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 POST-HEARING REPLY BRIEF**

LTD filed an application for designation as an eligible telecommunications carrier ("ETC"). LTD filed the application because it is the provisional winner of RDOF funding to provide broadband internet service to unserved locations in South Dakota. If the Commission denies LTD's ETC application, then LTD will not receive the RDOF funding to support voice and broadband service to South Dakotans. In turn, LTD will not deploy its network in South Dakota. Without LTD, consumers in the areas where LTD was presumptively awarded RDOF funds will not likely receive broadband service at any time in the near future. And, by definition, current providers—including SDTA's members—are not providing a sufficient level of broadband service to these locations, which is why federal funding is available.

Even though they have chosen not to serve these locations, SDTA's members do not want a company from outside South Dakota to access federal funds to deploy broadband service within South Dakota. Thus, SDTA intervened in this docket and opposed LTD's ETC application. In doing so, SDTA has tried to impose a new requirement on LTD that this Commission has never before required applicants to meet. Fundamentally, SDTA argues that the Commission should, for the first time ever, require LTD to prove as a condition to receiving ETC designation that it will be a remain a financially viable entity **even after** LTD deploys its federally supported network. This question, which is far beyond the scope of the Commission's

rules, is the entire basis for SDTA's claim that ETC designation should be denied. Because neither the Telecommunications Act of 1996 ("Telecom Act") nor the Commission's regulations allow the Commission to add this requirement for ETC status, the Commission should reject SDTA's arguments and grant LTD's application.

I. Everyone Agrees that LTD Satisfies the Requirements for Designation as an ETC Imposed by 47 U.S.C. § 214(e).

As argued by LTD in its opening brief, the Telecom Act defines what is required for designation of a company as an eligible telecommunications carrier. (Applicant's Opening Post-Hearing Brief ("Opening Brief") at pp.6-8). *See also In re GCC License Corp.*, 2001 SD 32, ¶ 9, 623 N.W.2d 474, 480. Specifically, 47 U.S.C. § 214(e)(1) states that an applicant—LTD here—must satisfy three requirements for ETC status. First, the applicant must be a common carrier. 47 U.S.C. § 214(e)(1). 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. 47 U.S.C. § 214(e)(1)(B).

Here, LTD satisfies each of these requirements for the reasons stated by LTD on pages 6 to 8 of LTD's Opening Brief. Commission Staff also agrees that LTD satisfies each of the three ETC requirements imposed by section 214(e)(1). (Staff's Post-Hearing Brief ("Staff Brief") at pp.2-3). SDTA does not dispute LTD's compliance with section 214(e). (*See generally* Post-Hearing Brief of the South Dakota Telecommunications Association (SDTA) ("SDTA's Brief")). Thus, it is undisputed that LTD meets all requirements for ETC status under section 214(e).

Analytically, LTD's satisfaction of section 214(e)(1)'s requirements should end this Commission's inquiry. Pursuant to the plain language of section 214(e)(2), the Commission **must** grant ETC status to any company meeting the requirements of subsection (e)(1). 47 U.S.C.

214(e)(2) ("A state commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission.").

Both SDTA and Commission Staff argue that state commissions, including the Commission here, have authority to impose additional requirements for ETC status. (SDTA Brief at pp.4-6; Staff Brief at pp.4-6). As noted above, this argument conflicts with the plain language of section 214(e)(2). The Commission should apply the language of the statute as written, not as SDTA and Commission Staff wish the language was written. Thus, because it is undisputed that LTD satisfies the requirements of section 214(e)(2), the Commission should grant LTD's application. However, even so, the requirements of the Commission's rules are satisfied as well.

II. Granting LTD's Application Serves the Public Interest.

If the Commission does consider additional factors beyond 47 U.S.C. § 214(e)(1), then the only other issue to be decided is whether granting LTD's ETC application is in the public interest. Both Staff and SDTA agree that this is the only disputed issue.[1] The Commission, through formal rulemaking, has adopted an administrative rule requiring a finding that designation of a carrier as an ETC "is in the public interest." ARSD 20:10:32:43.07. The administrative rule 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

[1] In addition to public interest, the Commission has adopted several other administrative rules governing an ETC application. *See* ARSD 20:10:32:43 through 20:10:32:43.07. In its opening brief, LTD described, at length, how SDTA satisfied all the Commission's administrative rules for granting ETC status. (Opening Brief at pp.8-17). Except for the public interest consideration, SDTA did not dispute LTD satisfied all the other applicable administrative rules. Commission Staff does not argue that LTD failed to satisfy any of the Commission's administrative rules for ETC status.

> 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*. In addition, the commission shall consider whether the designation of the applicant will have detrimental effects on the provisioning of universal service by the incumbent local exchange carrier. . . .

S.D. Admin. Rule 20:10:32:43.07 (emphasis added).

Regarding the public interest as defined in 20:10:32:43.07, LTD argued in its opening brief how it satisfied all of the public interest factors stated in the rule. (Opening Brief at pp.13-17). In response, SDTA only disputes one of the public interest factors. Specifically, SDTA argues that LTD failed to show that it has the ability to provide the supported services throughout the designated service area within a reasonable time frame. (SDTA Brief at pp.6-17). SDTA is wrong.

