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

2000 DEC 28 A 11: 59

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	AAD/USB File No. 98-37
	)	

ORDER ON REMAND

Adopted: December 21, 2000 **Released: December 26, 2000**

By the Commission:

I. INTRODUCTION

1. In a declaratory ruling,[1] the Commission determined that the Iowa Communications Network (ICN), a state-owned telecommunications network, is not a "telecommunications carrier" for purposes of the Telecommunications Act of 1996 (1996 Act)[2] and, therefore, is not qualified to receive direct reimbursement for discounted telecommunications services provided to schools, libraries, and rural health care providers under section 254(h)(1).[3] The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) remanded this matter to the Commission for further consideration.[4] On remand, we find that ICN is a telecommunications carrier for purposes of the 1996 Act. Accordingly, we find that, in addition to the other duties and responsibilities of a telecommunications carrier, ICN is eligible to receive direct reimbursement for discounted telecommunications services provided to schools, libraries, and rural health care providers on a prospective basis.

II. BACKGROUND

2. In section 254, Congress established a framework under which telecommunications providers are required to provide supported services at a discount to eligible schools and libraries. In 1997, the Commission held that the 1996 Act permits only "telecommunications carriers" to receive direct reimbursement from universal service support mechanisms for the provision of discounted telecommunications services.[5] The term "telecommunications carrier" includes only carriers that offer

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[1] *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, Declaratory Ruling, 14 FCC Rcd 3040 (1999) (*ICN Declaratory Ruling*).

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act). The 1996 Act amended the Communications Act of 1934. 47 U.S.C. §§ 151, *et seq.*

[3] 47 U.S.C. § 254(h)(1).

[4] *State of Iowa v. FCC*, 218 F.3d 756 (D.C. Cir. 2000) (*Iowa Decision*).

[5] 47 U.S.C. § 254(h)(1); *see Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourth Order on Reconsideration, *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, Report and Order, 13 FCC Rcd 5318, 5413-14 (1997) (*Fourth Order on Reconsideration*); *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) (*First Report and Order*) (subsequent history omitted).

telecommunications on a common carriage basis.[6]

3. The Commission held in the *Fourth Reconsideration Order* that state telecommunications networks generally do not satisfy common carriage requirements because they offer service to "specified classes of entities" rather than "indifferently [to] all potential users."[7] The Commission explained, however, that the 1996 Act provides other avenues by which schools and libraries may receive discounts for services obtained through a state network. With regard to telecommunications services, a state network is eligible, as a consortium, to secure discounts on supported services on behalf of eligible schools and libraries.[8] It must then pass the discounts along to the schools and libraries it serves. In addition, for providing non-telecommunications services to eligible schools and libraries, including Internet access and internal connections, a state network may secure discounts in its capacity as a consortium, or may receive direct reimbursement from universal service support mechanisms.[9]

4. Following the release of the *Fourth Reconsideration Order*, the Iowa Telecommunications and Technology Commission (Iowa), which operates ICN, requested a declaratory ruling that ICN is a common carrier.[10] ICN provides telecommunications services at subsidized rates to authorized users, which are limited to "public and private agencies" under the Iowa Code.[11] The Iowa statute divides authorized users into "certifying users" (higher education institutions, area education agencies, and certain United States post offices) and "preauthorized users" (other public and private agencies). Preauthorized users may choose whether to connect to ICN and which services to take from it. Certifying users must obtain specific legislative authorization to connect to the network unless they certified their intention to connect by July 1, 1994. Certified users also must receive all of their telecommunications services from ICN unless they obtain waivers from Iowa based on statutory criteria.[12]

5. In the *ICN Declaratory Ruling*, the Commission found that ICN does not satisfy the first prong of the common carriage test set forth in the *NARUC* cases: whether the carrier "holds himself out to serve indifferently all potential users[.]"[13] The Commission did not reach the second prong of the common carriage test: whether the carrier allows "customers to transmit intelligence of their own design and choosing."[14] The D.C. Circuit remanded due to the Commission's failure to respond to Iowa's

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[6] *See Fourth Order on Reconsideration*, 13 FCC Rcd at 5413-14; *see also Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 922, 925 (D.C. Cir. 1999) (Commission reasonably interpreted the phrase "telecommunications carrier" in the 1996 Act to mean essentially the same as "common carrier").

[7] *Fourth Reconsideration Order*, 13 FCC Rcd at 5424.

[8] *See id.* at 5423-24.

[9] *See id.* at 5423-24, 5428-29.

[10] Iowa contended, and the Commission later found, 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.'" *ICN Declaratory Ruling*, 14 FCC Rcd at 3050.

