

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

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In the Matter of the Application of LTD  
Broadband LLC for Designation as an Eligible  
Telecommunications Carrier for Purposes of  
Receiving Federal Universal Service Support

TC21-001

**APPLICANT'S AMENDED PETITION  
FOR RECONSIDERATION OR  
REHEARING**

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On March 23, 2021, the Public Utilities Commission of the State of South Dakota (“the Commission”) issued the Final Decision and Order Denying Application for Designation as an Eligible Telecommunications Carrier in Certain Census Blocks; Notice of Entry of Order (“Decision”) in the above-captioned docket. In the Decision, the Commission denied LTD Broadband LLC’s (“LTD”) application (“Amended Application”) for designation as an eligible telecommunications carrier (“ETC”).

On April 20, 2022, LTD timely petitioned for reconsideration of the denial of the application or, in the alternative, rehearing. The Commission held a hearing on the petition on May 24, 2022. At the hearing, LTD orally moved to amend its request for rehearing to include an additional reason, namely that LTD intends to seek leave to amend the Amended Application to withdraw some census blocks which are already receiving service or being built out. The Commission deferred action on the petition for reconsideration or rehearing to allow LTD to file a formal, amended petition. This is that filing. The only change from the original petition for reconsideration and rehearing are the addition of this paragraph and the addition of Section IV below.

## **AUTHORITY FOR RECONSIDERATION OR REHEARING**

The Commission has authority to grant reconsideration pursuant to ARSD 20:10:01:29, which authorizes a party “to apply for a rehearing or reconsideration as to any matter determined by the commission.” A party seeks reconsideration by filing a petition. ARSD 20:10:01:30.01.

According to the Commission’s rules:

An application for rehearing or reconsideration based upon claim of error shall specify all findings of fact and conclusions of law claimed to be erroneous with a brief statement of the ground of error. An application for rehearing or reconsideration based upon newly discovered evidence, upon facts and circumstances arising subsequent to the hearing, or upon consequences resulting from compliance with the decision or order, shall set forth fully the matters relied upon.

S.D. Admin. R. 20:10:01:30.01.

Here, the Commission should reconsider the Decision for several reasons. First, the Commission committed reversible legal error by exceeding the plain language of its administrative rules and imposing requirements for ETC status on LTD that it has never applied to any other applicant. Second, the Decision includes multiple clearly erroneous factual findings. Finally, additional, new evidence establishes that a fundamental premise for the Commission’s conclusion is incorrect. The Commission found that LTD lacked the ability to deploy its network because, at least in part, LTD’s estimated construction costs for fiber-to-the-home deployment were understated. While LTD disagrees with that conclusion, LTD has in fact deployed fiber-to-the-home network at a lower cost than even its estimates since the evidentiary hearing in this matter concluded. For these reasons, reconsideration and grant of LTD’s ETC Amended Application are warranted.

## REASONS FOR RECONSIDERATION OR REHEARING

### I. The Commission Committed Legal Error in the Decision.

The Commission relied on LTD's lack of managerial, technical, and financial capabilities to conclude LTD does not satisfy the public interest factor in ARSD 20:10:32:43.07, and thus denied LTD's Amended Application. In doing so, the Commission committed reversible legal error.

As an initial matter, based upon the Commission's findings of fact, the Commission was legally required to grant LTD's Amended Application. Under section 214 of the Communications Act of 1934, as amended ("Communications Act"), an ETC applicant must satisfy three requirements. If those requirements are satisfied, then the plain language of the Communications Act requires the Commission to grant ETC status to LTD. 47 U.S.C. 214(e)(2) ("A state commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission.").

Here, the Commission expressly found that LTD satisfies all three requirements for ETC status under the Communications Act. (Decision, at Finding of Fact 46). Based upon this factual finding, the Commission was legally required to grant LTD's Amended Application, and this Commission committed legal error by denying LTD's request for ETC status.

The Commission contends that it can impose additional state-law requirements for ETC status. Even if the Commission is correct, the Communications Act requires that all such state-law requirements be competitively neutral. The Commission committed additional legal error by imposing requirements on LTD that are not only beyond the scope of the Commission's own

administrative rules, but also are far more demanding than the requirements imposed on any other ETC applicant.

