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Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

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| In the Matter of | ) | |
| | ) | CC Docket No. 96-45 |
| Iowa Telecommunications and | ) | AAD/USB File No. 98-37 |
| Technology Commission | ) | |
| Petition for Waiver | ) | |

To: The Commission

# REPLY COMMENTS OF THE IOWA TELECOMMUNICATIONS AND TECHNOLOGY COMMISSION

Kenneth D. Salmon
J.G. Harrington

Its Attorneys

Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036

(202) 776-2000

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## EXECUTIVE SUMMARY

The Commission should issue an order determining that the Iowa Telecommunications and Technology Commission, operating the Iowa Communications Network (collectively, the "ICN") is an eligible carrier for purposes of universal service support for schools, libraries and rural health care institutions. Grant of ICN's request for such a determination would serve the public interest and would be consistent with ICN's status as a telecommunications carrier. Moreover, there are no procedural bars to granting the request.

First, the public interest would be served by a determination that ICN is an eligible carrier. Such a determination would ensure that Iowa schools, libraries and rural health care institutions would have access to advanced services that otherwise would not be available. Because the ICN is operated partly through resale and partly through ICN-owned facilities, determining that ICN is a telecommunications carrier would avoid the possibility that some schools would receive support and others would not merely because of how they obtained service from the ICN. In addition, determining that the ICN is an eligible carrier will increase the choices available to Iowa schools, libraries and health care institutions, which should reduce costs. No commenter seriously disputes these public interest benefits.

Second, ICN is a telecommunications carrier. The Commission should give great deference to the determination of the Iowa Utilities Board, the expert agency in Iowa, that ICN is a telecommunications carrier and should disregard the inaccurate factual and legal characterizations of commenters opposing ICN's request. ICN meets the criteria for being a telecommunications carrier and a common carrier because it holds itself out indifferently to all potential customers for its distance learning and telemedicine services and because it offers its services on standard terms and conditions. No entity, public or private, is required to use or continue to use ICN's services. ICN also does not have the characteristics of a private carrier because it does not choose its customers individually and does not negotiate separate terms with each customer.

Finally, ICN's request was procedurally proper. ICN has not requested any change in the Commission's policies governing "state telecommunications networks," but only a determination that ICN does not have the characteristics of such networks, as defined in the *Fourth Reconsideration Order*. Consequently, ICN's request is neither a petition for reconsideration nor a waiver request. Even if the Commission were to determine that a waiver is necessary, ICN would meet the criteria for a waiver because of the public interest benefits of the determination ICN has requested and because ICN does not share the most important characteristics that the Commission relied upon in reaching its general conclusions regarding "state telecommunications networks."

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To: The Commission

**REPLY COMMENTS OF THE**
**IOWA TELECOMMUNICATIONS AND TECHNOLOGY COMMISSION**

The Iowa Telecommunications and Technology Commission, operating the Iowa Communications Network (collectively, the "ICN"), by its attorneys, hereby submits its reply comments in the above-referenced proceeding.[1/] As shown below, the objections of competing carriers to the Request for a determination that it is a telecommunications carrier (the "Request") are without merit and the Request should be granted forthwith.

The comments opposing the Request inaccurately characterize ICN's services and customer base, misstate the legal basis for determining whether an entity is a telecommunications carrier and wholly ignore the critical public interest issues raised in this proceeding. When the Request is evaluated in light of the relevant facts and legal criteria and in light of the public interest benefits that will result from a determination that ICN is a telecommunications carrier, it is evident that the opposing comments simply reflect the commenters' commercial interests. The Commission should follow the lead of the only neutral expert commenter in these proceedings, the Iowa Utilities Board (the "IUB"), and

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[1/] *See Public Notice,* "Iowa Telecommunications and Technology Commission Seeks Determination that the Iowa Communications Network Is a Provider of Telecommunications Services to Schools, Libraries and Rural Health Care Providers," CC Docket No. 96-45, AAD/USB File No. 98-37, rel. Feb. 13, 1998 (the *"Public Notice"*).

neutral expert commenter in these proceedings, the Iowa Utilities Board (the "IUB"), and determine that ICN is a telecommunications carrier for the purposes of the universal service rules. As the IUB urges, the Commission also should take expedited action in this proceeding.

