

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 18-3231-PET

Petition of the Department of Public Service for an Investigation into the service quality provided by Telephone Operating Company of Vermont, Inc., d/b/a Consolidated Communications, Inc.	
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CONSOLIDATED COMMUNICATION'S INITIAL BRIEF
AND
PROPOSED FINDINGS AND CONCLUSIONS

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INITIAL BRIEF

Consolidated Communications of Vermont Company, LLC (formerly Telephone Operating Company of Vermont, LLC) d/b/a Consolidated Communications (“Consolidated” or the “Company”) respectfully submits this Initial Brief. In order to provide the Public Utility Commission (“Commission”) with a detailed summary of the evidence and analysis of the remedy/penalty issue, for its Initial Brief, Consolidated states as follows and relies on and incorporates the Proposed Findings, Discussion, and Conclusions below.

Consolidated does not dispute that it faced particular challenges in the second half of 2018 meeting the cleared in 24 hours metric and that its repair times and customer complaint levels were unsatisfactory. However, as detailed below, the evidence presented in this proceeding demonstrates that Consolidated has undertaken considerable and comprehensive efforts to improve its service quality by making improvements in every aspect of its business, e.g., adding technicians in Vermont, hiring more outside contractors, improving its dispatch system, cross training employees, adding tools for technicians, adding processes to ensure accountability throughout the organization, better tracking and monitoring trouble tickets, and investing in upgrades to the outside plant. These enhancements have resulted in significant improvement in Consolidated’s results on the cleared in 24 metric. While there was a dip again in the metric results in September 2019, importantly, it was qualitatively different than the situation in 2018. This September repairs were being missed by a matter of hours and complaint numbers continue to be down. This recent dip in the metric was primarily due to a hiring freeze and loss of contractors to hurricane-related work. Consolidated believes that overall, 2019 demonstrates that the improvements it has made are working and that it is on the right path to finding a long-term solution to resolve the cleared in 24 challenge.

The Department of Public Service (“Department”) is recommending that in lieu of a penalty, the Commission impose on Consolidated an enhanced bill credit, an additional \$5 per day, for future out of service events that last more than 24 hours. As detailed below, this remedy requested by the Department is not available under the metric and penalty system established in Docket 5903. The only option for a violation of the 5903 standards is a penalty under 30 V.S.A. § 30 with payment to the general fund of the State.

Consolidated had requested the Commission order mediation in this case in order to work with the Department on reaching an agreement that would offer a solution that better served the public and its customers, instead of a penalty payment to the State.¹ Mediation was not ordered and the Department’s proposed remedy, *i.e.*, the enhanced bill credit for future out of service events remains the Department’s only recommendation.

To acknowledge the 2018 service quality issues and provide a more meaningful remedy for its failure to meet the cleared in 24 standard, Consolidated stipulates to setting aside \$25,000 for further plant improvements in 2020 in a rural area of the State that has experienced a higher number of troubles. Consolidated’s \$25,000 commitment is conditioned on the Commission not imposing an additional penalty to be paid into the general fund of the State. Consolidated believes that the \$25,000 it agrees to spend exceeds the amount it should be penalized upon

¹ In that same Motion, Consolidated also requested that the evidentiary hearing in this case be reset to allow time for further development of the evidentiary record on the status of Consolidated’s planned additional hiring in Vermont and regarding Consolidated’s September 2019 cleared in 24 metric results. The Department opposed that motion arguing that “holding the technical hearings as planned, which will allow for detailed questioning, is the best means for developing a detailed evidentiary record...” Despite this, since the evidentiary hearing closed, the Department has attempted to present considerable further evidence through two filings with the Commission. First, on October 23, 2019, as part of a transcript correction, the Department filed with the Commission the last two quarterly service quality reports Consolidated submitted to the Department, including one filed with the Department on October 15, 2019, *after* the evidentiary hearing. The Department has not made an appropriate request to reopen the evidentiary record to present this information. On October 25, 2019, the Department filed a response to a request made by the Commission at the evidentiary hearing for information. The Department’s response went well beyond the Commission requested information, detailing specific customer complaints.

application of the Section 30 factors to determine the penalty amount, given the extensive mitigation already undertaken by Consolidated to improve service quality. If the Commission agrees to include the \$25,000 plant improvement commitment in the Order in lieu of any other penalty, Consolidated also agrees to provide the Department with a report in the first quarter of 2021 detailing how the \$25,000 was used for plant improvement. Consolidated has every interest in providing quality service to each of its customers and it believes this stipulation provides a meaningful way to both further remedy the 2018 issues and demonstrate its ongoing commitment to its customers and this State.

PROPOSED FINDINGS AND CONCLUSIONS

I. INTRODUCTION

This proceeding involves an investigation into the quality of service provided by Consolidated Communications of Vermont Company, LLC (formerly Telephone Operating Company of Vermont, LLC) d/b/a Consolidated Communications (“Consolidated” or the “Company”).

II. PROCEDURAL HISTORY

On September 19, 2018, the Vermont Department of Public Service (the “Department”) filed a Petition requesting that the Commission open an investigation into the service quality provided by Consolidated.

On September 26, 2018, the Commission issued an Order Opening Investigation and Notice of Prehearing Conference.

On October 2, 2018, Sarah L. Aceves filed a Notice of Appearance on behalf of the Department. Debra L. Bouffard filed a Notice of Appearance on behalf of Consolidated on October 10, 2018.

A Prehearing Conference was held on October 11, 2018. The Commission issued a Prehearing Conference and Scheduling Order on October 29.

A Public Hearing was held on November 26, 2018 at the Readsboro Central School in Readsboro, Vermont.

A Public Hearing was held on December 4, 2018 at the Bellows Free Academy in St. Albans, Vermont.

On January 30, 2019, Consolidated filed a Motion for Approval of Protective Agreement along with a Proposed Order and copy of the Protective Agreement executed on behalf of Consolidated and the Department.

On February 21, 2019, the Commission issued an Order approving implementation of the Protective Agreement.

On February 22, the Department filed a Motion to Amend Schedule in order to allow more time for filing the Department's direct testimony.

The Commission issued a Scheduling Order on February 27, 2019 adopting the modifications requested by the Department.

On March 26, 2019, the Department filed a Second Motion to Amend the Schedule.

