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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Ex parte Notice

April 21, 1998

EX PARTE OR LATE FILED

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
1919 M Street, NW  
Room 222  
Washington, DC 20554

**RE: CC Docket No. 96-45  
AAD/USB File No. 98-37**

Dear Ms. Salas:

The attached paper is being distributed today to respond to an April 9, 1998 ex parte presentation by the Iowa Communications Network (ICN) in the above referenced docket. Contrary to the claims of ICN, based on the facts and case law, ICN is not a common carrier and, as a matter of law, cannot be defined as a telecommunications carrier entitled to universal service support under the schools, libraries and rural health care programs.

The paper, prepared by William F. Maher, Jr., Esq., at the request of the United States Telephone Association (USTA) refutes the list of cases and general legal precepts provided by ICN. Indeed, the examples are either easily distinguished or actually support the FCC's determination in the Fourth Order on Reconsideration.

ICN does not satisfy the definition of telecommunications carrier under the 1996 Act and does not satisfy the standards developed by the FCC and the D.C. Circuit for determining common carrier status. ICN does not offer service directly to the public. ICN does not serve customers indifferently. The attached paper analyzes the Iowa statute which created ICN and the relevant case law. As USTA stated in its comments and reply comments, ICN's request to be defined as a telecommunications carrier must be denied.

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In accordance with Section 1.1206(a)(1) of the Commission's rules, two copies of this ex parte notice are being submitted to the office of the FCC today. Please include it in the public record of this proceeding.

Respectfully submitted

A handwritten signature in black ink that reads "Linda Kent". The signature is written in a cursive, flowing style.

Linda Kent  
Associate General Counsel

Attachment

cc: Chairman, William E. Kennard  
Susan Ness, Commissioner  
Harold Furchtgott-Roth, Commissioner  
Michael K. Powell, Commissioner  
Gloria Tristani, Commissioner

A. Richard Metzger, Jr.  
Ruth Milkman  
Lisa Gelb  
Irene Flannery  
Valerie Yates

**THE NON-COMMON CARRIER STATUS OF  
THE IOWA COMMUNICATIONS NETWORK**

by

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Washington, D.C. 20005**

for the

**UNITED STATES TELEPHONE ASSOCIATION**

**April 20, 1998**

I. SUMMARY AND CONCLUSIONS

The Fourth Reconsideration Order on universal service properly held that state telecommunications networks, including the Iowa Communications Network ("ICN"), are not telecommunications carriers as defined in the Telecommunications Act of 1996 (the "1996 Act").<sup>1/</sup> The FCC reiterated this finding on April 10, 1998, in its report to Congress on universal service.<sup>2/</sup>

ICN's *ex parte* presentation of April 9, 1998,<sup>3/</sup> includes "a list of examples" of cases and general legal precepts that provides no basis for the FCC to reverse or waive its

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<sup>1/</sup> See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourth Order on Reconsideration, FCC 97-420 (rel. Dec. 30, 1997) ("Fourth Reconsideration Order") ¶ 187.

<sup>2/</sup> See *Federal-State Joint Board*, CC Docket No. 96-45, Report to Congress, FCC 98-67 (rel. Apr. 10, 1998) ¶ 152.

<sup>3/</sup> See Letter from J.G. Harrington, counsel for Iowa Telecommunications and Technology Commission ("ITTC"), to Magalie Roman Salas, FCC, CC Docket No. 96-45, AAD/USB File No. 98-37 (filed Apr. 9, 1998) and Attachment (the "April 9 presentation"). ITTC is the Iowa state commission that operates ICN.

findings that ICN and other state telecommunications networks are not telecommunications carriers.<sup>4/</sup> The April 9 presentation does not provide a coherent framework for analysis of ICN's status -- an analysis already successfully completed in the Fourth Reconsideration Order. Indeed, the individual "examples" listed in the April 9 presentation are either easily distinguishable from ICN's situation or, contrary to ICN's claims, actually support the FCC's findings.

