

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>LTD BROADBAND LLC,</p> <p style="text-align: center;">Petitioner,</p> <p style="text-align: center;">v.</p> <p>IOWA UTILITIES BOARD, A DIVISION OF THE DEPARTMENT OF COMMERCE, STATE OF IOWA,</p> <p style="text-align: center;">Respondent.</p>	<p style="text-align: right;">Case No. CVCV062857</p> <p style="text-align: center;">MERITS BRIEF OF LTD BROADBAND LLC</p>
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On December 7, 2020, the Federal Communications Commission (“FCC”) provisionally awarded LTD Broadband LLC (“LTD Broadband”) approximately \$23 million dollars to invest in rural broadband deployment in unserved and underserved areas in Iowa through the FCC’s Rural Digital Opportunity Fund (“RDOF”) program. As a statutory requirement for obtaining the funds and being able to start building additional voice and broadband facilities, however, a winning bidder must be designated by the relevant state as an “eligible telecommunications carrier” (“ETC”). This should have been a simple matter – as recently as 2019, the Iowa Utilities Board (“Board”) had granted ETC status to LTD Broadband; by rule, practice and prior Board precedent, merely adding additional territory to an existing designation is not a demanding process. Indeed, while the requirements for an initial ETC designation are substantial, the Board’s entire rule on amending the territory of a designation reads:

i. Amendments other than transactions. Where a carrier that has been designated by the board as an ETC intends to serve as an ETC in a new service area for the purpose of receiving support from the CAF Phase II auction or for other similar purposes, the carrier shall file a request to amend its designation with a notice of expansion at least 30 days in advance of the expansion and shall certify that the carrier intends to amend its designation to serve as an ETC in the expanded service area.

199 Iowa Admin. Code 39.3(3)(i). In short, there are only two requirements of the rule on amending existing ETCs like that sought by LTD Broadband: that the ETC files a request to amend (a) that certifies the ETC's intent to serve the expanded area; (b) at least 30 days prior to the expansion. Here, LTD Broadband filed its expansion request on May 7, 2021, 30 days prior to the FCC's June 7, 2021 deadline for state certification. *See Answer ¶ 13*. And it is undisputed that LTD Broadband both is an existing Iowa ETC, and certified that it intended to serve the additional requested territories. *See Answer ¶ 10 and ¶ 13, respectively*.

Notwithstanding LTD Broadband's compliance with the only requirements on the face of the rule, the Board went beyond the language of its own rule – and its prior and even contemporary precedents -- to treat LTD Broadband's application like a new application for initial designation. In doing so, the Board considered alleged shortcomings that it generally concedes were resolved prior to its Order and speculated about possible future events to deny LTD Broadband's application for expansion into the new RDOF census blocks. Doing so created obvious and extreme harm to LTD Broadband and to rural Iowans that will not receive the benefit of LTD Broadband's federally funded deployment, undermining the pro-broadband policies of the state.

In summary, the Board failed to follow its own rules, failed without explanation to follow its own precedents, treated LTD Broadband in an arbitrary and capricious manner, and failed to balance in its analysis the magnitude of the harm to LTD Broadband and the harm to the public policy of promoting rural broadband investment, all in violation of numerous provisions of Iowa Code §17A.19(10). The Court should reverse the Board's action and grant, or require the granting, of LTD Broadband's amendment to its ETC designation in the new areas identified in its amendment.

I. THE BOARD’S DENIAL OF LTD BROADBAND’S AMENDED DESIGNATION IS BASED ON LEGAL ERROR.

Notably, the disagreements between the parties in this case are few; the Board admits, in whole or part, most of the factual assertions in LTD Broadband’s Petition for Judicial Review prior to the paragraphs asserting legal claims. The central legal dispute, however, is made clear by the Petition and Answer at ¶ 8. LTD Broadband asserts that it has complied with all of the requirements of 199 IAC 39.3(3). The Board, however, argues that the requirements of subsections 39.3(1) and (2) also apply to amendments to the territory of existing ETCs. The text and structure of the rule show the Board is wrong, and there is no indication the Board itself has interpreted the rule that way in other cases.