On March 27, 2019, the Commission issued an Order Modifying Schedule, which adopted the modifications requested by the Department in its Second Motion to Amend Schedule.

On March 28, 2019, the Commission issued a Notice of Rescheduled Hearing regarding changing the Status Conference scheduled for April 5 to April 19.

On April 9, 2019, the Department filed its Third Motion to Amend the Schedule.

On April 12, 2019, the Commission issued a Third Order Modifying Schedule, which adopted the modifications requested by the Department in its Third Motion to Amend Schedule, and requested proposed alternative dates for a status conference.

On April 16, 2019, the Commission issued a Notice of Cancelled Status Conference.

On April 18, 2019, the Department filed a joint response to the Commission's request for alternative status conference dates.

On April 25, 2019, Consolidated filed a Motion for Confidential Treatment of portions of the Department's Direct Testimony and Exhibits, along with an Averment and a Proposed Order.

On April 26, 2019, the Commission issued a Memorandum requesting comments on Consolidated's Motion for Confidential Treatment.

Also on April 26, the Department filed the Direct Testimony and Exhibits of Witnesses Clay Purvis, Carol Flint, Scott G. Wheeler, and joint Witnesses Fred Goldstein and Barlow Keener.

On April 29, 2019, the Department filed a response to Consolidated's Motion for Confidential Treatment.

A Status Conference was held on May 16, 2019.

On May 23, 2019, Consolidated filed a Motion to Strike Portions of the Joint Testimony of Department Witnesses Goldstein and Keener. The Department opposed that Motion, and on July 10, 2019, the Commission issued an Order Denying Consolidated's Motion to Exclude Testimony.

On May 30, 2019, the Department filed a Further Proposed Schedule.

On June 6, the Commission issued an Order Modifying Schedule and a Protective Order for Confidential Treatment of Evidence.

On June 12, 2019, Consolidated filed Direct Testimony of Witnesses Gabe Waggoner, Jeffrey Austin, Ryan Whitlock, and Michael Shultz, along with a Motion for Confidential Treatment of Prefiled Evidence, Averment and Proposed Order.

On June 14, 2019, Consolidated filed a Motion for Extension of Time to Supplement the Request for Confidential Treatment of Department Prefiled Testimony and/or Motion for Extension of Time to Seek Reconsideration of the Commission's June 6, 2019 Protective Order.

On June 26, 2019, the Department filed a Response Regarding Consolidated's Motion for Confidential Treatment.

Also on June 26, Consolidated filed a Supplemental Motion for Confidential Treatment of Prefiled Evidence, along with Averments.

On June 28, 2019, the Department filed a Response Regarding Supplemental Motion for Confidential Treatment.

On July 31, 2019, the Department filed Rebuttal Testimony of Witnesses Clay Purvis, Scott G. Wheeler, and Fred Goldstein and Barlow Keener.

On August 22, 2019, the Commission issued a Protective Order for Confidential Treatment of Evidence.

On September 13, 2019, Consolidated filed the Rebuttal Testimony of Michael Shultz.

The parties engaged in multiple rounds of discovery between January through September 2019.

On October 7, 2019, Consolidated filed a Motion for Modification of the Schedule, Including Resetting the Evidentiary Hearing, and Ordering Mediation. The Department filed an Opposition to Consolidated's Motion for Modification of the Schedule on October 8, 2019.

On October 9, 2019, the Commission issued an Order Denying Consolidated's Motion to Modify Schedule.

An Evidentiary Hearing was held on October 11, 2019.

In addition to the events listed above, the Commission received 33 Public Comments in this Case from October 2018 through September 2019.

Initial Briefs were filed by the parties on November 1, 2019, with Replies filed on November 22, 2019.

III. FINDINGS OF FACT

Based upon the record in this proceeding, the Commission makes the following findings of fact.

A. The Cleared in 24 Metric

1. This Investigation involves issues related to Consolidated's time to repair Plain Old Telephone Service ("POTS"), specifically, its performance as to the Cleared in 24 ("TC24") metric during the summer and fall of 2018.

2. In Docket 5903, the Commission, then known as the Public Service Board, adopted service quality metrics for Vermont telecommunications carriers in 1999. Cleared in 24 is one of the Docket 5903 metrics. *Investigation into Service Quality Standards*, Docket No. 5903, Final Order (Vt. Pub. Util. Comm. July 2, 1999) ("5903 Final Order"), at 117, Attachment 1 at 8-9.

3. The % Troubles Cleared Within 24 hours Residence and Business – Out of Service metric measures the percentage of Vermont business and residence exchange out-of-service troubles which are repaired within 24 hours from time of receipt of the initial trouble report from the company's retail end user customer. 5903 Final Order, Attachment 1 at 8-9.

4. Consolidated is subject to the Docket 5903 service quality metrics. April 26, 2019 Direct Testimony of Clay Purvis on behalf of the Department (“Purvis pf.”) at 3; April 26, 2019 Direct Testimony of Carol Flint on behalf of the Department of Public Service (“Flint pf.”) at 4-5.

5. Under the 5903 requirements, a carrier’s service quality is measured against a baseline standard and an action level standard. The baseline standard represents the minimum service quality expected of a carrier in its regular course of business. June 12, 2019 Direct Testimony of Michael Shultz on behalf of Consolidated Communications (“Shultz pf.”) at 13.

6. The Baseline for the TC24 metric is 70%, with an action level of 60%. Flint pf. at 8.

7. Pursuant to the 5903 requirements, companies must submit an action Plan to address performance that falls below the action level. In the event companies required to make an action plan fail to bring their service quality performance up to a baseline standard in a certain year, they are subject to penalties pursuant to 30 V.S.A. § 30. Flint pf. at 2.

8. Meeting the TC24 standard has been a chronic problem for Consolidated’s predecessors, particularly in the summer months when there is more rain. Shultz pf. at 5.

9. Consolidated reports that since 2011, when the current reporting structure was implemented, there were only 5 quarters where its predecessors met the TC24 Baseline metric of 70%. October 8, 2019 Revised Rebuttal Testimony of Michael Shultz on behalf of Consolidated Communications (“Shultz reb.”) at 5-6.

