

Before the
Federal Communications Commission
Washington, D.C. 20554

RECEIVED
FEB 26 1999
FCC MAIL ROOM

In the Matter of)
)
Federal-State Joint Board)
on Universal Service)

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

DECLARATORY RULING

Adopted: January 29, 1999

Released: February 18, 1999

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement.

I. INTRODUCTION

1. In this Declaratory Ruling, we address a petition by the Iowa Telecommunications and Technology Commission ("ITTC"), operating the Iowa Communications Network ("ICN"),¹ seeking a declaration that ICN is a "telecommunications carrier" eligible to receive direct universal service support for the provision of discounted telecommunications services to schools, libraries, and rural health care providers under sections 254(h)(1)(A) and (B) of the Communications Act of 1934, as amended ("Act").²

2. As we observed in the *Universal Service Order* and reiterated in the *Fourth Reconsideration Order*, the Act permits only "telecommunications carriers" to receive direct reimbursement from universal service support mechanisms for the provision of discounted telecommunications services, and the term "telecommunications carrier" includes only carriers that offer telecommunications on a common carriage basis.³ As we explain below, it is clear

¹ See Letter from J.G. Harrington, counsel for Iowa Telecommunications and Technology Commission (ITTC), to Magalie Roman Salas, FCC, dated Feb. 4, 1998 ("ICN petition").

² See 47 U.S.C. §§ 254(h)(1)(A) and (B).

³ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd 8776, 9177-78, 9005-23, 9084-90 (1997) (*Universal Service Order*), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), *appeal pending in Texas Office of Public Utility Counsel v. FCC and USA*, No. 97-60421 (5th Cir. 1997); see also *Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, *Fourth Order on Reconsideration*, 13 FCC Rcd 5318, 5413-14 (1997) (*Fourth Reconsideration Order*), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, DA

that ICN is not offering telecommunications on a common carrier basis and, therefore, is not within the category of providers defined by Congress as being eligible to receive direct reimbursement for the provision of discounted telecommunications services to schools, libraries, and rural health care providers under section 254(h)(1) of the Act.

3. While ICN is statutorily barred from receiving direct reimbursement for discounted telecommunications that it provides over its own network, we reiterate, nonetheless, that the Act does provide other avenues by which schools, libraries, and rural health care providers may receive discounts for services obtained through a state network. We note that state telecommunications networks may receive support for providing two types of services to eligible schools, libraries, and rural health care providers: (1) discounted telecommunications obtained by the state network acting as a consortium; and (2) non-telecommunications services. First, schools, libraries, and rural health care providers are specifically eligible to receive discounted telecommunications services from a state network that acts as a consortium in aggregating and purchasing discounted telecommunications from a telecommunications carrier that provides services over its network (as opposed to ICN's network) to the schools, libraries, and rural health care providers that make up the consortium.⁴ The state network must distribute the discounts between all of the participating recipients of the services.

4. Second, we emphasize, consistent with the *Fourth Reconsideration Order*, that state telecommunications networks, such as ICN, may secure direct reimbursements for their provision of eligible discounted non-telecommunications services (i.e., Internet access and internal connections) to schools and libraries.⁵ Alternatively, a state network may act as a consortium in obtaining these non-telecommunications services, and thus pass the discounts through to the participating schools and libraries as described above.

II. BACKGROUND

5. Section 254(e) generally provides that only an "eligible telecommunications carrier"⁶ under section 214(e) is eligible to receive universal service support.⁷ An entity must,

98-158 (rel. Jan 29, 1998), *appeal pending in Alenco Communications, Inc., et al. v. FCC and USA*, No. 98-60213 (5th Cir. 1998).

⁴ See *Fourth Reconsideration Order*, 13 FCC Rcd at 5423-24.

⁵ See *Fourth Reconsideration Order*, 13 FCC Rcd at 5423-24, 5428-29. The ICN has applied for support for provision of non-telecommunications services, in addition to telecommunications services.

⁶ See 47 U.S.C. § 214(e)(2). Section 214(e)(1)(A) requires an eligible telecommunications carrier ("ETC") to "offer the services that are supported by Federal universal service support mechanisms under section 254(c)." Pursuant to section 254(c), the Commission, based on the recommendation of the Federal-State Joint Board,

therefore, be an "eligible telecommunications carrier" for purposes of receiving universal service support under section 254(h)(1)(A) for providing telecommunications services to rural health care providers.⁸ Congress carved out an exception in the case of schools and libraries, however, by specifying that any "telecommunications carrier," even one that did not qualify as an "eligible telecommunications carrier," is eligible for direct reimbursement for providing discounted telecommunications services to schools and libraries.⁹ Notwithstanding this distinction, Congress clearly provided that an entity be a "telecommunications carrier" of some sort in order to receive universal service support for the provision of discounted telecommunications services to either rural health care providers or to schools and libraries.

6. Section 153(44) of the Act defines a "telecommunications carrier" to be any provider of "telecommunications services."¹⁰ The Act states that "telecommunications services" are the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."¹¹ This definition mirrors the common law definition of a "common carrier," and thus the Commission in the *Universal Service Order* determined that the term "telecommunications services" encompasses only telecommunications provided on a common carrier basis.¹² Accordingly, consistent with the Act, a telecommunications carrier is an entity that provides telecommunications on a common carrier basis.

determined that the following services or functionalities will be supported by universal service mechanisms: voice-grade access to the public switched network; local usage; dual tone multi-frequency signaling; single-party service; access to emergency services; access to operator services; access to interexchange service; access to directory assistance; and toll limitation for qualifying low-income customers. See 47 C.F.R. § 54.101(a)(1)-(9). In order to be designated an ETC, therefore, a common carrier needs to be offering each of these services.

⁷ 47 U.S.C. § 254(e).

⁸ See 47 U.S.C. § 254(h)(1)(A); *Universal Service Order*, 12 FCC Rcd at 9105-06.

⁹ Because section 254(h)(1)(B)(ii) states that "notwithstanding the provisions of subsection [254](e) of this section" a telecommunications carrier providing services to schools and libraries may receive reimbursement from universal service support mechanisms, the Commission interpreted the Act to allow all "telecommunications carriers" to be eligible for reimbursement under section 254(h)(1)(B). *Universal Service Order*, 12 FCC Rcd at 9015; see also 47 U.S.C. § 254(h)(1)(B)(ii).

