

---

**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

**OBJECTION TO LTD BROADBAND  
LLC'S AMENDED PETITION FOR  
RECONSIDERATION OR  
REHEARING**

**Docket No. TC21-001**

---

Comes now the South Dakota Telecommunications Association (herein SDTA) and submits this objection to LTD Broadband LLC's (herein LTD) Amended petition for Reconsideration or rehearing.

LTD's Amended Petition for Reconsideration includes three distinct requests based upon ARSD 20:10:01:30.01.

**20:10:01:30.01. Application for rehearing or reconsideration.** An application for a rehearing or reconsideration shall be made only by written petition by a party to the proceeding. The application shall be filed with the commission within 30 days from the issuance of the commission decision or order. An application for rehearing or reconsideration based upon claim of error shall specify all findings of fact and conclusions of law claimed to be erroneous with a brief statement of the ground of error. An application for rehearing or reconsideration based upon newly discovered evidence, upon facts and circumstances arising subsequent to the hearing, or upon consequences resulting from compliance with the decision or order, shall set forth fully the matters relied upon. The application shall show service on each party to the proceeding.

LTD's requests are: (I) rehearing or reconsideration due to legal and factual error, (II) rehearing or reconsideration to hear new evidence, (III) rehearing or reconsideration to allow for an amended application. SDTA urges the Commission to consider and rule on each of LTD's requests separately as they are based upon separate legal analysis. Each of LTD's requests are addressed separately below.

I. THE COMMISSION DID NOT COMMIT LEGAL OR FACTUAL ERROR: LTD's request for rehearing or reconsideration due to allegations of error should be denied.

On March 21, 2022, the Commission issued an Order to deny LTD's Application for designation as an Eligible Telecommunications Carrier in certain census blocks. The Commission properly applied the law and the facts in its the Order. SDTA relied upon and fully incorporates its previously submitted May 9, 2022, filing wherein SDTA briefed its objection to LTD's allegations of Commission error. The Commission should deny LTD's Motion for rehearing or reconsideration based upon legal and factual error.

The Commission fully heard, considered, and properly ruled on all legal arguments presented by LTD in the initial proceeding. The Commission properly considered and weighed the facts presented by the parties and the record supports all fact findings. The Commission did not commit error. LTD's request for rehearing or reconsider based upon error should be denied.

II. LTD MISCHARACTERIZES EVIDENCE IT CHOSE NOT TO PRESENT AT HEARING AS "NEW EVIDENCE:" LTD's request for rehearing or reconsideration to present construction cost evidence, that it deliberately chose to exclude at hearing, should be denied.

LTD requests reconsideration or rehearing to now submit evidence that prior to hearing and during the hearing itself, it considered irrelevant, and it refused to provide. Specifically,

prior to hearing, SDTA asked LTD to produce the very cost data that LTD now wants heard. Over 1 year ago, SDTA requested LTD produce, “the expected cost to build the network, in South Dakota, that will perform according to LTD’s RDOF bid.” LTD objected to the production of costs data arguing:

“...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 a requested service area if, with respect to that service area, the entity (i) is a common carrier; (ii) offers the services that are supported by Federal universal service support mechanisms under 47 U.S.C. § 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 as a common carrier, and is not needed to identify the services LTD will provide in South Dakota, or the manner in which those services will be advertised.”

Hearing Exhibit LTD Exhibit L-9, SDTA Discovery Request 10. *(attached to this filing as Exhibit A for ease of reference).*

If LTD had produced the expected cost or answered that cost is “unknown” and thereafter the cost changed or became known, then LTD would be entitled to have the new evidence heard. However, that is not what happened. Rather, LTD refused to provide the information arguing it is irrelevant. Not only did LTD argue cost data is irrelevant in discovery, it also did so in its Motion to Strike Expert Testimony filed on 11/5/21 and it made a standing objection to all “cost questions” at hearing. TR, page 86, line 18-20. Even within its Petition for Reconsideration LTD argues the Commission has no jurisdiction to consider the financial abilities of LTD. LTD further argues the Commission made legal error when it considered financial capabilities of LTD. At the same time, LTD asks for rehearing to produce cost evidence to demonstrate financial abilities. LTD damages its own credibility with such contradiction. It is not accurate or

genuine for LTD to now argue the cost of construction is a “new” revelation. Rather, LTD attempts to disguise its failure to make a record at hearing as “new evidence.”

The doctrine that requires LTD exhaust administrative remedies does not apply to this circumstance as one Commissioner suggested at the May 24, 2022, Commission meeting. SDTA agrees the doctrine of “exhaustion of administrative remedies” is fundamental and has been codified in SDCL 1-26-30. LTD is pursuing its administrative remedies when it argues the Commission committed legal error when it considered financial related evidence. LTD departs from that doctrine, however, when it changes legal course and now desires to create the record it chose not to create at hearing. “A party may not wait to submit evidence at an administrative hearing until after the party learns how the hearing examiner will rule.” McDowell v. Citybank, 734 N.W.2d 1 (SD 2007), 2007 SD 52.

