

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

APPLICATION OF LTD BROADBAND LLC FOR A )  
CERTIFICATE OF TERRITORIAL AUTHORITY ) Cause No. 45519  
FOR COMMUNICATIONS SERVICE PROVIDERS )

**NEW LISBON TELEPHONE COMPANY, INC. AND NEW LISBON  
BROADBAND AND COMMUNICATIONS, LLC'S BRIEF IN SUPPORT OF APPEAL  
TO THE INDIANA UTILITY REGULATORY COMMISSION OF THE PRESIDING  
OFFICER'S ORAL RULING DURING THE MAY 19, 2021 EVIDENTIARY HEARING**

New Lisbon Telephone Company, Inc. and New Lisbon Broadband and Communications, LLC (collectively, "New Lisbon"), by counsel, respectfully submit the following Brief in Support of Appeal to the Indiana Utility Regulatory Commission (the "Commission") of the Presiding Officer's Oral Ruling During the May 19, 2021 Evidentiary Hearing and request that the Commission reverse the ruling of the Presiding Officer and set a hearing date to allow admission of evidence into the record in this Cause regarding the financial obligations and associated cost estimates of LTD Broadband LLC ("LTD") related to its winning Rural Digital Opportunity Fund ("RDOF") bids.

**I. Introduction**

LTD filed its Application for a Certificate of Territorial Authority ("CTA") on March 15, 2021. Pursuant to Ind. Code § 8-1-32.5-9(a)(2), New Lisbon filed its Verified Request for Hearing on April 1, 2021, in LTD's CTA proceeding to question whether LTD has the financial, managerial and technical ability to provide the communications services for which it seeks a CTA in this proceeding. On April 14, 2021, the Commission issued a Docket Entry establishing the procedural schedule for this proceeding and setting the matter for hearing on May 10, 2021. The hearing was continued and ultimately held on May 19, 2021.

During the May 19 hearing New Lisbon’s counsel cross examined LTD’s witness, Corey Hauer, who is the chief executive officer of LTD. As part of New Lisbon’s cross examination, it attempted to enter into the record certain information relating to LTD’s winning RDOF bids, including, without limitation, information previously provided by LTD to New Lisbon during the discovery phase of this proceeding and related to the cost estimates and financial obligations incurred by LTD in the buildout of its Indiana network and networks in other states under the RDOF program.

LTD objected to the admission of this information into the record, and the Presiding Officers sustained the objection. Pursuant to 170 IAC 1-1.1-25, New Lisbon appealed the Presiding Officers’ sustainment to the full Commission following the ruling, and the Presiding Officer requested the filing of this brief.

## **II. Scope and Relevance of Evidence**

### *A. The requested evidence is within the scope of LTD’s testimony.*

As an initial matter, LTD has already opened the door to the admission of evidence related to its financial obligations and cost estimates related to its RDOF winning bids by continually referring to, and in fact *relying upon*, the subject matter to which this evidence directly pertains. LTD was a winning bidder in the Federal Communications Commission’s (“FCC”) RDOF Phase I auction and was provisionally awarded \$54,456,917.90 over a period of 10 years to build out a broadband network to serve 31,330 locations within 5,458 census blocks in Indiana.<sup>1</sup> In total, LTD was provisionally awarded more than \$1.3 billion over a period of 10 years to build out broadband networks to serve more than 528,000 locations in 15 states.<sup>2</sup> In order for LTD to provide the

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<sup>1</sup> *Long-Form Applicants Spreadsheet*, <https://www.fcc.gov/auction/904/round-results> (last accessed May 20, 2021).

<sup>2</sup> *Id.*

communications services required by its RDOF winning bids in Indiana, it must receive a CTA from the Commission.<sup>3</sup>

In this case, LTD stated that “[t]he locations LTD will serve in Indiana will be determined by the Federal Communications Commission and not LTD. The locations have been determined by the FCC. The FCC has provided guidance on what is an eligible location and what is not in the Public Notice found here: <https://docs.fcc.gov/public/attachments/DA-16-1363A1.pdf>.” (New Lisbon Exhibit 1, Attachment JEG-3, Cross Exam Exhibit 1). LTD repeatedly throughout its rebuttal testimony (admitted as Petitioner’s Exhibit 4) referenced its RDOF obligations as support for the Commission to grant its CTA application. Specifically, Mr. Hauer stated that LTD planned to deploy a fiber-to-the-home network in the last mile for its Indiana RDOF areas. (Hauer Rebuttal, p. 3, lines 18-19) Mr. Hauer further testified that LTD operates in six states and is poised to expand service into several other states (including Indiana) as part of its RDOF award. (Hauer Rebuttal, p. 5, lines 14-15) He described LTD’s staffing plans and stated that it expects to have “boots on the ground” in 12 of the 15 states (including Indiana) that comprise its RDOF award area and would manage the timing of its hiring and contractual activities so that LTD was positioned to comply with its RDOF buildout milestone obligations. (Hauer Rebuttal, p. 7, lines 8-15)

