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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 31, 1998

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Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Written Ex Parte Presentation
CC Docket No. 96-45
AAD/USB File No. 98-37

Dear Ms. Salas:

The United States Telephone Association ("USTA"), by its counsel, urges the Commission to deny the petition of the Iowa Telecommunications and Technology Commission ("ITTC") in the above-captioned matter, and to uphold the Commission's earlier decision in CC Docket No. 96-45 that the Iowa Communications Network ("ICN"), which ITTC operates, is not a telecommunications carrier for purposes of universal service funding.[1] In particular, this letter responds to recent written and oral *ex parte* presentations by ITTC on this topic.[2]

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[1] *See Federal-State Joint Board on Universal Service*, 13 FCC Rcd 5318 (1997) at 5426-5428 ¶¶ 187-189.

[2] *See, e.g.*, Letter to Hon. William E. Kennard, Chairman, FCC, from Kenneth D. Salmon, counsel, ITTC, CC Docket No. 96-45, AAD/USB File No. 98-37 (filed August 4, 1998) ("August 4 Letter"); Letter and Attachment to Magalie Roman Salas, Esq., Secretary, FCC from J.G. Harrington, counsel, ITTC, re Oral Ex Parte Presentation, CC Docket No. 96-45, AAD/USB File No. 98-37 (filed July 28, 1998) ("July 28 Letter"); Letter to Magalie Roman Salas, Esq., Secretary, FCC from J.G. Harrington, counsel, ITTC, re Oral Ex Parte Presentation, CC Docket No. 96-45, AAD/USB File No. 98-37 (filed July 31, 1998).

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ITTC's *ex partes*, particularly the August 4 letter and July 28 letter, provide no basis for the Commission to change its correct decision that ICN is not a telecommunications carrier. In particular, ICN does not even offer telecommunications service, since it does not offer telecommunications "directly to the public or to such classes of users as to be available directly to the public," as the Communications Act requires.[3] ICN also does not satisfy the definition of "common carrier" as developed by the D.C. Circuit in 1994 in *Southwestern Bell Telephone Company v. FCC*.[4]

As USTA has explained in detail,[5] Iowa state law restricts the eligible users of ICN to narrowly defined categories of governmental agencies -- so-called "public agencies" -- and "private agencies." All other potential users of ICN are excluded by Iowa statute. This exclusive arrangement cannot be considered "service directly to the public" or common carriage.

Even ICN's limited categories of eligible agencies face further hurdles in receiving service from, or otherwise "joining" ICN. Indeed, the Iowa legislature must pass legislation to individually approve many eligible agencies to receive service from ICN. Nor does ICN treat indifferently even those agencies that are certified as "authorized users." ICN expressly distinguishes among these limited permissible users by, among other things, charging narrow classes of users different rates for the same service. This narrow, individualized treatment of exclusive groups of users is the antithesis of common carriage.

ITTC's policy arguments are similarly flawed. ICN, unlike any privately-owned telecommunications carrier in Iowa, receives funding from the taxpayers of the state of Iowa. Those taxpayers include the privately-owned carriers that operate in Iowa. Additional direct reimbursement from federal universal service support mechanisms for ICN would simply increase the level of subsidy uniquely available to ICN. This would distort the competitive marketplace for telecommunications in Iowa by disadvantaging the privately-owned telecommunications carriers that compete with ICN's subsidized offerings. At the same time, less direct universal service support would be available where taxpayers have not funded networks such as ICN.

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[3] *See* 47 U.S.C. § 153(46).

[4] 19 F.3d 1475, 1480 (1994). In *Southwestern Bell*, the D.C. Circuit remanded a Commission decision that certain offerings of "dark fiber" were common carrier services.

[5] *See* W. F. Maher, Jr., *The Non-Common Carrier Status of the Iowa Communications Network*, attached to *Ex Parte* Notice From Linda Kent, USTA, to Magalie Salas Roman, Secretary, FCC, re CC Docket No. 96-45, AAD/USB File No. 98-37 (filed Apr. 21, 1998).

ITTC incorrectly claims in the August 4 letter that it should be treated as a common carrier because the Universal Service Administrative Corporation has billed ICN for payments to the federal universal service fund. As the Commission is well aware, non-common carriers like ICN, as well as common carriers, must contribute to universal service.[6] As the Commission has held,

> Accordingly, these providers [private service providers], like telecommunications or common carriers, have built their businesses or a part of their businesses on access to the PSTN, provide telecommunications in competition with common carriers, and their non-common carrier status results solely from the manner in which they have chosen to structure their operations. Even if a private network operator is not connected to the PSTN, if it provides telecommunications, it competes with common carriers, and the principle of competitive neutrality dictates that we should secure contributions from it as well as its competitors.[7]

Similarly, although the August 4 letter refers to a "determination" by the Iowa Utilities Board (the "Board") that ICN is a common carrier, there is no indication in the record of this proceeding that the Board even has jurisdiction over ICN. The Board merely filed comments in this proceeding on March 4, 1998, in which it stated that it "concurs with the ICN's position" regarding common carrier status. The Commission clearly is not bound by this "concurrence."

For all of the foregoing reasons, the Commission should uphold its decision in CC Docket No. 96-45 that ICN is not a telecommunications carrier for purposes of universal service funding, and deny the pending petition in AAD/USB File No. 98-37.

Pursuant to section 1.1206 of the Commission's rules, two copies of this written *ex parte* presentation are being submitted to the office of the Secretary of the Commission

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[6] *See Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 (1997) at 9184 ¶ 796.

[7] *Id.*

today. Please include this filing in the public record of this proceeding, and do not hesitate to call if any questions arise in connection with it.

Very truly yours,

Keith Townsend

Keith Townsend
Director Legal And Regulatory Affairs
And Senior Counsel

cc: Hon. William E. Kennard
Hon. Susan Ness
Hon. Michael Powell
Hon. Harold Furchtgott-Ross
Hon. Gloria Tristani
Thomas Power
Kathryn C. Brown
Suzanne Tetreault
Amy Nathan
Irene Flannery