LTD Broadband has set forth the entirety of the relevant rule on amendments to the served territory above. Nothing on the face of that paragraph suggests that all of the criteria for an original designation must be revisited. To the contrary, the plain reading is that because the paragraph assumes a carrier is already designated, the criteria for amendment are more streamlined. Moreover, contrary to the reading urged by the Board, 199 IAC 39.3(1) and (2) specifically apply to “designations.” Nowhere do these rules say that they apply to “designations *or amendments to designations*” – language the Board could have used in the rule had that been the intent. The rule makes a clear distinction between “designations” – the initial determination of whether a company has the technical, financial and managerial capability to be in universal service programs – versus “amendments,” which are treated differently and in a more streamlined fashion to recognize that the Board has already undertaken a more comprehensive review of the ETC. Section 39.3(3), a separate section from the one regarding “designation,” goes on to list a variety of scenarios that happen *after* and separate from a designation, and for each the rule provides the specific terms applicable to that scenario – ranging from providing

additional information about a transfer of control involving a “substantial transaction” (see 199 IAC 39.3(3)(d) and I) to mere notifications of consummation or non-consummation of a transfer (see 199 IAC 39.3(3)(h)). None of the other scenarios in section 39.3(3) require a review that is akin to an initial designation; the way the rule is structured suggests LTD Broadband is correct in interpreting Section 39.3(3)(i) as also not requiring a full “initial designation” review. Indeed, LTD Broadband’s interpretation is the only way to give meaning to 199 IAC 39.3(3). *See AT&T Communications of the Midwest v. Iowa Utils. Bd.*, 687 N.W.2d 554, 560 (Iowa 2004) (rejecting Board’s *sua sponte* waiver of its own rule “to insure the IUB does not arbitrarily and capriciously set aside policy developed through a formal rulemaking process.”)

Perhaps the best confirmation of LTD Broadband’s interpretation, however, is the Board’s own prior orders. The current version of 199 IAC 39.3(3) was adopted in 2018 in Board Docket RMU-2016-0011. Nothing in that Order discusses a review of the factors for an original ETC designation as part of amending a service territory. To the contrary, the Board explained that in the new Section 39.3

[t]he Board intended to streamline the process for amending ETC designations without sacrificing the Board’s ability to maintain its oversight of ETC designation. Based on the Board’s recent experience, the Board expects that the revised subrule will simplify the amendment process for both carriers and the Board. . .

If a carrier must provide the same information for amendment as initial designation, and must go through the same review, nothing has been simplified. Indeed, even before the “simplification,” in an order for Winnebago Cooperative Telephone Association (“WCTA”) while the new rules were under consideration, the Board granted an amendment to WCTA’s territory to comply with the prior FCC program (“Connect America Fund II” or “CAF II”) without any mention of the designation requirements. *See In re Winnebago Cooperative Telephone Association*, Docket No.

ETA-2018-0008 “Order Approving Amendment of Eligible Telecommunications Carrier Designation” (Iowa Utils. Bd., November 20, 2018).¹ Similarly, immediately after the rule change, the Board granted an amendment to Premier Communications’ ETC service territory, and again did not make mention of any application of the criteria for initial designation. *See In re Premier Communications Inc.*, Docket No. ETA-2018-0010 “Order Approving Eligible Telecommunications Carrier Designation” (Iowa Utils. Bd., Feb 6, 2019).² It was not until the Board’s series of June 2021 orders relating to the RDOF program that – despite there having been no change to the relevant rule – the Board began including this language in all of its ETC amendment orders:

The Board finds that MVEC has satisfied the notice and application requirements of 199 IAC 39.3(3)(i) and 199 IAC 39.3(2) and that MVEC has evidenced the qualifications to amend its ETC designation to reflect the new census blocks awarded support for the purposes of RDOF.