The Decision concludes that LTD satisfies all federal and state law requirements for ETC status except for ARSD 20:10:32:43.07, which states in relevant part:

Prior to designating an eligible telecommunications carrier, the commission shall determine that such designation is in the public interest. The commission shall consider the benefits of increased consumer choice, the impact of multiple designations on the universal service fund, the unique advantages and disadvantages of the applicant's service offering, commitments made regarding the quality of the telephone service provided by the applicant, and the applicant's ability to provide the supported services throughout the designated service area within a reasonable time frame. In addition, the commission shall consider whether the designation of the applicant will have detrimental effects on the provisioning of universal service by the incumbent local exchange carrier. . . .

ARSD 20:10:32:43.07.

Regarding the above-stated “public interest” factors, the Commission finds that these requirements are all satisfied except for the “applicant’s ability to provide the supported services throughout the designated service area within a reasonable time frame.” (Decision, at Finding of Fact 60-61, 89). When analyzing the “public interest” factors, the Commission judicially amended ARSD 20:10:32:43.07 by imposing several additional requirements never imposed on any other ETC applicant:

- Adopting SDTA’s expert’s analysis, the Commission stated that LTD’s managerial, financial, and technical capabilities are relevant to determine whether LTD can provide the supported services throughout the designated service area in a reasonable time.
  - The Commission exceeded its legal authority by considering LTD’s managerial, financial, and technical capabilities. These factors are outside the scope of ARSD 20:10:32:43.07 and cannot be read as part of the plain

meaning of that rule. The FCC's Auction Procedures Public Notice explains that an RDOF applicant must certify "that it is financially and technically capable of meeting the relevant public interest obligations for each performance tier and latency combination in the geographic areas in which it seeks support."<sup>1</sup> LTD made this certification. The FCC is undertaking a comprehensive review of LTD's financial submissions and ultimately will determine whether it is financially qualified to receive RDOF support. LTD also will be required to obtain and maintain a letter of credit for each state in the amount of one year's support.<sup>2</sup> Once authorized, the FCC assures that taxpayer contributions to the universal service fund are not placed at risk through annual reporting and the ability of the FCC to draw on the letter of credit if the recipient does not meet its performance milestones. In sum, the FCC has established financial requirements and enforcement mechanisms designed to encourage timely buildout.

- Although states can "evaluate local factual situations in ETC cases and exercise discretion in reaching their conclusions regarding the public interest, convenience and necessity," such local situations must be "consistent with federal and other state law," and "States that exercise jurisdiction over ETCs should apply these requirements in a manner that is

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<sup>1</sup> *Rural Digital Opportunity Fund Phase I Auction Scheduled for October 29, 2020*, Public Notice, AU Docket No. 20-34 and WC Docket Nos. 19-126 & 10-90, FCC 20-77 (rel. June 11, 2020) ("*Auction Procedures Public Notice*") at 90 ¶ 298.

<sup>2</sup> 47 C.F.R. § 54.804(c).

consistent with section 214(e)(2) of the Act.”<sup>3</sup> The Commission applied its rules and procedures in a manner that is not consistent with the separation of functions between the FCC and the Commission.

- LTD is not aware of any case where the Commission considered the managerial, financial, and technical capabilities of other ETC applicants in South Dakota. Instead, managerial, financial, and technical capabilities determine eligibility for a certificate of authority (“COA”). *See* SDCL 49-31-74 (The commission shall issue a *certificate of authority* for local exchange service to the applying telecommunications company, if . . . the applicant has demonstrated sufficient *technical, financial, and managerial capabilities* to provide the local exchange services applied for (emphasis added)). As recognized by Commissioner Nelson, COA and ETC dockets are completely separate proceedings. (HT at p.47, Lines 1-2). They have different rules and tests, and this Commission imposed new ETC requirements by lifting the statutory COA requirements and imposing them in this ETC docket, without public notice of any change in policy that would, in any event, have required a rulemaking.
- The Commission found that LTD “did not provide sufficient evidence of similar business experience showing its ability to deploy its network and provide the supported services within a reasonable time frame.” (Decision at Finding of Fact 66).

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<sup>3</sup> *In re Federal-State Joint Bd. on Universal Serv.*, Report and Order, 20 FCC Rcd 6371, 6398 ¶ 61 (2005) (citations omitted).

