



UNITED STATES  
TELEPHONE ASSOCIATION  
WASHINGTON, D.C.

EX PARTE OR LATE FILED

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Ex parte Notice

November 16, 1998

Magalie Roman Salas, Esq.  
Secretary  
Federal Communications Commission  
The Portals  
445 Twelfth Street, S.W., TW-A325  
Washington, D.C. 20554

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NOV 16 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

Dear Ms. Salas:

The United States Telephone Association ("USTA") is distributing today the attached paper (the "attachment") to respond to several ex parte presentations in October 1998 by the Iowa Telecommunications and Technology Commission ("ITTC") regarding the Iowa Communications Network ("ICN") in the above-referenced proceedings.

The attachment demonstrates that the Commission should deny the petition of ITTC in AAD/USB File No. 98-37 and uphold the decision in the Fourth Order on Reconsideration in CC Docket No. 96-45 that the ICN, which ITTC operates, is not a telecommunications carrier for purposes of universal service funding.<sup>1/</sup>

Pursuant to section 1.1206(b)(1) of the Commission's rules, four copies of this letter and the attachment are being submitted to the office of the Secretary of the Commission today (two copies for each of the proceedings listed above), and copies are being provided to the persons indicated below.

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

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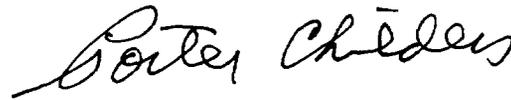
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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Please include this filing in the public record of each of the proceedings listed above.  
Please do not hesitate to call if any questions arise in connection with this matter.

Very truly yours,



Porter Childers

Attachment

cc: Thomas Power  
James L. Casserly  
Kyle D. Dixon  
Kevin J. Martin  
Paul Gallant  
Kathryn C. Brown  
Lawrence Strickling  
James Schlichting  
Lisa Zaina  
Lisa Gelb  
Amy Nathan  
Irene Flannery  
Jane Whang

**THE COMMISSION HAS RULED CORRECTLY THAT  
THE IOWA COMMUNICATIONS NETWORK IS  
NOT A TELECOMMUNICATIONS CARRIER**

UNITED STATES TELEPHONE ASSOCIATION

CC Docket No. 96-45  
AAD/USB File No. 98-37  
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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**I. INTRODUCTION**

The Commission should deny the petition of the Iowa Telecommunications and Technology Commission ("ITTC") in the above-captioned matter. The Commission should uphold the decision in the Fourth Order on Reconsideration 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.<sup>1/</sup> Although common carriers deal indifferently with the public, ICN does not.

ITTC's most recent oral and written *ex parte* presentations<sup>2/</sup> on this topic fail to provide any legal or policy justification for the Commission to change its correct holding that ICN is not a telecommunications carrier. USTA's earlier presentations on this matter demonstrate that the Commission should affirm that holding with respect to ICN.<sup>3/</sup> By statute ICN serves only

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

<sup>2/</sup> See Letter and Attachment to Magalie Salas Roman, Esq., Secretary, FCC, from J.G. Harrington, counsel, ITTC, CC Docket No. 96-45, AAD/USB File No. 98-37, re Oral Ex Parte Presentation to James Casserly (filed Oct. 8, 1998); *id.*, re Oral Ex Parte Presentation to Kevin J. Martin (filed Oct. 8, 1998); *id.*, re Oral Ex Parte Presentation to Thomas Power, Kyle D. Dixon, and Paul Gallant (filed Oct. 8, 1998) (collectively the "October 8 oral *ex parte* presentations"). See also Letter and Attachment to Magalie Salas Roman, Esq., Secretary, FCC, from J.G. Harrington, counsel, ITTC, CC Docket No. 96-45, AAD/USB File No. 98-37, re Written Ex Parte Presentation to James L. Casserly (filed Oct. 8, 1998) (the "October 8 ITTC Letter"); Letter to Magalie Salas Roman, Esq., Secretary, FCC, from Kenneth D. Salomon, counsel, ITTC, CC Docket No. 96-45, AAD/USB File No. 98-37, re Written Ex Parte Presentation (filed Oct. 9, 1998) (the "October 9 ITTC letter").

