

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

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 REPLY BRIEF
SUPPORTING
MOTION TO STRIKE EXPERT
TESTIMONY OF LARRY THOMPSON**

Confusing the respective roles of this Commission and the Federal Communications Commission ("FCC"), Intervenor, South Dakota Telecommunications Association ("SDTA"), argues that Larry Thompson's testimony is admissible because this Commission should determine whether Applicant, LTD Broadband LLC ("LTD"), can meet its RDOF obligations. (SDTA Objection and Reply to LTD Motion to Strike ("LTD's Brief") at p.3). Essentially, SDTA asks this Commission to second guess the FCC's decision on the RDOF application under the auspices of a "public interest" inquiry in this application for ETC status. Ultimately, the FCC, not this Commission, will determine whether LTD has the financial, managerial, and technical ability to deploy a network consistent with LTD's RDOF obligations. SDTA's proffered expert testimony about LTD's financial sustainability is irrelevant to the issues before this Commission, and thus, is inadmissible.

A. Standard for Admissibility of Larry Thompson's Proffered Expert Testimony.

Before admitting expert testimony, a court must first determine that such qualified testimony is relevant and based upon reliable foundation." *Burley v. Kytect 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).

B. Larry Thompson’s Proffered Testimony is Irrelevant Because He Wrongfully Relies on the Legal Standard for Issuance of a Certificate of Authority Rather than the Standard for Designation as an Eligible Telecommunications Carrier.

To be admissible, Larry Thompson’s opinions must be relevant and helpful to the finder of fact. Here, Larry Thompson’s opinions are irrelevant and inadmissible because Larry Thompson’s opinions are based upon the incorrect legal analysis.

Larry Thompson summarizes the scope of his testimony when explaining the purpose of the ETC review as “ensur[ing] that telecommunications providers in the State of South Dakota among other things, have the technical, managerial and financial ability to provide reliable telecommunications service and continue to do so without failing.” (SDTA’s Brief at p.2; *see also* Direct Testimony of Larry Thompson at p.5, lines 1-5). This proffered testimony confuses the legal standard for issuance of a certificate of authority with the standard for ETC designation.

Larry Thompson testifies and SDTA argues that the ETC review process requires this Commission to evaluate LTD’s technical, managerial, and financial condition. These conditions are the requirements of issuance of a *certificate of authority* under SDCL 49-31-71, which states:

The commission shall issue a certificate of authority for local exchange service to the applying telecommunications company, if, after notice and opportunity for hearing pursuant to chapter 1-26, the applicant has demonstrated sufficient technical, financial, and managerial capabilities to provide the local exchange services applied for. In granting a certificate of authority to provide local exchange service, the commission may impose terms and conditions, on a

competitively neutral basis, that it finds consistent with preserving and advancing universal service, protecting the public safety and welfare, ensuring the continued quality of service, and safeguarding the rights of consumers.

SDCL 49-31-71 (emphasis added). In this docket, however, the question before the Commission is whether LTD is entitled to ETC designation; not whether LTD should receive a certificate of authority.¹

The Commission's standard for issuing an ETC designation differs from the standard for issuing a certificate of authority. As noted in LTD's opening brief, the Telecommunications Act of 1996 limits this Commission's scope of review on the Application. (LTD's Opening Brief at p.4). Specifically, this Commission's inquiry in this ETC docket is limited to determining whether LTD satisfies the three legal requirements of 47 U.S.C. § 214(e)(1), 47 U.S.C. § 214(e)(2). 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).

Incredibly, even though its expert, Larry Thompson, applies the legal test for issuing a certificate of authority under SDCL 49-31-71 rather than the legal test for ETC designation, SDTA states that "[i]t is *not* SDTA's position that the legal analysis is the same for both a certificate of authority and ETC designation." (SDTA's Brief at p.2) (emphasis added). Stated another way—SDTA agrees that the legal test for ETC status and for issuance of a certificate of authority is different. This concession destroys SDTA's legal arguments because, as noted above, SDTA's expert's opinions are based upon the analysis for issuance of a certificate of

¹ SDTA has signed a stipulation consenting to issuance of the certificate of authority.

authority. In other words, Larry Thompson applied the wrong legal analysis, and his proffered testimony is inadmissible. *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.”).

C. Larry Thompson’s Opinions About LTD’s Financial Viability are Irrelevant to the Inquiry Before the Commission.

SDTA argues that the Commission should evaluate LTD’s financial viability, likelihood to remain in the market, and ability to provide services as part of the ETC application process. (SDTA’s Brief at p.5). According to SDTA, the Commission should follow the FCC’s 2005 Report and Order (“2005 Order”) providing direction to states regarding ETC status. (*Id.* at p.4).

LTD does not agree that the 2005 Order so broadly defines the scope of the Commission’s authority in evaluating an ETC application. To the contrary, the plain language of 47 U.S.C. § 214(e)(2) limits this Commission’s inquiry. Indeed, the 2005 Order recognizes that state commissions, when ruling on requests for ETC designation, should apply the factors of public interest, convenience, and necessity “in a manner that is consistent with section 214(e)(2) of the [Telecommunications Act of 1996].” (2005 Order at ¶ 61). Thus, even the 2005 Order recognizes that this Commission’s scope of review is controlled by 47 U.S.C. 214(e)(2).