Importantly, in response to an inquiry regarding the timing considerations guiding LTD’s financial, managerial and technical decisions for providing service related to its RDOF award, Mr. Hauer responded in his rebuttal testimony that LTD’s financial, managerial and technical decisions would be timed appropriately to align with the FCC’s approvals so that LTD’s financial, technical and hiring commitments are consistent with the FCC’s directives. (Hauer Rebuttal, p. 8, lines 1-4) Mr. Hauer also stated that LTD would equip and train its staff to deploy fiber networks once its

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<sup>3</sup> IND. CODE § 8-1-32.5-6.

RDOF long-form application is approved by the FCC. (Hauer Rebuttal, p. 10, lines 16-17) He further stated that LTD has taken steps to identify and meet any future financing needs to align with the FCC’s approvals so that LTD is positioned to comply with the applicable RDOF buildout milestones. (Hauer Rebuttal, p. 14) Mr. Hauer further testified during cross examination that LTD does not currently provide service in Indiana and confirmed that it was awarded approximately \$54 million in RDOF support to serve approximately 31,000 locations in Indiana. He further confirmed that the RDOF program provides subsidies for network buildout in RDOF-awarded areas.

It is clear from Mr. Hauer’s testimony that the impetus behind LTD’s CTA application is its receipt of federal RDOF support, which comes with it certain service obligations – specifically, to build a broadband network that will provide service of at least 1Gbps downstream and 500Mbps upstream, along with voice telephony and Lifeline service, to serve all of RDOF-awarded locations in Indiana in accordance with RDOF buildout milestones.<sup>4</sup> In fact, LTD has relied upon this testimony to convince the Commission of its need for a CTA.

An applicant seeking a CTA must provide “[i]nformation demonstrating the provider’s financial, managerial, and technical ability to provide each communications service identified in the provider’s application under subsection (a)(5) in each service area identified under subsection (a)(4).”<sup>5</sup> The evidence requested by New Lisbon to be admitted in this proceeding specifically relates to LTD’s costs to provide the communications services it has committed to provide in the service area in which it has committed to provide service, which includes more than 31,000 locations in Indiana.

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<sup>4</sup> See *In the Matter of Rural Digital Opportunity Fund, Connect America Fund Report and Order*, 35 FCC Rcd. 686, para. 39 (Feb. 7, 2020).

<sup>5</sup> IND. CODE § 8-1-32.5-6(b)(2).

Pursuant to 170 IAC 1-1.1-26, the Commission may be guided generally by relevant provisions of the Indiana Rules of Evidence to the extent they are consistent with Commission regulations. Indiana Rule of Evidence 602 provides that the scope of cross examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. Based on the foregoing, it is clear that the requested evidence is required to be admitted pursuant to Indiana Rule of Evidence 602, as it directly relates to and is within the scope of the assertions made by LTD in the rebuttal testimony of Mr. Hauer and relied upon by LTD in requesting the grant of a CTA to provide the RDOF-required services in Indiana.

Finally, it is also notable that the Commission has previously ruled that portions of the evidence requested by New Lisbon to be admitted in this proceeding – specifically LTD's responses to New Lisbon's data requests 1.18 and 1.24 – was required to be produced by LTD in the discovery phase of this proceeding. On April 22, 2021, the Commission issued a Docket Entry granting New Lisbon's motion to compel responses to these two data requests, stating that “[d]iscovery must be relevant to the subject matter at issue, which in this case is whether LTD has the financial, managerial and technical ability to provide the services indicated in its application. Although discovery is broad, requests must be reasonably calculated to lead to the discovery of admissible evidence.” Although slightly different standards are used to determine whether a piece of information is “reasonably calculated to lead to the discovery of admissible evidence” and whether it is actually considered admissible evidence, the Commission's previous ruling compelling production of the exact same type of information that New Lisbon requests be admitted into evidence should be instructive as to its relevance and relation to LTD's previously filed testimony.