## I. The Public Interest Will Be Served by Granting ICN's Request.

The fundamental basis for the Commission's authority is the need to serve the public interest. While public interest determinations often require the Commission to balance competing priorities and objectives of the Communications Act, that is not the case here. The public interest in ensuring the schools, libraries and rural health care facilities have access to advanced services — an objective clearly delineated in Section 254(h) — will be advanced by granting the Request. The public interest benefits of a grant are particularly evident because no party opposing the Request has made more than a token effort to dispute ICN's public interest showing.

As ICN has demonstrated, the public interest will be served by granting the Request because doing so will ensure that all Iowa schools, libraries and rural health care facilities have access to the advanced services contemplated by Section 254(h) on equitable terms and conditions. ICN was created to provide high-speed, high-quality telecommunications services across the State of Iowa because those services were not being made available by incumbent

local exchange carriers. For that matter, other providers are not making these services available today.[2/] In other words, without ICN, these services might not be available at all.

Grant of the Request also will ensure that Iowa schools, libraries and rural health care facilities are treated equitably. As described in the Request, if ICN is not determined to be a telecommunications carrier, some of ICN's school, library and rural health care provider customers will be eligible for universal service funding and some will not.[3/] Such a result would be inconsistent with the Commission's intent to make advanced services available on an equitable basis to schools, libraries and rural health care institutions.[4/] It would be particularly inequitable because many of the schools that use ICN's services made the decision to purchase those services long before the *Universal Service Order* was adopted and thus would be penalized on a going-forward basis for decisions made in good faith before the

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2/ It is noteworthy that none of the commenters even suggests that it is now providing such services in Iowa. Even the Rural Iowa Independent Telephone Association ("RIITA"), which claims that its members are "at the technological leading edge," does not indicate that they provide any services that can substitute for ICN's broadband telecommunications services. *See* RIITA Comments at 2. In practice, most rural LECs in Iowa do not have even the ability to provide guaranteed direct connections at the T-1 level. One RIITA member restricts its customers to connecting their lines to the Internet for no more than one half hour at a time.

3/ Request at 5. The differences in eligibility arise because some ICN services are offered over resold facilities and some are offered over ICN's own facilities. Regardless of the outcome of this proceeding, services offered over resold facilities will be eligible for discounts because the underlying carriers can receive the support payments. Services other than Internet access provided over ICN's own facilities, however, will be eligible only if the Commission grants the Request.

4/ *See* Federal-State Joint Board on Universal Service. *Report and Order*, 12 FCC Rcd 8776, 9083-84 (1997) ("*Universal Service Order*").

rules were adopted. If, however, the Commission grants the Request, these issues will not arise.

In addition, grant of the Request also will ensure that schools, libraries and rural health care facilities have access to the most cost-effective services, as contemplated by the Commission's universal service rules. If ICN is determined to be a telecommunications carrier, schools, libraries and rural health care facilities will have one additional option when they are choosing how to meet their telecommunications needs. This will increase competition for the provision of advanced services, lowering costs not only for schools, libraries and rural health care institutions, but also for the universal service funding mechanism itself.[5/]

Taken together, these facts provide a substantial public interest basis for granting the Request. Indeed, the commenters opposing the Request make no serious attempt to dispute the public interest benefits of granting the Request. Thus, the Commission must conclude that grant of the Request would serve the public interest.

