

**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
Telecommunications Carrier for Purposes of
Receiving Federal Universal Service Support

TC21-001

**APPLICANT'S PROPOSED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Applicant, LTD Broadband, LLC ("LTD"), filed an application on January 7, 2021, for designation as an eligible telecommunications carrier ("ETC"). South Dakota Telecommunications Association ("SDTA") filed a motion to intervene, which motion was granted on January 27, 2021. LTD amended its application on October 22, 2021 ("Amended Application"). LTD's amended application in the above-captioned docket came before the Public Utilities Commission for the State of South Dakota ("Commission") for an evidentiary hearing on December 1, 2021. LTD appeared at the hearing through Chief Executive Officer, Corey Hauer, and through its attorneys, Jason R. Sutton of Boyce Law Firm, LLP, and Brett Heather Freedson of Lerman Senter, PLLC. SDTA appeared through its attorney, Kara Semmler. Commission Staff appeared through its attorney, Amanda Reiss.

Following the evidentiary hearing, LTD, Commission Staff, and SDTA submitted post-hearing briefs. The Commission also held an oral argument on the amended application on February 18, 2022. Based upon the evidence presented, the written and oral arguments of counsel, and the record as a whole, the Commission enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. LTD filed an application for ETC status in this docket on January 7, 2021.
2. LTD amended its application on October 22, 2021. (Ex. L-3).
3. LTD filed its ETC application after LTD was the provisional auction winner of federal funding for building a broadband internet network under the Rural Digital Opportunity Fund (“RDOF”) reverse auction. The Federal Communications Commission (“FCC”) administers RDOF. LTD was the provisional auction winner for areas in South Dakota. Under the applicable RDOF rules, LTD must receive ETC status in South Dakota before the RDOF funds will be released by the FCC for LTD to deploy its network in South Dakota. (Hearing Transcript at pp.33-34). As a result, LTD filed its application for ETC status in the above-captioned docket.
4. SDTA intervened as a party in the above-captioned docket on January 27, 2021.

BACKGROUND OF LTD

5. LTD is a privately held broadband voice and internet access service provider with its primary place of business in Clarks Grove, Minnesota. (Ex. L-2, at Applicant 000002, Lines 16-18).
6. LTD’s CEO, Corey Hauer (“Hauer”), started the company in 2010, and, since then, LTD has specialized in providing broadband service to unserved or underserved rural broadband customers. (Ex. L-2, at Applicant 000002, Line 7; Ex. L-2, at Applicant 000002, Lines 10-12).
7. From 2011 through today, LTD has grown from a single water tower site in Rose Creek, Minnesota in 2011 to a network of over 2,500 tower sites covering over

50,000 square miles. (Ex. L-2, at Applicant 000002, Lines 19-20). LTD is one of the fastest growing broadband companies in the United States.

8. Currently LTD offers service in Iowa, Kansas, Minnesota, Nebraska, South Dakota, Tennessee and Wisconsin, and serves approximately 17,500 customers within those states. (Ex. L-2, at Applicant 000002, Lines 20-22). At the time of the evidentiary hearing, LTD was serving 18,000 customer locations. (Transcript from Evidentiary Hearing on December 1, 2021 (“Hearing Transcript”) at pp.109-10).
9. LTD previously participated in the Connect America Fund Phase II (“CAF Phase II”) program conducted by the FCC. (Ex. L-2, at Applicant 000003, Line 15 through Applicant 000004, Line 2). As part of the CAF Phase II program, LTD was authorized by the FCC to receive support to deploy voice and broadband services in unserved rural areas of Illinois, Iowa and Minnesota. LTD has been highly successful in deploying its network ahead of the schedule required by the CAF Phase II program rules. Specifically, LTD completed its fifth-year obligation of 80% buildout in both Iowa and Minnesota by the end of year one. (Ex. L-2, at Applicant 000003, Line 15 through Applicant 000004, Line 2; Applicant 000004, Lines 15-23). That is four years ahead of the CAF Phase II milestone requirement, which is to complete 80% of the buildout obligation by the end of year five. LTD also expects to finish 100% of its CAF Phase II obligation for Illinois later this year – also four years ahead of schedule. (Applicant 000004, Lines 15-23).

LTD’S PARTICIPATION IN RDOF

10. LTD participated in the RDOF reverse auction. Like CAF Phase II, RDOF is a federal funding program implemented by the FCC to provide funding for deployment

of voice and broadband networks to rural areas deemed by the FCC to be unserved. (Ex. L-2, at Applicant 000006, Lines 6-9).