B. Consolidated’s Performance on the Cleared in 24 Metric – second half of 2018

10. Pursuant to the approval issued in Docket 8881, Consolidated merged with the Fairpoint entities on July 3, 2017. Flint pf. at 5; Shultz pf. at 8.

11. During the summer and fall of 2018, Consolidated experienced particular difficulty meeting the TC24 metric, which in turn caused extended repair intervals for some of its customers. Shultz reb. at 2.

12. CAPI also reported that multiple consumers had contacted it in the summer of 2018 about pending repair requests in excess of seven days and that customers reported having to make multiple repair requests before they were addressed. Flint pf. at 7.

13. Consumers at public hearings held in Readsboro and St. Albans expressed concerns over long repair and installation delays, aging infrastructure, static on the line and lack of an adequate number of repair technicians. Flint pf. at 11.

14. Consolidated reports that during the second half of 2018, Consolidated received approximately 313 complaints from the Department related to the repair of telephone service which equals approximately .03% of its customer base. Shultz reb. at 2.

15. Consolidated did not meet the action or baseline level for TC24 in the last two quarters of 2017 or during 2018. Flint pf. at 9.

16. Consolidated concluded that service levels in Vermont, specifically as to the Cleared in 24 metric, declined in mid-2018 due to the combined impact of four primary factors: 1) technician retirements, 2) its increased market activity, 3) a restrictive collective bargaining agreement, and 4) weather. June 12, 2019 Direct Testimony of Gabe Waggoner on behalf of Consolidated Communications (“Waggoner pf.”) at 3-4.

17. First, Consolidated states that it experienced an increase in service installations and upgrade requests in 2018 based on its increased marketing and rebranding efforts, and large scale network investment and upgrades that increased available internet speeds. Many of these orders included internet service using bonded technology, which increased the installation

timeframe, because the bonding work can be more time consuming than other installations.

Waggoner pf. at 4; Shultz pf. at 4.

18. Second, Consolidated reports that technician retirements in the Splice Service Technician (SST) and Outside Plant Technician (OPT) classifications in late 2017 and during the first half of 2018 reduced the number of technicians available in Vermont to complete repairs and installations. Backfilling these positions took significantly longer than Consolidated anticipated. Waggoner pf. at 4.

19. Third, Consolidated reports that under the prior collective bargaining agreement, Consolidated had the inability to quickly scale the workforce due to restrictive language, which, for example: a) prohibited the Company from effectively sourcing flexible resources to meet workload demands, meaning there were restrictions on the use of outside contractors; b) had certain restrictions that prevented the workforce from being available on short notice to meet customer demands; and c) allowed for only 37.5 hour work weeks in supporting groups, which caused delays in order processing. Waggoner pf. at 4.

20. Fourth, weather was also a factor in several ways according to Consolidated. During the 2018 time period at issue, there were multiple significant weather events, which combined with an increase in service order activity related to large scale network and broadband enhancements for New England, resulted in less available technicians to assist in Vermont. Waggoner pf. at 4-5.

21. Weather was an issue according to Consolidated in another respect. Once the collective bargaining agreement was renegotiated and ratified in August of 2018, bringing on contractor resources took longer due to hurricanes in North Carolina and Florida. Waggoner pf. at 4.

22. The Department has argued that the TC24 issue Consolidated experienced in the second half of 2018 were due to inadequate staffing, a high volume of “repeated troubles,” (defined to mean any two troubles occurring in the 18 month period of July 2017-December 2018, whether related or repeat or not), failing to make sufficient plant upgrade investments, insufficient due diligence before purchase, and weather. See April 26, 2019 Direct Testimony of Fred Goldstein and Barlow Keener on behalf of the Department (“Goldstein/Keener pf.”); July 31, 2019 Rebuttal Testimony of Fred Goldstein and Barlow Keener on behalf of the Department (“Goldstein/Keener reb.”).

23. The Department’s consultants relied on public comments to support a number of their conclusions, and did not present data to support their argument regarding due diligence, use of out-of-state contractors, or insufficient plant upgrades. See Goldstein/Keener pf.; Goldstein/Keener reb.; Transcript of October 11, 2019 Evidentiary Hearing (“Tr. 10/11/19”) at 92-96, 99-100 (Barlow and Keener).

24. Consolidated did issue credits under Commission Rule 7.609(C) to those customers requesting credits, consistent with how its predecessor interpreted the Rule. Shultz pf. at 11; Tr. 10/11/2019 at 29 (Shultz).

25. The bill credit calculation per Rule 7.609 uses a fraction based on the number of days service is out, such that a credit would be $X/30$ ths of the bill, where X is the number of days out. Tr. 10/11/2019 at 60-61 (Shultz).

26. Consolidated reports, however, that specific customers that called and would otherwise receive a very small credit could receive a larger credit because the Company’s customer service agents are empowered with discretion to satisfy the customer with additional

credit and may look at multiple components to see what the customer is paying as a whole. Tr. 10/11/2019 at 60-61 (Shultz).

C. Efforts Consolidated Has Undertaken to Improve Service Quality

27. Consolidated provided detailed evidence on the efforts it has undertaken to address the problems it experienced in meeting the TC24 metric in the second half of 2018. Waggoner pf. at 5-9; June 12, 2019 Direct Testimony of Ryan Whitlock on behalf of Consolidated Communications (“Whitlock pf.”) at 4-9, 11-18, 26-27.

1. Suspension of marketing activities

28. First, in 2018, Consolidated chose to temporarily suspend all marketing activities and promotions for consumer and commercial products in Vermont to reduce new orders. This decision was made to avoid continuing to increase the workload until such a time the workload could be reasonably caught up. Waggoner pf. at 9.

2. Additional Technicians

29. In July 2018, Consolidated started supplementing the Vermont area with technicians from other Northern New England (“NNE”) locations. In 2018, in Vermont there were 15 technicians from other NNE states on a rotating basis. Waggoner pf. at 5.

30. Consolidated also utilized technicians from other Consolidated markets and sent 29 technicians beginning in October 2018 to support efforts in Vermont. These 29 technicians came from other Consolidated Communications markets including TX, IL, CA, MN, ND, and OK. Waggoner pf. at 5.

