

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE APPLICATION OF) FINAL DECISION AND ORDER
LTD BROADBAND LLC FOR DESIGNATION AS) DENYING APPLICATION FOR
AN ELIGIBLE TELECOMMUNICATIONS) DESIGNATION AS AN
CARRIER FOR PURPOSES OF RECEIVING) ELIGIBLE
FEDERAL UNIVERSAL SUPPORT) TELECOMMUNICATIONS
) CARRIER IN CERTAIN
) CENSUS BLOCKS; NOTICE OF
) ENTRY OF ORDER
)
)
) TC21-001

APPEARANCES

Commissioners Chris Nelson, Kristie Fiegen, and Gary Hanson.

Jason R. Sutton, Boyce Law Firm, LLP, 300 S. Main Ave., Sioux Falls, South Dakota 57117, appeared on behalf of Applicant, LTD Broadband LLC.

Amanda Reiss, 500 E. Capitol Ave., Pierre, South Dakota 57501, appeared on behalf of the South Dakota Public Utilities Commission Staff.

Kara Semmler, 320 E. Capitol Ave., Pierre, SD 57501, appeared on behalf of South Dakota Telecommunications Association.

PROCEDURAL HISTORY

On January 7, 2021, the South Dakota Public Utilities Commission (Commission) received an Application for Designation as an Eligible Telecommunications Carrier (ETC) from LTD Broadband LLC (LTD). LTD is requesting designation as an ETC for the purpose of being eligible to receive federal universal service support via the Federal Communications Commission's (FCC) Lifeline program and through the Rural Digital Opportunity Fund (RDOF) for the provision of broadband internet access and broadband-voice bundled offerings. LTD has preliminarily been awarded RDOF funding by the FCC for certain census blocks in South Dakota, see Exhibit A of the Amended Application. LTD also requested a waiver of ARSD 20:10:32:43.02.

On January 14, 2021, the Commission electronically transmitted notice of the filing and the intervention deadline of January 29, 2021, to interested individuals and entities on the Commission's PUC Weekly Filing electronic listserv. On January 27, 2021, South Dakota Telecommunications Association (SDTA) filed a Petition to Intervene. On February 22, 2021, the Commission issued an Order Granting Intervention to SDTA. On August 12, 2021, SDTA and LTD filed a Stipulation for Protective Order for Confidentiality. On August 13, 2021, LTD filed a Motion for Prehearing Conference requesting the Commission establish a procedural schedule. On August 26, 2021, the Commission issued an Order Approving Stipulation for Protective Order for Confidentiality. On August 27, 2021, SDTA filed a Motion to Compel Discovery. On September 3, 2021, SDTA filed an Amended Motion to Compel Discovery. On September 7, 2021, LTD filed a Brief Opposing SDTA's Motion to Compel Discovery. On September 9, 2021, SDTA filed a Response to LTD's Opposition to SDTA's Motion to Compel. On September 10, 2021, SDTA filed

a letter regarding its Motion to Compel and Procedural Schedule and LTD filed a letter regarding the September 14, 2021, Commission Meeting Agenda Items. On September 14, 2021, Commission staff (Staff) filed a letter detailing a proposed procedural schedule agreed to by all parties. On September 20, 2021, the Commission issued an Order Denying Motion for Prehearing Conference; Order Adopting Procedural Schedule. On October 22, 2021, LTD filed an Amended Application.¹ On October 22, 25, and 27, 2021, LTD and SDTA pre-filed their Direct Testimony and Exhibits.

On November 3, 2021, the Commission issued an Order for and Notice of Evidentiary Hearing. On November 5, 2021, LTD and SDTA filed rebuttal testimony and exhibits. On November 5, 2021, SDTA filed a Motion and Brief in Support regarding Use of Information Marked as Confidential. LTD filed a Motion to Strike Expert Testimony of Larry Thompson, amended on November 9, 2022, and a Motion to Attend Evidentiary Hearing Via Telephone or Video Link. On November 12, 2021, LTD filed Opposition to SDTA's Motion to Use Confidential Information, SDTA filed an Objection and Reply to LTD's Motion to Strike Expert Testimony of Larry Thompson and Staff filed a Response to Applicant's Motion to Strike Expert Testimony of Larry Thompson. On November 17, 2021, SDTA filed a Response to LTD's Opposition to Use of Confidential Information and LTD filed a Reply Brief Supporting Motion to Strike Expert Testimony of Larry Thompson. On November 24, 2021, the Commission issued an Order Denying LTD's Motion to Strike Expert Testimony of Larry Thompson; Order Granting LTD's Motion to Attend Evidentiary Hearing Via Telephone or Video Link. On November 29 and 30, LTD and SDTA pre-filed their exhibit lists, exhibits and witness lists for the evidentiary hearing.

On December 1, 2021, the Evidentiary Hearing was held as scheduled. On December 20, 2021, the parties filed a proposed procedural schedule for post-hearing briefing. On January 11, 2022, LTD filed a Post-Hearing Brief. On January 25, 2022, SDTA and Staff filed Post-Hearing Briefs. On February 8, 2022, LTD filed a Post-Hearing Reply Brief.

