



EX PARTE OR LATE FILED



January 13, 1999

Ex Parte Notice

Magalie Roman Salas
Secretary
Federal Communications Commission
445 - 12th Street, SW - TW - A325
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

Dear Ms. Roman Salas:

Today, the attached ex parte presentation pertaining to the above-referenced proceeding was provided to the Honorable William E. Kennard, Chairman, on behalf of the United States Telephone Association (USTA). Pursuant to Commission Rule 1.1206(b)(1), USTA hereby submits two copies of the written presentation, for each of the above-referenced proceedings, to you for inclusion in the public record. Please contact me if you have questions.

Respectfully Submitted,

Porter Childers
Executive Director of
Legal and Regulatory Affairs

cc: Hon. William E. Kennard	Kevin Martin
Hon. Susan Ness	Paul Gallant
Hon. Harold Furchtgott-Roth	Kathryn C. Brown
Hon. Michael K. Powell	Lawrence Strickling
Hon. Gloria Tristani	Lisa Zaina
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January 13, 1999

Hon. William E. Kennard
Chairman
Federal Communications Commission
The Portals
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

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

Dear Mr. Chairman:

The United States Telephone Association ("USTA") writes to respond to the *ex parte* letter of December 23, 1998 (the "December 23 letter") of the Iowa Telecommunications and Technology Commission ("ITTC").^{1/} USTA continues to urge the Commission to deny ITTC's petition 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.^{2/} USTA's earlier presentations on this topic demonstrate that the Commission should affirm its existing holdings with respect to ICN.^{3/}

^{1/} See 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 (Dec. 23, 1998).

^{2/} See *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 5318 (1997) at 5426-5428 ¶¶ 187-189.

^{3/} See, e.g., *The Commission Has Ruled Correctly That The Iowa Communications Network Is Not A Telecommunications Carrier*, attached to Ex Parte Notice to Hon. Magalie (continued...)

ICN is not a telecommunications carrier under the Communications Act (the "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 Act requires.^{4/} ITTC's December 23 letter is devoid of legal or policy justification for the Commission to change its correct holding that ICN does not qualify as a telecommunications carrier. ITTC's repetitive arguments patently are driven by its desire to obtain direct universal service funding for ICN, even though ICN acts neither as a telecommunications carrier nor a common carrier. Of course, the D.C. Circuit has held that 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."^{5/}

ICN Is Not A Telecommunications Carrier Because The Iowa Law That Established It Selectively Defines And Limits The Users That May Access The Network

The effect of Iowa law is to establish ICN as a closed, state-owned network. Although ITTC claims that ICN "does not choose individual customers,"^{6/} Iowa law does precisely such choosing, in a highly restrictive and discriminating manner. It is undisputed that by statute, ICN may only provide services to specifically defined categories of agencies -- so-called "public agencies" and "private agencies."^{7/} USTA has described these definitions in its earlier

^{3/}(...continued)

Roman Salas, Secretary, FCC, from Porter Childers, USTA, CC Docket No. 96-45, AAD/USB File No. 98-37 (filed Nov. 16, 1998); Letter to Hon. Magalie Roman Salas, Secretary, FCC, from Keith Townsend, USTA, re CC Docket No. 96-45, AAD/USB File No. 98-37 (filed Aug. 31, 1998); 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).

^{4/} See 47 U.S.C. § 153(46).

^{5/} *Southwestern Bell v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994), citing *NARUC v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*") at 644.

^{6/} See December 23 letter at 3.

^{7/} See Iowa Code §§ 8D.2(4), (5) (defining "private agency and "public agency"); W. F. Maher, Jr., *The Non-Common Carrier Status of the Iowa Communications Network*, attached

(continued...)

presentations. At the same time, Iowa law establishes very detailed rules that discriminate among its eligible users.^{8/} These exclusive arrangements cannot rationally be considered "service directly to the public," as required in the definitions of "telecommunications carrier" or common carriage.

ITTC wrongly claims that it is a common carrier because "it offers its services to all *potential* customers that can use and have a need for those services."^{9/} But ITTC again fails to confront the reality that these "potential customers" are not the public because they are precisely defined and restricted by statute. ITTC is barred by Iowa statute 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."^{10/} ICN's customers are screened and selected by Iowa statute, since ICN thus is prohibited by law from serving all potential users of its services.

Thus, a prospective user of ICN that does not satisfy the definition of "public agency" or "private agency" is barred from using ICN, even if it would use the network in the same way or for the same purposes (*e.g.*, training, education) as would the eligible agencies.^{11/} This disparate treatment, mandated by state law, is the hallmark of non-common carriage.

The Cable Landing Cases Support A Finding Of Non-Common Carriage For ICN

^{2/}(...continued)

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).