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5/ National Telephone Cooperative Association ("NTCA") suggestion that granting the Request will somehow reduce competition is erroneous. NTCA Comments at 9. First, NTCA does not demonstrate that the State Legislature's general statement that joint use of communications facilities is desirable has had any impact on schools, libraries and rural health care facilities or, in fact, has any legal effect. More important, because the Commission's rules require competitive bidding (and take precedence over any state rules), ICN will have an advantage over other bidders only if it offers a lower price or better service. As a practical matter, the facts suggest that ICN does not have any special advantage. For instance, many school districts obtain Internet access service from vendors other than ICN or do not purchase it at all.

## II. ICN Is a Telecommunications Carrier Providing Telecommunications Services.

The parties opposing the Request focus their arguments on whether ICN is a telecommunications carrier. To make their arguments against the Request, the opposing commenters rely on mischaracterizations of ICN's services and customer relationships and on inaccurate readings of the relevant legal authority. The Commission should disregard these claims. Rather, the Commission should give deference to the Iowa Utilities Board's determination, as evidenced by its comments, that ICN is a telecommunications carrier.

### A. The Commission Should Afford Considerable Deference to the Iowa Utilities Board's Conclusion That ICN Is a Common Carrier.

The Iowa Utilities Board, the agency responsible for regulating telecommunications carriers in Iowa, was the only non-carrier party to file formal comments with the Commission in this proceeding. The IUB supports the Request. Based on its knowledge of ICN and its expertise as the relevant State regulatory agency, the IUB's conclusion that ICN is a common carrier is entitled to considerable deference by the Commission.

The IUB recognizes that ICN is a common carrier. Following the analysis described in the Request, in case law and in the Commission's own orders, the IUB notes that ICN "holds itself out to all authorized end users," that "[t]he rates for services are from an established rate schedule and [that] the ICN does not negotiate individually with any of its

customers."[6] On the basis of these facts and ICN's large customer base, the IUB concludes that "[t]he ICN should be considered a common carrier instead of a private carrier."[7]

The IUB's conclusion is entitled to considerable deference from the Commission. State commissions routinely determine whether entities should be certificated to provide intrastate services as carriers and, as a consequence, have developed significant expertise in deciding whether a service is a common carrier service or not. For that matter, the States generally are empowered to determine whether a carrier is an eligible carrier under the universal service regime adopted in the 1996 Act.[8] Here, because the services described in the Request generally are intrastate in nature, they are particularly within the IUB's domain. Thus, it is appropriate for the Commission to recognize the IUB's expertise and to afford considerable deference to the IUB's views in this matter.

### B. The Comments Do Not Provide Any Basis for Determining that ICN Is Not a Common Carrier.

The carriers that filed comments in this proceeding make a variety of claims, both factual and legal, to oppose the Request. These claims depend on mischaracterizations of both fact and law. In many cases, the carriers' arguments are inconsistent with the regulatory treatment of their own services. Consequently, it is evident that ICN is, in fact, a

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6/ IUB Comments at 1.

7/ *Id.*

8/ *See Universal Service Order,* 12 FCC Rcd at 8851-52 (describing State authority under Section 214(e)). While this determination is not being made under Section 214(e), the States' authority under that section is illustrative of their broader role in determining whether an entity is a carrier.

common carrier and a telecommunications carrier within the ordinary meaning of those terms.

### 1. The Opposing Commenters Mischaracterize ICN's Operations and the State Law Governing ICN.

Initially, the opposing comments demonstrate a fundamental misunderstanding of both ICN and the Request. The Commission should not give any weight to these plainly erroneous claims.

Bell Atlantic, for instance, argues that ICN's distance learning and telemedicine services should not be eligible for support because they might be information services.[9/] This is incorrect, because both of these services are pure transmission services, and provide no information services functionality.[10/]

The Iowa Telecommunications Association ("ITA") and RIITA also make arguments based on their incorrect interpretations of Iowa law. While the Commission need not consider these state law arguments, which are matters for the state courts, even a brief analysis shows that ITA and RIITA have misinterpreted the underlying statutory provisions.[11/]

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9/ Bell Atlantic Comments at 2.