On February 18, 2022, at its regularly scheduled meeting, the Commission considered LTD's request for ETC designation in certain census blocks. The parties made oral arguments. After questions of the parties by the Commissioners and public discussion among the Commissioners, Commissioner Hanson's substitute motion to grant LTD's Application for Designation as an Eligible Telecommunications Carrier for Purposes of Receiving Federal Universal Support in Certain Census Blocks failed. The Commission then voted to deny LTD's Application for Designation as an Eligible Telecommunications Carrier for Purposes of Receiving Federal Universal Support in Certain Census Blocks (Commissioner Hanson, dissenting).

Having considered the evidence of record, the applicable laws, the briefs, and the oral arguments of the parties, the Commission makes the following Findings of Fact, Conclusions of Law, and Final Decision and Order Denying Application for Designation as an Eligible Telecommunications Carrier in Certain Census Blocks:

FINDINGS OF FACT

I. PROCEDURAL FINDINGS.

1. The Procedural History set forth above is hereby incorporated by reference in its entirety in these Procedural Findings. The procedural findings set forth in the Procedural History are a substantially complete and accurate description of the material

¹ See Ex. L-3 (Amended Application).

documents filed in this docket and the proceedings conducted and the decisions rendered by the Commission in this matter.

II. PARTIES.

2. LTD Broadband LLC, a Nevada LLC, is a privately held broadband voice and internet access service provider with its primary place of business in Blooming Prairie, Minnesota. Corey Hauer is the Chief Executive Officer of LTD.

3. South Dakota Telecommunications Association is an incorporated organization representing the interests of numerous cooperative, independent, and municipal telephone companies operating throughout South Dakota.

4. The South Dakota Public Utilities Commission Staff fully participated as a party in this matter.

III. APPLICABLE STATUTES AND REGULATIONS FOR ETC DESIGNATION.

5. The following South Dakota Chapters are applicable: SDCL Chapters 1-26, 49-1, 49-31 and 15-6. Also applicable is 47 U.S.C. § 214 and 47 U.S.C. § 254(f) and 47 C.F.R. § 54.201. The following South Dakota administrative rules are applicable: ARSD Chapters 20:10:01 and 20:10:32. The Commission may rely upon any or all of these laws or other laws of this state in making its determination.

6. Pursuant to ARSD 20:10:32:43 through 20:10:32:43.07 and 20:10:32:46, Applicant has the burden of proof to establish that it is eligible for designation as an ETC.

IV. OVERVIEW OF RURAL DIGITAL OPPORTUNITY FUND.

A. Generally

7. The FCC opened the RDOF program with a Notice of Proposed Rulemaking released on August 2, 2019.² RDOF is a federal funding program implemented by the FCC to provide infrastructure funding for the deployment of voice and broadband networks to rural areas deemed by the FCC to be unserved with adequate broadband service. The RDOF Phase I auction focused on census blocks that are wholly unserved with broadband speeds of 25/3 Mbps.

8. To begin the RDOF process, entities seeking to participate in the auction first submit a short-form application to establish baseline financial and technical capabilities in order to be found eligible to bid.³ The FCC reviews the short-form application submissions to make sure that applicants for RDOF support meet basic eligibility requirements and would not likely default if the applicant was authorized for support. (Ex. L-2 at pgs. 6-7).

9. A reverse auction then takes place in which auction participants bid on small geographic areas (census block groups) to see which bidder is willing to serve the

² *In the Matter of Rural Digital Opportunity Fund; Connect America Fund, Notice of Proposed Rulemaking*, WC Docket Nos. 10-90, 19-126 (rel. August 2, 2019).

³ *Id.*

area with the lowest amount of government support. The RDOF census block groups are high-cost areas and lack a financial case for a company to provide broadband and therefore needs support to do so.

10. These census block groups were selected by the FCC because one or more of the census blocks within these census block groups lack broadband based upon information the FCC receives from broadband providers as part of the FCC Form 477 process.⁴

11. Auction bidders continuously reduce the amount of their bids at each round to provide stated levels of broadband service within the four performance tiers, each with varying speed and usage allowances, and either high or low latency. Winning bidders must offer the service associated with their winning bid to specific census blocks within the won census block groups. (Id.).

12. Winning bidders, also known as provisional winners, then submit their long-form applications to the FCC. The long-form application includes additional information about qualifications, funding, and the network that they intend to use to meet their obligations.

13. Within 180 days of being announced as the winning bidder, the applicant must certify it has been designated by the appropriate state agency that it is an eligible telecommunications carrier in any areas for which it seeks support and submit relevant documentation to the FCC.⁵ In the event the provisional winner is unable to obtain the necessary ETC designations within this time frame, the FCC may waive the 180-day time frame if the applicant is able to demonstrate that it has engaged in good faith efforts to obtain ETC designation, but the proceeding is not yet complete.⁶

14. Within a specified number of days, provisional winners submit a letter to the FCC from an eligible bank committing to issue a letter of credit; then upon notification that the provisional winner is ready to be authorized, it must obtain a letter of credit from an eligible bank that remains open and covers disbursements until compliance with certain service milestones is complete and verified. (Ex. L-2 at pgs. 6-8).

15. Once a long-form application is approved, the long-form applicant will be authorized to begin receiving support.

16. Once a provisional winner receives RDOF funding, it must deploy a network able to provide voice and broadband service at speeds based on its winning bid. The provisional winner is obligated to build its network according to specific FCC

⁴ *In the Matter of the Digital Opportunity Fund*, WC Docket No 19-126, Paragraph 41 (Adopted, January 30, 2020).