SDTA relies on the testimony of its expert consultant, Larry Thompson ("Thompson"), to establish that LTD lacks the ability to provide the supported services. Essentially, SDTA's arguments rise and fall on the hope that the Commission will accept Thompson's testimony. For several reasons, Thompson's testimony and SDTA's arguments on LTD's ability to deploy its funded network do not support denying ETC's application.

A. Thompson Applied the Wrong Legal Test, and as a result, His Opinions Cannot Form the Basis for Rejecting LTD's Application.

In both his prefiled testimony and at the evidentiary hearing, Thompson testified that the purpose of an ETC proceeding is "to ensure 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 Ex. 1, at p.3; Hearing Transcript at pp.183-84). On cross-examination, Thompson admitted that his opinions were based upon those three considerations. (Hearing Transcript at pp.184-85). In its

brief, SDTA relies on technical, managerial, and financial considerations as well. (SDTA Brief at pp.9-17).

The fundamental problem with Thompson's testimony is that the issues he addresses—technical, managerial, and financial abilities to provide service—are what the Commission considers in determining whether to grant a certificate of authority ("COA"), not whether to grant ETC status. The applicable statute for whether to grant a COA states in relevant part: "The commission shall issue a *certificate of authority* for local exchange service to the applying telecommunications company, if . . . the applicant has demonstrated sufficient *technical, financial, and managerial capabilities* to provide the local exchange services applied for." SDCL 49-31-71 (emphasis added). Thus, under the plain language of the applicable statute, technical, financial, and managerial capabilities are COA issues. Unlike SDCL 49-31-71 for COAs, ARSD 20:10:32:43.07 does not prescribe any requirement that an ETC applicant demonstrate technical, financial, and managerial capabilities.

Thompson and SDTA contend the very same issues—financial, managerial, and technical capability—determine whether LTD should receive a certificate of authority and whether it should be designated as an ETC. This argument presents a question of statutory (SDCL 49-31-71) and administrative rule (ARSD 20:10:32:43.07) interpretation. When interpreting administrative rules, the Commission should apply "the same rules of construction as statutes." *Citibank, N.A. v. S.D. Dep't of Rev.*, 2015 SD 67, ¶ 12, 868 N.W.2d 381, 387.

The legal analysis for granting ETC status and issuing a COA cannot be the same because they are governed by different statutes and regulations. SDTA's argument ignores that the differences in the statutory and regulatory framework for ETC status and granting a certificate of authority. The Legislature has adopted statutes defining when this Commission

should issue a COA. That statute is SDCL 49-31-71. The Legislature adopted SDCL 49-31-71 in **1998**, and it has not amended the statute. *See* SL 1998, ch. 274, § 8.

Regarding ETC status, the Commission adopted the "public interest" rule ARSD 20:10:32:43.07 in July of **2006**. *See* 32 SDR 231. Undoubtedly, this Commission, which is responsible for issuing COAs, was fully aware of SDCL 49-31-71 when adopting 20:10:32:43.07. In fact, review of the Commission's electronic dockets confirm that the Commission ruled on numerous COA dockets in **2005**, which was the year before adoption of ARSD 20:10:32:43.07.[2] The Commission also heard an application for designation as an ETC in 2004.[3]

SDTA contends that the same requirements for issuance of a COA under SDCL 49-31-71 determine whether a carrier has the "ability to provide the supported services throughout the designated service area within a reasonable time frame." If that is true, the Commission would have used the same language from SDCL 49-31-71 when adopting ARSD 20:10:32:43.07. The

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[2] *In the Matter of Application of Phone 1, Inc. for a Certificate of Authority to Provide Alternative Operator Services in South Dakota*, TC 05-001; *In the Matter of the Application of Northstar Telecom, Inc. for a Certificate of Authority to Provide Interexchange Telecommunications Services and Local Exchange Services in South Dakota*, TC 05-005; *In the Matter of Bullseye Telecom, Inc. for Certificate of Authority to Provide Interexchange Telecommunication Services and Local Exchange Services in South Dakota*, TC 05-008; *In the Matter of Application of UCN, Inc. for a Certificate of Authority to Provide Local Exchange Services in South Dakota*, TC 05-51; *In the Matter of Application of New Rochelle Telephone Corp. for a Certificate of Authority to Provide Interexchange Telecommunications Services and Local Exchange Services in South Dakota*, TC 05-052; *In the Matter of Application of Global Tel-Link Corporation for a Certificate of Authority to Provide Payphone, Operator Services and Interexchange Telecommunication Services in South Dakota*, TC 05-053; *In the Matter of the Application of Pacific Centrex Services, Inc. for a Certificate of Authority to Provide Interexchange Telecommunications Services and Local Exchange Services in South Dakota*, TC 05-059; *In the Matter of Trans National Communications International, Inc. for a Certificate of Authority to Provide Local Exchange Services in South Dakota*, TC 05-061; *In the Matter of the Application of Network Services Billing, Inc. for a Certificate of Authority to Provide Interexchange Telecommunications Services in South Dakota*, TC 05-063; *In the Matter of the Application of Metropolitan Telecommunications of South Dakota, Inc., for a Certificate of Authority to Provide Interexchange Telecommunications Services and Local Exchange Services in South Dakota*, TC 05-069; *In the Matter of the Application of Advanced Tel, Inc. dba ATI for a Certificate of Authority to Provide Interexchange Telecommunications Services in South Dakota*, TC 05-082; *In the Mater of the Application of Acceris Management and Acquisition LLC for a Certificate of Authority to Provide Interexchange Telecommunications Services in South Dakota*, TC 05-100.