11. As part of the RDOF process, prior to the reverse auction for support, LTD submitted a short form application. (Ex. L-2, at Applicant 000006, Line 18 through Applicant 000007, Line 16). The FCC reviewed the short form application submissions to make sure that applicants for RDOF support, including LTD, met basic eligibility requirements and would not likely default if the applicant was authorized for support. (*Id.*). Then, a reverse auction occurred in which auction participants continuously reduced the amount of their bids at each round to provide stated levels of broadband service to specific census block groups. (*Id.*).
12. Following the RDOF reverse auction, LTD was the provisional RDOF auction winner of 366,000 locations throughout nine different states. (Hearing Transcript at pp.22-23).
13. In South Dakota, LTD was the provisional RDOF auction winner of over \$13 million dollars in funding to provide broadband service to 103 census block groups for 7,481 locations. (Hearing Transcript at pp.22, 110). A location generally means a residential dwelling unit. (Hearing Transcript at p.22). The FCC determined prior to the reverse auction that consumers in these locations are not able to receive eligible broadband service. (Ex. L-2, at Applicant 000006, Lines 10-14).
14. While some consumers in the census blocks provisionally awarded to LTD in South Dakota may be receiving broadband service from other providers pursuant to state funding (Hearing Transcript at pp.116-17), there are also some areas that may never receive service without the RDOF-supported deployment.

15. If LTD receives RDOF funding, then LTD must deploy a network able to provide voice and broadband service at speeds of 1 Gbps download and 500 Mbps upload.
16. Under RDOF (like CAF Phase II), LTD must satisfy deployment milestones beginning in the third year of its support term. (Hearing Transcript at pp.24-26). LTD will have to deploy its network to 95% of all locations within six years of funding. (*Id.*).
17. As the provisional auction winner, LTD was required to submit an RDOF long form for post-auction review by the FCC. The RDOF long form provides extensive detail about LTD's operational, financial, and technical capabilities. (Ex. L-2, at Applicant 000006, Line 18, through Applicant 000009, Line 9). FCC staff carefully scrutinize this information to confirm that LTD is reasonably capable of meeting the RDOF deployment milestones. (*Id.*). Ultimately, RDOF support will be awarded by the FCC only if that is determined to be the case.

DISCOVERY AND EVIDENTIARY HEARING IN THIS DOCKET

18. LTD has responded to numerous data requests by both PUC Staff and SDTA in the above-captioned docket. In total, LTD responded to three sets of data requests containing 26 individual requests from PUC Staff. LTD also responded to five separate sets of written discovery from SDTA containing 64 individual requests.
19. Both LTD and SDTA submitted prefiled testimony to the Commission. LTD submitted opening and rebuttal testimonies of Hauer. SDTA submitted prefiled testimony of Larry Thompson, Jr. ("Thompson"), who filed both opening and rebuttal testimonies.

20. An evidentiary hearing occurred before the Commission on December 1, 2021. Both Hauer and Thompson testified live at the evidentiary hearing.
21. The Commission received 18 exhibits from LTD: L-1 through L-18.
22. The Commission received nine exhibits from SDTA: Exhibits 1 through 9.
23. At the evidentiary hearing, Hauer testified on behalf of LTD. Among other things, Hauer, through both his prefiled testimony and his testimony at the evidentiary hearing, detailed how LTD satisfies each of the requirements of the Telecommunications Act of 1996 and each of the Commission's administrative rules required for ETC status. The Commission finds that Hauer's testimony on these matters is credible and is entitled to substantial weight.
24. At the evidentiary hearing, SDTA presented testimony of Thompson, who is SDTA's expert consultant. Thompson's testimony focused on the argument the Commission should deny LTD's application because LTD will likely fail as a business at some unknown date in the future. (Hearing Transcript at pp.195-96). The Commission finds that Thompson's testimony does not warrant denying the application because, as described below in the conclusions of law, financial sustainability in the future is not a proper consideration by this Commission when ruling on LTD's application.
25. Thompson's testimony that LTD will fail at some unknown future date is speculative and not entitled to any weight. Thompson never identified when LTD would fail, and Thompson only considered the profitability of LTD's RDOF funded network in concluding LTD would fail. Thompson also failed to account for any other future potential funding received by LTD.

26. Except for issue of whether granting the application serves the public interest, neither SDTA nor Commission Staff dispute that LTD satisfies all of the other requirements for ETC status. As a result, the only disputed factor in the above-captioned docket is whether granting LTD's application serves the public interest.

LTD'S PLANNED NETWORK

27. If the RDOF funding is released for LTD's planned network in South Dakota, LTD plans to provide fiber-to-the-home service. (Ex. L-2, at Applicant 000003, Lines 6-9).
28. The locations for which LTD has received RDOF funding do not currently receive broadband internet services.
29. If it receives the RDOF funds for which it was a provisional winner, LTD is required by the RDOF rules to deploy a network that supports the following speeds: 1 Gigabit download/500 Megabit upload.
30. There are some consumers within the RDOF locations provisionally awarded to LTD that may be served by other providers before LTD deploys its network. Others likely will not receive broadband service anytime soon if LTD's network is not deployed. LTD will not deploy its network in South Dakota without RDOF support, and the RDOF funds awarded to LTD on a preliminary basis will not be released to LTD unless ETC status is granted by this Commission. (Hearing Transcript at pp.33-34).
31. Although LTD would prefer not to be a second broadband provider in those RDOF locations served by other carriers, LTD will be obligated to build its network to include those locations. The FCC may impose monetary penalties that may be

millions of dollars if LTD fails to deploy its network to those locations, even if the location is served by another carrier. (Hearing Transcript at pp.125, 144-45).

