
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

**BRIEF IN SUPPORT OF SDTA
MOTION TO COMPEL DISCOVERY**

Docket No. TC21-001

Pursuant to ARSD 20:10:01:22.01 and SDCL 16-6-37(a), South Dakota Telecommunications Association (SDTA) hereby files this Brief in support of its Motion to Compel Petitioner, LTD Broadband (LTD) to respond to discovery requests.

I. PROCEDURAL AND FACT BACKGROUND

The FCC intends Rural Digital Opportunity Fund (RDOF) bring broadband to rural parts of the United States that lack adequate broadband service. On or about June 11, 2020, the FCC issued a Public Notice to initiate Phase I of RDOF. Phase I of the RDOF process required companies submit what is referred to as the “short form.” The short form was used by the FCC to determine a company’s eligibility to bid and participate in the RDOF auction. The RDOF auction was a reverse auction. Meaning, the winning company commits to provide the best broadband product for the least cost.

LTD participated in the short form process and was permitted to participate in the RDOF reverse auction. Ultimately, LTD won the right to serve many areas across the United States by submitting a bid to build the fastest broadband network at the lowest price. LTD was awarded

\$1,320,920,718.60 to serve 528,088 locations with fiber and fixed wireless. In South Dakota, LTD was awarded \$46,588,453.80 to serve 7,481 locations.

Upon conclusion of the auction process, on December 7, 2020, the FCC opened the post-auction application process known as the “long form” process. The long form process required all winning bidders submit the details of how they can and will build a broadband network to satisfy their winning bid.

Among other things, the long form requires the winning bidder submit “ETC Eligibility and Documentation.” Specifically, the FCC’s Order states,

“Consistent with the CAF Phase II auction rules, a winning bidder in the Rural Digital Opportunity Fund auction will be permitted to obtain its ETC designation after the close of the auction, submitting proof within 180 days of the public notice identifying winning bidders... We recognize the statutory role that Congress created for state commissions and the FCC with respect to ETC designations, and we do not disturb that framework. Nothing in the record addresses the standards necessary to find forbearance in the public interest, even if some interested parties may prefer not to become ETCs with all of the associated obligations. Therefore, we will continue to require service providers to obtain ETC status to qualify for universal service support.” In the Matter of the Digital Opportunity Fund, WC Docket No 19-126, Paragraph 92 (Adopted, January 30, 2020). (emphasis added)

January 7, 2021, LTD filed an Application with the South Dakota PUC seeking designation as an ETC in South Dakota, given the SD PUC has jurisdiction over ETC applications in South Dakota. Thereafter, SDTA petitioned for and was granted intervener status. LTD did not object to SDTA’s involvement as an intervener. Thereafter, in March, April, June, July and now in August SDTA has submitted discovery requests to LTD. Although the parties discussed it, a deadline for discovery was not formally established or agreed to among the parties. PUC Staff has also submitted discovery requests to LTD. The Staff most recently sent discovery to LTD on August 11, 2021. LTD submitted its first discovery requests to SDTA on August 27, 2021.

Over the course of the discovery process, LTD objected to various requests made by SDTA. SDTA chose to pursue all discovery disputes now, at one time. SDTA chose not to ask for the Commission's involvement for each individual discovery dispute as they arose.

Since LTD received the initial "award" of 528,088 locations, LTD has voluntarily relinquished census blocks in Colorado, Iowa, Illinois, Indiana, Minnesota, Missouri, North Dakota, Nebraska, Ohio, Texas, Wisconsin, and even some in South Dakota. In addition, LTD was denied an FCC waiver of the 180-day timeline to receive ETC status and is in default in California, Kansas, and Oklahoma. South Dakota is one of several other states still evaluating the company's ETC state filing.

II. STANDARD FOR A MOTION TO COMPEL

The Commission "may issue an order to compel discovery" "for good cause shown by a party." ARSD 20:10:01:22.01. The South Dakota Rules of Civil Procedure relating to discovery apply in this proceeding. *Id.* Under the civil procedure rules, a party may move for an order compelling an answer if a party fails to answer an interrogatory or request for production of documents. SDCL 15-6-37(a)(2).

