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**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

**SDTA MOTION TO COMPEL:**

**SDTA RESPONSE TO LTD  
OPPOSITION**

**Docket No. TC21-001**

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South Dakota Telecommunications Association (SDTA) hereby responds to LTD Broadband's (LTD) September 7, 2021, brief in opposition of SDTA's Motion to Compel.

SDTA denies the allegations made by LTD in its September 7, 2021, filing. SDTA argues that LTD's view of the situation and communication between parties is inaccurate. However, the deterioration of the relationship between counsel for SDTA and LTD is not relevant and it is unnecessary for this Commission to dissect "what he said" or "what she said." What is relevant is whether LTD can successfully serve the citizens of SD. The relevant question for this Commission is whether certifying LTD as an ETC in South Dakota is in the public interest. The Commission has no LTD service history to rely upon in making that judgment. Therefore, written plans and projections on paper is all this Commission can review when making the public interest judgment.

Through the discovery process, SDTA sought information relevant to the "public interest" consideration. LTD provided most of what SDTA requested. Several requests were, however, unanswered and SDTA filed a Motion to Compel as a result. Since that time, a portion

of what SDTA requested has been produced by LTD. Two requests remain unanswered. They are (i) What is the expected cost to maintain the network, in South Dakota, that will perform according to LTD's RDOF bid? (SDTA request 1-12) and (ii) What is the expected cost per location to maintain the network, in South Dakota that will perform according to LTD's RDOF bid? (SDTA request 1-13).

**I. Whether LTD has the financial ability to maintain its network is relevant and a proper consideration for this Commission pursuant to ARSD 20:10:32:43.07**

Data that indicates LTD success, or lack thereof, in serving South Dakota citizens is relevant. LTD is correct when it argues that ARSD 20:10:32:43.07 lists considerations the Commission shall make when analyzing the public interest. The list includes:

- (i) The benefits of consumer choice,
- (ii) The impact of multiple designations on the universal service fund,
- (iii) The unique advantages and disadvantage of the applicant's service offering,
- (iv) Commitments made regarding the quality of the telephone service provided by the applicant; and,
- (v) The applicant's ability to provide the supported services throughout the designated service area within a reasonable time frame.

Where LTD is incorrect, however, is arguing these are the only factors that the Commission may consider. There is nothing in the administrative rule that restricts the Commission's analysis to those five items. In this case, the applicant's understanding of what it will take to maintain a network (like none it has ever operated in the past) may determine success or failure. The maintenance data SDTA requests is therefore relevant. A failure by LTD to successfully serve South Dakota citizens in the awarded RDOF census blocks is not in the public interest. A failure will result in missed opportunity for South Dakota to attract good investment through several several other broadband infrastructure programs. A failure will result in a large area of unserved citizens. A failure will result in wasted resources.

Even if the Commission is persuaded by LTD's argument that it is restricted in its review of the public interest, the data requested by SDTA remains discoverable and relevant.

- The unique disadvantage of the applicant's service offering: A disadvantage of the applicant's service offering is its potential use of ariel fiber and its failure to consider maintenance costs. Ariel fiber in the Black Hills will have a unique maintenance cost associated with service.
- Commitments made regarding the quality of service: Data may demonstrate that LTD's commitments regarding the quality of service are unrealistic if the company has not planned for the costs associated with maintenance of its network.
- The ability to provide services throughout the designated service area: The applicant will be unable to provide services throughout the designated census blocks within a reasonable time if has not planned for the costs associated with the maintenance of its network.

As LTD itself recognizes, it is completely dependent upon outside capitol to make its construction plan work. It is possible that LTD's outside investors plan to also fund maintenance. However, that fact is unknown. The plan for maintenance is relevant. What are the maintenance costs and how will such costs be covered? An unmaintained plant will result in poor quality service to South Dakota citizens.

## **II. SDTA's Request is not burdensome**

The scope of discovery in this matter is not restricted to the materials filed with the FCC. The FCC took care in preserving this Commission's role in the ETC portion of the RDOF process. Whether the RDOF process required disclosure of maintenance costs is irrelevant for purposes of this Commission's review of "the public interest."