- In this finding, the Commission imposed an additional, new requirement – that LTD must present evidence of “similar business experience,” because failure to present that evidence supported denying the application. Nowhere in ARSD 20:10:32:43.07 or any other statutes or regulations governing ETC status is an applicant required to show “similar business experience.” Indeed, if this were a requirement, it could be used to deny ETC status for any new applicant given the vagaries of how a “similar” service might be interpreted. A vague and novel “similar business experience” standard imposes an artificial and improper barrier to new competitors entering the telecommunications market in South Dakota as ETCs, including LTD, and this Commission cannot extend its administrative rules in a manner that exceeds the stated public interest criteria and stifles competition. *See State v. Burdick*, 2006 SD 23, ¶ 18, 712 N.W.2d 5, 10 (internal quotation omitted) (stating that an agency must apply administrative rules as written “rather than rewrite the law to confirm what [it] or others think it should have said”); *In re GCC License Corp.*, 2001 SD 32, ¶ 22 n.11, 623 N.W.2d 474, 483 (stating that the Commission cannot adopt state-law ETC requirements that are discriminatory or inhibit competition).
- In evaluating LTD’s technical capabilities, and assuming *arguendo* the Commission has authority to do so, the Commission noted that LTD “did not share any plans” for deployment of its network. (Decision at Finding of Fact 70).

- To the best of LTD's knowledge, the Commission has never required any other ETC applicant to submit detailed construction plans prior to obtaining ETC status. Further, this case illustrates the wastefulness in imposing that requirement. The Commission essentially is requiring LTD to expend money on advance engineering before knowing whether it receives ETC status. Without ETC status, LTD will not deploy its network in South Dakota. Thus, the monies spent on engineering would be wasted.
- The Commission criticizes LTD for not having a specific plan for easement and permit acquisition. (Decision at Finding of Fact 72 and 73).
  - LTD is not aware that any other ETC applicant has been required to provide a specific easement and permit acquisition plan as a prerequisite to being designated as an ETC.
- The Commission even seems to require LTD to present plans about speculative, hypothetical situations to obtain ETC status. When discussing the cultural preservation process that a South Dakota tribe "may require," LTD has failed to prove it can deploy its network because "LTD has no plan in place to comply *if* an impacted Tribe requires cultural preservation studies." (Decision at Finding of Fact 74).
  - Again, the Commission is imposing requirements on LTD that, to the best of LTD's knowledge, the Commission never imposed on any other ETC applicant. The Commission criticizes LTD for failing to provide plans for something that may not ever be relevant to its deployment. Nor is there

any evidence presented that this is a real risk to the project. Instead, it is pure speculation and a hypothetical.

- The Commission appears to criticize LTD for failing to provide specific plans for LTD's internal construction company that will be used to construct its network. (Decision at Finding of Fact 66).
  - To the best of LTD's knowledge, the Commission has never imposed this requirement on any other ETC.

Ultimately, the Commission chose to probe LTD's managerial, technical, and financial capabilities to deploy its network, despite the important fact that ARSD 20:10:32:43.07 does not require ETC applicants to demonstrate such capabilities. In South Dakota, these requirements are associated only with COA applications, and in any event, the managerial, technical, and financial capabilities of all presumptive RDOF recipients are reviewed by the FCC pursuant to the *Auction Procedures Public Notice*. As indicated in LTD's post-hearing briefing, the COA requirement of technical, managerial, and financial capabilities imposed by SDCL 49-31-74 is different than the "public policy" consideration in ARSD 20:10:32:43.07. By interpreting ARSD 20:10:32:43.07 as requiring LTD to prove it has the requisite technical, managerial, and financial capabilities, the Commission committed an error of law in interpreting the administrative rule.

The Commission's erroneous interpretation of ARSD 20:10:32:43.07 further conflicts with the Communications Act and South Dakota Supreme Court case law. Through its application of ARSD 20:10:32:43.07 in this docket, the Commission has imposed requirements on LTD that it has never imposed on any other ETC applicant.<sup>4</sup> Imposing additional burdens

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<sup>4</sup> The foregoing identifies some of the new requirements imposed on LTD. This list may not be all inclusive, and any requirement imposed by the Commission against LTD only constitutes impermissible discrimination. LTD reserves its right to argue on appeal that other conditions imposed by the Commission were improperly discriminatory.