[3] *In the Matter of the Application of Midcontinent Communications for Eligible Telecommunications Carrier Designation within Quest Service Areas*, TC 04-003.

Commission certainly could have drafted the administrative rule language to say that when determining public interest, the Commission should decide whether the applicant has demonstrated sufficient *technical, financial, and managerial capabilities.* Indeed, it is a "fundamental principal of statutory construction that in determining legislative intent a court 'must assume the legislature in enacting a provision has in mind previously enacted statutes relating to the same subject matter.'" *State v. Feiok*, 364 N.W.2d 536, 539 (S.D. 1985) (quoting *State v. Chaney*, 261 N.W.2d 674, 676 (S.D. 1978)).

By using different language in the ARSD 20:10:32:43.07, the Commission's adoption of ARSD 20:10:32:43.07 confirms the legal tests for issuing a COA differ from the public interest analysis for ETC status. This difference is fatal to SDTA's arguments because as Thompson admitted, all of his opinions are based upon LTD not having sufficient technical, financial, and managerial capabilities, which is the COA analysis. Thus, when the actual correct legal analysis is applied, there is no evidence rebutting Hauer's testimony that the ETC requirements are satisfied.

Furthermore, the Commission should not interpret its ETC analysis as requiring analysis of LTD's financial, managerial, and technical capabilities because this would disrupt the careful balance intended by the dual state-federal regulatory scheme. As noted above, LTD's financial, managerial, and technical capabilities are not a proper ETC consideration under the Commission's administrative rules. In fact, these specific factors are not specifically addressed anywhere in this Commission's applicable regulations governing ETCs and instead are specifically within the FCC's purview in reviewing RDOF long-form applications. Contriving a similar obligation for this Commission to undertake that same analysis usurps the role of the

FCC. Notably, SDTA has questioned the FCC's authority to review LTD's technical, financial, and managerial capabilities.

Through sleight of hand, Thompson testifies that these COA rules also decide the ETC issue because the public interest regulation requires the Commission to consider 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. That is nothing but an after-the-fact attempt to shoehorn Thompson's opinions, which are based upon the wrong legal analysis, into the "public interest" regulation. And, as recognized by Thompson, designating a carrier as an ETC is different than granting a carrier a COA. (Hearing Transcript at p.183). Here again, the FCC has established six-year deployment term with enforceable milestones, reporting, and compliance obligations, and SDTA's efforts to have the Commission establish a new standard must fail.

B. If SDTA Is Correct and the Legal Analysis for Granting ETC Status and Issuing a COA is the Same, then SDTA Has Already Agreed that LTD Satisfies those Requirements.

As noted above, Thompson's opinions are based on the argument that LTD does not have the requisite financial, technical, and managerial ability to provide the proposed telecommunications services, and to continue providing those services without failing. (Hearing Transcript at p.184). This is the same legal test for issuance of a COA as described above.

Thompson's testimony that LTD does not have the required financial, technical, and managerial ability is overridden by the formal stipulation agreed to by SDTA. Separate from this matter, LTD filed an application for a COA. *See In the Matter of the Application of LTD Broadband LLC for Certificates of Authority to Provide Resold and Facilities-Based Local Exchange and Interexchange Telecommunications Services in the State of South Dakota,* TC 21-2014. SDTA filed a motion to intervene in that docket. (Ex. L-18, at p.2). The parties then

entered into a stipulation where SDTA agreed to the issuance of the COA with certain conditions: "The parties agree that upon the Commission's approval of this Stipulation, the concerns of SDTA that are the basis for its intervention in the above-referenced dockets shall be deemed fully satisfied, and SDTA shall not oppose LTD's [certificate of authority] Application." (*Id.*).

By entering into the stipulation, SDTA factually agreed that LTD satisfied the requirements for issuance of a COA. Ignoring this agreement, SDTA now argues that: (1) the test for granting ETC status and issuance of a COA is the same; and (2) LTD does not satisfy that test. These positions are logically inconsistent, and this Commission should hold SDTA to its prior stipulation. Because SDTA agreed to issuance of a COA, it cannot now reasonably argue that the requirements for issuance of COA are unsatisfied and that this somehow warrants denial of LTD's ETC application. And, because LTD claims the requirements for evaluating the "public interest" issue are the same as for issuance a COA under SDCL 49-31-71, SDTA formally agreed that these requirements are satisfied.

Apparently recognizing the problem that its stipulation in the COA docket has caused with respect to its arguments here, SDTA goes to great lengths to argue how the legal issues for issuance of a COA under SDCL 49-31-71 are different than the "public interest" standard for ETC status under ARSD 20:10:32:43.07. (SDTA Brief at p.21). If that is correct, then Thompson's opinions are inadmissible and entitled to no weight whatsoever because he used the wrong legal standard. *See* SDCL 19-19-702; *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."). Conversely, if the legal test for issuance a COA is the same analysis as the public interest as Thompson testified, then SDTA has agreed the ETC's public interest

requirements are satisfied. Either way, SDTA's arguments fail, and this Commission should grant LTD's application.