ICN does not satisfy the definition of telecommunications carrier under the 1996 Act, let alone the standards for determining common carrier status developed by the FCC and the D.C. Circuit.<sup>5/</sup> In no way does ICN provide telecommunications "directly to the public, or to such classes of users as to be directly available to the public," as is required for status as a telecommunications carrier.

ICN does not offer service to the public. ICN is legally required to serve only certified authorized users from very narrow classes of "public agencies" and "private agencies" defined by Iowa statute (hereinafter the "eligible agencies"). These limited classes of eligible agencies exclude other potential users of ICN's services. As such, they cannot reasonably be construed to constitute "the public."

Thus, for example, although all Iowa state agencies are defined to be "public agencies" eligible to use the ICN, most county and local government agencies in Iowa are

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<sup>4/</sup> The Fourth Reconsideration Order noted that ICN, unlike others, argued that it is a telecommunications carrier, *see id.* ¶ 177, and the FCC squarely rejected ICN's argument. *See id.* ¶ 187.

<sup>5/</sup> *See Southwestern Bell Telephone Company v. FCC*, 19 F.3d 1475, 1480 (D.C. 1994). In *Southwestern Bell*, the D.C. Circuit remanded an FCC decision that certain offerings of "dark fiber" were common carrier services.

excluded,<sup>6/</sup> even if they would use ICN in the same manner and for the same purposes. Similarly, U.S. post offices "which receive a federal grant for pilot and demonstration projects" are eligible to use the ICN, but all other U.S. post offices are excluded.<sup>7/</sup> Service to such narrowly defined classes of eligible agencies cannot be considered to be a holding-out of service to the "public" for purposes of the definition of telecommunications carrier.

Even if ICN were construed to be offering its services to the public, which it does not, ICN has not undertaken to serve its limited set of eligible agencies indifferently, as required for common carrier status.<sup>8/</sup> Indeed, the Iowa legislature must pass individualized legislation to approve specific eligible agencies to receive service from ICN. According to the Iowa statute that established the ICN, eligible agencies that did not certify their intent to become part of ICN by July 1, 1994, "shall be prohibited" from using the network, absent such "legislative approval."<sup>9/</sup>

Nor does ICN treat indifferently even those agencies that are certified as "authorized users." ICN expressly distinguishes among these limited classes by, among other things, charging narrow classes of users different rates for the same service. Thus, for example, according to ICN's web page, federal agencies and the U.S. Postal Service must pay \$45/hour per site for "video sessions" on the ICN. In contrast, state government users

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<sup>6/</sup> Iowa Code § 8D.2(5); Iowa Admin. Code § 751-7.4(7),(8) (authorizing connectivity for subsets of county and local government).

<sup>7/</sup> See Iowa Code § 8D.2(6).

<sup>8/</sup> See *Southwestern Bell*, 19 F.3d at 1480.

<sup>9/</sup> See *id.*; Iowa Admin. Code § 751-7.1 (defining authorized users).

pay \$10/hour per site for the same video sessions.<sup>10/</sup> Similarly, "telemedicine" users must pay \$45/hour per site, but "telemedicine training" users pay \$6/hour per site. And K-12 educational users pay \$5/hour per site, higher educational users pay \$6/hour per site, and "other" users pay \$10/hour per site, all for the same service.<sup>11/</sup> ICN's treatment of its various authorized users is anything but nondiscriminatory.

ICN also is empowered to negotiate individually with authorized users regarding how much they will use ICN. This individualized dealing is another characteristic of non-common carrier status. The Iowa statute requires authorized users of ICN to use it for all of their video, data, and voice requirements unless a waiver is obtained.<sup>12/</sup> ICN has stated to the FCC that it freely grants such waivers.<sup>13/</sup> One basis for such a waiver is an individualized agreement between ITTC and the authorized users.<sup>14/</sup> These waivers accordingly are a means by which ICN can individually tailor, and agree on, users' service requirements.