¹⁰ 47 U.S.C. § 153(44).

¹¹ 47 U.S.C. § 153(46). The term "telecommunications" is defined in the Act as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

¹² *Universal Service Order*, 12 FCC Rcd at 9177-78; see also *Fourth Reconsideration Order*, 13 FCC Rcd at 5413.

7. The Commission's rules define a common carrier as "any person engaged in rendering communications services for hire to the public."¹³ The Act requires common carriers to furnish services upon "reasonable request therefor."¹⁴ As the Commission noted in the *Universal Service Order*, and the D.C. Circuit Court of Appeals has held, a carrier may be a common carrier if it holds itself out "to service indifferently all potential users," and that a "carrier will not be a common carrier 'where its practice is to make individualized decisions in particular cases whether and on what terms to serve.'"¹⁵ The court determined that "holding oneself out to serve indiscriminately appears to be an essential element, if one is to draw a coherent line between common and private carriers."¹⁶ In contrast, a carrier that serves clients on an individualized basis, determines whether and on what terms to serve each client, and is under no regulatory compulsion to serve all indifferently, is a private carrier for that particular service.¹⁷

8. As the foregoing discussion reveals, to achieve the goal of allowing schools and libraries to obtain telecommunications services at discounted rates, Congress designed a system by which common carriers, in the course of providing service to the public generally, are required to offer discounted rates to those eligible entities.¹⁸ Prior to the creation of this federal scheme by Congress, a number of states had likewise sought to ensure that certain entities, often including schools, libraries, and state agencies, could receive telecommunications and related services at discounted rates. While pursuing the same goal as Congress, a number of these states adopted an approach significantly different than the one ultimately selected by Congress. Rather than designing a system under which private entities, independently engaged in the provision of telecommunications services to the public, would be reimbursed for giving discounts to eligible beneficiaries, many of the states created

¹³ 47 C.F.R. § 21.2.

¹⁴ 47 U.S.C. § 201(a).

¹⁵ *Universal Service Order*, 12 FCC Rcd at 9177-78 (citing *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (*NARUC II*)).

¹⁶ *National Association of Regulatory Commissioners v. FCC*, 525 F.2d 630, 642 (D.C. Cir.) (*NARUC I*), cert. denied, 425 U.S. 992 (1976).

¹⁷ *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994), citing *NARUC II*, 533 F.2d at 609. Private carriers do not serve everyone on "equal terms." Some examples of private carriers are "cable TV companies, [and] telecommunications carriers providing private lines to large users." Noam, Eli M., *Will Universal Service and Common Carriage Survive the Telecommunications Act of 1996?*, 97 Colum. L. Rev. 955 (May 1997).

¹⁸ The carriers shall offer the lowest corresponding price to eligible schools and libraries, and shall be reimbursed by the universal service support mechanism for the difference between the lowest corresponding price and the discount for which a school or library is qualified, pursuant to our rules. See *Universal Service Order*, 12 FCC Rcd at 9026-27; 9031-32.

government agencies and stand-alone state networks that offer service solely to state agencies, schools, and other beneficiaries specifically designated by the state legislature, at rates subsidized by the state. Some state networks own and operate their own facilities, while others aggregate demand for telecommunications services by eligible entities throughout the state and obtain volume discounts from independent carriers that actually provide the services directly to the eligible entities.¹⁹

9. In the petition before us, ITTC seeks to secure for ICN the benefits of both the federal and state support mechanisms. As a subsidized state network, ICN allows schools and other beneficiaries to obtain telecommunications and related services at steep discounts. For example, according to a 1998 memorandum to Iowa school district superintendents from the Iowa Department of Education, ICN charges its schools and libraries only \$5.00 per hour for video rates, even though the cost of that service was represented to be approximately \$75.²⁰ ITTC seeks a declaration that ICN, in addition to being a state network, is also a telecommunications carrier eligible for further support, or reimbursement of the state subsidy.

10. In the *Fourth Reconsideration Order*, the Commission addressed, *inter alia*, several petitions by state telecommunications networks, including ICN, concerning their eligibility under section 254(h)(1)(B) for direct reimbursement from universal service support mechanisms for provision of discounted telecommunications services to schools and libraries.²¹ If a state network qualified as a "telecommunications carrier," an eligible school, library, or rural health care provider could obtain service directly from the state telecommunications network at a discounted rate; the state network could then seek reimbursement from the universal service support mechanism for the discounted portion of the service. In its pleadings in the *Fourth Reconsideration Order* proceeding, ITTC specifically argued that ICN is a telecommunications carrier and "therefore eligible for direct reimbursement from the support mechanisms,"²² because ICN owns and operates its own network, and provides services to "a wide variety of users, not just schools and libraries."²³

11. The Commission decided in the *Fourth Reconsideration Order* that state telecommunications networks are not eligible for direct reimbursement from the support

¹⁹ *Fourth Reconsideration Order*, 13 FCC Rcd at 5417.

²⁰ See GTE reply comments at 6.

²¹ *Fourth Reconsideration Order*, 13 FCC Rcd at 5419-20.

²² *Fourth Reconsideration Order*, 13 FCC Rcd at 5418, 5421. ITTC also noted that the ICN network includes significant fiber capacity, switches, and high speed data hubs, in addition to services purchased from telecommunications carriers for DS-3 level connections to school districts. *Id.* at 5418.

²³ *Fourth Reconsideration Order*, 13 FCC Rcd at 5421.

mechanisms pursuant to section 254(h)(1), because the record showed that state telecommunications networks do not offer service "for a fee directly to the public," or "indifferently [to] all potential users," and instead, "offer services to specified classes of entities."²⁴ Because there was no credible evidence that state telecommunications networks "offer service indifferently to any requesting party," the Commission concluded that these networks were not "telecommunications carriers," and thus would "not be eligible for reimbursement from the support mechanisms pursuant to section 254(h)(1)."²⁵

12. As we have noted, the Act does not entirely prevent state telecommunications networks from receiving discounted telecommunications services under universal service support mechanisms. To the extent that a state telecommunications network procures supported telecommunications services for schools and libraries, the network would be eligible, as a consortium, to secure discounts on telecommunications services on behalf of eligible schools and libraries and would be required to pass those discounts along to the schools and libraries they serve.²⁶ Moreover, pursuant to section 254(h)(2), state telecommunications networks may secure discounts on Internet access and internal connections in their capacity as consortia, or may receive direct reimbursement, as non-telecommunications carriers, from universal service support mechanisms for providing such services to eligible schools and libraries.²⁷

13. On February 4, 1998, ITTC, operating ICN, filed a petition seeking a determination from the Commission that ICN is eligible under section 254 of the Act, and the Commission's rules, to receive direct reimbursement from universal service mechanisms for the provision of telecommunications services to schools, libraries, and rural health care providers.²⁸ ITTC argues that ICN is different from the state telecommunications networks described in the *Fourth Reconsideration Order* because it in fact provides telecommunications

²⁴ *Fourth Reconsideration Order*, 13 FCC Rcd at 5427.