Further illustrating SDTA's inconsistent positions, SDTA argues that LTD can receive a COA because it does not have defined geographic limitation whereas the ETC designation would specifically apply to approximately 7,000 locations identified in LTD's application. (SDTA Brief in p.21). SDTA ignores that the application in the COA docket is **actually broader** than the 7,000 locations:

> Applicant seeks authority to provide its services throughout the state of South Dakota. Initially, its main focus will be limited to the census blocks for which it will be receiving support through the FCC's Rural Development Opportunity Fund ("RDOF").

In the Matter of the Application of LTD Broadband LLC for Certificates of Authority to Provide Resold and Facilities-Based Local Exchange and Interexchange Telecommunications Services in the State of South Dakota, TC 21-2014, Application at p.5. Thus, SDTA agreed that LTD has the capability to provide these services throughout the entire state, including the 7,000 locations for which it seeks ETC status.

In short, SDTA, through the COA Stipulation, agreed LTD has the financial, technical, and managerial capability to provide the requested services **throughout** the state of South Dakota. It cannot now claim that it lacks the ability to provide those same services to 7,000 specific locations within the state. As a result, the Commission should find that granting ETC status to LTD serves the public interest.

C. The FCC, through the RDOF Long Form Review, Is Evaluating LTD's Ability to Provide the Requested Services.

As pointed out by LTD in its opening brief, the FCC, through its thorough consideration of LTD's RDOF long form, is engaged in a comprehensive analysis of LTD's technical,

financial, and managerial capabilities. (Opening Brief at pp.5,15-16). SDTA's own expert, Thompson, conceded that the FCC will review LTD's engineering plans and its financing before releasing the RDOF funds. (Hearing Transcript at p.194). He also conceded that the FCC is competent to perform that analysis. (*Id.*).

Ultimately, the FCC will thoroughly review LTD's abilities before releasing the RDOF funds. The FCC will not authorize support to winning bidders until confirming the applicant is reasonably capable of meeting its RDOF obligations. (Ex. L-2, Applicant 000007). And, if the RDOF funds are not released, then LTD has no intention of deploying its network in South Dakota. (Hearing Transcript at p.34). This Commission should not supplant the FCC's review, which is the purpose of the RDOF long form review process.

D. Thompson's Opinions Are All Based upon an Impermissible and Speculative Conclusion, Namely that LTD Will Eventually Fail as a Business

Thompson's own testimony is that he is not opining LTD will not be able to deploy its network, but instead, that LTD will eventually fail:

> Q. And just to be clear, as I heard your testimony, its fundamentally that this Commission should deny the ETC designation because LTD will inevitably fail as a business, correct.
>
> **A. Correct.**
>
> Q. That is the conclusion of all your opinions, correct.
>
> **A. If they move forward with their RDOF winnings, that is correct.**

(Hearing Transcript at pp.194-95). Similarly, in his prefiled testimony, Thompson stated that his opinions were that LTD would eventually fail, and thus, not be able *to continue* providing telecommunications services at some date in the future. On page 5, lines 3 through 5 of his prefiled testimony, Thompson stated the basis for his opinions on public interest: "Failure of an

ETC *to continue to provide* telecommunications service would not be in the best interest and could come at a time when emergency services is needed." (SDTA Ex. 1, at p.5).

There is a key temporal underpinning to Thompson's opinions. Thompson does not opine that LTD cannot successfully deploy its network. Instead, he speculates that LTD will eventually fail as a going concern at some undefined point in the future.[4] Under ARSD 20:10:32:43.07, the future sustainability of LTD's business is not a proper consideration. The operative language examines "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). By having a time limitation of providing services within a reasonable time frame, the plain language of the administrative rule indicates it refers to deployment of the network, not continued operation of the network over some uncertain time frame. SDTA essentially asks this Commission to amend the operative language in ARSD 20:10:32:43.07 to state: "the applicant's ability to provide the supported services throughout the designated service area within a reasonable time frame **and its ability to continue providing that service for an indefinite period of time."**

This Commission's obligation is to apply the administrative rule as written. When the language of the administrative rule is clear, the Commission's "function is confined to declaring its meaning as clearly expressed." *Krsnak v. S.D. Dep't of Environment & Nat'l Res.*, 2012 SD 89, ¶ 16, 824 N.W.2d 429, 436. The Commission must apply the regulation as written "rather than rewrite the law to confirm what [it] or others think it should have said." *State v. Burdick*, 2006 SD 23, ¶ 18, 712 N.W.2d 5, 10 (internal quotation omitted). "Administrative rules have 'the full force of law and presumed valid.'" *Krsnak*, at ¶ 16 (quoting *State v. Guerra*, 2009 SD 74, ¶ 32, 772 N.W.2d 907, 916)).

Based on these basic principles of statutory construction, the public interest question for the Commission asks whether LTD can deploy its network and provide the services within a reasonable amount of time. Thompson's opinions all focus on an irrelevant and improper inquiry—whether LTD will be able to continue providing those services.