<sup>3/</sup> See, e.g., Letter to Magalie Roman Salas, Secretary, FCC, from Keith Townsend, USTA, re Written Ex Parte Presentation in CC Docket No. 96-45, AAD/USB File No. 98-37 (filed Aug. 31, 1998); letter and attachment to Magalie Roman Salas, Secretary, FCC, from Porter Childers, USTA, re Ex Parte Presentations to Kyle D. Dixon, James L. Casserly, and Thomas Power in CC Docket No. 96-45, AAD/USB File No. 98-37 (filed June 24, 1998)

(continued...)

authorized "public agencies" and "private agencies." ICN does not "serve indifferently all potential users." ICN does not serve even its authorized users indifferently. Nor are ICN customers free to transmit intelligence "of their own design and choosing."<sup>4/</sup>

## II. ICN IS NOT A TELECOMMUNICATIONS CARRIER BECAUSE IT SERVES AN EXCLUSIVE SET OF USERS DEFINED AND RESTRICTED BY STATUTE

ICN does not offer telecommunications service under the Communications Act, because 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.<sup>5/</sup> ICN also does not satisfy the definition of "common carrier," which was most recently stated by the D.C. Circuit in 1994 in *Southwestern Bell Telephone Company v. FCC*.<sup>6/</sup>

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....

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<sup>3/</sup>(...continued)

("June 24 USTA presentation"). See also 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).

In particular, USTA's written presentation of April 21, 1998 directly rebuts the attachment to the October 8 ITTC letter, which ITTC also had filed earlier in this proceeding, as well as some portions of the October 9 ITTC letter. See *The Non-Common Carrier Status of the Iowa Communications Network*, *supra*.

<sup>4/</sup> As discussed below, ICN limits the subject matter, if not the specific contents, of transmissions over it. Uses of the ICN are limited to those "consistent with the written mission of the authorized user." See Iowa Admin. Code § 751-7.5.

<sup>5/</sup> See 47 U.S.C. § 153(46).

<sup>6/</sup> 19 F.3d 1475, 1480 (1994) ("*Southwestern Bell*"). In *Southwestern Bell*, the D.C. Circuit remanded a Commission decision that certain offerings of "dark fiber" were common carrier services.

A second prerequisite [is] ... that the system be such that customers transmit intelligence of their own design and choosing.<sup>7/</sup>

**Restricted Set Of Users:** The fact is that Iowa law prohibits ITTC from 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>8/</sup> Iowa law limits the entities eligible to be served by ICN to two narrowly defined categories of governmental agencies -- so-called "public agencies" and "private agencies."<sup>9/</sup> This exclusive arrangement cannot be considered "service directly to the public" or common carriage because ICN does not, and legally cannot, stand ready to serve all comers indifferently. ITTC's October 8 oral *ex parte* presentations, its October 8 letter, and its October 9 letter cannot overcome this central point.<sup>10/</sup>

**ITTC's Analogies Do Not Apply:** ITTC attempts to equate ICN with common carriers that serve "limited client bases," such as "carriers' carriers."<sup>11/</sup> But such carriers are legally obligated to serve indifferently all customers that desire their services. In contrast, ICN is barred by statute from serving any potential users that do not fall within the defined categories of "public agencies" and "private agencies," even for identical uses. Although ITTC mentions "channel service" to cable operators as an example of a common carrier service to a "specifically limited" clientele,<sup>12/</sup> the D.C. Circuit has described the Commission's view of carriers' obligations in providing channel service as "standing ready to provide common carrier services to any and all users."<sup>13/</sup> Iowa law bars ICN from acting in a similar way.

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<sup>7/</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 v. FCC*, 525 F.2d 630 ("*NARUC I*") (D.C. Cir. 1976).

<sup>8/</sup> Iowa Code § 8D.3(3)a. ITTC did not submit this section of the Iowa Code to the Commission in its October 8 oral *ex partes* presentations.

<sup>9/</sup> See Iowa Code §§ 8D.2(4), (5) (defining "private agency and "public agency").

<sup>10/</sup> See *The Non-Common Carrier Status Of The Iowa Communications Network*, *supra*. Although ITTC in the past has referred 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 "concur[s] with the ICN's position" regarding common carrier status. The Commission clearly is not bound by this "concurrence."

<sup>11/</sup> See October 9 ITTC letter at 3.

<sup>12/</sup> See *id.*

<sup>13/</sup> See *Northwestern Indiana Telephone Company v. FCC*, 872 F.2d 465, 469 (D.C. Cir. 1989), *cert denied*, 493 U.S. 1035 (1990). ITTC has previously discussed "channel service"

(continued...)

Although ITTC also claims that so-called "Dial-It services" are available indifferently only to information service providers ("ISPs"), the basis for this statement is not clear. In a typical pay-per-call arrangement, ISPs usually arrange to obtain both common carrier transmission services and also non-common carrier billing and collection services.<sup>14/</sup> The Commission has ruled that incumbent LECs may decline to offer non-common-carrier billing and collection services to ISPs.<sup>15/</sup>

Because ICN is legally available only to restricted classes of eligible agencies, it must deny service to other, very similar, potential users that are legally barred from becoming authorized ICN users. This is the antithesis of common carriage. For example, because the overwhelming majority of private businesses, whether for-profit or not-for-profit, are not eligible agencies, ICN cannot serve them even if their uses of the network are identical to those of the eligible public and private agencies. Thus, "physician clinics" are eligible private agencies only for certain purposes; use of ICN's services for other purposes by physician clinics are not permitted.<sup>16/</sup> Although Iowa state agencies are eligible "public agencies," most types of county and local government in Iowa are excluded from the list of public agencies and cannot use ICN, even if their potential uses are identical to those of eligible state agencies.<sup>17/</sup> Such differential treatment is not "service directly to the public." Nor is it common carriage.

