

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Petition of Alenco Communications, Inc.,	)	CC Docket No. 96-45
<i>et al.</i> , for a Declaratory Ruling and for	)	
Preemption of an Order by the	)	DA 07-1848
Public Utility Commission of Texas	)	
	)	

**DIALTONESERVICES, L.P. COMMENTS  
IN OPPOSITION TO THE PETITION FOR DECLARATORY RULING AND PREEMPTION**

William J. Dorran  
President  
DIALTONESERVICES, L.P.  
2087 Union Street, Suite 1  
San Francisco, CA 94147

David L. Sieradzki  
Matthew F. Wood  
HOGAN & HARTSON LLP  
555 Thirteenth Street NW  
Washington, DC 20004  
(202) 637-6400

Lawrence S. Smith  
Dineen J. Majcher  
SMITH & MAJCHER  
816 Congress Avenue, Suite 1270  
Austin, Texas 78701  
512/322-9044

Its Attorneys

June 22, 2007

**TABLE OF CONTENTS**

	<u>Page</u>
<b>INTRODUCTION AND SUMMARY.....</b>	<b>2</b>
<b>I. BACKGROUND .....</b>	<b>4</b>
<b>A. DTS Service and Service Areas. ....</b>	<b>4</b>
<b>B. History of the Texas PUC Proceeding.....</b>	<b>7</b>
<b>II. DTS’S FACILITIES SATISFY THE REQUIREMENTS OF SECTION 214(E)(1) .....</b>	<b>9</b>
<b>A. DTS-owned Network Transmission and Routing Facilities Deployed at     Customer Premises Qualify as DTS’s “Own Facilities” Within the Meaning of     the Act and the Commission’s Rules.....</b>	<b>10</b>
<b>B. DTS-Owned Facilities Used in Mobile Applications Qualify as Facilities     Eligible for Support. ....</b>	<b>13</b>
<b>C. MSS Capacity Obtained by DTS Qualifies as DTS’s Own Facilities.....</b>	<b>16</b>
<b>III. THE COMMISSION SHOULD DEFER TO THE TEXAS PUC’S FACTUAL     DETERMINATIONS UPON A FULLY LITIGATED EVIDENTIARY RECORD .....</b>	<b>19</b>
<b>IV. THE COMMISSION DOES NOT AND SHOULD NOT PREEMPT STATE     COMMISSION DECISIONS THAT PROMOTE RATHER THAN HINDER     COMPETITIVE ENTRY.....</b>	<b>20</b>
<b>CONCLUSION .....</b>	<b>21</b>

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Petition of Alenco Communications, Inc.,	)	CC Docket No. 96-45
<i>et al.</i> , for a Declaratory Ruling and for	)	
Preemption of an Order by the	)	DA 07-1848
Public Utility Commission of Texas	)	
	)	

**DIALTONESERVICES, L.P. COMMENTS IN OPPOSITION TO  
THE PETITION FOR DECLARATORY RULING AND PREEMPTION**

DialToneServices, L.P. (“DTS”) submits these comments in opposition to the Petition for Declaratory Ruling and Preemption (the “Petition”) filed by Alenco Communications, Inc. and six other entities (the “Petitioners”) on March 5, 2007.<sup>1</sup>

The Commission should deny the Petition. The Public Utility Commission of Texas (“Texas PUC”), in the Order challenged by the Petitioners,<sup>2</sup> concluded that DTS satisfied all the criteria for designation as an Eligible Telecommunications (“ETC”) for federal high-cost support, and as an Eligible Telecommunications Provider (“ETP”) for the Texas state high-cost support program. The Texas PUC, after a lengthy proceeding based on a detailed evidentiary record, properly resolved the facts in dispute, and correctly interpreted the settled law and precedents governing an ETC’s obligation to offer supported services using “its own facilities or a combination of its own facilities and resale of another carrier’s services.” 47 U.S.C. § 214(e)(1)(A); *see also* 47 C.F.R. § 54.201(d)(1). There is no merit to the Petitioners’ request to preempt the legal and factual conclusions in the Texas PUC’s Order.

---

<sup>1</sup> *See* Public Notice, DA 07-1848 (WCB rel. Apr. 25, 2007) (the “Public Notice”); *see also* Order, DA 07-2190 (WCB rel. May 24, 2007) (granting extension of time).

<sup>2</sup> *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, Order (P.U.C.T. rel. June 22, 2006) (the “Texas PUC Order”).

## INTRODUCTION AND SUMMARY

DTS provides telecommunications services via satellite to approximately 2,000 residential, small business, and public service consumers in some of the most rural, remote parts of Texas. In two 2005 proceedings, the Texas PUC designated DTS as an ETC (for federal high-cost support) and as an ETP (for state support) in areas served by four large incumbent local exchange carriers (“ILECs”) – AT&T, Verizon, Embarq, and Windstream.<sup>3</sup> In a third 2005 order, the Texas PUC designated DTS as an ETC and ETP in “uncertificated” areas – *i.e.*, geographic areas that are not included within any ILEC service territory, and consequently where no service is available at all from an ILEC.<sup>4</sup>

In a fourth order – the Order at issue here, issued on June 22, 2006 – the Texas PUC found that DTS also satisfied the ETC and ETP criteria in the study areas of eight rural ILECs (including Petitioners Alenco, Big Bend, Dell, Riviera, and Valley) and designated DTS as an ETC and ETP in those areas. The federal and state universal service high-cost support programs enable DTS to provide reasonably priced telecommunications service to consumers in previously unserved or underserved areas, and to introduce a valuable competitive alternative in these sparsely populated areas.