only on LTD is impermissible discrimination inhibiting competition. *See In re GCC License Corp.*, 2001 SD 32, ¶ 22 n.11, 623 N.W.2d 474, 483. In *GCC License Corp.*, the South Dakota Supreme Court did not reach the issue of whether the Commission had authority to impose requirements for ETC status beyond the requirements of 47 U.S.C. § 214(e)(1). *In re GCC License Corp.*, at ¶ 11, 623 N.W.2d at 483. Nevertheless, the Supreme Court did expressly state “that even if a state commission does retain authority to impose additional requirements, any such requirements must be competitively neutral and consistent with the Communication Act’s aim of promoting competition.” *Id.* at ¶ 22 n.11, 623 N.W.2d at 483 (citing 47 U.S.C. § 253(b)). Similarly, the Communications Act requires that any regulation imposed by this Commission be competitively neutral. *See* 47 U.S.C. § 253(b). The Commission thus further erred as a matter of law by imposing these additional, discriminatory requirements for ETC status. The Commission thus should reconsider its decision.

## **II. The Commission’s Findings of Fact Are Clearly Erroneous.**

In the Decision, the Commission adopted several Findings of Fact that were clearly erroneous. As an initial matter, the Commission should have adopted Applicant’s Proposed Findings of Fact and Conclusions of Law filed on February 8, 2022 (“LTD’s Proposed Findings”). The Commission clearly erred in failing to adopt LTD’s Proposed Findings. Separately, and in addition, the following specific findings of fact by the Commission are clearly erroneous:

1. **Finding of Fact 26:** This finding of fact is clearly erroneous because it overlooks, among other things, the egregious and fraudulent conduct of LTD’s prior attorney in at least one of the states that is the basis for denial of LTD’s ETC designation (and for which a petition for rehearing is pending). (12-1-21 HT at pp.154-56).

2. Finding of Fact 33: This finding of fact is clearly erroneous. The FCC can, and has, waived the requirement that RDOF provisional winners must receive ETC status within 180 days of the auction.<sup>5</sup>
3. Finding of Fact 34: This finding of fact is clearly erroneous. LTD was not “required” to file its ETC application by January 6, 2021 (and in any event, it did so). Rather, this was the date by which the FCC would presume that the applicant acted in good faith in filing its application for ETC designation.<sup>6</sup>
4. Findings of Fact 59: LTD submits that these are actually legal conclusions rather than findings of fact. Regardless, they are an incorrect statement of the law, and LTD disputes that this Commission has authority to impose additional requirements for ETC status if the applicant satisfies the three requirements for an ETC designation under section 214 of the Communications Act. Because LTD undisputedly satisfied all three requirements, the Commission erred in denying ETC status. As discussed above, the Commission also further erred in imposing additional requirements for ETC status on LTD only that is never applied the case of another ETC application, which is discriminatory.
5. Finding of Fact 63: This finding of fact is clearly erroneous because it does not include the entire methodology to which Mr. Hauer testified.
6. Finding of Fact 65: This finding of fact is clearly erroneous. The cited portion of the transcript does not support the finding, and Mr. Hauer never testified that LTD does not currently operate a fiber construction company. Instead, at the hearing, Hauer testified that LTD had staff installing fiber. (12-1-21 HT at pp.217-19).

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<sup>5</sup> See, e.g., *Rural Digital Opportunity Fund Support for 952 Winning Bids Ready to be Authorized; Bid Defaults Announced*, Public Notice, AU Docket No. 20-34 and WC Docket Nos. 19-126 & 10-90, DA 22-185 (rel. March 10, 2022) at 4-5.

7. Finding of Fact 66: LTD submits that this is a conclusion of law rather than a finding of fact, and this statement is an error of law for the reasons argued by LTD in its post-hearing briefing and at the oral argument occurring on February 18, 2022. Once the Commission determined that LTD satisfied all three requirements for ETC status under section 214(e) of the Communications Act, the Commission is required to grant LTD's application for ETC status. The Commission committed an error of law by relying on other considerations to deny LTD's application for ETC status despite LTD satisfying all three requirements imposed by section 214(e) of the Communications Act. Further, even if the Commission could impose additional requirements for ETC status, the Commission's denial of LTD's application based upon its alleged lack of managerial, technical, and financial capabilities is an error of law. Managerial, technical, and financial capabilities are not proper considerations addressed in any of the administrative rules governing an ETC application in South Dakota. Instead, those are the considerations for a COA application. The Commission committed a reversible error of law by imposing requirements for ETC status that are outside the Commission's administrative rules. Separately, and in addition, the Commission committed error of law by imposing requirements on LTD that it has never required of any other ETC applicant. These additional requirements are discriminatory and inhibit competition in violation of both the Communications Act and the South Dakota Supreme Court's decision in *In re GCC License Corp.*, 2001 SD 32, ¶ 22 n.11, 623 N.W.2d 474, 483.
8. Finding of Fact 67: This finding of fact is clearly erroneous because it is not supported by the record as a whole.