ICN also fails to satisfy the D.C. Circuit's requirement for common carrier status that "customers transmit intelligence of their own design and choosing."<sup>15/</sup> ICN limits

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<sup>10/</sup> See *Frequently Asked Questions About the ICN & Internet*, <http://www.icn.state.ia.us/ICN/HTML/FAQS.htm> (accessed Apr. 17, 1998), printed page 4 of 5.

<sup>11/</sup> *Id.*

<sup>12/</sup> Iowa Code § 8D.9(2)a.

<sup>13/</sup> See Reply Comments of ITTC in *Iowa Telecommunications and Technology Commission Petition for Waiver*, CC Docket No. 96-45, AAD/USB File No. 98-37 (filed Mar. 17, 1998) at n. 16 ("Upon appropriate application, waivers under Section 8D.9(2) have been granted to all applicants.").

<sup>14/</sup> *Id.* § 8D.9(2)a.(3).

<sup>15/</sup> See *Southwestern Bell*, 19 F.3d at 1480.

the subject matter of such transmissions. Under the Iowa administrative regulations, uses of the ICN to are restricted to those "consistent with the written mission of the authorized user."<sup>16/</sup> Failure to conform to these restrictions can result in suspension or revocation of authorization to use ICN's network.<sup>17/</sup> These legal restrictions on the subject matter that may be transmitted through the ICN do not comport with common carrier principles.

In considering ICN's status, the FCC "may not impose common carrier status upon any given entity on the basis of the desired policy goal the Commission seeks to advance."<sup>18/</sup> The FCC should not disturb the findings of the Fourth Reconsideration Order that ICN is not a telecommunications carrier.

## II. ICN DOES NOT SATISFY THE DEFINITION OF "TELECOMMUNICATIONS CARRIER"

ICN does not satisfy the key attribute of a telecommunications carrier: it does not provide telecommunications service, because it does not offer telecommunications for a fee "directly to the public, or to such classes of users as to be effectively available to the public."<sup>19/</sup> The FCC has equated "telecommunications service" with telecommunications offered on a common carrier basis.<sup>20/</sup>

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<sup>16/</sup> See Iowa Admin. Code § 751-7.5(8D).

<sup>17/</sup> *Id.* § 751-10.2.

<sup>18/</sup> *Southwestern Bell*, 19 F.3d at 1481, *citing NARUC v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*") at 644.

<sup>19/</sup> See 47 U.S.C. §§ 153(44) (defining telecommunications carrier) and 153(46) (defining telecommunications service).

<sup>20/</sup> See Fourth Reconsideration Order ¶ 187.

ICN does not operate on a common carrier basis. ICN fails the tests established by the D.C. Circuit for common carriage:

The primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently. This does not mean that the particular services offered must be practically available to the entire public; a specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users....

A second prerequisite [is] ... that the system be such that customers transmit intelligence of their own design and choosing.<sup>21/</sup>

A. ICN DOES NOT OFFER SERVICE TO THE PUBLIC

ICN does not offer service to the public indifferently -- in fact, it does not offer service to the public at all. Contrary to the D.C. Circuit's test for common carriage, ICN is prohibited by law from serving "all potential users" of its services.<sup>22/</sup> Indeed, ICN's authorized users only come from among the limited classes of eligible "public agencies" and "private agencies" defined by Iowa law.<sup>23/</sup> ICN's operator, ITTC, is prohibited by law from

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<sup>21/</sup> *Southwestern Bell*, 19 F.3d at 1480, citing *NARUC v. FCC*, 533 F.2d 601, 608-609 (D.C. Cir. 1976) ("*NARUC II*"); *NARUC I*, 525 F.2d 630 (D.C. Cir.).

<sup>22/</sup> See 19 F.3d at 1480.

<sup>23/</sup> A "public agency" is defined as:

[A] state agency [of Iowa], an institution under the control of the board of regents, the judicial branch as provided in section 8D.13, subsection 17, a school corporation, a city library, a regional library as provided in chapter 256, a county library as provided in chapter 336, or a judicial district department of correctional services established in section 905.2, to the extent provided in section 8D.13, subsection 15, an agency of the federal government, or a United States post office which receives a federal grant for pilot and demonstration projects.

