

**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**

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**STAFF’S RESPONSE TO LTD’S
PETITION FOR RECONSIDERATION
OR HEARING**

TC21-001

COMES NOW the South Dakota Public Utilities Commission Staff (Staff) and hereby files this Response to LTD Broadband LLC’s Petition for Reconsideration or Hearing.

Background

On January 7, 2021 (filed January 6, 2022, after close of business), the Public Utilities Commission (Commission) received an Application for Designation as an Eligible Telecommunications Carrier (ETC) for purposes of receiving federal universal service support (Application) from LTD Broadband, LLC (LTD). This Application stemmed from LTD being the successful bidder in the FCC’s RDOF auction for a number of census blocks in South Dakota. The Application specified LTD is a fixed wireless and fiber optic broadband internet service and voice-over-internet (VOIP) provider. (Ex. L-3, pg. 2). LTD was a winning bidder in the Federal Communications Commission’s (FCC) Rural Digital Opportunity Fund (RDOF) Phase I auction. The RDOF Phase I auction was focused on “census blocks that are wholly unserved with broadband speeds of at least 25/3 Mbps.” LTD’s South Dakota RDOF service area consists of 103 census block groups for 7,481 locations in South Dakota. (Exhibit L-3, Application pg. 1).

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

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

On March 21, 2022, the Commission issued a Final decision and Order Denying Application for Designation as an Eligible Telecommunications Carrier in Certain Census Blocks; Notice of Entry of Order (Order). Specifically, the Order found designating LTD as an ETC would not be in the public interest for a multitude of reasons. (Order pages 10-14).

On April 20, 2022, LTD filed a Petition for Reconsideration or Hearing asserting the Commission committed legal error in its decision, the Commission's finding of fact are clearly erroneous and that newly discovered evidence established LTD can deploy its network within a reasonable time.

Legal Authority

The Commission does have authority to either grant the request for reconsideration or rehearing for either error or newly discovered evidence if applied for within 30 days of the decision and reasoning is provided. LTD did make timely application and provide reasoning for the request in accordance with ARSD 20:10:01:29 and 20:10:01:30.01. The Commission is not required to reconsider its decision nor grant a rehearing as such a decision is within the Commission's discretion, but the Commission does have the authority to do so. Should the

Commission decide not to grant LTD's Petition, LTD could seek judicial review by appealing the Commission's Order. Such an appeal would not consider additional evidence, but it would determine whether the Commission's Order was in error or whether findings of fact were erroneous.

An agency's conclusions of law are reviewed de novo. *In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 S.D. 5, ¶ 26, 744 N.W.2d at 602. "[Q]uestions of law, including statutory interpretation, are reviewed de novo." *Pesall v. Montana Dakota Util. Co., et al.*, 2015 S.D. 81, ¶ 6, 871 N.W.2d 649. No deference is given to the Commission's decision.

The Commission's "findings of fact are reviewed under the clearly erroneous standard . . . A reviewing court must consider the evidence in its totality and set the [PUC's] findings aside if the court is definitely and firmly convinced a mistake has been made." *In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 S.D. 5, ¶ 26, 744 N.W.2d 594, 602 (citing *Sopko v. C & R Transfer Co., Inc.*, 1998 SD 8, ¶ 7, 575 N.W.2d 225, 228-29). The Court is to give great weight to findings and inferences of an agency on factual questions. *Sopko v. C & R Transfer Co., Inc.*, 1998 SD 8, ¶ 6, 575 N.W.2d 225, 228-229. "Factual findings can be overturned only if we find them to be 'clearly erroneous' after considering all the evidence. SDCL 1-26-36; *Permann v. South Dakota Dept. of Labor*, 411 N.W.2d 113, 117 (S.D. 1987). Unless we are left with a definite and firm conviction a mistake has been made, the findings must stand. The question is not whether there is substantial evidence contrary to the findings, but whether there is substantial evidence to support them." *Abild v. Gateway 2000, Inc.*, 1996 S.D. 50, ¶ 6, 547 N.W.2d 556, 558. On factual issues, courts "give great weight to the findings and inferences made by the agency on factual questions." *Woodcock v. City of Lake Preston*, 2005 SD 95, ¶ 8, 704 N.W.2d 32, 34. The requirement in SDCL 1-26-36(5) that the Court is to look at the whole record, does not, however, allow the Court to substitute

its judgment for the Commission's judgment as to the weight of evidence on questions of fact. *City of Brookings v. Department of Environmental Protection*, 274 N.W.2d 887, 890 (S.D. 1979). “All conflicts in the evidence must be resolved in favor of the trial court's determinations. The credibility of the witnesses, the weight to be accorded their testimony, and the weight of the evidence must be determined by the [circuit] court and we give due regard to the [circuit] court's opportunity to observe the witnesses and the evidence.” *In re Estate of Dokken*, 2000 SD 9, ¶ 10, 604 N.W.2d 487, 490-91 (internal citations and quotation marks omitted).