^{8/} Thus, as USTA has noted, some eligible agencies, including some colleges, must obtain approval from the Iowa legislature to use ICN. *See The Non-Common Carrier Status of the Iowa Communications Network, supra*, at 15. ICN is free to negotiate individually with its users and does so. And ICN charges very different rates for the same services to similar customers.

^{9/} See December 23 letter at 3 (emphasis in original).

^{10/} Iowa Code § 8D.3(3)a. ITTC has continued to ignore this section of the Iowa Code in its communications with the Commission.

^{11/} Some colleges that are barred from joining ICN without prior legislative approval undoubtedly would use the network for the same purposes and in the same ways as schools that are not subject to this statutory bar.

As USTA explained in April, 1998, there is a well-developed body of decisions in which the Commission has treated service providers, including operators of submarine cables, as non-common carriers.^{12/} While ITTC heretofore had ignored those decisions, ITTC's December 23 letter misconstrues the Commission's recent *AT&T Submarine Systems* order to be a precedent for declaring ICN to be a common carrier.^{13/} To the contrary, the reasoning of *AT&T Submarine Systems* strongly supports Commission affirmance of its earlier holding that ICN is not a telecommunications carrier.^{14/} The Commission should not be swayed by ITTC's distorted reading of *AT&T Submarine Systems*.

In *AT&T Submarine Systems*, the Commission upheld the International Bureau's earlier grant of a license to a subsidiary of AT&T ("AT&T-SSI") to land and operate, on a non-common basis, a digital submarine cable system. A party had applied for review of the license grant, arguing that because AT&T-SSI's customers are themselves common carriers, AT&T-SSI should be treated as a "telecommunications carrier" as defined in the Telecommunications Act of 1996 (the "1996 Act").^{15/}

The *AT&T Submarine Systems* order rightly denied the application for review and refused to impose common carrier status on AT&T-SSI.^{16/} Similarly, the Commission should uphold its earlier order and refuse to grant common carrier status to ICN. In *AT&T Submarine Systems*, the Commission noted that the term "telecommunications carrier" means essentially the same as "common carrier" and stated that:

^{12/} See *The Non-Common Carrier Status of the Iowa Communications Network*, *supra* at 12, citing *Tel-Optik Limited*, 100 FCC 2d 1033 (1985).

^{13/} See *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*, File No. S-C-L-94-006 (rel. Oct. 9, 1998) ("*AT&T Submarine Systems*").

^{14/} See *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 5318 (1997) at 5426-5428 ¶¶ 187-189.

^{15/} See *AT&T Submarine Systems* ¶ 5.

^{16/} *Accord, AT&T Corp., Access Telecom, et al.*, File No. SCL-AMD-19980902-00018, Cable Landing License, DA 98-2550 (Telecom Div., Int. Bur. rel. Dec. 15, 1998).

[A] carrier does not have to be regulated as a common carrier if (1) it intends to make "individualized decisions, whether and on what terms to serve" or (2) the public interest does not require the carrier to serve the public indifferently.^{17/}

Applying this test, the Commission found, first, as a factual matter, that AT&T-SSI will not sell cable capacity indifferently to the public, relying on statements by AT&T-SSI that it retained sole discretion to decide to serve *restricted classes* of users and tailor its offerings to the special requirements of its customers.

ICN, like AT&T-SSI, does not provide service indifferently to the public. ICN does not serve the public at all. By carrying out Iowa law, ITTC is the sole determinant of the restricted classes to be served, like ATT-SSI. As noted above, ICN's establishing statute preselects users by restricting ICN to serve only authorized "public agencies" and "private agencies." These *restricted classes* of agencies, defined by statute, cannot rationally be considered to constitute the public -- especially when Iowa law bars ITTC from permitting unauthorized users to access ICN.

Consistent with the Commission's holding in *AT&T Submarine Systems*, ICN does not serve even its authorized users indifferently.^{18/} ITTC is free to deal individually with its users, and has represented that it has done so. 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.^{19/} ITTC represents that it freely grants such waivers.^{20/} 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 code, ITTC is authorized to negotiate specific agreements with authorized users for the amount and type of

^{17/} *Id.* ¶ 7, citing *Cable & Wireless*, 12 FCC Rcd at 8521-8522. See also *Tel-Optik, Ltd.*, 100 FCC 2d 1033, 1046 (1987) (selling bulk capacity through individual negotiations or marketing needs does not constitute common carrier activity); *Domestic Fixed-Satellite Transponder Sales*, 90 FCC 2d 1238, 1252-3 (1982) *aff'd sub nom. World Communications v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984) ("Transponder Sales") (sale or longterm lease of transponders not common carrier activity).

^{18/} 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.

^{19/} Iowa Code § 8D.9.2.a.