LTD was on notice the Commission would hear financial related issues at hearing. LTD’s Motion to Strike filed on 11/5/21 addressed the admission of financial related information, including the cost of construction, to be considered at hearing. The Commission ruled in SDTA’s favor and allowed admission of financial data at hearing. Regardless, LTD persisted in its objection to create its appeal record rather than offer its construction cost data. To now disguise that financial data as “new” evidence is clever, but not accurate and should not be allowed.

SDTA urges the Commission to deny LTD’s Motion for Rehearing to admit additional evidence. LTD’s request is nothing more than an attempt to back-fill and create a record it deliberately chose not to make at hearing. If, however, the Commission grants LTD’s request then SDTA requests:

- i) Rehearing be limited and specific to what LTD requests in its Motion.  
That is: “LTD’s actual experience in deploying its network” (subsequent to the PUC hearing) for the purpose of confirming LTD’s cost estimates are accurate.
- ii) The opportunity to conduct discovery
- iii) The opportunity to call witnesses
- iv) The opportunity to cross examine LTD witnesses.

III. LTD’S REQUEST TO AMEND ITS APPLICATION SHOULD BE DENIED BECAUSE: (a) the request is untimely, (b) the Commission lacks statutory authority to permit the request, (c) RDOF deadlines are irrelevant in the Commission’s consideration and (d) it does not serve the public interest to grant LTD’s request.

- a. LTD’s request for rehearing to amend its application is untimely.

The Commission’s Order to deny LTD’s Application for Designation as an ETC was issued on March 21, 2022. LTD made its written request for rehearing to allow it to amend its application on June 2, 2022. The applicable administrative rule requires that:

“...an application for a rehearing or reconsideration shall be made only by written petition by a party to the proceeding. The application shall be filed with the commission within 30 days from the issuance of the commission decision or order.” ARSD 20:10:01:30.01.

LTD’s June 2, 2022, filing date is well outside the 30 days required by Administrative Rule.

LTD’s request for rehearing to amend its application should be denied as it is untimely.

- b. The Commission does not have statutory authority to allow LTD to amend its petition.

LTD requests the Commission allow it to amend its application for ETC status. LTD's request is not permitted under South Dakota Codified Law or Administrative Rules. LTD does not cite any legal authority to support its request outside of ARSD 20:10:01:30.01. The Commission should deny LTD's request as it lacks statutory authority to grant the request.

In some types of cases, the Commission has statutory authority to allow substantive application amendments. Specifically, within the context of energy conversion and transmission facilities, the legislature provided the Commission with authority to amend an application, "at the Commission's discretion," and "upon returning an application...allow the applicant to make changes in the application in order to comply with the requirements of this chapter." SDCL 49-21B-13. Administrative rules further support the Commission's ability to allow substantive amendments for energy conversion and transmission facilities. The applicable rule states, "each application shall be considered to be a continuing application..." ARSD 20:10:22:04(05). However, no such language exists in the context of ETC applications.

"The Public Utilities Commission of this state is subject to the Administrative Procedures Act of this state. As a commission acting as an agency, it is given limited powers in a specialized field of administrative law and can only exercise those specific powers which the legislature has bestowed upon it. This is settled law in our state." Affiliated Distillers Brands Corp. v. Gillis, 81 S.D. 44, 130 N.W.2d 597 (1964). Simply put, the legislature did not give the Commission power to grant LTD's request to amend its application as requested or to consider the application "continuing" in nature.

LTD desires to amend its application to change its requested ETC service area. The service area requested for ETC designation is pivotal to the application's outcome. Therefore,

the type of amendment requested is substantive in nature. The law requires the provider identify the service area for which it seeks ETC designation and then (among other things) prove it has the ability “to provide the supported services throughout the designated service area...” ARSD 20:10:32:43.07. ETC application filings center on “the service area.” The Commission heard and ruled on LTD’s case based upon its requested “service area.” Given the importance of the requested “service area” in ETC filings and the Commission’s ruling, a different service area must result in a new application. It is not proper for LTD to disguise a new application as an “amendment.”

In its Order to deny LTD’s request for ETC designation, the Commission held: “LTD did not demonstrate it has the managerial ability to comply with regulatory obligations...” ¶ 88, March 21, 2022, Final Decision. Unknowingly bidding on RDOF areas already served by carriers in SD is one more managerial failure on LTD’s part and further confirms the Commission’s decision was correct.

c. The impact of RDOF rules and deadlines are irrelevant.

LTD struggled to meet RDOF filing obligations across the nation. At this point, LTD failed to obtain ETC designation in 7 of the 15 states in which it sought designation. It is, therefore, no surprise that LTD asks this Commission to bend its rules to assist LTD in meeting FCC RDOF timelines as it pertains to South Dakota. As LTD writes in its June 2, 2022, brief, “If LTD has to refile its ETC application in a new docket, there is substantial risk that the FCC would hold LTD failed to engage in good faith efforts to obtain ETC status.” LTD’s difficulty in meeting its RDOF deadlines is not however a legally correct reason for the Commission to amend or bend South Dakota law.

