

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

<b>IN THE MATTER OF</b>	§	
	§	
<b>PETITION OF ALENCO</b>	§	
<b>COMMUNICATIONS, INC., BIG BEND</b>	§	
<b>TELEPHONE COMPANY, DELL</b>	§	<b>CC Docket No. 96-45</b>
<b>TELEPHONE COOPERATIVE, INC.</b>	§	
<b>RIVIERA TELEPHONE COMPANY,</b>	§	
<b>VALLEY TELEPHONE COOPERATIVE,</b>	§	
<b>INC., TEXAS STATEWIDE TELEPHONE</b>	§	
<b>COOPERATIVE, INC., AND TEXAS</b>	§	
<b>TELEPHONE ASSOCIATION FOR A</b>	§	
<b>DECLARATORY RULING AND FOR</b>	§	
<b>PREEMPTION</b>	§	

**COMMENTS OF THE PUBLIC UTILITY COMMISSION OF TEXAS  
TO PETITION FOR DECLARATORY RULING AND PREEMPTION**

**GREG ABBOTT**  
Attorney General of Texas

**KENT C. SULLIVAN**  
First Assistant Attorney General

**JEFF L. ROSE**  
Deputy First Assistant Attorney General

**KAREN W. KORNELL**  
Assistant Attorney General  
Chief, Natural Resources Division

**JOHN R. HULME**  
Assistant Attorney General  
Texas State Bar No. 10258400

**NATURAL RESOURCES DIVISION**  
P.O. BOX 12548, CAPITOL STATION  
AUSTIN, TEXAS 78711-2548  
TEL: (512) 475-4229  
FAX: (512) 320-0911

**ATTORNEYS FOR THE PUBLIC  
UTILITY COMMISSION OF TEXAS**

June 22, 2007

## **SUMMARY**

The petition for preemption and declaratory order presents no basis to preempt the Public Utility Commission of Texas's designation of DialToneServices, Inc. as an eligible telecommunications carrier in the study areas of eight Texas rural incumbent local exchange carriers. The PUCT's decision is fully consistent with the requirement that eligible telecommunications carriers use their own facilities at least in part to provide service. After proceedings including the development of a detailed evidentiary record before an Administrative Law Judge, the PUCT properly determined the disputed facts and applied the law in finding that the DialToneServices equipment was within the definition of "facilities" for purposes of eligible telecommunications carrier designation. The petition should be denied.

## Table of Contents

	<u>Pages</u>
Summary .....	i
I. Introduction .....	1
II. Factual Background .....	2
III. The PUCT’s designation of DTS as an eligible telecommunications carrier is not contrary to the federal Communications Act or Commission rules and orders. ....	6
A. DTS provides service using its own facilities as the Commission’s rules and orders require. ....	6
B. The DTS transceiver and wireless handset and associated equipment are network facilities, not customer premises equipment. ....	11
C. The <i>Tribal Lands</i> and <i>Computer II</i> orders do not support Alenco’s contention that the DTS-owned facilities are customer premises equipment, not network facilities. ....	12
IV. Conclusion .....	15

## Index of Authorities

### **Federal Statutes and Rules**

### **Pages**

47 U.S.C.	
§ 214(e)(1)(A) . . . . .	6, 7, 9
§ 254(a)(1) . . . . .	2
§ 254(c) . . . . .	6
 47 C.F.R.	
Part 36 . . . . .	11
§ 54.201(d)(1) . . . . .	6
§ 54.201(e) . . . . .	7
§ 54.201(h) . . . . .	7