Furthermore, based upon LTD's review of other dockets, it does not appear that the Commission has previously considered a company's future economic sustainability when evaluating public interest under ARSD 20:10:32:43.07.[5] In other words, SDTA asks the Commission to impose an additional burden on LTD, and only LTD, for ETC status. It is SDTA's position that LTD also must prove that it will not fail as a business at some unknown point in the future.

Imposing this additional burden on LTD only is impermissible discrimination inhibiting competition. *See In re GCC License Corp.*, 2001 SD 32, ¶ 22 n.11, 623 N.W.2d 474, 483. In *GCC License Corp.*, the South Dakota Supreme Court did not reach the issue of whether the Commission had authority to impose requirements for ETC status beyond the requirements of 47 U.S.C. § 214(e)(1). *In re GCC License Corp.*, at ¶ 11, 623 N.W.2d at 483. Nevertheless, the Supreme Court did expressly state "that even if a state commission does retain authority to impose additional requirements, any such requirements must be competitively neutral and consistent with the [Telecom] Act's aim of promoting competition." *Id.* at ¶ 22 n.11, 623 N.W.2d at 483 (citing 47 U.S.C. § 253(b)). Similarly, the Telecom Act and the FCC's rules require that any regulation imposed by this Commission be competitively neutral. *See* 47 U.S.C. § 253(b). Because this Commission's regulations must be competitively neutral, it cannot impose a new, additional burden—future economic sustainability—on LTD in this docket.

[4] LTD disputes this conclusion for the reasons stated below in Part II.E.

Because this is not a proper factor under ARSD 20:10:32:43.07, the Commission should not rely on Thompson's testimony or SDTA's arguments in denying LTD's application.

E. LTD Has the Ability to Provide Services Throughout the Designated Service Area Within a Reasonable Time Frame.

Under ARSD 20:10:32:43.07, the question is whether LTD has the ability to provide the services throughout the designated service area within a reasonable time frame. The answer is yes, and the best evidence is that LTD has already procured outside financing for its RDOF deployment. (Hearing Transcript pp.80-82, 86-98). [redacted] With this already procured funding, LTD will be able to deploy its network. (Hearing Transcript at p.80). This testimony from Hauer that he has funding in place is unrebutted and undisputed.

The fact that LTD has procured funding for deployment of its network confirms its ability to deploy the network and provide the services. This is confirmed by the testimony of SDTA's own expert, Thompson. As part of his work at Vantage Point, Thompson testified that he had been involved in submitting business plans for financing for deploying a network. (Hearing Transcript at p.195). Thompson agreed that as part of the financing process, the party seeking funding goes through extensive underwriting. (Hearing Transcript at p.195). And, as Thompson conceded, no one receives funding unless the funding source is convinced the business will survive:

> Q. And based upon your experience, the financing partners would not lend or give the money to the company unless they thought it was sustainable, correct.
>
> **A. Correct.**

[5] The undersigned reviewed every Commission order granting ETC status since 2006 and did not see any reference to future economic sustainability when the Commission analyzed public interest under ARSD 20:10:32:43.07.

(Hearing Transcript at p.196). The fact that LTD has successfully procured the necessary financing undermines Thompson's opinions that LTD lacks the ability to deploy its network. LTD would not have received financing if it was clearly doomed to fail as Thompson suggests. Instead, the unrebutted evidence indicates [redacted] LTD will be in a position to deploy its network once RDOF funds are released.

Further, the FCC has adopted rules to address the unlikely event that LTD fails before fully deploying its funded network. Those rules require LTD to obtain and maintain a letter of credit, meet deployment milestones, conduct quarterly speed and latency testing, and submit annual reports. *See* 47 C.F.R. § 54.314(c); 47 C.F.R. § 54.802(c)(1); 47 C.F.R. § 54.313(a)(6); 47 C.F.R. § 54.313. The letter of credit provides a means by which the FCC can recover support if LTD fails to meet the FCC's deployment milestones. (Hearing Transcript at pp. 25-17, 105-06). The FCC could then make support available in RDOF Phase II for someone else to build the network. (Hearing Transcript at pp.105-06). The FCC through the RDOF rules thus has already mitigated the risk of business failure through the letter of credit and other compliance measures.

SDTA asserts several meritless arguments regarding LTD's ability to deploy its network, including that LTD lacks the financial, managerial, or technical capability to deploy its network. These arguments fail.

1. Financial Ability

SDTA argues that LTD will not have the financial ability to deploy the network because it will cost more than LTD anticipates, and the RDOF funding is insufficient to build the network. (SDTA Brief at pp.9-12). According to SDTA, LTD will not be financially able to deploy its network because: (1) LTD is only receiving $46.6 million dollars in RDOF funding;

and (2) [redacted] (SDTA Brief at p.9). Then, SDTA argues that LTD underestimated its costs, and thus, the funding deficiency is even greater. (SDTA's Brief at p.10).

There is a fundamental fallacy in SDTA's argument. It assumes that the only source for LTD's funding is the RDOF funds. That is simply incorrect. As Hauer testified, LTD will obtain additional, outside financing resources as necessary to deploy its network. He has financing committed. LTD also may participate in other future government funding for some of its RDOF supported network. (Hearing Transcript at pp.36-37). Thus, the evidence shows LTD has adequate financial ability to deploy the network. This will be further confirmed by the thorough analysis performed by the FCC before releasing the RDOF funds to LTD.