---

<sup>3</sup> DTS applied for and received designation as an ETC and as an ETP in certain exchanges served by Southwestern Bell Telephone, LP d/b/a SBC Texas and GTE Southwest, Inc. d/b/a Verizon Southwest. *See 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 (P.U.C.T. rel. Aug. 2, 2005) (granting ETC designation); *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 (P.U.C.T. rel. Aug. 2, 2005) (granting ETP designation). The Texas PUC thereafter designated DTS as an ETC and ETP in all exchanges served by Valor Telecommunications of Texas L.P. and all exchanges served by Sprint/United Telephone Company of Texas. *See 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 (P.U.C.T. rel. Sept. 2, 2005).

<sup>4</sup> DTS applied for and received designation as an ETC and ETP in various uncertificated areas located in nineteen Texas counties. *See Application of DialToneServices, L.P. (DTS) for Designation as an Eligible Telecommunications Carrier and an Eligible Telecommunications Provider in Certain Uncertificated Areas*, Docket No. 31401, Order and Notice of Approval (P.U.C.T. rel. Sept. 2, 2005).

The Petitioners offer a meritless challenge to the Texas PUC’s findings that the satellite antennas, poles, brackets, network interface devices (“NIDs”), and other network and transmission facilities owned and operated by DTS satisfy the requirements in the Act, and in the rules of this Commission and the Texas PUC, that ETCs and ETPs must provide supported service in part using their “own facilities.” The Petitioners’ cramped readings of these requirements and applicable precedents are incorrect.<sup>5</sup> The Commission should reject the Petitioners’ poorly disguised efforts to hamstring a competitive provider’s ability to offer innovative and affordable local exchange service in areas that the Petitioners themselves typically serve, if at all, only at far greater cost to consumers.

As explained below, DTS has demonstrated throughout the course of the Texas proceeding that the company uses its own facilities – or, at minimum, a combination of its own facilities and the services of other carriers – to provide supported services to residents, businesses, and public service entities in unserved and underserved areas of the state. The Petitioners’ arguments to the contrary are unfounded, and supply no basis for the Commission to preempt the Texas PUC’s decision; revisit the Texas PUC’s findings of fact regarding DTS’s facilities-based offerings; or preempt the Texas PUC’s reasonable interpretation of Section 214(e)(1)(A) of the Act, Section 54.201 of the Commission’s rules, and related provisions. Moreover, while the Commission has authority to preempt state commission decisions that serve as barriers to competitive entry, there is no precedent suggesting that the Commission will

---

<sup>5</sup> See 47 C.F.R. § 54.201(e) (defining the term “facilities” for purposes of the ETC rules as “any physical components of the telecommunications network that are used in transmission or routing of the services designated for support”) (emphasis added); *id.* § 54.201(h) (directing state commissions to designate as ETCs any common carriers that meet the requirements of Section 54.201 “irrespective of the technology used by such carrier”); *Federal-State Joint Board On Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8801-02, ¶¶ 47-49 (1997) (“*First Report and Order*”) (announcing principles of technological and competitive neutrality).

preempt state commission decisions that facilitate competitive entry by providers in geographic areas otherwise devoid of competition.

## **I. BACKGROUND**

### **A. DTS Service and Service Areas.**

DTS provides facilities-based, local exchange telecommunications services to consumers in the most remote, rural areas of Texas, using mobile satellite service (“MSS”) technology.<sup>6</sup>

DTS provides this service through the use of network facilities that it owns, including transmitter/receiver earth stations and other antennas, wiring, mounts, poles, offset brackets, network interface boxes, grounding equipment, lightning rods, towers, and other equipment.<sup>7</sup>

DTS also uses equipment and services that it procures from other vendors such as MSS licensee Globalstar USA, LLC (“Globalstar”), pursuant to purchase agreements and/or lease-type agreements with these vendors.<sup>8</sup>

DTS offers satellite-delivered telephone service to residential and business customers located in over 180 telephone exchanges throughout the state of Texas, using Low Earth Orbiting (“LEO”) satellites to make service in remote areas available at affordable rates. DTS provides both fixed service (utilizing fixed antenna units mounted on structures such as homes, barns, cabins, shops, or businesses) and mobile service (supplied via portable units that can be mounted

---

<sup>6</sup> For a general description of MSS, see, for example, *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for use by the Mobile-Satellite Service*, ET Docket No. 95-18, Third Report and Order and Third Memorandum Opinion and Order, 18 FCC Rcd 23638, 23641-43, ¶¶ 3-6 (2003).