10/ Bell Atlantic concedes that, given these facts, the services would constitute "telecommunications." *Id.* at 2-3.

11/ *See e.g. Keystone Cable-Vision Corporation*, 67 F.C.C. 2d 348, 350 (1978) (deference to local authorities on matters of local law, *Cable Television of Rochester, Inc.*, 47 F.C.C.2d 10, 14 (1974) (state law to be revised by state authorities); *Report, Order and Policy Statement*, 102 F.C.C.2d, 1179, 1194 (declining to consider matters properly before other fora).

Initially, ITA and RIITA suggest that ICN is not permitted to serve all of the customers identified in the Request or to provide all of the services that it actually provides.[12/] This plainly is incorrect, because Chapter 8D of the Iowa Code permits the ICN to serve all of the customers identified in the Request.[13/] ITA also claims that the entities that use the ICN are required to do so.[14/] That also is not the case. ITA not only neglects to indicate that only a few agencies are covered by this provision but also fails to recognize that the statute contains an opt out provision for those entities that have chosen to use the ICN and does not mention the portion of the relevant statute that allows entities to choose whether or not to use the ICN in the first place.[15/] Indeed, the few agencies subject to this provision can terminate their service from the ICN on various grounds, including (1) that the user can obtain the services at a lower cost from another provider; (2) that the user has a contract with a different provider in place; and (3) that the contract with ICN does not cover all of the user's needs. In other words, the statute provides that an ICN user — without any

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12/ ITA Comments at 2; RIITA Comments at 3.

13/ *See, e.g.*, IOWA CODE §§ 8D.2(4), (5); 8D.13(2), (16) (describing eligible entities for service, including all educational entities and health care facilities staffed by physicians).

14/ ITA cites Section 8D.9(2)(a) for the proposition that certain agencies are required to use the ICN absent a waiver. ITA Comments at 2. The agencies covered by this provision are higher education institutions and area education agencies. This provision does not affect schools, libraries and telemedicine.

15/ *See* IOWA CODE § 8D.9(1) (provisions for choosing to use ICN); .2 (provisions for opting out of the ICN).

penalty — can use another provider whenever doing so is advantageous, which are better terms than are available in many commercial common carrier arrangements.[16/]

### 2. Under Longstanding Precedent and Practice, ICN Must Be Deemed to Be a Common Carrier.

The heart of the opposing commenters' argument against the Request is that ICN should not be deemed a common carrier because it either does not hold itself out to a broad enough class of customers or does not offer its services under generally available terms and conditions.[17/] To adopt this view, the Commission would have to reject decades of precedent concerning when an entity is a common carrier and would be forced to conclude that many existing services offered by common carriers and telecommunications carriers no longer fall within the definition of telecommunications service. The truth is that ICN's offerings to schools, libraries and health care institutions fall squarely within the definitions of both common carrier and telecommunications services and that no such contortions are necessary or appropriate to reach a decision in this case.

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16/ While Section 8D.9(2) is characterized as a "waiver" provision by the statute, users seeking to opt out of ICN are not subjected to any meaningful scrutiny when they seek to obtain services elsewhere. Upon appropriate application, waivers under Section 8D.9(2) have been granted to all applicants.

17/ *See, e.g.*, Ameritech Comments at 2-3; RIITA Comments at 3-4.

### a. ICN Holds Itself Out Indifferently.

To be a common carrier, an entity must hold itself out indifferently to the potential customers for its services.[18/] There is no dispute that the ICN will serve all of its authorized customers. The only dispute is over whether those customers constitute a broad enough class of customers for ICN to be a common carrier. As shown below, ICN plainly meets that standard.