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<sup>6</sup> Rural Digital Opportunity Fund Phase I Auction (Auction 904) Closes, Public Notice, AU Docket No. 20-34 and WC Docket Nos. 19-126 & 10-90, DA 22-185 (rel. Dec. 7, 2020) at 14.

9. Finding of Fact 68: This finding of fact is clearly erroneous because it conflates the number of customers LTD serves with the number of locations to which LTD must deploy RDOF service within six years. It further does not demonstrate LTD's inability to deploy service to the 7,481 locations in South Dakota.
10. Finding of Fact 69: This finding of fact is not supported by the record. Hauer testified that LTD is deploying fiber in very rural Tennessee and doing it for less than the cost estimates in the RDOF long form. (12-1-21 HT at p.219).
11. Findings of Fact 70 and 71: These findings of fact are clearly erroneous because they are not supported by the record as a whole.
12. Finding of Fact 72: LTD objects to this finding of fact as clearly erroneous. The cited evidence does not support this finding of fact.
13. Findings of Fact 75 and 76: These findings of fact are clearly erroneous because they are not supported by the record as a whole.
14. Finding of Fact 78: This finding of fact is actually a conclusion of law presenting a legal question, namely the interpretation of ARSD 20:10:32:43.07. Issues of interpretation of regulations are questions of law for the Commission rather than a matter of expert testimony.
15. Finding of Fact 79: This finding of fact is clearly erroneous because Mr. Thompson was not correct about how LTD determined its cost estimates. (12-1-21 HT at p.87).
16. Findings of Fact 80, 84, 85, 86, and 87: These findings of fact are clearly erroneous because they are not supported by the record as a whole.
17. Finding of Fact 88: This finding of fact is clearly erroneous because the cited evidence does not support this finding of fact. As explained above, January 6, 2021, was not a

hard deadline and, in any event, the FCC has waived the date by which RDOF applicants must obtain ETC designation on a number of occasions.

18. Findings of Fact 89, 90, 91, 92, 95 and 96: These findings of fact are clearly erroneous because they are not supported by the record as a whole.

**III. New Discovered Evidence Establishes LTD Can Deploy Its Network Within a Reasonable Time.**

SDTA's arguments, and this Commission's Decision, were impacted in large part by the claim that LTD cannot deploy its network consistent with its cost estimates. Mr. Thompson admitted on cross-examination that all of his opinions were based upon his conclusion that LTD will fail as a going concern:

Q. And just to be clear, as I heard your testimony, its fundamentally that this Commission should deny the ETC designation because LTD will inevitably fail as a business, correct.

A. **Correct.**

Q. That is the conclusion of all your opinions, correct.

A. **If they move forward with their RDOF winnings, that is correct.**

(12-1-21 HT at pp.194-95). Fundamentally, Mr. Thompson believed LTD would fail because LTD underestimated the cost of constructing its network.

New evidence establishes Thompson's opinions are incorrect, to the extent they had any merit in the first place. Since the evidentiary hearing in this matter, LTD has in fact been deploying fiber-to-the-home networks in rural areas. (Affidavit of Corey Hauer at ¶¶ 5-6). LTD has built fiber networks in Minnesota, Missouri, and Tennessee. (*Id.* at ¶ 5). LTD has deployed its network in rural areas of Missouri and Tennessee that are as difficult of an area to build as any in South Dakota. (*Id.* at ¶ 5). LTD has successfully built this network for less than the costs estimated in its RDOF application. Furthermore, LTD's actual costs are substantially less than

Larry Thompson, Jr.'s estimates at the evidentiary hearing. Corey Hauer, in his affidavit, details the costs actually incurred. Because of their confidential and proprietary nature, LTD designates that affidavit and the enclosed cost information as "Attorneys' Eyes Only."