<sup>7</sup> See 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, Docket No. 32024 (filed Nov. 9, 2005) (the “Application”), Attachment G – Summary of Facilities, included as Exhibit 1 to Amendment to Original Application. This DTS Exhibit is also included as Exhibit D to the instant Petition for Declaratory Ruling and Preemption. All of the parties’ record filings in the Texas proceeding, as well as the decisions of the Texas PUC and the ALJ in this docket, are also available from the Texas PUC’s website, located at <http://interchange.puc.state.tx.us>.

<sup>8</sup> See, e.g., *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*, Texas PUC Docket No. 32024, Proposal for Decision, at 7 (Tex. State Office of Admin. Hearings rel. May 9, 2006) (the “Proposal for Decision”).

in a vehicle or used as a hand-held unit).<sup>9</sup> DTS benefits consumers by offering service to customers where, in many instances, no basic service has been available in the past. In other instances, DTS competes with and compares favorably to ILEC services that are far more costly, less reliable, or both, in areas where landline and other ILEC services are available only on economically impractical or technically inferior terms.

As noted above, the Texas PUC has designated DTS as an ETC and ETP. The Texas PUC's criteria for ETP designation are more rigorous and more detailed than the criteria used to make federal universal service ETC designations. For example, Texas requires a designated ETP to offer any customers in its ETP service area basic local telecommunications services at a rate not to exceed 150% of the ILEC's tariffed rate, and requires ETPs to provide "continuous and adequate service" in compliance with stringent quality of service standards and performance benchmarks.<sup>10</sup> Nevertheless, a carrier cannot receive or retain an ETP designation unless the Texas PUC also designates that carrier as an ETC eligible to receive federal universal service funds.<sup>11</sup> Loss of DTS's ETC status in Texas would thus result in loss of its ETP status as well, and would deny DTS access to the state funds it uses to provide service to its customers.

Texas has established a unique state universal service support mechanism to promote telecommunications services to uncertificated areas. The Texas PUC determines the monthly per-line state support funding for ETPs in unserved areas based on either (1) an average of the per-line support available in adjacent ILEC study areas, or (2) the lowest-cost bid offered by an ETP in response to a competitive request for proposals ("RFP") process, subject to detailed

---

<sup>9</sup> See DTS's website, located at <http://www.dialtonetexas.com>, for additional information on DTS service offerings.

<sup>10</sup> See Texas PUC Subst. R. 26.417(c)(1)(B), (D).

<sup>11</sup> See *id.* R. 26.417(c)(1)(A).

specifications.<sup>12</sup> However, no federal high-cost support is available in these uncertificated areas, because there is no existing ILEC “study area” upon which to base high-cost support amounts.<sup>13</sup> Thus, loss of ETP status and state support would mean the loss of all universal service funds available to DTS for providing service to customers in uncertificated areas.

In addition to these completely unserved areas, DTS also provides telecommunications service to ranches, farms, and homesteads that are included in ILEC exchange areas, but that are so remote that ILEC service is unavailable or unaffordable as a practical matter. DTS customers in these remote locations report that they often cannot afford the “line extension” fees that ILECs typically charge to extend network facilities to the customer – with such costs often running into the tens of thousands of dollars. Consumers also cannot afford burdensome ILEC-imposed obligations requiring customers, in some cases, to install and maintain their own lines from their premises to a distant meet-point in the ILEC network.<sup>14</sup> These customers also may be “underserved” by the ILECs due to poor service quality: call quality may be degraded because the ILEC uses extremely long copper loops, obsolete technologies such as Basic Exchange Telephone Radio Service (“BETRS”), or microwave repeaters that are unable to cover remote locations.

DTS fills the gap and provides a competitive, high-quality service to these unserved or underserved areas, offering basic local exchange service and telecommunications capacity at affordable rates to homes, businesses, and public entities such as volunteer fire departments, county sheriff offices, rural ambulance and rescue districts, and school districts. DTS is able to

---

<sup>12</sup> *See id.* R. 26.423(e).

<sup>13</sup> *See, e.g.,* 47 C.F.R. § 54.307(a).

<sup>14</sup> DTS understands that in some cases, ILECs have loosened these requirements and/or reduced their line extension fees in response to DTS’s competitive entry – demonstrating that competition benefits consumers even in the most rural areas.

serve its rural consumers at reasonable rates – despite the fact that the costs it incurs are much higher than the rates it charges – only due to the availability of federal and/or state high-cost universal service support.

### **B. History of the Texas PUC Proceeding.**

DTS filed an application (the “Application”) with the Texas PUC on November 9, 2005, to amend the company’s ETC and ETP designations so as to include study areas served by certain rural ILECs.<sup>15</sup> The Application sought designation in all of the study areas served by each of the eight rural ILECs named in the Application.<sup>16</sup> The Application was referred to the Texas State Office of Administrative Hearings (“SOAH”) for a hearing before an Administrative Law Judge (“ALJ”). On December 13, 2005, the rural ILEC Petitioners sought permission to intervene in the Texas PUC proceeding, which they received on January 27, 2006.<sup>17</sup> Based on the extensive record developed in the direct testimony, briefs, and discovery responses submitted by the parties and by Texas PUC staff, Judge Lilo D. Pomerleau, the ALJ overseeing the proceeding, resolved the question whether DTS meets the statutory and regulatory requirements for ETC and ETP designation.