In re Maquoketa Valley Rural Electric Coop., Docket No. ETA-2018-0005 “Order Approving Amendment of Eligible Telecommunications Carrier Designation” (Iowa Utils. Bd., June 4, 2021).³ Nowhere did the Board explain why it suddenly believed the law established “qualifications to amend” other than the 30-day prior notice and certification of intent to serve. This new approach is inconsistent with how the Board had been interpreting its own rules prior

¹ The Order can be found on the Board’s Electronic Filing System site at: https://wcc.efs.iowa.gov/cs/idcplg?IdcService=GET_FILE&allowInterrupt=1&RevisionSelectionMethod=latest&DocName=1829043&noSaveAs=1

If it would assist the Court, LTD Broadband is also willing to file or provide by e-mail a tabbed PDF of all cited Board orders, or a paper binder of the same for the Court.

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https://wcc.efs.iowa.gov/cs/idcplg?IdcService=GET_FILE&allowInterrupt=1&RevisionSelectionMethod=latest&DocName=1838387&noSaveAs=1 . Premier made a request to waive a particular provision of 39.3(2) regarding maps; that language was specific to CAF II program census blocks and appeared to apply to any such census blocks awarded in the new program whether to existing or new ETCs.

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https://wcc.efs.iowa.gov/cs/idcplg?IdcService=GET_FILE&allowInterrupt=1&RevisionSelectionMethod=latest&DocName=2061367&noSaveAs=1

to June 2021, and is inconsistent with the text, purpose and structure of 199 IAC 39.3. *See* Iowa Code §§17A.19(10)(g),(h) (addressing actions inconsistent with an agency rule and inconsistent with prior practice or precedents without adequate explanation.). This lack of notice of any additional and hidden requirements constitutes reversible legal error.

II. THE BOARD’S DENIAL OF LTD BROADBAND’S REQUESTED SERVICE TERRITORY AMENDMENT WAS ARBITRARY AND CAPRICIOUS.

LTD Broadband searched the Board’s electronic filing system for orders in docket type “ETA” (the kind at issue here) including the word “amend.” There are at least 21 orders granting a request by an ETC to amend.⁴ There is just one denial: LTD Broadband. Moreover, the Board issued its Order denying LTD Broadband’s territory amendment six months after the amendment request was filed. LTD Broadband’s initial designation in 2019 took just 28 days for Board approval. As LTD Broadband’s Petition explains, Miles Communications’ ETC expansion amendment, as one example, was approved in only 31 days – even though Miles still had outstanding information that had been requested by the Board. Indeed, LTD Broadband is aware of 14 Board orders relating to ETC approval of RDOF territories, including amendments *and initial designations*, and the average time between filing the request and the order granting was 99 days. For LTD Broadband, it was four months *after it responded to the last staff request letter* and six months after the request was filed before the Board issued its Order denying ETC expansion. LTD Broadband was clearly treated differently – even differently than other carriers where, as with LTD Broadband, the staff requested additional information. This delay was highly prejudicial: it resulted in the FCC subsequently denying LTD Broadband’s waiver request

⁴ There are actually many more orders granting amendment; LTD Broadband excluded orders related to a large merger of numerous companies.

that would have preserved its ability to move forward because it lacked state authorization for the new service areas.

