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December 23, 1998

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VIA HAND DELIVERY

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

RECEIVED  
DEC 23 1998  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Iowa Communications Network Request for Determination  
CC Docket No. 96-45  
AAD/USB File No. 98-37  
Written Ex Parte Presentation

Dear Chairman Kennard:

I am writing on behalf of our client, the Iowa Telecommunications and Technology Commission, operating the Iowa Communications Network (collectively, the "ICN"), to highlight a recent Federal Communications Commission ("FCC") decision that sets forth the essential principles of common carriage, *i.e.*, holding oneself out indifferently to all potential users of the service offered, and to address the erroneous conclusions set forth in the United States Telephone Association's ("USTA") November 16, 1998, written *ex parte* presentation.

• *AT&T-SSI Order*

In *AT&T Submarine Systems*, the Commission addressed the application of AT&T Submarine Systems, Inc. ("AT&T-SSI") for a license to land and operate the St. Thomas-St. Croix cable system on a non-common carrier basis.<sup>1/</sup> Specifically, AT&T-SSI sought to sell bulk capacity to purchasers on an indefeasible right to use ("IRU") basis. Although AT&T-SSI

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<sup>1/</sup> AT&T Submarine Systems, Inc. Application for a License to Land and Operate a Digital Submarine Cable System Between St. Thomas and St. Croix in the U.S. Virgin Islands, *Memorandum Opinion and Order*, File No. S-C-L-94-006, FCC 98-263 (rel. Oct. 9, 1998) ("*AT&T-SSI Order*").

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intended to sell the capacity at market prices, the International Bureau found that AT&T-SSI would have to engage in negotiations with each of its customers on the price and other terms which would vary depending on the customer's needs. The Bureau thus concluded that AT&T-SSI would not be providing cable capacity indiscriminately — a necessary element of common carriage.

Based on the Bureau's conclusions and the statements of AT&T-SSI that it had the sole discretion to make individualized decisions on offering bulk capacity to *restricted classes* of users and to tailor its capacity to the specialized requirements of its customers, the Commission concluded that AT&T-SSI would not sell capacity "indifferently to the public" and thus the Commission was "not required to classify AT&T-SSI as a common carrier."<sup>2/</sup>

The AT&T-SSI decision sets forth the two critical factors for determining whether ICN should be classified as a common carrier: (1) whether the provider engages in individual negotiations with end users; and (2) whether the provider selects the *individual* customers it will serve. Thus, the central issue in determining whether an entity is a "common carrier" is whether the carrier seeks to provide its services on a non-discriminatory basis to its particular *class* of customers. ICN, unlike AT&T-SSI, holds itself out indifferently to all potential customers for its distance learning and telemedicine services and offers its services on standard terms and conditions.<sup>3/</sup> ICN thus meets the criteria for classification as a common carrier. 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. Thus, in contrast to AT&T-SSI, ICN should be classified as a telecommunications carrier under the 1996 Act.

AT&T-SSI also provides a specific example of a carrier that is common carrier for some service or purpose and not others. While the Commission determined that AT&T-SSI is a private carrier for its bulk capacity offerings, it is plain that AT&T is a common carrier for its other service offerings, such as interexchange service. Thus, USTA's apparent conclusion in its November 16, 1998, *ex parte* presentation that a carrier may not be a common carrier for one service offering and not for another, is unfounded and plainly incorrect.<sup>4/</sup>

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<sup>2/</sup> *Id.* at ¶ 8.

<sup>3/</sup> *See* ICN Reply Comments at 10.

<sup>4/</sup> *See infra* discussion of USTA Ex Parte Presentation.

- *USTA Ex Parte*

On November 16, 1998, USTA filed an *ex parte* presentation that again misstates both the law and the characteristics of ICN's service offerings.<sup>5/</sup> USTA contends that ICN has failed to provide any legal justification for the Commission to hold that ICN is a telecommunications carrier.<sup>6/</sup> This contention is plainly incorrect. ICN has shown that, under well-established precedent, the Commission should classify ICN as a telecommunications carrier. Indeed, ICN has described the nature of its services and classes of end users and explained that ICN offers its services indifferently to all of its possible customers repeatedly over the past ten months.<sup>7/</sup> These filings have shown, again and again, that ICN does not individually negotiate and does not choose individual customers, but rather offers its service to all members of large classes on non-discriminatory terms and conditions.