### **Texas Administrative Rules**

16 Tex. Admin. Code	
§ 26.418(c)(1) . . . . .	6
§ 26.418(g)(1)(B)(i) . . . . .	6

### **FCC Orders**

Final Decision, FCC 80-189, <i>In re Amendment of Section 64.702 of the Commission's Rules and Regulations</i> , Docket No. 20828, 77 F.C.C.2d 384, 1980 WL 356789 (rel. May 2, 1980), <i>aff'd sub nom. Computer and Communications Indus. Ass'n v. F.C.C.</i> , 693 F.2d 198 (D.C. Cir. 1982) (" <i>Computer II</i> ") . . . . .	14
 Report and Order, FCC 81-464, <i>An Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems</i> , CC Docket 79-318, 86 F.C.C.2d 469, 1981 WL 158543 (rel. May 4, 1981), <i>recon.</i> 89 FCC 2d 58, <i>further modified</i> , 90 FCC 2d 71 (1982), <i>appeal dismissed sub nom. United States v. FCC</i> , No. 1526 (D.C. Cir. 1983) (" <i>Cellular Communications Systems</i> ") . . . . .	14
 Report & Order, FCC 96-157, <i>In the Matter of Federal-State Joint Board on Universal Service</i> , CC Docket No. 96-45, 12 F.C.C.R. 8776, 1997 WL 236383 (rel. May 8, 1997), as amended by erratum released June 4, 1997 (" <i>USF Order</i> ") . . . . .	2, 7, 8, 9, 10

**Index of Authorities**  
**(continued)**

<b><u>FCC Orders</u></b>	<b><u>Pages</u></b>
Seventh Report and Order, FCC 99-119, <i>In the Matter of Federal-State Joint Board on Universal Service</i> , CC Docket No. 96-45,14 F.C.C.R. 8078, 1999 WL 343060 (rel. May 28, 1999) . . . . .	9
Twenty-Fifth Order on Reconsideration, FCC 03-115, <i>In re Federal State Joint Board on Universal Service</i> , CC Docket 96-45, 18 F.C.C.R. 10958, 2003 WL 21195264 (rel. May 21, 2003) (“ <i>Tribal Lands Order</i> ”). . . . .	12, 13
Twelfth Report and Order, FCC 00-208, <i>In re Federal-State Join Board on University Service</i> , CC Docket 96-45, 15 F.C.C.R. 12208, 2000 WL 870831 (rel. June 30, 2000) . . . . .	13
 <b><u>Public Utility Commission of Texas Orders</u></b>	
Tex. Pub. Util. Comm’n, <i>Application of DialToneServices, L.P. (DTS) for Designation as an Eligible Telecommunications Carrier (ETC) Pursuant to P.U.C. SUBST. R. 26.418</i> , Docket No. 30765 (Order) (Aug. 2, 2005) . . . . .	3
Tex. Pub. Util. Comm’n, <i>Application of DialToneServices, L.P. (DTS) for Designation as an Eligible Telecommunications Provider (ETP) Pursuant To P.U.C. SUBST. R. 26.417</i> , Docket No. 30812 (Order) (Aug. 2, 2005) . . . . .	3
Tex. Pub. Util. Comm’n, <i>Application of DialToneServices, L.P. (DTS) for Designation as an Eligible Telecommunications Carrier and an Eligible Telecommunications Provider in Certain Uncertificated Areas</i> , Docket No. 31401 (Order and Notice of Approval) (Sept. 2, 2005) . . . . .	3, 4
Tex. Pub. Util. Comm’n, <i>Application of DialToneServices, L.P. (DTS) to Amend Its Designation as an Eligible Telecommunications Carrier and an Eligible Telecommunications Provider to Include Certain Exchanges Served by Valor Telecommunications of Texas, L.P. and Sprint/United Telephone Company of Texas</i> , Docket No. 31399 (Order and Notice of Approval) (Sept. 2, 2005) . . . . .	3

**Index of Authorities**  
**(continued)**

<b><u>Public Utility Commission of Texas Orders</u></b>	<b><u>Pages</u></b>
Tex. Pub. Util. Comm’n, <i>Application of DialToneServices, L.P. (DTS) to Amend Its Designation as an Eligible Telecommunications Carrier and an Eligible Telecommunications Provider to Include Study Areas Served by Certain Rural Telephone Companies</i> , Docket No. 32024 (June 22, 2006) (Order) (“PUCT Order”). . . . .	2, 3, 4, 5, 6 <i>passim</i>

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

<b>IN THE MATTER OF</b>	§	
	§	
<b>PETITION OF ALENCO</b>	§	
<b>COMMUNICATIONS, INC., BIG BEND</b>	§	
<b>TELEPHONE COMPANY, DELL</b>	§	<b>CC Docket No. 96-45</b>
<b>TELEPHONE COOPERATIVE, INC.</b>	§	
<b>RIVIERA TELEPHONE COMPANY,</b>	§	
<b>VALLEY TELEPHONE COOPERATIVE,</b>	§	
<b>INC., TEXAS STATEWIDE TELEPHONE</b>	§	
<b>COOPERATIVE, INC., AND TEXAS</b>	§	
<b>TELEPHONE ASSOCIATION FOR A</b>	§	
<b>DECLARATORY RULING AND FOR</b>	§	
<b>PREEMPTION</b>	§	