²⁵ *Fourth Reconsideration Order*, 13 FCC Rcd at 5426-28.

²⁶ *Fourth Reconsideration Order*, 13 FCC Rcd at 5423-24. We also noted in the *Fourth Reconsideration Order* that parties "have not suggested any reason why state telecommunications networks should be treated differently from other consortia and thus be allowed to receive support directly from the universal service support mechanisms for providing telecommunications other than Internet access and internal connections." *Fourth Reconsideration Order*, 13 FCC Rcd at 5428.

²⁷ *Fourth Reconsideration Order*, 13 FCC Rcd at 5423-24, 5428-29.

²⁸ ICN petition at 1.

on a common carrier basis.²⁹ On February 13, 1998, the Common Carrier Bureau ("Bureau") requested public comment on ICN's petition.³⁰ Several parties filed comments and reply comments.³¹

III. ICN'S PETITION

14. ICN is authorized by the state legislature to provide high-speed, high-quality telecommunications and Internet services, and is operated by the ITTC.³² The state legislature provides funds to ITTC and subsidizes ICN's rates for its services.³³ Some parts of the network are state-owned and other portions are leased from private entities.³⁴ For the most part, ITTC leases the network to provide services to schools and libraries.³⁵ ITTC asserts that ICN offers a variety of services, including long distance, distance learning, telemedicine, and Internet services to "authorized users."³⁶

²⁹ ICN petition at 1.

³⁰ Iowa Telecommunications and Technology Commission Seeks Determination that the Iowa Communications Network is a Provider of Telecommunications Services to Schools, Libraries, and Rural Health Care Providers, CC Docket No. 96-45, *Public Notice*, 13 FCC Rcd 3014 (1998).

³¹ See, e.g., Ameritech comments; Bell Atlantic comments; Iowa Utilities Boards ("IUB") comments; Minnesota Equal Access Network Services, Inc. ("MEANS") comments; Rural Iowa Independent Telephone Association ("RIITA") comments; US West comments; GTE reply comments; ICN reply comments; US West reply comments.

³² ICN reply comments at 1-3.

³³ The Iowa statute provides that financing for the procurement costs of the network "shall be provided by the state," and that ICN's funds are appropriated to the ITTC. Iowa Code § 8D.13. Members of the ITTC are appointed by the governor of the state and subject to the state senate's confirmation. Iowa Code § 8D.3(2). GTE notes in its reply comments that currently ICN's subsidized rate for video rates is \$5.00 per hour. GTE reply comments at 6.

³⁴ ICN reply comments at 3; see also ICN *ex parte* submission, dated April 9, 1998, at 1 (*ICN April 9 ex parte*).

³⁵ There are three parts of the network: (1) Part I is state-owned and consists of the communications connections between the central switching hub of the network and 15 community colleges, universities governed by the board of regents and Iowa public television and other regional switching centers for the remainder of the network; (2) Part II is also state-owned and consists of communications connections between the Part I regional switching centers and each of the 99 counties located in the state; and (3) Part III consists *primarily of leased* equipment and telecommunications facilities (with the exception of some state-owned sites) that provides communication connections between the secondary switching centers and school districts and libraries and any other private or public agency authorized by the general assembly to connect to the network. Iowa Admin. Code § 751-7.1(8D) (emphasis added).

³⁶ *ICN April 9 ex parte*.

15. Under Iowa statute, only entities that are "private or public agencies"³⁷ may be included in the category of "authorized users" of ICN.³⁸ The Iowa statute divided the universe of private and public agencies into three categories, and treated each category differently for purposes of determining eligibility to take services from the ICN. First, certain private or public agencies, including state and federal agencies, local school districts and nonpublic schools, local libraries, judicial departments, hospitals and physician clinics, and certain United States post offices, were automatically "authorized" by Iowa statute to receive ICN's services as of May 18, 1994.³⁹ Second, private or public agencies that were not in the first group could certify their eligibility for the network by making the appropriate filing no later than July 1, 1994.⁴⁰ Third, a public or private agency that was not deemed authorized as of May 18, 1994, and that did not certify its eligibility by July 1, 1994, is prohibited from obtaining service from the ICN absent an act of the legislature.⁴¹ As noted, entities that do not qualify as private or public entities are absolutely barred from obtaining services from the state network. By Iowa law, a private or public agency that "certified" to purchase services from the network *must use* the network for all of its video, data, and voice requirements, and may not purchase any services from other carriers.⁴² A certified user may decide unilaterally to terminate its relationship with the ICN in favor of another provider with 60 days' prior

³⁷ A private agency under the Iowa code is an accredited nonpublic school, a nonprofit institution of higher education eligible for tuition grants, or a hospital or physician clinic. Iowa Code § 8D.2(4). A public agency means a "state agency, an institution under the control of the board of regents, the judicial department . . . a school corporation, a city library, a regional library, . . . an agency of the federal government, or a United States post office which receives a federal grant for pilot and demonstration projects." Iowa Code § 8D.2(5).

³⁸ Iowa Code § 8D.11(2).

³⁹ Included in this list are judicial district departments of correctional services and U.S. post offices that receive federal grants for pilot and demonstration projects, but not those U.S. post offices that do not receive such grants. Iowa Code § 8D.9.

⁴⁰ Iowa Code § 8D.9(1) and (2). Under Iowa's administrative law provisions, a "certified user" "means an area education agency, a community college, a regents institution, and a private college." Iowa Admin. Law Code § 751-9.1(3) (8D).

⁴¹ Any agency that obtains Iowa legislative approval to join the network after July 1, 1994, will also be treated as a "public or private agency" under the section and all provisions of Iowa Code chapter 8D. Iowa Admin. Code § 751-7.1(8D).