As a threshold matter, it has never been the case that an entity must serve the entire public before it can be a carrier. As the D.C. Circuit recognized in *NARUC I,* "[t]he cases make clear . . . that common carriers need not serve the whole public[.]"[19/] Indeed, an entity "may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population. And business may be turned away either because it is not of the type normally accepted or because the carrier's capacity has been exhausted."[20/] Critically, *NARUC I* establishes the important principal that a carrier may choose to accept only certain types of business so long as it

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18/ To the extent that some of the commenters are suggesting that the term "telecommunications carrier" requires an entity to serve a broader class of customers than a common carrier, the Commission should reject that approach. First, the Commission already has determined that all common carriers are telecommunications carriers. *See Universal Service Order,* 12 FCC Rcd at 9177-78. Second, it is evident from the language of the definition of "telecommunications carrier" that Congress intended, at the very least, for all common carriers to fall within that definition. 47 U.S.C. § 153(44).

19/ *Nat. Ass'n of Regulatory Utility Comm'rs v. F.C.C.,* 525 F.2d 630, 642 (D.C. Cir. 1976) (*"NARUC I"*), *citing Terminal Taxicab Co. v. Kutz,* 241 U.S. 252, 255 (1927).

20/ *NARUC I*, 525 F.2d at 641.

accepts those types of business indifferently.[21/] The Commission, likewise, has recognized that a carrier may limit the nature of its business. For instance, the *Universal Service Order* noted that a "carrier's carrier," which served only the very limited class of other carrier and not end users, still would be a telecommunications carrier for universal service purposes.[22/] Other regulators have determined that an entity is a carrier even when it serves a highly restricted clientele, so long as that clientele is served indifferently.[23/]

Against this background, the commenters opposing the Request argue that ICN does not serve a sufficiently broad range of "the public" for its service to constitute common carriage. Bell Atlantic, for instance, argues that ICN must "hold itself out to all potential customers of its *transport* services" before qualifying as a carrier.[24/] The problem with this argument is that it ignores the nature of ICN's service offerings, the case law described above and the longstanding practices of carriers, including all of the opposing commenters and their member companies.

First, ICN does offer services to the entire class of potential users. As noted in the Request, ICN's distance learning services are offered to all public and private educational institutions across the state and even are available to parents who engage in home

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21/ *Id.* ("business may be turned away . . . because it is not of the type normally accepted").

22/ *Universal Service Order,* 12 FCC Rcd at 9178.

23/ *See, e.g., Mobilefone of Northeastern Pennsylvania, Inc. v. The Professional Service Bureau of Luzerne County, Inc.*, 54 Pa. P.U.C. 161 (1980) (paging service offered only to physicians in small region of a state constituted a public utility service).

24/ Bell Atlantic Comments at 3 (emphasis in original). *See also* NTCA Comments at 6-8 (ICN does not serve a sufficiently broad class of customers).

schooling.[25] Similarly, ICN's telemedicine services effectively are available to any facility in Iowa where a physician practices medicine.[26] While ICN's power to offer these services is defined by statute, the list of statutorily-authorized users of these services was crafted to include *all* potential users.

Second, case law does not require an entity to make a service available to every single person or business before that entity becomes a carrier. *NARUC I* specifically holds that a common carrier may determine the "type" of business "normally accepted" without forfeiting its common carrier status.[27] Indeed, attempts to avoid common carrier status by limiting eligible users to a specified class of customer, such as doctors, historically do not succeed.[28]

Third, as a practical matter, there are many common carrier services that are available only to specific types of customers, even when other customers could use those services. Common carrier tariffs routinely specify the eligible customers for a particular service and carriers equally routinely refuse to make those services available to ineligible customers who ask for them. The best known example of such eligibility requirements, of course, is that business customers may not purchase residential service, even though residential service is functionally equivalent to business service. Similarly, incumbent LECs

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25/ Request at 3.

26/ *Id.*

27/ *NARUC I,* 525 F.2d at 641.