Additionally, the Board Staff Memorandum in the Certified Record beginning at page 228 also shows that the Board's decision was arbitrary and capricious. While LTD Broadband disagrees with the Board's contention that 199 IAC 39.3(2), regarding initial designations, is applicable here, it is useful to look at the Staff's analysis of the criteria under that section. In the Memorandum, in a section beginning at Certified Record page 244, Staff considers whether LTD Broadband had at that time met the additional requirements for *initial* designation. For nearly every paragraph, Staff concedes that either LTD Broadband's "assertion is sufficient," "LTD responded satisfactorily," "certification is adequate" or similar language acknowledging compliance. In regard to paragraph (g), Staff notes it sent a request for further information and "LTD responded by listing the awarded areas for RDOF in terms of census blocks," consistent with the request. In regard to paragraph (n), Staff acknowledges "LTD has now satisfied this requirement." There are in fact, from paragraph (a) to (n), just two exceptions. For paragraph (b), Staff does not state a conclusion – but the requirement is for a clear statement of the purposes for which designation is sought and a statement of the financial and technical qualification to provide the supported service." The Memorandum has an extended discussion where it appears Staff takes issue with LTD Broadband's claim it had gone "above and beyond" in providing information in its application. But nowhere in the discussion under (b) does Staff claim LTD Broadband did not comply with the requirement (more on this below.)

The only paragraph out of the 14 requirements, (a)-(n), that the Staff Memorandum found lacking was (m) – contribution to dual party relay service funding. Even then, Staff appears to acknowledge that after the issue was raised in a June 4, 2021 letter, LTD Broadband corrected its

past reports. Staff notes that the amounts involved were *de minimis* – in fact, the total value of the corrected dual party relay service reports and payments was approximately \$0.56, an amount that the Board’s payment system would not accept. (The online payment system would not accept payments under \$1.00; LTD Broadband paid by paper check.)

The Board in its Order agrees that “nearly every other applicant related to RDOF has a few omissions initially.” Order at 12. Nonetheless, LTD Broadband was treated significantly differently than those other applicants. The Board turns to vague, unknowable and unstated standards in making subjective evaluations of compliance history and timeliness of corrective action to determine whether “the Board is *inclined* to approve a request to expand.” Order at 12 (emphasis added).⁵ Ultimately, the Board noted that “a decision to deny expansion of the credential does not disturb LTD’s current designation” – that is, the Board did not reverse the finding it made in 2019 that LTD Broadband has the technical, financial and managerial capability to serve as an ETC. It remains designated as an ETC today. But if it *has* those capabilities (and it does), there is truly no legal or factual basis to deny the mere revision of its service territory. The denial is arbitrary, and unfair to LTD Broadband. Such differential treatment and application of vague standards is unlawful, and precisely what administrative procedures acts are designed to protect against. As the Bremer County District Court explained, in a case affirmed by the Iowa Supreme Court,

The Plaintiff argues that the Declaratory Rulings which in essence require the Plaintiff to subscribe its police and fire personnel to social security coverage while not so requiring other cities similarly situated are unreasonable, arbitrary,

⁵ Further, the Board does not appear to consider mitigating remedial factors: LTD Broadband took strong actions when compliance issues came to light in this process, hiring local Iowa regulatory counsel (previously LTD Broadband had used a national counsel), ultimately replacing the national counsel with a larger communications law firm. LTD Broadband takes the issues raised by the Board and its compliance obligations seriously, and is taking aggressive steps to ensure full and timely compliance. Nonetheless, other carriers appear to be able to make errors, to require follow-up, to fail to timely provide information – but not LTD Broadband.

capricious, discriminatory and result in an unequal application of the law to the Plaintiff as opposed to other municipal corporations similarly situated.

....

The Court further concludes that the Defendant's Declaratory Rulings 3–83 and 1–84 as pertaining to the Plaintiff are unreasonable, arbitrary or capricious and are characterized by an abuse of discretion or a clearly unwarranted exercise of discretion. Section 17A.19(8) of The Code 1983. The Plaintiff and its police and fire personnel are required to contribute to both a Chapter 411 retirement system and to social security while 11 other cities similarly situated and their police and fire personnel are only required to contribute to a Chapter 411 retirement system. The Court finds no rational basis for distinguishing the Plaintiff from the 11 other cities who have been allowed to terminate social security coverage for their police and fire personnel.

