

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

**LTD BROADBAND LLC,
Petitioner,**

v.

**IOWA UTILITIES BOARD,
Respondent,**

and

**OFFICE OF CONSUMER
ADVOCATE,
Intervenor.**

CASE NO. CVCV062857

**RESPONDENT'S BRIEF IN
RESISTANCE TO PETITION FOR
JUDICIAL REVIEW**

COMES NOW, the Iowa Utilities Board, by and through its undersigned counsel, and hereby submits the above-captioned Respondent's Brief in Resistance to Petition for Judicial Review.

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. The Iowa Utilities Board's finding that the Petitioner is required to make application to, and receive prior approval from, the Board for any request to amend its Eligible Telecommunications Carrier designation is supported by the evidence and the law.

Authorities:

ABC Disposal Sys., Inc., v. Dep't of Natural Res., 681 N.W.2d 596, 603 (Iowa 2004)
47 CFR § 54.201(d)
47 U.S.C. § 214(e)
47 U.S.C. § 254(f)
Iowa Code § 17A.4
Iowa Code § 17A.19
Iowa Code § 17A.19(11)(c)
Iowa Code § 476.2
Iowa Code § 476.15
Iowa Code § 476.102
Iowa Code § 476.95B

Iowa Admin. Code. r. 199—39.1
Iowa Admin. Code. r. 199—39.3(1)
Iowa Admin. Code. r. 199—39.3(2)
Iowa Admin. Code. r. 199—39.3(3)
Iowa Admin. Code. r. 199—39.3(3)(i)
Iowa Admin. Code. r. 199—39.5
Iowa Admin. Code. r. 199—39.7
Iowa Admin. Code. r. 199—39.8

B. The Iowa Utilities Board’s finding that the Petitioner’s Application was not in the public interest is supported by the evidence and the law.

Authorities:

ABC Disposal Sys., Inc., v. Dep’t of Natural Res., 681 N.W.2d 596, 603 (Iowa 2004)
47 CFR § 54.201(d)
47 CFR § 54.320(c)
47 U.S.C. § 214(e)
47 U.S.C. § 214(e)(2)
47 U.S.C. § 254(f)
Iowa Code § 17A.4
Iowa Code § 17A.19
Iowa Code § 17A.19(11)(c)
Iowa Code § 476.2
Iowa Code § 476.15
Iowa Code § 476.95A
Iowa Code § 476.95B
Iowa Code § 476.102
Iowa Code § 476.103
Iowa Code § 477C.7
Iowa Admin. Code. r. 199—39.1
Iowa Admin. Code. r. 199—39.3(1)
Iowa Admin. Code. r. 199—39.3(2)
Iowa Admin. Code. r. 199—39.3(3)
Iowa Admin. Code. r. 199—39.3(3)(i)

II. STATEMENT OF THE CASE

A. Nature of the Case and Parties in the Agency Proceeding.

This judicial review arises from final agency action taken by the Iowa Utilities Board (“IUB” or the “Board”). Specifically, the action concerns the Board’s denial of an application for amendment of eligible telecommunications carrier (“ETC”) designation filed by LTD Broadband LLC (“Petitioner” or “LTD”). The Office of Consumer Advocate (“OCA”), a division of the Iowa Department of Justice, was granted intervention in this proceeding in furtherance of Iowa Code § 475A.2(4), which directs OCA shall, “[a]pppear for all consumers generally and the public generally in all actions instituted in any state or federal court which involve the validity of a rule, regulation, or order of the utilities board.”

B. Course of Proceedings and IUB Disposition.

Before detailing the proceedings, a brief summary of the federal program that inspired this matter will ground the parties' arguments. The underlying agency matter concerns a designation which confers upon the holder the status of ETC, a concept established by Congress as a prerequisite for telecommunications carriers seeking the privilege of receiving funding from the Federal Communications Commission’s (“FCC”) Universal Service Fund (“USF”) programs. The USF was established in 1997 under the authority of the Telecommunications Act of 1996. While Congress charged the FCC with establishing the policies and procedures for participation in USF programs, it put the primary duty to carry out one role relating to eligibility—designation of ETCs—on states. Given the joint manner in which the USF programs operate, this section will offer certain facts in context to aid the Court with understanding the significance of the underlying

proceedings.

