
**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

**POST HEARING BRIEF OF THE
SOUTH DAKOTA
TELECOMMUNICATIONS
ASSOCIATION (SDTA)**

Docket No. TC21-001

Comes now the South Dakota Telecommunications Association (herein SDTA) and submits its post hearing brief in the above captioned matter. The South Dakota Public Utilities Commission (the Commission) should deny LTD Broadband’s (herein LTD) request for Eligible Telecommunications Carrier (herein ETC) designation.

I. PROCEDURAL AND FACT BACKGROUND

The Rural Digital Opportunity Fund (herein RDOF) is a broadband infrastructure funding mechanism, created by the Federal Communications Commission (herein FCC), to bring broadband to rural parts of the United States that lack adequate broadband service. On or about January 30, 2020, the FCC issued a Public Notice to initiate Phase I of RDOF reverse auction.¹ In order to participate in the RDOF Phase I auction process, the bidder was required to submit what is referred to as the “short form” to the FCC. The FCC created the list of “Qualified

¹ *In the Matter of the Rural Digital Opportunity Fund*, FCC 20-5 Report and Order, Adopted January 30, 2020.

Bidders” based on their evaluation of these short forms. The RDOF auction was a reverse auction where interested parties bid on specific geographic areas (census block groups) to determine which bidder is willing to serve the area with the lowest amount of government support. These areas were selected by the FCC because one or more of the census blocks within these census block groups lack broadband based on information the FCC receives from broadband providers as part of the FCC Form 477 process. The areas that were part of the RDOF auction are high-cost areas and lack a financial case for a company to provide broadband and therefore need support to do so. The winning bidder is obligated to build its network according to specific FCC milestones over a 6-year period for the awarded amount of support, which will be paid to the winning bidder over a ten-year period.

After the short form process, LTD was designated a “Qualified Bidder” by the FCC and participated in the RDOF reverse auction. Ultimately, LTD won the right to serve many areas across 15 states by submitting a bid to build a broadband network that received the best score at the lowest price. At this stage of the process, the FCC did not examine bidders to determine the legitimacy of their low bid. Rather, the FCC relied on the companies participating in the auction to determine if they themselves could fulfill the requirements of the auction, if successful.

The FCC had no mechanism to ensure a bidder did not overextend themselves nor did they determine if the support amounts “won” in the reverse auction were sufficient to construct broadband in these areas. SDTA believes LTD improperly bid on more areas than they could realistically construct and at support levels that were lower than what would reasonably be needed to support the construction and operating costs. LTD’s bidding strategy resulted in them winning bids far below what industry experts find is needed to fund and support the actual construction and operation of the broadband network.

LTD fully leveraged the shortcomings in the FCC’s auction process and became the provisional RDOF winner in fifteen states and the largest provisional winner in the auction. LTD was the provisional winner of \$1,320,920,718.60 in support (over 10 years) to serve 528,088 locations with fiber and fixed wireless. In South Dakota, LTD was the provisional winner of \$46,588,454 to serve 7,481 locations and promises to do so with a fiber to the home network.²

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 the provisional winning bidders to submit the details of how they can and will build a broadband network to satisfy their winning bid. The FCC determines which of the provisional auction winners will actually receive the support based on the information the provisional winner provides as part of the FCC long form process.

Among other things, the FCC long form requires the provisional 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)

² FCC Public Notice, Rural Digital Opportunity Fund Phase I Auction (Auction 904) Closes, DA 20-1422, Issued December 7, 2020.

The Commission has jurisdiction over ETC (or Eligible Telecommunications Carrier) applications in South Dakota. Therefore, the Commission plays a distinct role in the RDOF process and must make a decision based upon South Dakota law. January 7, 2021, LTD filed an Application with the Commission seeking designation as an ETC in South Dakota. SDTA petitioned for and was granted intervener status.

The FCC specifically recognized and preserved the state commission's role in the RDOF process leaving ETC designation up to the state commissions. 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, before granting LTD the ETC designation it seeks, this Commission, "shall determine that such designation is in the public interest." ARSD 20:10:32:43.07 (emphasis added). SDTA argues that the Commission should deny LTD's petition for ETC designation in South Dakota because it is not in the public interest.

On December 1, 2021, the Commission conducted a hearing to take evidence on the question regarding whether LTD should be granted designation as an ETC in South Dakota. LTD and SDTA presented evidence. LTD did not and cannot prove that designating it as an ETC in South Dakota is in the public interest. In its brief, LTD accurately describes SDTA's interest being centered on "the public interest" consideration this Commission must make.

II. APPLICABLE LAW: Application of ARSD 20:10:32:43.07

The FCC delegated an important aspect of the RDOF review process to the states through the ETC process. Specifically, before giving RDOF winners billions of government dollars, the provisional winners must obtain state ETC designation from state commissions.