⁵ *Rural Digital Opportunity Fund Phase I Auction Scheduled for October 29, 2020*; Notice and Filing Requirements and Other Procedures for Auction 904, AU Docket No. 20-34 *et al.*, Public Notice, 35 FCC Rcd 6077, par 316 (rel June 11, 2020).

⁶ *Rural Digital Opportunity Fund Phase I Auction Scheduled for October 29, 2020*; Notice and Filing Requirements and Other Procedures for Auction 904, AU Docket No. 20-34 *et al.*, Public Notice, 35 FCC Rcd 6077, par 317 (rel June 11, 2020).

milestones over a 6-year period for the awarded amount, which will be paid out over a ten-year period.

17. Under RDOF, the winning bidder must satisfy deployment milestones beginning in the third year of its support term. (TR at pg. 24-26). It must deploy its network to 95% of all locations within six years of funding. (Id.). A location generally means a residential dwelling unit. (TR at pg. 22).

B. LTD's Provisional RDOF Award and Planned Network

18. Corey Hauer, Chief Executive Officer of LTD, testified on behalf of LTD.

19. LTD is a privately held broadband voice and internet access service provider with its primary place of business in Blooming Prairie, Minnesota. (Ex. L-3 at pgs. 1-2). Mr. Hauer started the company in 2010, and, since then, LTD has specialized in providing broadband service to unserved or underserved rural broadband customers. (Ex. L-2 at pg. 2).

20. Mr. Hauer testified that from 2011 through today, LTD has grown from a single water tower site in Rose Creek, Minnesota in 2011 to a network of over 2,500 tower sites covering over 50,000 square miles. Currently LTD offers service in Iowa, Kansas, Minnesota, Nebraska, South Dakota, Tennessee and Wisconsin, and serves approximately 18,000 customers within those states. (Id.; TR at pg.109-10).

21. Mr. Hauer testified that LTD previously participated in the CAF Phase II program conducted by the FCC. (Ex. L-2 at pg. 3). As part of the CAF Phase II program, LTD was authorized by the FCC to receive support to deploy voice and broadband services in unserved rural areas of Illinois, Iowa and Minnesota. The CAF Phase II Auction obligated LTD to serve 1,407 locations with a fixed wireless network.

22. Mr. Hauer testified that LTD deployed its network ahead of the schedule required by the CAF Phase II program rules. Specifically, LTD completed its fifth-year obligation of 80% buildout in both Iowa and Minnesota by the end of year one. (Ex. L-2 at pgs. 3-4). He further testified that LTD expects to finish 100% of its CAF Phase II obligation for Illinois later this year. (Id.)

23. Mr. Hauer testified that in September 2021, LTD acquired an existing fiber-based network in Tennessee. This network served approximately 448 customers. (Ex. L-13 at pg. 1; TR at pg. 132).

24. LTD participated in the RDOF auction and bid to serve in states across the country. LTD was one of the winning bidders nationally announced by the FCC in a Public Notice dated December 7, 2020.⁷ LTD was the auction winner in 15 states. Before the June 7, 2021 deadline to obtain ETC status, LTD was designated as an ETC in seven states, and it was approved in an eighth a few days after June 7, 2021. (Ex. L-14 at pg. 6). As the provisional winner, LTD stands to receive \$1,320,920,718.60 in support (over 10 years) to serve 528,088 locations throughout the nation with fiber and fixed wireless.

⁷ *Rural Digital Opportunity Fund Phase I (Auction 904) Closes; Winning Bidders Announced*; FCC Form 683 due January 29, 2021, AU Docket No. 20-34 *et al.*, Public Notice, 35 FCC Rcd 13888.

25. Following the denial of some ETC designations, LTD was the provisional RDOF auction winner of approximately 366,000 locations throughout nine different states. (TR at p. 69; Ex. L-2, pg. 4). In South Dakota, LTD stands to receive \$46,588,454 to serve 7,481 locations.⁸ (Ex. L-2 at pg. 9).

26. Mr. Hauer testified that LTD has been denied or has not received ETC designation in six states due to LTD's failure to file for designation as an ETC in a timely manner, the designation has not been determined or it is under reconsideration. (TR at pgs. 66-72; See SDTA Ex. 1 at pg. 6).

27. As the provisional auction winner, on January 29, 2021, LTD submitted a RDOF long-form for post-auction review by the FCC. The RDOF long-form provides extensive detail about LTD's operational, financial, and technical capabilities. (Ex. L-2 at pgs. 6-9). FCC staff reviews this information to confirm that LTD is reasonably capable of meeting the RDOF deployment milestones. (Id.). The FCC will only release the RDOF funding after determining the provisional winners have the ability to deploy the network it has agreed to deploy.

28. The FCC has not completed its analysis of LTD's RDOF long-form. (TR at pgs. 23-24; Ex. L-2 at pg. 10).

29. While some consumers in the census blocks provisionally awarded to LTD in South Dakota may be receiving broadband service from other providers pursuant to state funding (TR at pgs. 116-17; 207-208), there are also some areas that may not receive service for several years without the RDOF-supported deployment (TR at pgs. 210-211).

30. Under RDOF, LTD must deploy a network able to provide voice and broadband service at the highest tier of speeds of 1 Gbps download and 500 Mbps upload with low latency.

31. LTD intends to serve all South Dakota locations with a fiber to the home network. (Ex. L-2 at pg. 14, lines 8-10.)

32. Under RDOF, LTD must satisfy deployment milestones beginning in the third year of its support term. (TR at pgs. 24-26). LTD will have to deploy its network to 95% of all locations within six years of funding. (Id.)