**COMMENTS OF THE PUBLIC UTILITY COMMISSION OF TEXAS  
TO PETITION FOR DECLARATORY RULING AND PREEMPTION**

The Public Utility Commission of Texas (“PUCT”) files these comments opposing the petition for declaratory ruling and preemption (“Petition”) filed by Alenco Communications, Inc., Big Bend Telephone Company, Dell Telephone Cooperative, Inc., Riviera Telephone Company, Valley Telephone Cooperative, Inc., Texas Statewide Telephone Cooperative, Inc., and Texas Telephone Association (collectively, “Alenco”).

**I. Introduction**

The PUCT properly determined that DialToneServices, L.P. (“DTS”) met all the requirements for designation as an eligible telecommunications carrier (“ETC”), including

that it use its “facilities,” in eight incumbent local exchange carriers (“ILEC”) study areas.<sup>1</sup> Following proceedings including the development of a detailed evidentiary record before an Administrative Law Judge (“ALJ”), the PUCT resolved the disputed facts—particularly, in finding that DTS used its own facilities to provide service. The PUCT’s decision is fully consistent with the Communications Act and Commission rules and orders. The petition should be denied.

## **II. Factual Background**

Under the federal Communications Act, the Federal Communications Commission (“Commission”) and the states are charged with establishing support mechanisms to provide telecommunications service to all Americans, including those in rural and remote areas that are expensive to serve.<sup>2</sup>

DTS is a competitive telephone provider that offers an alternative to traditional phone service from ILECs serving rural and remote areas. DTS offers satellite telephone service to many underserved regions, including sparsely populated areas of far west Texas.<sup>3</sup> It

---

<sup>1</sup> Attachment A, Tex. Pub. Util. Comm’n, *Application of DialToneServices, L.P. to Amend Its Designation as an Eligible Telecommunications Carrier and An Eligible Telecommunications Provider to Include Study Areas Served by Certain Rural Telephone Companies*, Docket No. 32024 (June 22, 2006) (Order) (“PUCT Order”).

<sup>2</sup> See 47 U.S.C. 254(a)(1). Report & Order, FCC 96-157, *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 14 F.C.C.R. 8776, 1997 WL 236383, ¶¶ 10-17 (rel. May 8, 1997), as amended by erratum released June 4, 1997 (“USF Order”).

<sup>3</sup> See Attachment B, Tex. Pub. Util. Comm’n, *Application of DialToneServices, L.P. to Amend Its Designation as an Eligible Telecommunications Carrier and An Eligible Telecommunications Provider to Include Study Areas Served by Certain Rural Telephone Companies*, Docket No. 32024 (May 9, 2006) (Proposal for Decision) (“PFD”) at 23-24.

provides this service to its end-customers by combining Globalstar satellite telecommunications services with its own network equipment that receives, transmits and transports satellite calls. In the case of fixed service, DTS owns and maintains equipment (attached to the customer's premises, or an adjacent tower or pole) that is connected to the network interface device ("NID"). In case of mobile service, DTS supplies DTS-owned handsets and sometimes an antenna that attaches to the customer's vehicle.<sup>4</sup>

At issue in this proceeding is the PUCT's approval of DTS's application for designation as an ETC in certain areas of Texas served by ILECs, including the ILEC petitioners.<sup>5</sup> DTS had previously applied for and received designation as an ETC and an eligible telecommunications provider ("ETP") in other areas of Texas.<sup>6</sup> With these

---

<sup>4</sup> Tex. Pub. Util. Comm'n, *Application of DialToneServices, L.P. to Amend Its Designation as an Eligible Telecommunications Carrier and An Eligible Telecommunications Provider to Include Study Areas Served by Certain Rural Telephone Companies*, Docket No. 32024 (Nov. 9, 2005 and Nov. 22, 2005) (Application and Amendment to Original Application); Exhibit D to Petition.

