

**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. REPLY COMMENTS
ON PETITION FOR DECLARATORY RULING AND PREEMPTION**

DialToneServices, L.P. (“DTS”) hereby submits these reply comments regarding the Petition for Declaratory Ruling and Preemption filed by Alenco Communications, Inc. and six other entities on March 5, 2007.¹ As explained in DTS’s initial comments,² the Commission should deny the Petition, which mischaracterizes the Communications Act as well as the Commission’s rules and precedents regarding facilities-based carriers’ eligibility for universal service high-cost support.

The Petition seeks preemption of a universal service designation order issued by the Public Utility Commission of Texas (“Texas PUC”),³ in addition to a declaratory ruling that would undermine the basis for the Texas PUC’s decision. The Texas PUC Order, however, was issued after a lengthy proceeding and based on a detailed evidentiary record, and properly interpreted federal and state law to determine that DTS satisfied all the criteria for designation as an Eligible Telecommunications (“ETC”) for federal high-cost support and as an Eligible

¹ 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).

² See DialToneServices, L.P. Comments in Opposition to the Petition for Declaratory Ruling and Preemption, CC Docket No. 96-45 (filed June 22, 2007) (“DTS Comments”).

³ *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”).

Telecommunications Provider (“ETP”) for the Texas state high-cost support program. Specifically, as DTS’s initial comments explained, the Texas PUC properly determined that DTS satisfied 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.”⁴

DTS agrees with the well reasoned comments filed by the Texas PUC⁵ and the Satellite Industry Association (“SIA”),⁶ both supporting the correct factual findings and legal conclusions of the Texas PUC Order. By contrast, neither the Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”)⁷ nor the Washington Independent Telephone Association (“WITA”)⁸ presents anything more than the same flawed analysis and circular reasoning offered in the Petition. OPASTCO and WITA take issue with the Texas PUC’s designation of DTS as an ETC and ETP on the grounds that DTS is a reseller of services, but as discussed further below, these parties provide nothing to contradict the Texas PUC’s determination that “DTS is not a pure reseller; it is a facilities-based provider and uses its own facilities to provide the proposed service.”⁹

⁴ 47 U.S.C. § 214(e)(1)(A); *see also* 47 C.F.R. § 54.201(d)(1).

⁵ *See* Comments of the Public Utility Commission of Texas to Petition for Declaratory Ruling and Preemption, CC Docket No. 96-45 (filed June 22, 2007) (“Texas PUC Comments”).

⁶ *See* Comments of the Satellite Industry Association, CC Docket No. 96-45 (filed June 22, 2007) (“SIA Comments”).

⁷ *See* Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies, CC Docket No. 96-45 (filed May 25, 2007) (“OPASTCO Comments”).

⁸ *See* Comments in Support of Petition for Declaratory Ruling and Preemption on Behalf of the Washington Independent Telephone Association, CC Docket No. 96-45 (filed June 22, 2007) (“WITA Comments”). Based on a review of the massive number of documents filed electronically in CC Docket No. 96-45 during the relevant time period, DTS is unaware of any other comments addressing the Petition.

⁹ *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 10 (Tex. State Office of Admin. Hearings rel. May 9, 2006) (the “Proposal for Decision”). As noted in the Petition, the Proposal for Decision is adopted by the Texas PUC Order “except where expressly modified or rejected.” Petition at 9 n.28 (citing Texas PUC Order at 1).

I. DTS PROVIDES FACILITIES-BASED SERVICE, AS SET FORTH IN THE TEXAS PUC’S AND SIA’S COMMENTS, AND THUS IS ELIGIBLE FOR SUPPORT.