V. SATISFACTION OF REQUIREMENTS FOR THE DESIGNATION OF AN ELIGIBLE TELECOMMUNICATIONS CARRIER.

33. All RDOF recipients are required to obtain ETC designation from the appropriate state agency within 180 days after the FCC identifies the winning bidders to remain eligible for RDOF funding.⁹

34. LTD was required to file its application for ETC designation in South Dakota by January 6, 2021, however the application did not get filed until after the close of

⁸ *Rural Digital Opportunity Fund Phase I (Auction 904) Closes; Winning Bidders Announced*; FCC Form 683 Due January 29, 2021, AU Docket No. 20-34 *et al.*, Public Notice, 35 FCC Rcd 13888, Attachment A.

⁹ *Rural Digital Opportunity Fund Phase I Auction Scheduled for October 29, 2020, Public Notice*, 35 FCC Rcd 6077, Par 317 (rel June 11, 2020).

business that day. See Procedural Findings, above. On June 7, 2021, LTD submitted a request for waiver with the FCC of the ETC documentation deadline of June 7, 2021.¹⁰

35. Specifically, the FCC's Order states, "Consistent with the CAF [Connect America Fund] 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."¹¹

36. 47 U.S.C. § 214 establishes the basic definition of an ETC and goes on to provide state commissions with the primary responsibility for performing ETC designations. 47 U.S.C. § 214(e).

37. The state commission is given further authority to "adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service." 47 U.S.C. § 254(f).

38. Under section 214(e)(1) of the Telecommunications Act of 1996, LTD must satisfy three requirements to obtain ETC status. 47 U.S.C. § 214(e)(2).

39. First, LTD must be a common carrier. 47 U.S.C. § 214(e)(1); SDCL 49-31-1(6) defines "common carrier" as anyone who offers telecommunications services to the public. See *also* 49-31-1(29) (definition of telecommunications services).

40. Mr. Hauer testified that LTD will provide voice service as interconnected VoIP service in South Dakota. As to customers and locations in which LTD is awarded RDOF support, LTD will provide its voice services on a common carrier basis. (Ex. L-2 at pg. 13, lines 4-9).

41. Second, in order to be designated an ETC, a carrier must offer the supported services throughout the service area for which the designation is received. 47 U.S.C. § 214(e) and 47 C.F.R. § 54.201. The FCC has designated the following services for support by federal universal service support mechanisms: (1) voice grade access to the public switched network or its functional equivalent; (2) minutes of use for local service provided at no additional charge to end users; (3) access to the emergency services provided by local government or other public safety organizations, such as 911 and enhanced 911, to the extent the local government in an eligible carrier's service area has implemented 911 or enhanced 911 systems; (4) toll limitation services to qualifying low-income consumers; and (5) eligible broadband internet access services which will provide the capability to transmit data to and receive data by wire or radio from all internet endpoints, including any

¹⁰ *In the Matter of the Digital Opportunity Fund*, WC Docket No 19-126, Paragraph 4 (Adopted, July 26, 2021).

¹¹ *In the Matter of the Digital Opportunity Fund*, WC Docket No 19-126, Paragraph 92 (Adopted, January 30, 2020).

capabilities that are incidental to and enable the operation of the communication service. 47 C.F.R. § 54.101.

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

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

44. LTD will primarily use its own facilities, but at times may resell another carrier’s services to offer the services that are supported by Federal universal service support mechanisms. LTD states it “will provide supported services using its network infrastructure, consisting of last mile connections and network equipment and components consistent with the RDOF award criteria” and that it “will also utilize its own facilities to provide backhaul for interconnection via a combination of fiber and wireless microwave technologies.” (Ex. L-3 at pg. 10).

45. Third, in order to be designated an ETC, in accordance with 47 U.S.C. § 214(e)(1)(B) and C.F.R. § 54.201(d)(2), the carrier must advertise the availability of supported services and the rate for the services using media of general distribution. Mr. Hauer testified as to LTD’s anticipated advertising plans. (Ex. L-2, pg. 15; Ex. L-8, Data Request 3-1). LTD states that it will advertise the availability of such services throughout its designated service areas “using media of general distribution in a manner that is designed to reach those likely to qualify for such services.” (Ex. L-3 at pg. 10).

46. The Commission finds that LTD satisfies all of the three requirements for ETC designation status under § 214(e)(1). No party provided evidence contrary to LTD’s testimony on this matter and the Commission finds that LTD meets the first prong of ETC designation by a state commission.

47. The Commission’s rules regarding an ETC application begins with ARSD 20:10:32:43, which requires the petition for ETC designation include contact information, proposed effective date, identification of the service area, a statement specifying why the requested designation satisfies the requirements for ETC designation and receiving federal universal service support, any reasons why additional time is needed to complete network upgrades, and a statement specifying why the applicant’s proposed designation is in the public interest.

48. LTD filed its Application, along with an Amended Application and responses to data requests that supplied this required information. (Ex. L-3). Specifically, LTD provided a list of the 15-digit census blocks associated with this filing in response to

Staff's Data Request 2-1. (Ex. L-6 at pgs. 182-237).

49. Further required information pursuant to ARSD 20:10:32:43.01 through 20:10:32:43.07 is discussed below:

A. Applicant shall commit to providing service throughout its proposed designated service area to all customers making a reasonable request for service.