[11] Iowa Code § 8D.2(4)-(5).

[12] *Id.*

[13] *ICN Declaratory Ruling*, 14 FCC Rcd at 3050 (citations omitted); *see Nat'l Assoc. of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) (*NARUC I*); *Nat'l Assoc. of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) (*NARUC II*).

[14] *Id.* at 608-09.

argument "that a carrier offering its services only to a legally defined class of users may still be a common carrier if it holds itself out indiscriminately to serve all within that class."[15] The court reasoned that both *Midwest Video*[16] and *NARUC I* can be read as supporting this argument, although it stated that "[w]e are not suggesting that *Midwest Video* or *NARUC* or the other cases Iowa cites require a decision in Iowa's favor."[17]

III. DISCUSSION

6. As set forth below, based on our examination of *NARUC I* in light of the D.C. Circuit's remand, we conclude that the statutory limitation on the entities that ICN may serve does not necessarily foreclose it from common carrier status. We also conclude, based on the particular circumstances presented in this case, that ICN satisfies both prongs of the *NARUC* common carriage test and, therefore, is a telecommunications carrier for purposes of the 1996 Act.

7. Initially, we conclude that under *NARUC I*, a carrier offering its services only to a legally defined class of users may still be a common carrier if it holds itself out indiscriminately to serve all within that class. The D.C. Circuit in *NARUC I* upheld the Commission's ruling that specialized mobile radio systems (SMRS), a category of commercial operators newly authorized to provide public safety, industrial, and land transportation radio services to "eligibles" (local governments, industrial, and transportation enterprises) under Parts 89, 91, and 93 of the Commission's rules, did not offer a common carrier service.[18] The court first defined the term "common carrier," relying mainly on common law sources, and then applied the definition to SMRS. In so doing, the court explained that:

> [i]t is not an obstacle to common carrier status that SMRS offer a service that may be of practical use to only a fraction of the population, *nor that the Order limits possible subscribers to SMRS services to [those who are eligible] under Sections 89, 91 and 93 of the Regulations*. The key factor is that the operator offer indiscriminate service to whatever public its service may *legally* and practically be of use.[19]

8. As the D.C. Circuit suggested in the *Iowa Decision*, this passage directly supports the proposition that legal restrictions on eligibility to use a carrier's services do not necessarily preclude common carrier status. The *NARUC I* decision as a whole is consistent with this proposition. The broad language used to define common carriage in the initial, definitional section of *NARUC I* (*e.g.*, "one must hold oneself out indiscriminately to the clientele one is suited to serve") is consistent with the above-quoted passage.[20] Furthermore, legal restrictions on the class of authorized users are not necessarily

[15] *Iowa Decision*, 218 F.3d at 759.

[16] *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

[17] *Iowa Decision*, 218 F.3d at 759.

[18] *NARUC I*, 525 F.2d at 639.

[19] *Id.* at 642 (emphasis added).

[20] In addition, although the *NARUC I* court generally defined common carriage in broad terms as holding oneself out to serve indifferently all potential users, it formulated the actual test that it applied as follows: "we must inquire, first, whether there will be any legal compulsion *thus to serve indifferently*, and if not, second, whether there are reasons implicit in the nature of SMRS operations to expect an indifferent holding out to the *eligible user public*." *NARUC I*, 525 F.2d at 642 (emphasis added.) This formulation immediately follows the above-quoted statement that "[t]he key factor is that the operator offer indiscriminate service to whatever public its service may (continued....)

relevant to the factors the *NARUC I* court emphasized in defining common carriage: "the quasi-public character of the activity involved" and "the manner and terms by which [carriers] approach and deal with their customers[,]" *i.e.*, whether they do so on an individualized basis.[21] Accordingly, based on our examination of *NARUC I* in light of the court's remand, we conclude that the statutory limitation designating which entities ICN may serve does not foreclose common carrier status.[22]

9. In light of the foregoing, to determine whether ICN satisfies the first prong of the common carriage test, we must consider whether ICN offers indiscriminate service to whatever public it is legally authorized to serve. Resolution of this issue depends on a close examination of the facts surrounding ICN and its customer base, for "whether an entity in a given case is a common carrier or a private carrier depends on the particular practice under surveillance."[23]

10. Based on our examination of the record, we conclude that ICN offers service to all of its authorized users. Pursuant to Iowa statute, ICN may legally serve a limited, but not insignificant number of different entities, including all accredited K-12 school districts, state agencies, federal agencies, public libraries, and hospitals and physician clinics (for limited services).[24] ICN was created for the purpose of ensuring that high-speed telecommunications services were adequately provided across the state of Iowa to these users.[25] The current number of discrete entities served by ICN exceeds 500.[26] According to Iowa, ICN "offers its services to qualified users on generally available terms and conditions."

