

STATE OF MINNESOTA
BEFORE THE
MINNESOTA PUBLIC UTILITIES COMMISSION

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Valarie Means	Commissioner
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John Tuma	Commissioner

In the Matter of the Petition LTD
Broadband, LLC to Expand its
Designation as an Eligible
Telecommunications Carrier

Docket No. P-6995/M-21-133

In the Matter of a Petition to Initiate a
Proceeding to Revoke the Expanded
Eligible Telecommunications Carrier
("ETC") Designation of LTD
Broadband, LLC ("LTD") and Deny
LTD's Funding Certification for 2023.

Docket No. P-558, P-6995/M-22-221

**REPLY COMMENTS
OF
MINNESOTA TELECOM ALLIANCE
AND
MINNESOTA RURAL ELECTRIC ASSOCIATION**

JUNE 8, 2022

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The Minnesota Telecom Alliance (“MTA”) and Minnesota Rural Electric Association (“MREA”) hereby jointly submit these Reply Comments pursuant to the Commission’s May 11, 2022, Notice of Comment Period.¹

INTRODUCTION

The Initial Comments demonstrate wide-spread and deep concerns regarding the expanded ETC for LTD Broadband LLC (“LTD”). Those concerns are fully justified. LTD’s ETC expanded designation was a necessary precondition to receiving approximately \$311 million in support under the federal Rural Digital Opportunity Fund (“RDOF”) to build and operate a fiber-to-the-premise (“FTTP”) broadband network in Minnesota. Unless LTD delivers on its promises, over 160,000 Minnesota residents could be denied the benefit of federal support for broadband deployment.² As the Department of Commerce (“Department”) recognized in its comments: “the importance of the Commission’s decision cannot be overstated.”³

LTD was able to receive expansion of its ETC designation in Minnesota for RDOF areas based on a series of certifications it made to the Commission in 2021. Notably, the Commission recognized in its Order the limits of the record before it at that time:

[T]he record currently before the Commission does not contain evidence sufficient to disprove the certifications in LTD’s petition or otherwise support a finding of failure to meet any of the ETC-designation criteria.”⁴

¹ *In the Matter of the Petition of LTD Broadband, LLC to Expand its Designation as an Eligible Telecommunications Carrier*, Docket No. P-6995/M-21-133, *In the Matter of a Petition to Initiate a Proceeding to Revoke the Expanded Eligible Telecommunications Carrier (“ETC”) Designation of LTD Broadband, LLC (“LTD”) and Deny LTD’s Funding Certification for 2023*, Docket No. P-558, P-6995/M-22-221, NOTICE OF COMMENT PERIOD (May 11, 2022).

² Petition, at p. 2, n. 8.

³ Comments of the Minnesota Department of Commerce (“Department Comments”), at p. 10.

⁴ *In the Matter of the Petition of LTD Broadband LLC to Expand Its Designation as an Eligible Telecommunications Carrier*, Docket No. P-6995/M-21-133, *In the Matter of a Notice to Rural Digital Opportunity Fund Grant Winners*, Docket No. P-999/CI-21-86, ORDER APPROVING PETITION FOR ETC DESIGNATION IN CERTAIN CENSUS BLOCKS, at p. 8, (June 3, 2021) (“LTD’s petition contains the requisite commitments that it will offer and advertise the supported services required under paragraph (1) as specified in 47 C.F.R. § 54.101. ...”) (hereinafter “LTD Expansion Order”).

Since that time, a number of facts have become known that undercut the reliability of LTD's certifications, including:

- The South Dakota Public Service Commission's ("SD PUC's") denial of LTD's ETC application based on detailed findings that LTD "failed to demonstrate the technical, managerial and financial capability to construct and operate the network it promised ..." to deploy FTTP to 7,481 South Dakota locations;
- Multiple FCC-declared LTD defaults through failure to meet basic ETC timelines or procedural requirements in multiple states;
- The FCC's recent notice of apparent forfeiture to LTD regarding noncompliance with critical bidding requirements related to its bid for the RDOF funding; and
- ETC application denials in California and Iowa, including a California Commission finding that LTD failed to disclose material information and an Iowa Commission finding that LTD failed to evidence "the technical and financial capabilities required to carry out the public interest obligations of those entrusted with federal funds."

These facts and other information provided by commentors, combined with the critical importance of this case to over 160,000 Minnesotans, fully support the Commission initiating a proceeding to develop a full and complete factual record regarding LTD's ability to fulfill its obligations and promises.

LTD claims that "the Petition is nothing more than an improper and groundless attempt, motivated by competitive animosity, to relitigate a decision."⁵ There is, however, no basis for that claim. Further, that claim cannot be squared with the support for the Petition from numerous intervenors who lack any competitive motivation whatsoever, including the Minnesota Association of Townships, the Minnesota Farmers' Union, the Institute for Local Self Reliance, Le Sueur County, Pine County, Jackson County, and Balkan Township

⁵ Comments of LTD Broadband LLC Opposing the Opening of a Proceeding (hereinafter "LTD Comments") at p. 2.

LTD's Comments misstate the Commission's authority, mischaracterize the applicable standard and lapse into an irrelevant and inaccurate characterization of motives. LTD asserts the Commission cannot initiate such a proceeding, relying on a series of procedural arguments or technicalities intended to prevent review of relevant substantive concerns related to whether LTD's ETC designation should be revoked. LTD fails to provide any credible basis to ignore this new information or forgo additional fact finding. The Commission clearly has the authority to both grant and revoke a provider's ETC designation, as set forth in the Petition and echoed by the Department, Minnesota Office of the Attorney General – Residential Utilities Division ("OAG") and the Institute for Local Self Reliance ("ILSR").⁶ It also has the authority to address LTD's use of RDOF support in 2023.

The ultimate question in this proceeding is whether LTD's can satisfy its commitments to 160,000 Minnesotans and deliver the broadband service it promised in its effort to win a bid for \$311 million in federal support. At this stage, however, the issue before the Commission is whether to initiate a proceeding to develop a factual record that will enable the Commission to definitively answer that question. The Petition and comments received by the Commission fully support and justify taking that step.

SUMMARY

The Department, OAG, Institute for Local Self-Reliance ("ILSR")/League of Rural Voters/AARP-Minnesota, Minnesota Association of Townships, the Minnesota Farmers' Union, Le Sueur County, Pine County, Jackson County, and Balkan Township all filed comments supporting a Commission proceeding to determine whether to revoke LTD's expanded ETC

⁶ The League of Rural Voters and AARP-Minnesota joined in the ILSR Comments.

designation and/or deny LTD's 2023 funding certification.⁷ Many of these commentors noted specific concerns about LTD relating to the public interest.

In particular, the ISLR Comments noted that they "are particularly concerned that LTD is not prepared to offer the high level of service required to meet the bar for receiving Universal Service Funds."⁸ ISLR emphasized that LTD's limited experience providing "all-wireless service in 5 states" does not align with its bid commitment to "[deploy] fiber across 15 states in nearly 530,000 locations via RDOF within six years."⁹

The Le Sueur Comments note that LTD's entire RDOF award "amounts to around \$1 million in Le Sueur County," which is a fraction of the \$12 million the County estimates it would cost "to build fiber-to-the-door, even with extensive middle mile fiber already in place."¹⁰ This revelation underscores the severity of LTD's errors and the concern that LTD will not be able to build the FTTP network contemplated in its bid for public RDOF funding.

LTD is the only commenter that opposes the proceeding requested in the Petition. LTD's opposition is rooted in several misstatements of fact and law and reflects a desire to keep the Commission from taking a hard look at its ability (or lack thereof) to provide the supported broadband services it promised in its bid for public broadband funding. As discussed in more detail below, and contrary to the LTD Comments, the Commission has

⁷ Department Comments; Comments of the OAG (hereinafter "OAG Comments"); Comments of the ISLR Regarding the Matter of the Petition of LTD to Expand its Designation as an ETC (hereinafter "ILSR Comments"); Minnesota Association of Townships Comment in the Matter of the Petition of LTD to Expand its Designation as an ETC (hereinafter "MAT Comments"); Minnesota Farmers Union Comment Re: Petition of LTD to Expand Its Designation as an ETC (hereinafter "Minnesota Farmers Union Comments"); Office of the Le Sueur County Administrator Comment in the Matter of the Petition of LTD to Expand its Designation as an ETC (hereinafter "Le Sueur County Comments"); Pine County Comments; Jackson County Comment in the Matter of the Petition of LTD to Expand its Designation as an ETC (hereinafter "Jackson County Comments"); Town Of Balkan Comment in the Matter of the Petition of LTD to Expand its Designation as an ETC (hereinafter "Balkan Township Comments").

