

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

<p>LTD BROADBAND LLC,</p> <p>Petitioner,</p> <p>vs.</p> <p>IOWA UTILITIES BOARD, A DIVISION OF THE DEPARTMENT FO COMMERCE, STATE OF IOWA,</p> <p>Respondent,</p> <p>and</p> <p>OFFICE OF CONSUMER ADVOCATE,</p> <p>Intervenor.</p>	<p>CVCV062857</p> <p>ORDER ON JUDICIAL REVIEW</p>
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This is a petition for judicial review from a final decision of the Iowa Utilities Board (“IUB”). A hearing was held by videoconference on 4/15/2022. The Parties all appeared through counsel.

I. PROCEDURAL POSTURE AND FACTUAL BACKGROUND.

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 of Iowa. This was part of the FCC’s Rural Digital Opportunity Fund (“RDOF”) program, Auction 904. The RDOF is a subset of the FCC’s Universal Service Fund (USF) programs. Federal statutes require the winning bidder to be designated as an “eligible telecommunications carrier” (ETC). 47 U.S.C. §214(e). Congress assigned the duty to designate ETCs to State Commissions. 47 U.S.C. §214(e).

The FCC issued a public notice on June 11, 2020 regarding RDOF Auction 904. The public notice stated: “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).” 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), at page 51, <https://docs.fcc.gov/public/attachments/FCC-20-77A1.pdf>

Successful bidders were required to obtain ETC designation by June 7, 2021. LTD Broadband had previously been granted ETC status on February 20, 2019 for 22 census blocks in Black Hawk, Butler, Floyd, Hamilton, Hardin, and Mitchell Counties. (See CR at 11, 34). On May 7, 2021, LTD Broadband filed Request to Amend Eligible Telecommunications Carrier Designation seeking to expand the ETC designation to an additional 3,798 census blocks in 71 different counties. (See Certified Record (CR) at 42, 52-64). On May 13, 2021, the IUB requested additional information by letter. (CR at 68). LTD Broadband responded on May 18, 2021 and May 19, 2021. (CR at 70, 182). On June 4, 2021, the IUB entered an Order Requesting Additional Information. (CR 209). On July 6, 2021, LTD Broadband responded to the request. On November 5, 2021, the IUB denied LTD Broadband’s request to amend the ETC designation.

LTD Broadband seeks judicial review. LTD Broadband challenges the standard applied by the IUB to decide the request to amend ETC designation and argues the IUB’s decision was arbitrary and capricious.

II. ANALYSIS AND CONCLUSIONS OF LAW.

A. Standard.

A petition for judicial review of the Board’s decision is governed by Iowa Code chapter 17A—the Administrative Procedure Act. Iowa Code § 10A.601(7); Kephart v. Emp’t Appeal Bd., 800 N.W.2d 756, 2011 WL 1136759, at *2 (Iowa Ct. App. Mar. 30, 2011) (Table). The Parties

agree that the IUB's November 5, 2021 Order constituted final agency action. (See Petition and Answer at ¶¶s 20). This Court is acting in an appellate capacity to correct errors of law by the agency. Bearce v. FMC Corp., 465 N.W.2d 531, 534 (Iowa 1991).

If the agency action is incorrect under a ground specified in the Act, and the substantial rights of a claimant have been prejudiced, this Court may grant relief. Iowa Code § 17A.19(10). Agency findings of fact are binding on this Court unless the findings are not supported by substantial evidence. Iowa Code § 17A.19(10)(f). An agency's findings of fact must be supported by substantial evidence when the record is viewed as a whole. Iowa Code § 17A.19(10)(f). The Court's "inquiry is whether the evidence supports the findings made by the agency, not whether the evidence may support a different finding." City of Des Moines v. Emp't Appeal Bd., 722 N.W.2d 183, 195 (Iowa 2006) (citation omitted).

If the agency's interpretation of law is the claimed error, the question on review is whether the agency's interpretation was erroneous. See Clark v. Vicorp Rests., Inc., 696 N.W.2d 596, 604 (Iowa 2005). If the agency's ultimate conclusion reached is the claimed error, "then the challenge is to the agency's application of the law to the facts, and the question on review is whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence." Meyer v. IBP, Inc., 710 N.W.2d 213, 219; Iowa Code § 17A.19(10)(i), (j), (m).

B. Whether the IUB Applied an Incorrect Standard.

The IUB is authorized by Iowa statute to "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, including but not limited to intercarrier compensation, interconnection, and number portability." Iowa Code § 476.95B. 47

U.S.C. §214 instructs state commissions to designate eligible telecommunications carriers for a designated service area. 47 U.S.C. § 214(e)(2).