32. LTD is already deploying fiber networks in Tennessee. (Hearing Transcript at p.219). LTD is deploying its fiber networks in Tennessee at significantly less cost than LTD estimated in its RDOF long form. (Hearing Transcript at p.219). [REDACTED]

33. LTD has secured the financing it needs to proceed with deploying its network once the RDOF funding is released. (Hearing Transcript at pp.80-82, 96-98). [REDACTED]

34. As part of the RDOF process, the FCC will perform an extensive analysis of each applicant's RDOF long form before it authorizes support. (Hearing Transcript at pp.23-24; Ex. L-2, at Applicant 000006, Lines 6 through Applicant 000009, Line 9).

35. The FCC is qualified and competent to evaluate LTD's financial, managerial, and technical capabilities for successfully deploying its network as part of the RDOF application process. (Hearing Transcript at p.194).

36. The Commission finds that if the FCC determines LTD has the ability to deploy its network and meet the RDOF milestones, there is not sufficient evidence in this proceeding to override that determination.

37. The FCC will only release the RDOF funding after determining LTD has the ability to deploy the network LTD agreed to deploy.

38. The Commission finds that LTD has the ability to deploy its network in South Dakota within a reasonable time.

39. LTD is required to procure a letter of credit that will provide security if LTD fails to deploy its network consistent with RDOF's required milestones.
40. If LTD does not receive ETC status, then it will not receive RDOF funding. (Hearing Transcript at pp.33-34).
41. Without RDOF funding, LTD will not deploy its network in South Dakota. (Hearing Transcript at p.34; Ex. L-2, at Applicant 000020, Lines 8 to 14).
42. Some of the census blocks where LTD is a provisional winner will not receive broadband services anytime soon without LTD and its RDOF support. Thus, if this Commission denies LTD's ETC status, some consumers in South Dakota will not receive broadband service.
43. For the reasons stated below, the Commission finds that the public interest is served by granting LTD's application.

LTD'S CERTIFICATE OF AUTHORITY DOCKET

44. LTD also filed an application with the Commission for issuance of a certificate of authority in South Dakota in the docket captioned *In the Matter of the Application of LTD Broadband LLC for Certificates of Authority to Provide Resold and Facilities-Based Local Exchange and Interexchange Telecommunications Services in the State of South Dakota*, TC 21-2014 ("COA Docket").
45. SDTA filed a motion to intervene in the COA Docket. (Ex. L-18, at p.2).
46. SDTA and LTD entered into a stipulation in the COA Docket, where SDTA agreed not to oppose the issuance of the COA. The parties agreed to the following language in the stipulation: "The parties agree that upon the Commission's approval of this Stipulation, the concerns of SDTA that are the basis for its intervention in the above-

referenced dockets shall be deemed fully satisfied, and SDTA shall not oppose LTD's [certificate of authority] Application." (*Id.*).

47. If any of the foregoing findings of fact are more properly considered a conclusion of law, they shall be deemed as such.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over LTD's application and this matter pursuant to SDCL Ch. 1-26 and 49-31, including 1-26-18, 1-26-19, 49-31-3, 49-31-7.1, and 49-31-78, ARSD Section 20:10:32:43, et al., and 47 USC §214(e)(1) through (5), and 47 USC §254(f).
2. LTD bears the burden of proving by the preponderance of the evidence that it satisfies the requirements for granting the ETC application. *See In re Black Hills Power, Inc.*, 2016 SD 92, ¶ 17, 889 N.W.2d 631, 636 ("The burden of proof for administrative hearings in preponderance of the evidence." (internal quotation and alternation omitted)).
3. Under section 214(e)(1) of the Telecommunications Act of 1996 ("Telecom Act"), LTD must satisfy three requirements to obtain ETC status. *See* 47 U.S.C. § 214(e)(2); *see also In re GCC License Corp.*, 2001 SD 32, ¶ 9, 623 N.W.2d 474, 479. First, the applicant must be a common carrier. 47 U.S.C. § 214(e)(1). Second, the applicant must "offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title" 47 U.S.C. § 214(e)(1)(A). Third, the applicant must advertise the availability of these services.. 47 U.S.C. § 214(e)(1)(B).
4. The Telecom Act says that the Commission must grant ETC status if the requirements of § 214(e)(1) are satisfied: "A State commission *shall* upon its motion or upon

request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for the service area designated by the State commission. . . .” 47 U.S.C. § 214(e)(2) (emphasis added).