⁴² Iowa Code § 8D.9(1) and (2). The ITTC may waive the requirement for the agencies that certified to use ICN if one of the following conditions is met: (1) the costs to the authorized user for services provided on the network are not competitive with the same services provided by another provider; (2) the authorized user is under contract with another provider for such services, and the contract was entered into prior to April 1, 1994; or (3) the authorized user entered into an agreement with ITTC to become part of the network prior to June 1, 1994, and that agreement did not require the agency to use the network for all of its video, data, and voice requirements. Iowa Code § 8D.9(2).

written notice, but will then have to seek permission of the Iowa General Assembly to recertify.⁴³

16. In the petition, ITTC argues that ICN is a "telecommunications carrier," offering telecommunications on a common carrier basis, for the following reasons: (1) "it holds itself out to all of its potential customers for those services" or it serves indifferently its "chosen class of customers;" (2) it offers its services on generally available terms and conditions and does not negotiate individually with any of its customers; and (3) it serves a large number of customers and, accordingly, is different from private carriers that have contracts with a small number of customers.⁴⁴ Moreover, ITTC argues that the Commission should defer to the comments of the Iowa Utilities Board (IUB), in which the IUB supports a finding that ICN is a common carrier.⁴⁵ Finally, ITTC argues that the public interest compels a finding that ICN is a telecommunications carrier because such a ruling would "ensure that all Iowa schools, libraries and rural health care facilities have access to the advanced services contemplated by section 254(h) on equitable terms and conditions."⁴⁶

17. Two parties, in addition to the IUB, provided comments in support of ICN's request, noting that ICN "provides valuable services to Iowa [s]chools," and that, in order to

⁴³ Iowa Admin. Law Code § 751-9.8(8D).

⁴⁴ ICN petition at 2-4; *see also* Letter from Kenneth D. Salomon, counsel for ITTC, to William E. Kennard, Chairman, FCC, dated December 23, 1998, at 2 (asserting that ICN does not engage in individual negotiations with its customers, and that ICN holds itself out indifferently to its particular class of customers).

⁴⁵ ICN reply comments at 5; *see also* IUB comments at 1-3. The IUB is the regulatory agency that generally oversees the rates and services of public utilities in Iowa, with certain exceptions. Iowa law exempts from IUB regulation any "public utility in furnishing a telecommunications service or facility to the [ITTC] for the Iowa Communications Network, or to any authorized user of the Iowa Communications Network for such authorized user's connection to the network." Iowa Code § 8D.13(18).

⁴⁶ ICN reply comments at 2-3. Although ITTC previously contended that ICN did not have to contribute to universal service support mechanisms, it acknowledges in its current request that being recognized as eligible for direct reimbursement under section 254(h)(1)(B)(ii) "also will subject ICN to certain obligations." ICN petition at 4. ITTC notes that these obligations include "making universal service contributions as a telecommunications carrier and complying with other state and federal regulatory requirements." ICN petition at 4. We note that ICN has filed contribution worksheets and has made universal service contributions. In the *Universal Service Order*, the Commission concluded that, pursuant to section 254(d), non-common carriers that are "other providers of interstate telecommunications," including "private service providers that offer interstate telecommunications to others for a fee and payphone aggregators," must contribute to universal service support mechanisms. *Universal Service Order*, 12 FCC Rcd at 9182-86.

prevent inequities among schools, "all schools served by the ICN [should] be eligible to receive" universal service support for telecommunications services.⁴⁷

18. Several commenters argue that ICN does not meet the definition of a telecommunications carrier because it does not offer telecommunications on a common carrier basis by holding itself out indifferently to all potential customers.⁴⁸ The Iowa Telephone Association notes that the "Iowa legislature has had ample opportunity to revise the charter of ICN since the adoption of section 254(h)(1)(A) if it wanted ICN to be a common carrier."⁴⁹ To date, the legislature has not yet done so. GTE noted that ITTC intends to "have users of the network proffer bills *not for the expenses which they actually incur but rather based upon ICN's purported overall cost structure,*" adding that Iowa's Department of Education stated in a memorandum to Iowa's schools that "[u]sing the non-subsidized rate [on the school and libraries application form] will help the State of Iowa recoup some of its ICN operating costs."⁵⁰ Commenters also assert that the Commission should dismiss ICN's request because it simply seeks a repetitive reconsideration of the Commission's previous determination in the *Fourth Reconsideration Order* that state telecommunications networks are not "telecommunications carriers" under section 254(h)(1)(B) of the Act.⁵¹

IV. DISCUSSION

19. As a preliminary matter, we address comments by some parties that ICN's petition is simply a repetitive petition for reconsideration that should be dismissed because it presents no new facts or arguments.⁵² We find that ICN's request for a "determination from the Commission," however, should be treated as a petition for a declaratory ruling under

⁴⁷ See IUB comments; James Jess comments and Jerry Schnabel comments submitted with Letter from J.G. Harrington, ITTC, to Irene Flannery, FCC, dated March 18, 1998.

⁴⁸ See, e.g., RIITA comments at 3; National Telephone Cooperative Association (NTCA) comments at 5; GTE reply comments at 2; US West reply comments at 3; Ameritech comments at 2-3.

⁴⁹ See Iowa Telephone Association *ex parte*, dated May 5, 1998 at 1 (*ITA May 5 ex parte*). Moreover, the Iowa Telephone Association asserts that ICN has not asked to be treated as an "eligible telecommunications carrier" for purposes of providing telecommunications services to rural health care providers. *ITA May 5 ex parte* at 1.

⁵⁰ GTE reply comments at 6 (emphasis added in part).

⁵¹ See NTCA comments at 4; United States Telephone Association (USTA) comments at 2; GTE reply comments at 7.

⁵² See USTA comments at 2; GTE comments at 7; NTCA comments at 3-4. ICN's only new argument, contends NTCA, is that it has now agreed to contribute to universal service support mechanisms. NTCA comments at 4.

section 1.2 of the Commission's rules.⁵³ We are persuaded by ICN's contention that the *Fourth Reconsideration Order* does not entirely preclude the possibility that, under certain circumstances a state telecommunications network might qualify as a "telecommunications carrier."