31. Another cause of the service decline in Vermont was due to technician retirements in the SST and OPT classifications in late 2017 and during the first half of 2018. To address this, Consolidated implemented a 2:1 backfill of SSTs related to a 2018 Voluntary Separation

Package, to backfill each opened position with two technicians for replacement purposes. The outcome of this for Vermont so far is the addition of eight technicians to replace the four technicians that have left the business. Whitlock pf. at 6-7.

32. The Company also hired an additional seven technicians in Vermont. Whitlock pf. at 7.

33. Consolidated is still taking steps to return to previous performance levels by posting for up to ten positions in Vermont, and reports that it is working on strengthening its local and national contracting relationships. Tr. 10/11/19 at 12 (Shultz).

34. Consolidated hopes to have people in place for up to ten additional technician positions within the next several months. Tr. 10/11/2019 at 58 (Whitlock).

35. The Company's contractor strategy is to continue building local resources and to continue identifying sources of people in Vermont, New Hampshire, and Maine where there is less risk of them leaving New England to work a natural disaster. Tr. 10/11/2019 at 51 (Whitlock).

36. While it is making continued efforts to increase the number of technicians in the State, Consolidated has also stated that it does not believe solving issues with meeting the TC24 metric is a simple matter of adding more staff, but rather, is a complex problem that requires a multi-faceted approach and implementation of long term solutions. Tr. 10/11/2019 at 67-68 (Whitlock).

3. New Collective Bargaining Agreement

37. The Company was able to achieve new language in the new collective bargaining agreement, providing it the flexibility it needed to hire additional, outside contractors to improve repair and installation times. Starting in October 2018, Consolidated was able to utilize

supplemental contractor resources in Vermont and had up to 29 in the fall-winter 2018 time period in Vermont. Whitlock pf. at 5. .

38. The Company made changes to the pre-existing collective bargaining terms to minimize impacts of vacations on workforce availability, expanded the weekly work week for some groups, and increased the number of hours technicians could be scheduled for overtime work. Whitlock pf. at 5-6.

39. The new collective bargaining agreement also improved the Company's ability to respond timely to after-hours emergencies through the creation of "standby zones," which allowed the Company to have technicians on-call and ready for repair response. Whitlock pf. at 6.

40. The new agreement also provided local technicians additional training and skills to perform premise installation and repair of commercial managed Voice over IP services when this work was previously assigned to an outside vendor. Whitlock pf. at 6.

4. Structural and Operational Improvements

41. Consolidated also reports that it made a number of structural and operational improvements to address the issues that resulted in the problems with the TC24 metric in the second half of 2018. Waggoner pf. at 5-9.

42. Consolidated uses a functional hierarchy structure for its technician workforce in Vermont and other New England states. This structure allows the Company to group technicians around their area of specialization, thus allowing it to be more responsive to the customer's needs. Each classification of technician, such as Central Office Technician, SST and OPT has a dedicated "first level" manager for their respective function (installation, repair, maintenance,

construction, and central office). First level managers thus manage the technicians for their respective function. Waggoner pf. at 8.

43. Operational steps have also been taken to improve service delivery and repair since the summer of 2018. These steps were implemented specifically to assist technicians in performing their work. For example, the Dispatch Resource Center was reinstated in the spring of 2018. New dispatch leadership was introduced in January 2019. Consolidated reorganized its dispatch center by appointing a 35+ year Consolidated veteran with extensive dispatch experience to lead the group. Waggoner pf. at 5-6.

44. Consolidated has changed its internal procedure so that a report listing dial tone trouble tickets which used to be provided to the dispatch team once per day is now provided every two hours, offering the dispatch team more of a real-time view of the tickets coming in during the day. Tr. 10/11/2019 at 68 (Whitlock).

45. Providing the dial tone trouble report to dispatch every two hours gives the Company an opportunity to utilize a technician that gets freed up or is able to stay late for a ticket that is going to expire early the next morning. Consolidated reports that this is important process change because the 24 hour metric for a trouble ticket that is called in at 7 a.m. will expire at 7 a.m. the very next day, so a once daily report setting the workload for the day challenging to work that ticket in. Tr. 10/11/2019 at 68-69 (Whitlock).

46. New test equipment was deployed to field technicians in Q4 2018 and Q1 2019. Specifically, Consolidated purchased additional cable troubleshooting units. The purpose of this equipment is to enhance the testing and conditioning of Consolidated's facilities providing internet services to customers. Consolidated also uses this new tool to pre-qualify customers'

cable pair for internet services, thus helping to meet due dates on a more consistent basis.

Waggoner pf. at 6.

47. Three additional resources were hired and trained during Q4 2018 and Q1 2019 in the Facilities Management Group, Internet Activation Center and Voice Activation Center to increase technician efficiencies if they need to interact with these groups during the installation and/or repair process. Waggoner pf. at 7.

48. During Q4 2018, additional resources in the Texas and California Provisioning centers were trained to assist VT technicians calling in for support when repairing and installing service. Waggoner pf. at 7.

49. Consolidated reports that the net result of these process changes described above has included a better quality product, less missed customer appointments, and less time the technician must interface with the customer, thus reducing the time the customer is required to be home during this process. Waggoner pf. at 7.

5. Plant Improvements

50. Since closing on the merger on July 3, 2017, the Company has invested over \$58 million in cap ex improvements in Vermont. That investment includes administrative, IT, corporate services, consumer, commercial, success based, updating the core network, updating outside plant, and integration costs. Tr. 10/11/2019 at 15 (Shultz).

51. As agreed to in Docket 8881, Consolidated has maintained and will continue to maintain a minimum level of capital investment in Vermont for network improvements at an average level of at least 14% of total Vermont revenue for the period of three (3) years after completion of the merger. Shultz pf. at 6.

52. In 2018 and 2019, the Company overachieved on the 14% state spend commitment by 25% of what was actually required based on revenue. Tr. 10/11/2019 at 20 (Shultz).

53. As agreed to in Docket 8881, Consolidated is investing another \$1M, on an average annual basis, for the three year period following the merger, in capital investments specifically to target areas with on-going service quality concerns, as identified in collaboration with the Department. Schultz pf. at 7.

54. The Company sets priorities for improvement by conferring with internal groups, including its operations team, and regulatory team, and creating a list of areas with continual trouble issues. Tr. 10/11/2019 at 17 (Shultz).