As USTA has already explained,<sup>18/</sup> ICN's situation is the opposite of those of Comsat and Amtrak, which were mentioned again in ITTC's October 9 letter. Both Comsat and

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<sup>13/</sup>(...continued)

by citing to now-repealed sections of the Commission's Rules that were removed in light of the Telecommunications Act of 1996. *See The Non-Common Carrier Status of the Iowa Communications Network, supra*, at 13-14.

<sup>14/</sup> *See, e.g., Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act*, Notice of Proposed Rulemaking and Notice of Inquiry, 8 FCC Rcd 2331, 2332 (1993); *Audio Communications, Inc. Petition For A Declaratory Ruling That The 900 Service Guidelines Of US Sprint Communications Co. Violate Sections 201(a) and 202(a) Of The Communications Act*, 8 FCC Rcd 8697 (1993) ("*Audio Communications*").

<sup>15/</sup> *See Audio Communications, supra*, ¶¶ 11-22.

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

<sup>17/</sup> Similarly, post offices that have federal grants "for pilot and demonstration projects" may use ICN, while post offices without such grants are barred from using it, even for precisely the same types of activities.

<sup>18/</sup> *See The Non-Common Carrier Status of the Iowa Communications Network, supra*, at 9-10.

Amtrak were expressly charged by federal statute to be common carriers.<sup>19/</sup> Even though Comsat and Amtrak can provide only specific types of services, both are obligated to serve indifferently all who wish to use those services. Nowhere does the Iowa statute command ICN to be a common carrier or otherwise hold itself out to the public. To the contrary, the Iowa statute prohibits ICN from serving unauthorized users.

The examples of Comsat and Amtrak support the Commission'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 enumerated and differentiated the types of eligible agencies that would be permitted to become authorized users of ICN, and prohibited all others.

**An Option To Use ICN Does Not Indicate Common Carrier Status:** Among other things, ITTC's October 8 oral *ex parte* presentations and October 9 letter dwell on the alleged freedom of authorized ICN users to choose to use ICN and its services.<sup>20/</sup> The Commission cannot base a finding of common carriage on whether authorized users have an option to use ICN, since the exercise of such choice is not determinative of common carrier status.

### III. ICN DOES NOT SERVE INDIFFERENTLY EVEN ITS ELIGIBLE AGENCIES

Even if ICN were assumed to be offering its services to the public, which it does not, ICN does not serve its potential users -- the eligible agencies -- indifferently.<sup>21/</sup> Rather, ICN deals with eligible agencies on a highly individualized basis, the key trait of non-common carrier status.<sup>22/</sup>

**Individualized And Disparate Approval of Users:** As USTA has noted, ICN requires certain agencies to receive individualized approval from the Iowa legislature to become authorized users of ICN, a practice far different from that of any common carrier.<sup>23/</sup> By statute, to receive service from ICN, such an agency must have certified no later than July 1,

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<sup>19/</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).

<sup>20/</sup> See Attachment to October 8 oral *ex parte* presentations at 1, 2; October 9 ITTC letter at 1-2.

<sup>21/</sup> See *Southwestern Bell*, 19 F.3d 1475, 1480 (1994).

<sup>22/</sup> See *NARUC II*, 533 F.2d at 608-609; *Southwestern Bell*, 19 F.3d at 1481.

<sup>23/</sup> See June 18 USTA presentation, attachment at 7.

1994, that it "is or intends to become" part of the network.<sup>24/</sup> The Iowa statute prohibits these eligible agencies that did not so certify from using the network, absent "legislative approval."<sup>25/</sup> As USTA has explained, the Iowa legislature has granted such approval for specific agencies.<sup>26/</sup> Such approval requires legislation on a case-by-case basis. This individualized treatment of users is not common carriage. Although ITTC argues that this requirement is of limited applicability and is meant "solely as a construction management tool,"<sup>27/</sup> the fact remains that some legible users must obtain individualized legislative permission to use ICN while others do not. This differential treatment is not common carriage.