20. The primary issue before us is whether ICN is a "telecommunications carrier" within the meaning of the Act and is, therefore, eligible to receive direct reimbursement from universal service support mechanisms for the provision of discounted telecommunications services to schools, libraries, and rural health care providers pursuant to section 254(h)(1).⁵⁴ We conclude that ICN does not meet the statutory definition of a "telecommunications carrier" because it does not offer telecommunications on a common carrier basis.⁵⁵

21. Generally, the test of common carriage, as set forth in the *NARUC* cases, analyzes the following factors: (1) whether the carrier "holds himself out to serve indifferently all potential users;" and (2) whether the carrier allows "customers to transmit intelligence of their own design and choosing."⁵⁶ Consistent with the D.C. Circuit's statement that the first requirement of holding oneself out to serve indifferently is a "key factor" in determining common carrier status,⁵⁷ our analysis focuses on that first prong of the *NARUC* test. We conclude that ICN fails to hold itself out to serve indifferently all potential users because of the particular facts and circumstances surrounding ICN's operation.⁵⁸

22. The evidence shows that ICN fails to "hold itself out" at all, contrary to a common carrier's duty to hold itself out "to the public" or to a party upon "reasonable

⁵³ Section 1.2 of our rules provides that the Commission may "on motion, or its own motion, issue a declaratory ruling terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2.

⁵⁴ See 47 U.S.C. §§ 254(h)(1)(A) and 254(h)(1)(B)(ii). As noted, an "eligible telecommunications carrier" is a "common carrier" that is designated an eligible telecommunications carrier by a state commission. See 47 U.S.C. § 214(e). Because we determine that ICN is not a common carrier, ICN cannot be designated an "eligible telecommunications carrier," and is not, therefore, eligible for universal service support under section 254(h)(1)(A) for providing services to rural health care providers.

⁵⁵ See *Fourth Reconsideration Order*, 13 FCC Rcd at 5427.

⁵⁶ *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d at 1480 (citing *NARUC II*, 533 F.2d at 608-09); see also *NARUC I*, 525 F.2d at 640-641 ("NARUC cases").

⁵⁷ *NARUC I*, 525 F.2d at 642.

⁵⁸ *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1480 (stating that "[w]hether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance").

request."⁵⁹ ICN does not offer its services to the public, nor does it even offer its services to any requesting party. In fact, ICN serves only an established and stable clientele⁶⁰ that has been previously selected by the Iowa legislature. ICN's customer base is closed, except for those public or private agencies that could request approval from the Iowa legislature to be an "authorized" user. Both case law and Commission precedent establish that an entity with such a pre-selected and stable customer base is a private carrier that does not make "any sort of holding out to the public at all."⁶¹

23. Further, ICN does not even "hold [itself] out indiscriminately to the clientele [it] is suited to serve,"⁶² because it does not serve indifferently the class of private or public agencies that comprises its clientele. As noted, the universe of private and public agencies is divided into three subcategories, each of which is treated differently for eligibility purposes. Only a select group of private or public agencies were designated as "authorized" as of May 18, 1994. This group apparently did not need to certify to ICN that it wished to use the network. A second group, comprised of remaining private or public agencies that were not deemed "authorized" in the first group, were required to make the appropriate filing and certify to ITTC by July 1, 1994 that they intended to use the network. Those private and public agencies that failed to certify to ITTC by July 1, 1994 to be "authorized" could only use the network by thereafter petitioning the state legislature.⁶³ There are further distinctions even within these subcategories. By law, for example, ICN serves only federal post offices that have federal grants for demonstration projects, but not other federal post offices.⁶⁴ Moreover, ICN treats its "certified users" differently from its "authorized" users, in that its "certified users," unlike ICN's other users, are bound by an exclusive statutory arrangement, in which they must purchase all their telecommunications services from ICN, and must specifically petition the ITTC in order to be released from taking some of their services from

⁵⁹ See 47 U.S.C. §§ 153(46) and 201(a).

⁶⁰ See *NARUC I*, 525 F.2d at 643 (finding that stable clientele, with few new clients, is characteristic of a private carrier, and not entity that makes "any sort of holding out to the public at all.") See also Noam, Eli M., *Will Universal Service and Common Carriage Survive the Telecommunications Act of 1996?*, 97 Colum. L. Rev. 955, 963 (May 1997) (noting that a common carrier "offer[s] service on a non-discriminatory basis, neutral as to use and user.")

⁶¹ See *NARUC I*, 525 F.2d at 643; In the Matter of Norlight, *Declaratory Ruling*, 2 FCC Rcd 132, at para. 23, *recon. denied*, 2 FCC Rcd 5167 (1987) (finding that a carrier's proposed fiber optic network operation would constitute private carriage because the record showed that the carrier screened potential customers before allowing them to use the network).

⁶² See *NARUC I*, 525 F.2d at 641-642.

⁶³ Iowa Code § 8D.9, and Iowa Admin. Code § 751-7.1(8D).

⁶⁴ Iowa Code § 8D.9.

ICN.⁶⁵ These requirements clearly indicate that ICN differentiates among various private and public agencies in the state. For all intents and purposes, ICN appears to be a private carrier, because it is under no regulatory compulsion to serve indifferently, and in fact, is under compulsion by state law to discriminate and serve only a highly restricted, individualized group of users.⁶⁶

24. We reject ITTC's argument reciting the D.C. Circuit's holding that "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."⁶⁷ As noted, ICN does not *hold itself out at all* to any group whatsoever. At best, the only remaining category of "potential users" consists of public and private agencies not previously authorized (either directly by Iowa statute or by the certification process that terminated on July 1, 1994). ICN does not, however, hold itself out to serve these potential users and must, in fact, deny service requests from them, absent an act of the legislature. More broadly, ICN clearly fails to hold itself out indifferently to furnish its services to many other individuals or entities that could potentially use these services,⁶⁸ that is, to those that are not private or public agencies. We find unpersuasive ITTC's argument in a written *ex parte* that ICN's distance learning services are so specialized as to be potentially useful to only those agencies to whom ICN offers service.⁶⁹ Elsewhere, ICN concedes that its distance learning services are "pure transmission services,"⁷⁰ which undermines its assertion that the services are so specialized as to be of use to only its authorized users. Businesses, individuals, and other associations not falling within ICN's select group of authorized users could use ICN's distance learning and telecommunications services, yet they are denied access to those services. We conclude that ICN fails to show how it serves indifferently all users that could potentially use its services.