^{20/} See Attachment to oral *ex parte* of ITTC of October 8, 1998, at 2.

services that it will provide and ITTC apparently uses this authority freely.^{21/} 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.

With respect to the second factor considered in the analysis of *AT&T Submarine Systems*, the Commission found that there was no public interest in requiring AT&T-SSI to act as a common carrier because AT&T-SSI did not have sufficient market power to warrant such treatment, since sufficient alternative facilities were available in the relevant markets.^{22/} Under this analysis, ICN has no market power and should not be considered a common carrier for regulatory purposes. There are readily available alternatives to ICN for those public and private agencies eligible to use ICN -- the numerous privately-owned telecommunications carriers already serve the public in Iowa.

Nor are there other policy reasons to require ICN to operate as a common carrier. There is no evidence in the Iowa statute -- and ITTC has pointed to none -- that ICN was intended to be a common carrier. The Iowa statute never uses the term common carrier and in fact establishes a closed network.^{23/}

Moreover, there are strong policy reasons against a finding of ICN as a telecommunications carrier, assuming that the D.C. Circuit's *Southwestern Bell* decision, *supra*, permitted such a finding, which it does not. Numerous privately-owned common

^{21/} 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); *see also* Iowa Admin. Code § 751-9.1.

^{22/} See *AT&T Submarine Systems* at ¶¶ 9-11.

^{23/} In contrast to the Iowa law, as USTA has noted, the federal statutes establishing such entities as Comsat and Amtrak expressly defined those entities as common carriers. *See The Commission Has Ruled Correctly That The Iowa Communications Network Is Not A Telecommunications Carrier, supra* note 3, at 5.

carriers already exist in Iowa. ICN's operations, unlike those of any such privately-owned carrier, are subsidized by Iowa taxpayers, including the privately-owned Iowa carriers. Additional direct reimbursement from 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 in states where taxpayers have not funded networks such as ICN.

ITTC engages in irrelevancy by citing *AT&T Submarine Systems* as authority for the proposition that an entity may be a common carrier with respect to some services but not others. No part of ICN operates on a common carrier basis. Attempts by ITTC to have the Commission carve out services taken by certain users as ICN common carriage are merely attempts to improperly garner direct universal service support. The *Southwestern Bell* decision forbids such policy-driven classifications. Indeed, the precedential effect of such a classification would be harmful, since it would serve as a regulatory incentive for state governments to establish networks similar to ICN simply to garner direct universal service support.

ICN Is Not A Common Carrier Because It Limits The Subject Matter Of Communications By End Users

The December 23 letter notwithstanding, ICN also fails to satisfy the judicial requirement for common carriage that "customers transmit intelligence of their own design and choosing."^{24/} The administrative rules that govern ICN's operation limit 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."^{25/} ICN's administrative rules also require 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."^{26/} As importantly, ITTC is

^{24/} See *Southwestern Bell v. FCC*, 19 F.3d at 1480.

^{25/} See Iowa Admin. Code § 751-7.5.

^{26/} See *id.* § 751-14.1(1).

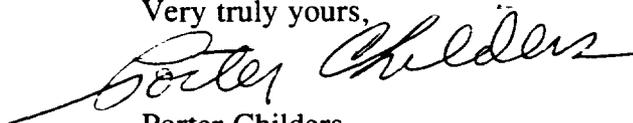
empowered to suspend or revoke violators' authorization to use the ICN network for violations of these restrictions.^{27/}

While ITTC's December 23 letter attempts to shift the responsibility for these restrictions onto ICN's authorized users, it omits to mention that ITTC itself is to enforce the restrictions. The December 23 letter also unaccountably attempts to compare ICN's content restrictions with the business/residential classifications commonly found in common carrier tariffs. The comparison fails: LEC tariffs do not bar LEC business customers from discussing personal matters using their services; conversely, LEC residential customers routinely and permissibly engage in business transactions (e.g., from selling houses to ordering pizzas) using their services. But if an employee of an ICN user strays from a use "consistent with the written mission of the authorized user," ITTC can suspend or revoke the user's authorization. These binding legal restrictions on the subject matter of the ICN are not consistent with common carrier principles.

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 today. This filing is to be included in the public record of this proceeding. Please do not hesitate to call me at 202.326.7268 if any questions arise in connection with these matters.

Very truly yours,



Porter Childers
Executive Director - Legal & Regulatory

cc: Hon. Susan Ness
Hon. Harold Furchtgott-Roth
Hon. Michael K. Powell
Hon. Gloria Tristani
Thomas Power
James L. Casserly
Kyle D. Dixon
Kevin J. Martin
Paul Gallant
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Lisa Zaina
Suzanne Tetreault
Amy Nathan
Irene Flannery

^{27/} *Id.* § 751-10.2.