<sup>5</sup> In this PUCT docket, DTS also sought and received designation as an ETP under Texas law in the eight rural ILECs' study areas, allowing it to receive Texas universal service fund support. The PUCT waived the requirement in its rules that DTS receive ETC designation before applying for ETP designation and processed both requests concurrently. PUCT Order at FOF 4.

<sup>6</sup> See Tex. Pub. Util. Comm'n, *Application of DialToneServices, L.P. (DTS) for Designation as an Eligible Telecommunications Carrier (ETC) Pursuant to P.U.C. Subst. R. 26.418*, Docket No. 30765 (Order) (Aug. 2, 2005) (granting ETC designation in certain exchanges served by SBC Texas and Verizon Southwest); Tex. Pub. Util. Comm'n, *Application of DialToneServices, L.P. (DTS) for Designation as an Eligible Telecommunications Provider (ETP) Pursuant To P.U.C. SUBST. R. 26.417*, Docket No. 30812 (Order) (Aug. 2, 2005) (granting ETP designation); Tex. Pub. Util. Comm'n, *Application of DialToneServices, L.P. (DTS) to Amend Its Designation as an Eligible Telecommunications Carrier and an Eligible Telecommunications Provider to Include Certain Exchanges Served by Valor Telecommunications of Texas, L.P. and Sprint/United Telephone Company of Texas*, Docket No. 31399 (Order and Notice of Approval) (Sept. 2, 2005) (ETC and ETP designation in all exchanges served by Valor Telecommunications of Texas L.P. and Sprint/United Telephone Company of Texas); Tex. Pub. Util. Comm'n, *Application of DialToneServices, L.P. (DTS) for Designation as an Eligible Telecommunications Carrier and an*

designations, DTS could receive federal high-cost USF support for its satellite telephone service in accordance with the Commission's rules. After designation, the carrier receiving such funding must continue to comply with the Commission's requirements for receipt of this support.

In November 2005, DTS filed its application with the PUCT for designation as an ETC and ETP in the study areas of eight rural local exchange carriers.<sup>7</sup> In December 2005, Alenco Communications, Inc., Rivera Telephone Company, Inc., Big Bend Telephone Company, Inc., and Valley Telephone Cooperative, Inc. filed motions to intervene.<sup>8</sup> In January 2006, the PUCT referred the application to the State Office of Administrative Hearings (SOAH), and shortly thereafter issued a preliminary order setting out the two issues to be addressed: Whether DTS's application met (1) the requirements for a ETC designation under federal law and Commission standards, and (2) the requirements for ETP designation under Texas law and PUCT standards.<sup>9</sup> After a hearing on the merits before ALJ Micheal O'Malley, the case was reassigned to SOAH ALJ Lilo D. Pomerleau, who read the record.<sup>10</sup> Judge Pomerleau determined that DTS had met all requirements for both ETC and ETP

---

*Eligible Telecommunications Provider in Certain Uncertificated Areas*, Docket No. 31401 (Order and Notice of Approval) (Sept. 2, 2005) (ETC and ETP designation in uncertificated areas in nineteen counties).

<sup>7</sup> PUCT Order at FOF 1; PFD at FOF 1.

<sup>8</sup> PUCT Order at FOF 5; PFD at FOF 5.

<sup>9</sup> PUCT Order at FOF 6-7; PFD at 28 (FOF 6-7).

<sup>10</sup> PUCT Order at FOF 10-11; PFD at 29 (FOF 10 -11).

designations and recommended approval of DTS's application to extend its current designation to include the requested study areas.<sup>11</sup>

The PUCT concurred with Judge Pomerleau. Applying the Commission's standards in light of the evidence, it determined that DTS qualified as an ETC and ETP. The ETC determination allowed DTS to receive the same per-line federal universal service fund support that the ILEC petitioners receive in their respective service areas. Thus, the decision promoted a competitive alternative to the ILECs' service.<sup>12</sup>

Unsuccessful in their attempt to defeat DTS's request for ETC designation before the PUCT, Alenco and the other intervening ILECs now petition the Commission.<sup>13</sup> They ask it to preempt the PUCT's determination that DTS qualified as an ETC because, they contend, DTS does not meet the facilities requirement for this designation under the federal Communications Act and the Commission's rules and orders. Alenco and the other ILECs also seek a declaratory ruling that "customer equipment used in connection with the fixed or mobile satellite service is not within the definition of 'facilities' as used in Section 214(e) of the Communications Act of 1934." (footnotes omitted).<sup>14</sup>

---

<sup>11</sup> PFD at 27.