In its Amended Petition for Reconsideration, LTD asks the Commission to term what amounts to a “new application” as an “amended application.” As LTD acknowledges in its filing, the purpose of its request is to increase LTD’s chances of meeting the FCC’s RDOF ETC deadline for South Dakota. According to the RDOF process, bidders such as LTD were to have ETC status by April 7, 2021. LTD asked for a waiver of that deadline in several states including South Dakota. The FCC has not yet ruled on whether it will waive that deadline for LTD in South Dakota.

As SDTA has argued throughout this proceeding, consistent with the FCC language, the Commission should not amend its process in any way as a result of RDOF. As the FCC outlined, “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.” In the Matter of the Digital Opportunity Fund, WC Docket No 19-126, Paragraph 92 (Adopted, January 30, 2020) (emphasis added). At no place in the relevant South Dakota codified law or administrative rules is this Commission permitted to change its process to accommodate the RDOF Auction or any other FCC reverse auction. Therefore, the Commission cannot change its practice as LTD requests. The RDOF deadline is irrelevant for purposes of the Commission’s decision. The impact or lack of impact a new filing has on the RDOF process cannot be considered by the Commission. The RDOF process is independent and separate from the Commission’s role. South Dakota law does not offer a path to do what LTD desires and LTD’s request must be denied.

d. It does not serve the public interest to allow LTD to amend its application.

Earlier in this proceeding SDTA argued the Commission should consider Broadband, Equity, Access and Deployment (BEAD) funding when analyzing “the public interest” in this



case. Specifically, South Dakota will receive at a minimum, \$100 Million in BEAD funding and if LTD is certified as an ETC, it stands in the way of South Dakota putting those dollars to use in all areas. The State may be prohibited from using BEAD funding in pending RDOF areas. Even if the State makes BEAD money available in pending RDOF areas, providers are hesitant to identify the areas LTD hopes to serve as “available.” Rural, high-cost areas cannot support more than one provider. Therefore, LTD potentially stands in the way of South Dakota’s use of BEAD funding.

In response, LTD argued: “SDTA asks this Commission to judicially amend the regulation by considering other factors...the language of ARSD 20:10:32:43.07 is clear. The Commission defined the factors to be considered when evaluating public interest. The Commission should simply apply the language of its own regulation.” See Applicant’s Post-Hearing Reply Brief filed 2/8/22, Section III.

Ironically, in its Amended Petition for Reconsideration, LTD argues the existence of RDOF funds should be considered part of the public interest. LTD once again, contradicts itself and now asks the Commission to “ignore its clear administrative rule and consider additional factors.” *Id.* LTD attempts to hide its contradiction by suggesting RDOF funds will deliver “consumer choice.” However, consumer choice has been defined by the FCC to mean competition. In the Matter of Federal-State Board on Universal Service, Report and Order, CC Docket 96-45, ¶44 (February 25, 2008). Contrary to the term’s settled definition, LTD uses “customer choice” to mean a consumer decision between something (broadband) or nothing (lack of connection). However, that is not how the FCC defines the term and that is not what it means within the context of ARSD 20:10:23:43.07. LTD incorrectly uses the term “consumer choice” in its argument and as a result its “public interest” argument falls flat.

If, however, the Commission believes other federal funding opportunities increase “consumer choice,” then BEAD should certainly be considered. Without the opportunity to use Broadband, Equity, Access and Deployment (BEAD) funding, there are citizens in South Dakota that will not receive broadband service in the foreseeable future.

#### **IV. Conclusion**

The Commission should deny all three of LTD’s requests. SDTA urges the Commission to consider and rule on each of LTD’s requests separately as they are based upon separate legal analysis.

1 - The Commission should deny LTD’s request for rehearing or reconsideration due to legal and factual error. The Commission fully heard, considered, and properly ruled on all legal arguments presented by LTD in the initial proceeding. The Commission heard all facts, properly considered witness credibility, and made accurate factual findings.

2 - The Commission should deny LTD’s request for rehearing or reconsideration to hear what LTD calls “new evidence.” The information LTD wants heard is evidence of LTD’s cost to construct. LTD intentionally withheld this evidence at hearing. It is improper for the Commission to permit LTD to backfill a record it chose not to make at hearing.

3 – The Commission should deny LTD’s request for rehearing or reconsideration to allow LTD to substantively amended its application to such an extent that it is essentially a new application. LTD’s request must be denied because: (a) the request is untimely (b) the Commission does not have legal authority to allow the amendment, (c) RDOF rules and deadlines do not change South Dakota law, (c) it is not in the public interest to grant LTD’s request.

SDTA respectfully requests the Commission deny LTD's June 2, 2022, Petition in its entirety.

DATED this 17 day of June 2022.

SOUTH DAKOTA TELECOMMUNICATIONS ASSOCIATION

/s/ Kara Semmler  
Kara Semmler  
General Counsel  
320 East Capitol Ave.  
P.O. Box 57  
Pierre, SD 57501