The IUB has developed agency rules to implement the federal requirement that it determine ETC designations. In the Iowa Administrative Code 199, Chapter 39, the IUB has issued administrative rules “intended to implement Iowa Code sections 17A.4, 476.2, 476.15, and 476.102 and 47 USC Section 214(e).” The statute implemented by this rule are: Iowa Code § 17A.4 (procedure for adoption of rules by administrative agencies), Iowa Code § 476.2 (Board powers and rules – utility’s Iowa office), Iowa Code § 476.15 (jurisdiction of IUB extends to public utilities operating within this state), Iowa Code § 476.102 (board duties regarding universal service), and federal statute 47 USC § 214(e) (state commission duties to designate eligible telecommunications carrier for a service area).

199 IAC 39.3 sets out the agency rules for applying for designation as an eligible telecommunications carrier (ETC). The rule provides:

A telecommunications carrier must be designated as an ETC to qualify for support from the federal universal service fund. The Iowa utilities board reviews applications for designation as an ETC for compliance with 47 U.S.C. § 214(e)(1) and grants ETC designations to qualified applicants for a service area designated by the board. If an applicant requests an expedited ruling from the board on an application to be designated as an ETC or on an amendment to an existing ETC designation, the applicant shall specify why an expedited process is necessary and why an expedited review would not be contrary to the public interest.

199 IAC 39.3(1). Rule 39.3(2)(a-n) provides a list of 14 requirements for an application for ETC designation. This includes a demonstration that the requested designation is in the public interest, where the carrier is seeking an ETC designation for an area served by a rural telephone company.

199 IAC 39.3(2)(h). Rule 39.3(3) addresses “Amendments, assignments and transfers of control.”

This section states:

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.

199 IAC 39.3(3) (emphasis added). Rule 39.3(3) further provides specific to amendments:

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 IAC 39.3(3)(i).

The Parties disagree regarding the appropriate interpretation of these rules. LTD Broadband contends that as long as it complies with 199 IAC 39.3(3)(i) and submits a request to amend at least 30 days in advance of expansion and certifies that the carrier intends to amend its designation to serve as an ETC in the expanded service area, the IUB is without discretion to deny the requested expansion. The IUB contends that a request to amend the service area is still subject to the considerations of 199 IAC 39.3(2) that set forth the requirements for an application for ETC designation and that a request to amend must include the 14 requirements of section 39.3(2).

The Court rejects LTD Broadband's proposed interpretation. According to LTD Broadband, the IUB would not have discretion to reject a proposed amendment as long as it was filed 30 days prior to expansion and contained the required certification. This is at odds both with the full context of rule 39, as well as the federal statute the rule is intended to implement. Rule 39.3(1) provides that "The Iowa utilities board reviews applications for designation as an ETC for compliance with 47 U.S.C. §214(e) and grants ETC designations to qualified applicants for a service area designated by the board." This section makes it clear that an ETC designation is tied to a particular service area. Therefore, the IUB must make decisions as to each designated service area, and not simply one decision as to whether an entity is an ETC or not. Rule 39.3(3) provides that "a carrier's ETC designation may be amended ... only upon application to and prior approval

by the board.” This rule expressly requires application for any amendment to ETC designation and requires that an ETC obtain board approval of the application. The requirement for application and approval would be inconsistent with the lack of discretion urged by LTD Broadband.

Finally, Rule 39.3 implements and specifically references 47 U.S.C. § 214(e). This federal statute requires a common carrier to be designated as an ETC to be eligible to receive universal service support “throughout the service area for which the designation is received.” Once again, eligibility is tied to the relevant service area. In addition, this federal statute requires State commissions to act “consistent with the public interest, convenience, and necessity.” 47 U.S.C. §214(e)(2). “Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.” *Id.* Both Parties agreed at oral argument that the public interest guides the IUB’s ETC designations. LTD Broadband’s application to amend ETC designation contained a statement regarding this public interest standard. (CR at 46, ¶H).

The Court finds the interpretation of Rule 39 that an amendment to an ETC designation requires satisfaction of the requirements of Rule 39.3(2) to be correct as a matter of law. Rule 39.3(2) provides the standards for “an application for ETC designation.” Rule 39.3(3) requires an application and IUB approval for any amendment to an ETC designation. Further, both Rule 39.3 and 47 U.S.C. § 214(e) are clear that ETC designations are specific to a service area. Therefore, the IUB must make determinations regarding ETC designations based on the specific service area at issue. The case at hand illustrates the rationality of the IUB’s interpretation. LTD Broadband previously obtained ETC designation for 22 census blocks and sought to expand its designation by 3,798 census blocks. The original designation was in six (6) counties and the requested amendment covered territory in 71 counties. It would be an illogical interpretation of the IUB Rule

39.3 to require a statement of financial and technical qualification to provide the supported service for the initial application but prevent the IUB from considering that same factor for a significant expansion of service area.