On page 10 of its brief LTD writes: "*it would be unduly burdensome for SDTA to require LTD to create documents...*" SDTA does not now, nor did it ever ask LTD to create documents

or conduct analysis. If LTD does not have anything to produce, then that is the answer. If LTD has nothing to produce, it should have said so rather than making a relevance argument. If LTD has nothing to produce, we could have avoided the briefs and the Commission can cancel its September 14 hearing on this issue.

### **III. SDTA's Motion to Compel is timely**

SDTA had no duty or obligation to push this docket toward conclusion or seek a scheduling order. Rather, LTD was and is the party with a deadline. If it believed this docket was “stagnating over the summer” then it should have done something about that. LTD did not take any action until now and proceeds to blame its scheduling problem on SDTA. I understand that LTD is under pressure from the FCC and likely under pressure from its outside investors. However, its attempt to point at SDTA as the cause for a lack of a procedural schedule is completely without merit.

The discovery window had not closed. SDTA has not pushed out any established deadlines. Furthermore, the Commission Staff filed a discovery request on August 11, 2021. Staff, apparently, did not believe the discovery window had passed either.

LTD argues SDTA's Motion to Compel is untimely. However, it did not support its position with any statute or rule dictating when a Motion to Compel must be filed. There is no such rule.

### **IV. SDTA did not agree to limit its opportunity to conduct additional discovery. SDTA did not limit its opportunity to seek procedural assistance from this Commission.**

SDTA made procedural schedule suggestions. It did not, however, at any time agree to a schedule. SDTA has not, at any time, refused to engage in scheduling conversation. SDTA

never, at any time, agree not to pursue a Motion to Compel or any other type of procedural assistance from this Commission. SDTA did not mislead any party to this proceeding.

To the contrary, SDTA respected LTD's concern regarding the confidential nature of its engineering and cost-of-construction plans. SDTA was hopeful that the LTD engineering plan would resolve SDTA's concern. Counsel for SDTA expressed her hope to LTD. If the engineering plan had resolved SDTA's concerns, then sharing financial information would be unnecessary. However, at no time did SDTA agree it would not seek financial information in the event it became necessary.

The Commission will not find any agreement by SDTA (in any of the 92 pages LTD filed with the Commission) that limits SDTA's discovery options or procedural recourse. What the Commission will find, is that SDTA took a conservative approach to discovery and chose not to pursue any unnecessary confidential LTD information. The Commission will also find that circumstances changed after the LTD engineering plan was shared with SDTA. At that time, after SDTA reviewed the engineering plan, SDTA became aware of its need for additional information and communicated the same to LTD.

If LTD intended to limit SDTA's procedural options, then it should have sought a concrete agreement from SDTA in exchange for the information. That did not occur. LTD should not now blame SDTA because the resulting procedure or timeline does not suit its needs. SDTA did not waive any right to receive maintenance cost data. SDTA did not "trick" LTD into providing any information of any kind. SDTA should not be estopped from seeking the cost of maintenance data.

## V. Conclusion

This Commission regularly requests information from South Dakota ETCs in addition to what the provider may file. SDTA argues it should stay that way. The Commission's usual process should also apply to any new ETC applications such as LTD. The RDOF is not intended to "disturb" the PUC's role.

"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)

Putting the big picture policy arguments aside, SDTA's specific request to this Commission now is that LTD be ordered to produce the expected cost to maintain its planned South Dakota network.

If LTD does not have the requested information, then this exercise in brief writing serves no purpose. If LTD does not have the information requested, then SDTA withdraws its request for any Commission action. SDTA understands the rules of discovery cannot be used to force a party to create documents or evidence that does not exist. If, however, LTD has determined the cost to maintain the South Dakota network, then SDTA believes the data is relevant and subject to review by this Commission and parties to the docket. SDTA supports its position with arguments presented in its original brief and in this reply.

DATED this 8 day of September 2021.

A handwritten signature in cursive script that reads "Kara Semmler".

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