*B. The requested evidence directly relates to LTD's financial ability to provide the services.*

Pursuant to Indiana Rule of Evidence 401, evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence, and (b) the fact is of consequence in determining the action. Pursuant to Indiana Rule of Evidence 402, relevant evidence is admissible unless otherwise provided by the U.S. or Indiana constitutions, statutes, other rules of evidence or other Indiana court rules. An applicant seeking a CTA must provide “information demonstrating the provider’s financial, managerial, and technical ability to provide each communications service identified in the provider’s application. . . in each service area identified . . .”<sup>6</sup> The Commission has not historically accepted unsubstantiated blanket statements that a CTA applicant is financially capable of providing the requested services. Rather, the Commission has reviewed a variety of evidence presented by CTA applicants in determining whether they possess the financial capability to provide the services for which they are requesting Commission authorization.<sup>7</sup>

The evidence requested by New Lisbon to be admitted in this proceeding relates directly to LTD’s financial ability to provide the services for which it is requesting a CTA. As explained in Section II.A above, this evidence demonstrates the estimated costs and financial obligations to be incurred by LTD in building its networks to provide the services that it is required by the FCC to provide pursuant to its RDOF obligations. Further, the RDOF-required services are the services

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<sup>6</sup> IND. CODE § 8-1-32.5-6(b)(2).

<sup>7</sup> See, e.g., *In re: Equicom Communications Inc.*, 1989 Ind. PUC LEXIS 262 (IURC July 12, 1989) (in which the Commission reviewed the applicant’s assets, liabilities, pro-forma income statement, line of credit and business affiliations); *In re: Kentucky Data Link, Inc.*, 2002 Ind. PUC LEXIS 237 (IURC July 17, 2002) (in which the Commission reviewed the applicant’s parent company financial backing as it related to the costs of construction and operation of the applicant’s network); *In re: American Consultants Alliance, Inc.*, 2002 Ind. PUC LEXIS 274 (IURC Aug. 7, 2002) (in which the Commission reviewed the applicant’s confidential financial data showing adequate assets for its planned enterprise); *In re: Broadslate Networks of Indiana, Inc.*, 2000 Ind. PUC LEXIS 161 (IURC July 19, 2000) (in which the Commission reviewed financial statements of applicant and its parent company); and *In re: Microwave Telecommunications Incorporated*, 1991 Ind. PUC LEXIS 326 (IURC Aug. 21, 1991) (in which the Commission reviewed the applicant’s balance sheet, facilities purchase agreement, and operating and maintenance expenses to provide the requested services).

that have necessitated LTD's CTA application. The Commission should consider all of the evidence before it in determining whether LTD has the financial ability to provide the services requested in its CTA, that is, all of its RDOF service commitments in Indiana, which includes more than 31,000 locations. Certainly, the cost and financial obligations incurred to provide these services is directly related to LTD's financial ability to provide them. As stated above, the Commission has historically reviewed construction, operation and maintenance costs associated with providing the requested services when determining whether to grant a CTA.<sup>8</sup>

Pursuant to Indiana Rule of Evidence 401 and consistent with the Commission's evaluation criteria in previous cases, including review of CTA applicants' construction, operation and maintenance costs of providing their requested services, the evidence requested by New Lisbon to be admitted in this proceeding contains information having a tendency to make it less probable that LTD has the financial ability to provide the services requested in its CTA, which include service commitments to more than 31,000 locations in Indiana. Such financial inability should be determinative of whether the Commission grants LTD's requested CTA. Under Indiana Rule of Evidence 402, the Commission must admit this relevant evidence.

### **III. Conclusion**

The Commission should reverse the Presiding Officer's ruling and set this Cause for hearing to allow for the admission of evidence of LTD's costs and financial obligations related to its winning RDOF bids into the record. The Commission should further consider such evidence in its evaluation of LTD's CTA application because it is within the scope of the subject matter introduced and relied upon by LTD in its pre-filed rebuttal testimony, pursuant to Indiana Rule of Evidence 602. Further, consistent with Indiana Rule of Evidence 401, this evidence is relevant to

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<sup>8</sup> See, e.g., *In re: Kentucky Data Link, Inc.*, 2002 Ind. PUC LEXIS 237; *In re: Microwave Telecommunications Incorporated*, 1991 Ind. PUC LEXIS 326.

the determination of whether LTD is financially capable of providing the services requested in its CTA application, which include its service obligations to more than 31,000 Indiana locations. Based on the foregoing, the Commission is urged to reverse the ruling of the Presiding Officer and set for hearing to permit admission of the requested evidence into the record of this proceeding.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been electronically served upon the following on May 20, 2021:

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