Relying on Thompson's speculation without any factual support, SDTA argues that LTD does not actually have outside financing.[6] (SDTA Brief at p.10). That is simply not the evidence. [redacted] This testimony is undisputed and unrebutted with anything other than Thompson's conjecture.

SDTA also argues that LTD will never be profitable, and thus, it cannot financially deploy its network. (SDTA Brief at pp.10-12). There are several problems with his argument. First, and most fundamentally, SDTA confuses the issue of ability to deploy a network and **future** economic sustainability. The profitability issue relates to whether LTD may fail in the

[6] Thompson did speculate that he would not see anyone funding LTD's deployment. (Hearing Transcript at pp.195-96). Thompson did admit that he heard Hauer testify that LTD had [redacted] (Hearing Transcript at pp.96, 199-200). Thompson admitted that he has no personal knowledge to dispute that testimony. (Hearing Transcript at pp.196-97). Because he lacks personal knowledge and it would be sheer speculation, Thompson's statement that he would not see anyone funding LTD's deployment is not even admissible. *See* SDCL 19-19-602. To the extent that Thompson is offering this statement as an expert opinion, it is nothing more than speculation. Expert testimony based upon nothing more than unsupported speculation is not admissible. *See Kuper v. Lincoln-Union Elec. Co.*, 1996 SD 145, ¶ 39, 557 N.W.2d 748, 760 (stating that the word "knowledge" in Rule 702 "connotes more than subjective belief or unsupported speculation"); *see also In re S.D. Microsoft Antitrust Litig.*, 2003 SD 19, ¶ 30, 657 N.W.2d 668, 679 (stating that an expert opinion is not worth any more weight than the facts upon which it is based).

future. SDTA's arguments about future failure are speculative. Furthermore, the argument is irrelevant for the reasons stated above.

Second, SDTA's arguments about profitability are based upon numerous faulty assumptions. SDTA assumes that LTD's entire business is RDOF deployed networks. Even if portions of LTD's business standing alone may not be profitable, the business as whole has been and will be profitable as described by Hauer. (Hearing Transcript at pp.92-93; Ex. L-14, at Applicant 000362, Lines 10-14). Thompson admitted that he has no knowledge of the profitability of LTD's other sectors. (Hearing Transcript at p.193). LTD may be using other portions of its operations to subsidize its lack of profitability.[7]

Third, LTD testified that it is currently deploying fiber-to-the-home for costs less than its RDOF bid. Thompson estimated $20,000.00 per mile for fiber deployment. [redacted] This is based upon LTD's actual experience using its own crews to complete the construction. (Hearing Transcript at pp.217-19). When asked by a Commissioner whether fiber could be deployed [redacted] Thompson did not dispute it. (Hearing Transcript at p.224).

Fundamentally, SDTA's entire case turns on Thompson saying "LTD cannot do it." It cannot be overlooked that Thompson has considerable bias that affects his credibility. Thompson's business, Vantage Point, is a member of SDTA. (Hearing Transcript at p.193). Vantage Point's clients include SDTA's members. (Hearing Transcript at p.189). Thompson knows that his clients may have plans to invest and expand into some of the areas that LTD

[7] SDTA argues that LTD could not use its nationwide operations to subsidize its unprofitable South Dakota operations because LTD will lose even more money with the RDOF funded deployment in other states. Again, this is sheer speculation. Regardless, this argument ignores a key fact—LTD has operations beyond its future RDOF expansion.

would serve. (Hearing Transcript at p.191). Of course, Thompson would not want to harm his clients. Finally, and perhaps most tellingly, Thompson and Vantage Point advised some of their clients regarding the RDOF auction. (Hearing Transcript at p.191). Some of Thompson's clients were unsuccessful bidders in the RDOF auction won by LTD. (Hearing Transcript at p.191). Thompson's clients stopped bidding because they, with his consultation, concluded that the client would not be profitable below a predetermined funding amount. (Hearing Transcript at pp.161-62, 192). Although he vacillated when asked the direct question, Thompson seems to be testifying that any company that bid materially less than his clients would go bankrupt. (Hearing Transcript at pp.192-93). Thompson simply cannot accept that another company may have a better way of designing and deploying a network. Nor could he because Vantage Point was telling its customers that you cannot profitably build the network below the number we told you. Thus, Thompson has every motivation to say LTD will inevitably fail.

In short, LTD has proven it has the financial ability to deploy its network within a reasonable time frame.

2. Managerial Ability

There is ample evidence provided of LTD's managerial ability to deploy its network. Hauer's prefiled testimony details his managerial team. (Ex. L-2, at Applicant 000005, Lines 1-12). That managerial team successfully deployed the CAF II funded network ahead of schedule. (Hearing Transcript at pp.37-40).

Further, the FCC will be reviewing LTD's ability to deploy its network through the RDOF process. This inquiry is the proper role of the FCC rather than this Commission.