5. LTD satisfies all of three requirements for ETC status under section 214(e)(1). Neither Commission Staff nor SDTA deny LTD meets the requirements of section 214(e)(1). Further, based upon the testimony and exhibits offered, LTD proved by the preponderance of the evidence that it satisfies each of the requirements of section 214(e).
6. First, LTD must be a common carrier. 47 U.S.C. § 214(e)(1). Hauer’s prefiled testimony establishes this requirement because “LTD will provide voice service as interconnected VoIP service in South Dakota. As to customers and locations in which LTD is awarded RDOF support, LTD will provide its voice services on a common carrier basis.” (Exhibit L-2, at Applicant 000013, Lines 4-9). Neither SDTA nor LTD disputed this prefiled testimony. Thus, this requirement has been satisfied.
7. Second, LTD must “offer services supported by the Federal universal service support mechanism” 47 U.S.C. § 214(e)(1)(A). Once again, the prefiled direct testimony of Corey Hauer confirms LTD’s satisfaction of this requirement. This requirement is specifically addressed in Exhibit L-2, at Applicant 000013, Line 11 through Applicant 000015, Line 9. Once again, neither SDTA nor Commission Staff contested this testimony. Thus, this requirement is satisfied.
8. The last requirement under section 214(e)(1) of the Telecom Act is LTD must advertise the ability of its services. Again, Hauer’s prefiled testimony proved LTD

satisfies this requirement. Hauer detailed LTD's anticipated advertising plans in his prefiled testimony. (Ex. L-2, at Applicant 000015, Lines 10-15). LTD also responded to Commission Staff's data requests detailing its anticipated advertising plan. (Ex. L-8, at Request 3-1). This statutory requirement therefore is satisfied.

9. Section 214(e)(2) of the Telecom Act says that if section 214(e)(1) is satisfied, the Commission "shall" grant ETC status to LTD. "Shall" is a mandatory term, and thus, this Commission must grant ETC status to LTD once LTD satisfies each of the three requirements of section 214(e)(1). *See Reck v. S.D. Bd of Pardons & Paroles*, 2019 SD 42, ¶ 12, 932 N.W.2d 135 ("As a result of statutory construction, we have determined that when shall is the operative verb in a statute, it is given obligatory or mandatory meaning." (internal quotation omitted)).
10. Despite the use of the word "shall" in section 214(e)(2), the Commission concludes that it has the authority, through its own administrative rules, to adopt additional state law requirements for ETC status. *See Report and Order of In re Federal-State Joint Board on Universal Service*, FCC 05-46, ¶¶ 60-61, Federal Communications Commission, March 15, 2005. Whether the Commission in fact has this authority does not affect the outcome in this docket because the Commission concludes that LTD has satisfied all the requirements under the Commission's administrative rules.
11. Any state law requirements adopted by the Commission for ETC status "must be competitively neutral and consistent with the [Telecom] 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 Telecom Act and the FCC's rules require that any regulation imposed by this Commission be competitively neutral. *See* 47 U.S.C. § 253(b).

12. The Commission has adopted administrative rules stating additional requirements for granting LTD's application, which are found at ARSD 20:10:32:43 through 20:10:32:43.07.
13. Under ARSD 20:10:32:43, the application must contain six specific types of information. LTD filed an application in this docket on January 7, 2021. LTD amended the application. (Ex. L-3). As stated by Hauer in his prefiled testimony, the amended application, as supplemented by LTD's responses to written discovery served by Commission Staff and SDTA, contains all of the information required by ARSD 20:10:32:43. (Ex. L-2, at Applicant 000015, Lines 16-19). Neither SDTA nor Commission Staff disputed this testimony. The Commission concludes that LTD has proven by the preponderance of the evidence that LTD satisfies the requirements for ARSD 20:10:32:43.
14. ARSD 20:10:43.01 requires that LTD "shall commit to providing service throughout its proposed designated service area to all customers making a reasonable request for service." The regulation also requires LTD to certify that it will:
 - (1) Provide service on a timely basis to requesting customers within the applicant's proposed designated service area where the applicant's network already passes the potential customer's premises; and
 - (2) If the potential customer is within the applicant's proposed designated service area but outside its existing network coverage, provide service within a reasonable period of time, if the service does not impose excessive or unreasonable cost, by:
 - (a) Modifying or replacing the requesting customer's equipment;
 - (b) Extending facilities, such as constructing or extending an access line, deploying a roof-mounted antenna, or installing other equipment;
 - (c) Adjusting the nearest cell tower;
 - (d) Adjusting network or customer facilities;

- (e) Reselling services from another carrier's facilities to provide service; or
- (f) Employing, leasing, or constructing additional network facilities such as an access line, a cell site, cell extender, repeater, or other similar equipment.

ARSD 20:10:43.01.

15. LTD certified that, once it deploys its supported network, it will provide service to potential customers requesting service within 10 days of their request. (Ex. L-2, at Applicant 000015, Line 20 through Applicant 000016, Line 10). As explained in response to Commission Staff's Data Request 2-6, LTD will deploy its network in a manner such that a drop may be installed to provide service to a new customer within 10 days of that customer's request. (Ex. L-6, at Request 2-6). With this certification, LTD has met its burden of proving by the preponderance of the evidence that it meets the requirements of ARSD 20:10:43.01.