On June 11, 2020, the FCC released by public notice over one hundred pages of technical guidance concerning its upcoming reverse auction, identified as the “Rural Digital Opportunity Fund (“RDOF”) Auction 904,” which would commence on October 29, 2020.¹ Issued nearly a year before the deadline to submit the documentation that is the subject of this judicial review, the FCC explained that Auction 904 was the multi-stage high cost support mechanism to conditionally award billions in federal USF funds for RDOF. The RDOF was the actual USF program that would carry out the program requirements required for disbursements to the ETCs ultimately authorized for funding. The FCC issued the guidance to put prospective bidders on official notice of the timelines, requirements and processes for RDOF, but the FCC largely replicated the approach from the previous auction. Therefore, ETCs that participated in Auction 903 (“Auction 903” or “Connect America Fund II” or “CAF II”) should have been familiar with the general parameters. The FCC was unequivocal in that guidance to prospective bidders: “Long-form applicants subject to state jurisdiction must petition the relevant state commissions for ETC designation and should follow state rules and requirements to apply for designation(s).”²

On December 7, 2020, the FCC announced by public notice that LTD was among the winning bidders, with LTD being conditionally awarded approximately \$23 million

¹ See *Rural Digital Opportunity Fund Phase I Auction Scheduled for October 29, 2020, Notice and Filing Requirements and Other Procedures for Auction 904*, Public Notice 20-77, 35 FCC Rcd 13888 (2020) (Auction 904 Closing PN). (June 11, 2020). Available at: <https://docs.fcc.gov/public/attachments/FCC-20-77A1.pdf>.

² *Id.* at p. 51, para 136.

ties to 3,798 census blocks in Iowa.³ In that announcement, the FCC reiterated that awards for RDOF were conditioned on timely filing of all remaining requirements, which included submission of documentation evidencing ETC designation over the census blocks awarded in Auction 904 by June 7, 2021. The FCC made clear that carriers must have ETC designation over the census blocks awarded for RDOF—it was not enough to be designated as an ETC for other census blocks won in a previous high-cost auction. There is no designation without a geographic service area corresponding to specific census blocks.

On May 7, 2021, LTD made a multi-document filing to the IUB, collectively identified by LTD as “Application Eligible Telecommunications Carrier Designation,” in IUB Docket No. ETA-2019-0001. Even while claiming advance notice was the only requirement concerning amendments, LTD repeatedly characterizes its May 7, 2021 filing as an “application.” (CR at pp. 42, 92, 220, 224; Petition for Judicial Review, and Petitioner’s Merit Brief.) Therefore, the Board hereinafter refers to the May 7, 2021 as “Application.” LTD stated the Application related to its December 2020 conditional award of high-cost support from the FCC in the RDOF Auction 904. Accordingly, LTD also requested approval from the Board but requested the Board grant approval before the FCC’s June 7, 2021 deadline, claiming it was in the public interest to essentially waive the Board’s requirement for thirty days advance notice of its intent to amend. (CR pp. 42-67).

From May 10 through May 13, 2021, Board Staff (Staff) reviewed LTD’s filing as

³ See *Rural Digital Opportunity Fund Phase I Auction (Auction 904) Closes, Winning Bidders Announced, FCC Form 683 Due January 29, 2021*, p. 15, Public Notice DA-20-1422, 35 FCC Rcd 13888 (2020) (Auction 904 Closing PN). (December 7, 2020). Available at: <https://docs.fcc.gov/public/attachments/DA-20-1422A1.pdf>.

an Application, evaluating it for completeness and compliance with the relevant law. That review necessarily also included verifying LTD's assertions concerning its history and experience as a Board-designated ETC. Based on a cursory review of the Application, LTD's assertions suggested there was some overlap in census blocks awarded and census blocks already designated.⁴ Closer review revealed that LTD's current designation covered only twenty-two census blocks, none of which appeared to be included among the 3,798 census blocks awarded for RDOF. LTD's status as a current ETC may have been persuasive if only offered to support LTD's familiarity with the FCC's high standards and complex procedures. The FCC requires a designation to specifically cover the blocks awarded, therefore LTD's existing designation was insufficient to support LTD's claim that it "has all necessary regulatory authority, having been previously designed [sic] as an ETC by this Board and having been awarded support under the FCC's RDOF." (CR p. 43). Given the need to approve any such Application by Board order, not merely acknowledge a notice of intent if the designation was already sufficient, the IUB prepared correspondence seeking more information and clarification.

On May 13, 2021, the IUB requested LTD to file additional information in LTD's docket, specifying the exact provisions of the Application that were incomplete and to afford LTD the opportunity to address assertions made in the Application which appeared to conflict with the Board's records concerning LTD's existing designation. (CR p. 68).