The ALJ’s Proposal for Decision submitted on May 9, 2006, answered that question in the affirmative.<sup>18</sup> On the basis of record evidence, Judge Pomerleau concluded that DTS qualified as a common carrier.<sup>19</sup> The Proposal for Decision also found that DTS offered the nine

---

<sup>15</sup> See Application at 1.

<sup>16</sup> See *id.* at 3-4.

<sup>17</sup> See *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, Order No. 5 Granting Motion to Intervene (Tex. State Office of Admin. Hearings rel. Jan. 27, 2006).

<sup>18</sup> See Proposal for Decision at 2.

<sup>19</sup> *Id.* at 4-7. On this point, the Proposal for Decision noted that the Texas PUC had previously designated DTS as an ETC and ETP in no fewer than four previous cases involving the study areas of larger ILECs and uncertificated

supported services that ETCs must provide pursuant to 47 C.F.R. § 54.101.<sup>20</sup> Furthermore, the ALJ determined that DTS would satisfy requirements obligating ETCs to provide Lifeline and Link-Up service and to provide service throughout the designated study areas, and that DTS also would satisfy the stringent, state-specific obligations imposed on Texas ETPs.<sup>21</sup> The Proposal for Decision analyzed the public interest benefits of designating DTS as a ETC in rural areas, and concluded that DTS satisfied the public interest tests established in Section 214(e)(2) of the Act and Texas PUC Rule 26.418(e)(2).<sup>22</sup>

Most importantly for purposes of the present Petition, the Proposal for Decision found that DTS “is a facilities-based provider and uses its own facilities to provide the proposed services” in satisfaction of the requirements set forth in the Act, the FCC’s rules, and the Texas PUC’s rules.<sup>23</sup> Specifically, Judge Pomerleau explained that “[t]here is unrefuted evidence . . . that DTS will use its own facilities to provide basic local telephone service.”<sup>24</sup> Thus, the Proposal for Decision rejected the rural ILEC Petitioners’ claims that DTS is a “pure reseller” of MSS services, and that all of the facilities owned and deployed by DTS are nothing but customer premise equipment (“CPE”).<sup>25</sup>

The rural ILEC Petitioners challenged Judge Pomerleau’s findings and conclusions in the Proposal for Decision on several procedural and substantive grounds, focusing especially but not exclusively on the issue of the facilities-based nature of DTS’s service. Over the protests of the

---

areas in Texas, and explained that these prior designations demonstrated that the Texas PUC had found favorably on the question of DTS’s common carrier status. *See id.* at 6 n.20.

<sup>20</sup> *See id.* at 10-16.

<sup>21</sup> *See id.* at 16-20, 25-27.

<sup>22</sup> *See id.* at 20-24.

<sup>23</sup> *Id.* at 10; *see also id.* at 7-10 (citing 47 U.S.C. § 214(e)(1)(A); 47 C.F.R. § 54.201(d)(1); and Texas PUC Subst. R. 26.417(c)(1)(C), 26.418(c)(1), and 26.418(g)(1)(B)(j)).

<sup>24</sup> *Id.* at 8.

<sup>25</sup> *See id.* at 8-9.

Petitioners, the Texas PUC adopted the Proposal for Decision and modified the ALJ's proposal by articulating several additional findings of fact and conclusions of law. In particular, the Texas PUC found that "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>26</sup> The Texas PUC also determined that "DTS will use universal service funds to obtain full satellite connectivity and provide all additional network facilities (wire, mounts, poles, offset brackets, network interface boxes, grounding equipment, lightning rods, towers and other equipment) for the areas it serves."<sup>27</sup>

In sum, after a detailed, fact-intensive proceeding including extensive analysis of the question of DTS's facilities-based service, the Texas PUC rejected the erroneous legal theories and factual claims advanced in the present Petition. For the reasons explained below, the Commission should confirm the Texas PUC's conclusion and reject out of hand the unfounded arguments rehashed by the Petitioners in their attempt to deny universal service support to DTS, and thereby hinder competitive entry by an innovative provider.

## **II. DTS'S FACILITIES SATISFY THE REQUIREMENTS OF SECTION 214(E)(1)**

The Petition contains several flawed arguments in support of the claim that equipment and capacity that DTS irrefutably owns outright, or that DTS leases, purchases, or otherwise obtains from its vendors, do not qualify as DTS's "own facilities" under Section 214(e)(1)(A) of the Act and Section 54.201(d)(1) of the Commission's rules. These arguments comprise three distinct claims. The Petitioners argue that (A) equipment and facilities owned by DTS and

---

<sup>26</sup> Texas PUC Order at 4.

<sup>27</sup> *Id.* at 5. The Texas PUC's conclusion of law on these points, not cited by the Petition, stated that DTS "offers the services specified for [federal] USF support in 47 C.F.R. § 54.101(a) (the federally supported services) throughout the ILEC's [sic] study area, either through its own facilities or a combination of its own facilities and resale of another carrier's services consistent with P.U.C. Subst. R. 26.418(b)(2) and (c)(1)." *Id.* at 7.

deployed at or near customer premises to receive fixed service is customer equipment, rather than network facilities used in the “transmission or routing”<sup>28</sup> of supported services; (B) even if such fixed equipment were network transmission or routing facilities, equipment owned by DTS and provided to customers receiving mobile service cannot support designation of DTS as a facilities-based carrier; and (C) DTS’s provision of basic local exchange service utilizing MSS capacity obtained by DTS from Globalstar or other MSS licensees constitutes resale of service. The Petitioners’ arguments fail on each of these three points.