16. ARSD 20:10:43.02 requires LTD to submit a two-year plan providing certain details about LTD's planned network. LTD requested a waiver of the two-year requirement. The Commission concludes that a waiver of the two-year plan requirement is appropriate in this case. RDOF has a different timeline for deployment. Under the RDOF rules, LTD must meet certain deployment milestones within three years, four years, five years, and six years. (Hearing Transcript at pp.24-25, 41). As noted by Commission Staff in its post-hearing brief, the Commission has granted waivers of the two-year plan requirement to other carriers who are seeking ETC status because of RDOF funding. Neither Commission Staff nor SDTA opposed the request for the waiver in their post-hearing briefs. The Commission decides under the circumstances

that a waiver of the requirement for filing of a two-year plan is appropriate in this case.

17. Under ARSD 20:10:43.03, LTD must prove it can remain functional in emergency situations. Hauer detailed in his prefiled testimony how LTD will comply with FCC requirements for back-up power. (Ex. L-2, at Applicant 000017, Lines 9-16). LTD will be able to have reasonable back-up power to ensure functionality of its network without an external power source. (Ex. L-2, at Applicant 000017, Lines 10-12). In addition to back-up power, LTD's network will be designed to provide other protections in the event of an emergency. (Ex. L-2, at Applicant 000017, Lines 17-18). LTD has successfully deployed its network in other states with sufficient back-up systems to remain functional in emergency situations. Neither SDTA nor Commission Staff has challenged Hauer's testimony that LTD's network will remain functional in emergency situations. As a result, the Commission concludes that LTD has proven by the preponderance of the evidence that it satisfies the requirements of ARSD 20:10:32:43.03.

18. LTD must also satisfy the requirements of ARSD 20:10:32:43.04, which states: "An applicant requesting designation as an eligible telecommunications carrier shall demonstrate that it will satisfy applicable consumer protection and service quality standards." The FCC sets these performance standards. (Ex. L-2, at Applicant 000018, Lines 5-9). LTD certifies that its network will comply with the applicable FCC requirements. (Ex. L-2, at Applicant 000018, Lines 7-9). Neither SDTA nor Commission Staff have disputed that LTD's application satisfies this administrative

rule. The Commission thus concludes that LTD has proven by the preponderance of the evidence that ARSD 20:10:32:43.04 is satisfied.

19. The next administrative requirement is ARSD 20:10:32:43.05, which requires LTD “to demonstrate it offers a local usage plan comparable to the one offered by the incumbent local exchange carrier in the service areas for which the applicant seeks designation.” Although LTD has not finalized its specific plan because it intends to engage in market research to determine what mix of services consumers desire, Hauer’s prefiled testimony confirms LTD’s plans to provide calling plans similar to those offered by incumbent local exchange carriers in the designated census blocks, including plans providing high-speed internet access service and unlimited voice calling in the United States for a fixed monthly price. (L-2, at Applicant 000018, Lines 13-18). SDTA and Commission Staff are not disputing LTD’s compliance with this administrative rule. As a result, the Commission concludes that LTD has proven by the preponderance of the evidence that LTD satisfies the requirements of ARSD 20:10:32:43.05.

20. The next administrative rule is ARSD 20:10:32:43.06, which requires LTD to certify that it will be able to provide “equal access to long distance carriers if no other eligible telecommunications carrier is providing equal access within the service area.” LTD’s service plans will provide unlimited voice calls in the United States for a fixed monthly price. (Ex. L-2, at Applicant 000019, Lines 9-15). As a result, the Commission concludes that this administrative rule does not apply because consumers on LTD’s plan will not need access to a separate long-distance carrier.

SDTA and Commission Staff do not dispute LTD's argument that this administrative rule does not apply.

21. The last administrative rule implicated by LTD's application is ARSD 20:10:32:43.07, which states: "Prior to designating an eligible telecommunications carrier, the commission shall determine such designation is in the public interest."

22. ARSD 20:10:32:43.07 specifically defines what the Commission considers when evaluating 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.

SDTA argues that the Commission can consider other "factors" in determining whether granting the application serves the public interest. The Commission rejects that argument.

23. When interpreting administrative rules, the Commission applies the same rules as the Court's apply when engaging in statutory construction. *Citibank, N.A. v. S.D. Dep't of Rev.*, 2015 SD 67, ¶ 12, 868 N.W.2d 381, 387. For both statutes and administrative rules, when the language of a rule is clear and unambiguous, the Commission's obligation is to enforce the clear language of the statute as written. *Hagemann ex rel. Est. of Hagemann v. NJS Eng'g, Inc.*, 2001 SD 102, ¶ 5, 632 N.W.2d 840, 843; *Citibank*, at ¶ 12, 86 N.W.2d at 388.

