Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Alenco Communications, Inc., *et al*.,	)	CC Docket No. 96-45
for a Declaratory Ruling and for Preemption of an	)	
Order by the Public Utility Commission of Texas	)	

COMMENTS OF THE SATELLITE INDUSTRY ASSOCIATION

SATELLITE INDUSTRY ASSOCIATION

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June 22, 2007

Summary

The Commission should decline the request to issue a declaratory ruling because it is inconsistent with prior Commission precedent and would impose unique technical and competitive requirements on carriers seeking to use satellite networks to provide services that are eligible for high cost USF support.

Petitioners are incorrect that satellite earth stations are not "physical components" of the satellite network and thus do not meet the facilities requirement for support eligibility. It is impossible to communicate with a satellite network without satellite earth stations. Thus, the requested declaratory ruling would represent a significant departure from Congressionally mandated policy goals and a reversal of the FCC's established policy of competitive and technical neutrality. Petitioners suggest no rationale for reversing established policy and rules, especially in the context of a request for a declaratory ruling. Petitioners attempt to apply Commission case law regarding wireless handsets in the Link-Up context to this case involving satellite earth stations in the high-cost context, but they stretch those cases well beyond both their holdings and their applicability. In fact, those cases actually hold that satellite earth stations are on the "network side of the demarcation point" and thus eligible for support.

Petitioners are actually seeking changes to the FCC's competitive neutrality policy. A declaratory petition is a poor vehicle for that task. Finally, the Petition is procedurally defective. For all these reasons, the Commission should deny the petition or, at minimum, exercise its discretion to decline to address it.

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The Satellite Industry Association ("SIA")[1] hereby files these Comments in opposition to the Petition for Declaratory Ruling and Preemption filed by Alenco Communications, Inc., et al. ("Petitioners" and the "Petition"). As discussed below, the customer premises equipment used for satellite services are "facilities" within the meaning of 47 CFR §54.201; thus, the satellite services are eligible for universal service support. By rejecting Petitioners' request, the Commission will promote the specific goals and mandates articulated by Congress in establishing federal support for providing universal telecommunications services in high-cost areas, where satellite service is often the most efficient service.

Background

DialToneServices, L.P. ("DTS") provides fixed and mobile telephony services in certain rural areas of Texas. On June 22, 2006, the Public Utility Commission of Texas granted ETC-

[1] SIA is a U.S.-based trade association providing worldwide representation of the leading satellite operators, service providers, manufacturers, launch services providers, remote sensing operators, and ground equipment suppliers. SIA is the unified voice of the U.S. satellite industry on policy, regulatory, and legislative issues affecting the satellite business. SIA Executive Members include: Arrowhead Global Solutions Inc.; Artel Inc.; The Boeing Company; Datapath, Inc.; The DIRECTV Group; Globalstar, Inc.; Hughes Network Systems LLC; ICO Global Communications; Integral Systems Inc.; Intelsat, Ltd.; Iridium Satellite LLC; Lockheed Martin Corp.; Loral Space & Communications Ltd.; Mobile Satellite Ventures LP; Northrop Grumman Corporation; SES Americom, Inc.; and TerreStar Networks Inc. Associate Members include ATK, Inc.; EchoStar Satellite LLC; EMC Inc.; Eutelsat Inc., Inmarsat Inc.; IOT System; Marshall Communications Corp.; SES New Skies; Spacecom Corp.; and SWE-DISH Space Corp.

ETP status (Eligible Telecommunications Carrier and Provider) to DTS.[2] According to its website, DTS provides services using low earth orbit ("LEO") satellites. According to Petitioners, in connection with its services, DTS owns and provides to customers the satellite "transmitter/receiver unit" or "satellite earth station" and associated hardware, including wires, mounts, poles, offset brackets, network interface box, grounding equipment, lightening rod, towers and other equipment. Petition at 7.

On March 5, 2007, Petitioners filed the Petition asking the Commission to issue a declaratory ruling that customer premises equipment used in connection with fixed or mobile satellite service is not within the definition of "facilities" as used in Section 214(e) of the Communications Act. Petitioners argue that DTS is simply a reseller of the satellite services. because, it alleges, DTS "owns no network transmission and routing facilities." Petition at 5. Contending that states may not designate pure resellers as ETCs, Petitioners ask the FCC to preempt the Texas PUC order so designating DTS and to declare that satellite earth station equipment, including fixed earth stations and mobile satellite handsets, are not "network transmission and routing facilities" and thus are not eligible for high cost universal service support. Petition at 19. The Petition also requests an order preempting a Public Utility Commission of Texas decision designating DialToneServices, L.P. ("DTS") as an eligible telecommunications carrier in certain areas of Texas because DTS does not meet the facilities requirement of Section 214(e).[3]

Discussion

For the reasons discussed below, the Petition should be denied.