⁸ ISLR Comments, at p.2.

⁹ ISLR Comments, at p. 4.

¹⁰ Le Sueur County Comments, at p. 1.

authority to reassess LTD's expanded ETC designation and determine funding certification for 2023, both of which are key aspects of the federal-state partnership designed by Congress to ensure the appropriate and effective use of universal service funding.¹¹

As the Commission recognized, the LTD Expansion Order was based on limited information. Only three months elapsed between LTD's initial petition and Commission deliberations. There were only two rounds of comments, no discovery and no evidentiary hearing. Further, the Commission did not have the benefit of LTD's long-form application or other financial or technical information.

Facts subsequently learned call into question the reliability of LTD's certifications to the Commission and therefore the basis for LTD's expanded ETC designation. None of these facts were before the Commission at the time of the LTD Expansion Order, and they all call into question continued reliance on LTD'S untested "certifications".

For these reasons, and as discussed below, MTA and MREA have requested (and the commentors have supported) a Commission proceeding to develop a full record that will enable the Commission to decide whether LTD's continued ETC status is in the public interest.

I. REPLY TO LTD INITIAL COMMENTS

LTD's Comments contains numerous claims and arguments that mischaracterize the facts and law. Those claims and arguments should be rejected.

¹¹ 47 U.S.C. § 214(e)(2), 47 U.S.C. § 254(f).

A. LTD ARGUES ERRONEOUSLY THAT THE COMMISSION LACKS AUTHORITY TO REEXAMINE AND REVOKE LTD'S EXPANDED ETC DESIGNATION BECAUSE LTD IS NOT A CERTIFICATED CARRIER.

LTD argues that the Commission's authority to revoke an ETC designation is limited to carriers that are certified by the Commission and does not include LTD. LTD's argument is refuted by federal and Minnesota state law.

The FCC's *2011 Transformation Order* specifically recognizes the authority of state commissions to revoke ETC designations, an authority that is not limited to state certified carriers:

*[S]tate commissions possess the authority to rescind ETC designations for failure of an ETC to comply with the requirements of section 214(e) of the Act or any other conditions imposed by the state.*¹²

Contrary to LTD's argument, no provisions of federal law or FCC regulations restrict state commission ETC authority to certificated carriers. Further, as the OAG recognized, federal law assigns primary responsibility for ETC designations to state commissions and contemplates revocation of ETC designations as an appropriate remedy.¹³

Minnesota Rules 7811.1400 and 7812.1400 also specifically authorize the Commission to revoke ETC designations for noncompliance with ETC requirements.¹⁴ LTD's comments claim that these rules "do not apply to non-certificated providers such as LTD." But that interpretation would lead to an absurd result because, if the Commission's rules apply solely to certificated carriers, then the Commission did not have authority to designate LTD as an ETC in the first place. Therefore, LTD's interpretation would compel the Commission to rescind its designation.

¹² A *In the Matter of Connect America Fund et al.*, WC Docket Nos. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, para.612, n.999 (2011) (hereinafter "FCC 11-161") (emphasis added).

¹³ See OAG Comments, pp. 4-6, including citation to 47 C.F.R. 54.320 (c), which provides that as follows: "Eligible telecommunications carriers authorized to receive high-cost support that fail to comply with the public interest obligations or any other terms and conditions may be subject to further action, including . . . potential revocation of ETC designation."

¹⁴ Minn. R. 7811.1400, subp. 15; Minn. R. 7812.1400, subp. 15.

B. LTD ARGUES ERRONEOUSLY THAT THE COMMISSION IS PROCEDURALLY BARRED FROM CONSIDERING THE MTA/MREA PETITION.

The Commission's authority to revoke ETC designations is clear. Nevertheless, LTD argues that the Commission is procedurally barred from exercising that authority in this instance either because the Petition: (1) is not truly a "petition" under Minn. Stat. 216A.05, subdivision 5; or (2) is an untimely request for rehearing. Both claims lack any foundation.

LTD's constrained interpretation of the term "Petitioner" in Minn. R. 7829.0100, subp. 16 cannot be seriously viewed as a bar to Commission consideration of the Petition in this case. The MTA/MREA Petition is simply a formal request that the Commission exercise its substantive authority under federal law and its own rules to consider revoking LTD's expanded ETC designation.

The Commission's substantive authority and responsibility cannot be limited by procedural rules, much less by LTD's mistaken interpretation of those rules. Such an approach would make the Commission's substantive jurisdiction subordinate to a definition of "petitioner" under procedural rules, a prioritization that is contrary to established principles and common sense. Moreover, Chapter 7829 itself requires that its provisions "be construed in light of the commission's statutory authority and responsibilities."¹⁵ LTD's argument, which seeks to subordinate the Commission's ability to conduct a substantive review affecting over 160,000 Minnesota residents to a procedural rule, violates these principles of construction.

The MTA/MREA Petition is also not a request for reconsideration. It is simply a formal request that the Commission exercise its ETC revocation authority, beginning with an evidentiary proceeding to develop a robust record based on additional information now available. If the Petition were treated as a request for reconsideration (as LTD illogically argues), the Commission

¹⁵ Minn. R. 7829.0200, subp. 1.

would never be able to consider new or additional information, or exercise its ongoing regulatory authority, once the window for a rehearing petition has closed. In this instance, LTD's interpretation would preclude the Commission's ability to conduct a substantive review of an ETC designation affecting over 160,000 Minnesota residents.¹⁶ That position is not tenable and would clearly violate fundamental principles in administrative law in Minnesota, as explained below.

C. THE LTD EXPANSION ORDER DOES NOT PRECLUDE EVALUATION OF LTD'S EXPANDED ETC DESIGNATION AND 2023 RDOF FUNDING CERTIFICATION.

LTD also claims that the Petition must be rejected because it raises the same issues that were addressed previously in the LTD Expansion Order.¹⁷ This claim fails for at least three reasons.

First, while the issues in the initial ETC designation and the Petition might address some of the same issues, the facts are very different. The Commission often faces cases in which it considers previously decided issues in light of new facts outside the scope of a re-hearing petition. The Commission is always free to re-examine issues from prior decisions in light of newly available facts or changed circumstances under well-established principles of administrative law.

Second, LTD's claim is inconsistent with the Commission's ongoing authority and responsibility to ensure that ETC's meet their ETC obligations.¹⁸ The Commission could not exercise this ongoing authority and responsibility if it were forever bound by its initial ETC designation, as LTD claims.

¹⁶ LTD Comments, at p. 8.

¹⁷ LTD Comments, at pp. 8-9.

¹⁸ The Commission relied on LTD's unsupported assurances in the initial designation which reflected the limited record that was developed in the context of the goal of meeting a FCC target of completing ETC designation by June 7, 2021. Acceptance of those assurances in 2022 is no longer reasonable give the facts that now show that LTD's assurances are not trustworthy

Third, as a matter of general administrative law, the Commission may always re-examine and depart from its prior decisions. In *Wangen v. Comm’r of Pub. Safety*, the Court rejected an argument that an agency was bound by its prior decision, saying:

Court decisions are reflected in a judgment which is docketed and final; the trial court's work is at an end with regard to the matter. In the administrative process, however, agencies typically exert continuing supervisory and regulatory jurisdiction over the affected person. In addition, administrative policies are in a constant state of change, and administrative decision-makers are not only adjudicating but often policy-making. Finally, administrative agencies are charged by a legislative body with protecting public health, safety, and welfare, not merely resolving past adjudicative facts in light of existing law.¹⁹

Other decisions have applied the same principles.²⁰ Under these principles, the Commission can certainly re-examine and revoke LTD’s expanded ETC designation based on new information.

D. THE ABSENCE OF A REQUEST FOR CONTESTED CASE IN THE 2021 CASE DOES NOT BAR THE PROCEEDING REQUESTED BY PETITIONERS.

In another baseless procedural argument, LTD argues that the decision by MTA and Paul Bunyan to not request a contested case hearing in the ETC expansion proceeding last year bars the proceeding requested in this case.²¹ LTD cites no authority for this argument. In fact, there is no authority for this argument. A prior decision to forgo an evidentiary proceeding has no bearing on whether the Commission should initiate an evidentiary proceeding now, especially given all the additional information that has come to light. Further, LTD’s efforts to use procedural claims to

¹⁹ 437 N.W.2d 120, 123 (Minn. Ct. App. 1989) (quoting W. Keppel D. Gilbert, *Minnesota Administrative Practice and Procedure* § 624 at 119-20 (1982)).