<sup>12</sup> PUCT Order at FOF 19 ("Telecommunications competition in rural areas is generally in the public interest because it brings service options to customers that typically do not have telecommunications options."). DTS has committed to offer basic service at a rate of not more than 150% of the ILECs' tariffed rates for particular service areas. *See* PUCT Order at FOF 20, 29.

<sup>13</sup> Petitioners Texas State Telephone Cooperative and Texas Telephone Association are trade associations representing telephone carriers.

<sup>14</sup> Petition for Declaratory Ruling and Preemption ("Petition") at 3. Alenco's petition inaccurately describes this equipment as a "rooftop or pole-mounted antenna used in connection with

**III. The PUCT’s designation of DTS as an eligible telecommunications carrier is not contrary to the federal Communications Act or Commission rules and orders.**

DTS satisfies all the standards for designation as an ETC found in the federal Communications Act and the Commission’s rules and orders,<sup>15</sup> including the requirement that DTS use its own facilities (at least in part) to provide service.

**A. *DTS provides service using its own facilities as the Commission’s rules and orders require.***

DTS provides service using a combination of its own facilities and Globalstar service, as expressly authorized under the Communications Act<sup>16</sup> and the Commission rules.<sup>17</sup>

---

fixed satellite service, or a mobile handset and related accessories used in connection with mobile satellite service.” Petition, Page 3 n.2.

<sup>15</sup> PUCT Order, COL 8-16D; PFD at 4-26; FOF 13-30; COL 7-16.

<sup>16</sup> An eligible telecommunications carrier offers services supported by Federal universal service support mechanisms under section 254(c) “either using its own facilities or a combination of facilities and resale of another carrier’s services (including the services offered by another eligible telecommunications carrier).” 47 U.S.C. § 214(e)(1)(A).

<sup>17</sup> Common carriers designated as ETCs shall “[o]ffer the services that are supported by the federal universal service support mechanisms under subpart B of this part and section 254(c) of the Act, either using its own facilities or a combination of its own facilities and resale of another carrier’s services (including services offered by another eligible telecommunications carrier).” 47 C.F.R. § 54.201(d)(1).

The PUCT’s rules provide: “Criteria for determination of ETCs. A common carrier shall be designated as eligible to receive federal universal service support if it: (1) offers the services that are supported by the federal universal service support mechanisms under 47 C.F.R. § 54.101 either using its own facilities or a combination of its own facilities and resale of another carrier’s services.” 16 Tex. Admin. Code § 26.418(c)(1). An application for ETC designation shall show that applicant offers FUSF supported services “either using its own facilities or a combination of its own facilities and resale of another carrier’s services.” 16 Tex. Admin. Code §26.418(g)(1)(B)(i).

In its order, the PUCT found that DTS was using its own facilities to provide service and met the facilities requirement.<sup>18</sup> The unrefuted evidence showed that DTS owns equipment (transceivers, wires and other equipment) that is used to transmit or route calls on the network.<sup>19</sup> The order lists some of the specific network equipment (wires, mounts, poles, offset brackets, network interface boxes, grounding equipment, lightning rods, towers and other equipment) that DTS will use to provide service.<sup>20</sup> This DTS network equipment qualifies as “facilities” under 47 U.S.C § 214(e)(1)(A) and the associated Commission and PUCT rules.

Commission rules include a broad definition of “facilities” applicable to ETC determinations: “[A]ny physical components of the telecommunications network that are used in the transmission or routing of the services that are designated for support.”<sup>21</sup> The rules also state that the designation of a carrier as an ETC is made “irrespective of the technology used by such carrier.”<sup>22</sup> The Commission explained in its 1997 USF Order that it adopted a broad definition of “facilities” to avoid discouraging competitive entry in rural areas:

---

<sup>18</sup> See PUCT Order at FOF 18.

<sup>19</sup> See PUCT Order, FOF 18 & 25; PFD at 7-8, *citing* DTS Ex. 4 (Dorran direct) at 12-13.

<sup>20</sup> PUCT Order, FOF 25.