DTS’ initial comments in this proceeding described the scope of the company’s supported services and the manner in which it provides facilities-based, local exchange 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.¹⁰ DTS offers its satellite-delivered telephone service to residential and business customers in over 180 telephone exchanges across Texas, using Low Earth Orbiting (“LEO”) satellites to make service available at affordable rates in remote areas where ILEC services are far more costly and less reliable, if available at all.¹¹

Those initial comments also described DTS’s success in obtaining designations from the Texas PUC as an ETC and an ETP in study areas served by large incumbent local exchange carriers and in various “uncertificated” areas in Texas that are not included within any ILEC service territory.¹² Certain rural ILECs, including several of the entities party to the Petition, opposed similar designation of DTS as an ETC and ETP in rural ILEC study areas.¹³ The Petition represents nothing more than what SIA aptly labels “an attempt at a ‘second bite at the apple’” by entities that unsuccessfully opposed the Texas PUC Order.¹⁴

¹⁰ See DTS Comments at 4-5. DTS provides telecommunications services to consumers using a combination of network facilities that it owns and that it procures from other vendors. The DTS-owned network facilities include fixed service transmitter/receiver earth stations and antennas, wiring, mounts, poles, offset brackets, network interface boxes, grounding equipment, lightning rods, towers, and other fixed service equipment, as well as mobile transmitter/receiver earth stations, antennas, and portable handset equipment. The equipment and services that DTS procures from other vendors include network capacity provided vendors such as mobile satellite service (“MSS”) licensee Globalstar USA, LLC. See *id.*

¹¹ See *id.*

¹² See *id.* at 2.

¹³ See *id.* at 2, 7.

¹⁴ SIA Comments at 11.

The Petitioners reiterate an argument that the Texas PUC rejected, and challenge the Texas PUC’s finding that network and transmission facilities owned and operated by DTS – including satellite antennas, poles, brackets, network interface devices (“NIDs”), and other equipment – satisfy the federal and state requirement that ETCs and ETPs must provide supported service in part using their own facilities.¹⁵ The Petitioners and their supporters argue unpersuasively that DTS’s facilities are “customer premises equipment” rather than network facilities, notwithstanding the facts that (i) DTS owns the equipment, (ii) the facilities are located on the network side of the NID,¹⁶ and (iii) the facilities are used in the “transmission or routing”¹⁷ of supported services. The comments filed by the Texas PUC and SIA make clear the flaws in the Petition’s arguments.

The Texas PUC Comments underscore the findings in the Texas PUC Order that DTS’s facilities used “[i]n both fixed and mobile service” satisfy the facilities-based requirement.¹⁸ DTS-owned and operated fixed service equipment is “located on the network side of the network interface device (‘NID’), the demarcation point between the customer’s premises and the telephone network.”¹⁹ This fact alone is enough to support the Texas PUC’s determination that DTS provides service using at least some of the company’s “own facilities.”²⁰ Moreover, as the Texas PUC explains in its comments here, DTS-owned facilities used to provide mobile service, including satellite transceivers, antennas, and vehicle-based equipment, also constitute DTS

¹⁵ See 47 U.S.C. § 214(e)(1)(A); 47 C.F.R. § 54.201(d)(1); Texas PUC Subst. R. 26.417(c)(1)(C); *id.* 26.418(c)(1).

¹⁶ See, e.g., Petition at 10 (declaring that DTS fixed service equipment is “located entirely on the customer side of the customer’s antenna,” without reference to the fact that this equipment is located on the network side of the NID) (emphasis in original); *id.* at 13 (asserting that the Commission “has generally treated” cellular handsets as CPE, without explanation of how the general treatment accorded to cellular handsets applies to mobile satellite handsets).

¹⁷ See 47 C.F.R. § 54.201(e).

¹⁸ Texas PUC Comments at 11.

¹⁹ *Id.*

²⁰ See DTS Comments at 13.

network facilities because “the [FCC] ha[s] excluded mobile radio and transmit earth stations from its definition” of customer premises equipment.²¹ In sum, as SIA clarifies, both fixed and mobile satellite earth stations are physical components of the network “‘used in the transmission or routing’ of communications services.”²² DTS’s facilities thus satisfy the definitions of network facilities set forth in the Communications Act, FCC and PUC rules, and in various FCC decisions interpreting these requirements.²³

As both the Texas PUC and SIA illustrate in their comments, the DTS facilities used to provide fixed service are analogous to an ILEC’s service drop from the pole to the NID, which clearly constitutes part of the provider’s network.²⁴ Such facilities may be located on or near the customer’s home or other structures, but this proximity does nothing to alter the character or function of network facilities used in the transmission or routing of traffic. SIA explains that “[a] communications satellite network requires at least two earth stations . . . and at least one satellite,” further explaining that “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.”²⁵

DTS agrees with SIA’s showing that “[i]n wireline parlance, [DTS’s] satellite earth station is the local loop, providing transmission and routing necessary to get communications to the interconnection point.”²⁶ Furthermore, as SIA explains:

²¹ Texas PUC Comments at 11 (citing 47 C.F.R. Part 36, Appendix to Part 36 – Glossary).

