

**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**

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**STAFF’S POST HEARING BRIEF**

**TC21-001**

COMES NOW the Public Utilities Commission Staff (Staff) and hereby files this Post Hearing Brief.

**Background**

On January 7, 2021 (filed January 6, 2021 after close of business), the Public Utilities Commission (Commission) received an Application for Designation as an Eligible Telecommunications Carrier (ETC) for purposes of receiving federal universal service support (Application) from LTD Broadband, LLC (LTD). This Application stemmed from LTD being the successful bidder in the FCC’s RDOF auction for a number of census blocks in South Dakota. The Application specified LTD is a fixed wireless and fiber optic broadband internet service and voice-over-internet (VOIP) provider. (Ex. L-3, pg. 2). LTD was a winning bidder in the Federal Communications Commission’s (FCC) Rural Digital Opportunity Fund (RDOF) Phase I auction. The RDOF Phase I auction was focused on “census blocks that are wholly unserved with broadband speeds of at least 25/3 Mbps.” LTD’s South Dakota RDOF service area consists of 103 census block groups for 7,481 locations in South Dakota. (Exhibit L-3, Application pg. 1).

On January 27, 2021, South Dakota Telecommunications Association (SDTA) filed a Petition to Intervene. The Commission issued an Order Granting Intervention to SDTA on February 22, 2021.

An evidentiary hearing on this matter was held by the Commission on December 1, 2021. Mr. Corey Hauer, CEO of LTD Broadband LLC, testified for LTD and Mr. Larry Thompson, CEO of Vantage Point Solutions, Inc., testified for SDTA. LTD presented Exhibits L-1 through L-18 and SDTA presented Exhibits 1 through 9.

### **Analysis**

The State's role in ETC designation is governed both by federal and state regulation. The Telecommunications Act of 1996, and 47 U.S.C §214(e) established a framework for state ETC designation along with specific issues for states to consider when making an ETC determination. As mentioned in LTD's Opening Post Hearing Brief, 47 U.S.C §214(e) sets the federal statutory framework for state ETC designation. LTD highlights the first sentence of this statute and asserts that based on the plain meaning of that first sentence, that this Commission shall grant ETC certification so long as the applicant is a common carrier, offers the services supported by Federal universal support and advertises the availability of those services and their corresponding services.

Staff does not dispute that LTD appears to meet these three requirements. 47 U.S.C §214(e) does indicate that in order for a carrier to be designated as an ETC, it must offer the supported services throughout the service area for which the designation is received and advertise the availability of, and the charges for, those services throughout the service area. The FCC has also designated the following services for support by federal universal service support

mechanisms: (1) voice grade access to the public switched network (PSTN) or its functional equivalent; (2) minutes of use for local service provided at no additional charge to end users; (3) access to the emergency services provided by local government or other public safety organizations, such as 911 and enhanced 911 (E911), to the extent the local government in an eligible carrier's service area has implemented 911 or E911 systems; (4) toll limitation services to qualifying low-income consumers; and (5) eligible broadband internet access services which will provide the capability to transmit data to and receive data by wire or radio from all internet endpoints, including any capabilities that are incidental to and enable the operation of the communication service.

In its Application, LTD stated it will "provide voice-grade access to the PSTN by providing interconnected VoIP service through the designated service area." The Company also states it "will meet the local usage requirement by including local usage in its rate plans" and "will comply with any minimum local usage requirements adopted by the FCC or this Commission." (Exhibit L-3 pg. 8). LTD states it "will provide access to emergency services by providing 911 and E911 for all of its customers to the extent that the local governments in its designated service areas have implemented 911 and E911." (Exhibit L-3, pg. 9). With regard to broadband services, LTD states it "will provide broadband services with the capability to transmit data to and receive data by wire or radio from all or substantially all internet endpoints including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up service. Customers will be provided last mile access by a fiber optic connection." (Exhibit L-3, pg. 9).