(continued...)

entering into "an agreement with an unauthorized user or any other person ... for the purpose of providing such a user or person access to the network."<sup>24/</sup>

Consistent with the Fourth Reconsideration Order, the eligible agencies are such narrow and specifically defined classes that they cannot reasonably be viewed as constituting the public. Private individuals, much of Iowa local government, and the overwhelming majority of for-profit and not-for-profit business organizations are not eligible agencies, regardless of whether their potential uses of ICN are identical to those of the eligible agencies. Indeed, ICN's limited classes of eligible agencies reflect its limited purpose. ICN's web site states that:

First and foremost, lawmakers have stressed that education, though not the only reason for the Network, is the ICN's top priority because the Network was founded to strengthen the quality of education in Iowa.<sup>25/</sup>

ICN's narrow classifications of eligible agencies result in disparate treatment of other, very similar, potential users that are legally barred from becoming authorized ICN

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<sup>23/</sup>(...continued)

Iowa Code § 8D.2(5), as amended by House File 2456, Ia. 77th Gen. Assembly, 2d. Sess. (approved by Gov. Apr. 2, 1998). A "private agency" is defined as:

[A]n accredited nonpublic school, a nonprofit institution of higher education eligible for tuition grants, or a hospital licensed pursuant to chapter 135B or a physician clinic to the extent provided in section 8D.13, subsection 16.

*Id.* § 8D.2(4).

<sup>24/</sup> *Id.* § 8D.3(3)a.

<sup>25/</sup> See [http://www.icn.state.ia.us/ICN/HTML/ICN\\_Story1.htm](http://www.icn.state.ia.us/ICN/HTML/ICN_Story1.htm) (accessed Apr. 20, 1998), printed page 3 of 12.

users. This is the antithesis of common carriage. As noted above, most types of county and local government in Iowa are excluded from the list of public agencies. These county and local agencies cannot use ICN, even if their potential uses are identical to that of state agencies, which are eligible agencies. Similarly, "physician clinics" are eligible private agencies only for certain purposes; uses of ICN's services for other purposes by physician clinics are not permitted.<sup>26/</sup> And post offices that have federal grants "for pilot and demonstration projects" may use the ICN, while post offices without such grants are barred from using it, even for precisely the same types of activities.

This disparate treatment of potential users is completely ignored in the April 9 presentation. That presentation lists several general and state court citations for the proposition that a common carrier may limit its business to the carriage of certain types of freight.<sup>27/</sup> None of those citations addresses a situation where, as here, a service provider refuses to provide, or is prohibited from providing, a particular service to a wide variety of potential users, with only a few classes of users permitted.<sup>28/</sup> In *Rosenstein*, which

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<sup>26/</sup> Cf., *id.* § 8D.13(16) (authorizing use by physician clinics "for the purpose of developing a comprehensive, statewide telemedicine network.")

<sup>27/</sup> See April 9 presentation, Attachment at 1, 4, *citing* 13 Am. Jur. 2d *Carriers* § 4, *Bowles v. Wieter*, 65 F. Supp. 359 (E.D. Ill. 1946); *State ex rel. Bd. of R.R. Comm'rs v. Rosenstein*, 252 N.W. 251 (Iowa 1934) ("*Rosenstein*"); *In re United Parcel Service*, 256 A.2d 443 (Me. 1969).

<sup>28/</sup> Indeed, the April 9 presentation neglects to mention that American Jurisprudence 2d states that:

One does not have the status of a common carrier where he undertakes carriage for a particular group or class of persons under a special contractual arrangement, or for a particular person only.