LTD filed a reply on May 18, 2021, in which it again characterized the May 7, 2021

⁴ *Id.* at p. 15.

filing as an “application to amend its existing ETC designation . . . as part of the FCC’s RDOF.” LTD also filed a revised reply on May 19, 2021. (CR p.70-206). In these replies, LTD did not object in form or function to the interpretation of the Board’s rule concerning the process to amend by application, the elements of that application, or the need for Board approval. After review, the IUB determined the reply was not responsive in several respects, which left LTD’s Application substantially incomplete.

On June 4, 2021, the Board issued orders granting new or amended designation to carriers that had filed applications the Board found to comply with the legal standards and thus were in the public interest. Also on June 4, 2021, the Board issued a preliminary order concerning LTD, detailing additional information needed to complete its Application, noting the inconsistencies in assertions versus established Board compliance records, and explaining that the information was needed before it could evaluate whether the Application complied with 47 U.S.C. § 214(e)(1) and thus consistent with the public interest, as required by the Board’s rules. The Board provided LTD thirty days to file the information, acknowledging that the Board would continue to review the Application beyond the FCC’s June 7, 2021. (CR p. 209) At this juncture, however, LTD’s remaining need for the Application was inextricably tied to whether it pursued, and the FCC granted, a waiver of the June 7, 2021 deadline. Importantly, because the FCC’s program guidance plainly defers to a state’s process to designate, the Board could have simply issued an order on June 7, 2021 denying the Application on the merits or as moot, which would have left LTD with no time to prepare a petition for waiver to the FCC. Instead, to afford LTD the opportunity to 1) timely file with the FCC for waiver, 2) complete its Application and 3)

address apparent non-compliance concerning its existing designation, the Board issued the order before the end of the notice period required. (CR p. 209).

On June 7, 2021, LTD petitioned the FCC for waiver (“Waiver Petition”) of the deadline to submit evidence of ETC designation for eight states (including Iowa) of the fifteen for which it won bids in Auction 904.⁵ (CR p. 261). In its Waiver Petition, LTD resumed its posture of asserting that Iowa only required thirty days’ advance notice of intent. LTD stated, “[a]s a CAF II recipient for Iowa census blocks, LTD is already designated by the Iowa Utilities Board as an ETC in Iowa (Docket No. ETA-2019-0001).”⁶ LTD’s Waiver Petition was significant as it cast doubt as to why LTD was seeking waiver. If LTD had all necessary approvals from Iowa, then it could have uploaded documentation but just missed the deadline. If it required an amendment to have a legally sufficient ETC designation, then it needed a waiver as it had not secured that amendment as of the FCC’s deadline. While the waiver petition misstated the barrier to documentation at that moment, it did not inherently question the ETC process in Iowa or suggest undue delay on the part of the IUB. In fact, LTD assured the FCC that it “expects to provide the requested information well within the 30-day time frame, and expects approval of its ETC amendment shortly thereafter.”

On July 7, 2021, LTD filed its response to the Board’s June 4, 2021 order. At this

⁵ See also *Petition for Limited Waiver of LTD Broadband LLC*, AU Docket No. 20-34, WC Docket Nos. 10-90, 19-126 (filed June 7, 2021). Available at: <https://ecfsapi.fcc.gov/file/106070476913071/LTD%20Broadband%20ETC%20Waiver%20Request.pdf>.

⁶ *Id.* at p. 6.

point, the Application was substantially complete in that some answer had been provided for each element; therefore, the IUB was finally in a position to begin its review on the merits, but remained cognizant that the Application was moot should the FCC deny LTD's petition for waiver of its June 7, 2021 documentation deadline. (CR p. 220).

On July 26, 2021, the FCC reached out to certain RDOF winners, including LTD, permitting carriers to voluntarily relinquish certain census blocks awarded that may already be served and thus inconsistent with the FCC's goal to only fund unserved census blocks. This development was positive for the prudent administration of USF funds, but it necessarily impacted states, as it would require any carrier that relinquished blocks to revisit the list of census blocks that were the subject of pending ETC applications or recently granted designations.

On August 16, 2021, LTD replied only in its FCC docket, requesting to voluntarily relinquish 118 census blocks in Iowa that were included as part of the prospective service area for the Application pending before the Board. Given the Board's exclusive role to set the geographic service area for ETCs and the Board's rule requiring a carrier to file a list of census blocks intended to constitute that service area, LTD's Application was rendered materially incomplete upon LTD's election to relinquish without update to the IUB. The IUB paused review temporarily, in anticipation of a filing from LTD offering a revised application that factored in that change.⁷ (CR p. 261). LTD never filed that update.