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[2] http://www.dialtonetexas.com

[3] The Petition was placed on Public Notice on April 25, 2007, with comments due May 25, 2007. DA 07-1848.

A. Satellite Earth Stations are "Facilities" for Purposes of Section 214(e) High Cost Support

A carrier may be designated as eligible to receive high cost universal service support if it provides service "either using its own facilities or a combination of its own facilities and resale of another carrier's services."[4] The Commission interprets "facilities" to mean "any physical components of the telecommunications network that are used in the transmission or routing of the services designated for support. . . ."[5] Satellite earth stations, both fixed and mobile, are "physical components." They are also "used in the transmission or routing" of communications services.

Petitioners claim that "the Commission has concluded that wireless mobile handsets are 'equipment that falls on the customer side of the network interface device boundary between customer and network facilities,' and, therefore, ineligible for universal service support,"[6] and that this conclusion addresses satellite earth stations. In fact, Petitioners overstate the Commission's conclusions regarding terrestrial wireless handsets, and neglect to mention that the cited orders specifically concluded that satellite earth stations fall on the network side of the demarcation point.

In spite of Petitioners' use of quotation marks, neither of the orders Petitioners cite states that "wireless mobile handsets are equipment that falls on the customer side of the network facility interface boundary." In both cases the Commission was considering whether Link-Up support should be available to subsidize the cost of wireless handsets. The Link-Up program, part of the Commission's universal support program for low-income consumers in both urban and rural areas, traditionally operated only to reduce qualifying consumers' initial connection or

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[4] 47 U.S.C. § 214(e)(1)(A).

[5] *Universal Service Order* at ¶ 24.

[6] Petition at 12, *citing Twelfth Report and Order* at ¶ 61 and *Tribal Lands Order* at ¶ 18.

initial installation charges.[7] In the *Twelfth Report and Order* the Commission sought to create incentives for eligible carriers to construct facilities on tribal lands and for new entrants offering alternative technologies to seek eligible telecommunications carrier status to serve tribal lands.[8] To accomplish this goal, the Commission made "expanded Link-Up support" available to qualifying consumers on tribal lands "to offset the charges for facilities that are necessary to enable a non-wireline eligible telecommunications carrier to provide service to the demarcation point." *Id.* at ¶ 61. The Commission explicitly decided that fixed satellite earth stations fall on the network side of the demarcation point while recognizing, in effect, that the demarcation point between the mobile customer and network facilities is somewhere within the handset itself. Along the way, the Commission noted that a rooftop reception device needed to provide satellite service would fall on the network side of the demarcation point.

> [F]ederal universal service support mechanisms generally support only the cost of facilities falling on the network side of the demarcation point . . . . Expanded Link Up support would be available for qualifying consumers on tribal lands to offset charges for facilities that are necessary to enable a non-wireline eligible telecommunications carrier to provide service to the demarcation point. For example, if the provision of a fixed wireless or satellite service required the installation of a receiver on the roof of a subscriber's premises to bring service to a demarcation point, i.e., a network interface device, expanded Link Up support could be used to offset the cost of installing such facilities. To the extent that a non-wireline carrier can isolate costs associated with the portion of a handset that receives wireless signals, we conclude that those costs would be covered as costs on the network side of the network interface device. [9]

Thus, in the *Twelfth Report and Order,* the Commission held that satellite receiver equipment falls on the network side of the demarcation point, and that the demarcation point lies somewhere within terrestrial wireless handsets – with the antenna and receiver falling on the network side.

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[7] *Universal Service Order* at ¶ 344.

[8] *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas Including Tribal and Insular Areas,* CC Docket 96-45, *Twelfth Report and Order. Memorandum Opinion and Order. and Further Notice of Proposed Rulemaking,* 15 FCC Rcd. 12208, ¶ 60 (2000) ("*Twelfth Report and Order*")

[9] *Twelfth Report and Order* at ¶ 61-63.