²² SIA Comments at 3 (quoting *Federal-State Joint Board On Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, ¶ 24 (1997) (“*First Report and Order*”)).

²³ *See id.*

²⁴ *See* Texas PUC Comments at 11; SIA Comments at 7; *see also* DTS Comments at 12 (noting that petitioner Big Bend Telephone Company uses satellite facilities similar to DTS’s facilities rather than copper plant or other landline facilities to serve Big Bend customers in remote locations).

²⁵ *See* SIA Comments at 6.

²⁶ *Id.* at 6-7 (emphasis in original).

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. . . . [because] 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.²⁷

That DTS obtains satellite capacity from another licensee party does not render DTS a reseller of that party's services. As the Texas PUC Comments make clear, the Texas PUC's "determination that the DTS service at issue qualifies for ETC designation is fully consistent with federal law and [FCC] rules and orders," and the Petition "offers no grounds to preempt the [] decision."²⁸

II. OPASTCO AND WITA OFFER NO NEW ARGUMENTS OR ANALYSES AND MERELY ECHO THE PETITION'S FAILED ARGUMENTS.

Neither OPASTCO nor WITA manages to do any more than repeat the unsupported assertions made in the Petition itself, and both repeat the same errors and mischaracterizations of FCC rules and decisions. For example, both OPASTCO and WITA begin their comments with the question-begging contention that DTS's facilities are CPE, but they offer no explanation as to why DTS's facilities on the network side of the NID should be so classified.²⁹ Both parties' comments also assume without proof that DTS is merely a reseller of satellite service, and therefore ineligible for high-cost support.³⁰ The analysis supplied to support these assumptions is thin, at best, and amounts to nothing more than a restatement of the flawed analysis put forward in the Petition itself – which, in turn, only rehashed the failed arguments offered in opposition to DTS's application before the Texas PUC.

²⁷ *Id.* at 9.

²⁸ Texas PUC Comments at 10.

²⁹ *See, e.g.*, OPASTCO Comments at 2; WITA Comments at 3.

³⁰ *See, e.g.*, OPASTCO Comments at 3-4; WITA Comments at 2.

The WITA Comments fixate on statements in the Texas PUC record that DTS’s facilities fall on the “customer side of the customer’s antenna.”³¹ Whatever spin WITA and the Petitioners may place on this wordplay, the uncontroverted fact remains that the antenna itself is owned by DTS, not the customer – and that such antennas, as well as DTS-owned earth stations, transceivers, cabling, antennas, grounding equipment, and other physical components, fall on the network side of the NID. The fact that the “rooftop antennas [are] at the customer’s house”³² does not make them CPE, just as the fact that an ILEC’s poles, service drops, or NIDs are located at or affixed to the customer’s premises does not make them CPE.

WITA and OPASTCO both also repeat the Petition’s claim that the Commission’s universal service *Twelfth Report and Order* and *Tribal Lands Reconsideration Order*³³ classified “wireless handsets and associated antennas”³⁴ as CPE ineligible for high-cost support. DTS agrees with the excellent refutation of this claim set forth in the Texas PUC’s and SIA’s Comments.³⁵ Instead of supporting the Petition’s favored interpretation, the cited decisions and other Commission rules and precedents actually undercut the Petition by expressly recognizing that some carrier-owned antennas and handsets are not CPE.³⁶ To be sure, the FCC orders cited

³¹ WITA Comments at 2-3 (citing Petition at 8, 10). This supposed admission is simply a misrepresentation of the record by the Petitioners. As made abundantly clear during the proceedings before the Texas PUC and the FCC, DTS does own and operate facilities on the network side of the NID. The Petitioners’ attempt to move the demarcation point away from the NID and further into the network is unavailing.