⁷ See *Petition for Waiver – Relinquishment of Census Blocks of LTD Broadband LLC*, AU Docket No. 20-34, WC Docket Nos. 10-90, 19-126 (filed August 16, 2021). Available at: <https://ecfsapi.fcc.gov/file/108162353501708/LTD%20-%20Petition%20for%20Waiver%20->

On October 20, 2021, the FCC issued an order denying LTD's request for waiver of its ETC documentation deadline in three states, including Iowa. (CR p. 42). LTD indicated in its Application that designation was for the express purpose of participating in RDOF Auction 904. Without a waiver of the deadline, the Application before the Board was moot at this point, and remains so as of the date of this brief, unless the FCC grants reconsideration and reverses its decision. In denying the waiver requested by LTD, the FCC reasoned that because LTD had not filed in Iowa within thirty days of the auction announcement, LTD had not established a good-faith basis to resolve doubt in favor of LTD and presented no extenuating circumstances that would suggest waiver would be in the public interest.⁸ (CR at p. 261). In its order, the FCC states:

LTD explains that it did not file its ETC designation application in . . . Iowa . . . until May 7, approximately five months after the release of the Auction 904 Closing Public Notice. LTD contends that it waited until those dates to file . . . due to its understanding that each state had a 30-day ETC approval process and that it therefore believed it would obtain ETC designation in all three states by the Commission's June 7 deadline. LTD offers no explanation for why it did not file in these states sooner, or why waiting until the last possible moment to file (even if its assumptions about a 30-day approval process were correct) was a choice warranting waiver. . . as the Commission explained in the Rural Digital Opportunity Fund Order, it is an applicant's 'sole responsibility to perform its due diligence research and analysis before proceeding to participate in the Rural Digital Opportunity Fund auction.' Thus, it was incumbent upon LTD, particularly as an experienced provider and Auction 903 participant, to understand the ETC designation rules in each of the states in which it sought designation.⁹

[%20Relinquishment%20of%20Census%20Blocks.pdf](#).

⁸ See *In the Matter of the Rural Digital Opportunity Fund Auction (Auction 904) Rural Digital Opportunity Fund*, AU Docket No. 20-34, WC Docket No. 19-126 2021 WL 4941602 (OHMSV Oct. 20, 2021). Available at:

<https://docs.fcc.gov/public/attachments/DA-21-1311A1.pdf>.

⁹ *Id.* at p. 4, para. 10.

On November 2, 2021, LTD filed with the IUB a Request for Expedited Order concerning ETC designation. LTD stated the purpose of the request for expedited approval of its Application was its desire to seek reconsideration of the FCC's October 20, 2021 decision to deny waiver. In order to move forward with review, the Board took official notice of the existence of LTD's filing to the FCC voluntarily relinquishing 118 of the 3,798 census blocks that formed the proposed service area described to comply with the Board's rule at 199 Iowa Administrative Code (IAC) 39.3(2)(g). As LTD had not filed this necessary information, official notice was required in order to consider the Application substantially complete. (CR p. 224).

The Board issued a final written order dated November 5, 2021, denying LTD's Application on the merits. (CR p. 255). LTD did not file a request with the Board for reconsideration of the denial of amended ETC, or seek a declaratory ruling from the FCC on the applicability of the Board's rule requiring an Application an ETC designation.

On November 19, 2021, LTD filed with the FCC a Petition for Reconsideration of the FCC's denial of waiver concerning Iowa and two other states. LTD did not suggest legal error or an arbitrary and capricious approach by the IUB as a factor concerning its failure to obtain designation in Iowa by the deadline.¹⁰ The Petition for Reconsideration made the general suggestion that misconduct by one of the attorneys LTD engaged for filings in several states had contributed to a flawed approach. LTD offered specific

¹⁰ See *Petition for Reconsideration of LTD Broadband LLC*, p. 15, AU Docket No. 20-34, WC Docket Nos. 10-90, 19-126 (filed November 19, 2021). Available at: [https://ecfsapi.fcc.gov/file/1119996800777/LTD_Broadband_Petition_for_Reconsideration%20\(11-19-2021\).pdf](https://ecfsapi.fcc.gov/file/1119996800777/LTD_Broadband_Petition_for_Reconsideration%20(11-19-2021).pdf).

examples for certain states, but did not directly claim that the deception alleged contributed to the delay in Iowa. (*See* Petition for Judicial Review, p. 5, para. 18, footnote 1). As of the date of this brief, the FCC has not ruled on LTD's Petition for Reconsideration.

C. Statement of Facts.

Certain facts were incorporated into the procedural history above to offer context or will be discussed as relevant to each argument.