SDTA argues that LTD does not have the managerial ability because the RDOF funding is for a substantially larger expansion that CAF II. (SDTA Brief at p.13). In South Dakota,

however, the RDOF network deployment is much more manageable. SDTA wrongfully focuses on LTD's award nationwide. The FCC, not this Commission, should be addressing whether the nationwide expansion of LTD will prevent it from successfully deploying its network. Instead, this Commission should be focused only on South Dakota and its 7,000 unserved locations. That is a significantly smaller expansion.

Moreover, Hauer testified that it will hire additional staff as it continues to grow. (Hearing Transcript at pp.39-40). As he noted, the amount of RDOF funding received makes LTD an attractive place to work. Thompson admits that future hiring of knowledgeable personnel can overcome any management difficulties. (Hearing Transcript at p.202).

SDTA claims that the outcome of other states regulatory shows LTD's lack of managerial ability. This argument is misplaced. SDTA distorts the record by characterizing the issue as "missed deadlines." (SDTA Brief at p.14). To support this argument based upon a misapprehension of the record, SDTA only cites pages 69 and 70 of the hearing transcript. (SDTA Brief at p.14). Review of the actual transcript confirms, however, that Hauer did not agree there were "missed deadlines." SDTA's characterization is simply incorrect.

As Hauer testified, there was a deadline for LTD to receive ETC status in each state that it was to receive RDOF funding. There also was a "safe harbor" deadline by which a carrier who filed their ETC application could qualify if it had not received ETC status by June 7, 2021. For certain states, the FCC refused to extend the June 7, 2021 deadline for ETC status. (Hearing Transcript at pp.70-73). SDTA intimates that LTD alone controls whether a state granted ETC status by June 7, or whether the FCC granted a waiver of the June 7 deadline. That is wrong. Other factors affect those issues, although the FCC did refuse to extend the June 7 date for LTD's applications in California, Oklahoma, Kansas, Iowa, Nebraska, and North Dakota.

(Hearing Transcript at pp.69-73). That is not a final decision, and LTD has asked the FCC for reconsideration. Moreover, because LTD filed its ETC application in South Dakota on January 6, 2021, – and long before it filed ETC applications in other states where the FCC has found it to be in default – it is within the "safe harbor" period.

SDTA also argues that the State of Iowa's denial of LTD's ETC application confirms LTD lacks the necessary manager experience. Hauer explained at length what happened in Iowa, and this Commission should not allow the Iowa decision to affect its separate evaluation of LTD's application. Further, as Hauer testified, the Iowa decision is being appealed. (Hearing Transcript at p.151)

In short, LTD has the necessary managerial abilities to deploy its network. It will hire the additional people needed, and SDTA's arguments do not warrant denying the application.

3. The FCC Will Confirm LTD Has the Requisite Technical Ability to Deploy its Network

SDTA argues that the Commission should deny the application because the final engineering plans for the network are not complete. (SDTA Brief at pp.16-17). This argument fails.

As Hauer explained, the money spent on final engineering is not incurred until LTD knows whether it will receive the RDOF funding and it will actually build its network. (Hearing Transcript at pp.151-52). The FCC, as part of the RDOF long form review, will determine whether LTD's engineering plans for deploying the network will work. (Hearing Transcript at p.24). If the FCC concludes LTD cannot build its network from a technical basis, it will not release the RDOF funds. This Commission thus should not refuse LTD's ETC application based upon alleged lack of technical ability. Instead, the Commission should find that LTD has the ability to deploy its network and doing so serves the public interest.

III. The Commission Cannot Consider "Other Factors" When Evaluating the Public Interest Under ARSD 20:10:32:43.07.

As discussed above, the Commission has, through formal rulemaking, adopted an administrative rule stating the factors to be considered by the Commission when evaluating the public interest in an ETC application. *See* ARSD 20:10:32:43.07. Specifically, the second and third sentences of the regulation define the factors to be considered.

SDTA asks this Commission to judicially amend the regulation by considering "other factors." (SDTA Brief at pp.17-20). Commission Staff, however, properly recognizes this Commission cannot ignore its clear administrative rule and consider additional factors. (Staff Brief at p.11). Staff is right.

As noted above, the rules of statutory construction apply to interpretation of administrative rules. *Citibank, N.A.*, at ¶ 12, 868 N.W.2d at 388. For both statutes and administrative rules, when the language of a rule is clear and unambiguous, the Commission's obligation is to enforce the clear language of the statute or rule as written. *Hagemann ex rel. Est. of Hagemann v. NJS Eng'g, Inc.*, 2001 SD 102, ¶ 5, 632 N.W.2d 840, 843; *Citibank*, at ¶ 12, 86 N.W.2d at 388.

The primary purpose of statutory interpretation is to determine legislative intent. *Hagemann v. NJS Eng'g, Inc.*, 2001 SD 102, ¶ 5, 632 N.W.2d 840, 843. Legislative intent is determined from the language of the statute. *Id.* A basic rule of statutory interpretation is that the "court assumes that statutes mean what they say and legislators have said what they meant." *Hagemann ex rel. Est. of Hagemann v. NJS Eng'g, Inc.*, 2001 SD 102, ¶ 5, 632 N.W.2d 840, 843. The actual language of the statute controls, not what the court or others think the statute should say. *S.D. Subsequent Injury Fund v. Fed. Mut. Ins. Co.*, 2000 SD 11, ¶ 13, 605 N.W.2d 166. This Commission cannot judicially amend ARSD 20:10:32:43.07 by "reading language" into the

regulation that is not otherwise there. *See Olson v. Butte County Comm'n*, 2019 SD 13, ¶ 10, 925 N.W.2d 463 ("When we interpret legislation, we cannot add language that is simply not there." (internal quotation omitted)).