**A. DTS-owned Network Transmission and Routing Facilities Deployed at Customer Premises Qualify as DTS’s “Own Facilities” Within the Meaning of the Act and the Commission’s Rules.**

The Petition attempts to characterize network and transmission facilities that DTS owns and deploys on the carrier’s side of the demarcation point as CPE.<sup>29</sup> But as Judge Pomerleau and the Texas PUC found based on unrefuted evidence in the record, DTS maintains full ownership of the fixed transmit-and-receive earth stations and antennas that it deploys at customer premises outside of the customer’s home or business. There is also unrefuted record evidence showing that DTS similarly owns and holds title to other network facilities such as the wire, mounts, poles, offset brackets, NIDs, grounding equipment, lighting rods, towers, and other equipment deployed on the carrier’s side of that demarcation point.<sup>30</sup> Notwithstanding the fact that these DTS transmission and routing facilities are on the network side of the demarcation point and are “installed with wiring terminating at a network interface device,”<sup>31</sup> the Petitioners contend that

---

<sup>28</sup> See 47 C.F.R. § 54.201(e).

<sup>29</sup> See, e.g., Petition at 12-13.

<sup>30</sup> See, e.g., Proposal for Decision at 7 (describing DTS facilities).

<sup>31</sup> See *id.*

these facilities must be CPE because they are located at the premises of DTS's fixed service customers. This contention is plain wrong.<sup>32</sup>

A comparison to typical ILEC facilities and a basic understanding of the FCC's rules and decisions on this point clearly demonstrate that carrier facilities on the network side of the demarcation point are not CPE, even if they are located on or near the customer's home, business, or other structure. While the antenna and transceiver facilities necessary to transmit signals and receive signals from the satellite are installed on or in the vicinity of the customer's premise, this equipment is no more CPE than is the local loop or the drop line that an ILEC installs to provide service. The ALJ found, based on the record evidence, that "for satellite service, the transceivers and wires work in a similar manner as a wire network – linking the customer premises to the rest of the network."<sup>33</sup> The Proposal for Decision correctly analogized the functions performed by DTS's transceiver units to those performed by network facilities installed and operated by traditional ILECs, including the Petitioners.

In a wireline network, the NID is the demarcation point between the customer's and the carrier's facilities. The ILEC owns the NID and the transmission facilities beginning at the NID and extending out to the public network; the customer owns the inside wiring and telephone handsets inside the home and on the customer side of the NID. Similarly, in the context of DTS's fixed installation customers, DTS owns the NID, the wires leading out of it, the satellite transmission equipment, and associated structures extending out toward the public network; the customer owns the inside wires and equipment on the customer side of the demarcation point. The Petitioners, however, attempt to move the demarcation point from the NID to a point further

---

<sup>32</sup> See Petition at 10 (citing DTS testimony from the Texas PUC proceeding that DTS facilities are located on what the Petitioners improperly describe as the "customer side" of the fixed access unit earth station installed at fixed service customer locations, despite the fact that these facilities are on the network side of the demarcation point).

<sup>33</sup> Proposal for Decision at 9.



The Petitioners offer red-herring arguments concerning the commercial availability of satellite equipment located at the customer’s location. There is no basis for Petitioners’ contention that equipment cannot be considered network transmission and routing equipment if it is “commonly supplied” by vendors that are not common carriers,<sup>34</sup> when such equipment in DTS’s case is owned by the carrier, installed on the network side of the NID, and vital to the routing and transmission of voice traffic and called/calling party data over the MSS network to the PSTN.<sup>35</sup>

The Commission need go no farther to reject the Petition’s request for preemption of the Texas PUC’s Order. As Judge Pomerleau correctly held in the Proposal for Decision, “DTS is not a pure reseller; it is a facilities-based provider and uses its own facilities to provide the proposed services.”<sup>36</sup> Neither the Act nor the FCC’s rules require a carrier to rely exclusively on its own facilities to qualify as an ETC. A carrier may qualify if it uses “a combination of its own facilities and resale of another carrier’s services.” 47 U.S.C. § 214(e)(1)(A); 47 C.F.R. § 54.201(d)(1). At least some of the network facilities used in DTS’s service are undoubtedly DTS’s “own facilities.” Nonetheless, the following sections show that all of DTS’s service can and should be considered facilities-based.

**B. DTS-Owned Facilities Used in Mobile Applications Qualify as Facilities Eligible for Support.**

The Petitioners also contend that even if DTS equipment used to provide fixed service constituted network transmission or routing facilities, the mobile satellite earth stations owned by

---

<sup>34</sup> Petition at 17.

<sup>35</sup> The Petition makes much of the Commission’s decision in 1983 to separate terminal equipment from network equipment and to deregulate CPE. *See id.* at 15-17. This circular argument does nothing to bolster Petitioners’ claims because the DTS-owned equipment located on the network side of the demarcation point at the customer premise satisfies the Commission’s 1983 definition of network equipment, and thus – as discussed in these comments – is not terminal equipment or CPE. *See* 47 C.F.R. Part 36, Appendix to Part 36 – Glossary.