³² WITA Comments at 2.

³³ *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscriberhip 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 (2000) (“*Twelfth Report and Order*”); *Federal-State Joint Board on Universal Service, Promoting Deployment and Subscriberhip 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*”).

³⁴ WITA Comments 3.

³⁵ See Texas PUC Comments at 12-15; SIA Comments at 3-7; see also DTS Comments at 13-16.

³⁶ See, e.g., Texas PUC Comments at 13.

in the Petition and in the OPASTCO and WITA comments confirm that the sale of CPE is not regulated and indicate that CPE is generally not eligible for universal service support.³⁷ But DTS's sales of CPE are not at issue here. Rather, this proceeding concerns the network facilities owned by DTS and located on the carrier's side of the network demarcation point. As the Texas PUC appropriately determined and as SIA emphasizes, DTS's facilities are its own network facilities because "the transmission and routing of communications services is the only purpose of a satellite earth station."³⁸

Both OPASTCO and WITA contend that so-called resellers such as DTS should not be encouraged to apply for ETC designation in light of the growth of the fund.³⁹ These straw-man arguments are wholly irrelevant, since DTS is a facilities-based carrier, not a pure reseller. And these commenters' suggestion that the Texas PUC Order jeopardizes "the availability of true universal service"⁴⁰ wrongly assumes that "true universal service" excludes anything other than the legacy wireline technology preferred by the rural ILEC members of OPASTCO and WITA – in defiance of the established principle of technological neutrality.⁴¹ These parties' attempts to conflate the issues raised in the generic rulemaking proceeding with the issues presented by the instant Petition scarcely merit attention.⁴²

³⁷ See *id.* at 14-15.

³⁸ See SIA Comments at 6 (emphasis in original).

³⁹ WITA Comments at 4-5.

⁴⁰ OPASTCO Comments at 4.

⁴¹ See *First Report and Order*, ¶¶ 49, 145 (emphasizing the principle of technological neutrality and concluding that service providers using any technology could qualify as ETCs).

⁴² Cf. *Virginia Cellular LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, 19 FCC Rcd 1563, ¶31 (2003) (designating competitive ETC notwithstanding pendency of generic rulemaking concerning CETC funding issues).

III. THE TEXAS PUC AND SIA CORRECTLY DESCRIBED THE PETITION AS AN IMPROPER ATTEMPT TO APPEAL THE TEXAS PUC ORDER.

DTS concurs with the Texas PUC's conclusion that the Petition offers no grounds for the FCC to rehear the objections unsuccessfully presented by the Petitioners before the Texas PUC or to preempt the Texas PUC Order.⁴³ DTS also concurs with SIA's demonstration that the Petition is procedurally defective. SIA correctly observes that the Petition "cited no provision . . . pursuant [to] which this Commission might preempt the Texas PUC's designation order," and makes clear that parties hoping to challenge the Texas PUC Order "must do so pursuant to provisions of Texas law applicable to appeals of Texas PUC decisions."⁴⁴ DTS agrees with SIA's showing that the Texas PUC decision challenged by Petitioners "has long since become final and is no longer appealable."⁴⁵ The Petition improperly attempts to use the FCC's declaratory ruling process as a backdoor appeal, and the Commission should not hesitate to deny this request for preemption.

⁴³ See Texas PUC Comments at 5 (noting that several of the petitioners had been "[u]nsuccessful in their attempt to defeat DTS's request for ETC designation before the [Texas PUC]").

⁴⁴ SIA Comments at 11.

⁴⁵ *Id.* ("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.").

CONCLUSION

For the foregoing reasons, and the reasons set forth in DTS's initial comments in this proceeding, DTS respectfully submits that the Commission should deny the Petition for Declaratory Ruling and Preemption. The Petition's arguments supply no basis for the Commission to preempt the Texas PUC's decision, revisit the Texas PUC's reasonable findings of fact, or preempt the Texas PUC's correct interpretation of federal and state law.

Respectfully submitted,

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