28/ *See Mobilefone,* 54 Pa. P.U.C. at 164 (rejecting claim that an entity that served only physicians was not a public utility because "the service was available to any physicians within the area who request the service").

generally restrict the availability of unbundled elements to other carriers, even though large end users could use these services for their own purposes.[29/] Thus, Bell Atlantic's claim that ICN's failure to sell "transport" to entities that have no use for distance learning and telemedicine services disqualifies ICN from carrier status is entirely spurious.[30/]

In the end, the limitations on ICN's services are no different than the self-imposed limitations of other carriers. Whether a carrier chooses to serve only business customers, or only physicians, or only a small town in rural Iowa is irrelevant. What is relevant is whether the chosen class of customers is served indifferently. ICN, no less than the members of RIITA, ITA or USTA, meets that requirement.

**b. ICN Offers Its Services Under Generally Available Terms and Conditions.**

The second test for whether an entity is offering a service on a common carrier basis is whether that service is offered on generally available terms and conditions. While RIITA

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29/ Thus, contrary to NTCA's claim, carriers routinely use "status" to determine whether to serve a customer or not. NTCA Comments at 8. It should be noted, however, that in practice ICN offers its telemedicine and distance learning services to all of the potential customers of those services, so it does not distinguish customers for those services on the basis of "status." Neither NTCA nor any other commenter identified a single customer that could use ICN's services but was ineligible to do so.

30/ Bell Atlantic also failed to provide any basis for its claim that distance learning and telemedicine services are identical to generic "transport" services. *See* Bell Atlantic Comments at 2-3. In practice, these services have technical requirements that differ from many transport services. It also should be noted that Bell Atlantic, along with other carriers, long has sought to prevent carriers from substituting "transport" services, such as access and local call termination, for each other, even though those services are functionally identical.

asserts that the Commission should find that ICN does not meet this standard, there is no basis in fact or law for that assertion.

The Request demonstrates that ICN offers its services on standard terms and conditions. As the Request describes, ICN has standard rates for its services, and it does not negotiate rates with its customers.[31/] ICN does not deviate from this policy. All information about these rates also is publicly available.

RIITA argues that, nevertheless, ICN may not be offering its services on generally available terms and conditions because it enters into separate agreements with each of its customers.[32/] RIITA apparently believes that the existence of separate agreements implies negotiated terms and conditions and that all carriers must tariff their rates. Neither premise is correct.

First, RIITA provides no evidence that ICN negotiates rates or other terms with any of its customers. As shown above and in the Request, ICN does not engage in any such negotiation. Therefore, the Commission can conclude only that ICN's rates and other terms are generally available.

Second, there are many examples of agreements between telecommunications carriers and their customers. Wireless providers, for instance, routinely have separate customer agreements for each customer. It also is common practice for long distance companies to

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31/ Request at 3.

32/ RIITA Comments at 4.

enter into contracts with their larger customers. Thus, the use of separate agreements says nothing about whether an entity is a carrier.

Similarly, there is no requirement that an entity file a tariff to be a carrier. Again, wireless providers generally do not file tariffs (and even in the states where tariffs are required, the tariffs do not list prices). Equally important, the 1996 Act explicitly permitted the Commission to forbear from applying tariffing requirements to common carriers, so it is evident that there is no requirement to file tariffs to become a common carrier under federal law.[33/]

### 3. ICN Does Not Have the Characteristics of a Private Carrier.

Some of the commenters argue that ICN must be a private carrier.[34/] These commenters are right to suggest that private carriage is the only alternative to common carriage in this proceeding, but they fail to recognize that it is impossible to classify ICN as a private carrier.

Private carriers have two key characteristics. First, they choose their specific customers. Second, they negotiate individual agreements with those customers, with customer-specific terms. ICN meets neither of those characteristics.

As shown above, ICN does not pick its customers. Any entity that falls within several broad statutory categories may use ICN's services. ICN, like any other common

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33/ *See* 47 U.S.C. § 160 (allowing Commission to forbear from tariffing and other requirements if a specified showing is made).