24. The primary purpose of statutory interpretation is to determine legislative intent. *Hagemann v. NJS Eng'g, Inc.*, 2001 SD 102, ¶ 5, 632 N.W.2d 840, 843. Legislative intent is determined from the language of the statute. *Id.* A basic rule of statutory

interpretation is that the “court assumes that statutes mean what they say and legislators have said what they meant.” *Hagemann ex rel. Est. of Hagemann v. NJS Eng’g, Inc.*, 2001 SD 102, ¶ 5, 632 N.W.2d 840, 843. The actual language of the statute controls, not what the court or others think the statute should say. *S.D. Subsequent Injury Fund v. Fed. Mut. Ins. Co.*, 2000 SD 11, ¶ 13, 605 N.W.2d 166. This Commission cannot judicially amend ARSD 20:10:32:43.07 by “reading language” into the regulation that is not otherwise there. *See Olson v. Butte County Comm’n*, 2019 SD 13, ¶ 10, 925 N.W.2d 463 (“When we interpret legislation, we cannot add language that is simply not there.” (internal quotation omitted)).

25. The plain language of ARSD 20:10:32:43.07 expressly states what factors the Commission must consider when evaluating the public interest consideration for LTD’s application. The Commission follows the plain language of the administrative rule, and it only applies those factors that are specifically identified in ARSD 20:10:32:43.07.
26. SDTA relies on *Tracphone Wireless, Inc. v. S.D. Dep’t of Revenue and Regulation*, 2010 SD 6, 778 N.W.2d 130, to argue that the Commission can impose additional requirements because ARSD 20:10:32:43.07 does not contain language of limitation. (SDTA’s Brief at p.17). The Commission concludes *Tracphone Wireless, Inc.*, does not support imposing additional “public interest” factors under ARSD 20:10:32:43.07.
27. In *Tracphone Wireless, Inc.*, the issue was whether an appeal of a denial of a refund request for overpayment of telecommunications gross receipts tax was able to be heard because a contested case by the Office of Hearing Examiners (“OHE”). In

answering the question affirmatively, the South Dakota Supreme Court had to address the interplay of two different statutes. The South Dakota Department of Revenue argued that the OHE lacked jurisdiction to hear the appeal because: (1) SDCL 10-59-1 expressly authorized administrative appeals to the OHE for taxes imposed by several specifically delineated statutory sections; and (2) the telecommunications gross receipts tax was not one of the statutory provisions identified in SDCL 10-59-1. *Id.* at ¶ 13, 778 N.W.2d at 134. In response, the taxpayer agreed that the applicable tax was not defined as one of the taxes from which an administrative appeal can be taken pursuant to SDCL 10-59-1. Instead, the taxpayer argued that the administrative appeal was proper pursuant to a separate, general statute authorizing an administrative appeal of any final decision by the Secretary of the Department of Revenue. *Id.* at ¶ 19, 778 NW.2d at 134. Thus, the Supreme Court had to decide whether the specific statute authorizing an appeal of some, but not all, taxes prevailed over the general statute authorizing an administrative appeal from all final decisions of the Secretary of the Department of Labor. *Id.* at ¶ 14. Ultimately, the South Dakota Supreme Court ruled that because the specific statute did not include language limiting an administrative appeal to those taxes specifically identified in SDCL 10-59-1, the taxpayer could rely on the other, general statute. *Id.* at ¶¶ 14-19.

28. SDTA's reliance on *Tracphone* to argue the Commission can impose additional requirements is misplaced. Unlike in *Tracphone*, there is not a separate administrative rule authorizing the Commission to consider "additional factors" outside ARSD 20:10:32:43.07. The only administrative rule defining what is

considered in evaluating public interest is ARSD 20:10:32:43.07, and that rule expressly states what the Commission should consider.

29. Moving to the specific public interest factors identified in ARSD 20:10:32:43.07, the first consideration is “increased consumer choice.” The Commission concludes that LTD has proven by the preponderance of the evidence that granting the application will increase consumer choice. LTD will provide broadband services to areas in which consumers currently do not have access to sufficient broadband service as determined by the FCC. LTD is required under RDOF to deploy a network able to offer voice and 1 Gbps/500 Mbps broadband service to every location in the RDOF-supported areas. If the Commission does not designate LTD as an ETC, LTD will not be authorized to receive RDOF support for any South Dakota census blocks. No one knows what future funding may be available to provide broadband services to these unserved areas. Without LTD building its network, there are consumers in South Dakota that will have no real choice for broadband service – or in some cases, no broadband service at all. LTD’s designation as an ETC thus increases availability and consumer choice. SDTA and Commission staff do not dispute that granting LTD’s application will increase public choice.

30. The next public interest factor under ARSD 20:10:32:43.07 is the impact of designating multiple companies as ETCs in a designated service area for the universal service fund. Here, there are areas where LTD would be the only ETC. (Hearing Transcript at pp.206-07). There are other census blocks where LTD was the provisional RDOF winner but where there is already another ETC designee. (*Id.*).

Furthermore, where there is another ETC designee, some of those carriers will likely be providing broadband services.