²⁰ *State ex. rel. Turnblad v. Dist. Ct.*, 259 Minn. 228, 107 N.W.2d 307 (1960) (“A second, equally important, point is that in such a situation as presented here an administrative agency has a well-established right to reopen, rehear, and redetermine the matter even after a determination has been made. This is a rule of general application.”); *In re North Metro Harness, Inc.*, 711 N.W.2d 129 (Minn. Ct. App. 2006) (“Because there is no statute barring the commission from reconsidering its decisions while it still has jurisdiction, the commission had inherent authority to reconsider its decision.”).

²¹ LTD Comments, at pp. 4-5.

evade investigation are particularly inappropriate given the enormous public interest implications at stake and the principles of *Wangen* and other cases.

E. LTD WRONGLY CLAIMS THAT ITS EXPANDED ETC DESIGNATION WAS “EXHAUSTIVELY ANALYZED.”

The LTD Comments also wrongly claim that its expanded ETC designation was “exhaustively analyzed just a year ago.”²² To the contrary, the LTD Expansion Order reflected the Commission’s awareness that the record before it was significantly limited:

The Commission acknowledges participants’ concerns about LTD’s ability to deploy the proposed services and meet all RDOF requirements. ***However, the record currently before the Commission*** does not contain evidence sufficient to disprove the certifications in LTD’s petition or otherwise support a finding of failure to meet any of the ETC-designation criteria. ***Therefore, the record does not support denying*** the requested ETC designation and, thus, precluding LTD from receiving RDOF support for Minnesota locations.

Nor does the record developed to date contain evidence of disputed factual or legal issues sufficient to warrant a contested case regarding the question currently before the Commission.²³

The Commission also expressly noted that the limited record and its decision would not limit its ongoing supervision:

Based on the record currently before the Commission, the Commission finds that LTD Broadband LLC has met the requirements for ETC designation, and approves LTD’s petition for ETC designation in the census blocks listed in its petition, ***subject to this Commission’s ongoing jurisdiction to oversee ETC compliance*** as set forth in sections 214(e)(2) and 254(f) of the Communications Act of 1934 as amended, the FCC’s universal service rules codified at 47 C.F.R. part 54, and the applicable FCC auction materials.²⁴

²² LTD Comments, at p. 1.

²³ LTD Expansion Order, at p. 8 (emphasis added).

²⁴ LTD Expansion Order, at pp. 9-10 (emphasis added).

In short, the Commission was under a time constraint and was fully aware that it was relying on a limited, quickly developed record. As such, the Commission understood that its analysis could not be credibly described as “exhaustive.”

F. LTD WRONGLY CLAIMS THAT NO NEW INFORMATION HAS BECOME AVAILABLE SINCE THE LTD EXPANSION ORDER.

LTD also erroneously claims that “[t]he information on which [Petitioners] rely is not new” and is simply “a rehash of arguments Petitioners made a year ago that the Commission rejected.”²⁵ LTD is again confusing issues with facts. The core issue (whether LTD qualifies for its expanded ETC designation) remains the same; however, there is significant additional information now available to the Commission that was not available when the LTD Expansion Order was issued. That information includes: (1) SD PUC findings that led to denial of ETC designation for 7481 locations in South Dakota; (2) extensive FCC-declared defaults for LTD’s failure to meet basic filing requirements; (3) a FCC notice of apparent forfeiture for violation of rules and failure to disclose prohibited contacts with another RDOF bidder; and (4) denial of ETC designation by other states.

Under the principles of *Wagen* and other cases, when the Commission is presented with additional new information, it has full authority to decide the same issues differently, especially when there are significant public interest implications. This information clearly supports a proceeding to develop a record to determine whether LTD’s expanded ETC designation should be revoked.

Moreover, Petitioners intend to provide additional Minnesota-specific information and evidence comparable to what was provided in South Dakota along with information pertaining to the impacts on funding availability.

²⁵ LTD Comments, at p. 1.

G. LTD'S CLAIMS ABOUT ITS FIXED WIRELESS SERVICE AND CAF II IMPLEMENTATION HAVE LITTLE OR NO RELEVANCE TO ITS ABILITY TO MEET ITS EXPANDED ETC OBLIGATIONS UNDER RDOF.

LTD asserts that it is ahead of schedule for its CAF II deployments.²⁶ The present status and significance, if any, of LTD's CAF II deployment are evidentiary matters to be explored in a proceeding. Moreover, the information provided in ILSR's comments suggests that LTD's poor track record with its CAF II fixed wireless service might serve as further basis *for revoking* LTD's expanded ETC designation for RDOF funding.²⁷ Even if LTD is entirely correct about the quality and success of its fixed wireless service under CAF II, the gulf between a small-scale deployment of a familiar technology (fixed wireless) and a massive deployment of unfamiliar technology (FTTP) calls into question the probative value of LTD's CAF II performance in predicting the successful deployment and operation of a massive FTTP network under RDOF.

H. LTD'S VAGUE CLAIMS ABOUT DEPLOYING FTTP IN MINNESOTA PROVIDE NO BASIS FOR DECLINING TO INITIATE THE PROCEEDING REQUESTED IN THIS MATTER.

LTD asserts that it is currently deploying FTTP in rural areas in Minnesota.²⁸ However, LTD offers no information whatsoever on the nature, extent, cost or location of any such deployments. Moreover, it is inconceivable that any deployments being made have any resemblance to the scale and complexity of the deployments that will be needed to address any significant part, much less all, of LTD's obligations to approximately 102,000 Minnesota locations. The actual extent and nature of any LTD deployments that have been made, or may be in process, are also evidentiary matters to explore in a proceeding.

²⁶ LTD Comments, at p. 3.

²⁷ ILSR Comments, at p. 3.

²⁸ LTD Comments, at p. 6.

I. THE COMMISSION SHOULD REJECT LTD'S PROPOSAL TO USE UNLAWFULLY NARROW CRITERIA FOR REVOCATION OF ETC STATUS.

In another effort to constrain the Commission's authority, LTD invents an "extreme circumstance" standard for revoking ETC designations.²⁹ LTD doesn't define or cite any authority for this standard, which is not surprising since there is no such standard. LTD then erroneously argues that the OAG recommended limiting the Commission's revocation authority in the OAG's Reply Comments last year.³⁰ In those comments, the OAG simply stated that "the Commission must be prepared to deny and/or revoke ETC designations for companies that will not recognize its authority or that refuse to comply with its ETC requirements." It is obvious from the text of those comments that the OAG was not seeking to define the limits of Commission revocation authority but was instead identifying two circumstances that would require revocation.

In a further attempt to support its arguments for unlawfully narrow revocation criteria, LTD claims that the Commission's criteria for revocation of ETC designations are limited to circumstances present in a 2010 case involving *Midwestern Telecommunications, Inc.*, and that LTD does not meet those criteria.³¹ To the contrary, there is no indication that the Commission was limiting its authority or establishing exclusive criteria for revoking ETC designations. Rather, the Commission was merely stating the basis for revocation in that instance.

²⁹ LTD Comments, at p. 9

³⁰ LTD Comments, at pp. 10-11.

³¹ LTD Comments, at p. 11.

J. THE COMMISSION HAS FULL AUTHORITY TO REVIEW INFORMATION PROVIDED TO THE FCC.

LTD continues its efforts to avoid dealing with the facts by arguing that the Commission “does not have authority to evaluate RDOF commitments LTD has made to the FCC.”³² There are several reasons why the Commission should reject this argument.

First, LTD’s position ignores the Commission’s obligations and authority under Federal statutes and rules to take primary responsibility for ETC designations. Further, there are no provisions of federal law, rules or FCC orders to suggest that states cannot consider technical and financial capabilities (including information provided to the FCC) as part of determining whether an applicant qualifies for an ETC designation. To the contrary, the FCC has repeatedly emphasized its reliance on state commissions to police access to public USF funding through their ETC designation and annual certification authority. The FCC has been clear regarding the broad discretion of state commissions regarding ETC designations. And the FCC has repeatedly emphasized its reliance on state commission fact-finding in relation to ETC designations as it did in the following passage from its *2005 ETC Order*:

We believe 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.³³

It is not possible to evaluate local factual situations without access to information related to a provider’s ETC designation. This necessarily includes information provided to the FCC. Moreover, since ETC designations are limited to those who provide federally supported services,

³² LTD Comments, at pp. 12-13.