III. ARGUMENT

The IUB has carried out the delegated duties concerning ETC designation for a quarter of a century. In carrying out this duty, the Board relies on the application filed by the carrier, any record developed in the docket assigned to a carrier's ETC designation, and the plain language of the statutes and rules. In analyzing whether to grant a new or amended ETC designation, the IUB conducts a fact-based analysis to determine whether granting the designation would be in the public interest. The IUB understands that it plays a very limited yet highly technical role delegated by federal law, authorized by Iowa Code and detailed in the Board's rules. Therefore, the Board issues orders that offer the appropriate context for its decisions. The purpose of that approach is to aid with the public policy challenge of carrying out that role within a jointly administered framework that does not afford the state agency the ultimate or complete control of establishing the eligibility criteria for USF funds. LTD asserts the IUB's decision to deny LTD's request to amend ETC designation constitutes legal error or is the product of reasoning that was arbitrary, capricious, and inconsistent with current or previous practice or precedent. The IUB submits that LTD fails to meet its burden to establish any basis for relief.

The Board's rule requiring an application and compliance with certain standards can be the only logical interpretation of the plain text of the relevant legal authority. The IUB respectfully requests that even if this Court could find that the plain text of the law can be interpreted differently, deference to the IUB's specialized expertise in this subject matter is appropriate pursuant to Iowa Code § 17A.19(11)(c). Should the Court determine that the agency's determination cannot be afforded deference, the IUB asserts the Court should reject the interpretation advanced by LTD as producing an absurd result and against the public interest. LTD's interpretation would allow a carrier designated for twenty-two census blocks (based upon a commitment to future compliance) to later amend to expand its authorization to more than 3,798 census blocks, for the specific purpose of securing millions of dollars in public funds, with no additional scrutiny. However, LTD's own actions do not support the interpretation it advances. The IUB urges this Court to closely examine the relevant state and federal authority to determine whether LTD has established any basis for relief.

Standard of Review and Statement of the Law

Judicial review of an agency decision is controlled by the provisions of Iowa Code § 17A.19(10) (2021).¹¹ This Court may grant relief if the party challenging agency action demonstrates the agency's action was based on an erroneous interpretation of law, inconsistent with prior agency precedent, unsupported by substantial evidence in the record when that record is viewed as a whole, or otherwise unreasonable, arbitrary, capricious, or

¹¹ Unless noted, all statutory citations are to the current version of the Iowa Code.

an abuse of discretion. See Iowa Code § 17A.19(10). A party challenging agency action bears the burden of demonstrating the action’s invalidity and resulting prejudice. Iowa Code § 17A.19(8)(a). Pursuant to Iowa Code § 17A.19(8)(b), the “validity of agency action must be determined in accordance with the standards of review” provided in Iowa Code § 17A.19(11). Substantial evidence is defined as evidence of the quality and quantity “that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.” Iowa Code § 17A.19(10)(f)(1). “The agency’s decision does not lack substantial evidence merely because the interpretation of the evidence is open to a fair difference of opinion.” *ABC Disposal Sys., Inc., v. Dep’t of Natural Res.*, 681 N.W.2d 596, 603 (Iowa 2004).

With respect to the appropriate standard of deference to be accorded the IUB’s decision under Iowa Code § 17A.19(11), the undersigned respectfully submits that the Court should give appropriate deference to the IUB’s determination that approving LTD’s Application to amend its ETC designation was not in the public interest.

A. The Iowa Utilities Board’s finding that the Petitioner is required to make application to, and receive prior approval from, the Board for any request to amend its Eligible Telecommunications Carrier designation is supported by the evidence and the law.

The Board’s role concerning ETC designation is governed by both federal and state law. Congress established the framework of shared authority over the USF and the FCC firmly and frequently reminds carriers of the role afforded to states concerning their duty to designate ETCs. *See* 47 U.S.C. § 214(e) (prescribing requirements that common carriers

must satisfy in order to receive federal universal service support) and 47 U.S.C. § 214(e)(2) (placing the duty to designate carriers on state commissions); *see also* Iowa Code § 476.95B, which provides: “The board may exercise any powers reserved or delegated to the state by the federal Telecommunications Act of 1996 or any other federal law, rule, or order thereunder, and may hear and resolve any dispute arising thereunder . . .”

The Board’s rule chapter 39 is devoted to Universal Service and ETC designations. *See* 199 IAC 39. Board subrule 39.3(3) provides that a carrier’s ETC designation may be amended . . . only upon application to and prior approval by the Board and 39.3(3)(i) governs the advance notice of a carrier’s intent to amend an existing ETC designation 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. Finally, Board subrule 39.3(2) sets out the Board’s application criteria to be designated as an ETC to qualify for support from the federal USF in a particular geographic service area.