<sup>36</sup> Proposal for Decision at 10.

DTS “cannot support designation of DTS as a facility-based carrier of mobile service.”<sup>37</sup> This claim fares no better, as it misconstrues or ignores relevant FCC rules and decisions.

Once again, there is unrefuted evidence in the Texas PUC proceeding that DTS maintains ownership of the mobile transceiver equipment that it provides to its mobile service customers. As the Proposal for Decision noted, there is “no legal basis for treating DTS’s fixed and mobile receiver units and associated equipment as CPE,” due in significant part to the fact that “the FCC excludes mobile radio equipment and transmit earth stations from classification as CPE.”<sup>38</sup> The Petition fails to overcome the provision in the FCC’s rules that specifically excludes from the definition of CPE the type of equipment that DTS owns and uses to provide service to its mobile service customers.<sup>39</sup>

The *Tribal Lands Reconsideration Order*<sup>40</sup> decision regarding Link-Up Support for conventional wireless handsets does not support the proposition for which the Petitioners cite it here. In a reconsideration of a sentence in the *Twelfth Report and Order*<sup>41</sup> indicating that Link-Up support could be used to offset that portion of a handset that receives wireless signals, the Commission concluded that Link-Up should not offset any costs of a wireless handset because, “for purposes of bundled marketing of equipment and services,” wireless handsets are generally

---

<sup>37</sup> Petition at 10.

<sup>38</sup> Proposal for Decision at 9 (emphasis added).

<sup>39</sup> 47 C.F.R. Part 36, Appendix to Part 36 – Glossary (definition of “Customer Premises Equipment”).

<sup>40</sup> *Federal-State Joint Board on Universal Service, Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Area; Commonwealth of Northern Mariana Islands*, CC Docket No. 96-45, Twenty-Fifth Order on Reconsideration, Report and Order, Order, and Further Notice of Proposed Rulemaking, 18 FCC Rcd 10958 (2003) (“*Tribal Lands Reconsideration Order*”).

<sup>41</sup> *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas including Tribal an Insular Areas*, CC Docket 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12241, ¶ 61 (2000) (“*Twelfth Report and Order*”).

treated as CPE.<sup>42</sup> The Commission emphasized, however, that it had reached “this finding regarding wireless handsets solely for purposes of determining what charges are eligible for Link-Up discounts.”<sup>43</sup> More fundamentally, the Commission made clear that “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.’ Accordingly, such a unit would not be excluded from receiving Link-Up support under our rules.”<sup>44</sup>

DTS’s carrier-owned wireless access terminals fall squarely within this clarification. DTS owns its mobile handsets (as well as the fixed service rooftop installations on the network side of the NID demarcation point discussed above). Thus, to the extent that a rule regarding eligibility for Link-Up is relevant to the present Petition, the Commission has ruled that the type of mobile wireless equipment DTS employs is a facility eligible for support.<sup>45</sup> The Commission did not decide – or even come close to deciding – in the *Tribal Lands Reconsideration Order* that no part of mobile wireless terminal equipment could be the carrier’s “own facilities” used for transmission and routing. To the contrary, the Commission expressly noted that certain

---

<sup>42</sup> *Tribal Lands Reconsideration Order*, ¶ 18.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*, ¶ 18 n.52. The Commission also reiterated that “if a fixed wireless service requires the installation of a receiver on a rooftop, for example, to bring service to a demarcation point, expanded Link-Up support could be used to offset the cost of installing such facilities.” *Id.*, ¶ 18 (citing *Twelfth Report and Order*, ¶ 61). Furthermore, the Commission noted that it had “never defined a demarcation point for wireless service” and recognized 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.” *Id.*, ¶ 18.

<sup>45</sup> The fact that Link-Up support can be applied to the costs of installing facilities such as rooftop wireless antennas supports DTS’s position. Petitioners’ argument misreads the Commission’s decision on this point. *See* Petition at 14 (citing *Twelfth Report and Order*, ¶ 61, and quoting 47 C.F.R. § 54.411(a)(3)). Whether a carrier may recover all or part of the costs it incurs to install network facilities through one-time Link-Up charges or through monthly recurring support is irrelevant to the status of those carrier-owned network facilities for purposes of ETC designation.

wireless equipment is not customer equipment and confirmed that wireless equipment may perform network functions.

**C. MSS Capacity Obtained by DTS Qualifies as DTS's Own Facilities.**

Again, as noted above, the analysis can stop here. Based on the foregoing, the Commission could conclude readily that DTS at minimum provides supported service “using its own facilities or a combination of its own facilities and resale of another carrier’s services,” in satisfaction of Section 214(e)(1)(A) of the Act and Section 54.201(d)(1) of the FCC’s rules. The Commission could reach such a conclusion even if DTS were reselling MSS service in combination with the use of its own network facilities used in the provision of fixed and mobile services as described above. As the Commission made clear in the Universal Service *First Report and Order*, Section 214(e)(1)(A) does not require the use of any particular level or percentage of a carrier’s own facilities to provide supported services.<sup>46</sup> DTS’s ownership of network transmission or routing facilities used to provide fixed and mobile service as detailed herein satisfy this requirement.

