
**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

**SDTA OBJECTION AND REPLY TO
LTD MOTION TO STRIKE**

Docket No. TC21-001

The South Dakota Telecommunications Association (“SDTA”) objects to LTD Broadband, LLC (“LTD”) November 5, 2021 “Motion to Strike Expert Testimony of Larry Thompson.” LTD argues that Mr. Thompson’s testimony is “irrelevant and unhelpful.” The South Dakota Codified law on relevancy is SDCL 19-19-401. The statute directs:

Evidence is relevant if:

- (a) *It has any tendency to make a fact more or less probable than it would be without the evidence; and*
- (b) *The fact is of consequence in determining the action.*

LTD’s only challenge to Larry Thompson’s expert testimony is based on relevance.

As explained by the South Dakota Supreme Court, the threshold for relevancy is low. “Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence... more or less probable...”. SDCL 19-19-401 is based upon the Federal Rule 401. “Rule 401 uses a lenient standard for relevance.” citing *Supreme Pork v. Master Blaster*, 2009 SD 20, ¶46. *St. John v. Peterson*, 804 N.W.2d 71, 75 (S.D. 2011). South Dakota follows the general rule that Rule 401 is interpreted liberally. The South Dakota Court deems evidence

relevant “even if it only slightly affects the trier’s assessment.” *Supreme Pork v. Master Blaster*, 764 N.W.2d 474, 488 (S.D. 2009) (affirming the admission of expert testimony at trial).

THE LEGAL STANDARD FOR ETC CERTIFICATION

In his prefiled direct testimony Mr. Thompson set forth, on Page 5, lines 1 – 5 that the goal of an ETC certification process is to “ensure that telecommunication 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 recognizes that same language is found in SDCL 49-31-71 and is what a company must demonstrate to obtain a certificate of authority. It is not SDTA’s position that the legal analysis is the same for both a certificate of authority and an ETC designation. In fact, SDTA entered into a stipulation with LTD in its certificate of authority docket. See SDPUC docket TC21-014.

SDTA does not take issue with LTD’s financial and managerial abilities to operate generally as a telecommunication company. The company has been offering communication services for several years in South Dakota and other states. LTD, seemingly has the bare minimum resources available to operate a telecommunications company. However, LTD having the bare necessary capability to operate a telecommunications company (thus being eligible for a certificate of authority) is very different than being able to meet obligations in the RDOF Auction. Failing to meet RDOF obligations results in the company’s failure to advance Universal Service. Larry Thompson testifies that LTD does not have the financial or managerial abilities to meet those RDOF obligations.

It is SDTA's position that: (i) LTD's RDOF obligations are directly tied to its ETC application, not its certificate of authority¹, (ii) LTD must meet its RDOF buildout obligations and commitments to remain in compliance with its ETC obligations (iii) and therefore, this is the proper docket in which to review whether LTD has the requisite financial, managerial and technical ability, (iv) financial, managerial and technical capabilities are relevant when the SDPUC considers whether an ETC designation is in the public interest, and (v) LTD cannot prove it has financial, managerial and technical capabilities necessary to achieve its RDOF obligations in South Dakota and therefore it is not in the public interest to grant LTD the ETC status it requests. SDTA offers Mr. Thompson's expert testimony for consideration by the South Dakota Public Utilities Commission in its analysis of fact regarding whether LTD should be granted ETC designation.

LARRY THOMPSON'S TESTIMONY IS RELEVANT

For Larry Thompson's testimony to be *irrelevant* as LTD argues it is, the South Dakota Public Utilities Commission ("SDPUC") must conclude that the South Dakota ETC designation process is a check-the-box exercise based entirely on an applicant's "self-certification." Historically, that is not how the SDPUC has interpreted its role and it should not start doing so now. LTD's position, that the SDPUC has a limited role and limited jurisdiction over South Dakota ETC applications is incorrect. Likewise, LTD's position regarding the limited public interest analysis the SDPUC must conduct is incorrect. When correcting LTD's erroneous position regarding the SDPUC's jurisdiction and its role in the ETC process generally, Mr.

¹ Certificate of Authority recipients do not have buildout obligations.

Thompson's testimony is clearly relevant pursuant to SDCL 19-19-401 and should be heard by the SDPUC.