(continued...)

addressed the status of a delivery service for theatrical film and advertising, the Iowa Supreme Court noted that its test of common carriage is:

[W]hether [the provider] holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he has room, the goods of *all persons*, indifferently, who send him goods to be carried.<sup>29/</sup>

ICN fails this test of common carriage because it is legally barred from serving any users other than its authorized users. Although the April 9 presentation mentions a 28 year-old Pennsylvania regulatory decision that found a small paging service for the medical profession to be a common carrier,<sup>30/</sup> that decision did not consider a situation where the service provider prohibits or is prohibited from serving broad classes of potential users or bars particular kinds of uses.

Because ICN's disparate treatment of potential users is a requirement of state law, ICN's situation is the opposite of those of Comsat and Amtrak, which were listed in the April 9 presentation. Both Comsat and Amtrak were expressly charged by federal statute to be common carriers.<sup>31/</sup> Nowhere does the Iowa statute command ICN to be a common

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<sup>28/</sup> (...continued)

13 Am. Jur. 2d, *Carriers* § 2 (1964) (citations omitted). According to the same source, unlike common carriers, "[p]rivate carriers do not undertake to carry for all persons indiscriminately but transport only for those with whom they see fit to contract." *Id.* § 8 (1964).

<sup>29/</sup> *Rosenstein*, 252 N.W. at 254 (emphasis added).

<sup>30/</sup> See April 9 presentation, Attachment at 4, citing *Mobilefone of Northeastern Pennsylvania, Inc. v. The Professional Service Bureau of Luzerne County, Inc.*, 54 Pa. P.U.C. 161 (1980). *Contra*, 13 Am. Jur. 2d, *Carriers* § 2 (1964) (describing attributes of private carriers).

<sup>31/</sup> See Satellite Communications Act of 1962 § 401 (deeming Comsat a common carrier for purposes of the Communications Act); 49 U.S.C. §§ 24301(a)(1), 10102(6) (defining Amtrak as a common carrier of railroad transportation).

carrier or otherwise hold itself out to the public. To the contrary, the Iowa statute prohibits ICN from serving unauthorized users.

Indeed, the examples of Comsat and Amtrak support the FCC's position that ICN is not a telecommunications carrier. If the state of Iowa had wished to deem ICN a common carrier, it clearly could have done so, as the U.S. Congress deemed Comsat and Amtrak. Instead, Iowa carefully enumerated and differentiated the types of eligible agencies that would be permitted to become authorized users of ICN, and prohibited all others.

Of course, the FCC has found services offered by government-related entities to be common carriage, but not services offered in ICN's selective manner. Thus, in *Graphnet Systems*,<sup>32/</sup> cited in the April 9 presentation, the FCC found that an electronic transmission service offered by the U.S. Postal Service was common carriage within its jurisdiction. The service was "a new sub-class of first class mail aimed at large volume users,"<sup>33/</sup> and the FCC rightly concluded that it "affords the public an opportunity to transmit messages of its own design and choosing."<sup>34/</sup> In contrast to ICN's services, it was undisputed in *Graphnet* that the service was available to the public generally.

The April 9 presentation also cites several FCC decisions for the proposition that common carriers can limit the scope of their services. This proposition begs the

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<sup>32/</sup> *Request For Declaratory Ruling And Investigation By Graphnet Systems, Incorporated Concerning A Proposed Offering Of Electronic Computer Originated Mail (ECOM)*, 73 FCC 2d 283 (1979).

<sup>33/</sup> *Id.* at 284.

<sup>34/</sup> *Id.* at 289.

question of whether ICN holds itself out indifferently to the public. The answer to that question is no, and the cited cases are therefore irrelevant. For example, in *Tower Communication*,<sup>35/</sup> the Common Carrier Bureau granted a Section 214 application for a domestic satellite receive-only earth station to operate on common carrier frequencies, even though its only customer was an affiliated cable system. However, the decision relied in part on the applicant's statement that it anticipated providing service to non-affiliated systems,<sup>36/</sup> and there was no issue before the Bureau regarding disparate treatment of potential users by the applicant.