³³ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 05- 46, para. 61 (2005) (hereinafter “2005 ETC Order”).

the Commission must necessarily have access to information regarding a provider's ability to offer those services to determine whether the provider qualifies for ETC status. In this case, the supported services are the FTTP broadband services for which LTD seeks RDOF funding.

Second, the discretion of states to consider and address local needs with eligibility requirements has judicial support. The Fifth Circuit reversed an earlier FCC decision that had attempted to deny states authority to add eligibility requirements:

The plain language of the statute [Section 214(e)(2)] speaks to the question of how many carriers a state commission may designate, but nothing in the subsection prohibits the states from imposing their own eligibility requirements. This reading makes sense in light of the states' historical role in ensuring service quality standards for local service. Therefore, we reverse that portion of the Order prohibiting the states from imposing any additional requirements when designating carriers as eligible for federal universal service support.³⁴

In the Commission's 2021 proceeding, LTD erroneously cited this case for the opposite (and incorrect) proposition that the Commission's role in ETC designation was narrow and that the Commission "cannot consider LTD's technological or financial ability – that important task is exclusively within the FCC's jurisdiction."³⁵ LTD takes the same erroneous position in this case, without reliance on the Fifth Circuit.

³⁴ *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 418 (5th Cir. 1999).

³⁵ Page 7 of LTD's April 12, 2021 Reply Comments in Docket No. P-6995/M-21-133 stated:

In *Tex. Office of Pub. Util. Counsel v. FCC*, the Court interpreted Section 214(e)(2) as follows: [w]ith limited exceptions for rural areas, a state commission has no discretion when assessing a carrier's eligibility for federal support. If a carrier satisfies the terms of § 214(e)(1), a state commission must designate it as eligible. Thus, the FCC ruled that a state commission may not impose additional eligibility requirements on a carrier seeking universal service support in non-rural service areas. The agency does permit the states to impose service quality obligations on local carriers if those obligations are unrelated to a carrier's eligibility to receive federal universal service support.

Accordingly, the Commission cannot consider LTD's technological or financial ability – that important task is exclusively within the FCC's jurisdiction.

However, the quote was not the Court's decision, but rather a paraphrasing of the FCC argument:

In the Order, the FCC interpreted § 214(e)(2) in this way. With limited exceptions for rural areas, a state commission has no discretion, ..." (emphasis added)

LTD also argues that a review of the LTD long form would disrupt the partnership between the FCC and the Commission.³⁶ Again, there are no FCC rules or orders or any court decisions to suggest that state commissions are walled off from considering long-form applications in ETC proceedings. To the contrary, the FCC frequently has acknowledged the primary role of a state commission to “evaluate local factual situations in ETC cases.”³⁷ Moreover, LTD provided its long-form application to the SD PUC, which considered it as a significant part of its decision.

A close review of all available facts, including information submitted to the FCC, is especially important since LTD (1) has no significant experience installing and operating FTTP facilities; and (2) is also attempting a dramatic increase in the size (and complexity) of its operations. This combination fully supports a requirement for LTD to share the information that it has provided to the FCC.

Further, LTD voluntarily provided its long form in the South Dakota PUC proceeding, which involved LTD’s ability to provide FTTP to 7,481 locations. By comparison, LTD claims the ability to provide FTTP to approximately 13 times as many locations in Minnesota (102,000). The Commission has far greater cause for concern regarding LTD’s ability to meet its obligations to such a far larger number of locations, which further supports the need to consider all information.

As the Fifth Circuit opinion made clear, the court rejected this narrow interpretation of section 214(e)(2).

³⁶ LTD Comments, at p. 13.

³⁷ 2005 ETC Order, para. 61.

K. LTD ARGUES ERRONEOUSLY THAT THERE ARE NO NEW SIGNIFICANT FACTS TO JUSTIFY OPENING A PROCEEDING.

LTD argues that the facts identified in the Petition are not “significant or relevant ‘new facts,’” and do not support opening any sort of proceeding or investigation.³⁸ MTA, MREA, the OAG, and all other Commenters disagree.

1. Events since the LTD Expansion Order clearly justify Commission investigation.

Since the Commission issued the LTD Expansion Order, each of the following has occurred:

- The SD PUC has made detailed findings showing LTD cannot meet its RDOF obligations to 7,481 locations in South Dakota and denied LTD ETC designation;
- The FCC has declared LTD in default for failure to meet basic filing ETC filing deadlines in six states;
- The FCC informed LTD of apparent liability for noncompliance with critical requirements, including failure meet disclosure requirements, related to its bid for the RDOF funding; and
- California and Iowa have also denied LTD ETC status on the merits.

Overall, these actions have resulted in the FCC declaring LTD in default on over 30 percent (161,343 of 528,088) of the RDOF locations included in LTD’s bid.³⁹ It is difficult to understand how LTD can assert these are not “significant” events.

³⁸ LTD Comments, at p. 14. LTD also asserts that information identified in the Petition does not support revocation, based on LTD’s inappropriately narrow articulation of the standard for revocation. LTD Comments, at p. 13. As discussed above, whether to revoke LTD’s expanded ETC designation is the ultimate issue facing the Commission, but the current, threshold matter is whether to open a proceeding to gather additional facts directed at that issue.

³⁹ The FCC declared LTD in default in California, Kansas, Oklahoma, Iowa, Nebraska, and North Dakota. RDOF Winning Bidders; *Rural Digital Opportunity Fund Auction (Auction 904)*; *Rural Digital Opportunity Fund*, DA 21-908, Order para. 16 (July 26, 2021) (“DA 21-908”); *Rural Digital Opportunity Fund Auction (Auction 904)*; *Rural Digital Opportunity Fund*, Order para. 18, DA 21-1311 (Oct. 20, 2021) (“DA 21-1311”); *Rural Digital Opportunity Fund Support for 7,608 Winning Bids Ready to be Authorized*; *Bid Defaults Announced*, Public Notice, DA 21-1582, at Attach. B (Dec. 16, 2021) (“DA 21-1582, Attach. B.”); *Rural Digital Opportunity Fund Support for 5,254 Winning Bids Ready to be Authorized*; *Bid Defaults Announced*, Public Notice, DA 22-96, at Attach. B (Jan. 28, 2022) (“DA 22-96, Attach. B.”).

2. *The SD PUC proceeding is particularly informative because it directly pertains to the same factors that will apply with even more force in Minnesota.*

LTD attempts to minimize the importance of the SD PUC proceeding, asserting that the SD PUC's determinations were specific to South Dakota's public interest statute and based entirely on one person's testimony. Contrary to LTD's argument, the SD PUC findings regarding LTD's inability to perform are themselves *facts* that are not dependent on the SD PUC public interest *conclusions* that were also included in the SD PUC Order. It is a fact that the SD PUC denied LTD's request for ETC designation and the SD PUC's findings in support of its decision factually represent what the SD PUC determined as the basis for its ultimate decision. MTA and MREA are not asking the Commission to rely upon the facts found by the SD PUC to make its ultimate decision regarding LTD's expanded ETC designation. Rather, Petitioners will provide comparable evidence directly pertaining to Minnesota – evidence that will support comparable conclusions. The facts found by the SD PUC, along with other information now available, clearly support initiating a similar proceeding in Minnesota.

The LTD Comments appear to misunderstand the fact-finding role of regulatory commissions. Expert witnesses are often called upon in regulatory proceedings to provide reports, expert testimony, and opinions. It is up to the regulatory body to weigh the evidence and make factual determinations. If the regulatory agency accepts the testimony of an expert, that testimony is no longer merely the opinion of the expert.

Mr. Larry Thompson provided testimony based on extensive experience in the installation of FTTP facilities and networks and direct familiarity with the engineering characteristics areas to be served in South Dakota. LTD presented testimony of its Chief Executive Officer, Mr. Corey Hauer. Assessing the credibility and weight to be given to these experts is entirely within the fact-

finding role of regulatory commissions. In performing that role, the SD PUC accepted Mr. Thompson's testimony⁴⁰ and rejected Mr. Hauer's.⁴¹

LTD's primary response to the information contained in its long form and the SD PUC findings is that these facts "existed at the time" of the Commission designation of LTD, making these facts not "new."⁴² Although LTD's long-form application information was available previously, the salient point is that the Commission did not have that information when it granted LTD's expanded ETC designation. The unknown "existence" of these facts does not preclude the Commission from considering these facts now.