<sup>21</sup> 47 C.F.R. § 54.201(e); *see also* USF Order at ¶ 151.

<sup>22</sup> 47 C.F.R. § 54.201(h).

We . . . decline to adopt a more restrictive definition of the term “facilities,” as some commenters suggest. For example, we reject the suggestion that we define “facilities” as both the loop *and* switching facilities based on our concern that such a restrictive definition would erect substantial entry barriers for potential competitors seeking to enter local markets and, therefore, would unduly restrict the class of carriers that may be designated as eligible telecommunications carriers. Rather, we conclude that the definition of “facilities” that we adopt will serve the goals of universal service and competitive neutrality to the extent that it does not dictate the specific facilities that a carrier must provide or, by implication, the entry strategy a carrier must use and, therefore, will not unduly restrict the class of carriers that may be designated as eligible.<sup>23</sup>

The Commission’s broad definition of “facilities” (requiring a physical component of the network used to transmit or route the supported services) excludes “pure” resellers that could claim to satisfy the standard through use of a billing office or another facility that is not a physical component of the network.<sup>24</sup> However, DTS is not a “pure” reseller. It uses its own network facilities in the transmission path for both its mobile and fixed services. It combines Globalstar mobile satellite service with service through DTS-owned facilities (particularly the transreceiver and wire) to provide telephone service to its end customers. Providers such as DTS combining a satellite service with use of its own facilities qualify as ETCs and are entitled to federal high-cost universal service fund support.

The Commission made clear in its 1997 USF Order that no particular level of facility use is necessary to qualify for high-cost universal service fund support: “[T]he statute does not dictate that a carrier use a specific level of its ‘own facilities’ in providing the services

---

<sup>23</sup> USF Order at ¶ 153.

<sup>24</sup> USF Order at ¶ 152 (rejecting suggestion that carrier that merely establishes a billing office would meet the definition of “facility”).

designated for universal service support given that the statute provides only that a carrier may use a ‘combination of its own facilities and resale’ and does not qualify the term ‘own facilities’ with respect to the amount of facilities a carrier must use.”<sup>25</sup> Moreover, the Commission has several times reaffirmed its determination that Commercial Mobile Radio Service providers may be designated as ETCs.<sup>26</sup> But the net effect of Alenco’s position would be that only actual satellite providers such as Globalstar could ever be eligible. All providers that offer service using a combination of satellite communications and their own facilities would be excluded.

Because DTS was not a “pure reseller” but used its equipment to provide services, neither the ALJ nor the PUCT needed to address the issue of whether DTS obtained mobile satellite services from Globalstar as an unbundled network element or under a lease.<sup>27</sup>

By claiming that DTS’s wires and transceivers are not “facilities,” Alenco wants to treat a “last mile” consisting of a wire and transceiver combination differently than a “last mile” consisting solely of wire. But both serve exactly the same purpose: transmitting calls between the customer premises and the rest of the network. The ALJ noted the transceiver and wires work in the same way as the wires linking the customer’s premises to the rest of

---

<sup>25</sup> USF Order at ¶ 169.

<sup>26</sup> *E.g.*, Seventh Report and Order, FCC 99-119, *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 14 F.C.C.R. 8078, 1999 WL 343060, ¶ 30 (rel. May 28, 1999).

<sup>27</sup> *See* PFD at 10. The Commission stated in its *USF Order* that a carrier using facilities obtained as UNEs, and that themselves meet the definition of facilities, satisfies the facilities requirement of 47 U.S.C. § 214(e)(1)(A). USF Order at ¶ 154; PFD at 8 n.24.

the network.<sup>28</sup> Effectively, Alenco and the other ILEC petitioners want to preclude use of alternative technologies for the “last mile” in rural areas. The distinction they want the Commission to adopt now is exactly what it sought to avoid by crafting a broad definition of “facility” so as not to discourage competitive entry.<sup>29</sup>

The PUCT’s order included the following fact findings supporting its determination that DTS met the “facilities” requirement:

DTS will use MSS obtained through Globalstar USA in addition to other facilities owned by DTS and thus meets the requirement of using either its own facilities or a combination of its own facilities and resale of another carrier’s services.<sup>30</sup>

DTS will use universal service funds to obtain full satellite connectivity and provide all additional network facilities (wires, mounts, poles, offset brackets, network interface boxes, grounding equipment, lightning rods, tower and other equipment) for the areas it serves.<sup>31</sup>

Applying these fact findings, the PUCT’s corresponding determination that the DTS service at issue qualifies for ETC designation is fully consistent with federal law and Commission rules and orders. Alenco offers no grounds to preempt the PUCT’s decision.