Similarly, in several orders cited in the April 9 presentation, the FCC staff acted on delegated authority to authorize carriers to provide international common carrier services.<sup>37/</sup> The common carrier status of the applicants was not an issue in any of these decisions. These international orders provide no reason for the FCC to reverse its finding

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<sup>35/</sup> See *Application Of Tower Communication Systems Corporation For authority under Section 214 of the Communications Act of 1934*, 59 F.C.C. 2d 130 (Com. Car. Bur. 1976).

<sup>36/</sup> *Id.*

<sup>37/</sup> See April 9 presentation, Attachment at 3-4, citing *Telestra [sic], Inc., Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended*, 13 FCC Rcd 205 (Int. Bur. 1997) (granting Telstra, Inc. conditional authority to operate facilities for switched and private line service between the United States and Australia); *Application of IDC America, Inc., Order, Authorization, and Certificate*, File No. I-T-C-96-685, DA 97-571 (Int. Bur. rel. March 21, 1997); *IDB Communications Group, LTD, Application to Modify its License for its Domestic Transmit/Receive Earth Station (E7754) at Culver City, California to Add the ANIK Satellite as a Point of Communication for Service Between the U.S. and Canada*, Order, Authorization and Certificate, File No. 2805-DSE-MP/L-85 (Int. Fac. Div. rel. Feb. 14, 1986); *Consortium Communications International, Inc., Application for Authority to Acquire and Operate Facilities for the Provision of Telex Service between the U.S. and Canada*, 5 FCC Rcd 6562 (Int. Fac. Div. 1990).

regarding state telecommunications networks in the Fourth Reconsideration Order.<sup>38/</sup>

The April 9 presentation fails to mention the well-developed body of decisions other than the Fourth Reconsideration Order in which the FCC has treated service providers as non-common carriers or private carriers. For example, in 1997 the International Bureau decided to regulate Teledesic Corporation, a fixed-satellite operator, as a non-common carrier, applying *NARUC I*.<sup>39/</sup> Similarly, the FCC has treated the operators of submarine cables as non-common carriers.<sup>40/</sup> The D.C. Circuit<sup>41/</sup> upheld an FCC decision in 1982 that providers of domestic satellite transponders do not hold themselves out indifferently to serve the user public and, thus, are not common carriers.

While avoiding discussion of these unfavorable FCC precedents, the April 9 presentation lists a variety of court decisions in which non-communications businesses like amusement park rides, mule rides, and ski chair lifts are treated as common carriers.<sup>42/</sup>

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<sup>38/</sup> The April 9 presentation also inexplicably cites an FCC decision granting special authority to ITT to operate an earth station aboard a U.S. Navy carrier to assist in providing television coverage of Gemini spaceship recovery. *Application of ITT World Communications Inc., for Temporary Authority, Pursuant to Section 214 of the Communications Act of 1934, as amended*, 3 F.C.C. 2d 628 (1966). The regulatory status of neither the applicant nor the earth station were at issue in that order, which is irrelevant to ICN's non-telecommunications carrier status.

<sup>39/</sup> See *Teledesic Corporation Application for Authority to Construct, Launch and Operate a Low Earth Orbit Satellite System in the Domestic and International Fixed Satellite Service*, 12 FCC Rcd 3154, 3165-3166 (Int. Bur. 1997).

<sup>40/</sup> See *TEL-OPTIK LIMITED*, 100 F.C.C. 2d 1033 (1985).

<sup>41/</sup> See *Wold Communications, Inc. v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984) (affirming *Domestic-Fixed Satellite Transponder Sales*, 90 F.C.C. 2d 1238 (1982)).

<sup>42/</sup> See April 9 presentation, Attachment at 5, citing *Neubauer v. Disneyland*, 875 F. Supp. 672 (C.D. Cal. 1995) (amusement park operator) and following cases.

These tort cases address the standard of care that businesses must exercise in providing services. They present no basis for reversing the Fourth Reconsideration Order.