34/ *See, e.g.*, ITA Comments at 2; Ameritech Comments at 3; USTA Comments at 3.

carrier, has no power to refuse to provide service to a potential customer that meets the requirements for a particular service. A private carrier, on the other hand, could refuse service to anyone for any reason.

In addition, ICN simply does not negotiate its contracts. Potential customers may take ICN's services if they agree to the standard terms and conditions applicable to all customers for a particular service. If those terms and conditions, including the price of the service, are unsatisfactory, the customer may choose to go elsewhere or not to take the service, but ICN will not alter its standard contract. In other words, there is no individual negotiation.

While ITA argues that ICN appears to be a "private network" because it loses money, that is not one of the criteria used to determine whether an entity is a private or common carrier.[35/] Many carriers, including cellular providers and long distance companies, lose money during their start-up phases (and later) and require capital infusions. In this regard, it also is important to recognize that the definition of "telecommunications service" does not require the service to be sold on a for-profit basis, but merely "for a fee."[36/] Many

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35/ ITA Comments at 2. To the extent that RIITA is arguing that the subsidy payments that would be made to ICN if the Request is granted would provide improper support for ICN's infrastructure costs, this also is incorrect ICN's charges to its customers are based on the operating costs of the network, not on the capital costs. Even if this argument were factually correct, there would be nothing improper about recovering capital costs through charges for service, which, after all, is the consistent practice of all commercial common carriers and has been enshrined as a reasonable practice in ratemaking law for more than a century. *See FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). Nevertheless, and as described in the Request, ICN does not seek reimbursement for its capital costs. Request at 4.

36/ 47 U.S.C. § 153(46).

telecommunications carriers, such as rural telephone cooperatives, do not operate on a for-profit basis. Thus, the profits or losses of an entity, or even its intention to make profits, are irrelevant to the statutory determination of whether the entity is providing telecommunications services and is a telecommunications carrier.

## III. The ICN Request Was Procedurally Proper.

NTCA also argues that the ICN has not met supposed procedural requirements in this proceeding. It claims that Request is an untimely petition for reconsideration or as a waiver request.[37/] These characterizations are inaccurate and, in any event, do not prevent the Commission from granting the Request.

As the Request describes, in the *Fourth Reconsideration Order,* the Commission made a determination regarding the eligibility of certain State entities, which it termed "state telecommunications networks," for universal service funding.[38/] The determination that they were not eligible was based on certain specific characteristics of those entities. Most important, the Commission noted that these entities generally operate via resale of another carrier's services, that state (and sometimes local) agencies are required to obtain their telecommunications services through these entities, and that these entities serve only government agencies. The Commission concluded that these characteristics were inconsistent with classifying these entities as common carriers. The Commission also concluded that

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37/ *See* NTCA Comments at 3-4.

38/ Federal-State Joint Board on Universal Service, *Fourth Order on Reconsideration*, ((Docket No. 96-45, FCC No. 97-420 at ¶187 (rel. Dec. 30, 1997)).

there would be no adverse effects on schools, libraries and rural health care providers because the services were provided via resale and the underlying facilities-based carriers would be eligible for universal service support.[39/]

ICN does not dispute those conclusions. Rather, ICN seeks a determination that it does not share the salient characteristics of the entities the Commission calls "state telecommunications networks" and that, therefore, ICN is a telecommunications carrier. As shown throughout these reply comments, that is the case. ICN differs in many significant ways from the state telecommunications networks that were the subject of the *Fourth Reconsideration Order:* It is facilities-based, use of the ICN network is not mandatory for any customer and, most important, ICN's services are available to a wide range of public and private entities.