It is therefore held that the IUB did not err as a matter of law in requiring LTD Broadband to address the requirements of Rule 39.3(2) to obtain an expanded ETC designation.

C. Whether the IUB's Decision was Arbitrary and Capricious.

LTD Broadband also argues the Board's decision denying its amended ETC designation was arbitrary and capricious. The Parties agree the Board has discretion to determine whether to grant ETC status and that the Board must consider the public interest in its decision making. Therefore, the appropriate standard of review is whether the action is "unreasonable, arbitrary, capricious, or an abuse of discretion." Iowa Code § 17A.19(10)(n).

The IUB opinion and its briefing in this court repeatedly focused on frustration with LTD Broadband's legal position on the rules or "tone." (See for example IUB decision at 12, CR at 266). The IUB has repeatedly emphasized that LTD Broadband formed a different legal analysis of Rule 39.3, one with which the IUB disagreed. (see Resistance Brief at 18, arguing LTD Broadband's interpretation of the Rule is "misguided;" Resistance Brief at 22, criticizing LTD's "strategic decision" and "lapse in judgment" regarding how to interpret the agency rules). The Court finds that an applicant's different legal interpretation of an agency rule or the "tone" of the application would be an arbitrary and capricious basis for decision. Therefore, the Court does not consider those arguments as a basis to support the IUB's decision.

Instead, this Court limits its consideration to the specific facts relied upon by the IUB as the alleged justification for denial of amended ETC designation. (See pages 14-16 of the IUB Order, CR 268-270). The IUB decision relied on LTD Broadband's alleged history of failing to comply with IUB oversight. The IUB found that LTD Broadband had "routinely submitted

regulatory filings with obvious errors, if filings were submitted at all.” (CR. at 267). The IUB then cited to three specific complaints: 1) failure to file accurate DPRS reports, 2) failure to register prior to providing services, and 3) failure to file timely annual reports as an ETC for the years 2019 and 2020, with the 2020 report filed late and the 2019 report never filed. The IUB’s February 20, 2019 Order approving ETC designation for 22 census blocks had ordered “LTD Broadband LLC shall submit a telecommunications service provider registration prior to offering service in Iowa” and, “Once registered, LTD Broadband shall complete and file Dual Party Relay Assessments as required by Iowa Code §§ 476.95 and 477C.7.” (CR. at 41). The IUB found that the scale of additional responsibility sought by LTD Broadband was not supported by the inconsistent history of compliance.

First, it is not disputed that LTD Broadband filed reports to the Dual Party Relay Service (DPRS) Program that were incorrect. The IUB raised concerns after LTD Broadband sought to expand its ETC designation. LTD Broadband filed corrected reports and paid a required assessments of \$0.56¹. LTD Broadband argues that such a small monetary amount should not prevent ETC expansion. The IUB found the failure to provide accurate DPRS reports to be a concerning failure to fully comply with IUB regulations. LTD Broadband filed its first DPRS report on October 4, 2019 and reported no revenue-producing telephone lines. During the process of seeking amended ETC designation, it was discovered that LTD Broadband did have revenue-producing lines that triggered assessments and prior reports had to be amended to make them fully compliant. (CR. at 211). LTD Broadband had filed eight DPRS reports by the time of consideration. Five (5) reports identified zero lines and had to be amended because there were

¹ The Court was unable to locate this specific figure in the Certified Record but the amount does not seem to be in dispute.

applicable lines. A sixth report had to be amended because it identified an incorrect number of lines (4 corrected to 10). Three reports were filed late. (CR. at 243). Although the amount of funds at issue was minimal and the number of lines at issue small, it is not unreasonable for the IUB to be concerned about so many incorrect and late reports.

Second, LTD Broadband also failed to timely register and file required annual reports. At the time of LTD Broadband's application to amend ETC designation, LTD Broadband had not filed an annual report for 2019 and 2020. (CR. at 68, May 13, 2021 letter). LTD Broadband had not registered or created a company profile. (*Id.*) After the IUB staff raised these issues, LTD Broadband registered, created a company profile, and filed the 2020 annual report. (CR. at 71; 221). A 2019 report was never filed. LTD Broadband explained its misunderstanding of the report and registration requirements and stated "LTD Broadband believes that issues like this will be avoided going forward by additional in-house regulatory staff and by use of Iowa counsel." (CR. at 221). Registration and annual report requirements are not onerous tasks and it was not unreasonable for the IUB to be concerned with the failure to comply, particularly given LTD Broadband's desire for significant expansion.

The Court finds that the IUB's reliance on prior compliance problems was not arbitrary or capricious. It is not unreasonable for the IUB to evaluate whether LTD Broadband's inability to comply with relatively basic regulatory authority when it was only reporting six to ten revenue-producing lines and authorized in 22 census blocks reflects on LTD Broadband's ability to expand to 3,798 more census blocks.

