

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE APPLICATION
OF NATIVE AMERICAN TELECOM, LLC
FOR A CERTIFICATE OF AUTHORITY TO
PROVIDE LOCAL EXCHANGE SERVICE
WITHIN THE STUDY AREA OF
MIDSTATE COMMUNICATIONS, INC.

Docket No. TC11-087

**MEMORANDUM IN SUPPORT OF
NATIVE AMERICAN TELECOM, LLC'S
MOTION TO STRIKE EXPERT TESTIMONY OF
WILLIAM R. EASTON**

Native American Telecom, LLC ("NAT") submits this memorandum in support of its motion to strike portions of the expert testimony of Qwest Communications Company, LLC's ("Qwest") employee, William R. Easton ("Mr. Easton").

FACTS

On October 11, 2011, NAT filed its original "Application for Certificate of Authority" ("Application") with the Commission.

On January 27, 2012, NAT filed its revised "Application for Certificate of Authority" ("Revised Application") with the Commission.

On March 26, 2012, Qwest, d/b/a CenturyLink, filed the direct testimony of its employee, Mr. Easton, in opposition to NAT's Revised Application.

On June 3, 2013, NAT filed its second revised “Application for Certificate of Authority (“Second Revised Application”) with the Commission.

LAW & ANALYSIS

I. QWEST DOES NOT CHALLENGE NAT’S TECHNICAL OR MANAGERIAL CAPABILITIES TO OBTAIN A CERTIFICATE OF AUTHORITY IN THIS PROCEEDING

SDCL 49-31-3 provides that “[e]ach telecommunications company that plans to offer or provide interexchange telecommunications service shall file an application for a certificate of authority with the commission pursuant to this section.” This statutory provision also requires that “[a] telecommunications company has the burden to prove in its application that it has *sufficient technical, financial and managerial capabilities* to offer the telecommunications services described in its application. . . .” *Id.* (emphasis added). Mr. Easton’s written testimony indicates that Qwest does not object to NAT’s technical or managerial capabilities to obtain a certificate of authority in this proceeding. (See Direct Testimony of William R. Easton - Filed March 26, 2012 – pages 17-18).

II. SOUTH DAKOTA’S STANDARD FOR THE ADMISSIBILITY OF EXPERT TESTIMONY

Under SDCL 19-15-2 (Rule 702), an expert’s knowledge, skill, experience, training, or education must be sufficient to assist the trier of fact and the area of the witness’s competence must match the subject

matter of the witness's testimony.¹ "The fact that a proposed witness is an expert in one area does not . . . qualify him to testify as an expert in all related areas." *Shreve v. Sears, Roebuck & Co.*, 166 F.Supp.2d 378, 391 (D.Md. 2001) (concluding that a mechanical engineer "is not necessarily qualified to testify as an expert on any issue within the vast field of mechanical engineering"); *Garland v. Rossknecht*, 624 N.W.2d 700 (S.D. 2001) ("Frankenfeld . . . admits that he has no competence as a vocational expert . . . [He] also acknowledged that in most instances where he testifies concerning economic loss, he does so based on the analysis of a vocational expert. We conclude that his opinion cannot be considered reliable").

¹ SDCL 19-15-2 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data,
- (2) The testimony is the product of reliable principles and methods, and
- (3) The witness has applied the principles and methods reliably to the facts of the case.

In *State v. Hofer*, 512 N.W.2d 482 (S.D. 1994) and *State v. Guthrie*, 627 N.W.2d 401 (S.D. 2001), the South Dakota Supreme Court adopted the United States Supreme Court's *Daubert / Kumho* "reliability and relevancy" standard for the admissibility of expert testimony. See Honorable Janine M. Kern and Scott R. Swier, *Daubert, Kumho, and Its Impact on South Dakota Jurisprudence: An Update*, 49 South Dakota Law Review 217 (2003-2004) (examining the South Dakota Supreme Court's recent analyses of the *Daubert/Kumho* standard).²

III. MR. EASTON'S TESTIMONY OFFERS IMPROPER LEGAL ANALYSES AND CONCLUSIONS.

Throughout Mr. Easton's written testimony, he provides the Commission with his legal analyses and conclusions of the Federal Communications Commission's *Connect America Fund* ("CAF") Order, Iowa Utilities Board and federal court decisions, "access stimulation," and the legal propriety of Free Conferencing Corporation's ("Free

² One effect of the South Dakota Supreme Court's decision to adopt the *Daubert/Kumho* standard is that an expert who is not a "scientist" now receives the same level of scrutiny for "reliability" and "relevancy" as does a "scientific" expert. In other words, *Daubert/Kumho* now exposes all experts to the same degree of scrutiny that was once reserved only for "scientific" experts.

Conferencing”) services.³ (See Direct Testimony of William R. Easton - Filed March 26, 2012 – pages 2, 4-14).

Mr. Easton is not an attorney. Legal issues and analyses are to be decided by the court (or in this case, the Commission). Thus, all of Mr. Easton’s “legal analyses and conclusions” should be stricken by the Commission. Mr. Easton exceeds the permissible bounds of expert testimony by attempting to interpret these various legal documents – documents on which he is not an expert and on which even a legitimate expert would be unable to testify. Mr. Easton’s written testimony even attempts to go another step beyond this by adding Qwest’s editorial comments on these legal documents. Mr. Easton’s conclusory legal opinions of these documents are nothing more than his biased interpretation of the legal documents. This is clearly improper.

Mr. Easton’s direct testimony also includes his “legal opinion and analysis” of why he and Qwest contend that the allowance of NAT’s Second Revised Application is not in the “public interest.” (See Direct Testimony of William R. Easton - Filed March 26, 2012 – pages 5-9; 19-

³ Much of Mr. Easton’s “legal analyses and conclusions” also rely on impermissible hearsay from other administrative agencies and courts. (See *e.g.*, Direct Testimony of William R. Easton - Filed March 26, 2012 – pages 9, 14).

20). However, Mr. Easton's "opinions" on what may or may not be in the "public interest" is not admissible for a variety of reasons.

In making this "public policy" claim, Mr. Easton entirely disregards the fact that the South Dakota Legislature (not Qwest) sets our state's "public policy." Mr. Easton also ignores that the South Dakota Legislature (on two separate occasions) overwhelmingly rejected Sprint's long-standing position that "access stimulation" is not good "public policy."

Therefore, Mr. Easton's "expert testimony" regarding the issue of "access stimulation" constituting "bad public policy" should be stricken because (1) this issue is irrelevant to the Commission's review of NAT's "technical, managerial, and technical capabilities" and (2) Mr. Easton has no basis on which to claim that "access stimulation" harms the "public interest."

IV. MR. EASTON'S TESTIMONY REGARDING "MILEAGE PUMPING" IS IRRELEVANT AND HE HAS OFFERED NO EVIDENCE THAT NAT IS INVOLVED IN THIS PHENOMENON.

Mr. Easton's testimony also references the phenomenon of "mileage pumping." (See Direct Testimony of William R. Easton - Filed March 26, 2012 - pages 20-22). However, Mr. Easton provides no evidence that NAT is engaged in "mileage pumping." As such, Mr. Easton's reference to

“mileage pumping” is not supported by any facts and should be stricken as irrelevant and based upon unsupported assertions.

CONCLUSION

For the above-referenced reasons, NAT respectfully requests that the Commission strike portions of Mr. Easton’s written testimony.

Dated this 10th day of February, 2014.

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