Pursuant to 47 U.S.C. §214(e)(1)(A) and C.F.R. §54.201(d)(1), a carrier must offer the supported services either using its own facilities or a combination of its own facilities and resale

of another carrier's services. LTD states it "will provide supported services using its network infrastructure, consisting of last mile connections and network equipment and components consistent with the RDOF award criteria" and that it "will also utilize its own facilities to provide backhaul for interconnection via a combination of fiber and wireless microwave technologies." (Exhibit L-3, pg 10).

In accordance with 47 U.S.C. §214(e)(1)(B) and C.F.R. §54.201(d)(2), the carrier must advertise the availability of supported services and the rate for the services using media of general distribution. LTD states that it will advertise the availability of such services throughout its designated service areas "using media of general distribution in a manner that is designed to reach those likely to qualify for such services." (Exhibit L-3, pg. 10).

However, LTD's initial assessment on page 8 of LTD's Opening Post Hearing Brief, that merely meeting these three standards requires the Commission to grant ETC designation, and that the Commission's analysis should end here disregards 47 U.S.C. §214(e)(2) which in relevant part provides:

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. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1).

LTD's initial assessment also disregards a Federal Communications Commission Order issued in 2005 that further elaborates on ETC certification review and also disregards state administrative rules adopted in 2006, following that FCC order.

Staff does concede that one South Dakota Supreme Court decision does appear to bolster LTD's initial assessment. *In re GCC License Corp.* provided an interpretation in line with LTD's position that meeting the factors laid out in 47 U.S.C. §214(e) is the standard for ETC certification, and that based on the plain language of the statute, no public interest determination is required in non-rural exchanges. *In re GCC License Corp.*, 2001 SD 32, 623 N.W. 2d, 474. The court also opined that certifying multiple ETCs in non-rural areas is in the public interest, and aligns with the intent of the Telecommunications Act of 1996.

While Staff acknowledges the precedent provided by *GCC*, due to actions at the federal level, that case no longer holds the significance it once did. In the years after this case decided in 2000, the FCC issued an order, FCC Order 05-46, which provides a federal agency interpretation of the application of 47 U.S.C. §214(e). Under the Chevron doctrine, recognized by the Court in *In re GCC* federal agency interpretations of the statutes it administers are given "highly deferential review" *Id at 482*, citing *Chevron USA v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984).

FCC Order 05-46 provided additional guidance on the intent of these regulations, indicating that although Congress did not establish specific criteria, State commissions must make a finding that ETC certification is in the public interest. (FCC Order 05-46 pg. 18-19). The Order elaborates that:

[t]he public interest benefits of a particular ETC designation must be analyzed in a manner that is consistent with the purposes of the Act itself, including the fundamental goals of preserving and advancing universal service; ensuring the availability of quality telecommunications services at just, reasonable, and affordable rates; and promoting the deployment of advanced telecommunications and information services to all regions of the nation, including rural and high-cost areas.

FCC Order 05-46, pg 19 (internal citations removed).

FCC Order 05-46 does recognize that state commission have used additional factors in making a public interest determination and that “merely showing that a requesting carrier in a non-rural study area complies with the eligibility requirements in section 214(e)(1) of the Act would not necessarily show that an ETC designation would be consistent with the public interest in every instance.” FCC Order 05-46 pg.20. Applying Chevron deference to this agency interpretation, a public interest determination should be made, and state administrative rules regarding ETC designations should be applied as well.

There are a number of state administrative rules regarding ETC designations and based on the record, there is clear evidence and also no real dispute that LTD meets many of these rules, except in the case of the ARSD 20:10:32:43.07, whether designation is in the public interest.

The record shows LTD meets ARSD 20:10:32:43, which requires the petition for ETC designation include contact information, proposed effective date, identification of the service area, a statement specifying why the requested designation satisfies the requirements for ETC designation and receiving federal universal service support, any reasons why additional time is needed to complete network upgrades, and a statement specifying why the applicant’s proposed designation is in the public interest. LTD filed an application, along with an amended application and responses to data requests that supplied this required information. (Exhibit L-3, Specifically, LTD provided a list of the 15-digit census blocks associated with this filing in response to Staff’s Data Request 2-1. (Exhibit L-6, bate stamp Applicant 000182 through 000237).