Pursuant to SDCL 15-6-26(b), "the scope of pretrial discovery is, for the most part, broadly construed," *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 16, 19 (S. Dakota, 1989). "A broad construction of the discovery rules is necessary to satisfy the three distinct purposes of discovery: (1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial." *Id.* State law, SDCL 15-6-26(b) itself "implies a broad construction of relevancy at the discovery stage because one of the purposes is to examine information that may lead to admissible evidence at trial." *Id.*, 426 N.W.2d at 20.

III. APPLICATION OF ARSD 20:10:32:43.07

ARSD 29:10:32:43.07 is the basis for SDTA's request for the disputed information.

"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 offerings, 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 with a reasonable time frame..." ARSD 20:10:32:43.07 (emphasis added).

There is nothing in any FCC Order that eliminates, overrides, negates, or invalidates this Commission's duty and responsibility to make the above determination.

IV. LTD MUST PROVIDE A SUBSTANTIVE RESPONSE TO SDTA'S DISCOVERY REQUESTS

THE DISPUTED REQUESTS

LTD objects to the following requests made by SDTA:

REQUEST 1-1:

Request 1-1: Provide a copy to SDTA of all discovery responses and documents LTD provided to Commission Staff in response to Commission Staff's First Data Request or any follow up thereafter.

Answer: A copy of LTD Broadband's response to Commission Staff's First Data Request is appended hereto as Exhibit 1. LTD Broadband responses to Commission Staff's Requests 1-4, 1-7 and 1-11 have been provide to the Commission subject to a request for confidential treatment, pursuant to SD Admin R 20:10:1:41 and are therefore omitted from the materials included in Exhibit 1.

REQUEST 1-10:

What is the expected cost to build the network, in South Dakota, that will perform according to LTD's RDOF bid?

Answer: see below

REQUEST 1-11:

What is the expected cost per location to build the network, in South Dakota, that will perform according to LTD's RDOF bid?

Answer: see below.

REQUEST 1-12:

What is the expected cost to maintain the network, in South Dakota that will perform according to LTD's RDOF bid?

Answer: see below.

REQUEST 1-13:

What is the expected cost per location to maintain the network, in South Dakota that will perform according to LTD's RDOF bid?

Answer to Request 1-10, 11, 12 and 13: LTD Broadband objects to SDTA's Request (10, 11, 12, 13) because the information requested by SDTA is not relevant to the Commission's review of LTD Broadband's Application, pursuant to 47 U.S.C. §214(e) and SD Codified L 49-31-78. The Communications Act provides that a state commission shall designate an entity as an ETC for requested service area if, with respect to that service area the entity is (i) a common carrier; (ii) offers the services that are supported by Federal universal service support mechanisms under 47 USC §254 and (iii) advertise the availability of such services. While the Commission may be permitted to impose further requirements where the public interest so demands, no such requirements exist under the Commission's rules. The cost of LTD Broadband's network construction in South Dakota does not bear on LTD Broadband's status or the manner in which those service will be advertised

ARGUMENT REGARDING REQUEST 1-1

SDTA requests to see all materials that have been provided to Commission Staff. Staff request 1-11 asked LTD to provide "all RDOF applications LTD Broadband made to the FCC regarding the census blocks identified in Exhibit A." Exhibit A lists the SD Census blocks auctioned to LTD in the RDOF auction. Staff received the requested materials from LTD. However, they were not provided to SDTA. Specifically, LTD provided a link of the entire RDOF application to the Staff.

SDTA requests the information because it seeks to understand the economic considerations, analysis and conclusions that LTD came to prior to bidding to serve in South Dakota. More specifically, SDTA questions that LTD truly appreciates or understands the costs to construct, maintain and operate the network it proposes to build in South Dakota. The RDOF application, presumably, provides an explanation.

SDTA admits that initially, it was not certain that a financial review would be necessary. If LTD's engineering plan "matched" its bids in the RDOF auction, then the arguments would have been centered around the type of technology LTD intends to use, not its financial plan to accomplish it. However, that is not what occurred. SDTA's retained experts conclude there is a disconnect between what LTD proposes to build, maintain and operate and the support LTD will receive from the RDOF auction.

That disconnect weighs heavy on the public interest and is relevant for this Commission's consideration and review. A company, of any type, cannot remain in business without a proper financial plan. It is necessary for businesses, of all types, to properly assess their construction costs, their maintenance costs and their operational costs. If LTD did not do so, it may fail. A failed attempt to provide service to South Dakota consumers is not in the public interest.