The Communications Act of 1934, 47 USC §214 establishes the basic definition of an ETC and goes on to provide state commissions with the primary responsibility for performing ETC designations. 47 USC §214(e). The state is given further authority to “adopt regulations not inconsistent with the Commission’s rules to preserve and advance universal service.” 47 USC §254(f). LTD’s argument that the Commission’s jurisdiction is limited, to void the South Dakota Administrative Rules established by the Commission pursuant to 47 USC §254(f) is improper.

The FCC, through a 2005 Report and Order, addressed the minimum requirements for a telecommunications carrier to be designated as an ETC. In said Order, the FCC encouraged states (such as South Dakota) to adopt the requirements. Clearly, the FCC supports additional and separate state ETC requirements and judicial discretion when evaluating ETC applications. See. *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, March 17, 2005.

ARSD 29:10:32:43.07 is one such rule this Commission adopted with the support of the Federal Code in 47 USC §254(f) and the FCC. The rule sets forth the framework for how the Commission chose to analyze “whether or not the public interest would be served by designating a carrier as an ETC.” ARSD 20:20:32:43.07. The Administrative Rule follows the FCC’s framework established in the *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, March 17, 2005. Specifically, the Administrative Rule states:

“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

The Administrative Rule lists what the Commission must consider. However, it does not prohibit consideration of other factors unique to the public interest analysis in this case. LTD disagrees and argues the Commission is limited to the five items listed in the Administrative Rule.³ Regardless of whether the Commission ultimately agrees with SDTA or LTD on this point, the result of this proceeding is the same. Either way, the Commission must deny LTD the ETC status it requests because LTD did not prove it has the ability to provide services throughout the designated service area.

- a. LTD DID NOT PROVE IT HAS THE ABILITY TO PROVIDE SERVICES TO 103 CENSUS BLOCK GROUPS COVERING OVER 7,000 LOCATIONS WITHIN A REASONABLE TIMEFRAME

Starting with the undisputed language expressly included in the public interest consideration; the Commission must deny LTD’s application because it did not prove it has the ability provide services throughout the service area. The language in the rule leaves no room for the Commission to simply consider a verbal promise or commitment. Rather, the rule requires the Commission find the applicant company actually has the ability to do so.

LTD’s witness, Corey Hauer (herein Hauer) testified that LTD has the ability to provide services. However, he could not offer anything other than his own promises and beliefs.

Although Hauer is ambitious and his promises may be well intended, it became apparent

³ (i) the benefit of increased consumer choice, (ii) the impact of multiple designations on the universal service fund, (iii) the unique advantages and disadvantages of the applicant’s service offering, (iv) commitments made regarding the quality of the telephone service provided by the applicant (v) the applicants ability to provide the supported services throughout the designated service area within a reasonable timeframe.

throughout the hearing that many of Hauer's promises are supported by nothing more than "his word." Unfortunately, throughout the hearing it also became apparent that Hauer's "word" is not always based in fact. For example:

- In written testimony, Hauer attempted to prop up LTD's financial capabilities by discrediting SDTA member companies. He accused SDTA member companies of irresponsible financial behaviors and planning. Exhibit L-14, 9: 6 -12, TR 49: 22-25, 50:1-5. However, it became apparent through testimony that Hauer had no basis for his belief. Hauer ultimately acknowledged that he is not familiar with South Dakota telecommunication or broadband companies or how they plan their finances. TR 51:1-5.
- In written testimony, Hauer attempted to discredit SDTA expert Larry Thompson (herein Thompson). Hauer testified that Thompson lacked experience with "entrepreneurial companies risking private capital." Exhibit L-14, 3:15-17. However, at hearing, Hauer acknowledged that he does not know the various types of work that Thompson or his company, Vantage Point, performs. TR 45:24-25, 46:1-8.
- Hauer was critical of rural company growth in the broadband field. L-14, 4:1-3. At hearing, he accused rural companies of refusing to serve some rural areas of South Dakota. TR 76: 8-9. However, when questioned he acknowledged that he has never worked for an RLEC in SD that provides fiber broadband services and is unaware of rural company broadband growth or service plans. TR 48: 1-15. Hauer did not hesitate to testify negatively about SD rural broadband providers despite the fact he was uninformed regarding the underlying facts.
- In written testimony, Hauer states that LTD can deploy a fiber directly to homes for less cost than an RLEC. Exhibit L-14, 9:12-13. However, at hearing, he acknowledged that he was not making a comparison to any South Dakota RLEC thus making his comparison irrelevant for purposes of the South Dakota Commission hearing. TR 83:24, 84:1-3. Facts matter.
- In written testimony Hauer states, "Our financial data combined with our track record demonstrate that LTD has the experience and ability to build its network...". Exhibit L-2, 4:21-23. Later, however, at hearing when questioned regarding his company's financial data, he testified that: "I don't think anything with regard to financial data is relevant to this Commission in terms of the ETC." TR 78:15-18. Hauer did not hesitate in changing his position to benefit the current situation he was in. One thing is clear, however, is that LTD has never undertaken a project even close to this magnitude. The number of fiber to the premises locations currently served by LTD represent less than 0.001% of the number that they provisionally won in the RDOF auction.

