

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

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

**COMMENTS
OF THE
ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT
OF SMALL TELECOMMUNICATIONS COMPANIES**

I. INTRODUCTION

The Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”) hereby submits these comments in response to the FCC’s Public Notice in the above captioned proceeding.¹ The Public Notice seeks comment on the Petition of Alenco Communications, Inc., Big Bend Telephone Company, Dell Telephone Cooperative, Inc., Riviera Telephone Company, Valley Telephone Cooperative, Inc., Texas Statewide Telephone Cooperative, Inc., and the Texas Telephone Association for a Declaratory Ruling and for Preemption of an Order by the Public Utility Commission of Texas. OPASTCO is a national trade association representing over 520 small incumbent local exchange carriers (ILECs) serving rural areas of the United States. Its members, which include both commercial

¹ *Comment Invited on the Petition of Alenco Communications, Inc., et al. for a Declaratory Ruling and for Preemption of an Order by the Public Utility Commission of Texas*, CC Docket No. 96-45, Public Notice, DA 07-1848 (rel. Apr. 25, 2007).

companies and cooperatives, together serve over 3.5 million customers. All OPASTCO members are rural telephone companies as defined in 47 U.S.C. § 153(37).

II. THE COMMISSION SHOULD GRANT ALENCO'S PETITION

The Commission should grant Alenco's petition and affirm that under its existing rules, customer premises equipment is not within the definition of "facilities" as used in section 214(e) of the Communications Act of 1934, as amended. In section 214(e) of the Act, Congress limited federal high-cost universal service support to a carrier that provides supported services "using its own facilities or a combination of its own facilities and resale of another carrier's services."² Congress' intent was that high-cost support be used to build and maintain networks in rural areas through which service is provided at affordable rates. This intent is mirrored in section 51.201(i) of the Commission's rules: "A state commission shall not designate as an eligible telecommunications carrier a telecommunications carrier that offers the services supported by federal universal service support mechanisms exclusively through the resale of another carrier's services."³ Consequently, a reseller of satellite service, providing the customer only with fixed and mobile handsets and antennas, is outside the class of carriers whom Congress intended to have access to universal service support.

The Commission defined the "facilities requirement" of section 214(e) in its Universal Service First Report and Order and in subsequent orders addressing wireless customer equipment specifically. In the Universal Service First Report and Order, the Commission determined that "facilities" for purposes of section 214(e) means "...any *physical components of the telecommunications network that are used in the transmission*

² 47 U.S.C. §214(e).

³ 47 C.F.R. §54.201(i).

or routing of the services designated for support under Section 254(c)(1).”⁴ The Universal Service First Report and Order further defines equipment used in transmission and routing of services to include “...local loops, switches, transmission systems, and network control systems.”⁵ Moreover, not just any facilities qualify as “transmission and routing.” As explained in the Universal Service First Report and Order: “By encompassing only physical components of the telecommunications network that are used to transmit or route the supported services, this definition, in effect, excludes from eligibility a ‘pure’ reseller that claims to satisfy the facilities requirement by providing its own billing office or some other facility that is not a ‘physical component’ of the network, as defined in this Order.”⁶ Thus, to qualify for high-cost support, the facilities the carrier must own, in whole or in part, are those facilities used to transmit or route the supported services.

As indicated in the petition filed by Alenco, *et. al.*, the Texas order does not find that the applicant owns any facilities used in the transmission or routing of supported services. The order cites only the applicant’s ownership of customer premises equipment, not facilities used in the transmission or routing of supported services. Customer premises equipment was severed from the telecommunications network and deregulated in the *Computer II* orders the mid-1980’s.⁷ Since this time, such equipment has been outside the network and is thus outside the scope of “facilities” as used in section 214(e). Similarly, wireless customer premises equipment has been severed from

⁴ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8861, ¶151 (1997) (Universal Service First Report and Order) (emphasis added).

⁵ *Id.*, n. 380.

⁶ *Id.*, 12 FCC Rcd 8861-8862, ¶152.

⁷ *Amendment of Section 64.702 of the Commission’s Rules and Regulations*, 77 FCC 2d 384 (1980), *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff’d sub nom. Computer and Communications Industry Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983) (Computer II).

the underlying cellular common carrier service.⁸ See also the Universal Service Tribal Lands Order, in which the Commission concludes that wireless handsets and associated antennas are not network transmission and routing facilities for purposes of section 214(e).⁹

The Texas order, by making universal service support available to a reseller having no network facilities, also jeopardizes the sustainability of the High-Cost program and thus jeopardizes the availability of true universal service to high-cost rural areas. The Texas order could potentially double the support paid, as high-cost support now would be available to both the reseller and the carrier owning the resold network. Moreover, using the same rationale as the Texas order, any retailer of satellite or mobile wireless customer premises equipment that also resells satellite or mobile service could qualify for universal service support. Neither result is within the intended scope of section 214(e).

Congress chose for good reason to limit high-cost support to those entities building and maintaining networks in rural areas, and to exclude retailers of customer premise equipment. By granting Alenco's petition and preempting the Texas order, the Commission can avoid undue harm to the High-Cost program. As the Commission recognized in its Universal Service First Report and Order, its interpretation of the term "own facilities" in section 214(e) is consistent with the goals of universal service and any

⁸ *Cellular Communications System*, 86 FCC 2d 469, 497-98 (1981), *recon.* 89 FCC 2d 58, 83), *further modified*, 90 FCC 2d 571 (1982), *appeal dismissed sub nom. United States V. FCC*, No. 82-1526 (D.C. Cir. 1983).

⁹ *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscriberhip in Unserved and Underserved Areas, Including Tribal and Insular Areas, Commonwealth of Northern Mariana Islands, Petitions for Reconsideration filed by Crow Tribal Council, et. al.*, 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) (Universal Service Tribal Lands Order).

contrary interpretation, such as that contained in the Texas order, “would frustrate the goals of the Act and lead to absurd results.”¹⁰

III. CONCLUSION

The Alenco Petition seeks a declaratory ruling on a narrow issue that warrants immediate attention. The declaration sought, clarifying the Commission’s orders and rules and preempting the Texas order, does not impact the larger questions pending before the Commission regarding universal service reform. It is simply a clarification of existing rules. Such an order will terminate the flow of funds currently being paid outside the intended purpose of the High-Cost program, and prevent similar misinterpretations of existing rules. The Commission should therefore grant Alenco’s petition.

¹⁰ Universal Service First Report and Order, 12 FCC Rcd 8866, ¶161.

Respectfully submitted,

**THE ORGANIZATION FOR THE
PROMOTION AND ADVANCEMENT OF
SMALL TELECOMMUNICATIONS COMPANIES**

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May 25, 2007

CERTIFICATE OF SERVICE

I, Brian Ford, hereby certify that a copy of the comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies was sent on this, the 25th day of May, 2007 via electronic mail, to those listed on the attached sheet.

By: /s/ Brian J. Ford
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CC Docket No. 96-45
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