The record shows LTD meets ARSD 20:10:32:43.01, which requires an applicant requesting designation as an ETC commit to providing service throughout its proposed designated service area to all customers making a reasonable request for service. Each applicant shall 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.

In response to SDTA's Second Discovery Request Item 6, LTD stated that "[w]hile LTD Broadband is not required to provide service to any customer, it plans to provide reasonable updates to prospective customers about the availability of service, upon request." In response to Staff Data Request 2-6 inquiring about the statements made in response to SDTA, LTD confirmed its commitment to serving potential customers in its awarded RDOF area consistent with ARSD 20:10:32:43.01. In particular, the Company explained it must deploy its network in a manner that ensures a potential customer requesting service can be served within ten days of when the request is made. Therefore, the network will be constructed such that a drop may be installed to provide service to a new customer within a ten-day time period. (Exhibit L-6, Data Request 2-6).

The record shows LTD meets ARSD 20:10:32:43.03 which requires the applicant to demonstrate its ability to remain functional in emergency situations, including a demonstration that it has a reasonable amount of back-up power to ensure functionality without an external

power source, is able to reroute traffic around damaged transport facilities, and is capable of managing traffic spikes resulting from emergency situations.

LTD states it “is able to re-route traffic around damaged facilities and will be able to manage traffic spikes resulting from emergency situations” and that it “uses battery back-up power in the field and battery backup power at its NOC for internet service.” (Exhibit L-3, pg. 11). In response to SDTA’s Second Discovery Request Item 8, LTD stated it “will size its battery arrays at customer premises and at network distribution points, to comply with the requirements of the FCC’s RDOF rules.” (Exhibit L-10, Data Request 8).

LTD also noted that its “VoIP service requires an Internet Protocol (IP) connection to the Company’s network or public Internet and 120VAC power to function. In the event of a failure of the IP connection or the local AC power, the service, including the E911 feature, will not function.” (Exhibit L-3, Pg11). The Company also asserts it will provide customers with clear instructions on the use of the emergency services. Although in SDTA’s Second Discovery Request Item 8, SDTA asked LTD to provide a copy of such instructions, LTD simply responded that “calls placed by a customer to 911 will be routed by LTD Broadband to emergency services”. Based on these responses, it appears LTD meets this requirement.

The record shows LTD meets ARSD 20:10:32:43.04. which requires an applicant to demonstrate that it will satisfy applicable consumer protection and service quality standards. The Company certified it would comply with all applicable FCC requirements. (Exhibit L-2, pg. 18) and meets this requirement.

The record shows the applicant meets ARSD 20:10:32:43.05, which requires the applicant demonstrate that 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. LTD's voice and broadband plans are found on page 4 of the Application. (Exhibit L-3, pg. 4). The Company states its "residential digital voice service plan is \$25 with LTD Broadband internet and \$30 without. Lifeline customers will receive the \$9.25 benefit, lowering the price to \$15.75 per month or \$20.75 respectively. The customer can use its own VoIP-enabled phone, pay an additional fee to use the service's mobile app, or purchase a phone from LTD."

In response to Staff Data Request 1-6, LTD provided additional information regarding its planned service plans. Staff questioned how LTD would provide 1 GB upload and download service for \$30/month given the current services offered for much lower speeds at higher prices. LTD responded that the RDOF award requires LTD to make 1 GB speeds available in its service area, but not at the \$30 price point and that "[g]igabit service plans will vary depending on the market and the underlying economics to profitably serve the area including towers and equipment to be deployed as well as backhaul transport costs." Exhibit L-4, Data Request 1-6b). Mr. Hauer also testified that LTD will provide calling plans comparable to other plans offered in the designated census blocks for a fixed monthly price and will offer standalone voice services as required by the FCC. (Exhibit L-2, pg.18).

ARSD 20:10:32:43.06 requires the applicant certify 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. However, the record reflects that LTD will offer unlimited calls for a fixed price, including long-distance calls. (Exhibit L-2, pg.19). Based on this evidence, Staff does not dispute LTD's assertion on page 13 of its Opening Post Hearing Brief that this rule is inapplicable.