55. Consolidated confers with the Department to identify and target areas with ongoing service quality concerns for capital investment. Typically those conversations happen between Jeff Austin on behalf of the Company and Clay Purvis from the Department. Tr. 10/11/2019 at 21-22 (Austin).

56. Consolidated has deployed many fiber fed remote terminal supporting voice and data services which reduces Central Office copper facilities. Shultz pf. at 8.

57. Since the July 3, 2017 merger, Consolidated reports that it has increased broadband availability and speed in Vermont. Consolidated has increased fiber and broadband deployment and increased available speeds to approximately 100,000 Vermont consumers. Shultz pf. at 8.

58. Consolidated reports that it is difficult to quantify what amount of investment has specifically benefited POTS service because improvements in broadband service, such as

updating a node, pushing fiber out, and shortening loop length, also improves the quality of the core delivery of POTS service. Tr. 10/11/2019 at 15-16 (Shultz).

6. Additional Improvements reported by Consolidated

59. Consolidated states that it has undertaken efforts to ensure that managers are more aware of and involved with addressing timely trouble ticket repair. Waggoner pf. at 8.

60. Beginning in Q1 2019, Consolidated reports that a greater focus throughout the organization has been brought to monitoring trouble tickets prior to the 24 hour deadline. The Senior Director of Operations, the Director of Dispatch Resource Center, and the Dispatch Resource Center Manager communicate daily regarding the oversight of the workload and service restoral. Waggoner pf. at 9.

61. The Company has expanded call center responsibilities to have all call centers handle calls in NNE. Shultz pf. at 19.

D. Improvement in the TC 24 metric results

62. The Company's 5903 Quarterly Service Quality filings with the PUC and Department show consistent improvement in the Total TC24 in 2019 as illustrated below compared to a Baseline of 70% and Action Level of 60%.

3Q2018 - Total TC24 = 23%

4Q2018 – Total TC24 = 23%

1Q2019 – Total TC24 = 46%

2Q2019 – Total TC24= 72%

July 2019 – Preliminary – Total TC24 = 65%

Shultz reb. at 3.

63. Complaints to the Department have also decreased significantly. Waggoner pf. at 8.

64. In April 2019, results showed the Company achieved a cleared in 24 performance of 67.24% for residential customers and a 69% cleared in 24 for combined residential and business basic telephone out of service repairs. Waggoner pf. at 7-8.

65. Consolidated met the TC24 70% Baseline for Residential customers in May and June of 2019 and met the combined Business and Residential Baseline for the second quarter of 2019. Shultz reb. at 4.

66. The Company experienced a dip in performance in the TC24 metric in September 2019. Tr. 10/11/2019 at 72 (Whitlock).

67. Consolidated reports this is because it lost approximately 30% of its over 90 independent contractors to hurricane-related work around the same time as Labor Day, which is a high vacation time for its technicians. Tr. 10/11/2019 at 50 (Whitlock); Tr. 10/11/2019 at 11-12 (Shultz).

68. Additionally, a union challenge to a potential sale of one service put a freeze on filling up to 10 vacant service splice technician positions in Vermont. Tr. 10/11/2019 at 11 (Shultz).

69. Although the Company missed the metric in September 2019, the total number of complaints was down substantially, and often times that metric was missed by a number of hours, not days, whereas in 2018, the metric was off by days. Tr. 10/11/2019 at 72 (Whitlock).

70. The volume of complaints, too, was substantially different in September 2019 as compared to September 2018. From the three-month period of July/August/September 2018 to

July/August/September 2019, the Company saw a 75% reduction in complaints, from 411 in 2018 to 102 in 2019. Tr. 10/11/2019 at 72 (Shultz).

71. The amount of time that the Company is taking to make repairs is much shorter than it was 12 months ago attributable in part to the hiring of independent contractors. Tr. 10/11/2019 at 70-71 (Whitlock).

72. According to Consolidated, it seeks a long term solution to meeting the TC24 metric, which involves addressing things like productivity, continued flexibility with the labor agreement, and such things as staggering shifts to expand the total coverage within a day and consideration of the home garage concept to reduce the amount of travel time for technicians. Tr. 10/11/2019 at 70-71 (Whitlock).

73. From Consolidated's perspective, 2019 as a whole shows that Consolidated has refined the previous model and now has the right model in place; through incremental improvements in service levels, the Company exceeded the TC24 metric in multiple months. Tr. 10/11/2019 at 48 (Waggoner).

74. Consolidated believes that it has a sufficient number of technicians to clear troubles and meet the TC24 metric. According to Consolidated, with the new collective bargaining agreement in place, it now has the flexibility to flex up and flex down based on demands, which allows the Company access to the right number of technicians. Tr. 10/11/2019 at 48 (Waggoner).

75. As well, Consolidated believes that the improvements to dispatch – essential to getting technicians to the right place and at the time they are committed to being there – has benefitted POTS service specifically. Tr. 10/11/2019 at 49 (Waggoner).

76. While the Company states that it remains committed to its goal of providing a timely repair for any customers experiencing service issues, and thinks its recent improvement in TC24 results demonstrates that commitment, the Company has repeatedly stated during this proceeding that the TC24 metric is outdated and unfairly imposes burdens on Consolidated not shared by its competitors. Shultz reb. at 6-8.

E. Consolidated's Claims regarding the TC24 Metric and Competition

77. Consolidated has argued in this case that the existing service quality metrics from Docket 5903, that became effective in 1999, should be modified because the Company's competitors are not subject to the Docket 5903 reporting at all, and it claims that is no longer a realistic and accurate measurement of customer satisfaction. Shultz pf. at 5.

78. The Company reports that it has lost 238,840 access lines since 1999, and the model that supported the Docket 5903 metrics 20 years ago no longer exists. Consolidated's predecessors had a statewide monopoly in their service territories on telephone service, which allowed more urban areas to subsidize the cost to serve more rural areas of the State. Shultz pf. at 12, 15.

79. At the same time, there is significant competition from Cable companies, CLEC's, municipalities, and wireless providers, primarily in the most populated areas in Vermont. These competitors do not serve all areas of the exchange, they instead choose to service locations that provide the best financial return on their investment. Shultz pf. at 16.