11. We also conclude that ICN satisfies the requirement of indiscriminate service. In determining whether ICN satisfies this requirement, we must consider whether ICN's "practice is to make individualized decisions, in particular cases, whether and on what terms to deal."[27] We found in the *ICN Declaratory Ruling* that ICN did not offer indiscriminate service because the Iowa statute made distinctions among the types of authorized users.[28] In light of the *Iowa Decision*, however, we find persuasive ICN's position that while its enabling statute may discriminate among various classes of users, it does not allow ICN to discriminate among entities within each class of users.[29] Thus, while the statute

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legally and practically be of use" and, therefore, the italicized phrases can be read as modified by that statement. Many Commission decisions applying the *NARUC I* test also use this formulation. *See, e.g., Cable & Wireless, PLC*, 12 F.C.C.R. 8516, 8522 (1997).

[21] *Id.* at 640.

[22] Because we determine that, under *NARUC I*, ICN is not foreclosed from common carrier status, we need not discuss the applicability of *Midwest Video* or other cases cited by Iowa in their brief.

[23] *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

[24] Iowa Code § 8D.9.

[25] ICN Reply Comments at 2-3. We note that ICN was created prior to creation of the federal universal service support mechanism for schools and libraries, evidence that ICN was not created for such a limited purpose as to be inconsistent with common carriage.

[26] Letter from Kenneth D. Salomon, on behalf of ICN, to Magalie Roman Salas, Secretary, FCC, dated February 4, 1998, at 4. *See also* Iowa Utilities Board Reply Comments at 4.

[27] *NARUC I*, 525 F.2d at 641.

[28] *ICN Declaratory Ruling*, 14 FCC Rcd at 3051, para. 23.

[29] In the *Iowa Decision*, the D.C. Circuit held that ICN's alleged discrimination among different statutorily-defined classes of eligible users was not an independent basis for upholding the Commission's ruling that it was (continued....)

makes a distinction between "certified" and "pre-authorized" users, it also dictates that ICN provides the same treatment to all users within each class of users.

12. Some commenters argue that ICN charges different rates to different classes of customers, and thus, its treatment of its customers is highly individualized.[30] In addition, commenters argue that ICN has discretion to waive a statutory requirement that certain users take all services from ICN, and thus may individually tailor service needs to individual customers.[31] ICN counters that the statutory waiver procedure does not operate as a mechanism for negotiation "because ICN has no power to negotiate." Rather, "if an ICN customer obtains better terms and conditions elsewhere, ICN grants a waiver."[32] Further, according to Iowa, certifying users represent a small percentage of all authorized ICN users. All but two members of this subclass certified their intention to connect to the network prior to July 1, 1994, so that they do not need specific legislative authorization to connect, and in practice waiver requests "are not subjected to any significant scrutiny." In addition, ICN states that, while it is true that ICN charges different rates to different classes of customers, the rate schedule applicable to a particular class applies to all users in the defined class, and therefore is not inconsistent with common carriage.[33] Moreover, ICN states that the price differences "include specific, separately-funded subsidies for Iowa schools."

13. Therefore, it appears that ICN neither charges individualized rates within the various authorized customer classes nor uses the waiver process in a way that allows it to negotiate terms and conditions in an individualized manner. Moreover, as the D.C. Circuit noted, a common carrier may make reasonable distinctions in the terms and conditions of service offered to different classes of customers.[34] The record does not indicate that ICN makes, or is required by statute to make, unreasonable distinctions among customers served. Based on these facts, we find that ICN serves its authorized customers indifferently.

14. Finally, we must determine whether ICN satisfies the second prong of the common carriage test: whether it allows customers to transmit intelligence of their own design and choosing. Some commenters urge that ICN fails to satisfy this requirement because the use of ICN's network is limited to the users' "written mission."[35] Although we recognize that limiting the use of its network to the customers' written mission may have some effect on what customers transmit over the ICN, we believe that this limitation is intended to acknowledge the statutorily-prescribed customer base, rather than to limit the "intelligence" they may transmit over the network. That is, the effect of this limitation is to

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not a common carrier because such discrimination raised "precisely the same question as the Commission's first reason for denying ICN common carrier status: Whether holding out service only to the class of users authorized by law to receive it is inconsistent with being a common carrier." *Iowa Decision*, 218 F.3d at 760.