In the *Tribal Lands Order*, the FCC reversed its invitation to carriers to define the demarcation point within the handset and seek expanded Link-Up support for the handset's network components. In doing so the Commission did not find, as Petitioners claim, "that wireless mobile handsets . . . [fall] on the customer side" of the demarcation point. It simply held that for purposes of one-time Link-Up subsidies it was just too difficult to allocate the costs between network side and customer side components:

> Upon reconsideration, we conclude that Link-Up should not offset any costs of a wireless handset. * * * we recognize that some portion of a wireless handset may perform functions analogous to the functions on the network side of the demarcation point, which, in the wireline context, would be eligible for Link-Up support. Nevertheless, under all the circumstances, we find that Link-Up should not support any costs of a wireless handset. In reaching this decision, we consider the difficulty of defining what portion, if any, of a wireless handset is on the network side of the demarcation point, as well as the difficulty in isolating the costs of such portion. *We note that we make this finding regarding wireless handsets solely for purposes of determining what charges are eligible for Link-Up discounts.* We further note that non-wireline carriers remain eligible to receive Link-Up support for the "customary charge for commencing telecommunications service," as defined in section 54.411 of the Commission's rules, including wireless activation fees. Where wireless telecommunications service is provided to an eligible resident of tribal lands, such charges may also continue to include "facilities-based" charges associated with the construction of facilities needed to initiate service, as provided in section 54.411(a)(3).[10]

The *Twelfth Report and Order* and the *Tribal Lands Order* – rather than supporting Petitioners' position – actually compel the rejection of Petitioners' arguments. A satellite receiver on the roof of a subscriber's premises that brings service to demarcation point is a network side facility.[11] Wireless handsets are hybrid facilities that include network facilities that in the wireline context would be eligible for support. Solely because of the difficulty of allocating costs, the network portion of those facilities is not eligible for the one-time subsidy of

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[10] *Tribal Lands Order* at ¶ 18 (emphasis added, citations omitted).

[11] Petitioners acknowledge that fixed satellite earth stations are eligible for expanded Link Up support. Petition at 14.

expanded Link-Up facilities support. Thus, to the extent that these orders are applicable in the high-cost context,[12] they stand for the proposition that the Petition must be denied.

The *Twelfth Report and Order* and the *Tribal Lands Order* reached the correct conclusion. In many or most cases, the transmission and routing of communications services is the *only* purpose of a satellite earth station. For example, in issuing a blanket license for certain MSS terminals the FCC noted that the terminals "transmit . . . and receive" and "will place and receive calls through the public switched telephone network and other terrestrial networks via interconnection . . . ." [13] A network component that "transmits" and "receives" and "places and receives calls through the public switched telephone network via interconnection" is plainly a "facility" used in the "transmission or routing" of services within the meaning of 214(e).

Nonetheless, Petitioners contend that "mobile satellite service handsets and fixed satellite service customer antennas are not an integral part of the transmission or routing of the associated satellite services."[14] A communications satellite network requires at least two earth stations (to communicate with each other) and at least one satellite (to relay the communications). Petitioners' attempt to equate a satellite earth station – fully a third of the logical infrastructure that forms a satellite network – with analog telephones reflects a technological bias that the Commission has rejected. In wireline parlance, the satellite earth station *is* the local loop,

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[12] In the *Twelfth Report and Order* and the *Tribal Lands Order,* the Commission was interpreting its low-income support rules, not its high-cost support rules, and the *Tribal Lands Order* specifically limited its conclusion to those facts.

[13] *AirTouch Satellite Services US, Inc., Application for Blanket Authorization to Construct and Operate up to 500,000 Mobile Satellite Earth Terminals,* File No. 1367-DSE-P/L-97 Satellite System, 14 FCC Rcd. 17,328 ¶ 4 (1999).

[14] Petition at 17.

providing transmission and routing necessary to get communications to the interconnection point.[15]

The satellite earth station and the wireline local loop are not just logically identical, they are functionally indistinguishable from the customer's perspective. A wireline network begins and ends with the local loop that transmits and routes the communications, just as the satellite network begins and ends with the satellite earth station that transmits and routes the communications. If a wire drop to a residence is cut, the network is damaged and the customer loses the communications link. If a satellite earth station is destroyed, the network is damaged and the customer loses the communications link. From the perspective of the customer, *loss of the satellite earth station and loss of the wireline link have the same effect*, yet Petitioners urge the Commission to draw a rule that distinguishes between these events, permitting USF high cost support based on one type of infrastructure but denying USF high cost support to a different type of infrastructure that is functionally indistinguishable. Petitioners ask the Commission to institutionalize a bias towards terrestrial technology that is inimical to the objectives of the Act and the express purpose of the FCC's implementation of it.[16]

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[15] *Cf. In re Federal-State Joint Board on Universal Service, Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal arid Insular Areas, Commonwealth of Northern Marinara Islands,* FCC 03-115, Twenty-Fifth Order on Reconsideration, Report and Order, Order, and Further Notice of Proposed Rulemaking. 18 FCC Rcd 10928, ¶ 18 (2003) *("Tribal Lands Order")* ("some portion of a wireless handset may perform functions analogous to the functions on the network side of the demarcation point").