31. The Commission concludes that some of the census blocks provisionally awarded under RDOF to LTD may have difficulty supporting two broadband providers. While LTD wants to provide broadband service to unserved consumers; its business model does not focus on being a competing provider. (Hearing Transcript at pp.125-26). However, ARSD 20:10:32:43.07 does not prohibit multiple ETCs in a geographic area or support denial of an ETC application, even if granting a company ETC status makes that company unprofitable in some areas. Instead, the applicable consideration under the regulation is the effect of multiple ETC designations on the universal service fund. ARSD 20:10:32:43.07. Here, there was no evidence presented that designating LTD as an ETC, even in those census blocks where LTD as a competitor may have a relatively lower take rate, would harm the universal service fund. Nor has SDTA or Commission Staff argued that this administrative rule is not satisfied. The Commission thus concludes that LTD has proven by the preponderance of the evidence that this public interest factor weighs in favor of granting the application.
32. The third public interest factor under ARSD 20:10:32:43.07 is LTD's "commitments made regarding the quality of the telephone service" it will provide. LTD's network will provide a high-quality broadband network along with VoIP calling service. It will be deployed through fiber-to-the-home with a minimum speed of 1 Gbps download speed and 500 Mbps upload speed. (Hearing Transcript at p.24; Ex. L-2, at Applicant 000003, Lines 6-9). The Commission concludes that LTD has proven by the preponderance of the evidence that this public interest factor is fully satisfied.

Neither SDTA nor Commission Staff argue that this public interest factor is not satisfied.

33. The last public interest factor under ARSD 20:10:32:43.07 is “the applicant’s ability to provide the supported services throughout the designated service area within a reasonable time frame.” The Commission concludes that LTD has proven by the greater weight of the evidence that it has the ability to provide the supported services in the designated service area within a reasonable time frame.
34. The FCC through its thorough consideration of LTD’s RDOF long form, is engaged in a comprehensive analysis of LTD’s technical, financial, and managerial capabilities. (Ex. L-2, Applicant 000006, Line 18 through Applicant 000009, Line 9). Under the RDOF program rules, once authorized to receive RDOF funds, LTD will have an enforceable obligation to deploy its network to the awarded locations within six years. (Hearing Transcript at pp.24-25). Before authorizing monthly RDOF support, the FCC and its legal and engineering staff demand and review extensive technical, operational, and financial information of the applicant. (L-2, at Applicant 000007). This information is fully vetted by the FCC. The FCC will not authorize support to winning bidders until confirming the applicant is reasonably capable of meeting its RDOF obligations. (Ex. L-2, Applicant 000007).
35. LTD’s network will more likely than not be deployed if the RDOF funds are authorized. As noted, the FCC is carefully scrutinizing LTD’s plans and capabilities before it can authorize support. Moreover, LTD has outside investors ready to provide the additional funding needed to deploy the network. Even SDTA’s own expert Thompson conceded that these outside investors engage in detailed

underwriting. (Hearing Transcript at pp.195-96). He also conceded that the investors “would not lend or give their money to the company unless they thought it was sustainable.” (*Id.* at p.196). The fact that LTD has already procured financing for its RDOF network confirms that it will have the funds and capabilities needed to successfully deploy its network.

36. SDTA argues that LTD does not have the financial, managerial, and technical ability to deploy its network. SDTA, through its expert Thompson, primarily argued that LTD will fail at some unknown date in the future because LTD’s RDOF supported network will not be profitable. The Commission concludes that Thompson’s opinions do not support denying the application, and the Commission gives them no weight. On cross-examination, Thompson admitted that his opinions were primarily that the Commission should deny LTD’s application because LTD will inevitably fail as a business. (Hearing Transcript at pp.194-95). Future economic viability is not a proper consideration under the Commission’s administrative rules.

37. One of the public interest factors under ARSD 20:10:32:43.07 is “the applicant’s ability to provide the supported service throughout the designated service area within a reasonable time frame.” SDTA and Thompson argue that the Commission should construe this factor to mean that LTD must remain a financially profitable company even after it deploys its network. This is an issue of interpretation of the administrative rule.

38. This Commission’s obligation is to apply the administrative rule as written. When the language of the administrative rule is clear, the Commission’s “function is confined to declaring its meaning as clearly expressed.” *Krsnak v. S.D. Dep’t of*

Environment & Nat'l Res., 2012 SD 89, ¶ 16, 824 N.W.2d 429, 436. The Commission must apply the regulation as written “rather than rewrite the law to confirm what [it] or others think it should have said.” *State v. Burdick*, 2006 SD 23, ¶ 18, 712 N.W.2d 5, 10 (internal quotation omitted). “Administrative rules have ‘the full force of law and presumed valid.’” *Krsnak*, at ¶ 16 (quoting *State v. Guerra*, 2009 SD 74, ¶ 32, 772 N.W.2d 907, 916)).

