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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

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

**Docket No. TC21-001**

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Comes now the South Dakota Telecommunications Association (herein SDTA) and submits this objection to LTD Broadband LLC’s (herein LTD) request for reconsideration or rehearing.

On March 23, 2021, the South Dakota Public Utilities Commission (herein Commission) issued the Final Decision and Order Denying LTD’s Application for Designation as an Eligible Telecommunications Carrier in South Dakota. On April 20, 2022, LTD requested the Commission reconsider its decision or provide a new hearing to take new evidence.

The Commission should deny LTD’s request because:

- (i) The Commission fully heard, considered and properly ruled on all legal arguments presented by LTD in the initial proceeding.
- (ii) The Commission properly considered and weighed the facts presented by the parties and the record supports all fact findings.

- (iii) The product price information LTD desires the Commission to review is not “new evidence” as the term is defined in law. Furthermore, the information has not been subject to the discovery and cross examination process. SDTA disputes the validity of the product price information in detail, in a later portion of this brief. However, putting the questionable validity of the product price information aside, the information was available prior to the Commission’s hearing in December 2021. LTD simply chose not to seek it out prior to then or present it at the Commission hearing. The evidence is only “new” to LTD because it failed to present a case regarding cost at hearing.

If the Commission decides to take new evidence, then due process dictates SDTA must be given an opportunity to conduct discovery, cross examine LTD witnesses and present evidence of its own.

**I. The Commission acted within the authority given to it by the US Code and FCC.**

LTD argues the Commission applied SD Administrative Rules in a way that is not “consistent with the separation of functions between the FCC and the Commission.” In making this argument LTD points to the Rural Digital Opportunity Fund (herein RDOF) proceeding, arguing the Commission should forgo the state ETC process, and defer to the Federal Communications Commission (herein FCC) in its RDOF process and applicant

evaluation<sup>1</sup>. LTD is incorrect. The Commission correctly performed its function and role as granted to it by Congress.

LTD argues the Commission lacks jurisdiction despite clear RDOF procedural language from the FCC that defines and preserves the Commission's role in ETC applications. The FCC had no intent to preempt or modify the state process. Quite the opposite, the FCC instructed states retain and perform their ETC designation 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)

By design, in RDOF, the state ETC proceeding occurs first. Long forms are considered incomplete by the FCC until the RDOF applicant obtains ETC designation. The order of things, as established by the FCC, provides additional verification that states remain the desired first gatekeepers of the USF support mechanism and the hundreds of millions of dollars that stand to be distributed each year to qualifying companies. The RDOF proceeding was not intended to displace this long standing Congressionally granted state role.

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<sup>1</sup> The FCC has not issued an opinion or decision regarding LTD's RDOF application for South Dakota.

## **II. The Commission has legal authority to establish state ETC requirements**

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). The Commission established such regulations consistent with Universal Service principals in ARSD 20:10:32:43.

LTD is unable to satisfy the regulations in ARSD 20:10:32:43.07. Therefore, it ignores 47 USC §254(f) and argues Commission’s jurisdiction is limited by 47 USC §214(e). The argument is incorrect. The Commission has the legal authority, expressly given to it by the Federal Code to adopt and enforce state “regulations to provide for additional definitions and standards to preserve and advance universal service...” 47 USC §254(f).

Additionally, the FCC specifically interpreted Congressional intent as it applies to the ETC process and finds that,

“Section 214(e)(2) 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. States that exercise jurisdiction over ETCs should apply these requirements in a manner that is consistent with section 214(e)(2) of the Act. Furthermore, state commissions, as the entities most familiar with the service area for which ETC designation is sought, are particularly well-equipped to determine their own ETC eligibility requirements.”

*In the matter of Federal-State Board on Universal Service*, CC Docket No 96-45, February 25, 2005. See also, *Texas Office, Public Utility Counsel v. F.C.C.*, 183 F.3d 393 (5th Cir. 1999) (The Court found that states may subject carriers designated as ETCs to

eligibility requirements in addition to the eligibility requirements detailed in section 214(e) of the Telecommunications Act.) The Commission did not make legal error.

