

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

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In the Matter of the Application of LTD  
Broadband LLC for Designation as an Eligible  
Telecommunications Carrier for Purposes of  
Receiving Federal Universal Service Support

TC21-001

**APPLICANT'S AMENDED BRIEF  
SUPPORTING  
MOTION TO STRIKE EXPERT  
TESTIMONY OF LARRY THOMPSON**

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Applicant, LTD Broadband LLC ("LTD"), moves to strike the proffered expert testimony of Larry Thompson. Mr. Thompson's proffered expert testimony is irrelevant and inadmissible because he opines on the wrong legal standard.

**BACKGROUND**

LTD filed an Application for ETC designation. SDTA has intervened in this docket.<sup>1</sup> SDTA filed prefiled testimony of proffered expert, Larry Thompson ("Thompson"). That prefiled testimony also includes an expert report by Thompson.

Fundamentally, Thompson opines that the Commission should deny the Application because: (1) LTD underestimated its construction costs; (2) LTD's business plan is not viable; and (3) allowing LTD to receive RDOF funding could adversely affect whether other companies might, at some future time, receive government funding to deploy broadband service to these unserved locations. Essentially, under the "auspices" of public interest, Thompson argues that the Commission has the relevant expertise to determine the profitability and economic viability of LTD's planned network and use that as the basis to deny LTD's Application. These opinions

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<sup>1</sup> LTD has a separate docket regarding its application for Certificate of Authority ("COA"). See TC21-014. SDTA also filed a motion to intervene in that docket. LTD and SDTA have signed a stipulation resolving any concerns that SDTA may have regarding the COA docket.

are not helpful to the Commission and inadmissible because Thompson ignores the limited scope of the Commission's role in evaluating an ETC application.

### LEGAL STANDARD

The admissibility of evidence at the evidentiary hearing in this matter is governed by South Dakota's Administrative Procedures Act, which generally provides that the rules of evidence in South Dakota's Circuit Courts generally applies to this proceeding. Specifically, SDCL 1-26-19 states in relevant part:

In contested cases:

(1) Irrelevant, incompetent, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied under statutory provisions and in the trial of civil cases in the circuit courts of this state, or as may be provided in statutes relating to the specific agency, shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not otherwise admissible thereunder may be admitted except where precluded by statute if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form;

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SDCL 1-26-19. Through section 1-26-19, South Dakota's rules of evidence regarding admission of expert opinions apply to this proceeding. *See Peery v. Dep't of Ag.*, 402 N.W.2d 695, 698 (S.D. 1987).

Admissibility of expert testimony in South Dakota is governed by SDCL 19-19-702, which states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

- (b) The testimony is based on sufficient facts or data;
- (c) The testimony is the product of reliable principles and methods; and
- (d) The expert has reliably applied the principles and methods to the facts of the case.

SDCL 19-19-702. Under Rule 702, the proffered expert must be “qualified.” *Burley v. Kyttec Innov. Sports Equip., Inc.*, 2007 SD 82, ¶ 16, 737 N.W.2d 397, 404. In other words, the Court must determine “whether a particular expert has sufficient specialized knowledge to assist jurors in deciding the specific issues in the case.” *Id.* Qualification as an expert on some matters does not make the expert qualified to opine on all matters, however. *Garland v. Rossknecht*, 2001 SD 42, ¶ 11, 624 N.W.2d 700, 703 (“A fundamental baseline for reliability is that experts are limited to offering opinions within their expertise.”)

Even if qualified, the proffered expert testimony must be relevant and reliable. “Before admitting expert testimony, a court must first determine that such qualified testimony is relevant and based upon reliable foundation.” *Burley v. Kyttec Innov. Sports Equip.*, 2007 SD 82, ¶ 13, 737 N.W.2d 397, 402. “Expert testimony which does not relate to any issue in the case is not relevant and, ergo, not helpful.” *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993). SDTA has the burden of establishing admissibility by the preponderance of the evidence, and that the proffered testimony “is competent, relevant, and reliable.” *Tosh v. Schwab*, 2007 SD 132, ¶ 18, 743 N.W.2d 422, 428 (quoting *Burley*, 2007 SD 82, ¶ 13, 737 N.W.2d at 403). When ruling on the admissibility of expert testimony, the Commission “needs to exercise its gatekeeping function.” *Rogen v. Monson*, 2000 SD 51, 609 N.W.2d 456, 459 (quoting *Kuper v. Lincoln-Union Electric Co.*, 1996 SD 145, ¶ 41, 557 N.W.2d 748, 760).

## ARGUMENT

Thompson's proffered expert opinions are both irrelevant and unhelpful because he misunderstands the role of the Commission vis-à-vis the Federal Communications Commission ("FCC") in evaluating LTD's ETC Application. The Telecommunications Act of 1996 expressly limits the scope of a state commission's authority when reviewing a request for ETC designation: "A State commission *shall* upon its motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for the service area designated by the State commission. . . ." 47 U.S.C. § 214(e)(2) (emphasis added). Under the plain language of the statute, this Commission must grant LTD's Application for ETC status if LTD satisfies the requirements of 47 U.S.C. § 214(e)(1).

Section 214(e)(1) states three requirements for ETC status. First, the applicant must be a common carrier. Second, the applicant must "offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title . . . ." 47 U.S.C. § 214(e)(1)(A). Third, the applicant must advertise the availability of these services and their corresponding service. 47 U.S.C. § 214(e)(1)(B). Here, LTD satisfies each of these requirements as stated in its Application. Pertinent to this specific motion, none of Section 214(e)'s three requirements relate in any way to LTD's financial status, planning or profitability.