Here, the language of ARSD 20:10:32:43.07 is clear. The Commission defined the factors to be considered when evaluating public interest. The Commission should simply apply the language of its own regulation. Moreover, the Commission cannot impose other, different burdens on LTD because that would be discriminatory and violate of the Telecom Act. *See In re GCC License Corp.*, 2001 SD 32, ¶ 22 n.11, 623 N.W.2d 474, 483.

Relying on *Tracphone Wireless, Inc. v. S.D. Dep't of Revenue and Regulation*, 2010 SD 6, 778 N.W.2d 130, SDTA argues that the Commission can impose additional requirements because ARSD 20:10:32:43.07 does not contain language of limitation. (SDTA Brief at p.17). *Tracphone Wireless, Inc.*, does not support SDTA's argument.

In *Tracphone Wireless, Inc.*, the issue was whether an appeal of a denial of a refund request for overpayment of telecommunications gross receipts tax was able to be heard as a contested case by the Office of Hearing Examiners ("OHE"). In answering the question affirmatively, the South Dakota Supreme Court had to address the interplay of two different statutes. The South Dakota Department of Revenue argued that the OHE lacked jurisdiction to hear the appeal because: (1) SDCL 10-59-1 expressly authorized administrative appeals to the OHE for taxes imposed by several specifically delineated statutory sections; and (2) the telecommunications gross receipts tax was not one of the statutory provisions identified in SDCL 10-59-1. *Id.* at ¶ 13, 778 N.W.2d at 134. In response, the taxpayer agreed that the applicable tax was not defined as one of the taxes from which an administrative appeal can be taken pursuant to SDCL 10-59-1. Instead, the taxpayer argued that the administrative appeal was proper pursuant

to a separate, general statute authorizing an administrative appeal of any final decision by the Secretary of the Department of Revenue. *Id.* at ¶ 19, 778 NW.2d at 134. Thus, the Supreme Court had to decide whether the specific statute authorizing an appeal of some, but not all, taxes prevailed over the general statute authorizing an administrative appeal from all final decisions of the Secretary of the Department of Labor. *Id.* at ¶ 14. Ultimately, the South Dakota Supreme Court ruled that because the specific statute did not include language limiting an administrative appeal to those taxes specifically identified in SDCL 10-59-1, the taxpayer could rely on the other, general statute. *Id.* at ¶¶ 14-19.

SDTA's reliance on *Tracphone* to argue the Commission can impose additional requirements is misplaced. Unlike in *Tracphone*, there is not a separate administrative rule authorizing the Commission to consider "additional factors" outside ARSD 20:10:32:43.07. The only administrative rule defining what is considered in evaluating public interest is ARSD 20:10:32:43.07, and that rule expressly states what the Commission should consider.

Finally, SDTA argues that Hauer's testimony confirms the Commission can consider other considerations outside ARSD 20:10:32:43.07. (SDTA Brief at p.20). Hauer did testify why he thought issuing LTD's application served the public interest. (Hearing Transcript at pp.32-36). And although he did not label his reasons specifically in the applicable regulatory language, his stated reasons are proper considerations under ARSD 20:10:32:43.07. Essentially, Hauer testified that granting ETC would serve the public interest because he would be providing service to otherwise unserved consumers. By providing its service, LTD is increasing consumer choice, which is a specific public interest consideration identified in ARSD 20:10:32:43.07. Thus, LTD is not asking the Commission to consider additional public interest criteria outside ARSD 20:10:32:43.07.

In sum, this Commission has adopted a regulation stating what it considers when evaluating public interest. The Commission should follow its administrative rule, and it cannot consider additional criteria outside its regulation which have never before been applied to an ETC applicant.

CONCLUSION

LTD has proven that it satisfies all of the requirements of 47 U.S.C. § 214(e) and all of South Dakota's applicable administrative rules for granting ETC status. In a desperate attempt to prevent competition, SDTA asks this Commission to credit the testimony of its expert—Thompson—who resorted to speculation and innuendo, and who applied the wrong legal analysis. SDTA asks the Commission to ignore the fact that it has already agreed LTD has the financial, managerial, and technical ability to provide its services. Finally, SDTA wrongfully asks this Commission to ignore its own regulation and impose a new burden on LTD that the Commission has never imposed before. SDTA's efforts fail. As a result, this Commission should grant LTD's application and designate LTD as an eligible telecommunications carrier.

Dated this 8th day of February, 2022

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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 8th day of February, 2022, 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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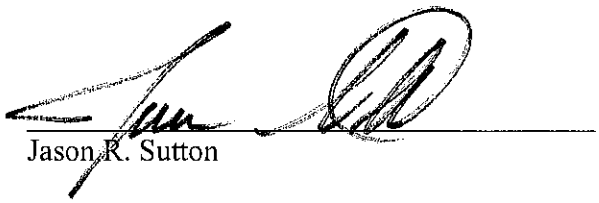

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