusively non-qualifying service obtaining UNE access in order to obtain favorable rates or to otherwise engage in regulatory arbitrage."[10] However, FDN does not provide "exclusively non-qualifying services" but rather is a *bona fide* providers of local service including local data service and exchange access. The *TRO* found that local data service and access services such as xDSL, exchange access and high capacity services were services for which CLECs could use UNEs to provide because they competed with services that the ILECs traditionally have dominated.[11] The 1996 Act requires the Commission to open to competition all of the markets over which ILECs have maintained an historic stranglehold. The over-inclusive and unnecessary application of EEL criteria to stand-alone loops would undermine all CLECs' ability to offer competitive services, and preclude competition in innovative, advanced services that the Commission elsewhere seeks to encourage.

For instance, the BOC proposals would have a devastating impact on CLECs that use stand-alone loops to provide data services. The Commission has made it clear in a number of recent orders that it seeks to develop policies that will encourage the deployment of facilities to provide innovative broadband services, not just legacy voice services. FDN is doing that now, investing considerable sums in collocations to place equipment to provide small businesses with next generation services, but these efforts would be frustrated if the Commission denies FDN access to UNE loops for data services. For example, in its recent *Vonage Order,* the Commission freed VoIP services from a patchwork quilt of state economic regulation.

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[6] 47 C.F.R. § 318(b);

[7] *TRO* ¶ 594.

[8] *Id.*

[9] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587, 9597 ¶ 18 (2000); *see also Competitive Telecommunications Assoc. v. FCC*, 309 F.3d 8, 14 (D.C. Cir 2002).

[10] *TRO,* ¶ 591.

[11] *TRO,* ¶ 140.

Restricting access to UNE loops to carriers providing legacy voice services could reduce competitive supply of data-only broadband services relied on by VoIP providers to reach their customers. In other words, imposition of use restrictions tied to a legacy architecture for delivering voice would undoubtedly undermine the growth in the new innovative services that rely on a broadband transmission capability.

Thus, there is no legal or policy reason for the Commission to adopt the use restrictions currently under consideration.

IMPAIRMENT PRESUMPTION

Finally, FDN explained how important it is that whatever network elements the Commission decides ILECs must unbundle, that it establish a presumption of impairment and place the burden of proving non-impairment on the ILEC. FDN does not need to tell the Commission that the ILEC-CLEC relationship remains antagonistic on many levels. If the ILECs are granted a gate-keeper function with respect to the availability of UNEs, then the CLECs' day-to-day operations could be significantly harmed.

Respectfully Submitted,

Michael C. Sloan

Counsel for FDN Communications, Inc.

cc: Attendees (w/o enclosure).

FDN *TRO* Remand Issues

- **DS1 Loops**: Impairment remains when fewer than 2 wholesale alternatives to specific customer premises

- **UNE Loop Use Restrictions**: EEL criteria are unlawful and bad policy—stifling innovation over data loops

- **Dedicated Transport**: Retain *TRO*'s route specific approach—any transport route to or from a Tier 3 CO should be available as a UNE; test should be fiber-based collocators AND business lines (instead of OR)