LTD also argues that the SD PUC decision is meaningless because it is based on a "public interest" standard and the South Dakota rules.⁴³ But the application of a public interest standard to ETC designations is not unique to South Dakota. Public interest considerations expressly apply to ETCs in Minnesota under both State and Federal law, as discussed above

3. LTD's other claims are mistaken and do not address the immediate issue of whether the Commission should initiate a proceeding.

LTD makes several claims regarding the question of whether its expanded ETC designation should be revoked. Those claims are unsupported and do not address the immediate issue of whether the commission should initiate an investigation. At most, LTD's claims suggest factual disputes to be resolved in the expedited proceeding requested by Petitioners.

⁴⁰ *In the Matter of the Application of LTD Broadband LLC for Designation as an Eligible Telecommunications Carrier for Purposes of Receiving Federal Universal Support*, TC21-001, Final Decision and Order Denying Application for Designation as an Eligible Telecommunications Carrier in Certain Census Blocks; Notice of Entry of Order, Findings of Fact para. 82 (Mar. 21, 2022) ("SD PUC Order").

⁴¹ SD PUC Order, Findings of Fact, para. 69.

⁴² LTD Comments, at p. 14.

⁴³ LTD Comments, at p. 18.

Public Interest Harms: LTD argues that the Petition’s discussion pertaining to public interest harms is no more than illogical speculation, based on improper competitive motives,⁴⁴ and that Petitioners have provided no support for great risk to other federal funding sources resulting from LTD’s ETC designation.⁴⁵ To the contrary, Petitioners will present clear evidence that LTD’s expanded ETC designation: (1) impedes other federal and state funding for those 102,000 locations within its designation; and (2) will continue to do so for as long as LTD remains a designated ETC for those locations.

Finally as explained above, there is absolutely no basis for any assertions about the motives of the Petitioners, much less the motives of the many Commenters who have filed in support of the Petition.

Claims re CAF II: LTD also claims that it is providing reliable service and exceeding CAF obligations in Minnesota.⁴⁶ There are two fundamental flaws with this claim: (1) even if LTD was meeting or exceeding its CAF II obligations in Minnesota, it would have very little, if any, relevance or significance with respect to LTD’s ability to simultaneously meet its RDOF obligations and manage a huge increase to the size and complexity of its business operation; (2) there is substantial question as to whether LTD is providing the service quality called for by CAF II, since installation of facilities does not equate to meeting CAF II service quality requirements.

Installation of Fiber Facilities: LTD further claims that it has invested in deployment and operation of fiber broadband in rural areas of Minnesota and that this investment somehow indicates that LTD can meet its ETC obligations to the approximately 102,000 Minnesota locations

⁴⁴ LTD Comments, at pp. 15-17.

⁴⁵ LTD Comments, at p. 17

⁴⁶ LTD Comments, at p. 16.

within its expanded ETC designation area.⁴⁷ Even if LTD has installed some fiber facilities in Minnesota, it would have very little, if any, relevance or significance with respect to LTD's ability to simultaneously meet its expanded ETC obligation to build and operate an extensive FTTP network and manage a huge increase in the size and complexity of its business operation. Moreover, there is also substantial question as to exactly what LTD has installed and how much, if any, installation has been accomplished. A proceeding and factual record is needed to evaluate these claims.

The LTD Expansion Order. LTD quotes the Commission's finding in last year's LTD Expansion Order that ETC designation of LTD for its RDOF areas was in the public interest.⁴⁸ LTD then claims that none of the facts in the Petition "could, if true, change this public interest analysis."⁴⁹ But the LTD Expansion Order was clear that the public interest finding at that time was based on the assumptions that LTD could actually be successful: (1) in deploying the FTTP network; and (2) thereafter operating the FTTP network. As explained above, the facts now available suggest that LTD certifications are unreliable and call into question LTD's ability to successfully deploy and operate the promised FTTP network. The LTD Expansion Order was also clear that: (1) the Commission had accepted LTD "certifications" of its abilities;⁵⁰ (2) the

⁴⁷ LTD Comments, at p. 16.

⁴⁸ LTD Comment, at p. 17.

⁴⁹ LTD Comments, at p. 17.

⁵⁰ LTD Expansion Order, at p. 8.

Commission was aware of limitations in the record;⁵¹ and (3) the Commission expressly reserved its rights to revisit the designation if facts warranted such a step.⁵²

As discussed above, the Commission has full authority to consider all available information (including information provided to the FCC) and to revoke LTD's ETC designation for RDOF areas under both state and federal law.

L. LTD SHOULD NOT BE INCLUDED IN THE 2022 GENERAL CERTIFICATION PROCEEDING BECAUSE OF SERIOUS AND UNIQUE QUESTIONS REGARDING LTD.

LTD claims that its annual ETC certification should be included in Docket P-999/PR-22-8.⁵³ To the contrary, the unique and troubling questions related to LTD preclude such an approach.

LTD's position is based on the instructions for completing data collection forms,⁵⁴ which is in turn based on its position that its certification does not raise any unusual concerns. Again, LTD's position elevates form over substance.

LTD argues that its' "track record, experience and planning" are irrelevant. LTD further raises an imaginary risk that the Commission's consideration of these facts "could be construed to require the State to examine the track record and experience of Petitioners' members' non-deployment in the areas where LTD successfully bid for RDOF support."⁵⁵ LTD appears to not recognize the connection between receipt of federal support and an obligation to serve. LTD's duties and the Commission's concern are rooted in LTD's possible \$311 million of support.

⁵¹ LTD Expansion Order, at p. 8 ("[T]he record currently before the Commission does not contain evidence sufficient to disprove the certifications in LTD's petition or otherwise support a finding of failure to meet any of the ETC-designation criteria.")

⁵² LTD Expansion Order at p. 9 -10 ("LTD and its ETC status remain subject to this Commission's ongoing authority to oversee compliance.).

⁵³ LTD Comments, at pp. 19-20.

⁵⁴ LTD Comments, at pp. 19-20.

⁵⁵ LTD Comments, at p. 20.

M. CONTRARY TO LTD'S CLAIMS, AN EXPEDITED PROCEEDING WITH DISCOVERY IS NEEDED TO PROVIDE A FACTUAL BASIS FOR THE COMMISSION'S DECISION.

LTD argues that no proceeding is needed.⁵⁶ As a secondary position, LTD argues for an unreasonably compressed timeframe with no discovery.⁵⁷ This position is an extension of LTD's claim that there are no remaining factual issues regarding its designation that are within the Commission's jurisdiction. LTD is wrong on all of these points as explained above. As a result, its procedural recommendations are also wrong.

Contrary to LTD's position, discovery is essential to develop a fact record that will address the critical public interest question of whether LTD can meet its ETC obligation to provide the supported broadband services contemplated in bid for \$311 in RDOF funding for Minnesota. It is widely recognized that discovery is an essential tool to develop reliable records, and the Commission routinely grants discovery even in proceedings when no evidentiary record is being developed. Discovery is an essential tool to obtain relevant information and to test the credibility and weight of parties' claims. The need for discovery is all the more obvious when critically important material facts are contested, as in this case.

LTD also claims that it needs further protections beyond those provided in Petitioners' draft protective order, which LTD characterizes as a "tolerable start but is not fully adequate to protect LTD's interests and competitively-sensitive information."⁵⁸ That claim is refuted by the fact that the protections for highly sensitive data that are contained in Petitioners' draft protective order are essentially the same as the protections to which LTD stipulated in the SD PUC proceeding.

⁵⁶ LTD Comments, at pp. 1-2.

⁵⁷ LTD Comments, at p. 21.

⁵⁸ LTD Comments, at p. 21.

