

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

In the Matter of the Application of LTD Broadband LLC for Designation as an Eligible Communications Carrier for Purposes of Receiving Federal Universal Service Support	<b>DOCKET NO. TC21-001</b>  <b>APPLICANT'S OPPOSITION TO SDTA'S MOTION TO USE CONFIDENTIAL INFORMATION</b>
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LTD Broadband LLC (the "Applicant" or "LTD Broadband"), by its undersigned counsel, opposes the motion of the South Dakota Telecommunications Association ("SDTA") to publicly disclose testimony and exhibits based on confidential information derived from the materials filed in support of LTD Broadband's application for RDOF support.<sup>1</sup> SDTA's request to examine its expert witness in an open and public forum, and to introduce certain confidential exhibits into the public record in this docket, blatantly violates the Protective Order for Confidentiality entered by the Commission (the "Protective Order"),<sup>2</sup> and the affirmations by SDTA's General Counsel and consultants that the requirements of the Protective Order would be honored.<sup>3</sup> The Commission must deny SDTA's motion, and instead, must declare that all testimony and exhibits derived from LTD Broadband's RDOF Materials (as defined herein) remain subject to confidential treatment for the entire duration of this action and after, as the Protective Order provides.<sup>4</sup>

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<sup>1</sup> The acronym "RDOF" refers to the Rural Digital Opportunity Fund administered by the Federal Communications Commission ("FCC"). References to LTD Broadband's "RDOF Application" mean the application filed by LTD Broadband at the FCC for RDOF support.

<sup>2</sup> See Joint Motion and Stipulation for a Protective Order, Docket No. TC21-001 (filed Aug. 12, 2021).

<sup>3</sup> In accordance with Section 7 of the Protective Order, Non-Disclosure Agreements were executed by SDTA's General Counsel, Kara Semmler, expert witness Larry Thompson, and two other individuals from Vantage Point.

<sup>4</sup> This opposition to SDTA's motion is subject to, and without waiver of any of the claims for relief set forth in LTD Broadband's November 5, 2021 motion to strike the expert testimony of Larry Thompson on behalf of SDTA. As explained more fully in that motion, Mr. Thompson's testimony is unhelpful to the Commission's analysis of LTD Broadband's ETC Application under 47 U.S.C. § 214(e) and its own rules, irrelevant, and inadmissible under Rule 702. However, if the Commission is inclined to hear Mr. Thompson's testimony, all portions thereof (which shall be deemed to include all pre-filed written testimony and all exhibits) that include confidential information derived from the RDOF Materials must be handled in accordance with the requirements of the Protective Order.

## BACKGROUND AND ARGUMENT

On April 9, 2021, LTD Broadband submitted to the Commission its confidential response to Staff's First Data Request 1-11, which was comprised of the materials filed by LTD Broadband with the FCC in support of its RDOF Application.<sup>5</sup> The RDOF Materials were submitted subject to a request for confidentiality, which explained the basis for the request, and the specific need to protect the RDOF Materials from public disclosure.<sup>6</sup> SDTA was advised that the RDOF Materials were disclosed to the Commission subject to a confidentiality request.

Immediately thereafter, SDTA's General Counsel, Kara Semmler, communicated to counsel for LTD Broadband, Brett Heather Freedson, that she would execute the appropriate confidentiality terms as a condition to access the RDOF Materials and other confidential information submitted to the Commission subject to LTD Broadband's confidentiality request.<sup>7</sup> SDTA did not then, or at any time after, dispute LTD Broadband's representation that the RDOF Materials contain "confidential information," as that term is defined in S.D. Admin. R. 20:10:1:39.

On August 12, 2021, LTD Broadband and SDTA filed with the Commission a joint motion and Stipulation for a Protective Order for Confidentiality wherein the parties expressly indicated a need and an intention to protect trade secrets and confidential and propriety business information disclosed by either party in this docket. The Joint Motion and Stipulation stated as follows:

The Parties **agree** that the attached Protective Order is needed to protect the trade secrets and confidential and proprietary business information of the Parties that may be exchanged in discovery **or offered as evidence** in this docket. In order to protect their trade secrets and confidential and proprietary business information, the Parties **jointly request** that the

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<sup>5</sup> The "RDOF Materials" are the documents provided to the Commission in response to Staff's First Data Request 1-11, and later to SDTA's General Counsel, subject to the Protective Order. SDTA's motion pertains specifically to confidential information derived from the RDOF Materials.