[30] *See e.g.*, USTA November 16, 1998 *Ex Parte* Letter at 7.

[31] *Id.* at 6.

[32] ICN May 7, 1998 *Ex Parte* Letter at 4-5.

[33] *Id.* at 5. Although ICN may enter into separate agreements with each of its customers, ICN points out that it does not negotiate individual rates and terms with each customer. ICN Reply Comments at 14.

[34] *Iowa Decision*, 218 F.3d at 759-760 (*citing* 47 U.S.C. § 201(b)).

[35] *See e.g.*, USTA January 13, 1999 *Ex Parte* letter at pp.7-8. In addition, some parties argue that ICN customers are prohibited from using the ICN network for profit-making ventures. *Id.*

restrict the use of the ICN to the primary purpose for which the network exists.[36] ICN also indicates that it does not "police" the content that a user transmits, but places "the responsibility of determining whether the use of the network is consistent with the authorized user's 'written mission' on the authorized user."[37] Moreover, ICN states, and no party disputes, that it has "never denied or cut off service on the basis of an acceptable use issue."[38] These facts lead us to conclude that ICN satisfies the second prong of the common carriage test.

15. In sum, based on the record before us, we find that ICN satisfies the common law definition of common carriage and, therefore, is a telecommunications carrier for purposes of the 1996 Act. In accordance with the *NARUC I*, the specific statutory limitation on ICN's potential users does not act as a bar to a finding of common carrier status. The facts demonstrate that ICN serves its statutorily-prescribed customers indifferently and allows those customers to transmit intelligence of their own design and choosing.

16. Our decision today is specific to the circumstances presented by ICN.[39] However, we expect that other similarly situated state telecommunications networks would be eligible for similar treatment, provided that they satisfy the definition of common carriage.[40]

17. We also emphasize that as a telecommunications carrier, ICN is subject to both the benefits and the obligations that are applicable to such carriers. For example, as a telecommunications carrier, ICN must comply with all applicable provisions of section 251.[41] To the extent that ICN has interstate and international end-user telecommunications revenues, it is obligated to make contributions to the universal service fund in accordance with Commission rules.[42] Furthermore, we note that as a common carrier, ICN is subject to the Commission's enforcement authority.[43] Nothing in this Order is intended to modify or negate any such common carriage duties or responsibilities as set out in our rules and policies.

18. In conclusion, we find that, in addition to the other benefits and responsibilities of a

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[36] For example, under Iowa rules, students using the ICN network at school may use the ICN network for voice, video and data transmissions, including Internet access, if the use of the network is consistent with the written mission of the school. *See* Iowa Administrative Code § 751 – 7.5 (8D).

[37] ICN October 9, 1998 *Ex Parte* Letter at 2.

[38] *Id.*

[39] As stated above, "whether an entity in a given case is a common carrier or a private carrier depends on the particular practice under surveillance." *Southwestern Bell Telephone Co.*, 19 F.3d at 1481. As stated above, consistent with this principle, the Commission concluded in the *ICN Declaratory Ruling* that its previous ruling that state networks generally do not satisfy common carriage requirements "does not entirely preclude the possibility that, under certain circumstances a state telecommunications network might qualify as a 'telecommunications carrier.'" *ICN Declaratory Ruling*, 14 FCC Rcd at 3050.

[40] We note that, to date, ICN is the only such network to seek a common carrier designation. *Fourth Order on Reconsideration*, 13 FCC Rcd at para. 104.

[41] 47 U.S.C. § 251.

[42] *See* 47 U.S.C. § 254(d); 47 C.F.R. §§ 54.706, *et seq.*; *see also First Report and Order*, 12 FCC Rcd at 9173; *see also Fourth Order on Reconsideration*, 13 FCC Rcd at 5476.

[43] *See, e.g.*, 47 U.S.C. § 208.

telecommunications carrier, ICN is eligible to receive direct reimbursement for discounted telecommunications services provided to schools and libraries. We direct the Universal Service Administrative Company to provide direct reimbursement to ICN on a prospective basis, in the event ICN provides supported telecommunications services to eligible schools and libraries, and complies with all other applicable Commission rules and policies.[44]

19. Accordingly, IT IS ORDERED, pursuant to section 4(i) and (j), 254, and 403 of the Act, 47 U.S.C. §§ 154(i) and (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 GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

[44] As a common carrier, ICN is also eligible to receive direct reimbursement from the Commission's rural health care support mechanism to the extent it provides supported telecommunications services to eligible rural health care providers and complies with all other applicable commission rules and policies.