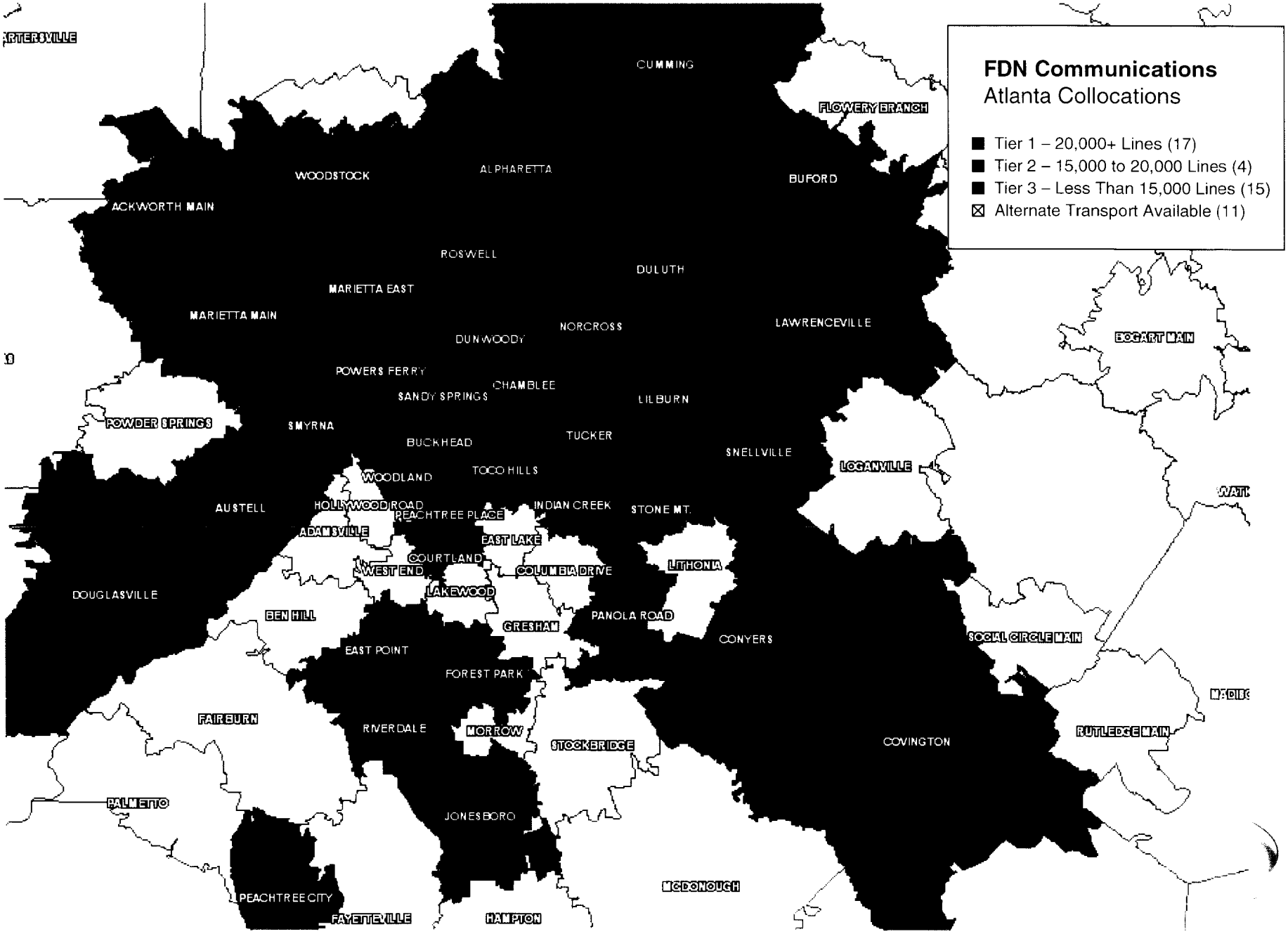
- **Dark Fiber Transition:** Three-year transition is reasonable and lawful for CLECs to deploy new fiber facilities and integrate into existing network

FDN Atlanta, Georgia CLEC Operation

• Collocations	36
• Switch Type	DMS 500 Local
• Customers	11,000
• Lines in Service	27,000
• DS-0 POTS Lines	22,000
• T-1 Lines	5,000

FDN is a facilities based CLEC operating in 7 FL/GA markets. The company is Free Cash Flow Positive, will generate $140 of revenue in 2004 and has invested over $100M in its network since its founding in 1998.

FDN COMMUNICATIONS


FDN Communications
Atlanta Collocations
Tier 1 – 20,000+ Lines (17)
Tier 2 – 15,000 to 20,000 Lines (4)
Tier 3 – Less Than 15,000 Lines (15)
Alternate Transport Available (11)
CUMMING
FLOWERY BRANCH
WOODSTOCK
ALPHARETTA
BUFORD
ACKWORTH MAIN
ROSWELL
DULUTH
MARIETTA EAST
MARIETTA MAIN
NORCROSS
LAWRENCEVILLE
DUNWOODY
EDGART MAIN
POWERS FERRY
CHAMBLEE
SANDY SPRINGS
LILBURN
POWDER SPRINGS
SMYRNA
BUCKHEAD
TUCKER
SNELLVILLE
LOGANVILLE
WOODLAND
TOCO HILLS
AUSTELL
HOLLYWOOD ROAD
PEACHTREE PLACE
INDIAN CREEK
STONE MT.
ADAMSVILLE
EAST LAKE
COURTLAND
WEST END
COLUMBIA DRIVE
LITHONIA
DOUGLASVILLE
LAKEWOOD
BEN HILL
PANOLA ROAD
GRESHAM
CONYERS
SOCIAL CIRCLE MAIN
EAST POINT
FOREST PARK
FAIRBURN
RIVERDALE
MORROW
STOCKBRIDGE
COVINGTON
RUTLEDGE MAIN
PALMETTO
JONESBORO
MCDONOUGH
PEACHTREE CITY
FAYETTEVILLE
HAMPTON