80. Neither VoIP nor wireless service is subject to TC24 or the other Docket 5903 service quality requirements. Shultz reb. at 8.

81. Consolidated has statewide pricing, which is approximately \$17 for a residential line anywhere in the state, but Consolidated reports that the cost to provide that service is not the

same in Burlington as it is in Island Pond or other exchanges, so a disconnect exists between the revenue coming in and the actual cost to provide the service. Tr. 10/11/2019 at 39-40 (Shultz).

82. Consolidated reports that it is losing money to provide regulated services – which can be more than POTS – in Vermont. Tr. 10/11/2019 at 28 (Shultz).

83. There is little to no funding to specifically support POTS service; all of the funding in Vermont is focused on broadband build out. Tr. 10/11/2019 at 67 (Austin).

F. The Department's Remedy Recommendation

84. The Department argues that while penalties are merited in this case, Consolidated is in a unique position in that it continues to lose customers, but retain a monopoly market share in primarily rural areas where its remaining customers have no viable telephone service alternative. The Department argues that any remedy should be directed toward improving service for rural consumers and compensating those customers when the company fails to meet its service quality obligations. Purvis pf. at 9.

85. Specifically, the Department recommends that the Commission require Consolidated to provide customers residing in high-cost exchange areas with an automatic enhanced bill credit of \$5 per day for troubles not cleared within 24 hours. Purvis pf. at 9.

86. The Department states that there would not be an instance where Consolidated is paying the customer more than the value of their service at the end of the month; it could be seen as a free month of service. Tr. 10/11/2019 at 84 (Purvis).

87. Consolidated has opposed the Department's recommendation because (1) Consolidated already strives to have all of its customers' services repaired as quickly as reasonably possible and expects to continue to do so, (2) the Company regularly provides credits to customers today and did so in 2018, and (3) increasing the credit amount does not solve for

the service quality metrics being missed, but exacerbates the problem as shown in Consolidated Vermont's 2018 annual report which shows that Consolidated has already lost several million dollars to serve Vermont. Shultz pf. at 11.

IV. DISCUSSION

A. The Docket 5903 Requirements

This case involves the Department's allegation that Consolidated has failed to comply with the Docket 5903 service quality standards, specifically the Cleared in 24 requirement. The Commission opened this investigation to "determine whether penalties should be imposed for any non-compliance with those requirements."²

In 1996, the Commission opened Docket 5903 to investigate whether to establish service quality standards for all retail telecommunication providers and ordered that all local exchange providers participate as parties. The Commission's initiative in Docket 5903 resulted in a 117-page Final Order which established standards for both the collection and reporting of service quality information, as well as comprehensive service quality standards under which the Commission can "assess service quality for Vermont retail telecommunications consumers" (the "5903 Standards").³ Furthermore, the 5903 Standards were supported by all parties to the proceeding, and expressly govern both (1) the determination as to whether a company is in compliance with the Docket 5903 Standards, as well as (2) the consequence of a company falling below Docket 5903 Standards.⁴

² *Petition of Vermont Department of Public Service for an investigation into the service quality provided by Telephone Operating Company of Vermont, Inc., d/b/a Consolidated Communications*, Case No. 18-3231-PET (Vt. Pub. Util. Comm. Sept. 26, 2018), Order Opening Investigation and Notice of Prehearing Conference, at 1.

³ *Investigation into Service Quality Standards, Privacy Protections, and other Consumer Safeguards for Retail Telecommunications Service*, Docket 5903 (Vt. Pub. Serv. Bd. Jul. 2, 1999)(hereinafter "5903 Final Order").

⁴ See 5903 Final Order at 15 ("The definitions and Baseline and Action Level standards for each performance area will apply to all regulated industry service providers, including facilities-based providers, resellers, and those providers utilizing unbundled elements of the telecommunications network. The Stipulation also defines certain consequences that flow from the failure to attain acceptable service quality as defined by the

In this case, the Department alleges that Consolidated has violated one of the seven performance areas established under the 5903 Standards, namely, Troubles Cleared within 24 hours or TC24. Significantly, failure to meet the Baseline Standard is not a violation of the Docket 5903 standards unless a company's 12-month average performance falls below the Baseline Standard. In particular, the Standards provide:

Companies subject to the standards set forth in Exhibit 1 shall be measured against the Baseline Standards on an annual basis. The Parties further agree that if a provider triggers the Action Level Report in any quarter or in any 5 or more months in a calendar year, the provider must provide the Board with a full explanation for the failure in addition to a plan and timetable for correcting the problem giving rise to the failure. *A carrier required to make an Action Level Report will not be subject to the provisions of 30 V.S.A. § 30 for the circumstances giving rise to the Action Level Report if it is able to bring its calendar-year performance up to the Baseline Standard for the year.*⁵

Accordingly, in order to establish a single "violation" of the 5903 Standards that warrants a penalty under those Standards, the Department must demonstrate that Consolidated fell below the Baseline for a 12-month period.

Additionally, the 5903 Standards govern the consequences of a violation. In particular, the Standards provide that, "[A]ny penalties assessed for failure to meet the Baseline Standards as described in Exhibit 1 will be assessed in accordance with 30 V.S.A. § 30."⁶ In order for a penalty to be assessed in accordance with Section 30 in this case, the Commission must find, "after notice and opportunity for hearing" that Consolidated violated a Commission order or rule. Thus, the penalty is necessarily based on a retrospective review of the alleged violation because it can only be imposed based on a violation, "after" a notice and hearing on that alleged

Stipulation. Company performance will generally be measured against the Baseline Standards, and may be subject to penalties in accordance with 30 V.S. A. § 30.").

⁵ 5903 Final Order, Attachment 1, Service Quality Stipulation, ¶ 7. The Commission's Final Order adopting the standards modified the compliance standard in one respect: The Commission concluded that the "standards set out in the Stipulation should be measured on the basis of twelve-month rolling averages rather than calendar years." 5903 Final Order at 87.

⁶ 5903 Final Order, Attachment 1, Service Quality Stipulation, ¶ 8.

violation. Additionally, in order for a penalty to accord with Section 30, it must involve a monetary fine paid to the general fund of the State. Section 30 does not authorize any other remedies.