LTD Broadband argues that the public interest would be served by granting the ETC designation because it would help secure reliable broadband services to rural Iowa. Certainly, this is a concern for the citizens of Iowa and the public interest. However, the public interest must also

consider whether the entity requesting ETC designation will meet the obligations and commitments it seeks to undertake. Here, the IUB found that LTD Broadband had not “evidenced the technical and financial capabilities required to carry out the public interest obligations of those entrusted with federal funds.” (CR. at 270). The IUB staff memo notes the IUB staff would expect to have the basic regulatory compliance elements in place prior to such a significant expansion. (CR. at 238). It also notes the concern that the funds would be awarded and removed from future eligibility, but with the entity subsequently unable to uphold the regulatory requirements, thereby actually preventing development of the needed services. (CR. at 238). The Iowa Consumer Advocate intervened in this matter and joins the IUB’s position. At oral argument, the Consumer Advocate agreed that it is not in the public interest to support award of funds for these expanded areas if the entity is not in a position to fulfill provision of the services.

LTD Broadband also argues it is arbitrary and capricious to allow it to maintain its existing ETC designation but deny the amendment. However, the IUB found that although LTD Broadband needed additional compliance monitoring, it would be appropriate to keep its existing ETC designation for 22 census blocks. It is not arbitrary and capricious for the IUB to ensure an entity is prepared to take on a significant expansion from 22 census blocks to 3,768, by having the technical and financial capabilities to do so, including compliance with regulatory oversight.

LTD Broadband argues the IUB acted arbitrarily and capriciously by treating LTD Broadband differently from other applicants by handling its application more slowly and denying the application, when others were approved. See Simmons v. Smith, 888 F.3d 994, 1001 (8th Cir. 2018) (“Agencies may act arbitrarily and capriciously if they treat similarly-situated parties differently or if they act with bad faith.”). LTD Broadband asserts generally that the IUB granted 21 amendments and denied only LTD Broadband’s application. However, LTD Broadband has

not identified to this Court any similarly situated applicants with facts similar to LTD Broadband who were approved. See Simmons, 888 F.3d at 1001-02 (finding party challenging agency failed to identify facts to support claim of differential treatment). LTD Broadband points only to Miles' Communication. The IUB contends Miles Communication was in a very different position than LTD Broadband. LTD Broadband has not provided evidence of the circumstances of Miles Communication's application, how it was handled by the IUB, and why it is comparable to LTD Broadband's application.

Finally, LTD Broadband argues delay in receiving an IUB decision was arbitrary and capricious. It appears the IUB delayed its ruling on the ETC amendment from July 6, 2021, when the application was completed, until November 5, 2021. The Certified Record does not reveal an explanation for the delay. On June 4, 2021, the IUB entered an order identifying deficiencies and requiring additional information. (CR. at 209). On July 6, 2021, LTD Broadband responded. (CR. at 220). The Certified Record does not reveal any action between July 6, 2021 and November 2, 2021. On November 2, 2021, LTD Broadband filed a Request for Expedited Order. (CR at 224). On November 5, 2021, IUB Staff provided a memo analyzing the request. (CR. at 228). Also on November 5, 2021, the IUB entered an order denying the application. (CR. at 255). There does not appear to be any filing explaining the time-lag from July 5, 2021 until November 5, 2021. The IUB's briefing in this matter asserts that the issue had become "moot" because LTD Broadband was waiting on a waiver of a June 7, 2021 deadline. However, based on the Court's review of the Certified Record, the IUB did not issue a decision finding the issue was "moot" or holding that the matter was somehow stayed during the time frame of July 6, 2021 until November 5, 2021.

Regardless, even if the Court accepts that the IUB's delay was arbitrary and capricious, it does not affect this Court's analysis. The IUB ultimately issued an order denying the ETC

designation amendment on the merits. This Court addressed those merits above and found the IUB's decision was not arbitrary or capricious. Therefore, an earlier decision would have had no impact. A delay in obtaining amended ETC designation did not prevent LTD Broadband from obtaining a waiver because LTD Broadband was ultimately unable to obtain the amended ETC designation.

The Court therefore finds the IUB's denial of LTD Broadband's application to expand their ETC designation was not arbitrary or capricious.

IT IS THEREFORE ORDERED that the IUB decision is AFFIRMED.

IT IS SO ORDERED.



State of Iowa Courts

Case Number
CVCV062857
Type:

Case Title
LTD BROADBAND LLC VS IOWA UTILITIES BOARD
ORDER FOR JUDGMENT

So Ordered

Sarah Crane, District Court Judge
Fifth Judicial District of Iowa

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