⁶⁵ See Iowa Code § 8D.9(2). Further, the certified user that petitions the ITTC for a waiver of the requirement to use ICN for all its telecommunications needs must also go through a limited discovery period and a hearing before the ITTC. See Iowa Admin. Law Code §§ 751-9.4-9.6(8D). The ITTC's decision constitutes "final agency action" that, if appealed, is resolved through alternative dispute resolution. Iowa Admin. Law Code § 751-9.6(2)(8D).

⁶⁶ *NARUC II*, 533 F.2d at 1481 (noting that factors supporting a finding that a carrier is a private carrier include, among other things, there being "no specific regulatory compulsion to serve all indifferently," and the carrier choosing its clients on an individual basis).

⁶⁷ *NARUC II*, 533 F.2d at 608-609.

⁶⁸ See *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d at 1480.

⁶⁹ See Letter from J.G. Harrington, ITTC, to Magalie Roman Salas, FCC, dated May 7, 1998 (ICN May *ex parte*) at 3.

⁷⁰ ICN describes the distance learning and telemedicine services as "pure transmission services." ICN reply comments at 7.

25. We also find no merit in ITTC's contention that there have previously been instances in which the Commission recognized service to limited groups as common carriage. ITTC cites, for instance, telephone companies' provision of "common carrier channel service" to franchised cable operators.⁷¹ In the channel service cases, local telephone companies were allowed to build out video distribution facilities and services to provide channel service, which links "a cable operator's headend to subscriber premises."⁷² The Commission required the carriers to provide the channel service on "an *indiscriminate basis* . . . to any and all similarly-situated companies or members of the public."⁷³ A programmer, however, that wished to deliver video and cable services to subscribers via the channel service, had to obtain a Title VI cable franchise, as required of all cable operators providing cable service over a cable system.⁷⁴ The channel service cases are distinguishable from ICN's case because the Commission did not restrict the class of users that could receive the underlying channel service, and in fact, required carriers offering the channel service to provide it on an "*indiscriminate basis*." Thus, although the Commission required entities that received the channel service *and provided* the cable services that channel service supports to obtain a cable franchise, the carrier *offering* the underlying channel service could not discriminate among potential users. In contrast, in ICN's case, state law clearly requires ICN's services to be provided on a discriminatory basis, and restricts the group of customers for the services.⁷⁵

⁷¹ *ICN April 9 ex parte* case list at 2 (arguing that the FCC "authorized telephone companies to acquire cable facilities for the limited purpose of providing common carrier channel service to a limited class of users -- franchised cable operators -- via those facilities subject to section 214 certification").

⁷² In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266, *Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 10 FCC Rcd 244, 247 (1994). See, e.g., In re the Application, the Ohio Bell Telephone Company, DA 86-220, *Memorandum Opinion, Order and Certificate*, 1 FCC Rcd 942 (1986) (emphasis added). Sections 63.54-63.55 of the Commission's rules existed to "generally prohibit telephone common carriers from directly, or indirectly, constructing cable television facilities and providing video programming to subscribers within their telephone service areas," but the rules did not "prohibit telephone companies from constructing facilities to provide channel distribution service for use by *others* in their telephone service areas." *Id.* at 944. Sections 63.54 and 63.55 no longer exist because the Telecommunications Act of 1996 repealed the prohibition against telephone common carriers owning and operating cable television systems. In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, *Report and Order*, 11 FCC Rcd 14639, 14683 (1996).

⁷³ *Northwestern Indiana Telephone Co., Inc. v. Federal Communications Commission*, 872 F.2d 465, 468 (D.C. Cir. 1989) (emphasis added).

⁷⁴ In the Matter of Entertainment Connections, Inc., *Motion for Declaratory Ruling, Memorandum Opinion and Order*, FCC 98-111, 1998 WL 344168, at para. 11 (rel. June 30, 1998); citing *National Cable Television Association, Inc., v. Federal Communications Commission*, 33 F.3d 66, 71-74 (D.C. Cir. 1994).

⁷⁵ We also reject ITTC's attempts to analogize its case to other examples even more tenuous than the channel service cases. See *ICN April 9 ex parte* case list. For example, ITTC erroneously compares its case to Commission cases that allow common carriers to limit the scope of their services. As we noted above, we find that ICN is not

26. ITTC's reliance on the IUB's comments asserting that ICN is a common carrier is misplaced.⁷⁶ The IUB's support of ICN's position that it is a "common carrier" is not controlling or legally dispositive.⁷⁷ As the D.C. Circuit stated in *NARUC I*, the "common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities. . . . [an entity] is a common carrier by virtue of its functions, rather than because it is declared to be so."⁷⁸ Moreover, IUB's assertion that ICN is a common carrier because it provides services on its network and does not simply buy or lease facilities from underlying carriers is irrelevant to the determination of common carrier status. As case law states, a "common carrier is one which undertakes indifferently to provide communications service to the *public for hire, regardless of the actual ownership or operation* of the facilities involved."⁷⁹

27. Finally, ITTC contends that the public interest would be harmed by an unfavorable ruling to ICN because there would be: (1) inequitable treatment between Iowa's schools and libraries and other states' schools and libraries; and (2) inequitable treatment among ICN's own schools and libraries since some of ICN's services are provided over its own facilities (and not eligible for direct reimbursement) and other ICN services are provided over resold facilities (and potentially discounted from other common carriers).⁸⁰ We reject ITTC's argument that the public interest compels a conclusion that ICN is eligible to receive

a common carrier not because it limits its scope of services, but because it serves a restricted class of customers. Further, ITTC incorrectly compares ICN to Comsat and Amtrak, carriers that have been charged by federal statute to be common carriers. See 47 U.S.C. §§ 701-02, 49 U.S.C. § 24301(a)(1). ICN, in contrast to these carriers, was never deemed to be a common carrier by Iowa statute. Moreover, ITTC incorrectly analogizes its case to a Commission grant of a Section 214 application for a satellite station to operate on common carrier frequencies even though the company was serving only one affiliated cable system. See *In re Application of Tower Communication Systems Corporation*, Memorandum Opinion and Order, 59 FCC 2d 130 (1976). In granting the license in this case, the Commission noted, however, that the company had filed a request to construct and operate two additional channels to provide service to a non-affiliated customer and thus, that the company would be providing services indifferently to other entities that wished to use the service. See *id.*

⁷⁶ See ICN reply comments at 5. The IUB notes that ICN is a common carrier because it provides services to all authorized end users and that ICN is "significantly different from other state networks that buy or lease facilities from underlying carriers and can thus obtain discounts on behalf of their ultimate school, library, and health provider customers." IUB comments at 2.