### **III. The Commission properly applied ARSD 20:10:32:43.07.**

ARSD 20:20:32:43.07 (properly adopted by the State of South Dakota pursuant to 47 USC §254(f)), requires the Commission affirmatively find the request for ETC designation is in the public interest before granting ETC privileges to any company. LTD failed to meet its burden and establish its designation as an ETC is in the public interest. Therefore, the company takes issue with the Commission's legal application of the Administrative Rule. Specifically, the 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. (emphasis added).**

SDTA argues and presented evidence to show LTD lacks the "ability to provide the supported serviced throughout the designated service area within a reasonable timeframe...". The Commission did not "judicially amend" the rule nor did it apply the rule differently or in a discriminatory fashion as LTD alleges. Rather, it heard testimony and reviewed evidence to determine whether LTD has the ability as described in the rule. LTD provided very little evidence and relied entirely on the hollow promises of Corey Hauer who does not have the expertise to testify to the company's ability.

- (a) The Commission's interpretation of the word "ability" as written in ARSD 20:10:32:47.07 is proper.

The Commission properly adhered to the rules of statutory construction in seeking to understand the meaning of "ability" as used by the legislature in ARSD 20:10:32:43.07. The Commission interpreted the Administrative Rule in accord with legislative intent. "Such intent is derived from the plain, ordinary and popular meaning of statutory language." *Unruh v. Davison Cnty*, 2008 SD 9, ¶5, 744 N.W.2d 839 (S.D. 2008). However, the word, "ability" is not defined in the Administrative Rule. As a result, the term must be given a "reasonable, natural and practical meaning." *Paul Nelson Farm v. SD Dep't of Revenue*, 2014 S.D. 31 ¶ 11, 847 N.W.2d at 554.

Black's Law Dictionary defines the word "ability" as, "the capacity to perform an act or service." *Black's Law Dictionary*, 3, Seventh Edition. Webster's dictionary defines "ability" as: (i) possession of the means or skill to do something; (ii) talent, skill, or proficiency in a particular area. "Ability." *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/ability>. Accessed 29 Apr. 2022. While the definitions are instructive, the analysis does not end because the ability to perform brain surgery, build a rocket or land a double back-flip dismount off the uneven bars is different than the ability to build a reliable, sustainable broadband network to serve over 7,000 locations in South Dakota in a way that promotes Universal Service Goals. Therefore, the Commission sought out and applied the "reasonable, natural and practical meaning" of the word according to broadband industry standards. *Paul Nelson Farm*, 2014 S.D. When construing a statute, a technical term of art, "should be interpreted by reference to the trade or industry to which they apply." *Verizon Wireless v.*

*Kolbeck*, 529 F. Supp. 2d 1081 at ¶71 (D.S.D. 2007) citing *Louisiana Public Service Commission v. FCC*, 476 US 355, 372 (1986).

Larry Thompson, found by the Commission to be a qualified expert in the field of broadband construction and operation, testified that: to determine whether a company has “ability” to provide broadband services as LTD claims it can, (i) financial, (ii) managerial and (iii) technical capabilities should be considered. 12/1/21, TR 214:25, 215:1-4. Nether 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 (LTD’s only witness) asks the Commission to review LTD’s financial, managerial, and technical capabilities. Exhibit L-2, 4:21-23, 5:1-23, 6:1-4.

The Commission did not add language to the administrative rule. Rather, it considered what “ability” means in the context of the Administration Rule and the ETC process as a whole. The Commission complied with the rules of statutory construction.

The Certificate of Authority (COA) process is irrelevant. In COA proceedings, the Commission reviews financial, managerial, and technical capabilities to determine whether the applicant has the capability to provide the service absent a required service area or timeline to do it.<sup>2</sup> In fact, companies with a Certificate of Authority are not required to ever provide services. Furthermore, the purpose of certification (in a COA proceeding) has no connection to the protection or safeguarding of government funds.

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<sup>2</sup> **20:10:32:05. Opportunity for hearing -- Burden of proof.** The applicant and other parties to the application may request a hearing on the application for a certificate of authority to provide local exchange services. In the application proceeding, the telecommunications company filing **the application shall have the burden of proving that it has sufficient technical, financial, and managerial capabilities to provide the local exchange services applied for** consistent with the requirements of this chapter and other applicable laws, rules, and commission orders.