[16] *See, e.g., Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way,* CC Docket No. 98-1, Memorandum Opinion and Order, 14 FCC Rcd 21,697 ¶ 51 (1999): "We do not believe that Congress intended to protect the imposition of requirements that are not competitively neutral in their effect on the theory that the non-neutral requirement was somehow imposed in a neutral manner. Moreover, we do not believe that this narrow interpretation is appropriate because it would undermine the primary purpose of section 253 – ensuring that no state or locality can erect legal barriers to entry that would frustrate the 1996 Act's explicit goal of opening all telecommunications markets to competition." *See also Federal State Joint Board On Universal Service,* CC Docket No. 96-45, Declaratory Ruling, 15 FCC Rcd 15168, 15177 ¶ 22 (2000) ("the proper inquiry is whether the *effect* of a legal requirement, rather than the method imposed, is competitively neutral.") (emphasis in original).

B. Petitioners' Request is Contrary to the Core Objectives of the USF Program

Petitioners seek a result that on its face is contrary to the explicit purposes of the universal service fund. In implementing the Act, the FCC identified "four critical goals" embodied in "explicit statutory principles" of the Act:[17]

- Implementation of all of the universal service objectives established by the Act, including, *inter alia*, ensuring that consumers in rural, insular, and high cost areas have access to telecommunications and information services
- Maintaining rates for basic residential service at affordable levels
- Ensuring affordable basic service availability to all users
- Bringing the benefits of competition to as many consumers as possible.

The FCC's rules also reflect an explicit policy objective that is particularly relevant here: universal service support mechanisms and rules should be competitively neutral,[18] which means they should "neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another."[19]

The Petitioners, incumbent rural local exchange carriers, ask the FCC to limit competition in the rural areas they serve by eliminating USF high cost support to satellite service

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[17] *Federal State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 97-157, Report and Order, 12 FCC Rcd 8776 ¶ 2 (1997) (*"Universal Service Order"*) (subsequent history omitted).

[18] Congress authorized the Commission to employ "[S]uch other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity. . . ." in implementing the universal service provisions of the Act. 47 USC §254(b)(7); *see also Universal Service Order* at ¶ 21.

[19] *Universal Service Order* at ¶ 47. The Commission elaborated: "Technological neutrality will allow the marketplace to direct the advancement of technology and all citizens to benefit from such development. By following the principle of technological neutrality, we will avoid limiting providers of universal service to modes of delivering that service that are obsolete or not cost effective. The Joint Board correctly recognized that . . . universal service support should not be biased toward any particular technologies. We anticipate that a policy of technological neutrality will foster the development of competition and benefit certain providers, including wireless, cable, and small businesses, that may have been excluded from participation in universal service mechanisms if we had interpreted universal service eligibility criteria so as to favor particular technologies. We also agree with the Joint Board's recommendation that the principle of competitive neutrality, including the concept of technological neutrality, should be considered in formulating universal service policies relating to each and every recipient and contributor to the universal service support mechanisms, regardless of size, status, or geographic location." *Id*. at ¶ 49.

providers that do not own the satellite network end-to-end. In the most remote rural areas -- those beyond the reach of both wireline and even wireless networks and served only by satellite -- Petitioners would deny USF high cost support altogether.

DTS and many other satellite service providers rely on a combination of their own dedicated facilities and shared satellite infrastructure in order to provide end-to-end services. The reasons they rely partially on shared facilities are simple: there are a limited number of satellite licenses, satellites are extraordinarily expensive as compared to terrestrial infrastructure, and they provide service over vast geographic areas. A service provider focused on a limited geographic area – especially a sparsely-populated rural area – could never obtain funding to launch and operate a dedicated satellite. Thus, from the earliest days of communications satellites, the industry has consisted of two, potentially separate segments, one focused on launching and operating satellites and another on providing ground equipment and services.

In many ways satellites provide the reciprocal features of wireline and other terrestrial networks. While a satellite network is widely dispersed and can serve any person anywhere, it may not have a significant market share in any specific geographic area. In contrast, local exchange carriers' facilities and operations are co-located in specifically circumscribed geographic areas, and their presence is pervasive in those areas. However, they cannot serve anyone outside of that area without incurring overwhelming marginal costs to extend wireline facilities. Technical requirements drive different system architectures, and those architectures drive varying approaches to the business of providing communications services. Commission policy favors this diversity of systems and approaches because it ensures the widest availability of service in each area by the most efficient means. Quite apart from the burden of proof

Petitioners face as a legal matter,[20] the Commission should be skeptical of legal arguments that, if accepted, would require satellite operators to own their networks end-to-end in order to be eligible for high cost USF support.