A failed attempt to provide service will result in the following:

- Pursuant to the RDOF schedule, 103 census blocks, representing 7,481 locations in South Dakota will wait for a period of years to receive service from LTD. If LTD does not complete this project, the consumers in those 103 census blocks will continue to wait.
- While the consumers in 103 census blocks, or 7,481 locations wait for service from LTD, the State of South Dakota is administering a grant program (ConnectSD). Those 7,481 locations may have been considered by a different service provider in applying for a grant. However, many geographic areas in SD cannot support one provider let alone two. Therefore, no responsible company will seek a grant to provide service to these 7,481 locations through the ConnectSD grant program if it is believed they will be served by LTD. If LTD does not successfully complete its project, then 103 census blocks will

have lost an opportunity to receive broadband service through the ConnectSD grant program. In that case, 7,481 locations remain unserved.

- While consumers in 103 census blocks or 7,481 locations wait for service from LTD the Federal Government is designing an infrastructure plan that will direct millions of dollars to South Dakota for broadband construction. RDOF areas, where the Federal Government is already spending billions of dollars will likely not be eligible for any additional funding. If LTD does not successfully complete its project, 103 census blocks will have missed out on this infrastructure funding and will remain unserved.
- While consumers in 103 census blocks or 7,481 locations wait for service from LTD the USDA is preparing future rounds of Re-Connect grants. RDOF areas, where the Federal Government is already spending billions of dollars will likely not be eligible for any additional funding. If LTD does not successfully complete its project, 103 census blocks will have missed out on this funding and will remain unserved.

The FCC specifically recognized and preserved the state commission role in the RDOF process leaving ETC designation up to the state commission. Therefore, this Commission's role is distinct and different from the FCC role and was not impacted in any way by RDOF. Nothing in the RDOF process changes the South Dakota ETC process. As a result, this Commission, "*shall* determine that such designation is in the public interest." ARSD 20:10:32:43.07 (emphasis added). It is not in the public interest for this Commission to grant ETC status to LTD if LTD's financial analysis is not sound.

Financial analysis as contained in LTD's RDOF application, is relevant and necessary for this Commission to determine whether ETC designation is in the public interest. An understanding of LTD's plan for the cost to build, serve and maintain its South Dakota network is necessary for SDTA to prepare its case and present its position to the Commission.

ARGUMENT REGARDING REQUEST 1-10, 11, 12, 13

For all the reasons argued above, SDTA seeks to understand the cost to build, maintain and operate the network that LTD proposes to build in South Dakota. For all the reasons argued

above, such an analysis is relevant and necessary for this Commission to rule on “the public interest.”

In its objection to Request 1-10, 11, 12 and 13 LTD failed to account for the entirety of the chapter of law and the administrative rules that dictate the Commission’s analysis and action on ETC applications. In addition to the statute cited by LTD in its objection, the Commission shall determine if designation of LTD as an ETC is in the public interest. Given the disconnect between what LTD bid in the RDOF auction and what SDTA’s experts believe actual construction, maintenance, and operational costs to be, LTD’s cost analysis and financial plans are relevant and necessary in the Commission’s public interest analysis. As argued above, a failed attempt to serve South Dakota consumers is in the public interest.

It is possible that answers to SDTA request 1-10, 11, 12 and 13 are contained within the RDOF application materials. If this Commission grants SDTA’s Request 1-1, it may be unnecessary to rule on request 1-10, 11, 12, and 13. SDTA does not seek cumulative or duplicative material.

V. CONCLUSION

Each filing made at the PUC is unique as each company the PUC regulates is unique. The public interest analysis this Commission must make is dependent on many factors not specifically listed in statute or rule. Rather, the public interest is a living and evolving consideration. Given the challenges surrounding the RDOF auction process and the impact it has on other available funding to serve unconnected areas of SD, it is imperative for this Commission to consider LTD’s understanding of what it will cost to build, maintain and operate the network it proposes to build in South Dakota. A failed attempt by LTD to serve in South

Dakota is not in the public interest. One sure way to fail in the attempt to serve is by not properly evaluating the costs to do so.

The information SDTA requests is relevant and necessary for SDTA to formulate its position and present its case to the Commission. SDTA respectfully requests the Commission grant this Motion to Compel Discovery.

DATED this 27 day of August, 2021.

A handwritten signature in cursive script that reads "Kara Semmler". The signature is written in black ink and is positioned above a horizontal line.

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