RDOF Auction "presumptive winners," like LTD, must obtain ETC designation. The FCC did not disturb the State's ETC designation role or state process. LTD itself does not argue that the FCC modified the state ETC process in any way. Therefore, the SDPUC's process does not change regardless of what the FCC will or will not review in the RDOF proceeding. The scope of the FCC's review of LTD in the RDOF proceeding is irrelevant and plays no role in this docket. This docket should be treated like any other ETC designation proceeding in South Dakota. The process is not new. However, the applicant in this case just happens to be quite different than others the SDPUC has considered for certification in the past.

In February of 2005, the FCC provided states with instruction regarding the ETC designation process. The 2005, FCC Report and Order remains good authority and should be followed by the SDPUC in this docket. The SDPUC has historically followed said Report and Order ("2005 Order") and must continue to do regardless of the RDOF Auction. See Exhibit A. *Report and Order in CC Docket No. 96-45.*

The 2005 Order, "addresses the minimum requirements for a telecommunications carrier to be designed as an eligible telecommunications carrier or ETC." *Id.* ¶ 1. In addition to setting forth, specifically, what a common carrier must prove to obtain ETC designation, the 2005 Order establishes the analytical framework to determine whether the public interest is served by an applicant's designation as an ETC. *Id.* at ¶ 3.

- I. THE ETC PROCESS IS INTENDED TO DETERMINE A CARRIER'S FINANCIAL VIABILITY, LIKELIHOOD TO REMAIN IN THE MARKET AND ABILITY TO PROVIDE SERVICES: LTD incorrectly argues the SDPUC role and jurisdiction over ETC applications is limited. Larry Thompson's testimony is relevant to LTD's financial viability, likelihood to remain in the market and ability to provide services through the designated service area.

The ETC process is intended to “ensure designation of carriers that are financially viable, likely to remain in the market, willing and able to provide the supported services through the designated service area and able to provide consumers an evolving level of universal service.”

Id. ¶60. LTD's position regarding the SDPUC's limited role contradicts the 2005 Order. Mr. Thompson's testimony speaks directly to LTD's “financial viability,” whether it is “likely to remain in the market” and whether it has the ability “to provide the supported services through the designated service area.” *Id.* Given the FCC's instruction in the 2005 Order, Mr.

Thompson's testimony is relevant. Mr. Thompson's testimony “affects the trier's assessment.” *Supreme Pork v. Master Blaster* at 488.

- II. THE SDPUC HAS DISCRETION WHEN CONSIDERING WHETHER LTD'S REQUEST IS IN THE PUBLIC INTEREST: LTD incorrectly attempts to restrict what the SDPUC must consider in its public interest analysis. Larry Thompson's testimony is relevant to the public interest analysis.

LTD incorrectly argues that the SDPUC's public interest analysis is *restricted* to the (i) benefits of consumer choice, (ii) the impact of multiple designations on the Universal Service Fund, (iii) the unique advantages or disadvantage of an applicant's service offerings, (iv) commitments made regarding the quality of service, and (v) the applicant's ability to provide services throughout the designated areas within a reasonable timeframe. SDTA agrees that the SDPUC “shall” look at these five elements. See ARSD 20:10:32:43.07. However, LTD incorrectly argues that the SDPUC is *limited* to these five elements.

Once again, SDTA’s position is supported by the FCC and LTD’s position directly contradicts the FCC’s guidance and instruction on topic. The FCC does not limit states in their public interest analysis. Rather, states are given the broad authority to review each application based upon individual and particular attributes and challenges presented therein.

“Congress did not establish specific criterion to be applied under the public interest test in section 214 and 254. The public interest benefits of a particular ETC designation must be analyzed in a manner that is consistent with the Act itself, including the fundamental goals of preserving and advancing universal service; ensuring the availability of preserving and advancing universal service; ensuring the availability of quality telecommunications services at just, reasonable and affordable rates; and promoting the deployment of advanced telecommunications and information services to all regions of the nation, including rural and high-cost areas. Beyond the principles detailed in the Act, the Commission and state commissions have used additional factors to analyze whether the designation of an additional ETC is in the public interest.” *Id.* at 40

It is “Congress’s intent that state commissions evaluate *local factual situations* in ETC cases and *exercise discretion* in reaching their conclusions regarding the public interest.” *Id.* ¶ 61.

