

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	CC Docket No. 96-45
Federal-State Joint Board on Universal Service)	
)	
Iowa Telecommunications and Technology Commission Petition for Waiver)	AAD/USB File No. 98-37
)	

REPLY COMMENTS OF GTE

GTE Service Corporation and its affiliated
domestic telecommunications companies

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March 16, 1998

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REPLY COMMENTS OF GTE

GTE Service Corporation and its affiliated domestic telecommunications companies¹ (collectively, "GTE") respectfully submit these Reply Comments in response to the comments filed in regard to the petition ("Petition") of the Iowa Telecommunications and Technology Commission ("ITTC") for a determination that its Iowa Communications Network ("ICN") is eligible to receive universal service fund ("USF") support in accordance with Section 254 of the Telecommunications Act of

¹ GTE Alaska, Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., Contel of the South, Inc., GTE Hawaiian Tel International Incorporated, GTE Communications Corporation, GTE Mobilnet Incorporated, Contel Cellular Inc. and GTE Airfone Incorporated.

1996.² As set forth below, GTE agrees with those commenters which have persuasively established that the Commission need not and ought not to re-examine its previous rejection of ICN's claim that state networks be treated as eligible for USF support³ and that ICN is, in fact, ineligible for such support.

ARGUMENT

Commenters in this proceeding, with the exception of agencies of the State of Iowa, universally agree that ICN is not eligible for USF support. The reason is simple: ICN is not a telecommunications carrier providing common carrier telecommunications services.⁴ As such, it is ineligible for USF support.

As Bell Atlantic correctly points out (at 2), ITTC's *only* argument for USF support is that ICN offers its limited services (distance learning and telemedicine) to "all of its potential customers for those services." Petition, at 3. This argument fails for two reasons. *First*, neither distance learning nor telemedicine are telecommunications service (or those particularly specified non-telecommunications services--Internet access and inside wire) which the Commission has found eligible for USF support. *Second*, even if ICN were offering telecommunications services or supportable non-

² Pub. L. No. 104-104, 110 Stat. 56 (February 8, 1996), *codified at* 47 U.S.C. § 153 *et seq.* (the "1996 Act"). All references to the "Act" or the "Communications Act" are to the Communications Act of 1934, as amended by the 1996 Act. The Commission requested comment on ITTC's Petition on February 13, 1998. Public Notice, DA 98-294 (released February 13, 1998).

³ *Fourth Order on Reconsideration*, FCC 97-240, 1997 FCC LEXIS 7229 (released December 30, 1997), ¶ 187.

⁴ 47 U.S.C. § 254(h)(1)(B), 47 C.F.R. § 54.502.

telecommunications services (which it is not), ICN is assuredly not offering its services on a common carrier basis.

To the point: ITTC has not established that ICN offers its services on a common carrier basis. Instead, ICN services are limited to "certain authorized users" specifically designated by statute.⁵ Such "authorized users" generally consist of governmental agencies, schools and (for limited purposes) hospitals and clinics.⁶ However, even as to these "authorized users," unless they certify to the ITTC that they will exclusively use the ICN, they are prohibited from such use.⁷

As USTA correctly observes (at 2), the line between common carriage and private carriage turns upon the manner and terms by which a carrier approaches and deals with its customers. The *number* of customers which a particular carrier may serve is irrelevant, if the carrier does not hold itself out to serve the public indiscriminately.⁸ As a matter of Iowa law, ICN does not (and cannot) hold itself out to serve the public or

⁵ Iowa Code, Chapter 8.D.

⁶ Iowa Code, Chapter 8.D, §§ 4-5.

⁷ Iowa Code, Chapter 8.D, § 1 ("An agency which does not certify to the [ITTC] that the agency is a part of or intends to become a part of the network as required by this subsection shall be prohibited from using the network.").

⁸ Consequently, the remark that "ICN serves over 500 entities in 1,600 separate locations" (Comments of Iowa Utilities Board, at 1) is simply beside the point.

even a subset of the general public, but rather only those entities specifically designated by statute.⁹

While ITTC cites *NARUC I*¹⁰ for the proposition that a common carrier need not offer service to *all* members of the general public, as Ameritech (at 2-3) correctly concludes, *NARUC I* actually makes clear that ICN does not provide its services on a common carrier basis.

"What appears to be the essential quasi-public character implicit in the common carrier concept is that the carrier '>undertakes to carry for all people indifferently.' ... [T]he characteristic of holding oneself out to serve indiscriminately appears to be an essential element, if one is to draw a coherent line between common and public carrier. ... The common law requirement of holding oneself out to serve the public indiscriminately draws such a logical and sensible line between the two types of service."¹¹

Simply stated, Iowa law actually prohibits ICN from offering its services to the public. Apart from Chapter 8.D of the Iowa, which specifically designates which entities may take ICN's services, Chapter 23A of the Iowa Code prohibits the provision of telecommunications services to the general public--since the general public receives these services from private enterprises--except for the agencies designated in Chapter

⁹ USTA is also correct in its observation (at 3) that internal rate schedules are not comparable to publicly filed tariffs which contain all conditions of service and by which true common carriers offer their services indiscriminately to the public. Indeed, ICN's use of internal rate schedules C which are attributes of any private entity offering limited service to limited customers C actually undermine ICN's common carriage claim.