⁷⁷ See also Letter from Keith Townsend, USTA, to Magalie Roman Salas, FCC, dated August 31, 1998, at 3 (stating that "there is no indication in the record of this proceeding that the Board even has jurisdiction over ICN The Commission clearly is not bound by [IUB's comments]").

⁷⁸ *NARUC I*, 525 F.2d at 644.

⁷⁹ See *AT&T v. FCC*, 572 F.2d 17, 24 (2d Cir. 1978) (emphasis added).

⁸⁰ See ITTC May 7 *ex parte* at 5 and ITTC reply comments at 3.

direct reimbursement from universal service support mechanisms under section 254(h)(1) of the Act.⁸¹ The Act explicitly provides that only "telecommunications carriers" are eligible for direct reimbursement pursuant to section 254(h)(1)(B) and for universal service support pursuant to section 254(h)(1)(A). Congress did not give the Commission discretion to allow non-common carriers to receive direct reimbursement or universal service support pursuant to section 254(h)(1). Iowa's schools and libraries, therefore, are treated no differently from other states' schools and libraries, in that the Act provides for direct reimbursement of discounted telecommunications services under section 254(h)(1) to eligible common carriers. Although the efforts of Iowa and other states that have established state telecommunications networks to ensure affordable telecommunications services for schools and libraries are laudable, Congress did not create the federal universal service support mechanism for schools and libraries specifically in order to support or supplement these state networks, and in fact, state programs such as Iowa's are incompatible with the federal program. We note, however, that under the Commission's rules, ICN may receive direct reimbursement for the provision of the non-telecommunications services of Internet and internal connections to schools and libraries, and that ICN may act as a consortium in purchasing and passing along discounted telecommunications services to the schools and libraries that it serves.⁸²

28. Moreover, ICN's schools and libraries currently receive low rates, which are subsidized by funding to ICN from the General Assembly of Iowa.⁸³ For example, we note that ICN's schools and libraries are charged only \$5.00 per hour for video rates, even though the cost of that service is represented to be approximately \$75.00.⁸⁴ Therefore, we find that there is nothing in the record to indicate that an unfavorable ruling to ICN would create unaffordable telecommunications services or inequitable conditions for Iowa's and ICN's schools and libraries. ICN itself has noted that the competitive bidding process required by the Commission's rules will ensure that its schools and libraries take their services from the most competitive providers.⁸⁵ Finally, we note that our ruling on this issue is consistent with the Commission's commitment to maintaining a support mechanism that is no larger than necessary to accomplish Congress' goal in enacting section 254(h)(1)(B) of the Act.

⁸¹ See IUB comments at 2; ICN petition at 5; ICN reply comments at 2-4. Further, NTCA notes that because ICN is subsidized by the state, its low rates provide ICN with a competitive advantage and therefore are inconsistent with the Commission's goals of competitive neutrality and competitive bidding under Section 254. NTCA comments at 9.

⁸² See *Fourth Reconsideration Order*, 13 FCC Rcd at 5423-25; 47 U.S.C. § 254(h)(2); 47 C.F.R. § 54.501(d)(3).

⁸³ See ICN webpage, Frequently Asked Questions about the ICN and Internet, at <http://www.icn.state.ia.us/ICN/HTML/FAQs.htm>.

⁸⁴ See GTE reply comments at 6.

⁸⁵ ICN reply comments at 4.

29. Based on the above analysis, we find that ICN does not meet the test of common carriage and, therefore, is not a "telecommunications carrier." Specifically, ICN does not hold itself out at all, let alone offer its services indifferently to its potential users or the clientele it is suited to serve.⁸⁶ Our conclusion is supported by the fact that ICN: (1) serves a limited and stable group of entities; (2) does not serve additional entities that may seek to obtain service, absent specific legislative authorization; and (3) treats its customers differently. Because we find that ICN fails an essential element of common carriage and is not acting as a "telecommunications carrier," we need not consider ITTC's additional arguments that ICN offers services on generally available terms and conditions and serves a large number of customers. We do note that the D.C. Circuit has specifically found that even a tariff filing with the Commission was not dispositive of whether a service was a common carrier offering, and thus ITTC's contention that it offers services on generally available terms and conditions is not probative of its common carrier status.⁸⁷ Moreover, ITTC's assertion regarding the size of ICN's customer base is irrelevant.⁸⁸ Finally, because ICN has failed to satisfy the first element of common carriage, we need not consider whether ICN meets the second element of the test of common carriage, of allowing its "customers to transmit intelligence of their own design and choosing."⁸⁹

V. CONCLUSION

30. We conclude that ICN is not a "telecommunications carrier" under Section 254(h) because ICN does not offer telecommunications on a common carrier basis.⁹⁰ We find, therefore, that ICN is not eligible for direct reimbursement from universal service support mechanisms for the provision of discounted telecommunications services to schools and libraries under section 254(h)(1)(B)(ii), nor is it eligible to receive a credit against its

⁸⁶ See *NARUC I*, 525 F.2d at 641-42.

⁸⁷ See *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d at 1483 (holding that "the Commission short-circuited any analysis of whether petitioners held themselves out indifferently to all potential users of dark fiber," by relying on an "insupportable per se rule" that a tariff filing with the Commission constitutes a common carrier offering.)

⁸⁸ See RIITA comments at 4; USTA reply at 2. Contrary to ICN's assertions that the Commission previously relied on the size of the customer base to conclude Norlight was a private carrier, the Commission actually noted that Norlight's proposed fiber optic network operation would constitute private carriage because the record did not show that Norlight would hold its services out indiscriminately to the user public; and instead showed that Norlight would screen potential customers before allowing them to use the network. See *In the Matter of Norlight, Declaratory Ruling*, 2 FCC Rcd 132, 135, *recon. denied*, 2 FCC Rcd 5167 (1987).

⁸⁹ See *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d at 1480-1483 (finding that the Commission had not adequately met the first part of the test and remanding orders to the Commission for consideration of whether dark fiber offering had been made "indifferently to all potential users").