B. The Department’s Prospective Bill-Credit Enhancement Cannot be Imposed in this Proceeding.

The Department’s proposed remedy would impose “enhanced bill credits ... in lieu of penalties”⁷ on a prospective basis every time a customer’s trouble ticket is not cleared in 24 hours. As discussed in more detail below, this proposal is unlawful for at least three reasons.

First, the Department’s prospective penalty violates the terms of the Docket 5903 service quality standards and 30 V.S.A. § 30. Second, the prospective bill-credit penalty contradicts the express terms of the Commission’s bill-credit rule, Commission Rule 7.609(C), and thus constitutes an unlawful and discriminatory rule-making in violation of the Vermont Administrative Procedures Act (“VAPA”) promulgated at Title 3 V.S.A. Chapter 25. Third, the prospective bill-credit rule proposed by the Department constitutes a regulation affecting rates, but fails to comply with applicable ratemaking provisions of Title 30.

1. The Department’s Prospective Bill-Credit Enhancement Violates the Terms of the Docket 5903 Service Quality Standards.

The Department’s prospective bill-credit remedy violates the 5903 Standards in multiple ways. First, it imposes a monetary fine in the form of a bill-credit every time Consolidated does not meet the TC 24 Baseline. This is inconsistent with the Standards themselves because not meeting the TC24 Baseline in a single instance—or even a single month—does not subject the Company to penalties under the 5903 Standards; a 12-month rolling average below the Baseline is required to establish a violation. Accordingly, imposition of an ‘enhanced’ credit for conduct

⁷ April 26, 2019 Direct Testimony of Clay Purvis at 1, 9.

that is not based on a violation as defined by the 5903 Standards contradicts the express terms of the Standards.

Second, the prospective bill-credit proposed by the Department provides for a financial consequence based on future conduct. This is inconsistent with Section 30 because that statute only allows for a penalty to be assessed based on past conduct *after* an opportunity for a hearing on the alleged violation. Since the Department’s bill-credit “remedy” imposes an “enhanced” credit for future conduct, the proposed penalty is not “in accordance” with Section 30 because that provision only authorizes penalties for past conduct.

In short, since the Department’s proposal is not in accordance with Section 30, it violates the express language of the 5903 Standards.

2. The Department’s Bill Credit Proposal Constitutes An Impermissible Amendment to Rule 7.609 Because It Amends the Bill-Credit Rule Applicable to Consolidated On A Prospective Basis Without Compliance with the Vermont Administrative Procedure Act.

Both the 5903 Standards and Rule 7.609 are administrative rules because they are “agency statement[s] of general applicability.”⁸ The VAPA provides specific procedures required to modify or adopt an administrative rule. These consist of filing a proposed rule, publishing the rule, holding public hearings, receiving comments, publishing the final proposed rule, responding to the legislative committee on administrative rules, and filing the adopted rule.⁹ Because the Department’s proposal conflicts with both the 5903 Standards and the plain language of Rule 7.609, the proposal constitutes a revision to those rules and cannot be adopted without following VAPA procedures.¹⁰ Since those procedures have not been followed in this

⁸ 3 V.S.A. § 801(b)(9).

⁹ 3 V.S.A. § 836.

¹⁰ See *Investigation into Establishing Rates for Power Sold to the Purchasing Agent Pursuant to Pub. Serv. Bd. Rule 4.100, 16 U.S.C. S 824a-3 & 30 V.S.A. S 209(a)(8)*, Docket No. 8010 (Vt. Pub. Serv. Bd. Feb. 9, 2015) (“[T]he Board does not have authority to ... amend or effectively repeal a duly-promulgated rule. To do so would

case, the Department recommendation is contrary to regulatory requirements for such a rule amendment.

3. The Department’s Proposed Bill Credit Rule Cannot Be Implemented Without Compliance With Applicable Statutory Ratemaking Requirements.

In this case, the Department’s proposal to impose a \$5 penalty in the form of an automatic bill credit for failure to clear a customer’s trouble in 24 hours would constitute a regulation affecting rates.¹¹ The Vermont Supreme Court has held that requirements similar to the proposed credits constitute regulation affecting rates, and absent compliance with procedures applicable to a change in rates, “there is no power in the public service commission to initiate a rate change or order a rate schedule amended.”¹² In *Carpenter v. Home Telephone Company* (“*Carpenter*”), the Court reversed a Commission decision barring a regulated utility from requiring a customer deposit absent proof of poor credit because the applicable tariff did not require that proof. In order to amend the regulation, the Court said the Commission must abide by the applicable rate making provision of Title 30. Likewise, in *Petition of Vermont Welfare Rights Organization* (“VWRO”) the Court held that a rule prescribing the conditions and manner in which a utility may disconnect service for nonpayment of a bill was a regulation affecting rates that could not be issued absent compliance with applicable ratemaking provisions.¹³

violate the Vermont Administrative Procedure Act's requirements for the adoption of rules.”) at 30 (citing 3 V.S.A. §§ 836-848 (outlining process for adoption and repeal of rules)).

¹¹ *Carpenter v. Home Tel. Co.*, 122 Vt. 50, 54 (1960) (holding that Commission’s order barring utility from imposing an established deposit requirement absent a demonstration that customer’s credit standing made the loss of tolls or charges likely “materially altered the regulation” without raising the issue in a proceeding “designed to give notice to all interested parties”); *Pet. of Vermont Welfare Rights Org.*, 132 Vt. 622, 625 (1974) (holding that a general order requiring a “utility to continue furnishing service to a customer unable to pay his bill in full when due without allowing it to impose a finance or interest charge as a condition to accepting installment payments” was a regulation affecting rates).

¹² *Id.*

¹³ 132 Vt. 622, 624 (1974).