¹⁰ *National Ass'n of Regulatory Utility Commissioners v. F.C.C.*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*").

¹¹ *Id.*, at 641-42.

8.D.¹² Such statutory limitations on ICN's provision of services can hardly be said to be consistent with common carriage.

As the National Telephone Cooperative Association ("NTCA") correctly points out (at 3-4), ITTC's Petition is little more than a further request for reconsideration.

However, even as a request for further reconsideration, ITTC has presented no new facts or arguments which have not already been considered and rejected by the Commission. Specifically, ITTC has already argued on reconsideration that ICN should be eligible for USF support¹³ and this argument was not accepted by the Commission in the *Fourth Order on Reconsideration*. The instant Petition adds nothing new for further reconsideration of the Commission's prior, and very recent, determination in this respect.

Apart from adding nothing new with respect to the Commission's determination in the *Fourth Report and Order*, there appears to be another purpose underlying the Petition. Specifically, ICN experiences an annual shortfall in revenues of approximately \$2.4 million and an annual shortfall on interest and principal payments on its capital investment of approximately \$12.5 million, both of which are paid for by an annual appropriation from the Iowa General Fund. Moreover, additions to the network, which average approximately \$23 million per year, are paid for by an annual appropriation

¹² See Comments of the Rural Iowa Independent Telephone Association ("RIITA"), at 3.

¹³ *Fourth Order on Reconsideration*, ¶ 177.

from the Rebuild Iowa Infrastructure Fund. All in all, Iowa taxpayers support ICN to the tune of almost \$39 million annually.¹⁴

By its Petition, ITTC apparently believes that it has found an avenue to provide relief for Iowa taxpayers at the expense of the federal universal service fund. Indeed, should the Commission find ICN eligible for USF funding, ITTC intends to have users of the network proffer bills *not for the expenses which they actually incur* but rather based upon ICN's purported overall cost structure. This is clear from a February 25, 1998 memorandum to all Iowa school district superintendents from the director of the Iowa Department of Education, which stated, in pertinent part, that:

"As you recall, in an earlier memo this month I discussed listing the ICN video rate on the 471 application form as the actual non-subsidized rate instead of the \$5.00 per hour figure. Using the non-subsidized rate will help the State of Iowa recoup some of its ICN operating costs. I said that I would provide you with that cost figure once it was available. The amount that has been provided by the ICN is **\$74.82** per hour. ... If your school is at the 50% discount level, by listing the ICN hourly cost as **\$74.82**, your actual ICN hourly cost that you will be charged from the ICN will be \$2.50 instead of the \$5.00 pre-USF rate. In other words, both your district and the ICN benefit. ..."15

At the very least, the federal USF support would not be competitively neutral if it were extended to a state network available only to very limited subscribers.¹⁶ Just as

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- ¹⁴ Comments of the Iowa Telecommunications Association, at 2, *quoting* statistics set forth on ICN's official webpage, at www.icn.state.ia.us.
- ¹⁵ Memorandum from Ted Stilwill, Director, Department of Education, State of Iowa, to School District Superintendents, February 25, 1998, at 1 (emphasis in the original).
- ¹⁶ It should be noted that once an authorized user of ICN certified use of the network, it must use the network for all of its telecommunications needs. Iowa Code Chapter 8.D, § 9.2a.

likely, it would be subject to the type of abuse reflected in the above-quoted memorandum.

CONCLUSION

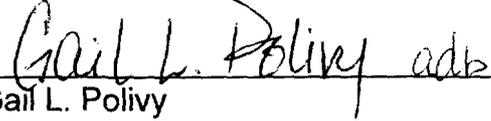
ITTC's Petition presents no new facts which would warrant the Commission to reconsider its recent determination that state networks are ineligible for USF support. ITTC's only argument fails because ICN neither provides telecommunications services nor does so on a common carrier basis. Moreover, it would appear that the purpose of the Petition is not to enable the Commission to correct any error of fact or law, but to allow ITTC to recoup from the federal fund ICN costs which are properly borne by the State of Iowa.

Respectfully submitted,

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Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Reply Comments of GTE" have been mailed by first class United States mail, postage prepaid, on March 16, 1998 to all parties of record.

A handwritten signature in black ink, appearing to read "Ann D. Berkowitz", written over a horizontal line.

Ann D. Berkowitz