Analysis

The Commission did not exceed the authority in statute and administrative rule in finding that granting LTD ETC designation is not in the public interest. 47 U.S.C §214(e) established a framework for state ETC designation along with specific issues for states to consider when making an ETC determination. While this federal statute does establish three factors discussed by LTD, these are not the only factors to be considered by a Commission in determining whether to grant ETC designation. The FCC issued further guidance on this statute in FCC 05-46 which specifically contemplates Commissions making public interest determinations when considering ETC Petitions under 47 U.S.C 214(e). Under the Chevron doctrine, recognized by the Court in *In re GCC* federal agency interpretations of the statutes it administers are given “highly deferential review” *Id at* 482, citing *Chevron USA v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). Applying Chevron, the Commission was not in error to make a public interest determination nor was the Commission’s decision outside of the scope of the Commissions own rules regarding the public interest in ARSD 20:10:32:43.07.

The applicable portion of ARSD 20:10:32:43.07 requires that:

Prior to designating an eligible telecommunications carrier, the commission shall determine that such designation is in the public interest. The commission shall consider the benefits of increased consumer choice, the impact of multiple designations on the universal service fund, the unique advantages and disadvantages of the applicant's service offering, commitments made regarding the quality of the telephone service provided by the applicant, and the applicant's ability to provide the supported services throughout the designated service area within a reasonable time frame. In addition, the commission shall consider whether the designation of the applicant will have detrimental effects on the provisioning of universal service by the incumbent local exchange carrier.

In reviewing whether LTD has met this standard, ARSD 20:10:43:07 specifies the Commission consider 1) benefits of increased consumer choice, 2) the impact of multiple designations on the universal service fund, 3) the unique disadvantages of the applicant's service offerings, 4) commitments made regarding the quality of telephone service provided by the applicant and 5) the applicant's ability to provide the supported services throughout the designated service area within a reasonable time frame. In this case, the Commission found granting LTD ETC designation was not in the public interest under section 5, specifically that LTD did not show the ability to provide the supported services throughout the designated service area within a reasonable time frame. This was a fact-based determination and should be considered under the clearly erroneous standard.

The Commission's findings of fact are not erroneous to necessitate reconsideration of the Order. In this case, LTD has asserted a number of PUC's findings of fact supporting the Commission's determination that granting LTD ETC designation is not in the public interest. Without delving into each finding of fact, Staff would point out that LTD's disagreement with the PUC's findings does not in itself equate an erroneous decision.. The court has ruled the

Commission findings of fact should be granted deference and only overturned if there is a firm conviction a mistake has been made when looking at the record as a whole. In this case, LTD's witness, Corey Hauer, and SDTA's witness, Larry Thompson, provided conflicting testimony regarding LTD's ability to meet requirements for ETC certification. In a case of conflicting testimony, the Commission, as the factfinder, weighs the credibility of the witnesses and evidence presented. In the Order, the Commission clearly cited to the evidence it relied on when making each finding of fact. While LTD may not agree that the evidence cited was convincing, LTD's disagreement as to what the record as a whole shows is not a sufficient basis to find the Commission's decision erroneous when there was clearly evidence presented in the record which the Commission relied on and cited in its Order. The Commission's findings are not in error to necessitate reconsideration.

While there does not appear to be sufficient reason to grant LTD's request based on error of law or erroneous findings of fact, LTD has filed some additional evidence in the docket. ARSD 20:10:01:29 provides the Commission may grant rehearing if there appears sufficient reason to do so. ARSD 20:10:01:30.01 further specifies "[a]n 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." In this case, the additional evidence submitted by LTD does appear to qualify as evidence that would qualify for rehearing or reconsideration under ARSD 20:10:01:30.01, though under rule, the Commission is not obligated to grant LTD's request for rehearing.

Without fully vetting this evidence through discovery and cross-examining witnesses, it is unclear whether the evidence is compelling enough to result in a different Commission

decision, but it is possible the evidence could do so. If the Commission does believe the additional evidence could impact their decision, it would be consistent with ARSD 20:10:01:29 and 20:10:01:30.01 to grant a new hearing for the purpose of considering additional information. However, Staff would recommend if the Commission does grant a rehearing, all parties should have the opportunity to conduct discovery, cross-examine LTD's witnesses providing additional evidence, and provide testimony related to this additional evidence and that any rehearing be limited in scope.

Conclusion

For all of the reasons stated above, LTD's Petition for Reconsideration or Rehearing should be denied as it relates to LTD's assertion that the Order was in error and findings of fact are erroneous. However, LTD has provided additional evidence and Staff is not opposed to a rehearing to consider that additional evidence, provided all parties have the opportunity to conduct discovery, cross-examine witnesses and present testimony and that the rehearing be limited in scope.

Dated this 10th Day of May 2022.



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