---

<sup>28</sup> PFD at 9.

<sup>29</sup> See USF Order at ¶¶ 151-153 (declining to adopt more restrictive of facilities and rejecting suggestion “facilities” must include both loop and switching as intent behind FCC rule was to exclude pure resellers).

<sup>30</sup> PUCT Order at FOF 18.

<sup>31</sup> *Id.* at FOF 25.

***B. The DTS transceiver and wireless handset and associated equipment are network facilities, not customer premises equipment.***

In both fixed and mobile service, the equipment DTS provides is not customer premises equipment like the telephone set and wiring inside the customer's home. With fixed service, DTS's transceiver and associated equipment are all located on the network side of the network interface device ("NID"), the demarcation point between the customer's premises and the telephone network.<sup>32</sup> The DTS equipment is equivalent to the landline company's drop line from the telephone pole to the NID, which is part of the network. With mobile service, there is no customer premises. DTS supplies a mobile handset and sometimes a car-top antenna. In both cases, this equipment serves the same function as a landline carrier's "last mile" of wire to the customer. The ALJ found no basis for treating either DTS's fixed or mobile receiver and the associated equipment as "customer premises equipment," noting that the Commission had excluded mobile radio and transmit earth stations from its definition.<sup>33</sup>

DTS, not its customers, owns the equipment at issue here. With both the fixed and mobile service, DTS absorbs installation costs, generally between \$2,000 to \$30,000 per customer.<sup>34</sup> How DTS obtains the equipment it provides and installs, and that it may

---

<sup>32</sup> It is of no consequence that the DTS fixed-service equipment is on the "customer side" of the antenna. *E.g.*, Petition at 10. The DTS antenna, and its other equipment, is still on the network side of the NID.

<sup>33</sup> PFD at 9, *citing* 47 C.F.R. Part 36, Appendix to Part 36 - Glossary.

<sup>34</sup> *See* PUCT Order at FOF 26. In the case of fixed service, establishing service for the customer generally involves not only installing the transceiver and associated wiring but also a backup power source. In the case of mobile service, DTS usually installs a car-top antenna to allow

sometimes contract with third parties for its installation and maintenance, has no bearing upon whether this DTS-owned equipment qualifies as “facilities.”

Alenco seemingly argues that *any* equipment located at or in the vicinity of the customer’s premises cannot be part of the network. But Alenco’s petition does not explain why customer premises equipment—as it defines it—could possibly include DTS-owned equipment that is on the network side of the customer’s NID. The argument that it is “customer premises equipment” is seemingly based on the false likening of this network equipment to a landline customer’s inside wiring or telephone sets.

***C. The Tribal Lands and Computer II orders do not support Alenco’s contention that the DTS-owned facilities are customer premises equipment, not network facilities.***

Nothing in the *Tribal Lands Order*<sup>35</sup> forecloses the PUCT’s decision—that DTS equipment at issue is a “facility” for purposes of federal high-cost universal service support. The Commission’s determination in the *Tribal Lands Order* was expressly limited to the issue of whether non-wireline carriers are eligible to receive Link-Up support for that portion of a mobile phone that receives wireless signals.<sup>36</sup> The Commission noted that it has never defined a demarcation point between customer and network equipment for wireless mobile service. Significantly, the Commission also noted that some portion of a wireless handset

---

the customer to use the mobile handset inside the car.

<sup>35</sup> Twenty-Fifth Order on Reconsideration, FCC 03-115, *In re Federal State Joint Board on Universal Service*, CC Docket 96-45, 18 F.C.C.R. 10958, 2003 WL 21195264 (rel. May 21, 2003) (“*Tribal Lands Order*”).

<sup>36</sup> *Tribal Lands Order*, ¶ 18.

may perform functions that are on the network side of the demarcation point, which (in the wireline context) would be eligible for Link-Up support.<sup>37</sup> The Commission’s decision under the circumstances there—that Link-Up support would not be provided for any part of the wireless handset—was not a holding that no part of the wireless handset was part of the network. Instead, the *Tribal Lands* decision was rooted in “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.”<sup>38</sup> Neither of those concerns control this case.