Notably, the April 9 presentation describes *Neubauer v. Disneyland*, a decision of a U.S. district court in California, for the proposition that an amusement park operator is a common carrier.<sup>43/</sup> However, the Iowa courts more recently held to the contrary. In *Wright v. Midwest Old Settlers and Threshers Association*,<sup>44/</sup> the Iowa Supreme Court held that a passenger train open to the public, and operated for amusement and transportation at an annual event, is not a common carrier. In that decision, the Iowa Supreme Court also referred to *Pessl v. Bridger Bowl*<sup>45/</sup> for the holding that a ski lift operator is not a common carrier, contrary to an example in the April 9 presentation.

The April 9 presentation also cites some now-repealed FCC rules regarding telephone-cable company cross-ownership that the FCC eliminated after the passage of the 1996 Act, nominally to demonstrate that the FCC authorized telephone companies to provide common carrier channel service to a limited class of users -- cable operators.<sup>46/</sup> The FCC repealed the cited rules in 1996 pursuant to the provisions of the 1996 Act that revamped the permissible relationships between telephone companies and cable operators.<sup>47/</sup> The cited

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<sup>43/</sup> The *Neubauer* court noted that "[c]ourts nation-wide have struggled with the degree of care owed by an amusement park operator." 875 F. Supp. at 674. This question is unrelated to the regulatory status of ITC.

<sup>44/</sup> 556 N.W. 2d 808 (Iowa 1996).

<sup>45/</sup> 524 P.2d 1101 (Mont. 1974).

<sup>46/</sup> See April 9 presentation, Attachment at 2, citing 47 C.F.R. §§ 63.54, 63.55 (1995).

<sup>47/</sup> See *Implementation of Section 302 of the Telecommunications Act of 1996; Open Video Systems; Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, 11 FCC Rcd 14639, 14683 (1996).

rules did not address ICN's situation, in which a service provider is legally barred from serving all but narrowly defined classes of eligible agencies. By their terms, the cited rules did not permit or require telephone companies to engage in such disparate treatment.

The examples listed in the April 9 presentation fail to alter the fact that ICN does not hold itself out to the public. The Fourth Reconsideration Order's findings on this point should not be disturbed.

**B. ICN DOES NOT OFFER SERVICE INDIFFERENTLY TO ELIGIBLE AGENCIES OR TO AUTHORIZED USERS**

Even if ICN were construed to be offering its services to the public, which it does not, ICN does not even serve its potential users -- the eligible agencies -- indifferently.<sup>48/</sup> Rather, ICN deals with eligible agencies on a highly individualized basis, a hallmark of non-common carrier status.<sup>49/</sup> Agencies must receive individualized approval from the Iowa legislature to become authorized users of ICN, a practice far different from that of any common carrier. By statute, to receive service from ICN, an eligible agency must have certified no later than July 1, 1994, that it "is or intends to become" part of the network.<sup>50/</sup> The Iowa statute prohibits eligible agencies that did not so certify from using the network, absent "legislative approval."<sup>51/</sup> Such approval requires legislation on a case-by-case basis. For example, on April 13, 1998, the Governor approved House File 2476, an

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<sup>48/</sup> See *Southwestern Bell Telephone Company v. FCC*, 19 F.3d 1475, 1480 (1994).

<sup>49/</sup> See *NARUC II*, 533 F.2d at 608-609; *Southwestern Bell*, 19 F.3d at 1481.

<sup>50/</sup> See Iowa Code § 8D.9(1).

<sup>51/</sup> See *id.*; Iowa Admin. Code § 751-7.1 (defining authorized users).

act that provided for the Quad Cities Graduate Center to be connected to the ICN.<sup>52/</sup> ICN's web page discloses that in 1997, the Iowa legislature passed, and the Governor signed, House File 730, which "allow[ed] certification to three private colleges not requesting certification in 1994 and one which was not offered certification."<sup>53/</sup> This individualized treatment of users is not common carriage.