39. Thompson’s opinions do not warrant denying the application. Thompson’s opinions do not support the argument that LTD cannot successfully deploy its network. Instead, Thompson’s opinions are that at some unknown date LTD will eventually fail as a going concern at some undefined point in the future. Under ARSD 20:10:32:43.07, the future sustainability of LTD’s business is not a proper consideration. The operative language in the regulation inquires whether “the applicant’s ability to provide the supported services throughout the designated service area within a reasonable time frame.” By having a time limitation of providing within a reasonable time frame, the plain language of the administrative rule indicates it refers to deployment of the network. Not to continued operation of the network over some uncertain time frame. SDTA’s argument essentially asks this Commission to amend the operative language in ARSD 20:10:32:43.07 to state: “the applicant’s ability to provide the supported services throughout the designated service area within a reasonable time frame and its ability to continue providing that service for an indefinite period of time.” The Commission refuses this request. Future economic success is not a public interest factor stated in ARSD 20:10:32:43.07, and the

Commission refuses to impose requirements on LTD to prove factors that are not stated in ARSD 20:10:32:43.07 as part of the “public interest” consideration.

40. The Commission also refuses to require future economic success as a public interest consideration because the Commission has not imposed this requirement on other carriers seeking ETC designation. Imposing additional burdens on LTD would be discriminatory, and would inhibit competition. This is inconsistent with the requirements of the Telecom Act. Any obligation imposed by this Commission on carriers seeking ETC status must be “competitively neutral and consistent with the [Telecom] Act’s aim of promoting competition.” *See In re GCC License Corp.*, 2001 SD 32, ¶ 22 n.11, 623 N.W.2d 474, 483; *see also* 47 U.S.C. § 253(b). Because this Commission’s regulations must be competitively neutral, it will not impose a new, additional burden—future economic sustainability—on LTD in this docket.
41. To the extent that SDTA’s expert opinions can be construed to indicate that LTD lacks the ability to provide the services within a reasonable time frame as described in ARSD 20:10:32:43.07, the Commission still concludes that the opinions do not warrant denying LTD’s application. Thompson opines that LTD lacks the financial, managerial, or technical ability to deploy its network. (Hearing Transcript at pp.184-85). At the same time, SDTA has already agreed that LTD has the financial, managerial, and technical abilities to deploy its network.
42. LTD has filed a separate application in the COA Docket. The applicable statute for whether to grant a COA states in relevant part: “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.” SDCL 49-31-71 (emphasis added).

43. SDTA intervened in the COA Docket. It later signed a stipulation agreeing that the Commission should grant the COA application: “The parties agree that upon the Commission’s approval of this Stipulation, the concerns of SDTA that are the basis for its intervention in the above-referenced dockets shall be deemed fully satisfied, and SDTA shall not oppose LTD’s [COA] Application.” (*Id.*). By entering into the stipulation agreeing that all of its concerns are addressed, SDTA has agreed that LTD has the financial, managerial, and technical capabilities to deliver its services. In order to deliver the services, LTD logically must have deployed its network. Thus, the Commission concludes that the stipulation signed by SDTA in the COA Docket is inconsistent with the testimony of Thompson.
44. The Commission concludes that Hauer’s testimony about LTD’s ability to deploy its network is entitled to more weight than Thompson’s testimony. Thompson’s opinions are fundamentally based upon an improper consideration, namely LTD’s future economic sustainability. The Commission also concludes that Thompson’s testimony is speculative. Thompson’s opinions are also inconsistent with the fact that LTD has secured financing. Thompson did not consider LTD’s non-RDOF business lines or sectors when determining LTD will fail. Finally, Hauer’s testimony, which the Commission finds credible, was that LTD can deploy its network and is deploying its network for less than the cost per mile of the RDOF application. This testimony contradicts Thompson’s opinions.

45. The Commission concludes that LTD has proven by the preponderance of the evidence that it has the “ability to provide the supported services throughout the designated service area within a reasonable time frame” as stated in ARSD 20:10:32:43.07.
46. The Commission concludes that granting LTD’s application will serve the public interest for all the reasons stated above, and because without LTD’s receiving ETC status and RDOF funding, there are consumers in South Dakota that will not receive broadband internet service anytime in the foreseeable future.
47. The Commission concludes that all of the requirements for granting LTD’s application are satisfied. The Commission thus grant’s LTD’s application for designation as an ETC in South Dakota.
48. If any of the foregoing conclusions of law are more properly considered a finding of fact, they shall be deemed as such.

Based on the foregoing, it is hereby

ORDERED that LTD’s Amended Application is granted. It is further

ORDERED that LTD is designated as an eligible telecommunications carrier for the designates service area identified as Exhibit A to the Amended Application.

Dated at Pierre, SD this ____ day of February, 2022.

BY ORDER OF THE COMMISSION

CHRIS NELSON, Chairman

KRISTIE FIEGEN, Commissioner

GARY HANSON, Commissioner

CERTIFICATE OF SERVICE

I, Jason R. Sutton, do hereby certify that I am a member of Boyce Law Firm, LLP, attorneys for LTD Broadband, LLC and that on the 8th day of February, 2022, 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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