II. REPLY TO DEPARTMENT AND OAG COMMENTS

A. REPLY TO DEPARTMENT COMMENTS

The Department Comments indicate general agreement with the need for Commission diligence in policing access to federal broadband funding through its authority over ETC designation and certification. As the Department comments note, the need for diligence is reflected in the Le Sueur and Pine Counties comments, which “clearly reflect how critical it is that all sources of high-cost funds are coordinated, are distributed to providers to serve unserved and underserved areas as soon as possible, and providers are held accountable to the standards of the federal program.”⁵⁹

Once public funds are given to an ill-equipped or untrustworthy provider, it is virtually impossible for regulators to assure proper use of funds or quality service. To have a meaningful impact that protects the integrity of these public funds and ensures the effective, timely deployment of high quality broadband to Minnesota residents services , the Commission needs to address the concerns on the front end through ETC designation. In this case, this means revoking LTD’s expanded ETC designation.

The Department Comments recount that on February 19, 2019, Commerce filed a Petition for Reconsideration that asked the Commission to issue an Order requiring LTD and Broadband Corp. to “commit to comply with the consumer protections afforded by specific, identified Minnesota laws and rules, and commit to enforcement authority of the Commission and Department.”⁶⁰ Petitioners acknowledge that consumer protections are important, but such requirements do not address the far more fundamental issue of whether a provider can be trusted

⁵⁹ Department Comments, at p. 1.

⁶⁰ Department Comments, at p. 5.

with public funds to build and reliably operate a broadband network. By the time the Commission applies consumer protections to a provider's operations, it is too late to protect the funds that have been provided and too late to assure installation of a network that will provide quality service.

Petitioners agree with the Department that LTD never explained how it will meet the FCC's requirement that providers receiving RDOF support be prepared to provide voice service throughout its service areas.⁶¹ Even more troubling is the fact that LTD has not explained, much less demonstrated, how it will provide RDOF-supported FTTP broadband services throughout its expanded ETC areas. Instead of providing an explanation, LTD has relied on mere certifications that it can meet its obligations. With no experience or track record building and operating a FTTP in Minnesota and given the need for massive growth to meet its nationwide RDOF obligations, it is critical that LTD provide a thorough and credible demonstration of its ability to meet its ETC obligations consistent with the public interest.

The Department's comments request that Petitioners further explain the purpose of state-level review and how a positive or negative FCC determination for LTD would influence a pending Commission proceeding.⁶² The Commission has authority over the designation and annual certification of ETCs under the Telecommunications Act of 1996.⁶³ As the Department Comments note, states were given this authority because "Congress determined that state commissions are the best situated to scrutinize ETC applicants."⁶⁴ The FCC does not have the same ability or knowledge of conditions in Minnesota to match the Commission's ability to determine whether a provider can meet its ETC obligations in Minnesota. Further, the focus of the FCC's review will not be limited

⁶¹ Department Comments, at p. 6.

⁶² Department Comments, at p. 8.

47 U.S.C. § 214(e)(2), 47 U.S.C. § 254(f).

⁶⁴ Department Comments, at p. 9.

to Minnesota and will not necessarily be informed as to specific Minnesota facts. For these reasons, the FCC depends on states to police access to Universal Service Funds on the front end through ETC designations.⁶⁵

Given the FCC's express reliance on state commission ETC designations to protect the public interest in each state, this proceeding would not be rendered moot by a positive or negative FCC decision on LTD's RDOF funding request. The FCC will still look to and depend on the Commission, which has sole responsibility for ETC designations in Minnesota. Moreover, the FCC has given no indication that it is poised to decide LTD's funding any time soon. As of the date of this filing, the FCC has approved funding for 15 of 22 RDOF companies in Minnesota, but has not approved funding for LTD, which "won" over 75 percent of total Minnesota RDOF funding.⁶⁶

The Department Comments suggest that if the Commission decides to open a proceeding, the Commission may wish to apply consistent criteria for all ETCs.⁶⁷ No such decision is needed in this proceeding, and any such decision by the Commission should be made after this proceeding since this proceeding will already involve multiple issues and a compressed timetable. The standard for ETC designations has already been established by the FCC and Commission rules.

⁶⁵ See *In the Matter of Bridging the Digital Divide for Low-Income Consumers et al.*, WC Docket No. 17-287 et al., Fifth Report and Order, Memorandum Opinion and Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 19-111, para. 52. (2019) (emphasis added) ("the **traditional state designation role better serves section 254(b)'s policy goals by facilitating thorough state reviews of carriers seeking ETC designations**, as well as state monitoring of carriers who have received ETC designations. This helps prevent, detect, and curb waste, fraud, and abuse in the program, which in turn promotes the efficient and responsible use of limited program funds.") (emphasis added).

⁶⁶ *Rural Digital Opportunity Fund Support Authorized for 466 Winning Bids*, Public Notice, DA 21-1158, at Attach. A (Sept. 15, 2021); *Rural Digital Opportunity Fund Support Authorized for 311 Winning Bids*, Public Notice, DA 21-1420, at Attach. A (Nov. 12, 2021); *Rural Digital Opportunity Fund Support Authorized for 2,008 Winning Bids*, Public Notice, DA 21-1560, at Attach. A (Dec. 14, 2021); *Rural Digital Opportunity Fund Support Authorized for 2,521 Winning Bids*, Public Notice, DA 22-38, at Attach. A (Jan. 14, 2022); *Rural Digital Opportunity Fund Support Authorized for 5,657 Winning Bids*, Public Notice, DA 22-280, at Attach. A (Mar. 15, 2022); *Rural Digital Opportunity Fund Support Authorized for 1,345 Winning Bids*, Public Notice, DA 22-402, at Attach. A (Apr. 15, 2022); *Rural Digital Opportunity Fund Support Authorized for 830 Winning Bids*, Public Notice, DA 22-523, at Attach. A (May. 12, 2022).

⁶⁷ Department Comments, at p. 8.

The crux of that standard boils down to whether the applicant can provide the supported services, which includes broadband services for which the applicant seeks funding, consistent with the public interest. That is the standard to apply in this case or any other.

Petitioners also agree with the Department's recommendation to consider all the criteria used by the SD PUC to reach its decision.⁶⁸ Therefore, the Commission should, in addition to technical, managerial, financial capability, consider issues such as service quality defects that are likely to result from a cut-rate network designed with minimization of costs as the overriding consideration. LTD's ability to provide reliable broadband service to the over 160,000 Minnesotans within its expanded ETC territory, will ultimately depend on LTD's ability to build and operate an extensive, high quality FTTP network. As such, the Commission should consider the impacts of LTD's financial limitations on the construction of the FTTP and how a cobbled-together FTTP will impact service quality.

The Department Comments also recognize that Congress gave primary responsibility to states to designate and annually recertify ETCs.⁶⁹ This position is also supported by the *2005 Report and Order*, in which the FCC emphasized the critical role of states, noting that "Section 214(e)(2) of the Act gives states the primary responsibility to designate ETCs."⁷⁰

The Department Comments state that if the Commission decides to grant Petitioners' request to build a more complete record on LTD's ETC status, findings from such a record may assist the Commission to determine future state specific requirements to ensure a meaningful ETC designation process.⁷¹ Petitioners agree that this proceeding might inform future proceedings.

⁶⁸ Department Comments, at p. 9.

⁶⁹ Department Comments, at p. 9.

⁷⁰ 2005 ETC Order, para. 61.

⁷¹ Department Comments, at p. 10.

However, decisions regarding any such future proceedings will obviously have to be made in those proceedings or in a generic docket rather than this case.

B. REPLY TO OAG COMMENTS

As explained below, Petitioners agree with the great majority of the OAG Comments.

Procedural Recommendations: The OAG Comments recommend that the Commission grant the Petition’s request for a proceeding.⁷² In support of its recommendation, the OAG Comments note that oversight of ETCs to ensure that they properly use federal Universal Service support is a “continual process.”⁷³ Petitioners agree with the OAG on this fundamental point. As the OAG indicates, even after a state commission grants ETC designation, it must continue to ensure that federal high-cost support is used “only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.”⁷⁴

The OAG Comments are not opposed to an expedited proceeding under Minn. Stat. § 237.61.⁷⁵ Petitioners continue to believe that an expedited proceeding provides the best path for building a robust record as efficiently and quickly as possible. While a contested case process could also develop a robust record, it would be more costly to the parties and take significantly more time. It is important to resolve this matter as expeditiously as possible given the need to clarify the availability of broadband funding and the opportunities for broadband development in Minnesota. Therefore, an expedited proceeding would be a far better alternative than a contested case in this instance.

⁷² OAG Comments, at p. 3.

⁷³ OAG Comments, at p. 3.

⁷⁴ 47 C.F.R. § 54.314(a).

⁷⁵ OAG Comments, at p. 3.