Nevertheless, the Commission also should find that network capacity acquired and used by DTS pursuant to agreements with Globalstar (or other MSS spectrum licensees) also may constitute DTS’s “own facilities” under the Act and the Commission’s rules. The *First Report and Order* clarifies that a physical network component need not be owned by an ETC in order to qualify as the ETC’s “own facilities.” For example, after confirming that “facilities” are confined to network components used to transmit or route supported services, the Commission

---

<sup>46</sup> See *First Report and Order*, 12 FCC Rcd at 8870, ¶ 169.

[T]he statute does not dictate that a carrier use a specific level of its “own facilities” . . . 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.

*Id.*

rejected commenters’ suggestions to “adopt a more restrictive definition of the term ‘facilities,’” to mean “both 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.”<sup>47</sup> The Commission concluded that the definition of “facilities” it had adopted would “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.”<sup>48</sup> To be sure, pure resellers, as a rule, are not eligible for ETC status,<sup>49</sup> and the Texas PUC declined to address the argument that DTS’s purchase of capacity from Globalstar was analogous to the purchase of Unbundled Network Elements (“UNEs”).<sup>50</sup> But the status of UNEs is irrelevant here. The Proposal for Decision neither approved nor rejected any argument along these lines: the ALJ simply concluded that it was “unnecessary to determine this issue [because] DTS is not a pure reseller; it is a facilities-based provider and uses its own facilities to provide the proposed service.”<sup>51</sup>

However, the *First Report and Order* does make clear that a facility or equipment used in the provision of a telecommunications service “is the requesting carrier’s ‘own facilit[y]’ for purposes of Section 214(e)(1)(A)” where “the requesting carrier has the ‘exclusive use of that facility for a period of time.’”<sup>52</sup> In the end, the Commission noted that Section 214(e)(1)(A)

---

<sup>47</sup> *First Report and Order*, 12 FCC Rcd at 8862, ¶ 153 (emphasis in original).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*, ¶ 152; see also Petition at 12. But see *Petition of TracFone Wireless, Inc. for Forbearance from 47 USC § 214(e)(1)(A) and 47 CFR § 54.201(i)*, CC Docket No. 96-45, Order, 20 FCC Rcd 15095 (2005) (granting TracFone forbearance from the facilities requirement for ETC designation for Lifeline support).

<sup>50</sup> Petition at 9 and n.28.

<sup>51</sup> Proposal for Decision at 10.

<sup>52</sup> *First Report and Order*, 12 FCC Rcd at 8865, ¶ 158 (alteration in original).

uses the term “own facilities” instead of facilities “owned by” a carrier,<sup>53</sup> so that even though “DTS does not own any component of the Globalstar network,”<sup>54</sup> the satellites, routing and transmission equipment, and MSS spectrum capacity that DTS uses could qualify as DTS’s “own facilities” under Section 214(e)(1)(A) of the Act and Section 54.201(d)(1) of the Commission’s rules.

Furthermore, other Commission decisions provide additional support for the principle that leased facilities can be used to provide the lessee’s facilities-based services. For example, in its *Secondary Markets* proceeding, the Commission announced that “the use of leased spectrum by a lessee” could qualify as the lessee’s “provid[ing] facilities-based commercial mobile radio services.”<sup>55</sup> In an order on local wireline competition and broadband reporting requirements, the Commission focused its information collection efforts on broadband reporting from facilities-based providers, but defined “facilities-based providers” to mean “entities that provide broadband services over their own facilities, UNEs, special access lines, and other leased lines and wireless channels.”<sup>56</sup> These decisions in other contexts provide additional authority for the treatment of leased wireless channels and other network equipment that a carrier procures, but for which it does not hold title, as a facilities-based provider’s “own facilities.”

---

<sup>53</sup> *Id.*, ¶ 159. The Commission further explained that the word “own” is not defined in the Act, and that the word varies in significance according to context, “applying not only to legal title holders, but to others enjoying the beneficial use of property.” *Id.*, ¶ 158.

<sup>54</sup> Petition at 12.

<sup>55</sup> *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604, 20656-57, ¶¶ 118-19 (2003). The Commission also stated that it “anticipate[d] that most leasing arrangements will serve to enhance competition, including the entry of new facilities-based competitors.” *Id.*

<sup>56</sup> *Local Competition and Broadband Reporting*, CC Docket No. 99-301, Report and Order, 15 FCC Rcd 926, 942, ¶ 25 n.74 (2003); see also *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 24031, ¶ 315 n.659 (1997) (noting that the term “facilities-based carrier” has been defined at times to include carriers with ownership of, indefeasible right of use in, and leasehold interests for capacity).