50. ARSD 20:10:32:43.01 requires LTD to certify that it will:

A. Provide service on a timely basis to requesting customers within its proposed designated service area where its network already passes the potential customer's premises or will pass, consistent with FCC RDOF buildout requirements; and

B. If the potential customer is within LTD's proposed designated service area but outside its existing network coverage, it will provide service within a reasonable period of time, if the service can be provided at a reasonable cost, by

1. Extending, modifying, adjusting, or replacing network or customer's facilities; or
2. Reselling services of another carrier's facilities to provide service.

51. LTD states once it deploys its supported network, it will provide service to potential customers requesting service within 10 days of their request. (Ex. L-2 at pgs. 15-16). As explained in response to Staff's Data Request 2-6, LTD will deploy its network in a manner such that a drop may be installed to provide service to a new customer within 10 days of that customer's request. (Ex. L-6 at Request 2-6).

B. Applicant shall submit a two-year plan.

52. ARSD 20:10:43.02 requires LTD to submit a two-year plan providing certain details about LTD's planned network.

53. LTD requested a waiver of the two-year requirement. The Commission finds that a waiver of the two-year plan requirement is not appropriate in this case as the Commission has denied LTD's request for designation as an ETC.

C. Applicant shall demonstrate ability to remain functional in emergency situations.

54. Under ARSD 20:10:43.03, LTD must prove it can remain functional in emergency situations. Mr. Hauer detailed in his prefiled testimony how LTD will comply with FCC requirements for back-up power. (Ex. L-2 at pg. 17.) LTD will be able to have reasonable back-up power to ensure functionality of its network without an external power source. (Ex. L-2 at pg. 17). In addition to back-up power, LTD's network will be designed to provide other protections in the event of an emergency. (Ex. L-2 at pg. 17).

D. Applicant shall demonstrate an ability to satisfy consumer protection and service quality standards.

55. ARSD 20:10:32:43.04, which states: "An applicant requesting designation as an eligible telecommunications carrier shall demonstrate that it will satisfy applicable

consumer protection and service quality standards." The FCC sets these performance standards. (Ex. L-2 at pg. 8).

56. While Hauer states LTD will comply with applicable service quality standards and consumer protection rules, he also notes that the FCC has waived the requirement for a winning bidder to demonstrate that it will satisfy consumer protection and service quality standards as part of the ETC designation process. (Ex. L-2 at pg. 18).

E. Applicant shall offer comparable local usage plan.

57. ARSD 20:10:32:43.05, which requires LTD "to demonstrate it offers a local usage plan comparable to the one offered by the incumbent local exchange carrier in the service areas for which the applicant seeks designation." Although LTD has not finalized its specific plan because it intends to engage in market research to determine what mix of services consumers desire, Mr. Hauer's prefiled testimony confirms LTD's plans to provide calling plans similar to those offered by incumbent local exchange carriers in the designated census blocks, including plans providing high-speed internet access service and unlimited voice calling in the United States for a fixed monthly price. (Ex. L-2 at pg. 18).

F. Applicant shall provision equal access.

58. ARSD 20:10:32:43.06, which requires LTD to certify that it will be able to provide "equal access to long distance carriers if no other eligible telecommunications carrier is providing equal access within the service area." LTD's service plans will provide unlimited voice calls in the United States for a fixed monthly price. (Ex. L-2 at pg. 19). As a result, the Commission finds that this administrative rule does not apply because consumers on LTD's plan will not need access to a separate long distance carrier.

G. Commission shall determine designation is in the public interest.

59. In order to designate an applicant as an ETC, the Commission must also determine whether such designation is in the public interest. See ARSD 20:10:32:43.07. When making this determination, the Commission must consider the following:

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.

60. As to the unique advantages and disadvantages of the service offerings, and commitments regarding telephone service quality, LTD stated that it will deploy state-of-the-art FTTP services in the census blocks in Exhibit A, in order to provide communities access of up to Gigabit speeds and better voice service. Lifeline-eligible customers will have a greater choice of providers for accessing telecommunications services that may not be available today. (Ex. L-3 at p. 14).

61. Regarding the impact of multiple designations on the universal service fund, the incumbent local exchange carrier is CenturyLink. CenturyLink did not intervene or submit comments in this docket.

62. The Commission next considers LTD's ability to provide the supported services throughout the designated service area within a reasonable time frame. Both LTD and SDTA presented evidence regarding this factor in regard to public interest.

63. Mr. Hauer testified to the method LTD used to estimate its construction costs to deploy the services throughout the designated service area. He testified LTD looked at the topology to determine if deployment of the fiber would be aerial or buried and LTD looked to see how the local electric companies reached their customers. (TR at pgs. 87; 91; 94; 152-154).

64. Mr. Hauer testified that LTD intends to operate its own fiber construction company to install all infrastructure necessary to serve 7,481 locations throughout the designated service area shown on Exhibit A to its Amended Application. (TR at pgs. 217-218).

65. Mr. Hauer testified that LTD does not currently operate a fiber construction company and did not provide any plans or data regarding how it will start up such a company able to meet construction and service obligations. (TR at pg. 100).

66. The Commission finds review of LTD's financial, managerial, and technical capabilities are appropriate considerations when determining whether LTD has the ability to deploy its network and provide the supported services within a reasonable time frame throughout the designated service area in South Dakota as shown on Exhibit A to the Amended Application.