In contrast, in an ETC proceeding, the company's ability is reviewed to determine whether the applicant has the ability to provide the promised services throughout the service area and within a particular time frame.<sup>3</sup> The company must be able to provide the service to every reasonable request for service in the entire service area. Additionally, an ETC company is given substantial government funds to provide the service. A company is not eligible to receive millions of dollars of government money until it proves it has the ability to provide services throughout the service area. In other words, the state ETC process is in place to protect government dollars. In this case, the Commission is charged with protecting \$46 Million dollars from waste, fraud, or abuse.

Bottom line, the COA and ETC proceedings are very different. The two proceedings have a different purpose, different scope and therefore a different process.

Although the COA and ETC proceedings serve a different telecommunications purpose, the COA language in ARSD 20:10:32:05 can be used to support the Commission's interpretation of "ability" in this ETC proceeding. In the applicable COA administrative rule (ARSD 20:10:32:05) the term "capability" is used. In the ETC administrative rule (ARSD 20:10:32:43.07) the word "ability" is used but not defined. If "ability" and "capability" mean the

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<sup>3</sup> **20:10:32:43.07. Public interest standard.** 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. If an applicant seeks designation below the study area level of a rural telephone company, the commission shall also conduct a creamskimming analysis that compares the population density of each wire center in which the applicant seeks designation against that of the wire centers in the study area in which the applicant does not seek designation. In its creamskimming analysis, the commission shall consider other factors, such as disaggregation of support pursuant to 47 C.F.R. § 54.315 (January 1, 2006) by the incumbent local exchange carrier.

same thing, as LTD alleges, then according to the rules of statutory interpretation, the “statute as a whole, as well as enactments relating to the same subject” should be used to determine meaning. (emphasis added). *Dale v. Young*, 2015 S.D. 96 ¶ 6, 873 N.W.2d 72. Although the COA rules and the ETC rules serve a different purpose, they are both related to telecommunications companies. The rules of statutory interpretation dictate, contrary to LTD’s position, that the language in the COA administrative rule is instructive and supports the Commission’s interpretation of the term, “ability.”

It was not legal error for the Commission to determine the meaning of ability according to the “reasonable, natural and practical meaning” of the word consistent with broadband industry standards. *Paul Nelson Farm*, 2014 S.D. *Verizon Wireless*, 529 F. Supp. 2d 1081. Furthermore, LTD’s attempt to confuse the analysis with a different type of Commission telecommunications proceeding has no legal merit other than to provide guidance and support regarding the meaning of an undefined term in the applicable Administrative Rule.

(b) The Commission did not apply the law in a discriminatory manner or in a way that inhibits competition. Rather, the facts presented in LTD’s application are different than any ETC filing made in South Dakota to date.

LTD fails to recognize the project set forth in its ETC filing in South Dakota is unique and complex. That failure in itself is problematic and supports the Commission’s decision. If granted ETC status, LTD stands to receive \$14 Million before it even breaks ground in South Dakota. Thereafter, its receipt of \$32.6 Million and its promise to serve 7,481 locations in South Dakota represents a tremendous project with tremendous consequences. Those consequences represent either grand opportunity for South Dakota citizens or disaster that will haunt the State for generations to come. The Commission is

simply doing its job when it expected LTD, just like all other ETC applicants, to prove its ability to provide the required service to the required population, within the required timeline. LTD's failure to understand that its facts are different than all other filings that proceeded it is both baffling and concerning.

The Supreme Court recognizes, in various types of cases, that different facts result in a different analysis and can drive a different conclusion. See *Iversen v. Wall Bd. of Educ*, 522 N.W.2d 188 (S.D. 1994), *Grynberg v. Citation Oil Gas Corp.*, 573 N.W.2d 493 (S.D. 1997), *Everly v. Black Hills U. Mining Co.*, 63 S.D. 138 (S.D. 1934). The Commission, in its findings recognized the various ways LTD's application for ETC status is different than others the Commission has seen. Those differences include but are certainly not limited to:

- LTD is the first wireline, fiber based ETC applicant in South Dakota to seek designation to serve various remote areas in the Black Hills. It is common knowledge that the geographic, geological, ecological, permitting, and cultural implications of construction in the Black Hills of South Dakota increases the cost to build, the time it takes to build and requires unique construction ability. LTD is the first company to seek ETC designation in these areas of the Black Hills to build a fiber network yet failed to provide any information regarding how it intends to accomplish the task. The new facts (Black Hills fiber construction in the RDOF areas) warrant new and different questions and does not amount to discrimination. Rather, LTD simply failed to offer evidence of or prove its ability to serve in various areas of the state. LTD's application, thus this proceeding cannot be compared to any other the Commission has ever received due to the new areas LTD proposed to serve with fiber. The Commission's concern regarding LTD's lack of deployment, permitting, easement acquisition and cultural preservation plan was not in error.
- LTD is the first ETC applicant in South Dakota to transition from historic wireless infrastructure and wireless service to a fiber-to-the-premises network providing fiber service. As such, LTD has no prior record of fiber construction, maintenance, or service to the magnitude of their planned network in South Dakota. As a result of these novel facts, LTD had to address concerns that simply did not exist in any other ETC application ever filed in

this State. The Commission expected facts to reasonably demonstrate LTD can successfully make the fiber transition thus have the ability to provide service throughout all areas it applied to serve. The ability including financial resources, managerial and technical skill necessary to build a fiber network are different than those necessary to build a wireless network. An unsuccessful transition will result in a loss of the \$46.5 Million dollars and unserved South Dakota citizens. Unsuccessful deployment of the network results in complete lack of ability to serve all South Dakota citizens throughout the designated service area. The Commission did not error in raising concern regarding LTD's lack of deployment or managerial plan.

- The size and scope of LTD's ETC application is unlike any the Commission has ever seen. 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 15 states. 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. To put this in perspective LTD would need to turn up nearly 250 customers every day for the next six years to meet their FCC buildout obligations.<sup>4</sup> This would be a daunting task for an experienced fiber to the premises provider, much less one who has never deployed nor operated a fiber to the premises network of any size. These customers are also located in some of the most remote and most costly areas to serve. A project of this size presents different factual concerns. The Commission properly evaluated the different facts LTD project presents.
- LTD is the only RDOF related applicant in the state of South Dakota that was not merely expanding its existing ETC service area. All other RDOF related ETC filings in South Dakota represented an expansion of a current company's ETC area. As a result of the ETC expansion rather than 100% new construction, some infrastructure, personal and structure was in place. The LTD facts are very different thus leading to different issues. The Commission did not error in raising engineering concerns. The different and complicated facts led to the procedural differences. LTD's argument that the law was applied differently is incorrect. Rather the process was different only due to the very different facts that the LTD application presents when compared to others.
- LTD is the first ETC application in South Dakota to claim all construction will be done internally. This fact raised questions that simply didn't occur in other ETC filings. While LTD fails to recognize the risk of unsuccessful construction on LTD's ability to deliver services to the entire service area, the Commission did. The Commission's concern regarding LTD's internal construction plan, once again, relates entirely to the company's ability to

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<sup>4</sup> Assuming a 70% penetration and 250 installation days per year.

provide the service to the service area. LTD did not provide any evidence regarding its ability to internally perform the massive construction project. The Commission did not error in considering LTD's plans for in-house construction in assessing its ability to provide services.

None of the information the Commission expected from LTD inhibits competition or new entrants. Rather, all the missing information of concern to the Commission goes to LTD's ability to provide the required services throughout the entire service area. Either LTD lacks evidence of its ability to build the promised broadband network or it chose to not to provide the evidence due to its belief that the Commission lacks jurisdiction. Either way, LTD did not provide sufficient evidence of its ability to provide services to the entire service area in South Dakota within the established timeframe.

LTD misrepresents the Commission's action in prior ETC filings. Take for example, dockets TC14-019 and TC15-002. The applicants did not intend to build their own network in either of these cases. Therefore, the issues and questions were once again, different. However, the data requests on file demonstrate the detailed analysis done by Commission Staff focusing on financial, managerial, and technical abilities. While it is true the Commission did not consider the managerial, financial, and technical capabilities of the applicants, that is only because the applicant withdrew its application before the Commission could do so. LTD is, therefore, wrong to assert that managerial, financial, and technical capabilities are not considered. Fact is, the Commission has simply not received an ETC application from a company with questionable ability, wherein the company didn't withdraw.

- (c) The Commission did not impose an additional requirement for “similar business experience.”