- In written testimony Hauer states that LTD in South Dakota, “is profitable now and it intends to remain profitable in the future regardless of take rate.” Exhibit L-14, 12:1-5. However, based upon his testimony at the hearing, Hauer acknowledged his South Dakota wireless business is not profitable and it relies upon subsidies from other aspects of the company’s business. TR, 114:4-25; 115:1-12. It can’t be both.

[REDACTED]

[REDACTED] Again, Hauer demonstrated his willingness to manipulate his position to best fit the circumstances.

- In written testimony, Hauer asserts that absent LTD being awarded RDOF funds, broadband construction in South Dakota cannot occur. Exhibit L-14, 20:8-14. However, the fact is, South Dakota will have access to hundreds of millions of dollars of funds to complete broadband construction in South Dakota through other federal programs. TR 210:24-25, 211:1-11. Hauer chooses to ignore facts to benefit his sales pitch.

Hauer is not an engineer – in fact he never graduated from college. TR 42:13. Rather, he is an ambitious businessman attempting to convince others that his plan is more than smoke and mirrors. The Commission cannot accept Mr. Hauer’s unqualified belief regarding LTD’s abilities absent sufficient evidence. The Commission is legally bound to base its decision upon the evidence it was presented regarding LTD’s ability to provide services throughout the entire SD RDOF service area. A sales pitch is insufficient.

Although ARSD 20:10:32:43.07 instructs the Commission to assess LTD’s ability to provide services, it does not dictate how to examine the company’s “ability.” Thompson, a qualified expert in the field of broadband construction and operation, testified that: to determine whether a company has “ability” to provide services, (i) financial, (ii) managerial and (iii) technical capabilities should be considered. TR 214:25, 215:1-4. Each element will be discussed separately below. Neither LTD nor Commission Staff offered an alternative method to judge LTD’s ability to “provide services throughout the entire service area.” In fact, in his prefiled

testimony, Hauer himself asks the Commission to review LTD's financial, managerial, and technical capabilities. Exhibit L-2, 4:21-23, 5:1-23, 6:1-4.

LTD does not have the financial ability
to provide services throughout the entire service area

Mr. Hauer testified that, "Our financial data combined with our track record demonstrate that LTD has the experience and ability to build its network in South Dakota consistent with the RDOF application requirements." Exhibit L-2, 4:21-23. SDTA agrees that financial data is relevant. However, SDTA disagrees regarding the conclusions that can be drawn from LTD's "financial data."

LTD has never built a network like it proposes to do in South Dakota. LTD has not completed any of the design work associated with its proposed ETC service area. As a result, LTD could not base its projected costs on actual plans. Mr. Hauer acknowledges that plans have not been developed and will not be until the company receives millions of dollars. TR 152:1-4. In South Dakota alone, the company will receive almost \$14,000,000 before having to be accountable for any type of service requirement. TR 110:14-21.

Without actual plans from which to develop costs, LTD simply determined the construction amount by multiplying the RDOF support awarded to LTD [REDACTED] Exhibit SDTA-2, page 11. This methodology bears no relationship to reality and is not an acceptable industry standard to determine cost and, in fact, doesn't even pass a "smell test" of being a reasonable approach. *Id.* Pages 11-12. Under its methodology, since LTD was awarded approximately \$46.6 in South Dakota, the construction amount assumed by LTD was approximately [REDACTED], [REDACTED] per location. *Id.* The [REDACTED] was used in all states

regardless of bidding level in individual states, or the actual costs to serve in individual states or regions within each state. *Id.*

Thompson and his company, Vantage Point, have engineered networks in all geographic areas of South Dakota. Exhibit SDTA-1, page 2- 4. Exhibit SDTA-7. Based upon Thompson's experience and knowledge it estimates LTD's network will cost \$91 million to construct or \$12,167 per location. TR 173:1-3, Exhibit SDTA-1, page 9. Thompson's construction cost estimate is [REDACTED] higher than LTD's artificial figure. It is worth noting, to give LTD the benefit of the doubt, Thompson used conservative numbers in his approach. For example, Thompson assumed ariel construction would be used in the Black Hills region and didn't include various other cost elements normally included in cost analysis which would result in a significantly higher cost per location. TR 175: 1-3, 170:2, Exhibit SDTA-2, page 9. LTD has underestimated its construction costs by over [REDACTED] dollars in South Dakota alone. The result of its improper methodology demonstrates a clear lack of financial ability to serve the entire ETC service area. Quite simply, LTD will not have sufficient funds to compete construction. The massive shortfall in funds will have to be raised from private investors. Exhibit L-13, page 20. At the time of the hearing, LTD claimed it was negotiating with several interested parties. TR 85:5-6.