(Emphasis added.) Mr. Thompson’s testimony is relevant to the SDPUC’s exercise of discretion when evaluating local facts for purposes of the public interest evaluation in this ETC application.

Iowa recently interpreted the public interest consistent with SDTA’s argument in this case and the 2005 Order. On November 5, 2021, the Iowa Department of Commerce Utility Board denied LTD’s request to expand its ETC certification. (In Iowa, LTD had a prior ETC designation with a small footprint.) Iowa found, “The record in this docket does not merit the expansion of a credential that signals to the public that LTD has evidenced the technical and financial capabilities required to carry out the public interest obligations of those entrusted with federal funds.” *State of Iowa, Department of Commerce Utility Board, Docket No. ETA-2019-0001, Order Denying Request to Amend Eligibility Telecommunications Carrier Designation,*

Page 16. Attached as Exhibit B. The SDPUC should do the same. It is proper for the SDPUC to review LTD's financial capabilities. Mr. Thompson's testimony is relevant to the SDPUC's assessment.

However, even if the SDPUC is limited to the factors listed in ARSD 20:10:23:43.07 as LTD argues, Mr. Thompson's testimony is still relevant. LTD's business plan and managerial abilities will dictate and determine LTD's "ability to provide the proposed services throughout the designated service area within a reasonable timeframe." ARSD 20:10:23:43.07. Mr. Thompson offers testimony regarding the flaws he sees in LTD's business plan and how those flaws will impact LTD's ability to serve RDOF areas. Mr. Thompson also offers testimony regarding the impact on South Dakota's citizens if LTD is unable to "provide the proposed services throughout the designated service area within a reasonable timeframe." Mr. Thompson's testimony will aid the SDPUC in examining ARSD 20:10:23:43.07 factors even if the SDPUC believes it is limited to the factors listed in the administrative rule.

Mr. Hauer himself, in his direct testimony asks the Commission to consider his company's financial and managerial capabilities:

- Mr. Hauer Direct Testimony, Page 4, Line 21: Mr. Hauer testifies that LTD's financial data supports its ability to build its network in South Dakota consistent with its RDOF application requirements.
- Mr. Hauer Direct Testimony, Page 5. Mr. Hauer testifies that his managerial team has the requisite ability and experience.

It seems Mr. Hauer agrees with SDTA that his company's financial status and managerial abilities are relevant to the public interest analysis. Mr. Hauer opens the door to further analysis.

Mr. Thompson's testimony is on point and relevant. The facts he presents are, "*of consequence in determining the action,*" SDCL 19-19-401.

CONCLUSION

The ETC process is intended to be rigorous to improve the long-term viability of the universal service fund. *Id* ¶ 62. The SDPUC must review all ETC applications in a manner that will best promote universal service goals. LTD argues the SDPUC should simply check the box and allow self-certifications. LTD argues the SDPUC has no jurisdiction to examine how the proposed ETC will meet its burden of advancing universal service and that the SDPUC's public interest review is limited. LTD's arguments are not supported by the FCC or the SDPUC's historic approach to ETC certification.

The RDOF Auction, in this case, sets forth LTD's build obligations. If the build occurs, the goals of universal service will advance. Larry Thompson's testimony is relevant to the SDPUC consideration of whether LTD can possibly accomplish the RDOF build thus whether it can advance universal service principals in South Dakota. LTD's position is not consistent with the FCC's interpretation of the law and instruction to the states. See 2005 Order. LTD's position is not consistent with the SDPUC's historic approach to ETC docket analysis.

Mr. Thompson's finding, that LTD is not capable of successfully serving its South Dakota RDOF footprint, is relevant. His testimony is relevant to the SDPUC's consideration of whether LTD should receive ETC designation in South Dakota. Mr. Thompson's testimony indicates that LTD is not "financially viable," is not "likely to remain in the market" and is not "able to provide the supported services through the designated service area." 2005 Order at ¶ 60.

His testimony is relevant to the SDPUC's consideration of the public interest. Ultimately, the SDPUC should follow Iowa's lead and deny LTD's request for ETC designation.

The SDPUC should deny LTD's Motion to Strike and should hear all evidence.

DATED this 12 day of November 2021.

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