LTD's actual experience in deploying its network confirms that it can deploy the network consistent with its estimated costs. LTD is in fact deploying its network for less than its RDOF estimated cost. This new evidence supports granting ETC status. To the extent the Commission is not prepared to grant reconsideration and LTD's Amended Application, LTD requests a rehearing so that the Commission can consider this evidence. LTD also would not oppose presenting its new evidence at a supplemental evidentiary hearing.

**IV. The Commission Should Grant Rehearing to Allow LTD to File a Further Amended Application for ETC Status, In Which LTD Intends To Withdraw Its Request for ETC Status for Certain Census Blocks.**

LTD requests that the Commission grant rehearing so that LTD can seek leave to further amend the Amended Application. In the Amended Application, LTD intends to reduce the census blocks for which it seeks ETC status. By doing so, LTD will mitigate the risk that certain census areas are needlessly overbuilt while, at the same time, utilizing the RDOF funding to provide broadband to unserved South Dakota citizens. Only if rehearing is granted could LTD amend its application.

As indicated by LTD's CEO, Corey Hauer, at the evidentiary hearing, LTD does not desire to be the second broadband service provider to any location in South Dakota. Instead, LTD's business plan relating to the RDOF award areas is for LTD to be the first broadband provider providing speeds of 1 gigabyte per second download speed, and 500 megabyte per second upload. As LTD learned during the evidentiary hearing, some of the census block areas provisionally awarded to LTD in the RDOF auction are already being built out or served by other

providers through different funding mechanisms, including state funding. This additional service build out has only continued since the hearing.

In response to LTD's request, SDTA argues that LTD should just file a new application in a new docket. Although that may be a legally viable option, under the RDOF rules, filing a new application in a new docket will create substantial risk that LTD will never receive the RDOF award for South Dakota areas. As this Commission is aware, the applicable RDOF rules require a provisional auction winner to receive ETC status for those states where RDOF funds were awarded within 180 days after the RDOF auction. If the applicant does not receive RDOF status within 180 days, the FCC will waive the ETC deadline if the applicant shows they engaged in good faith efforts to obtain ETC status. If LTD filed its application for ETC status by January 6, 2021, then there is a presumption of a good faith effort to obtain ETC status. The FCC has denied LTD's waiver request with respect to some jurisdictions where LTD failed to file their ETC application by January 6, 2021.<sup>7</sup> If LTD has to refile its ETC application in a new docket, there is substantial risk that the FCC would hold LTD failed to engage in good faith efforts to obtain ETC status.

Further, when comparing a new application filing compared to granting rehearing and allowing LTD to amend its application, there is no prejudice to SDTA in granting rehearing. If LTD filed a new application, the entire docket process would occur, including full discovery and a full evidentiary hearing on all issues. Comparatively, the scope of rehearing will likely be narrower. At a minimum, the current evidence will already have been received by the Commission, and thus, there will be no need to recover previous evidence.

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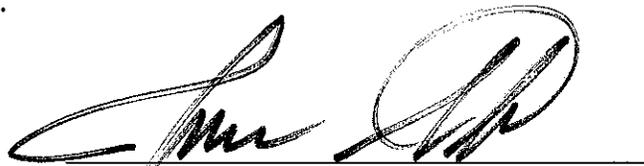
<sup>7</sup> LTD filed motions for reconsideration of these orders by the FCC, which motions remain pending.

Ultimately, this Commission concluded that it must consider whether granting ETC status to LTD serves the public interest under ARSD 20:10:32:43.07. One of the public interest factors is “consumer choice.” Without LTD and the RDOF funding, there are citizens in South Dakota that will not receive broadband service in the foreseeable future. This Commission should grant rehearing to allow LTD to narrow its application. The Commission should thus consider whether this narrower application, along with the more recent cost evidence, supports granting LTD’s request for ETC status.

### CONCLUSION

Based on the foregoing, LTD respectfully requests that the Commission grant its petition for reconsideration or rehearing to consider the newly acquired evidence described in this petition. Alternatively, if the Commission is not prepared to grant reconsideration, it should allow for rehearing on the additional, new and relevant facts presented herein.

Dated this 2<sup>nd</sup> day of June, 2022.



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