67. The Commission finds LTD did not provide sufficient evidence of similar business experience showing its ability to deploy its network and provide the supported services within a reasonable time frame throughout the designated service area in South Dakota as shown on Exhibit A to the Amended Application.

68. The Commission finds LTD's previous business experience does not indicate it will be able to provide the scale of services planned, that is, growing from zero customers in 2010, to 18,000 customers in 2021, to bidding to serve 366,000 locations within the RDOF time frame. (TR at pgs. 109-110).

69. The Commission finds that Mr. Hauer, CEO of a fixed wireless company, has no experience building fiber to locations in very remote rural places. LTD's history is as follows:

- a. LTD's primary business, to date, is fixed wireless telecommunications and broadband. Generally, LTD does not build infrastructure. (TR at pg. 53).
- b. LTD serves 259 customers in South Dakota. (Ex. L-9 at pg. 3). None of these customers are served by a fiber to the home network. (TR at pg. 54).
- c. LTD serves approximately 18,000 customers nationwide. (TR at pgs. 109-110).
- d. In September 2021, LTD acquired an existing fiber-based network in Tennessee. This represents LTD's largest fiber to the home operation. This network served approximately 448 customers. (Ex. L-13 at pg. 1).
- e. LTD was a successful participant in the FCC CAF Phase II Auction. However, the CAF Phase II Auction obligated LTD to serve 1,407 locations with a fixed wireless network whereas the RDOF Auction obligates LTD to serve 528,088 locations with a fiber network. (SDTA Ex. 8 at pgs. 1- 2; TR at pg. 22; see Finding of Fact 25).

70. LTD's technical ability can be evaluated by examining how it plans to serve the designated ETC service area. LTD did not share any plans and relied upon its business experience as indication of its technical ability. (Ex. L-2 at pg. 5).

71. LTD has not developed engineering, networking, or staffing plans to explain how it intends to provide ETC services throughout all areas listed in Exhibit A to its Amended Application. (TR at pg. 61).

72. To provide all ETC supported services via fiber, throughout all areas listed on Exhibit A to its Amended Application, LTD must cross National Forest land, private land and Tribal land. To make the crossings, LTD must obtain easements and permits. (Ex. L-11 at pgs. 2-5; TR at pgs. 44-45).

73. LTD is not aware of what permits or easements are necessary and did not provide any evidence of a plan to acquire necessary easements and permits. (Id.).

74. LTD has reached out to contact the impacted tribes. (TR at pgs. 44-45). However, LTD is unaware of the cultural preservation process that South Dakota tribes may require. LTD has no plan in place to comply if an impacted Tribe requires cultural preservation studies. (Id.; Ex. L-13 at pg. 3).

75. The Commission finds LTD did not demonstrate it has the technical ability to build a fiber to the home network.

76. LTD did not demonstrate it has the financial ability to construct and operate a fiber to the premises network to over 7,000 locations in South Dakota. The evidence shows LTD failed to fully or accurately consider the costs to construct a fiber to the premises.

77. Larry Thompson, Chief Executive Officer of Vantage Point Solutions, a telecommunications engineering and consulting company testified on behalf of SDTA. Mr. Thompson is a licensed engineer in 21 states, including South Dakota. Mr. Thompson has worked for hundreds of broadband companies nationwide and has engineered more than \$2.5B in fiber to the home networks. (SDTA Ex. 1; Ex. 3).

78. Mr. Thompson testified that to determine whether a company has the ability to provide services throughout the RDOF designated service area within a reasonable time frame, financial, managerial, and technical capabilities should be considered. (TR at pgs. 214- 215; SDTA Ex. 1).

79. Mr. Thompson testified that an improper or incorrect consideration of construction costs will impact LTD's financial ability to successfully construct the planned network. To determine construction costs in South Dakota, Mr. Thompson explained that LTD utilized the RDOF award amount (\$46.6 Million) and multiplied it by 1.3 to arrive at [REDACTED]. However, given his experience in engineering fiber to the home networks across the state of South Dakota, Mr. Thompson believes construction costs will be twice that figure. (TR at pg. 173; SDTA Ex. 1 at pg. 9).

80. Mr. Thompson testified that LTD's methodology to determine construction costs bears no relationship to actual construction costs. The evidence shows construction costs will be significantly higher than what LTD anticipates. (TR at pg. 175, 170; SDTA Ex. 2 at pg. 9).

81. Mr. Thompson testified that his analysis shows that the [REDACTED] will even exceed LTD's estimate. (SDTA Ex. 2 at pg. 13; TR at pg. 174).

82. The Commission finds that Mr. Thompson, a highly respected licensed engineer, who has worked for hundreds of broadband companies nationwide and has engineered more than \$2.5B in fiber to the home networks, has the requisite knowledge, skill, and experience to opine on the likely success of whether LTD can provide services throughout the RDOF designated service area within a reasonable time frame.

83. The Commission finds that LTD financial documents project [REDACTED] [REDACTED] in the first six years of operation. (SDTA Ex. 2 at pg. 13; TR at pg. 174).

84. LTD did not provide sufficient evidence to demonstrate it has the ability or has a viable plan to acquire the ability to manage the massive infrastructure and internal management growth it must undertake to serve the requested ETC designation area and comply with applicable regulation.

85. LTD did not offer sufficient evidence to demonstrate how it will technically serve over 7,000 locations in South Dakota. None of LTD's engineering or network plans are started or complete, it did not offer evidence regarding when or how it will complete the plans, it has not sought to acquire any permits or easements and is unaware of what cultural or environmental studies may be required.