City of Waverly v. Iowa Dep't of Job Serv. (IPERS), No. 22425, 1985 WL 71750, at *8-9 (Iowa Dist., Bremer Co., May 8, 1985), *aff'd*, 383 N.W.2d 513 (Iowa 1986).⁶

Finally, the Board's decision ignores facts and policies that a reasonable decision maker should consider. The denial is essentially a \$23 million penalty for \$0.56's worth of corrected dual party relay assessments. The result here is disproportionate to the alleged concerns, particularly when errors and incompleteness did not result in similar outcomes for other carriers. But that \$23 million isn't just a loss for LTD Broadband: those are federal funds contributed in part by Iowa citizens that would have come back to Iowa to improve their rural broadband service that are now potentially lost. Letting those funds vanish undermines what the Board agrees is a state and federal policy to support investment in rural broadband. Providing funding to help fulfill that policy did not appear to be considered or weighed in the Board's decision, but

⁶ While there does not appear to be an Iowa Supreme Court case stating the proposition as clearly as the Bremer County District Court, it is a well-established position under the Federal administrative procedures act and those of other states. *See, e.g., Simmons v. Smith*, 888 F.3d 994, 1001 (8th Cir. 2018) (agencies may be acting arbitrarily and capriciously if they treat similarly-situated parties differently or if they act with bad faith); *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1024 (D.C. Cir. 2018) ("In particular, the decision must give a 'reasoned analysis' to justify the disparate treatment of regulated parties that seem similarly situated, and its reasoning cannot be internally inconsistent.") (internal citations omitted); *State ex rel. White v. Parsons*, 483 S.E.2d 1, 11 (W. Va 1996) ("The disparate, inconsistent treatment of similarly-situated parties, and particularly the setting of different standards for similar situations, may be seen as a textbook description of arbitrary conduct, absent articulation of good reason therefor.").

the importance of those goals should have carried more weight against the paperwork issues that the Staff Memorandum admits were all corrected before the final order was issued. *See* Iowa Code §17A.19(10)(j).

CONCLUSION

The facts in this case paint a clear picture of LTD Broadband being treated differently than other carriers – it took much longer to process LTD Broadband’s application; other carriers were granted amended ETC areas even with information outstanding similar to that Staff was requesting from LTD Broadband; and other carriers’ incomplete applications were processed and granted in half the time the Board held LTD Broadband’s application.

The facts also paint a clear picture of the Board treating the 2021 applications for amendments differently than prior applications, with no explanation given for the inconsistency. Prior orders, including those immediately before and after the rules were changed to their current language, show the Board did not require a full analysis for an already-designated ETC to merely amend its territory. The Board’s prior approach is the correct one: the Board’s rulemaking indicated a desire to make amendments simpler, and the rules are clearly structured such that amendments are something different from, and governed by a different section, than initial designations. The rules for amendments are minimal, presuming qualification was already shown in full at the time of initial designation. In adding criteria beyond the streamlined rules in 199 IAC 39.3(3), the Board committed an error of law.

Finally, the Board’s denial was disproportionate, and failed to consider the magnitude of the consequences of denial – both on LTD Broadband and on rural Iowans waiting for better broadband service. It metaphorically imposes the death penalty for a paid-up parking ticket, something the Board has never done. In all of these ways, the Board violated Iowa Code

§17A.19(10) and the various specific paragraphs pleaded in LTD Broadband’s Petition. As allowed by §17A.19(10), the Court should reverse the decision of the Board as the “substantial rights of the person seeking judicial relief have been prejudiced” by the violations of § 17A.19(10).

Filed this 25th day of February, 2022.

Respectfully submitted,

/s/ Bret A. Dublinske

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CERTIFICATE OF SERVICE

The undersigned certifies the foregoing document was electronically filed with the Clerk of Court using the Electronic Document Management System (EDMS) on February 25, 2022, which will send a notice of electronic filing to all registered parties.

/s/ Sarah McCray