

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

LTD Broadband LLC
Designated Eligible Carrier
Application

PU-21-168

Staff Response to Request to view Information

Background

On September 15, 2021, Broadband Association of North Dakota (BAND) provided two requests for Derrick Bulawa who is a BEK employee, and Carissa Swenson who is an consultant who works for Consortia Consulting to view the protected information filed by LTD Broadband LLC (LTD).

Trade secret protection was granted by the ALJ based on the staff response to LTD's application for protected information. The information was provided to Commission Staff in response to a data request of LTD. The information provided was materials that LTD was required by the FCC's application to for the Rural Digital Opportunity Fund (RDOF). The FCC treats this information as protected. Prior orders and also an Attorney General opinion state if the information is protected by a Federal Agency, it is appropriate for it to be protected information by the commission as well.

On October 13, 2021, the ALJ denied BAND's request to intervene in the case.

N.D.Admin.R. applicable

N.D.Admin.R. 69-02-09-07 dictates the burden the applicant must meet to view protected information.

69-02-09-07. Viewing protected information.

1. The commission and its staff, and any outside counsel retained by the commission, may view protected information filed with the commission at any time. However, the commission and its staff are bound by the terms of these rules to keep the information confidential and must execute the protective agreement as required in subsection 3. The originator (applicant for protected status) may view the information at any time without the necessity of executing the protective agreement required in subsection 3.

2. Others who wish to view protected information, including experts who are not regular full-time employees of the commission, and opposing counsel

and experts, may do so only after authorization from the commission. The commission may grant authorization when the person wishing to view the information submits a written request that includes all of the following:

- a. The name and address of the person who will view the information;
- b. Identification, as specifically as possible, of the information requested;
- c. A showing of good cause why the information is needed;
- d. Identification of the purpose of the review;
- e. Identification of the intended use of the information; and
- f. An estimate of the time needed for review.

The requesting person shall file the original written request with the commission and serve it upon the originator at least ten days prior to the time the person desires to view the information unless the originator agrees to a shorter notice period.

3. Any person reviewing protected information filed with the commission shall execute a protective agreement form provided by the commission. A new protective agreement form must be executed for each work day in which information is viewed.

4. The commission shall disclose the information unless:

- a. The commission is prohibited by law from disclosure under any circumstance; or
- b. The originator shows good cause why disclosure should not be granted.

When disclosed, protected information may not be removed from commission offices and must be returned for secure filing prior to the end of the workday on which the information was disclosed, and may be used only for purposes of the proceeding or case.

History: Effective March 1, 1994; amended effective April 1, 2015.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-06, 47-25.1

The commission is not prohibited by law from disclosure under any circumstance in this case so the question becomes has BAND shown good cause why disclosure should be granted, and has the originator shown good cause why disclosure should not be granted.

BAND lists as its showing of good cause the relevancy and adequacy of the materials filed by LTD in responding to NDPSC questions related to the ETC application. BAND was denied intervener status because they did not meet the statutory requirements for intervention and as stated by the ALJ because “although

BAND is a potential competitor of LTD Broadband LLC (LTD), the stated substantial interest of BAND is ensuring that all federal and state requirements pertaining to the eligible telecommunications carrier status are properly considered by the commission.”

BAND’s good cause is simply to ensure that all federal and state requirements pertaining to the application as an eligible telecommunications carrier status are properly considered by the commission. Staff does not believe this reaches the level of good cause to view protected information.

BAND did file comments on October 6, 2021. The summary for their arguments starts with they are competitors, and the outcome of this case will directly impact them and their plans and operations. This appears to be a better argument for why the disclosure of protected information should not be viewed by BAND as its members are in direct competition with LTD.

BAND and its members do have direct hands-on experience with broadband and its costs for implementation/deployment and realistic costs. BAND’s commitment to the public interest of the citizens of North Dakota is not in question.

BAND’s final argument for viewing the protected information is that the Public Service Commission does not have the technical expertise or sufficient staff to adequately analyze cost in competitive markets. The PSC can hire outside experts and consultants if it feels it is beneficial and needed. The PSC has been processing ETC applications for some time without issue.

BAND is able to participate and provide testimony during public comment and can testify as to what reasonable costs to serve these areas and cost to install facilities to serve these areas without knowing LTD’s financial or other protected information. BAND can provide through its testimony information it feels the commission needs to adequately make its decision on LTD’s ETC application.

The commission must also consider if the originator has shown good cause why the disclosure should not be granted.

On September 29, 2021, LTD responded to BAND’s request to view information. LTD begins with discussing allowing BAND to view the protected information would be a vehicle for LTD’s competitors to view information that was protected as confidential first by the FCC and now the commission.

LTD next states that Bands request to view protected information is inadequate in showing good cause, identification of the purpose of the review, and the intended use of the information.

As discussed above it does not appear a good cause showing has been met. BAND could provide public comment and provide information to the commission as to realistic and up to date costs on the installation of fiber, expected returns on

investment and other relevant information the commission could use in making the ETC determination. Viewing the protected information would not hinder in the information BAND can provide that would be useful to the commission.

While BAND does state a purpose for a review and the intended use, it is vague and lacks specificity of why it is necessary and prudent to break the protection afforded to all telecom companies for the information protected by the commission, which is also protected during the FCC application process for the RDOF funds.

If this was granted, competitors in future ETC applications could view the financial and other detailed information of BAND's members, allowing competitive disadvantage across the board for all communication companies.

LTD's final argument is that the FCC protects this information as confidential which is discussed in staff's response to the application of protected information the previous treatment by the commission and the Attorney General's opinion regarding information protected at the federal level. LTD makes the argument that BAND has not supported or shown good cause to pierce the veil of protection afforded at the Federal or State level to allow an organization made up of competitors to LTD to view the protected information.

For the reasons set forth above, Staff believes that BAND has not shown good cause as to why viewing the protected information would be useful or beneficial in the information it can provide to the commission. BAND is able to participate and provide public testimony and provide the commission with the information it requires to evaluate LTD's ETC application without viewing the protected information.

Dated this 15th day of October 2021.



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