In that context, it is evident that the Request is not a petition for reconsideration, because it does not seek any change in the general rule adopted by the Commission. The Request also is not a waiver request, because ICN seeks a determination that the rule does not apply, rather than a finding that the rule should not be applied in this instance.[40/] Rather,

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39/ *Id.* at ¶¶ 183-89.

40/ To the extent that the Commission were to determine that a waiver is required in this instance, however, ICN has more than met the standards for a waiver. *See WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S., 1027 (1972) *waiver is appropriate where particular facts would make strict compliance inconsistent with the public interest. ICN has shown that there would significant public interest harms to applying the rule to ICN's services and that the underlying concerns that led to adoption of the rule do not apply in ICN's case. Notably, the Commission's concerns regarding coercive requirements to use state telecommunications networks plainly do not apply to ICN, and ICN's services are available to both public and private schools, libraries and health care facilities.

the Request is more analogous to a request for a declaratory ruling, to wit, that ICN meets the requirements for being treated as a telecommunications carrier. ICN has more than met the burden of demonstrating that such a ruling is justified, and the opponents of the Request have done nothing to cast any doubt on ICN's case.

## IV. Conclusion

The Commission should grant the Request. The standards for determining whether an entity is a common carrier are clear and well-established, and ICN meets those standards easily. ICN's status has been confirmed by the comments of the Iowa Utilities Board, the expert agency that regulates such matters in Iowa, and none of the claims of any of the other commenters can shake that conclusion.

The Commission also should act expeditiously. As ICN described in its Request, quick action is necessary to prevent Iowa schools and libraries from missing the initial 75-day window for obtaining funding for telecommunications service. Prompt Commission action will reduce the potential for confusion and for inequitable treatment of Iowa schools and libraries in the funding process.

For all these reasons, the Iowa Telecommunications and Technology Commission respectfully requests that the Commission act in accordance with these reply comments.

Respectfully submitted,

IOWA TELECOMMUNICATIONS AND
TECHNOLOGY COMMISSION

By: _____
Kenneth D. Salmon
J.G. Harrington

Its Attorneys

Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036

(202) 776-2000

March 16, 1998

## CERTIFICATE OF SERVICE

I, Timothy Powderly, a legal assistant at Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 16th day of March, 1998, a copy of the foregoing "Reply Comments of Iowa Telecommunications and Technology Commission" was sent by first-class mail, postage prepaid, to the following:

Michael S. Pabian
Counsel for Ameritech
Room 4H82
2000 West Ameritech Center Drive
Hoffman Estates, Illinois, 60196

Lawrence W. Katz
Counsel for Bell Atlantic
1320 North Court House Road, 8th Floor
Arlington, Virginia, 22201

Diane Munns
Iowa Utilities Board
350 Maple Street
Des Moines, Iowa, 50319

William H. Smith
Iowa Utilities Board
350 Maple Street
Des Moines, Iowa, 50319

L. Marie Guillory
Counsel for National Telephone Cooperative Association
2626 Pennsylvania Avenue, NW
Washington, D.C., 20037

Tanisha L. Lyon
Assistant Attorney General
Public Utilities Section
180 E. Broad Street
Columbus, Ohio, 43215

Michael R. May
Counsel for Rural Iowa Independent Telephone Association
Suite 535 -- Two Ruan Center
601 Locust Street
Des Moines, Iowa, 50309

Ricardo Guzman
Texas Office of Public Utility Counsel
1701 North Congress Avenue, 9-180
Austin, Texas, 78711-2397

Mary McDermott
Linda I. Kent
United States Telephone Association
1401 H Street, NW, Suite 600
Washington, D.C., 20005

*William E. Kennard, Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

*Harold Furchtgott-Roth, Commissioner
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

*Michael Powell, Commissioner
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

*Gloria Tristani, Commissioner
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

*Susan Ness, Commissioner
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

*Magalie Roman Salas
Secretary, Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554

*Sheryl Todd
Universal Service Branch, Accounting and Audits Division
Federal Communications Commission
2100 M Street, NW 20554