Finally, the Commission should decline to issue the requested declaratory ruling because this case is very fact specific, involving the ETC designation of one particular service provider by only one state commission based on specific legal, technical and market showings. As such this case is a poor vehicle to consider important universal service policy questions. Satellite services are sometimes the only option and are often the most efficient option for providing communications services to rural and remote areas. The importance of satellite services as a crucial link in the nation's communications infrastructure will only increase as satellite providers deploy new technology to expand their end-user telecommunications and broadband offerings. As SIA has noted in this docket, satellite providers may offer many significant benefits over other technological platforms for the efficient and economical achievement of statutory universal service goals.[21] Moreover, legislation currently pending before the United States Senate would explicitly make satellite broadband service eligible for universal service support.[22]

The instant case, however, is complicated by reseller and ETC-designation issues raised on the present facts. These issues are unrelated to the policy change Petitioners seek: extreme limitations on the availability of high-cost support for consumers choosing satellite service providers. These ancillary matters should not be permitted to cloud the Commission's

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[20] Petitioners have the burden of proving their entitlement to the declaratory relief they seek. Section 4(c) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 556(d) provides, in relevant part, that: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." Section 4(b) of the APA, 5 U.S.C. § 551(6) defines the word "order" to mean "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing."

[21] *See, e.g.,* SIA *ex parte* letter, CC Docket No. 96-45 (filed April 17, 2007).

[22] S.101, 110th Cong. (2007) at § 202.

consideration of this important issue. The Commission is under no obligation to issue the declaratory ruling requested.[23] It should decline to do so.

C. The Petition is Procedurally Defective

First, in addition to a declaratory ruling, the petition requests that the Commission "preempt" the Texas PUC's decision pursuant to section 214(e) to designate DTS as an eligible telecommunications carrier to receive high-cost universal service support.[24] The Petitioners have cited no provision, however, pursuant which this Commission might preempt the Texas PUC's designation order. If Petitioners wish to challenge the Texas PUC's ETC designation order, they must do so pursuant to provisions of Texas law applicable to appeals of Texas PUC decisions.

The Petition is defective because it represents an attempt at a "second bite at the apple". Although styled as a request for declaratory ruling, the relief Petitioners actually seek is reversal of an order or the Texas PUC that was issued months before the Petition was filed. It appears that the Texas PUC order has long since become final and is no longer appealable. Four of the Petitioners (Alenco Communications, Inc. d/b/a ACI: Riviera Telephone Company, Inc.; Big Bend Telephone Company, Inc.; and Valley Telephone Cooperative, Inc.) filed motions to intervene in the Texas PUC proceeding.[25] The Petition is essentially a direct challenge to a state agency decision that has become final. Section 214(e) in no way provides for federal preemption in cases where the state commission possesses jurisdiction to rule on an eligible telecommunications carrier determination.[26] The Petitioners' appropriate remedy to challenge the Texas PUC's determination is to appeal the decision as prescribed by Texas law.

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[23] Petitioners requested their declaratory ruling pursuant to sections 1.1 and 1.2 of the Rules, which provide that the Commission "may" issue a declaratory ruling. *See* Petition at 3; 47 C.F.R. § 1.2. The Commission is not obligated to do so.

[24] Petition at 4, 6, 18-19.

[25] Petition Exhibit A, page 2, finding 5.

[26] *Cf.* 47 U.S.C. § 214(e)(6) (providing for federal jurisdiction only where state commission lacks such).

Conclusion

As discussed herein, Petitioners ask the Commission to make a counterintuitive finding (that communications satellite earth stations are not "physical components" of a satellite telecommunications network) as a foundation for requested relief that would limit competition in high cost areas and deny high cost support altogether in the areas that need it most – those that are served *only* by satellite networks. Petitioners offer no relevant precedent and suggest no procedural rationale for making such basic changes in USF high cost support policy.

Respectfully submitted,

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June 22, 2007

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CERTIFICATE OF SERVICE

I, Julia Colish, a secretary with the law firm of Pillsbury Winthrop Shaw Pittman LLP, hereby certify that copies of the foregoing "Comments of the Satellite Industry Association" were served via U.S. mail on this 22nd day of June 2007 to the following:

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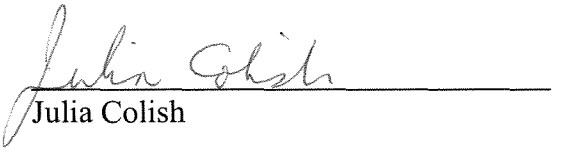

Julia Colish

*Via Hand Delivery