

**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

TC21-001

**APPLICANT'S OPPOSITION TO
SDTA'S MOTION TO CLOSE**

Applicant, LTD Broadband LLC ("LTD"), opposes intervenor South Dakota Telecommunications Association's ("SDTA") Objection to Docket Suspension and Motion to Close ("SDTA's Motion to Close"). This docket is not moot, and there is absolutely no prejudice to SDTA in keeping the docket open.

As the Commission is aware, LTD was the provisional winner of RDOF funding, including funding for census blocks located in South Dakota. To qualify for the RDOF funding for South Dakota, LTD must obtain status as an eligible telecommunications carrier ("ETC") in the state. LTD filed its application in the above-captioned docket. Although the Commission previously denied LTD's application for ETC status, it recently granted rehearing on LTD's application in its July 22, 2022, Order Denying Reconsideration, Order Granting Rehearing; Order Granting Request to Amend Amended Application; Order to Submit Proposed Procedural Schedule ("Order Granting Rehearing").

After the Order Granting Rehearing, on August 10, 2022, Federal Communications Commission ("FCC") Staff denied LTD's long-form application. Critically, this was not a decision by the FCC commissioners. Therefore, on September 9, 2022 LTD filed an Application for Review ("AFR") of the Staff decision seeking review by the full FCC. The AFR asks the

FCC to reverse the August 10, 2022, staff decision denying LTD's long-form application. The AFR is pending and it is not known when the full FCC will act.

SDTA argues that the initial determination by FCC Staff denying the RDOF long form moots this docket. (SDTA's Motion to Close at p.3). SDTA primarily relies on two cases, namely *Investigation of Highway Construction Industries v. Bartholow*, 373 N.W.2d 419, 420 (S.D. 1985), and *Maxwell v. State*, 261 N.W.2d 429, 430 (S.D. 1978). Without any discussion of either case's facts, SDTA quotes from the *Bartholow* case as stating the general principle prohibiting courts from hearing advisory cases when intervening circumstances moot the issue. In both *Bartholow* and *Maxwell*, the South Dakota Supreme Court dismissed appeals because, based upon intervening circumstances, their Supreme Court's decision would have no effect on the parties. As stated by the Supreme Court in *Bartholow*, "a case is usually said to become moot for the purpose of an appeal where by a change in circumstances prior to the appellate decision the case has lost any practical purpose for the parties." *Investigation of Highway Constr. Indus.*, 373 N.W.2d 419, 420-21 (quoting *Maxwell*, 261 N.W.2d at 432).

Here, however, this docket still can affect the parties. As noted, LTD has sought review of the FCC staff's decision denying the RDOF long form. There is a very real possibility that the Staff decision recommending denial of LTD's RDOF long form will be reversed. If that occurs, then the case will be in the same posture as when this Commission granted rehearing, and LTD will need ETC status to obtain authorization to receive RDOF funding. SDTA apparently believes that the Staff's decision denying the RDOF long form is a final decision, but that is clearly not the case. Simply put, the outcome of this ETC docket may still have very practical effects on LTD. It also may affect consumers in South Dakota because, if LTD is successful in reversing the FCC Staff decision, then LTD (and South Dakota consumers) are placed back in

the same position that prompted this Commission to grant rehearing. Some consumers will not get broadband service within the RDOF buildout time frame unless LTD receives RDOF funding, and LTD cannot get funding authorization without ETC status. Requiring LTD to file a new ETC application would unnecessarily further jeopardize that funding for reasons LTD previously argued to the Commission. Frankly, that is the real motivation behind SDTA's motion to close the docket.

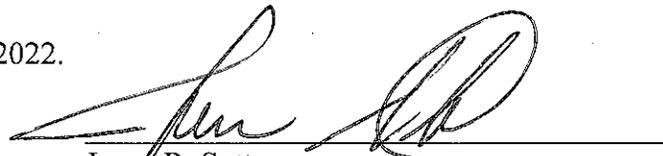
Alternatively, SDTA argues that the Commission should proceed with rehearing rather than staying the docket. Because the FCC Staff decision is not "final," it would be premature and a waste of the Commission's resources to proceed with the rehearing until such time as the full FCC acts on the AFR. If LTD's AFR is granted, then the rehearing proceeding can commence, and there likely will be even more "new evidence" to consider given the passage of time. If LTD is not successful and elects to not appeal the FCC's decision to federal court, then at that time it would be appropriate to close the proceeding, as rehearing would be moot. But it is not correct to characterize the current situation as academic or nonexistent, as SDTA argues, until such time as LTD's AFR is successful or it has exhausted its administrative and judicial remedies.

Further, requiring rehearing at this time would be a wasteful burden on both LTD and SDTA to proceed with rehearing at this time. There is absolutely no harm to SDTA in leaving the docket open pending the FCC's decision on the AFR. SDTA, and its members, are not harmed by suspending this docket. Indeed, other jurisdictions have similarly stayed their ETC proceedings pending a final decision by the FCC. *See* Order of Nebraska Supreme Court staying proceedings pursuant to a joint motion of the parties attached as Exhibit 1.

Without any explanation of their purported relevance, SDTA attaches Exhibits A and B to SDTA's Motion to Close. SDTA's inclusion of Exhibits A and B to its Opposition are entirely pejorative. These are notices of *apparent* liability for forfeiture. There has been no finding of liability, and LTD has challenged each of the orders. Even so, assessment of a monetary forfeiture down the road would not be disqualifying. The FCC has on many occasions issued notices of apparent liability, most recently in the July 22, 2022, decision SDTA cites, which includes dozens of auction winners that were authorized to receive RDOF support but are subject to default penalties. And even if LTD were ultimately required to pay a monetary forfeiture, it would not be automatically disqualified from receiving support. In fact, some companies listed in the Appendix to the FCC's July 22, 2022, order likely paid the proposed forfeiture amount and are receiving RDOF support.

Ultimately, this Commission should balance the following interests. It should avoid wasting valuable Commission and party resources by forcing a hearing that *may* serve no purpose. At the same time, it should not further jeopardize necessary federal funding by closing this docket while the FCC proceedings continue. Indeed, there is no harm in leaving the docket open but suspended. That is the best balance of the respective interests in this matter, and as a result, LTD requests that the Commission deny SDTA's Motion to Close.

Dated this 4th day of October, 2022.



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