The OAG Comments assert that the Commission could also initiate an informal or expedited proceeding under Minnesota Rules 7829.1200 and 7829.1900. Petitioners agree on the initiation of an expedited proceeding but do not agree that an informal proceeding would be appropriate because there are contested material facts that do not lend themselves to more informal proceedings.

The OAG Comments do not oppose the designation of a lead Commissioner or subcommittee of Commissioners to facilitate the proceeding,⁷⁶ which is allowed under Minn. Stat. § 216A.03, sub. 8 or 9. Petitioners continue to believe that the appointment of a lead commissioner or subcommittee is essential to ensure the timely and orderly management of the proceeding and to resolve any discovery or evidentiary disputes. The OAG is not opposed to the cross-examination of parties if the Commission would find it helpful.⁷⁷ The Petitioners continue to believe that cross examination is important.

The OAG Comments also agree that either schedule proposed by the Petitioners is acceptable, as is a proposed schedule from the Commission or an ALJ.⁷⁸ The Petitioners understand that the final schedule will have to account for other Commission priorities. The Petitioners encourage the adoption of a schedule that expedites consideration of this petition to the extent practical and consistent with development of a full record.

The OAG Comments also agree that the Commission should require LTD to submit the long-form application portion of its FCC Form 683 to the Commission.⁷⁹ The OAG Comments note that review of LTD's long form application is essential for the Commission to properly

⁷⁶ OAG Comments, at p. 4.

⁷⁷ OAG Comments, at p. 4.

⁷⁸ OAG Comments, at p. 4.

⁷⁹ OAG Comments, at p. 4.

determine LTD's capabilities and will show that LTD is not able to meet its bid commitments in Minnesota.

Commission Authority and Jurisdiction: The OAG Comments correctly note that the Commission has the authority to oversee and monitor an ETC's compliance with the federal Universal Service rules.⁸⁰ The FCC has made this point in several orders. In the *2011 Transformational Order*, the FCC recognized that the statutory role that Congress created for state commissions with respect to eligible telecommunications carrier designations includes "monitoring compliance with the new public interest obligations."⁸¹ More recently, the FCC emphasized the states' role in conducting thorough reviews of those seeking ETC designations and monitoring carriers who have received designations.⁸²

The OAG Comments state that the Commission has the authority to put into place conditions it deems necessary to ensure that an ETC fulfills its federal Universal Service Obligations.⁸³ Petitioners agree with the OAG. Congress granted state commissions authority over ETC designations and certifications,⁸⁴ and FCC Orders have confirmed that states have authority to add requirements for ETC designation. That authority would also support added conditions.

The OAG Comments also recognize that the Commission has the necessary authority to revoke LTD's expanded ETC designation. The Petitioners agree because the Commission has express authority to revoke ETC designations under Minnesota Rules and the responsibility and

⁸⁰ OAG Comments, at pp. 4-5.

⁸¹ FCC 11-161, para. 15.

⁸² *In the Matter of Bridging the Digital Divide for Low-Income Consumers et al.*, WC Docket No. 17-287 et al., Fifth Report and Order, Memorandum Opinion and Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 19-111, para. 52. (2019).

⁸³ OAG Comments, at pp. 4-5.

⁸⁴ 47 U.S.C. § 214(e)(2), 47 U.S.C. § 254(f).

authority to do so under Federal statute and FCC orders. Minn. R. 7811.1400, subp. 15 and 7812.1400, subp. 15 explicitly provide for revocation of ETC designation upon finding that a local service provider does not qualify as an ETC.

The OAG Comments also recognize that federal statute and FCC rules and orders provide sufficient authority for Commission revocation of an ETC designation if (1) the FCC's High Cost criteria are not met, (2) a designation is not in the public interest, or (3) an ETC does not use its support solely for the provision, maintenance, and upgrading of the facilities and services for which the support is intended. The OAG Comments also provide citations to federal statute and FCC rules and orders that establish Commission authority to revoke an ETC designation.

The OAG says that it is not strictly necessary for the Commission to revisit its LTD expanded ETC designation order, however, revisiting its prior order may provide the cleanest administrative path if the Commission decides to revoke TLD's expanded ETC designation.⁸⁵ Petitioners agree that there are several alternatives available to the Commission.

The OAG Comments clarify that while a state commission's denial or revocation of an ETC designation prevents the receipt of the federal Universal Service Support, state commissions do not make federal Universal Service funding decisions.⁸⁶ Petitioners agree with the OAG. The Telecommunications Act of 1996 created a federal-state partnership framework in which states have "*the primary responsibility* to designate ETCs."⁸⁷ Such designation unlocks access to limited federal universal service funding, but does not determine the amount of funding available upon designation.

⁸⁶ OAG Comments, at p. 7.

⁸⁷ 2005 ETC Order, para. 61 (emphasis added).

The OAG Comments say that, contrary to footnote 24 of the Petition, the Commission's federal Universal Service jurisdiction goes beyond ETC designations and annual certifications, even for wireless and interconnected Voice Over Internet Protocol.⁸⁸ While Petitioners do not necessarily agree with this position, the OAG Comments note that there is an open docket regarding the Commission's ETC jurisdiction and, as such, they will not discuss jurisdiction at length here. Petitioners submit that this matter should be addressed without adding other issues that can be resolved in a separate pending proceeding.

Public Interest Factors: The OAG Comments recognize the importance of the fact that other state and federal broadband funding opportunities could be substantially limited or delayed if LTD is not able to fulfill its RDOF obligations and its expanded ETC designation is not revoked.⁸⁹ Comments by other parties in this docket confirm that LTD's expanded ETC designation is currently harming the public interest by tying up funding that could otherwise be used to expand broadband service to rural Minnesota residents. For instance, in January 2021, Le Sueur County had a state border to border grant rejected by the Minnesota Department of Employment and Economic Development because of LTD's RDOF commitments in the county.⁹⁰

The OAG says that if the Commission determines that LTD's ETC expansion designation should be revoked, LTD's RDOF Phase I support will not automatically be redistributed to other Minnesota RDOF ETCs.⁹¹ The Petitioners agree that RDOF Phase I support will not be automatically redistributed. However, this funding will be accessible for rural broadband

⁸⁸ OAG Comments, at p. 4.

⁸⁹ OAG Comments, at p. 7.

⁹⁰ Le Sueur County Comments, at pp. 1-2.

⁹¹ OAG Comments, at p. 7.

development through RDOF Phase II⁹² and the Broadband Equity Access and Deployment (BEAD) program.⁹³

III. REPLY TO OTHER COMMENTS

a. Institute for Local Self-Reliance

In addition to LTD's lack of ability to provide service discussed in the Summary above, the ILSR's comments also recognized the implications of LTD's history of poor customer service and provided an extensive list of additional concerns about whether LTD can be trusted to provide adequate consumer protections, ensure affordability, account for impacts on Tribal lands, provide quality service and actually deliver on its bid commitments. Among other things, ILSR's comments observed that:

- “LTD also failed to follow through on both its CAF II and Rural Broadband Experiment bids,” defaulting on \$71,254 in support under CAF II in Nebraska and Nevada and ultimately being “subject to penalty fees” and an FCC finding that “LTD had hindered the disbursement of funds that could have otherwise been productively used to increase broadband access to unserved or underserved areas;”⁹⁴
- LTD “failed to outline any specific consumer protection measures in the works for its expansion” and provided only what ILSR characterized as “vague commitments” that “should not be considered sufficient basis for expanding LTD’s ETC designation” “LTD’s history of poor customer service”⁹⁵
- “LTD has taken a similarly vague approach to affordable connectivity requirements” and “expanding LTD’s ETC designation has the potential to harm

⁹² *Rural Digital Opportunity Fund; Connect America Fund*, WC Docket No. 19-126 et al., Report and Order, FCC 20-5, at p. 4 (Jan. 30, 2020) (“We adopt our proposal to establish a budget of \$20.4 billion for the Rural Digital Opportunity Fund. We also adopt our proposal to make available \$16 billion for Phase I, and to make available for Phase II a budget based on the remaining \$4.4 billion, **along with any unawarded funds from Phase I.**”) (emphasis added).

⁹³ *Telecompetitor*, NTIA Chief has Ambitious BEAD Goals, Clarifies Fiber Priority and Overbuilding, <https://www.telecompetitor.com/ntia-chief-has-ambitious-bead-goals-clarifies-fiber-priority-and-overbuilding/> (“Davidson suggested that if an area has yet to receive RDOF funding authorization, that area should be eligible for BEAD grants.”),

⁹⁴ ILSR Comments, at p. 3.