LTD did not fulfill the requirements of ARSD 20:10:32:43.02, however, LTD requested a waiver of this rule. (LTD's Opening Post Hearing Brief, pg 10). Under ARSD 20:10:32:43.02, an applicant is required to submit a two-year plan that describes with specificity proposed improvements or updates to its network on a wire center-by-wire center basis through its proposed designated service area. In response to Staff Data Request 1-12, the Company stated it will follow FCC RDOF timelines and that some portions of the network will be completed within two years, but not all. (Exhibit L-4, Data Request 1-12) The Commission has granted similar requests for waivers in other ETC dockets relating to RDOF. The record shows that in order to access the RDOF funding, LTD is required to provide periodic reports to the FCC. (Exhibit L-2, Application 20). Staff supports granting a waiver of this rule.

As mentioned in LTD's Post Hearing Brief, the real issue in this docket is whether LTD's application meets ARSD 20:10:32:43.07, the public interest standard. The applicable portion of ARSD 20:10:32:43.07 requires that:

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.

In reviewing whether LTD has met this standard, ARSD 20:10:43:07 specifies the Commission consider 1) benefits of increased consumer choice, 2) the impact of multiple designations on the universal service fund, 3) the unique disadvantages of the applicant's service

offerings, 4) commitments made regarding the quality of telephone service provided by the applicant and 5) the applicant's ability to provide the supported services throughout the designated service area within a reasonable time frame.

“When regulatory language is clear, certain and unambiguous, [the Court's] function is confined to declaring its meaning as clearly expressed” *Citibank*, 2015 S.D. 67, ,r 12, 868 N.W.2d at 387 (quoting *Westmed Rehab*, 2004 S.D. 104, ,r 8, 687 N.W.2d at 518). “[I]t is fundamental ‘that the words of a [rule] must be read in their context and with a view to their place in the overall [regulatory] scheme.’” *In re Certification of a Question of Law from U.S. Dist. Court*, Dist. of S.D., S. Div., 2014 S.D. 57, ,r 8, 851 N.W.2d 924, 927 (quoting *In re Expungement of Oliver*, 2012 S.D. 9, 810 N.W.2d 350, 352).

*In re Black Hills Power, Inc.* 889 N.W. 2d 631, 634 (SD 2016).

When language is clear, “[the Court] may not, under the guise of judicial construction, add modifying words to the statute or change its terms” *Id.* at 635, quoting *State v. Franz*, 526 N.W.2d 718, 720 (S.D. 1995). Based on this guidance, the factors specified in ARSD 20:10:43:07 are the only factors that should be considered when determining whether ETC designation is in the public interest.

In this case, as laid out in LTD's Opening Post Hearing Brief, LTD has submitted evidence into the record that granting ETC certification to LTD would be in the public interest and meets each of the five factors listed in ARSD 20:10:43:07. SDTA did present evidence into the record that does potentially rebut the evidence presented by LTD. SDTA, through expert witness Larry Thompson's testimony, expressed his opinion that “LTD had grossly underestimated the cost to serve RDOF locations in South Dakota.” (Exhibit 1 pg. 9 lines 3-4). He went on to opine that this would “increase the likelihood of LTD Broadband failing to meet buildout requirements and the South Dakota PUC requirements.” (Exhibit 1, pg. 9 lines 13-15). This testimony, along with additional details presented by Mr. Thompson certainly raises the

question of whether LTD has the ability to provide the supported services throughout the designated service area within a reasonable time frame.

### **Conclusion**

Although Staff maintains that based on FCC Order 05-46 and ARSD 20:10:43.07, a determination of whether granting ETC designation is in the public interest is necessary, Staff acknowledges that SDTA and LTD have made compelling arguments regarding whether LTD has shown that granting ETC designation is in the public interest. Staff believes that the Commission is well within its discretion to rule on either side of this issue.

Dated this 25<sup>th</sup> Day of January 2022.



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