The Commission’s *Tribal Lands* decision further undercuts Alenco’s position. It expressly recognized that some carrier-owned handsets are *not* customer equipment: “We note this decision extends only to wireless handsets that constitute customer equipment. Certain types of wireless service are provided using a wireless access terminal *that is owned by the carrier* and is not considered ‘customer equipment.’<sup>39</sup> Significantly, the *Tribal Lands Order* also noted—as the *Twelfth Report and Order*<sup>40</sup> had earlier—that if a fixed wireless service requires installation of a receiver on a rooftop, for example, to bring service to the demarcation point, Expanded Link-Up support could be used to offset the cost of installing

---

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Tribal Lands Order*, ¶ 18 n.52 (emphasis added).

<sup>40</sup> Twelfth Report and Order, FCC 00-208, *In re Federal-State Joint Board on University Service*, CC Docket 96-45, 15 F.C.C.R. 12208, 2000 WL 870831 (rel. June 30, 2000) (“*Twelfth Report and Order*”).

such network facilities.<sup>41</sup> It does not logically follow, as Alenco claims, that because costs associated with the installation of these facilities qualify for Link-Up support, that the associated service cannot qualify for monthly per-line high-cost assistance.<sup>42</sup>

Nor do the Commission's *Cellular Communication Systems*<sup>43</sup> or *Computer II*<sup>44</sup> orders support Alenco's restrictive view of "facility."<sup>45</sup> As a threshold matter, *Cellular Communication Systems* involved mobile wireless units and has no relevance to the DTS fixed transceivers. More importantly, neither order supports Alenco's position that the equipment DTS supplies (fixed and mobile) is not network equipment. The two orders reflect the fact that the sale of customer-premises equipment is not regulated,<sup>46</sup> is not considered common carriage, and is severable from transmission service.<sup>47</sup> But that has no bearing on the fundamental question in this case—whether the carrier-owned equipment at

---

<sup>41</sup> *Tribal Lands Order*, ¶ 18 n.52, citing *Twelfth Report and Order*, ¶ 61.

<sup>42</sup> Petition at 14.

<sup>43</sup> Report and Order, FCC 81-464, *An Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, CC Docket 79-318, 86 F.C.C.2d 469, 1981 WL 158543 (rel. May 4, 1981), *recon.* 89 FCC 2d 58, *further modified*, 90 FCC 2d 71 (1982), *appeal dismissed sub nom. United States v. FCC*, No. 1526 (D.C. Cir. 1983) ("*Cellular Communications Systems*").

<sup>44</sup> Final Decision, FCC 80-189, *In re Amendment of Section 64.702 of the Commission's Rules and Regulations*, Docket No. 20828, 77 F.C.C.2d 384, 1980 WL 356789 (rel May 2, 1980), *aff'd sub nom. Computer and Communications Indus. Ass'n v. F.C.C.*, 693 F.2d 198 (D.C. Cir. 1982).

<sup>45</sup> Petition at 14-17.

<sup>46</sup> See Petition at 15-16.

<sup>47</sup> Petition at 16-17.

issue is within the definition of “facility” for purposes of determining federal high-cost universal service support.

#### **IV. Conclusion**

The PUCT’s designation of DTS as an eligible telecommunications carrier entitled to receive high-cost universal service fund support is fully consistent with the federal Communications Act and the Commission’s rules and orders. Alenco’s petition for declaratory ruling and preemption should be denied.

GREG ABBOTT  
Attorney General of Texas

KENT C. SULLIVAN  
First Assistant Attorney General

JEFF L. ROSE  
Deputy First Assistant Attorney General

KAREN KORNELL  
Assistant Attorney General  
Chief, Natural Resources Division

/s/— efiled  
JOHN R. HULME  
Texas State Bar No. 10258400  
Assistant Attorney General

Natural Resources Division  
P.O. Box 12548, Capitol Station  
Austin, Texas 78711-2548  
Tel: (512) 475-4229  
Fax: (512) 320-0911

ATTORNEYS FOR THE PUBLIC  
UTILITY COMMISSION OF TEXAS