LTD misrepresents why the Commission addressed LTD’s “prior business experience” in its Order, Findings of Fact, paragraph 67, 68. LTD itself asked the Commission to rely upon prior business experience to demonstrate the ability to provide services throughout the entire service area. 12/1/21 TR 75:24 – 76: 1-9. Therefore, the Commission was not wrong addressing LTD’s request to consider prior experience. Contrary to LTD’s representation, “prior business experience” was not a required element of proof used by the Commission. Rather, the Commission, in its Order simply denied the usefulness of LTD’s offered “prior experience.” The “prior experience” offered by LTD was based upon a different type of services with no technical, geographic, mechanical, managerial, or physical similarities to the ability necessary to build the promised broadband network in South Dakota.

It appears the Commission also used TLD’s lack of prior experience for purposes of credibility. Paragraphs 67 – 69 of the Findings of Fact in the Commission’s Order lists the facts considered by the Commission. Based upon those listed facts, the Commission concludes LTD and Mr. Hauer lack relevant experience, thus lack credibility. In contrast, Paragraphs 77 and 82 describe the facts the Commission considered to determine Larry Thompson experience and credibility. “Determinations of lay and expert witness credibility are factual questions.” *Wiedmann v. Merillat Industries*, 623 N.W.2d 43 (S.D. 2001). The Commission clearly set forth the facts it considered to weigh the testimony offered by witnesses. The Commission did not error in considering prior business experience one such fact.

#### **IV. The Commission Findings of Fact are Correct**

The Commission's findings of fact are correct.

Paragraph 26 – LTD's asks for a "pass" in California and blames its attorney for failing to obtain the necessary ETC designation by the June 7, 2021 deadline established by the FCC. The FCC did not accept this excuse, and neither should the Commission. See Exhibit A. The Commission's finding is correct.

Paragraph 33 and 34 – LTD seeks to soften the RDOF ETC deadline and the fact it failed to meet the deadlines. The FCC referred to June 7, 2021 (180 days after the FCC identified the winning bids) as a deadline and it is not factual error for this Commission to do the same.

"The Commission established a *deadline* for submitting this documentation of 180 days after the release of the public notice identifying Auction 904 winning bidders. This public notice was released on December 7, 2020, effectuating a *deadline* of June 7, 2021 for applicants to submit the required ETC documentation." See Exhibit A.

While the FCC has waived the June 7, 2021 deadline in some circumstances for some RDOF applicants, it has not done so for LTD in South Dakota. This finding is correct.

Paragraph 59 – This objection is addressed previously.

Paragraph 63 – LTD did not present any useful detail either on direct or on cross examination regarding how it calculated its construction costs. Rather, Mr. Hauer provided very high-level generalizations regarding how costs were estimated. The Commission accurately summarized the high-level general statements made by Mr. Hauer in this finding. SDTA does not object, however, to inclusion of other methodology statements made by Mr. Hauer to the extent LTD believes they exist. Ultimately, Mr. Hauer is not qualified to determine construction costs given is lack of education, expertise, or experience and he did not provide any level of detail that can be relied upon. As a result, any such general statement made by him does not change the result.

Paragraph 65 – LTD's objection to this finding is yet another example of its inability to acknowledge the difference between its current business model and what it must do to serve all RDOF areas in South Dakota. With that said, SDTA does not object to modifying this Finding to incorporate the testimony Mr. Hauer offered regarding his very small operation in Tennessee. The small fiber operation in Tennessee does not change the fact that LTD must, "hire and train hundreds of construction workers to build a labor force capable of meeting LTD RDOF build-out commitments" during a time of labor and supply chain shortages. 12/1/21, TR 100: 17 – 20.

Paragraph 66 – This objection is addressed previously.

Paragraph 67 – Mr. Hauer's prior business experience does not demonstrate, prove, or otherwise suggest he or LTD has the ability to build the RDOF network in South Dakota to serve all locations in all applicable South Dakota areas. In its post hearing brief, SDTA pointed to the various ways the record supports the fact that Mr. Hauer lacks experience. SDTA relies upon the

brief as a complete analysis. However, it is worth highlighting some of the most glaring areas in which LTD and Mr. Hauer lack experience:

- a. LTD has no experience with a government project of this scope. In the CAF Phase II auction, LTD won \$1.3 million vs the \$1.3 billion in RDOF. CAF Phase II involved 1,407 locations vs. the 528,088 in RDOF. Exhibit SDTA-8, 1:16-22, 2:1-8. Furthermore, now it seems LTD is struggling to even meet its CAF Phase II obligations. See Exhibit B.
- b. LTD has little experience operating a fiber network and no experience in building a fiber network from scratch. LTD serves 259 customers in South Dakota. Exhibit L-9, page 3. None of the 259 customers are served by a fiber to the home network. 12/1/21, TR 54:23. LTD's only fiber to the home network is in Tennessee and serves 448 customers. In contrast to what LTD proposes to do in SD, the Tennessee network was purchased and not built by LTD. Exhibit L-13, page 1, 12/1/21 TR 132: 21-23.
- c. LTD has no experience in serving a large customer base. Currently, LTD serves 18,000 customers nationwide. 12/1/21 TR, 109: 22-25, 110:1 – 9. In RDOF, LTD must serve 528,088 locations nationwide. There are numerous complexities in transitioning from a 18,000-customer network to a 528,088-location network. LTD's weak credibility is further damaged by its belief that its small wireless business provides it with sufficient experience to build a nationwide broadband network from scratch to serve over ½ a million locations. The number of fiber to the premises locations currently served by LTD represents less than .001% of the number that LTD provisionally won in the RDOF auction.
- d. LTD does not have adequate construction experience. LTD does not customarily build towers for its wireless business. In most cases, it does not construct the tower itself. 12/1/21 TR 53:12-23. LTD has constructed only 6 towers total. *Id.* In other words, the management team has little experience in constructing or maintaining owned facilities regardless of type.

Paragraph 68 – LTD did not provide evidence regarding its abilities. As previously stated, it either has no evidence or it doubled down on its belief the Commission does not have jurisdiction. Either way, LTD had the burden of proving its ability as the Administrative Rule requires. LTD states in this objection that the Commission must “demonstrate LTD's inability.” That is legally incorrect. LTD has the burden of proving it has ability. LTD failed to do so.

SDTA has no objection if LTD prefers the word “location” rather than “customer” be used. Use of that language is inconsequential to the result.

Paragraph 69 – In subpart d of this paragraph, the Commission acknowledges the very small Tennessee operation purchased by LTD. However, SDTA does not object to modification of Paragraph 69 to further acknowledge it. The Tennessee operation is not comparable, in any way, to what LTD proclaims (but fails to prove) it can accomplish in RDOF and is therefore not consequential to the result.

Paragraph 70/71 – SDTA supports the Commission Findings as they are supported by the record. LTD did not present evidence of technical, engineering, networking, or staffing plans.

Paragraphs 72, 75, 76, 78, 79, 80, 84, 85, 86, 87, 89, 90, 91, 92, 95, 96 – SDTA supports the Commission Findings as they are supported by the record. LTD did not provide sufficient evidence to meet its burden. The Commission properly weighed the credibility of the witnesses when conflicting evidence was presented.

Paragraph 78 – This objection is addressed previously.

Paragraph 88 – See SDTA response to Paragraph 33 and 34.

## **V. The Commission should not take additional evidence.**

The Commission should deny LTD’s request to present evidence on the cost of materials. At hearing, Mr. Hauer offered a high level, undetailed belief regarding the cost of construction. He did not, however, present any supporting documentation or basis for his belief other than a high-level description of his methodology. Furthermore, he did not call upon any other witness with firsthand knowledge regarding the cost of construction. Information regarding the cost of materials and vendors that sell fiber network materials were available at the time of hearing in December of 2021. Mr. Hauer simply did not offer the information.

It is inaccurate to claim cost of materials is “new evidence.” Materials always had a cost associated with them. The cost of materials could only be considered “new” for rehearing purposes if: Mr. Hauer had presented material cost evidence at hearing, and then later the price changed in a way that the hearing outcome would be different. The problem with LTD’s request is that Mr. Hauer did not provide evidence of material cost at the hearing. The South Dakota Supreme Court holds:

“Before a motion for a new hearing based on new evidence may be granted, it must be shown that the evidence was not discoverable before the hearing and that it would have changed the outcome. *Massey Ferguson Credit Corp. v. Bice*, 450 N.W.2d 435, 441 (S.D. 1990). The decision whether to grant a new

hearing based on a claim of newly discovered evidence rests in the first instance with the Board and we will not disturb that decision on appeal unless it appears affirmatively from the record that there has been an abuse of discretion. *State v. Steele*, 510 N.W.2d 661, 664 (S.D. 1994); *Enchanted World Doll Museum v. Buskohl*, 398 N.W.2d 149, 153 (S.D. 1986).”