**Individualized Waivers of Capacity Requirements:** ITTC also admits that the Iowa statute requires certain authorized users of ICN to use it for all of their video, data, and voice requirements unless they obtain a waiver.<sup>28/</sup> ITTC represents that it freely grants such waivers.<sup>29/</sup> Far from showing that ICN users are treated indifferently, ITTC's waiver authority is further evidence that ITTC deals individually with users. Through the waiver process, which is carefully defined in the Iowa statute, ITTC is authorized to negotiate specific agreements with these authorized users for the amount and type of services that it will provide.<sup>30/</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. Such individualized treatment further supports a finding of non-common carrier status for ICN.

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<sup>24/</sup> See Iowa Code § 8D.9(1).

<sup>25/</sup> See *id.*

<sup>26/</sup> See *The Non-Common Carrier Status of the Iowa Communications Network, supra*, at 14-15.

<sup>27/</sup> See October 9 ITTC letter at 1.

<sup>28/</sup> See *id.* at 2; Iowa Code § 8D.9.2.a.

<sup>29/</sup> See Attachment to October 8 oral *ex parte* presentations at 2.

<sup>30/</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.

Iowa Code § 8D.9(2)a.(3).

**Varying Rates Based On User's Identity:** As USTA has pointed out, ICN's web page disclosed in April, 1998, that ICN charges different types of users different rates for the same service. There were 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 were 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>31/</sup> "Telemedicine" users were required to pay \$45/hour per site, but "telemedicine training" users paid \$6/hour per site.<sup>32/</sup>

As the foregoing factors illustrate, ICN's treatment of its various authorized users is highly individualized by class.

#### **IV. THE COMMISSION CANNOT IMPOSE COMMON CARRIER STATUS ON THE BASIS OF POLICY OBJECTIVES**

In the October 8 oral *ex parte* presentation, ITTC argues that even if ICN is not a carrier with respect to "higher education institutions," it is a carrier for "all other Iowa entities eligible for universal service support."<sup>33/</sup> The Commission should not countenance ITTC's result-driven attempt to obtain direct universal service support. As the D.C. Circuit held in *Southwestern Bell*, the Commission "may not impose common carrier status upon any given entity on the basis of the desired policy goal the Commission seeks to advance."<sup>34/</sup> Iowa law permits only a narrow class of agencies to use ICN. It would be absurd to determine that ICN provides telecommunications "directly to the public," or acts as a common carrier, with respect to a still smaller sub-class of eligible agencies -- the "Iowa entities eligible for universal service support" -- solely for the purpose of permitting ICN to receive direct universal service support.

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

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<sup>31/</sup> See *Frequently Asked Questions About the ICN & Internet*, <http://www.icn.state.ia.us/ICN/HTML/FAQS.htm> ("FAQ") (accessed Apr. 17, 1998), printed page 4 of 5 (on file with USTA). The ICN web page has recently been revised, and this information is no longer listed.

<sup>32/</sup> See FAQ, *supra*. According to the web page, K-12 educational users were to pay \$5/hour per site, higher educational users were to pay \$6/hour per site, and "other" users were to pay \$10/hour per site, all for the same service.

<sup>33/</sup> See Attachment to October 8 oral *ex parte* presentations at 3.

<sup>34/</sup> *Southwestern Bell*, 19 F.3d at 1481, *citing* NARUC I, 525 F.2d at 644.

Despite ITTC's claims to the contrary, ICN fails to satisfy the further requirement for common carriage that "customers transmit intelligence of their own design and choosing."<sup>35/</sup> In the October 9 letter, ITTC claims that "ICN does not restrict the content that a user can transmit."<sup>36/</sup> Yet ITTC's administrative regulations restrict the subject matter, if not the specific contents, of transmissions over it. Uses of the ICN are limited to those "consistent with the written mission of the authorized user."<sup>37/</sup> ITTC 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>38/</sup> ITTC fails to point out that authorized users that violate these restrictions can be suspended from use of ICN's network, or their authorizations can be revoked.<sup>39/</sup>

Notwithstanding ITTC's claim, without citation, of alleged restrictions in common carrier tariffs on "using residential service for business purposes," and yet another reference to channel service, ITTC is unable to point to a common carrier that restricts the subject matter of every call on its network as ITTC does. ITTC's *de jure* restrictions on the subject matter of the "limited access" ICN are not consistent with common carrier principles.

## **VI. CONCLUSION: THE TREATMENT OF ICN IN THE FOURTH RECONSIDERATION ORDER SHOULD BE UPHELD**

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.

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<sup>35/</sup> See *Southwestern Bell*, 19 F.3d at 1480.

<sup>36/</sup> See October 9 ITTC letter at 2.

<sup>37/</sup> See Iowa Admin. Code § 751-7.5. See also *id.* § 751-14.1(1)2.

<sup>38/</sup> See *id.* § 751-14.1(1)1 (emphasis added).

<sup>39/</sup> *Id.* § 751-10.2.