⁹⁵ ILSR Comments, at p. 4.

all customers in its bid areas, but poses a particular risk for low-income customers,”⁹⁶

- “LTD has failed to respond to the Department’s requests for information regarding Tribal lands falling within its expanded service areas;”⁹⁷
- “LTD has experienced prolonged network outages that cause concern about its ability to provide the required level of quality for essential 911 service” and “has had 33 complaints on Downhunter in the last 9 months, with commenters citing outages, long customer service wait times to manage these outages, and slower-than-advertised speeds when service is working”⁹⁸

Putting these serious defects into context, the ILSR Comments emphasize the “valuable and unprecedented federal funding opportunities for the expansion of broadband” being put at risk by LTD, and note the need that this funding be spent in ways that will extend quality, affordable, reliable connectivity as soon as possible to those who need it.⁹⁹ The ILSR Comments also recognize that LTD’s inability to obtain ETC designations in seven of fifteen states are indicative of limited resources and poor planning which calls into question the LTD’s ability to deliver service on the scale needed.¹⁰⁰

ILSR Comments notes the dilemma that would result from reliance on the FCC process. If FCC ultimately places LTD in default, there will be significant delay for tens of thousands of rural residents in getting “future-proof broadband service.” If FCC awards LTD the RDOF funds, LTD is not required to begin building for several years, forcing localities to continue to wait.¹⁰¹ Petitioners agree with the ILSR. If the FCC awards LTD the RDOF funds, the FCC’s first

⁹⁶ ILSR Comments, at p. 4..

⁹⁷ILSR Comments, at p. 5.

⁹⁸ LSR Comments, at pp. 3-4.

⁹⁹ ILSR Comments, at p. 2.

¹⁰⁰ ILSR Comments, at p. 3.

¹⁰¹ ILSR Comments, at p. 5.

enforcement milestone does not occur until three years after funding begins. As a result, by the time LTD's failure to meet RDOF deployment obligations are discovered, replacement public funds may have become unavailable, leaving little if any funding sources to extend broadband service to the 160,000 unserved Minnesotans who had been forced to wait. The ILSR Comments also recognize LTD is causing funding from programs such as BEAD to be unavailable to other providers. Petitioners share ILSR's concern and agree that early indications suggest it will be difficult for a different provider in areas already served by RDOF to obtain BEAD funding.¹⁰²

b. Le Sueur County

In addition to LTD's gross underestimate of costs discussed in the Summary above, the Le Sueur Comments note that it is "not aware of any significant work conducted, underway or planned within [the] County by LTD to install fiber networks in [their] communities."¹⁰³ Le Sueur County's comments indicate that the County has "reached out to LTD several times and invited them to meetings to discuss their plans for investments within [the] County," but the County has "not been able to secure such a meeting" or received any communication from LTD regarding "any plans for work within [the] County."¹⁰⁴

The Le Sueur Comments also state that the County has been working with existing internet service providers who are willing and ready to conduct work, but that RDOF creates a barrier to accessing State and Federal grant dollars. Moreover, Le Sueur County Comments recount that in January 2021 the Minnesota Department of Employment and Economic Development rejected a

¹⁰² Notice of Funding Opportunity, Broadband Equity, Access, and Deployment Program (May 13, 2022) ("In identifying an Unserved Service Project or Underserved Service Project, an Eligible Entity may not treat as "unserved" or "underserved" any location that is already subject to an enforceable federal, state, or local commitment to deploy qualifying broadband as of the date that the challenge process described in Section IV.B.6 of this NOFO is concluded."),

¹⁰³ Le Sueur County Comments, at p. 1.

¹⁰⁴ Le Sueur County Comments, at p. 1.

state border to border grant to Le Sueur County because of RDOF and LTD commitments.¹⁰⁵ These comments further show that LTD’s expanded ETC designation is currently harming the public interest by tying up funding that could otherwise be used to expand broadband service to Minnesotans.

The Le Sueur Comments support the Commission conducting an expedited proceeding and note that the “longer this issue remains unresolved, the less funds will likely be available for our local internet service providers to access and our citizens go without improved internet access which they all deserve.”¹⁰⁶

c. Pine County

The Pine County Comments recognize that LTD is proposing to provide wireline connections throughout Pine County without first understanding the topography, the current infrastructure, or demographics.¹⁰⁷ The Pine County Comments also note that “LTD Broadband’s small presence and unproven track record in anything approaching a project this large, causes us considerable concern.”¹⁰⁸ These concerns underscore LTD’s lack of experience building FTTP networks and the massive increase in the size of LTD’s business required by its RDOF bid and demonstrate the need for the Commission to thoroughly scrutinize LTD’s expanded ETC designation.

The Pine County Comments recognize LTD’s RDOF award in may prevent the County from using other federal or state funding and that “[m]any of our residents will be locked

¹⁰⁵ Le Sueur County Comments, at pp. 1-2.

¹⁰⁶ Le Sueur County Comments, at p. 2.

¹⁰⁷ Pine County Comments, at p. 1.

¹⁰⁸ Pine County Comments, at p. 2.

out...despite the historic state and federal investment in broadband.”¹⁰⁹ These Comments further show that LTD’s expanded ETC designation ties up funding that could otherwise be used to expand broadband service, thereby, harming the public interest.

d. Jackson County

The Jackson Comments recommend that the Commission initiate a proceeding and revoke LTD’s expanded ETC designation.¹¹⁰ The Jackson County Comments also state that while LTD won locations in the County, the County is not aware of any significant work conducted, underway or planned by LTD, and recognize that LTD’s RDOF award prevents the County from using other federal or state funding in RDOF areas.¹¹¹

e. Minnesota Association of Townships

Minnesota Association of Townships (“MAT”) Comments support the Commission initiating a proceeding to consider revoking LTD’s expanded ETC designation and declining to certify LTD.¹¹² MAT Comments further note that there are serious concerns about LTD Broadband’s ability to provide broadband and that revoking LTD’s designation would best allow broadband service to be reliably brought to unserved and underserved rural areas.¹¹³

e. Balkan Township

The Balkan Township Comments indicate that the Township has been hindered in their efforts to bring a fiber network to the Township because of LTD’s RDOF award.¹¹⁴ This illustrates yet another instance in which LTD’s expanded ETC designation harms the public interest by tying

¹⁰⁹ Pine County Comments, at p. 2.

¹¹⁰ Jackson County Comments, at p. 1.

¹¹¹ Jackson County Comments, at p. 1.

¹¹² MAT Comments, at p. 1.

¹¹³ MAT Comments, at p. 1.

¹¹⁴ Balkan Township Comments, at p. 1.

up funding that could otherwise be used to expand broadband service. The Balkan Township Comments also support an expedited proceeding, noting the “longer this process takes, the more Balkan Township will experience delays and cost increases to provide fiber” its residents.¹¹⁵

f. Minnesota Famers Union

The Minnesota Farmers Union Comments correctly note that: the Commission should consider revoking LTD’s expanded ETC designation; LTD’s RDOF award is standing in the way of farms and others from gaining quality internet service through new fiber networks; LTD does not have experience building fiber networks; and LTD has not undergone significant work to serve new homes with fiber.¹¹⁶

Those Comments emphasize that burying fiber, by making use of the right-of-way, effects farms. As a result, LTD’s lack of communication with local government is particularly concerning as it could lead to conflicts with and confusion among landowners.¹¹⁷

CONCLUSION

For the reasons set forth above, Petitioners hereby request that the Commission:

1. Reject LTD’s Comments;
2. Address the Comments of other parties as explained above;
3. Initiate a proceeding to develop a record regarding LTD’s expanded ETC designation and annual certification for 2023 RDOF funding, including substantial new facts which were unavailable and unknown at the time of the LTD Expansion Order; and
4. Based on those facts, revoke the LTD expanded ETC designation and decline to certify LTD for 2023 funding.

¹¹⁵ Balkan Township Comments, at p. 2.

¹¹⁶ Minnesota Farmers Union Comments, at p. 1.

¹¹⁷ Minnesota Farmers Union Comments, at p.1.

Dated: June 8, 2022

Respectfully Submitted:

MINNESOTA TELECOM ALLIANCE

MINNESOTA RURAL ELECTRIC ASSOCIATION

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