86. The Commission finds that LTD did not provide sufficient evidence to demonstrate its construction cost methodology is accurate, that is, it failed to consider typical construction cost factors such as density of build-out, soil and rock composition, underground or overhead placement of fiber, inflation, and supply chain issues when determining whether it has the ability to deploy its network and provide the supported services throughout the designated service area in South Dakota as shown on Exhibit A to the Amended Application within a reasonable time.

87. The Commission finds the evidence does not demonstrate LTD is financially able to complete construction and provide services within a reasonable time frame or financially able to maintain operations of the planned fiber to the home network throughout the designated service area.

88. The Commission finds LTD did not demonstrate it has the managerial ability to comply with regulatory obligations. In the RDOF process alone, LTD missed filing deadlines in California, Kansas, Oklahoma, North Dakota, Iowa and Nebraska. (TR at pg. 68).

89. The Commission finds that LTD did not submit sufficient evidence regarding the public interest standard to prove it has the ability to deploy its network and provide the supported services within a reasonable time frame throughout the designated service area in South Dakota as shown on Exhibit A to the Amended Application.

90. The Commission finds that it would not be in the public interest to designate LTD as an eligible telecommunications carrier for purposes of receiving federal universal support in certain census blocks.

91. The Commission finds, due to the lack of evidence presented by LTD to demonstrate its ability to provide services throughout the requested ETC designation area, that it is not in the public interest to put all other federal funding, including but not limited to the Broadband, Equity, Access and Deployment Fund monies, at risk.

92. The record demonstrates that the Application does not meet all applicable requirements of SDCL Chapter 49-31, ARSD 20:10:32, and 47 U.S.C. § 214(e) and 47 U.S.C. § 254(f).

VI. GENERAL.

93. The Commission finds LTD has furnished all information required by the applicable statutes and Commission regulations.

94. The Commission finds that LTD filed its Application generally in the form and content required by ARSD Chapter 20:10:32. The Commission notes that the supplementation of an application with additional information is common.

95. The Commission finds that LTD did not present evidence sufficient to approve the Application under the applicable statutes and Commission regulations.

96. The Commission finds LTD has not satisfied its burden of proving all of the requirements imposed by ARSD 20:10:32 for designation as an eligible telecommunications carrier for purposes of receiving federal universal support in certain census blocks by a preponderance of the evidence.

97. To the extent that any Conclusion of Law set forth below is more appropriately a finding of fact, that Conclusion of Law is incorporated herein by reference as a Finding of Fact as if set forth in full herein.

98. To the extent that any of the Findings of Fact in this decision are determined to be Conclusions of Law or mixed findings of fact and conclusions of law, the same are incorporated herein by this reference as a Conclusion of Law as if set forth in full herein.

Based on the foregoing Findings of Fact and the entire record in this proceeding, the Commission hereby makes the following:

CONCLUSIONS OF LAW

1. The Commission has jurisdiction to consider the Application under SDCL Chapter 49-31, ARSD 20:10:32, and 47 U.S.C. § 214(e) and 47 U.S.C. § 254(f).
2. The Application submitted by Applicant, as amended and supplemented throughout the proceedings in this matter, does not meet the criteria required by SDCL Chapter 49-31, ARSD 20:10:32, and 47 U.S.C. § 214(e) and 47 U.S.C. § 254(f).
3. The Commission concludes that it needs no other information to determine if LTD has met its burden of proof imposed by SDCL Chapter 49-31, ARSD 20:10:32, and 47 U.S.C. § 214(e) and 47 U.S.C. § 254(f) to be designated as an ETC.
4. The Commission satisfied the hearing and notice requirement in SDCL Chapter 1-26.
5. The Commission concludes that the statutory requirements for the granting of a certificate of authority under SDCL 49-31-71 and the statutory requirements for the designation of an eligible telecommunications carrier under 49-31-78 are two separate and distinct functions of the Commission.
6. The Commission has an obligation to apply the law in a manner that will best promote the universal service goals found in 47 U.S.C. § 254(b). Universal service goals are promoted through financially viable carriers likely to remain in the market. *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, March 17, 2005.
7. The Commission concludes that LTD has not demonstrated that its designation as an eligible telecommunications carrier will comply with all applicable laws and rules, in particular, LTD's ability to provide the supported services throughout the designated service area within a reasonable time frame.
8. Under section 214(e)(1) of the Telecommunications Act of 1996, LTD must satisfy three requirements to obtain ETC status. See 47 U.S.C. § 214(e)(2). First, the applicant must be a common carrier. 47 U.S.C. § 214(e)(1). Second, the applicant must "offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title" 47 U.S.C. § 214(e)(1)(A). Third, the applicant must advertise the availability of these services. 47 U.S.C. § 214(e)(1)(B). The Commission concludes LTD satisfies all three requirements for ETC status under section 214(e)(1).
9. Although the Telecommunications Act of 1996 says that the Commission must grant ETC status if the requirements of § 214(e)(1) are satisfied: "A State commission shall upon its motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for the service area designated by the State commission...." 47 U.S.C. § 214(e)(2), the states are given

further authority to “adopt regulations not inconsistent with the Commission’s rules to preserve and advance universal service.” 47 USC § 254(f).¹²

10. The Commission concludes that it has the authority, through its own administrative rules, to adopt additional state law requirements for ETC status, which are found at ARSD 20:10:32:43 through 20:10:32:43.07.