It is unreasonable, however, to believe this project can attract the type of investment Hauer will need to provide services throughout the South Dakota ETC service area requested. TR 195:19-24. Due to higher than estimated capital costs and ongoing operating costs, it will be impossible for LTD to make a profit in South Dakota. TR 161-166. It is common sense to conclude that a company that cannot turn a profit will ultimately fail. Thompson confirmed this result. *Id.* LTD's own financial documents project [REDACTED] of

operation. During this same timeframe and considering the more realistic construction and operational costs, Thompson estimates LTD will lose over \$65 million in South Dakota. Exhibit SDTA-2, page 13, TR 174: 23-25. This type of loss is simply not sustainable, and it will likely make it impossible to attract any external investors.

Ultimately, Hauer acknowledges that LTD will not be profitable in South Dakota. He testified regarding his intent to “take profits from other areas and invest them in South Dakota.” TR 92:23-25. Hauer went so far as to indicate the “take rate” in SD is irrelevant as a financial loss from South Dakota operations is expected. TR 114:21- 25, 115:1 -10.

Anticipating this explanation from LTD, Thompson assessed the possibility of LTD’s plan to use revenue from other states to subsidize LTD losses in South Dakota. Thompson ran the analysis in all fifteen states in which LTD was the provisional RDOF winner. In other states, LTD also bid down the auction price far below reality. Because of this, in other states LTD will receive less support per location than it will in South Dakota. Therefore, LTD’s estimated construction costs are also much lower [REDACTED]. As a result, LTD will experience more of a loss in these states. Also, LTD was awarded many more locations in these other states, which will exacerbate their loss. In other words, Thompson concluded it is unrealistic to believe enough profits will be made in other states to sufficiently subsidize the losses in South Dakota. TR 179:10-25, 180:1-11, Exhibit SDTA- 2, page 14. LTD’s own analysis using unrealistically low construction costs still results [REDACTED] approximately [REDACTED] operation. Using a more realistic, yet conservative average per location construction cost, for all LTD areas in all states where they were named the provisional winner, Thompson finds LTD will lose approximately \$6 Billion in the first six years. Exhibit SDTA-2, page 14. Hauer’s testimony is completely void of factual reality.

LTD did not provide sufficient financial data for the Commission to believe its multi-state “profit sharing” plan will render it able to provide services throughout the SD service area. To believe LTD can make a profit in other states, and then rely upon it to invest those funds in SD is an unacceptable risk contrary to the public interest and does not satisfy the company’s obligation to prove it has financial ability to provide services throughout the service area in South Dakota.

Hauer further confirms that LTD lacks financial ability through his belief that the magic ticket to cost savings lies in LTD’s operation of its own construction crew. TR pages 217- 219. However, LTD did not provide any expert testimony on the subject. Rather, Hauer provided his own inexperienced, unsupported opinion. LTD did not provide evidence of plans or prices. Thompson, on the other hand, has worked with companies that use their own construction crews and contractors. In his experience, it is frequently more expensive for a company to operate its own construction crew. A company with its own crew has the expenses associated with employees and loses the benefit of bidding the project in a competitive environment. TR pages 222-224. Operating a construction crew comes with the responsibility to work with all impacted counties and tribes to achieve construction mandates including right of way, depth of burial and other safety compliance issues along the way. Good management (addressed in the next section) becomes even more important. Operating an internal construction crew was the only explanation LTD offered as to why it believes it can accomplish construction far below acceptable industry standard costs. The one and only explanation given by LTD was unsupported and problematic.

LTD does not have the managerial ability
to provide services throughout the entire service area

Hauer testified that, “LTD’s managerial team has the ability to ensure that LTD continues to deploy networks and offer quality customer service while remaining in compliance with regulatory requirements.” Exhibit L-2, 5:10-12. SDTA agrees that managerial ability is relevant. However, the evidence presented does not support LTD’s claim regarding its management ability.

Hauer’s management team currently oversees a relatively small operation that does not regularly perform extensive construction.

For example:

- LTD participated in the CAF Phase II auction, where the support they won was more than 1,000 times less than RDOF and only involved 1,407 locations. LTD is meeting their CAF Phase II obligations with a wireless network, not fiber. Exhibit SDTA-8, 1:16-22, 2:1-8.
- LTD serves 259 customers in SD. Exhibit L-9, page 3. None of which are served by a fiber to the home network. TR 54:23
- LTD customer service employees all work from home. LTD does not have a location to address customer service needs. TR 43:12-21
- LTD’s only fiber to the home network is in Tennessee and serves 448 customers. However, this network was purchased and not built by LTD. Exhibit L-13, page 1, TR 132: 21-23.
- LTD serves 18,000 customers nationwide. TR, 109: 22-25, 110:1 - 9
- With regard to its fixed wireless network, in most circumstances, LTD places its equipment on leased tower space. In most cases, it does not construct the tower itself. TR 53:12-23. LTD has constructed only 6 towers. *Id.* In other words, the management team has little experience in constructing or maintaining owned facilities.

If LTD receives the RDOF funding, Hauer’s team must be capable of managing a

significantly larger company.