Furthermore, ICN fails to treat indifferently those agencies that obtain certification as "authorized users." As ICN's web page discloses, ICN charges different types of users different rates for the same service. As already described, there are major differences in ICN's charges for video sessions, depending on the identity of the authorized user. Federal agencies and eligible users from the U.S. Postal Service are charged \$45/hour per site for video sessions on the ICN, but state government users pay \$10/hour per site for the same service.<sup>54/</sup> "Telemedicine" users must pay \$45/hour per site, but "telemedicine training" users pay \$6/hour per site.<sup>55/</sup> ICN's treatment of its various authorized users is highly individualized by class.

Further evidence of ICN's individualized dealings with users is that ICN is permitted to negotiate specific agreements with authorized users for the amount and type of

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<sup>52/</sup> See House File 2476, Ia. 77th Gen. Assembly, 2d Sess. (approved by the Governor Apr. 13, 1998).

<sup>53/</sup> See <http://www.icn.state.ia.us/ICN/HTML/LEGIS/legis97.htm> (accessed Apr. 17, 1998), printed page 2 of 4.

<sup>54/</sup> See *Frequently Asked Questions About the ICN & Internet*, <http://www.icn.state.ia.us/ICN/HTML/FAQS.htm> (accessed Apr. 17, 1998), printed page 4 of 5.

<sup>55/</sup> *Id.* K-12 educational users pay \$5/hour per site, higher educational users pay \$6/hour per site, and "other" users pay \$10/hour per site, all for the same service.

services that it will provide. As a general matter, the Iowa statute requires authorized users of ICN to use it for all of their video, data, and voice requirements unless they obtain a waiver.<sup>56/</sup> One basis for such a waiver is if:

[T]he authorized user has entered into an agreement with [ITTC] to become part of the network prior to June 1, 1994, which does not provide for the use of the network for all video, data, and voice requirements of the agency. The [ITTC] may enter into an agreement described in this subparagraph upon a determination that the use of the network for all video, data, and voice requirements of the agency would not be in the best interests of the agency.<sup>57/</sup>

ICN has represented that it freely grants such waivers.<sup>58/</sup> This waiver authority gives ITTC power over the conditions under which users take service from ICN, and provides a means of individually tailoring, and agreeing upon, users' service requirements. This further supports a finding of non-common carrier status for ICN.

### III. ICN LIMITS THE SUBJECT MATTER OF COMMUNICATIONS BY END USERS

ICN fails to satisfy the further requirement for common carriage that "customers transmit intelligence of their own design and choosing."<sup>59/</sup> ICN limits the subject matter, if not the specific contents, of transmissions over it. Uses of the ICN are

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<sup>56/</sup> Iowa Code § 8D.9.2.a.

<sup>57/</sup> Iowa Code § 8D.9(2)a.(3); *see also* Iowa Admin. Code § 751-9.1.

<sup>58/</sup> *See* Reply Comments of ITTC, CC Docket No. 96-45, AAD/USB File No. 98-37 (filed Mar. 17, 1998) at n. 16 ("Upon appropriate application, waivers under Section 8D.9(2) have been granted to all applicants.").

<sup>59/</sup> *See Southwestern Bell*, 19 F.3d at 1480.

limited to those "consistent with the written mission of the authorized user."<sup>60/</sup> ICN also requires authorized users to develop written policies to the effect that "[t]he network is a limited access network and cannot be used for a profit-making venture."<sup>61/</sup> Authorized users that violate these restrictions can be suspended from use of ICN's network, or their authorizations can be revoked.<sup>62/</sup> These *de jure* restrictions on the subject matter of the ICN are not consistent with common carrier principles.

#### IV. CONCLUSION

The April 9 presentation fails to obscure the fact that ICN neither provides service directly to the public, nor to such classes of users as to be directly available to the public. ICN treats various types of eligible agencies and authorized users in very different ways. As the Fourth Reconsideration Order has established, state telecommunications networks such as ICN are not telecommunications carriers.

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<sup>60/</sup> See Iowa Admin. Code § 751-7.5.

<sup>61/</sup> See *id.* § 751-14.1(1).

<sup>62/</sup> *Id.* § 751-10.2.