Nevertheless, even if the 2005 Order expands this Commission’s scope of inquiry in ETC proceedings, the Commission does not address the issue of LTD’s financial viability. The FCC expressly refused to adopt a requirement “that an ETC applicant demonstrate that it has the financial resources and ability to provide quality services throughout the designated service area.” (2005 Order at ¶ 37). Similarly, as pointed out by Staff in their brief supporting LTD’s motion to strike, neither the Legislature nor this Commission have adopted statutes or administrative rules authorizing an inquiry into LTD’s financial viability as part of the ETC

designation process. (Staff's Response to LTD's Motion to Strike Expert Testimony of Larry Thompson at p.4). *See also* ARSD 20:10:32:43.01 TO 43.07.

Critically, all of Larry Thompson's purported expert opinions, including his questions about managerial and support capabilities, arise from questions about LTD's financial viability. Thus, at its core, all of Larry Thompson's opinions are really challenges of LTD's financial status and sustainability. Because financial sustainability is not a proper ETC consideration, Larry Thompson's proffered testimony is irrelevant and should be stricken.

D. The Commission's Discretion is Not Limitless When Evaluating "Public Interest" in the ETC Review Process.

Ignoring the plain language of properly adopted administrative rules, SDTA essentially argues that the Commission has limitless discretion when evaluating the "public interest" in an ETC application. This argument is simply wrong.

The Commission, through formal rule making process, has adopted a regulation defining the applicable public interest standard:

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 20:10:32:43.07 (emphasis added). The second sentence of the administrative rule states the five considerations the Commission "shall consider" in determining whether ETC status serves the public interest. When the language of an administrative rule is clear, the Commission's responsibility is to declare the meaning of the administrative rule as expressed in its language. *West Med Rehab, Inc. v. Dep't of Social Servs.*, 2004 SD 104, ¶ 8, 687 N.W.2d

516, 518. “Administrative rules have the force of law and are presumed valid.” *Krsnak v. S.D. Dep’t of Environmental & Nat’l Res.*, 2012 SD 89, ¶ 16, 824 N.W.2d 429, 436.

Here, SDTA concedes that the second sentence of ARSD 20:10:32:43.07 has five factors that must be considered by the Commission. (SDTA’s Brief at p.5). SDTA, nevertheless, argues that the Commission can consider other factors when evaluating the public interest. (*Id.* at pp.5-6). The only basis for SDTA’s argument is reference to the 2005 Order, which recognizes that state commissions have considered various factors in evaluating public interest. (*Id.* at p.6 (quoting 2005 Order at ¶ 40)).

SDTA’s argument ignores that this Commission has already exercised its rule-making authority to determine what factors it will consider in the public interest inquiry. Furthermore, basic rules of statutory construction provide that the combination of mandatory language such as “shall” along with a list of factors to consider prohibits consideration of factors outside the list. *See In re Estate of Flaws*, 2012 SD 3, ¶ 19, 811 N.W.2d 749, 753-54 (stating that when a rule or statute includes items in a list, “that what is not listed is excluded”).

In short, the Commission cannot consider factors outside those listed in the second sentence of ARSD 20:10:32:43.07. Because financial sustainability is not one of the properly considered factors, Larry Thompson’s testimony is irrelevant and unhelpful to the jury. In turn, it should be excluded under Rule 702. *Daubert*, 509 U.S. at 591.

E. Larry Thompson’s Proffered Testimony Is Not Relevant to Any of the Factors in ARSD 20:10:23:43.07.

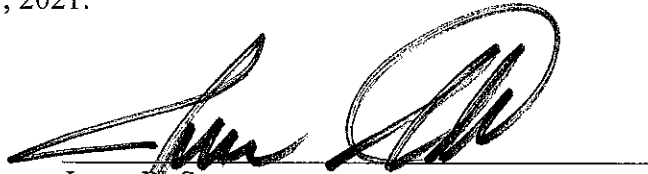
SDTA argues that Larry Thompson’s testimony is relevant and admissible because one of the factors under ARSD 20:10:23:43.07 addresses LTD’s “ability to provide the supported services through the designated service area within a reasonable time frame.” (SDTA’s Brief at p.7). Larry Thompson’s actual offered testimony and opinions do not address the deployment of

LTD's network. Instead, Larry Thompson is focused on his conclusion that because LTD did not properly consider its costs, it will not be profitable, and, it turn, will eventually fail. (Direct Testimony of Larry Thompson p.9, lines 10-15). The **future** profitability of LTD has nothing to do with whether LTD will be able to deliver the service within a reasonable time frame. That is an issue of deployment; not an issue of profitability and sustainability. In turn, Larry Thompson's testimony is not relevant or admissible. Simply put, as recognized by Staff, Larry Thompson's opinions about profitability and sustainability are outside the Commission's scope of inquiry when ruling on LTD's ETC application.

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 17th day of November, 2021.



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CERTIFICATE OF SERVICE

I, Jason R. Sutton, do hereby certify that I am a member of Boyce Law Firm, LLP, attorneys for LTD Broadband, LLC and that on the 17th 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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