LTD argues that, “while the requirements for an initial ETC designation are substantial, the Board’s entire rule on amending the territory of a designation” is found at 199 IAC 39.3(3)(i), asserting, “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.” (Petitioner’s Brief, p. 1-2) LTD accurately identifies the two components of lettered paragraph (i), but conveniently ignores the rest of the rule offering the clarity LTD seeks; 199 IAC 39.3(3) speaks to amendments, assignments and transfers of control

of ETC designation, and provides: “Except as otherwise provided in this subrule, a carrier’s ETC designation may be amended or assigned, or control of such designation may be transferred by the transfer of control of the carrier, whether voluntarily or involuntarily, directly or indirectly, only upon application to and prior approval by the board.” The Board respectfully submits that LTD’s assertion, that the Board has gone beyond the plain language of its own rule, requires the Court to ignore the majority of the rule and is contrary to the very approval LTD seeks through an amended designation. A plain reading of Chapter 39, and specifically the rule at 199 IAC 39.3, suggests that LTD’s citation to only one subparagraph of a rule was necessary to make the best of poor business decisions. When the entirety of 199 IAC 39.3 is read together as intended, LTD’s interpretation is absurd on its face and illogical in outcome. The entire purpose of the delegated duty is to use state commissions as a mechanism to monitor the integrity of the ETC designation, preserve finite USF funds, and advance the public interest of those served in the census blocks the designation covers. LTD asserts that the Board’s implementation of this plain text constitutes legal error, or if it doesn’t, additional requirements were applied to only LTD in an arbitrary and capricious manner and with no advance notice.

Based on the evidence submitted in the record and a complete reading of the relevant law, the Board concluded that LTD was required to submit an Application as specified by the Board’s rules at 199 IAC 39.3(3) and to adequately address the elements of that application as detailed in 39.3(2)(a)-(n) before that application could be evaluated for compliance and approved by the Board in conformance with the public interest standard required by federal law. Even if LTD desired a waiver of some provision that otherwise

applied, as it plainly desired but refused to acknowledge, the Board agrees with LTD that the Board cannot waive a rule upon its own motion and LTD failed to make a proper request for such waiver. The Board's interpretation of the governing law was anything but arbitrary and was certainly not capricious. The Board issued its final decision by written order and based it upon a determination of fact clearly vested by a provision of law in the discretion of the agency. While this is the first instance of the Board denying an Application made pursuant to 199 IAC 39.3(3)(i), the actions taken by the agency to fully develop the record and the steps taken to afford LTD the opportunity to cure a deficient application were consistent with the agency's prior practice and precedents. LTD's assertions are particularly suspect given the FCC's program guidance (some pre-dating RDOF) that reminds potential ETCs that states are vested with the authority to determine the procedure for designation and to adopt additional criteria for designation.¹² Contrary to LTD's assertion, the Board applied the full text of its rule to all carriers that applied for ETC designation in relation to the RDOF auction. The Board applied the previous version of the rule in a similar manner. It is unclear why LTD, in order to claim that the Board has added new requirements, would point to an example of the Board's past practice when that example clearly demonstrates the requirement for an application and express approval from the Board. LTD seems to suggest that the IUB's rule changed so substantially from 2018 to 2021 so as to demonstrate

¹² See 47 U.S.C. § 214(e)(2); see also *WCB Reminds Connect America Fund Phase II Auction Applicants of the Process for Obtaining a Federal Designation as an Eligible Telecommunications Carrier*, Public Notice, 33 FCC Rcd 6696 (WCB 2018) (*Federal ETC Public Notice*). Available at: <https://www.fcc.gov/document/wcb-reminds-carriers-federal-etc-designation-process>

that the Board is now going beyond the language of its rule. LTD claims “[n]othing 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.’” It is inexplicable that LTD points the Court to a rulemaking that did not disturb the requirement to make application to, and secure approval from, the Board for an amendment to a service territory related to USF auctions.¹³ But even if the rulemaking cited stands for the proposition LTD advances, LTD misses the contradiction in its overall argument. If LTD claims the plain language of the rule affords the Board the discretion to not revisit all the criteria laid out in 39.3(2), then it appears LTD is arguing this Court could find the IUB also has the discretion to revisit all criteria. One such basis might be where a carrier’s own misguided actions conflict with its assertions.