11. The Commission concludes it is appropriate to evaluate the importance of each of the factors in ARSD 20:10:32:43.07 and give each an appropriate weight while recognizing some can have more probative weight than others.

12. The Commission concludes that the knowledge, skill, and experience of a witness will help to determine who can speak most accurately in answering whether LTD has the ability to provide services throughout the RDOF designated service area within a reasonable time frame.

13. The Commission concludes that the credibility of a witness, the import to be accorded their testimony, and the weight of the evidence has been determined by its opportunity to observe the witness and examine the evidence. *Hubbard v. City of Pierre*, 2010 SD 55; 784 NW2d 499 (2010).

14. The Commission concludes that Congress recognized, in the adoption of the Telecom Act of 1996, that it is important to protect the scarce USF dollars and that is why states were given the authority to designate ETC status to requesting telecommunications companies.

15. The Commission concludes that Congress recognized the unique insight that state commissions can bring to the determination of ETC designation as they are the regulatory agency closest to customers and locations where USF monies are spent thus ensuring the USF dollars are spent wisely. 47 U.S.C. § 214(e); *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, March 17, 2005.

16. SDTA argues that the Commission can consider other “factors” in determining whether granting the application serves the public interest. However, when interpreting administrative rules, the Commission applies the same rules as the Court’s apply when engaging in statutory construction. *Citibank, N.A. v. S.D. Dep’t of Rev.*, 2015 SD 67, ¶ 12, 868 N.W.2d 381, 387. For both statutes and administrative rules, when the language of a rule is clear and unambiguous, the Commission’s obligation is to enforce the clear language of the statute as written. *Hagemann ex rel. Est. of Hagemann v. NJS Eng’g, Inc.*, 2001 SD 102, ¶ 5, 632 N.W.2d 840, 843; *Citibank*, at ¶ 12, 86 N.W.2d at 388.

17. ARSD 20:10:32:43.07 was adopted by the Commission pursuant to its authority under SDCL 49-31-76 and concludes the factors set forth in the rule are sufficient to make its public interest determination.

¹² See *Report and Order of In re Federal-State Joint Board on Universal Service*, FCC 05-46, ¶¶ 60-61, Federal Communications Commission, March 15, 2005.

18. The Commission concludes that the public interest factors found in ARSD 20:10:32:43.07 afford it the ability to make its final decision based solely on those factors.

19. The Commission concludes that LTD has not demonstrated that its designation as an eligible telecommunications carrier will serve the public interest.

20. The Commission concludes that LTD did not submit sufficient evidence to find that granting LTD's request for designation as an ETC meets the public interest standard found in ARSD 20:10:32:43.07. In particular, the Commission finds that LTD lacks the ability to provide the supported services throughout the designated service area within a reasonable time frame.

21. The Commission concludes that LTD's inability to provide the supported services throughout the designated service area within a reasonable time frame places too much financial risk on ratepayers and the USF.

22. The Commission concludes that LTD did not submit sufficient evidence to show that it has the ability to grow its company quickly enough to deploy its network to the entire RDOF service areas in South Dakota within a reasonable time.

23. The Commission concludes the evidence did not show that LTD has the ability to manage the build out in order to provide the supported services throughout the designated service area within a reasonable time frame.

24. LTD bears the burden of proving by the preponderance of the evidence that it satisfies the requirements for granting the ETC Application. *See In re Black Hills Power, Inc.*, 2016 SD 92, ¶ 17, 889 N.W.2d 631, 636 ("The burden of proof for administrative hearings in preponderance of the evidence." (internal quotation and alternation omitted)).

25. Based on the preponderance of the evidence as presented to the Commission, the Commission concludes that the requirements of SDCL Chapter 49-31, ARSD 20:10:32, and 47 U.S.C. §214(e) and 47 U.S.C. § 254(f) have not been satisfied in order to grant LTD's Application for ETC designation.

26. The Commission concludes it has specialized knowledge of the telecommunications industry and its judgment and insight in this specialized field facilitate the overall regulation of this industry and its final decision was determined using the Findings of Fact and Conclusions of Law set forth above.

27. The Commission thus concludes that the Application should be denied for the reasons stated in these Findings of Fact and Conclusions of Law.

28. The Commission concludes that a waiver of the two-year plan requirement is not appropriate in this case as the Commission has denied LTD's request for designation as an ETC.

ORDER

From the foregoing Findings of Fact and Conclusions of Law, it is therefore

ORDERED, that LTD's Application for Designation as an Eligible Telecommunications Carrier for purposes of receiving federal universal support in certain census blocks is hereby denied. It is further

ORDERED, that LTD's request for a waiver of the two-year plan requirement is hereby denied.

Dated at Pierre, South Dakota, this 21st day of March 2022.

NOTICE OF ENTRY

PLEASE TAKE NOTICE that this Final Decision and Order Denying Eligible Telecommunications Carrier Designation in Certain Census Blocks was duly issued and entered on the 21st day of March 2022.

CERTIFICATE OF SERVICE
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, electronically or by mail.
By: <u>Karen E. Cremer</u>
Date: <u>03/21/22</u>
(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

Chris Nelson
CHRIS NELSON, Commissioner

Kristie Fiegen
KRISTIE FIEGEN, Commissioner

GARY HANSON, Commissioner (dissenting)