- LTD must manage \$1.3 *billion* in federal funds which is far different than the experience gained in CAF II managing only \$1.3 *million*. They must also manage the construction to 528,088 locations rather than only 1,407 locations in CAF Phase II. Exhibit SDTA-8, 1:16-22, 2:1-8.
- LTD must manage negotiation and attain acquisition of private, government and tribal permits and easements throughout fifteen states. They must also manage permitting in National Parks and National Forests. Exhibit L-11, pages 2-5.
- LTD will be required to work with tribal governments, the Bureau of Indian Affairs, the Tribal Employment Rights Ordinance (TERO) and satisfy all tribal construction and operational regulations. *Id.* To date, LTD has no relevant experience in obtaining federal and tribal permits. Exhibit L-13, page 3.
- The LTD team must manage a nationwide fiber construction project with “hundreds of construction workers” in its employ. TR 100:17-20.

However, Hauer didn’t provide the Commission with a management plan or access to his management team. Rather he simply names the individuals on his management team. While those individuals may be important within Mr. Hauer’s relatively small fixed wireless business, they have no experience with a fiber to the home operation, and in many cases do not have any specialized education. TR 181:14-20. Hauer did not explain or demonstrate in any way how LTD will manage the growth necessary while providing customers with good service and responding to the various regulatory requirements.

Thus far, LTD has not been successful in managing its regulatory requirements. LTD’s pending long form application was denied by the FCC due to missed deadlines in the following states: California, Kansas, Oklahoma, North Dakota, Iowa, Nebraska. TR 69:14-15, 70:11-12. More specifically, LTD did not comply with the filing deadlines to achieve ETC designation in the listed states. If LTD is unable to achieve this first state filing obligation, it is unreasonable to believe it can achieve the many other regulatory obligations that come with ETC designation. In

California, the ETC filing errors and missed deadlines were particularly egregious. Rather than simply take responsibility for the missed deadlines, Hauer blamed his attorney. At the hearing, Hauer referred to that attorney with a racially charged insulting epithet. TR 155:20-22.

In addition to the FCC denial of long form applications in the above states, the state of Iowa denied LTD's request for ETC designation at the state level. The Iowa Department of Commerce Utility Board, in its rejection order, explained that LTD has "routinely submitted regulatory filings with obvious errors, if filings were submitted at all." Exhibit SDTA-9, page 13. However, the Department of Commerce did not base its decision upon isolated acts of noncompliance. Rather, it found:

It is that inconsistent history of compliance, coupled with LTD's representations to the Board and FCC about that history for purposes of this Application, as well as the scale of the additional responsibilities LTD seeks to take on, that the Board finds more concerning from a public interest standpoint. The record in this docket does not merit the expansion of a credential that signals to the public that LTD has evidenced the technical and financial capabilities required to carry out the public interest obligations of those entrusted with federal funds. LTD's response and actions lack the candor that the Board would expect from a carrier seeking to evidence the expertise to take on this degree of expansion. SDTA Exhibit-9, page 16.

Hauer refused to take responsibility for the Iowa regulatory failings of his company. Instead, in reaction, to the Iowa Order, Hauer testified that "the fix was in" and called the Iowa decision, "petty." TR 122:10 -11, 68:14-16. It should also be noted that LTD already has ETC designation in Iowa. LTD's request in Iowa was simply to expand its ETC territory. The new or expanded Iowa area it requested, according to Hauer, is quite small. TR 68:13. Despite the small expansion request in Iowa (relative to the large South Dakota request) Iowa maintained that LTD is not able to manage additional ETC responsibilities. Also notable in Iowa's decision is its finding on public interest. The Iowa Board found LTD lacked the ability to carry out the public

interest obligations of those entrusted with federal funds. *Id.* South Dakota should follow Iowa's lead.

LTD's record indicates it does not have the management ability to achieve and maintain regulatory compliance within the states it serves. More concerning is what appears to be LTD's disrespect and disregard for the state regulatory process. Without a strong management team committed to compliance, cost savings could be prioritized over all else.

LTD does not have the technical ability
to provide service throughout the entire service area

Hauer testifies that LTD's past fixed wireless business proves its technical ability to construct and operate a fiber to the home network to more than 7,000 locations in South Dakota. Exhibit L-2, 5:13-23, 6:1-4. However, the technical aspects of a fixed wireless systems, that Hauer does have experience in constructing and operating, are not comparable to the technical aspects of building and operating a fiber to the home network able to serve over 7,000 locations in South Dakota with gigabit speeds. Exhibit SDTA-2, page 5. According to LTD's own website, their fixed wireless networks are only capable of offering up to 35 Mbps to their residential customers.

Once again, Hauer gave this Commission nothing in the form of evidence. Hauer did not provide the Commission with evidence of fiber to the home technical ability or a plan to acquire it. Rather, he simply expects the Commission to trust him. He promises that he will get the job done. Again, SDTA argues that Hauer's "word" is insufficient. Hauer testified that neither the engineering plans nor network design plans are complete. TR 61:11, 73:19-22. One would have expected that these engineering plans and network designs be completed prior to the RDOF so that LTD could understand the costs to formulate their bidding strategy. It is now a year after

the auction has ended and the engineering plans and network designs still do not exist, which is likely a reflection on LTD's management capabilities, their technical ability, or both. Hauer himself is not an engineer and he did not provide this Commission access to any of the engineers or experts that he plans to work with to accomplish the complicated task of technical planning and execution.