By the structure of the overall rules and phrasing of the application provisions that do not distinguish between applications for new or amended designation, the rule anticipates that each census block is to be afforded the same public interest analysis. There is no ETC designation without a corresponding service area to which the designation attaches. LTD’s interpretation would deprive the Iowans in the census blocks added later of the same stringent public interest analysis. LTD may not have intended to make this point, but the public interest analysis for an amendment cannot be separated from the

¹³ See also IUB Docket No. RMU-2016-0001. Available at: <https://efs.iowa.gov/efs/ShowDocketSummary.do?docketNumber=RMU-2016-0011>.

census blocks designated. The analysis must consider the carrier's ability to serve the new census blocks individually and in the context of the existing service obligation. The reason it is flexible—not arbitrary—is that a staffing scenario deemed prudent for 22 census blocks may be wholly inadequate when the number of census blocks grows by 17,000 percent in just two years' time. The outcome this framework affords frustrates LTD's financial goals, but it serves the public interest and is well within the bounds of the law.

Confusion on legal requirements does not merit reversal of the Board's decision. Judicial review is not the forum to retrofit rules simply because the applicant fails to appreciate the well-established, plain language of the requirements it must operate within. Even if that established framework produces a disappointing outcome after a well-reasoned, objective review of the facts and law at hand. The delegated framework and state-specific requirements were proper, produced the right result and should be upheld by this Court.

B. The Iowa Utilities Board's finding, that the Petitioner's Application was not in the public interest, is supported by the evidence and the law.

The IUB is vested with the authority to carry out the duty to designate ETCs, and the plain language of the rule has long required ETC applications to meet the standards set forth in law. The IUB now urges the Court, pursuant to Iowa Code 17A.19(11)(c), to defer to the Board's determination that LTD's Application could not be granted because LTD failed to establish even substantial compliance with the public interest standard. A standard that Congress authorized the FCC and state utility commissions to safeguard through this duty in a highly technical realm. (CR p. 255).

An action of the Board in a matter of this kind is not necessarily an erroneous interpretation of the law or inconsistent with prior practice merely because the same process yields a different result. The IUB offered detail sufficient to indicate a fair and rational basis for a decision supported by substantial evidence in the record when viewed as a whole. (CR p. 255). The Board justified a different outcome for LTD compared to other applicants when it explained that nearly all the RDOF applications required additional information or corrections, but only LTD was evasive and nonresponsive. (CR p. 255). The Board also distinguished this decision from its past decision concerning LTD when it noted the Board had previously authorized LTD to serve as an ETC, but could not do so here given the legally insufficient nature of the Application when considered as a whole. Given the purpose of the duty and text of the law, a past grant cannot and should not bind the Board, because each modification must also be found to comply with the federal law and further the public interest. This outcome was not unreasonable in the abstract or under the circumstances, it was the proper exercise of the Board's highly specialized duty concerning designation of ETCs, particularly in the context of amendments in pursuit of finite USF funds.

In its Petition, LTD attempts to cast doubt using the circumstances of two other applicants, but offers only inaccurate citations and half-information. The first, concerning Miles Communication (Miles), appears intended to support a claim that the Board acted capriciously when it allowed Miles—a carrier seeking ETC designation for the first time—to file the terms and conditions of its prospective plans after designation and award. LTD ignores that the Board afforded Miles that opportunity because Miles' application was also

seeking designation for another program and the website link in the application for that aspect did not redirect to the carrier's pricing plan as expected. The Board concluded that because the applicant made the necessary showings for purposes of RDOF, it was not in the public interest to hold up the application since it could be addressed in the future as a compliance matter. LTD then points to another applicant that determined it did not have to amend its existing ETC designation, and thus did not require notice of intent to amend or an application, because it was already designated for the census blocks that were subject to its RDOF award. LTD fundamentally misrepresents the purpose of the IUB's request to the company to file the exact list of census blocks in its docket—i.e., to augment the carrier's electronic record with information that predated the Board's electronic filing system and thus ensure the FCC could easily verify the ETC documentation that was not readily available in electronic form. The IUB appreciates LTD offering these examples to illustrate how the Board took reasonable efforts to ensure its duty to issue and monitor ETC designations was carried out in the least burdensome manner for all RDOF applicants. The Board struck this balance without compromising the high standards required of carriers that elect to participate in a program that requires specific adherence to the public's interests, not pure pecuniary gain. These examples also evidence both LTD's ability to distinguish the various factual circumstances covered by the Board's rules and illustrate the depth to which LTD will go to suggest unfair treatment.

Aside from patently misleading assertions, LTD's own actions established the record upon which the Board based its decision; this outcome was not the product of assumptions, bias or capricious disregard for the facts, nor was it influenced by the FCC's

independent conclusions. LTD ignored the clear directives in the Board's February 2019 order granting ETC designation concerning its compliance obligations and then self-reported in a manner that concealed that fact until Staff conducted diligent research in response to LTD's present Application. LTD made a strategic decision when it claimed Iowa's rules do not require an Application and then filed the functional equivalent, perhaps sensing the plain language of the rule would make that a difficult proposition to support.