<sup>6</sup> Letter from Brett Heather Freedson, counsel to LTD Broadband to Patricia Van Gerpen, Executive Director, South Dakota Public Utilities Commission (Apr. 9, 2021) (attached as **Exhibit 1**).

<sup>7</sup> Email from Kara Semmler, SDTA to Brett Heather Freedson, counsel to LTD Broadband (Apr. 9, 2021).

Public Utilities Commission of the State of South Dakota enter the attached Protective Order.<sup>8</sup> (Emphasis added.)

It was expressly understood that the RDOF Materials would be subject to the Protective Order. To that end, the Protective Order stated:

For avoidance of doubt, any information contained in or derived from the Applicant's application to the FCC for receipt of RDOF fund **shall be deemed "Attorneys Eyes Only – Confidential," which designation shall not be subject to opposition** pursuant to this section.<sup>9</sup> (Emphasis added.)

The Protective Order was executed by SDTA's General Counsel, Kara Semmler, and by its expert witness, Larry Thompson.<sup>10</sup> The representatives of SDTA executing the Protective Order affirmed that they understood the Protective Order's terms and restrictions, and agreed to be bound by them.<sup>11</sup> In reliance on the written affirmations of SDTA's General Counsel and representatives, LTD Broadband's counsel, Jason Sutton, transmitted a copy of the RDOF Materials to Ms. Semmler by email, on August 13, 2021.<sup>12</sup> Mr. Sutton's indicated specifically that the RDOF Materials were provided subject to the Protective Order, and the document itself was marked Attorneys' Eyes Only – Confidential. However, despite the clear requirements of the Protective Order to which both parties stipulated, and the commitments of SDTA's General Counsel and expert witness to be bound by them, SDTA now requests to publicly disclose precisely the information that the Protective Order is intended to shield.

Importantly, SDTA's motion makes no attempt to explain why individuals who may require access to confidential information contained in or derived from the RDOF Materials for purposes of

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<sup>8</sup> Joint Motion and Stipulation for a Protective Order, Docket No. TC21-001 (filed Aug. 12, 2021) at 1.

<sup>9</sup> Protective Order at Section 11(c).

<sup>10</sup> See attached, as **Exhibit 2**.

<sup>11</sup> See Protective Order at Section 7 and **Exhibit 2**.

<sup>12</sup> Email from Jason R. Sutton, counsel to LTD Broadband to Kara Semmler, SDTA (Aug. 13, 2021) (attached as **Exhibit 3**).

this action could not execute the Protective Order. SDTA's motion also fails to articulate why, at this late date, public disclosure of LTD Broadband's confidential information is suddenly necessary for the Commission to execute its obligations to evaluate the merits of LTD Broadband's ETC Application, or SDTA's objections to LTD Broadband's ETC Application. Based on this, and SDTA's persistent attempts to obtain confidential, proprietary, and commercially sensitive information that is irrelevant to the Commission's analysis under the Communications Act and its own rules, one can only conclude that motivation for SDTA's motion is improper. SDTA should be held to its earlier agreement upon which LTD Broadband relied in submitting the RDOF Materials to SDTA for its confidential review.

If the Commission permits the expert testimony proffered by Larry Thompson on behalf of SDTA (and it should not do so), all pre-filed written testimony, oral testimony, and related exhibits that contain, or are derived from LTD Broadband's confidential information contained in the RDOF Materials must be shielded from public disclosure pursuant to the Protective Order. To that end, LTD Broadband recommends that all individuals who are not bound by the Protective Order be excluded from the hearing at all times that information subject to the Protective Order may be disclosed.<sup>13</sup>

### **CONCLUSION**

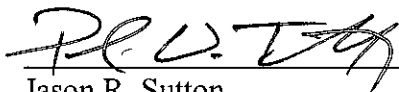
For the reasons set forth herein, the Commission should deny SDTA's motion, and affirm that all testimony and exhibits that include, or are derived from confidential information contained

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<sup>13</sup> See Protective Order at Section 9.

in the RDOF Materials remain subject to confidential treatment in accordance with the Protective Order.

Dated this 12th day of November, 2021.



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**CERTIFICATE OF SERVICE**

I, Paul W. Tschetter, do hereby certify that I am a member of Boyce Law Firm, LLP, attorneys for LTD Broadband, LLC and that on the 12<sup>th</sup> day of November, 2021, a true and correct copy of the foregoing and this Certificate of Service were served via email to the following addresses listed:

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