Thompson provided this Commission with detailed information regarding the technical complexities associated with a fiber to the home construction project. See Exhibit SDTA-8a. LTD did not provide this Commission with any reason to believe it can accomplish this task.

b. THE ADMINISTRATIVE RULE DOES NOT PROHIBIT THE EVALUATION OF OTHER FACTS THAT WILL IMPACT THE PUBLIC INTEREST.

ARSD 20:10:32:43.07 lists five items that the Commission must (shall) consider evaluating the public interest. As discussed previously, LTD cannot prove it has the ability to provide services through the entire requested ETC service area. However, the administrative rules do not designate those five items as the exclusive and the only considerations included in the public interest. The Supreme Court finds it instructive when a statute "uses no language of exclusion or inclusion that serves to indicate only." *Tracfone Wireless, Inc. v. South Dakota Department of Revenue and Regulation*, 2010 SD 6, ¶15. Furthermore,

The general rule that the express mention of one thing in a statute implies the exclusion of another 'is merely an auxiliary rule of statutory construction to be applied with great caution; it is not a rule of substantive law, or a constitutional command. The maxim is not of universal application, or conclusive as to the meaning of a statute; and it does not constitute a formula for construction to be arbitrarily applied.' *Argo Oil Corp v. Lathrop*, 76 SD 70, 74, 72 NW2d 431, 434 (1955).

The administrative rule at issue, ARSD 20:10:32:43.07, does not list the five items for Commission Consideration as the only items for consideration in “the public interest.” Therefore, the Commission should not arbitrarily apply the auxiliary rule of construction that LTD seeks to advance in this case. Rather, the Commission should consider the intent of the administrative rule. *DeSmet Inc. Co. of South Dakota, v. Gibson*, 1996 SD 102, P 7. 552 NW 2d 98, 100. The Commission structured ARSD 20:10:32:43.07 consistent with The FCC’s March 17, 2005, Report and Order in, *The matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45 (herein FCC Order). It is proper, therefore, to look to the FCC Order for guidance.

In the FCC Order, the FCC found that Congress did not intend to tie the hands of state commissions. Rather, the FCC found, “Section 214 demonstrates Congress’s intent that state commissions evaluate local factual situations in ETC cases and exercise discretion in reaching their conclusions regarding the public interest, convenience and necessity, as long as such determinations are consistent with federal and other state law.” *Id* at ¶61. The FCC acknowledges that state commissions are most knowledgeable regarding local service areas and the public interest is best served by giving the states flexibility in the ETC designation process. *Id*. It is proper for the Commission to consider the public interest in a more robust way than LTD desires. The plain language of the administrative rule at issue does not contain any limiting language such that the auxiliary rule of statutory construction LTD advances should take priority over the intent of the administrative rule.

The FCC has taken into account the “alternative funding programs for broadband deployment that are readily available at this time” when judging whether RDOF applicants meet ETC state filing deadlines. *In the Matter of Rural Digital Opportunity Fund Auction (Auction*

904), AU Docket No 20-34, Order Released July 26, 2021 at ¶15. Specifically, the FCC found it appropriate to expect RDOF presumptive auction winners to meet a “high hurdle” due to the availability of other federal and state broadband programs. *Id.* If this Commission designates LTD as an ETC, (despite its failure to prove its ability to provide services throughout the requested ETC service area) the LTD service areas will be ineligible for any of the “alternative funding programs for broadband deployment that are readily available at this time.” *Id.* Therefore, it is proper for this Commission to consider other negative public interest impacts associated with designating LTD as an ETC. Specifically,

- Pursuant to the RDOF schedule, 103 census block groups, representing 7,481 locations in South Dakota will wait for up to six years to receive service from LTD. If LTD does not complete this project, the consumers in those 103 census blocks will continue to wait. South Dakota also represents only 1.4% of the locations that were won by LTD, so these locations will likely not be a high priority for the company.
- While consumers in 103 census block groups or 7,481 locations wait for service from LTD, the Federal Government 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 expected in the next one to two years. If LTD does not successfully complete its project, 103 census block groups will have missed out on this infrastructure funding and will remain unserved.
- While consumers in 103 census block groups or 7,481 locations wait for service from LTD, the USDA is preparing future rounds of Re-Connect grants (the most recent round was over \$1B). 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 block groups will have missed out on this funding and will remain unserved.