It may have been possible to overcome those initial lapses in judgment had LTD simply been forthright once it came before the Board in May 2021, but actions subsequent to the filing of the Application were even more problematic. LTD rendered its own Application incomplete when it relinquished 118 census blocks in August 2021 but failed to file that development in the IUB's docket. LTD also failed to address the reason it did not register as a telecommunications carrier prior to offering service, as directed in 2019 and required by Iowa Code 476.95A for all telecommunications service providers prior to offering service. LTD was delinquent on two annual reports when it claimed full compliance and still has not filed the annual report covering operations in 2019, despite ample opportunity and guidance from the IUB. LTD failed almost every measure concerning the Dual Party Relay Service (DPRS) program—while claiming it was in compliance—before filing a string of corrected reports. Rather than develop a credible plan to improve for the future, LTD argued that even though it was consistently out of compliance for DPRS, it was for a small amount—and that it shouldn't matter because the Board's system would not accept payments under \$1. The accurate version of the facts is that there is no *de minimus* exception for reporting and paying into the DPRS, the

requirement exists even for companies that want to pay electronically yet can't figure out the system, and there has never been a penalty to ETCs that reach out to the IUB seeking resources to understand the general requirements. To the contrary, by the sheer volume of guidance and technical support afforded ETCs, it should be clear that both the FCC and IUB have built a framework to support applicants with the regulatory aspects of participation in USF programs.

Notably, the Board declined to revoke LTD's existing ETC designation despite concerns about LTD's compliance history that surfaced during this proceeding. The Board based this outcome solely on the conclusion that LTD may have the ability to appropriately serve 22 census blocks, albeit with additional oversight, but it was not yet prepared to take on 3,798 more census blocks until the Board was confident LTD understood the regulatory requirements with which it pledged to comply in 2019. The facts of each ETC applicant can vary greatly; however, the applicable law is well-established, offers a consistent set of criteria, and has not changed since LTD was initially designated.

LTD's public assertions are staggering given the abundance of clear FCC guidance and the plain language of state and federal authority vesting states with the authority to determine the procedure for ETC designation, to adopt additional criteria for designation, and to hold ETCs to any other state-specific requirements imposed by the state that designates it as an ETC. The FCC made this crystal clear in 2018 when reminded prospective bidders: "[C]arriers subject to state jurisdiction should follow state rules and

requirements to apply for designation.”¹⁴ The rules concerning this matter are proper and well-supported. The record in this matter fully supports the Board’s logical, rationale, and completely objective finding that LTD was unable—after multiple opportunities—to credibly establish that amended designation would comport with the public interest standards that define the USF. The Board only took the steps necessary to properly carry out the role delegated by state and federal law. LTD is aggrieved because it delayed filing its Application, chose not to self-report lapses in compliance along the way, and was not diligent in addressing compliance with ongoing regulatory requirements when pressed by the IUB. When framing the decision as a good-faith misunderstanding of the applicable rules failed to convince, the only remaining option was to paint the Board’s decision as arbitrary and capricious. This matter is before the Court because LTD faces adverse financial consequences for that calculation; however, the natural consequences of that business decision is not a basis for affording LTD relief. If LTD seeks to play by its own set of rules, it may do so elsewhere using its own funds. The law does not prevent the IUB from sending LTD a stern message that it may not use the public’s USF funds to further its own business interests with absolutely no oversight.

IV. CONCLUSION.

For the reasons set forth above, the IUB’s conclusion that LTD is required to make

¹⁴ See *WCB Reminds Connect America Fund Phase II Auction Applicants of the Process for Obtaining a Federal Designation as an Eligible Telecommunications Carrier*, p. 1, footnote 4. Public Notice, 33 FCC Rcd 6696 (WCB 2018) (*Federal ETC Public Notice*). Available at: <https://www.fcc.gov/document/wcb-reminds-carriers-federal-etc-designation-process>.

application to, and receive prior approval from, the Board for any request to amend its Eligible Telecommunications Carrier designation comports with 199 IAC chapter 39 and other provisions of law. The Board's finding, that LTD's Application was not in the public interest because it failed to establish the necessary qualifications to merit an exponential expansion of authority, is supported by substantial evidence and should be affirmed. LTD's remaining contentions are wholly without merit and do not serve as a basis to reverse the final agency action. The IUB respectfully requests this Court deny the relief requested by LTD Broadband LLC; affirm the final agency decision; and assess costs of this action against LTD.

Respectfully submitted,

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**ATTORNEYS FOR RESPONDENT
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ALL PARTIES SERVED ELECTRONICALLY