*Application of Widdison*, 539 N.W.2d 671, 677 (S.D. 1995). LTD’s Motion must be denied.

There is nothing in South Dakota code that prevents LTD from reapplying for ETC status. However, Commission dockets are not indefinitely open for parties to supplement and add information with a continual evaluation by the Commission. The Commission established a procedural schedule in this case. Either LTD failed to abide by it, made a strategic decision not to provide the Commission with technical, managerial, or financial details of its operation, or it was lacking the information altogether. Regardless, the time to present evidence in this docket is over. If LTD desires to open a new docket and reapply for ETC status (despite the long-passed RDOF ETC deadline) it can do so.

If, however, the Commission intends to take new evidence, then SDTA must be afforded the opportunity to conduct discovery, cross examine witnesses, call witnesses of its own and offer evidence. The information LTD provided, at a minimum, raise questions and concerns related to the following:

- The cost to construct a FTTP network in Cory Hauer’s confidential affidavit are unrealistically low. One only needs to total the invoices for the project (which were included in the affidavit) to find that the material prices alone were more than six times the cost per mile as is claimed in the affidavit.
- The cost of the fiber cable alone in the included affidavit was significantly more per mile than the total installed cost per mile claimed by Cory Hauer. In addition, there does not appear to be enough fiber cable included in the invoices to complete the number of miles

claimed in the affidavit, so the cost is likely higher than what is represented in the invoices.

- The costs in the affidavit did not address any of the costs associated with installation labor, engineering, aerial make ready, pole loading analysis, clearing, guying and anchoring of poles, permitting, right of way, or any drops. In SDTA Members' experience, labor (whether internal or external) is significantly more than the material costs.
- A similar project to the one described in the affidavit was recently competitively bid by Vantage Point. The cost for this project when including the contractor materials and labor (including the materials and labor associated with splicing) was \$22,540 per mile. As in the affidavit, this does not include any costs associated with engineering, aerial make ready, pole loading analysis, clearing, guying and anchoring of poles, permitting, right of way, or drops.

If the Commission chooses to take new evidence, SDTA requests the Commission also consider LTD's failure to meet CAF Phase II obligations, See Exhibit B and the FCC's recent determination that LTD violated RDOF procedures. See Exhibit C. The FCC's findings regarding LTD's breach of RDOF rules also raises concerns regarding its ability to finance the project and the truthfulness of Mr. Hauer's testimony at the Commission hearing.

SDTA objects to the Commission opening the record to take new evidence. If, however, the Commission does take new evidence then SDTA requests: (i) the opportunity for discovery, (ii) the opportunity to cross examination LTD witnesses, (iii) the opportunity to call its own witnesses and (iv) that SDTA be permitted to offer its own "new evidence" including the implications and impact of Exhibit B and C.

## **VI. Conclusion**

The Commission should deny LTD's request for both reconsideration and rehearing. 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.

LTD's application presents unique facts. The company proposes to establish a service area in size, scope and location unlike any other in South Dakota. However, LTD did not provide evidence of its ability to accomplish the job. LTD offered no more than high-level projections and estimates from a witness that lacked the basic qualifications to provide information regarding the company's ability.

The product price information LTD desires the Commission to review is not new evidence as defined in the law. Product price information was available prior to the Commission's hearing in December 2021. LTD simply chose not to seek it out prior to then or present it at the Commission hearing. Furthermore, the legitimacy and validity of the offered information is questionable. If the Commission takes new evidence, SDTA requests the opportunity to conduct discovery, cross examine witnesses and offer testimony of its own. In addition, if the proceeding is opened for new evidence, SDTA requests the opportunity to present new evidence of its own. It is far more appropriate for LTD to refile and initiate a new proceeding rather than attempt to fill in blanks after-the-fact.

SDTA respectfully requests the Commission deny LTD's Motion.

DATED this 9 day of May 2022.

SOUTH DAKOTA TELECOMMUNICATIONS ASSOCIATION

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