Thompson's testimony and opinions ignore the statutorily limited scope of review by the Commission of an ETC designation. Instead, Thompson focuses on LTD's purported financial viability and managerial experience. LTD's planning and profitability are not, however, appropriate considerations under 47 U.S.C. § 214(e)(2). Because Thompson's opinions are wholly unrelated to the legal issues before the Commission, they are irrelevant, unhelpful to the Commission, and inadmissible under Rule 702. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S.

579, 591 (1993) (“Expert testimony which does not relate to any issue in the case is not relevant and, ergo, not helpful.”).

Thompson opines that LTD’s financial viability affects the Commission’s “public interest” inquiry under ARSD 20:10:32:43:07, which states in relevant part:

*Prior to designating an eligible telecommunications carrier, the commission shall determine that such designation is in the public interest. The commission shall consider the benefits of increased consumer choice, the impact of multiple designations on the universal service fund, the unique advantages and disadvantages of the applicant's service offering, commitments made regarding the quality of the telephone service provided by the applicant, and the applicant's ability to provide the supported services throughout the designated service area within a reasonable time frame. . . .*

ARSD 20:10:43:07 (emphasis added). According to Thompson, without a proper financial plan, LTD “may fail.” Thompson then speculates that failure by LTD would not be in the public interest because if LTD fails, others might not use future government funding that might be available under rules not yet written to provide voice and broadband services to the 103 census blocks provisionally awarded to LTD.

Thompson’s opinions ignore that 20:10:43:07 defines the factors considered when evaluating the public interest.<sup>2</sup> Specifically, the second sentence of ARSD 20:10:43:07 describes the specific areas of inquiry directing the Commission’s public interest analysis as “the benefits of increased consumer choice, the impact of multiple designations on the universal service fund, the unique advantages and disadvantages of the applicant's service offering, commitments made regarding the quality of the telephone service provided by the applicant, and the applicant's

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<sup>2</sup> LTD does not agree that the Commission should evaluate anything other than the three requirements of 47 U.S.C. § 214(e) when determining LTD’s ETC application. Even assuming for argument’s sake only that the Commission’s rules authorize it to consider additional factors when evaluating “public interest,” inquiries into future maintenance cost are outside the scope of ARSD 20:10:43:07.

ability to provide the supported services throughout the designated service area within a reasonable time frame.”<sup>3</sup>

None of these “public interest” considerations articulated in the second sentence of ARSD 20:10:43:07 require evaluation of the future sustainability of an applicant’s financial status for this purpose. At most, ARSD 20:10:43:07 inquires whether LTD can build its network in a reasonable time frame. LTD has committed to build the network, and it will be obligated to do so consistent with the six-year buildout period required by the FCC’s RDOF rules. Thompson’s testimony does not contest this. Further evaluation of LTD’s construction plans and financial capabilities will be determined by the FCC as part of the RDOF long form review, and this Commission would exceed its authority under 47 U.S.C. § 214(e)(2) by engaging in the analysis in Thompson’s proffered testimony. Further, because Thompson’s opinions do not relate to any of the issues within the Commission’s statutorily defined jurisdiction, these opinions should all be excluded.

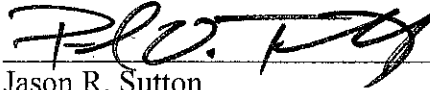
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<sup>3</sup> The Commission applied these specific factors when evaluating the public interest while granting applications for ETC status in other dockets. *See, e.g.,* Order Granting Expanded Eligible Telecommunications Carrier Designation in Certain Census Blocks; Order Granting Waiver, *In the Matter of Alliance Communications Cooperative, Inc. d/b/a Alliance Communications Application for Expanded Designation as an Eligible Telecommunications Carrier*, TC 201-010 (May 29, 2021); Order Granting Expanded Eligible Telecommunications Carrier Designation in Certain Census Blocks; Order Granting Waiver, *In the Matter of Eligible Telecommunications Cooperative, Inc. Application for Expanded Designation as An Eligible Telecommunications Carrier*, TC 21-011 (May 19, 2021); Order Granting Expanded Eligible Telecommunications Carrier Designation in Certain Census Blocks, Order Granting Waiver; *In the Matter of Application by Valley Telecommunications Cooperative, Association, Inc. For Expanded Designation as an Eligible Telecommunications Carrier in the State of South Dakota*, TC 21-003 (May 7, 2021); Order Granting Eligible Telecommunications Carrier Designation in Certain Census Blocks, Order Granting Waiver, *In the Matter of the Application by Venture Vision, Inc. as an Eligible Telecommunications Carrier in the State of South Dakota*, TC 21-009 (April 19, 2021); Order Granting Eligible Telecommunications Designation, Order Granting Certification; *In the Matter of the Application of Midcontinent Communications for Eligible Telecommunications Carrier Designation with Certain Additional Qwest Service Areas*, TC 10-099 (Feb. 23, 2011).

## CONCLUSION

The Commission should strike the prefiled testimony of Larry Thompson and exclude him from testifying at the evidentiary hearing in this matter.

Dated this 9<sup>th</sup> day of November, 2021.



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**CERTIFICATE OF SERVICE**

I, Paul W. Tschetter, do hereby certify that I am a member of Boyce Law Firm, LLP, attorneys for LTD Broadband, LLC and that on the 9<sup>th</sup> day of November, 2021, a true and correct copy of the foregoing and this Certificate of Service were served via email to the following addresses listed:

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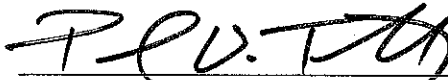
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