### **III. THE COMMISSION SHOULD DEFER TO THE TEXAS PUC'S FACTUAL DETERMINATIONS UPON A FULLY LITIGATED EVIDENTIARY RECORD**

Section 214(e)(2) of the Act authorizes a state commission to designate common carriers meeting the requirements of Section 214(e)(1) as ETCs in service areas determined by the state commission. As explained above, the Texas PUC has in a number of prior proceedings found that DTS met the ETC requirements of Section 214(e)(1) and the Commission's rules, as well as detailed Texas state requirements governing the more stringent ETP designation process.<sup>57</sup> In the proceeding that concluded with the Texas PUC Order challenged by the Petitioners, Judge Pomerleau and the Texas PUC undertook another examination of DTS's qualifications and ability to meet the ETC and ETP requirements, in the process developing a robust record in a contested proceeding.

The Commission should not accept the Petitioners' implicit invitation to re-open the record on which the Texas PUC Order was based, or to overturn the Texas state commission's findings of fact – elucidated through a thorough evidentiary proceeding that included direct and rebuttal testimony, interrogatory responses, and live testimony regarding the nature of DTS's facilities-based fixed and mobile service offerings.<sup>58</sup> Petitioners' mischaracterization of the facts in that proceeding and here was rejected by the ALJ who conducted the hearing, and whose factual findings the Texas PUC later adopted and expanded upon in the Texas PUC Order that approved the ALJ's Proposal for Decision. Having made their case and lost before the ALJ and the Texas PUC, the Petitioners now raise many of the same arguments regarding the nature of DTS's facilities-based offering in the rural ILEC Petitioners' study areas. The Commission

---

<sup>57</sup> See *supra* notes 3-4, 10-12 and accompanying text.

<sup>58</sup> The Commission has recognized on several occasions – even within the orders that the Petition cites – the principle of federal-state comity that should, as a rule, guide universal service decisionmaking processes in recognition of the joint responsibilities that federal and state regulators share in administering the program. See, e.g., *Twelfth Report and Order*, 15 FCC Rcd at 12264, 12270, ¶¶ 113, 131.

should not overturn the reasoned decision of the Texas PUC, based as it was on an extensive factual record and reasonable interpretations of FCC rules and decisions regarding the classification of facilities owned by the carrier and deployed on the network side of the demarcation point.

#### **IV. THE COMMISSION DOES NOT AND SHOULD NOT PREEMPT STATE COMMISSION DECISIONS THAT PROMOTE RATHER THAN HINDER COMPETITIVE ENTRY**

The Commission should reject the Petitioners' attempt to preclude DTS from competing with them by denying DTS the ETC and ETP status for which it qualifies. The Commission has no history of preempting state commission ETC designations that facilitate rather than hinder competitive entry. The FCC has reviewed and preempted state commission decisions denying ETC applications, as well as other state decisions that preclude new entrants from competing effectively, as potential barriers to entry.<sup>59</sup> Nevertheless, the Commission has not in the past preempted state commission ETC designation orders facilitating entry by competitive carriers that are willing and able to provide facilities-based service on an efficient and affordable basis in high-cost areas such as the remote portions of Texas that DTS serves. The Commission need not

---

<sup>59</sup> See, e.g., *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket No. 96-45, Declaratory Ruling, 15 FCC Rcd 15168 (2000). The cited order stated that “under both the authority of section 253(d) and traditional federal preemption authority, we find that to require the provision of service throughout the service area prior to designation effectively precludes designation of new entrants as ETCs in violation of the intent of Congress.” *Id.*, ¶ 2; see also *Tribal Lands Reconsideration Order*, 18 FCC Rcd at 10971-72, ¶ 26; *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, Memorandum Opinion and Order, 12 FCC Rcd 15639, 15656-60, ¶¶ 38-46 (1997) (finding that the Wyoming state commission’s “rural incumbent protection provision,” which allowed rural ILECs with 30,000 access lines or fewer to block the state’s issuance of certificates to competitive carriers, was not competitively neutral and thus fell outside the scope of the authority reserved to state commissions by Section 253(b) of the Act). Rural ILECs supporting the Wyoming program preempted in the *Silver Star* decision argued that the provision gave small rural carriers necessary “special protections from the advent of competition in order to preserve and advance universal service.” *Id.*, ¶ 30. The claimed need for special protection from competition flew in the face of Congress’s and the Commission’s longstanding policies to promote competitive entry. This rural ILEC argument directly contravening those pro-competitive policies did not persuade the Commission in 1997, and it should not influence the Commission now in its consideration of the Petitioners’ arguments echoing that same protectionist sentiment.

and should not take such a step here when DTS has demonstrated that it satisfies the requirements for ETC designation set forth in the Act and in the FCC's rules.

### CONCLUSION

For the foregoing reasons, the Commission should deny the Petition for Declaratory Ruling and Preemption.

Respectfully submitted,

DIALTONESERVICES, L.P.

/s/ David L. Sieradzki

William J. Dorran  
President  
DIALTONESERVICES, L.P.  
2087 Union Street, Suite 1  
San Francisco, CA 94147

David L. Sieradzki  
Matthew F. Wood  
HOGAN & HARTSON LLP  
555 Thirteenth Street NW  
Washington, DC 20004  
(202) 637-6400

Lawrence S. Smith  
Dineen J. Majcher  
SMITH & MAJCHER  
816 Congress Avenue, Suite 1270  
Austin, Texas 78701  
512/322-9044

Its Attorneys

June 22, 2007