

**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**

*
*
*
*
*
*
*

**STAFF’S RESPONSE TO LTD’S
MOTION TO STRIKE EXPERT
TESTIMONY OF LARRY THOMPSON**

TC21-001

COMES NOW the South Dakota Public Utilities Commission Staff (“Staff”) and hereby files this Response to LTD Broadband LLC’s Motion to Strike Expert Testimony of Larry Thompson.

Background

On January 7, 2021 (filed January 6, 2021 after close of business), the South Dakota Public Utilities Commission (Commission) received an Application for Designation as an Eligible Telecommunications Carrier for purposes of receiving federal universal service support from LTD Broadband LLC (LTD). This application stemmed from LTD being the successful bidder in the FCC’s Rural Digital Opportunity Fund (RDOF) auction for a number of census blocks in South Dakota. On January 27, 2021, South Dakota Telecommunications Association (SDTA) filed a Petition to Intervene, which the Commission granted with its February 22, 2021 Order Granting Intervention.

On October 22, 2021, SDTA filed Pre-Filed Direct Testimony of Larry Thompson and on November 5, 2021, filed Rebuttal Testimony of Larry Thompson. Mr. Thompson’s testimony indicated he is CEO of Vantage Point Solutions, Inc. and indicated the purpose of his testimony was to “provide an Expert Report” in this docket. Mr. Thompson’s testimony focused on his

estimate of the cost to build and deploy a Fiber-to-the-Home network in the applicable service areas and raised concerns that LTD's business model did not adequately reflect the actual costs to construct its network in South Dakota. Mr. Thompson also opined that LTD's plans gave him concerns about LTD's ability to meet service standards under South Dakota Administrative Rules. Mr. Thompson testified that LTD's proposal was unlikely to succeed, and so approval of LTD's Application for ETC Designation would not be in the public interest.

On November 5, 2021, LTD filed a Motion to Strike Expert Testimony of Larry Thompson on the basis that Mr. Thompson's testimony is irrelevant and inadmissible because he opines on the wrong legal standard.

Legal Standard

Staff does not opine on whether Larry Thompson qualifies as an expert in the area of his testimony and conducts analysis with the assumption that Mr. Thompson would qualify as an expert.

In determining whether Mr. Thompson's testimony should be excluded from the proceeding, the Commission must determine whether the evidence is relevant.

Relevance is defined by SDCL 19-12-1 (Rule 401). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." SDCL 19-12-1 (Rule 401). As we have previously noted, "Rule 401 uses a lenient standard for relevance. Any proffered item that would appear to alter the probabilities of a consequential fact is relevant, although it may be excluded because of other factors." *Supreme Pork*, 2009 S.D. 20, ¶ 46, 764 N.W.2d at 488 (quoting 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence*, § 401.04[2][c] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed.2008)). *John v. Peterson*, 804 NW 2d 71 (SD 2011).

To determine whether evidence is of consequence to any fact that is of consequence to the determination of the action, the Commission must consider what issues are properly considered by the Commission in determining whether to grant an application for ETC designation. The State's role in ETC designation is governed both by federal and state regulation. The Telecommunications Act of 1996, and 47 C.F.R. 54.201 established a framework for state ETC designation along with specific issues for states to consider when making an ETC determination, including whether designation is in the public interest. FCC Order 05-46 provided additional guidance on the intent of these regulations, indicating that although Congress did not establish specific criteria, State commissions must make a finding that ETC certification is in the public interest. (FCC Order 05-46 pg. 18-19). The Order elaborates that:

[t]he public interest benefits of a particular ETC designation must be analyzed in a manner that is consistent with the purposes of the Act itself, including the fundamental goals 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.

FCC Order 05-46, pg. 19 (internal citations removed).

The order does recognize that state commissions have used additional factors in making a public interest determination and that “merely showing that a requesting carrier in a non-rural study area complies with the eligibility requirements in section 214(e)(1) of the Act would not necessarily show that an ETC designation would be consistent with the public interest in every instance.” FCC Order 05-46 pg. 20. However, the Order specifically declined to adopt a financial

requirement because ETC obligations adequately ensure financial stability, though the Order did not preclude states from considering financial qualification factors in their ETC designations.

South Dakota also declined to adopt a separate financial standard when it promulgated rules consistent with the FCC Order 05-46, including ARSD 20:10:32:43.07, which provides:

[p]rior 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....

However, even if there is some flexibility for the Commission to consider additional factors in its review, Mr. Thompson's testimony is still not relevant. While Mr. Thompson claims the issues raised in his testimony speak to the applicant's ability to provide the supported services throughout the designated service area within a reasonable time frame, the actual testimony does not seem to show it more or less probable that the applicant can, or cannot, provide the required services in accordance with state or federal regulations. Mr. Thompson's testimony provides an alternative construction cost estimate than LTD provided, but it does not actually show that a different construction cost would actually affect LTD's ability to serve in that area. As a result, Mr. Thompson's testimony does not appear relevant to the question before the Commission as to whether ETC Designation to LTD is in the public interest, and more specifically, whether LTD has the ability to provide the supported services to the designated area within a reasonable time.

Though Mr. Thompson appears to have significant knowledge and experience in planning networks and may have concerns about the profitability and sustainability of the plans reviewed, Mr. Thompson's testimony and conclusions appear to be outside of the scope of the issues before the Commission in this proceeding as well as outside of the scope of state rules regarding ETC certification.

Conclusion

For all of the reasons stated above, Mr. Thompson's testimony does not appear to be relevant to the actual issue before the Commission in this docket and therefore, LTD's Motion to Strike Expert Testimony of Larry Thompson should be granted.

Dated this 12th Day of November 2021.



Amanda M. Reiss
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol Ave.
Pierre, SD 57501