The state of South Dakota and our nation has an opportunity, through the Broadband Equity Access and Development program to connect all citizens to broadband. The risks associated with designation of LTD as a ETC in South Dakota is an example of why the public interest is not and cannot be static. The public interest looks very different now than it did last

year, let alone in 2006 when the administrative rule was written. In 2006, the Internet and broadband were still in their infancy and few, if any, had come to rely on them as they do today for communication, education, healthcare, commerce, and entertainment. The circumstances the PUC finds itself in demonstrate why the administrative rule at issue does not contain limiting language that limits the Commission's assessment of the public interest. While the five items listed in the rule are considered essential, a choice was made in drafting not to limit the Commission to those five items. The public interest changes.

Although the LTD lawyers argue otherwise, Hauer agrees that the public interest consideration requires an examination of other elements. Specifically, Hauer requested the Commission consider the following in its assessment of whether the public interest will be served by designating LTD as an ETC: (i) that LTD promises to invest in facilities and equipment, (ii) that broadband development will promote economic growth in rural areas, (iii) that LTD intends to open markets to competition, and that (iv) LTD's products to be innovative. TR 11:22-23, 113:1-5, 113:6-12, 113:14-17. It seems LTD only supports the addition of context to the South Dakota public interest evaluation when deemed beneficial.

c. SDTA's POSITION ON LTD'S CERTIFICATE OF AUTHORITY PROCEEDING IS IRRELEVANT

LTD cannot prove its request for ETC status is in the public interest. Therefore, LTD attempts to discredit SDTA and confuse the issue and the law.

In docket TC21-014, LTD asks this Commission for a Certificate of Authority. SDTA's unique interest in that docket pertains to SDTA member company service areas. LTD agrees it will not serve in rural service territories. As such, SDTA had no further interest in the docket and chose not to litigate the same.

The request for a certificate of service, and the request for ETC designation are entirely different. SDTA’s position in docket TC21-014 is irrelevant for purposes of evaluating whether LTD has met its burden of proof for designation as an ETC. The differences in law and purpose between the two regulatory processes is shown in the chart below:

<u>COA: Certificate of Authority</u>	VS.	<u>ETC: Eligible Telecommunications Carrier</u>
SDCL 9-31-71 – The Applicant must demonstrate sufficient technical, financial, and managerial <u>capabilities</u> to provide the local exchange <u>services</u> applied for.	VS	ARSD 20:10:32:43.07 – The provider must have: The <u>ability</u> to provide the supported services <u>throughout the designated service area</u>
Burden of proof = Capability = Having the potential or capacity	VS	Burden of Proof = Ability = The state of being able
Capability is judged based upon the <u>services</u> requested, not any measurable quantity or service area. In fact, the company could choose to never serve a single customer and not risk loss of its COA.	VS	Ability to provide service is judged based upon a designated area that includes a measured quantity to serve: 103 census block groups, over 7,000 locations
SERVICES requested for certification = <ul style="list-style-type: none"> • Facilities-based and resold local exchange and interexchange telecommunications services throughout the State of South Dakota, EXCLUDING rural areas pursuant to a stipulation between SDTA and LTD. • Service to enterprise and carrier customers outside rural areas pursuant to a stipulation between SDTA and LTD. • LTD does not have any current plans to provide switched voice local retail services or switched voice interexchange services to customers in South Dakota <p>See TC21-014.</p>	VS	AREA requested for ETC designation = Over 7,000 locations in the most high-cost geography and low population density.
LTD has provided the requested services in other states and can use the type of technology (fixed wireless) that it is most familiar with to serve customers. There is	VS	LTD’s application asserts it will serve all customers with fiber to the home. LTD has not yet developed any design, construction or operation plans. LTD has

<p>not, however, any COA requirement that it serves any customers at all.</p> <p>Without a service area or service population requirement, available information leads to the conclusion that LTD has the <u>capability</u> of providing this <u>type</u> of service.</p>	<p>never constructed or operated comparable infrastructure. LTD has never served the quantity of customers that it must serve if declared the RDOF winner. LTD has not developed a construction or service plan that demonstrates appreciation of the cost and scale of construction/service it must achieve in the coming years.</p> <p>The record contains no evidence to prove LTD has the <u>ability</u> to provide services <u>throughout the service area.</u></p>
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

When comparing the processes side, by side, it is easy to see how they differ. SDTA’s belief there is a lack of “litigable” issues in the COA proceeding has nothing to do with its legal position in the ETC proceeding.

In the ETC docket, LTD did not and cannot prove it has the ability to provide services throughout the entire service area. LTD is, therefore, left with no other option. As a result, it attempts to confuse its COA application with its request for ETC designation. However, its attempts have no merit in the law as the standard in COA proceeding is very different than an ETC proceeding.

III. *The Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier, 2001 SD 32.*

Upon the conclusion of the PUC hearing, Hearing Examiner Cremer instructed the parties to brief the applicability of *The Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier, 2001 SD 32.*

The Supreme Court decision in *GCC License* is the result of the Commission’s denial of GCC’s request for ETC designation. The GCC request for designation was made in 1998 before the Commission had adopted ARSD 20:10:43.07, the rule presently in dispute.