Like the regulations in *Carpenter* and *VWRO*, the Department’s proposed bill credit rule is a “regulation affecting rates” because it involves the rates paid by customers, credits to those rates, the service provided under those rates, and the potential for loss of charges. The Department’s proposal to initiate such a rule in the context of a penalty proceeding fails to comply with the requirement that regulations affecting rates can only be imposed pursuant to the Commission’s rulemaking or ratemaking authority. Here, the Department has not initiated the Commission’s rulemaking process or ratemaking process, and therefore cannot seek a bill credit rule because implementation of such a rule absent compliance with applicable ratemaking regulations (*i.e.*, 30 V.S.A. §§ 218, 225, 226, 227) is unlawful.¹⁴ Similarly, authorized regulation of rates through a rule is available only if there is statutory authority to change rates through rulemaking.¹⁵

C. The remedy referenced in Docket 5903 is that provided for in 30 V.S.A. § 30.

As discussed above, per Docket 5903 requirements, “[A]ny penalties assessed for failure to meet the Baseline Standards as described in Exhibit 1 will be assessed in accordance with 30 V.S.A. § 30.” Further, the 5903 Standards may warrant a penalty under those Standards where the Department demonstrates that Consolidated fell below the Baseline for a 12-month period. While the Department has not presented evidence on the “rolling annual average” of the baseline level, based on testimony referring to the TC24 metric results in 2017 and 2018, it is not disputed that Consolidated did not meet the TC24 standard in 2017 and 2018. Accordingly, for these two

¹⁴ *Carpenter*, 122 Vt. at 53 (“Rate schedules on file with the Public Service Commission become lawful rates which remain in force until changed in the manner prescribed by statute.”); *see also Chesshire v. New Eng. Tel. & Tel. Co.*, 139 Vt. 323, 325 (1981) (rate schedule governed classification of customer as business rather than residential customer); *North v. City of Burlington*, 125 Vt. 240, 243 (1965) (filing of schedule pursuant to statute established lawful rate utility could charge).

¹⁵ *VWRO*, 132 Vt. at 627 (aside from promulgation of specific procedural rules, rulemaking authority must be found in an agency’s enabling legislation).

violations, we must next consider the listed factors under 30 V.S.A. § 30(c) to determine the penalty amount.

There is no evidence in the record that any outage harmed public health, safety and welfare, but the Department and public comments suggest that there could have been during outages. There is also no evidence in the record that Consolidated's failure to meet the TC24 metric was intentional. Further, there is no evidence in the record that Consolidated benefited economically from the violation. There is no evidence to suggest that a penalty will have a deterrent effect. There is ample evidence in the record that Consolidated has been focused and active in its efforts to improve service in Vermont.

Consolidated does not dispute that during the second half of 2018 it did not meet the TC24 metric, that it experienced extended repairs delays during this time period and high levels of complaints. It also did not meet the metric on a quarterly basis for the prior year, but its repair times and customer complaint levels only began to increase in the second half of 2018. Consolidated believes that no one cause led to the particular issues in the second half of 2018 but that it was a combination of factors including challenges to secure sufficient staff under the restrictive collective bargaining agreement, weather, and increased marketing efforts.

Consolidated began implementing its action plan to resolve its service quality issues in July 2018. It has implemented changes throughout its organization as detailed above and states that its objective is to find long-term solutions to a complex problem. It repeated that it did not think simply adding additional staffing would solve the issues that impact the TC 24 metric. The efforts Consolidated has made to address the TC24 issues in the second half of 2018 did improve its results. It expects the dip in service quality in September 2019 will resolve promptly and it

has explained that the complaints and repair times in September 2019 did not compare to the much higher numbers for the same time period in 2018.

This is the first service quality investigation for Consolidated, and thus, its first compliance violation. Meeting the TC24 standard has been a challenge for Consolidated's predecessors and we expect it will continue to be for Consolidated. This is because Consolidated must continue to maintain the same geographic service territory as it has in the past but today has far fewer customers spread more thinly across the same vast service area. This reality makes servicing customers less efficient and more costly, and makes the likelihood of consistently achieving meeting the TC24 metric a significant challenge. At the same time, there is increasing competition in all of Consolidated's markets.

V. CONCLUSION

Consolidated has acknowledged that it did not meet the TC24 standard, and experienced unsatisfactory levels of customer complaints and long repair times in the summer and fall of 2018. On balance, we are satisfied that Consolidated has undertaken considerable steps to mitigate the issues that prompted this investigation in September 2018. Imposing a penalty that gets paid to the general fund has little value here, particularly given our conclusion that it will have no deterrent effect. Similarly, while as discussed above, the Department's requested enhanced bill credit is not an available legal remedy, it would also prove to be of limited value.

In the absence of a Memorandum of Understanding between the parties, however, the remedies available to the Commission under Section 30 of Title 30 are very limited. In lieu of a Commission-imposed penalty, Consolidated has agreed that it will set aside \$25,000 to be used for plant upgrades at a rural location in this State that has experienced a high trouble report rate.

Consolidated proposes to perform the \$25,000 worth of work in 2020 and will make a report to the Department detailing that work in the first quarter of 2021.

We find Consolidated's stipulation to spend an additional \$25,000 on plant improvements a better and more meaningful remedy than a payment to the general fund. We also find this amount equivalent to or in excess of any penalty amount we would have ordered pursuant to the analysis of factors under section 30.¹⁶ Accordingly, we therefore order Consolidated to implement its stipulated plan.

VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Utility Commission of the State of Vermont that:

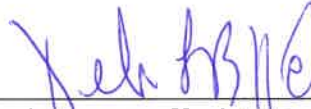
1. Consolidated is ordered to set aside \$25,000 in addition to other planned Vermont outside plant improvements and to direct those funds to be used for plant improvements in 2020 in a rural area of the State that has experienced a high number of reported troubles;
2. In the first quarter of 2021, Consolidated shall make a written report to the Department of Public Service detailing how the \$25,000 was used.

¹⁶ See e.g., *Investigation pursuant to 30 V.S.A. §§ 30 and 209 into operations during icing conditions by the Georgia Mountain Community Wind, LLC wind electric generation facility in Georgia, Vermont*, Docket No. 8734 (Vt. Pub. Serv. Bd. Nov. 29, 2017) (imposing a penalty of \$7,500 for operating wind turbines in icing conditions on two occasions in violation of the approved Winter Operating Protocol in case where operator had prior violations for which it was sanctioned); *Petition of Central Vermont Public Service Corp.*, Docket No. 7635 (Vt. Pub. Serv. Bd. June 18, 2012) ("Docket 7635 Order") (\$1,000 fine for cutting of several dozen trees, which was clear violation of Final Order).

DATED at Burlington, Vermont this 1st day of November, 2019.

RESPECTFULLY SUBMITTED
Consolidated Communications of
Vermont Company, LLC

By:



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