⁹⁰ See *Fourth Reconsideration Order*, 13 FCC Rcd at 5427.

contribution obligation for the provision of telecommunications services to rural health care providers under section 254(h)(1)(A).⁹¹

VI. ORDERING CLAUSE

31. Accordingly, IT IS ORDERED, pursuant to sections 4(i), (j), 254, and 403 of the Act, 47 U.S.C. §§ 154(i), (j), 254, and 403, and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that the relief sought in the Petition for Declaratory Ruling filed by the Iowa Telecommunications and Technology Commission, is DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

⁹¹ See 47 C.F.R. § 1.2; 47 U.S.C. §§ 254(h)(1)(A) and 254(h)(1)(B).

**DISSENTING STATEMENT OF
COMMISSIONER HAROLD FURCHTGOTT-ROTH**

Re: Declaratory Ruling Regarding the Iowa Communications Network in Federal-State Joint Board on Universal Service, CC Docket 96-45.

I dissent from today's decision finding that the Iowa Communications Network is ineligible for receiving direct universal service support for the provision of discounted telecommunications services to schools, libraries, and rural health care providers under sections 254(h)(1)(A) and (B). I cannot support such a strict interpretation of our rules that disadvantages state-based networks while the Commission continues to allow non-carriers, such as large computer companies, to receive money for providing other services under Section 254. I believe that such state telecommunications networks are closer to the kinds of eligible receivers that Congress had envisioned than many of the numerous beneficiaries of the fund today.

The history of the Commission's interpretation of Section 254 is not a happy one. For almost two years, the Commission has established programs and promulgated rules under the guise of Section 254. But these programs and rules, while perhaps engendered with noble intent, have not met the exacting requirements of Section 254. Indeed, many of these programs and rules are clearly outside of Section 254, and clearly outside of Commission authority. I have noted just a few of these many peculiar circumstances in several statements over the past year.⁹²

⁹² See Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding Federal State Joint Board on Universal Service, CC Docket 96-45, *Third Order on Reconsideration*, 12 FCC Rcd 22801 (1997); Statement of Commissioner Harold Furchtgott-Roth Regarding the Second Quarter 1998 Universal Service Contribution Factors, rel. March 20, 1998; Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Federal-State Joint Board Report to Congress, rel. April 10, 1998; Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Report to Congress in Response to Senate Bill 1768 and Conference Report on H.R. 3579, rel. May 8, 1998; Statement of Commissioner Harold Furchtgott-Roth Regarding the Common Carrier Bureau's Proposed Revisions of 1998 Collection Amounts For Schools and Libraries and Rural Health Care Universal Service Support Mechanisms, rel. May 13, 1998; Statement of Commissioner Harold Furchtgott-Roth Regarding the Common Carrier Bureau's Clarification of "Services" Eligible for Discounts to Schools and Libraries, rel. June 11, 1998; Statement of Commissioner Harold Furchtgott-Roth Regarding the Common Carrier Bureau's Third Quarter 1998 Universal Service Contribution Factors, rel. June 12, 1998; Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding Federal

Many parties come before the Commission with disputes about how best to interpret for specific circumstances Commission rules under Section 254. Iowa has presented the Commission with an issue that, at least on the surface, seems have substantial merit: that it would be inequitable to disallow Iowa's schools and libraries from receiving universal service support for telecommunications services just because those services are being provided by a state telecommunications network.

The majority's responds that "The Act explicitly provides that only 'telecommunications carriers' are eligible for direct reimbursement pursuant to 254(h)(1)(B) and for universal service support pursuant to section 254(h)(1)(A)."⁹³ Usually I would applaud such a straightforward reading of the statute's requirements. But these are the same requirements that have been ignored by this Commission on repeated occasions.

For example, the Commission acknowledges that Section 254(e)'s requirement that only "eligible telecommunications carriers" receive universal service support applies to Section 254(h) generally.⁹⁴ Indeed, it limits the recipients of support for providing telecommunications service to rural health care providers under section 254(h)(1)(A) to those eligible carriers under 254(e). But then that provision should also apply to the other provisions of 254(h), at least unless specifically excepted. Thus, Section 254(h)(1)(B), which expressly permits recipients to be "telecommunications carriers," is more specific than 254(e) and could take precedence. But the provisions of section 254(e) -- which require that only eligible telecommunications carriers be able to receive federal universal service support -- apply fully to section 254(h)(2). Thus, the requirements for being able to receive funds in conjunction with section 254(h)(2) are actually stricter -- a recipient would have to be designated an eligible telecommunications carrier. But the Commission has ignored this restriction.

As one can see, to form an opinion about this issue, one must suspend disbelief in the legality of the underlying programs and rules. That is, how does one best interpret a statute for a particular circumstance under a rule that appears to be inconsistent with the statute? If I were able to suspend disbelief, I would applaud the strict statutory construction: only telecommunications carriers, which must be common carriers, appear to be eligible to receive discounts under Section 254(h)(1)(B). The unfortunate result under this program, however, is that states that had been more forward-looking than most and that had invested substantial

State Joint Board on Universal Service, *Fifth Order on Reconsideration and Fourth Report and Order Regarding the Federal-State Joint Board on Universal Service*, rel. June 17, 1998.

⁹³ Declaratory Ruling at par. 27.

⁹⁴ Declaratory Ruling at par. 5.

resources into developing education networks are disadvantaged. And, more importantly, it is only now in this circumstance that we are applying the actual requirements of Section 254.

I, for one, believe that these state educational networks, are closer to being eligible telecommunications carriers than many of those receiving universal service support today. Moreover, they are at least as close as the computer companies that are receiving support. Thus, I do not agree with the majority that "state programs such as Iowa's are incompatible with the federal program."⁹⁵ Indeed, I find it ironic that it is only now that some advocate a strict interpretation of Section 254.

Finally, I note that several Congressional leaders have called on the FCC to reconsider its universal service programs and to start anew in a manner consistent with Section 254. Any such renewed effort on universals should consider block grants to States and thereby allow State rather than federal officials, to make final determinations about the assignment of universal service funds. Such a system would remove FCC Commissioners from having to repeat the awkward process -- not only of assigning funds among many competing private companies -- but of resolving disputes in those assignments brought by State governments and their agencies. Such a system would also allow states to provide support to the forward-looking educational efforts that they have put in place.

⁹⁵ Declaratory Ruling at par. 27.