USTA also misconstrues the availability of ICN's service to end users. According to USTA, the entities eligible to use ICN are limited to two narrowly defined categories of governmental agencies. As ICN has stated, however, all entities — public and private — eligible for support under the commission's school, library and rural health care rules are free to choose to use or not to use ICN's services at any time.<sup>8/</sup> ICN offers its services to all *potential* customers that can use and that have a need for those services. Moreover, the law is plain that one may be a common carrier even though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population.<sup>9/</sup> USTA's claim that ICN serves only a narrow category of customers and thus cannot be a common carrier not only

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<sup>5/</sup> Letter to Magalie Roman Salas, Esq., from Porter Childers of USTA, CC Docket No. 96-45, AAD/USB File No. 98-37, dated November 16, 1998 ("USTA Letter").

<sup>6/</sup> USTA also incorrectly claims that the Commission has held that ICN is not a common carrier. *Id.* at 1. As described in ICN's initial petition, the Commission did not reach any specific conclusion regarding ICN's carrier status.

<sup>7/</sup> See ICN Reply Comments; see also ICN Ex Parte submitted on April 9, 1998, describing the general principles of common carriage; ICN Ex Parte submitted on October 5, 1998, describing the principles of use of the ICN network; ICN Ex Parte submitted on October 9, 1998, responding to questions raised during meetings with Commission staff.

<sup>8/</sup> ICN Ex Parte submitted on October 5, 1998 (Principles of Use of the Network).

<sup>9/</sup> See, e.g., *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630 (D.C. Cir. 1976), *cert denied*, 425 U.S. 992 (1976) (*NARUC I*).

misstates the law and the well-established definition of “common carriage,” but also misconstrues the nature and size of the class of ICN users.

USTA also claims that ICN restricts the subject matter of communications by end users. Once again, this assertion is incorrect. As ICN has recently explained, ICN does not restrict the content that a user can transmit, nor does ICN have any control over the content transmitted. Indeed, ICN’s administrative rules place the responsibility of determining whether the use of the network is consistent with the authorized user’s “written mission” on the user itself.<sup>10/</sup> This is consistent with the Commission’s rules which restrict the resale of services purchased pursuant to universal service mechanisms to ensure that the services are used in a manner consistent with the end user’s objectives.<sup>11/</sup> Similarly, USTA fails to refute ICN’s specific examples of the acceptable use requirements found in common carrier tariffs, *e.g.* prohibitions on using residential service for business purposes, concluding wrongfully and without any support that ICN restricts the content of “every call on its network.”<sup>12/</sup>

For the forgoing reasons, ICN requests that the Commission act in accordance with this *ex parte* as well as its previous filings in this proceeding, and classify ICN as a common carrier. ICN requests that the Commission expeditiously render its decision so that Iowa is not unfairly handicapped in its effort to ensure that Iowa schools and libraries have access to advanced learning technologies.

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<sup>10/</sup> ICN Ex Parte submitted on October 9, 1998 (Responses to Questions).

<sup>11/</sup> 47 C.F.R. § 54.617(a).

<sup>12/</sup> In this regard, USTA’s complaint that ICN requires users to use services in a way consistent with their missions is particularly misplaced. This requirement is no more restrictive than a tariff requirement that business users not purchase residential service. USTA member companies zealously enforce such tariff requirements, but USTA does not claim that its members are not common carriers.

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In accordance with Section 1.1206 of the Commission's Rules, the original and two copies of this presentation are being submitted to the Secretary's office on this date. Please inform me if any questions should arise in connection with this submission.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kenneth D. Salomon", written in a cursive style.

Kenneth D. Salomon

KDS/lsr

cc: Hon. William E. Kennard  
Hon. Susan Ness  
Hon. Harold Furchtgott-Roth  
Hon. Michael K. Powell  
Hon. Gloria Tristani  
Thomas Power  
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