In GCC, the Commission determined that “an ETC must be actually offering or providing the services supported by the federal universal support mechanisms throughout the service area before being designated an ETC.” PUC Docket 98-146, Order dated May 19, 1999 Conclusions of Law, ¶6. The decision was based upon 47 USC 214(e)(1) which requires an ETC offer supported services throughout the service area. The Commission’s intent was to apply the plain reading of the law and apply “offer” as written in the present tense. After analyzing the intent of the Federal Code as a whole, however, the Court disagreed. The Court sought to interpret the intent and meaning of the Code as a whole rather than the word “offer” in isolation.

Unfortunately, the Supreme Court’s decision is not instructive regarding the analysis of ARSD 20:10:32:43.07 and the public interest. The public interest definition was not evaluated or otherwise reviewed by the Court in *GCC License*. Even if we stretch the Court’s decision in *GCC License* to find applicability here it remains unhelpful. SDTA has not taken a position that LTD must currently be providing services in South Dakota to obtain ETC designation.

The company’s current service in South Dakota or any other state could be used as evidence to help prove *ability* as required by ARSD 20:10:23:43.07. In fact, LTD did attempt to use its fixed wireless business as evidence of its ability. However, there is certainly other types of evidence that could have been used to demonstrate ability to provide services in the future. Other types of evidence could include: engineering, service or other operational plans, or testimony from those retained to provide engineering, planning, construction or staffing services. However, none of these things were offered by LTD because they are nonexistent. Therefore, LTD had to rely upon Mr. Hauer’s salesmanship and belief in his ability to figure it out as he goes to prove LTD’s ability thus qualifying it to accept millions of dollars in government funds.

IV. CONCLUSION

It appears Hauer will rely upon his salesmanship and his perceived ability to attract private capital rather than responsible planning. As Hauer testified, “construction costs will be what they will be.” Exhibit L-14, 11:1-8. Facts and data are of little concern to him. Rather, he seeks to collect millions of dollars to construct broadband in currently unserved areas in South Dakota and then figure it out. It is likely he will never “figure it out” and few, if any, of the South Dakota customers in these census blocks will ever receive broadband from LTD. Meanwhile, all these same unserved areas in South Dakota sit at risk of losing out on a once in a generation opportunity to bring connection and opportunity to citizens through the Broadband Equity Access and Deployment program.

The Commission has been put in a gate keeper position. The FCC specifically gave the Commission an important and preliminary role in the RDOF process. SDTA encourages the Commission to read applicable statutes and administrative rules with purpose and meaning. They exist to give this Commission authority to assess the ability of a prospective company seeking to impact the lives of South Dakota citizens.

The Commission gets its authority from ARSD 20:20:32:43.07. The rule requires this company to determine whether LTD has the ability to provide services throughout the entire service area. The service area is particularly relevant as it covers over 7,000 locations in South Dakota in some of our most high-cost unpopulated areas. What will it take to get the job done? What abilities must a company have to do it? Thompson, who works for hundreds of broadband companies nationwide and has engineered more than \$2.5B in fiber to the home networks, provided the Commission with a framework by which to make the determination. Given his experience nationwide with companies of all types and sizes, he recommends the Commission

evaluate financial, managerial, and technical ability of the applicant company. All three elements must be present to achieve the end goal of successful construction and operation of a fiber to the home broadband network.

LTD provided no evidence of its ability. Rather, Hauer asks the Commission to trust him and use his past fixed wireless business as proof. LTD has been providing wireless service in Iowa for a number of years and the amount of support LTD expected to receive there was approximately half that of South Dakota and yet the Iowa Utility Board chose to deny LTD broadband the expansion of ETC designation based on Iowa's past experience.

Hauer believes RDOF money is a "bird in the hand" and he asks the Commission to risk millions of dollars of federal money available to the state through the Broadband Equity Access and Deployment program. TR 32:20-21. At best, however, the citizens in the LTD census blocks have a feather in their hand, not a bird. Based upon the available evidence, LTD has nearly zero probability of success. Mr. Thompson examined all fifteen states in which LTD was the winning bidder. He found the company will lose \$6 Billion in the first six years, at least. TR193:10-11. For LTD to acquire the capitol needed from outside investors, while Mr. Hauer retains control, the company must be valued at over \$12 Billion. TR 201: 2-4. Despite Mr. Hauer's ambitions and his well-rehearsed sales pitch, the Commission decision must be based in fact and evidence – not empty promises.

The facts show that LTD is not able to provide services throughout the requested ETC service area. The facts show that, allowing LTD to experiment with its unproven and unsubstantiated theories on cost reduction will put South Dakota citizens at risk for losing all access to the millions of dollars available through the Broadband Equity Access and Deployment Program along with other state and federal programs. As a result, the Commission should find it

is not in the public interest to designate LTD as an ETC in South Dakota. The Commission should deny LTD its requested ETC designation in South Dakota.

DATED this 25 day of January 2022.

SOUTH DAKOTA TELECOMMUNICATIONS ASSOCIATION

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