

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 21-4060-PET

Petition of Consolidated Communications)
of Vermont Company, LLC and Consolidated)
Communications of Northland Company for)
approval of a successor (2022-2024) Incentive)
Regulation Plan, pursuant to 30 V.S.A. § 226b)

DEPARTMENT OF PUBLIC SERVICE REQUEST FOR JUDICIAL NOTICE

The Department of Public Service (“Department”) hereby respectfully requests that the Public Utility Commission (“Commission”) take judicial notice of the November 5, 2021 status report (“Status Report”) filed by Consolidated Communications of Vermont Company, LLC (“Consolidated”) in Case No. 19-0869-PET. In support of this Request, the Department relies on the following incorporated Memorandum of Law.

MEMORANDUM OF LAW

I. Introduction

On January 21, 2022, the Department filed copies of prefiled direct testimony and exhibits in the above-captioned matter. The prefiled direct testimony of Clay Purvis and QSI Consulting, Inc. references Case No. 19-0869-PET, which the Commission initiated to investigate host-remote isolation vulnerabilities in the state and potential remedies to mitigate the risk of isolation events. The Status Report, attached hereto as **Exhibit A**, serves as the foundation of one of the Department’s recommendations in this case to condition approval of a successor Incentive Regulation Plan on a commitment from Consolidated to reduce the number of exchanges subject to partial diversity by half and the number of exchanges with no diversity by three.

II. Standard for Judicial Notice

The practice of taking judicial notice is founded on the assumption that certain matters are not controversial and therefore need not be established for legal purposes by presenting contested evidence to a trier of fact.¹ Section 810(4) of Title 3 provides:

Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.²

The Vermont Supreme Court has interpreted the phrase “judicially cognizable” by referring to V.R.E. 201(b), which states that “[a] judicially noticed fact must be one not subject to reasonable dispute in that it is ... (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”³ The purpose is “to save the time and trouble that it would take to present evidence of matters, the truth of which no one can legitimately challenge.”⁴ Accordingly, when a matter is judicially noticed, it is accepted as true without formal evidentiary proof.⁵

¹ *Petition of Chelsea Solar LLC*, Docket 8302, Order of 4/14/17 at 14.

² 3 V.S.A. § 810(4). *See also Amended Petition of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.*, Docket 7862, Order of 3/29/13 at 5-6; *In re Vermont Elec. Power Co., Inc.*, Docket 6860, Order of 10/06/04 at 3.

³ *In re Handy*, 144 Vt. 610, 612, 481 A.2d 1051, 1053 (1984).

⁴ Docket 7862, Order of 3/29/13 at 4 (quoting Jack H. Friedenthal, Mary Kay Kane, Arthur R. Miller, *Civil Procedure* § 5.22 (2nd ed. 1993)).

⁵ *See Carson v. Department of Employment Security*, 135 Vt. 312, 315, 376 A.2d 355, 358 (1977) (reversing administrative referee who found it was “common knowledge” that store clerks generally work six days a week because “practice is not so widespread and uniform that its existence may be assumed without proof.”).

III. Description of Information Requested to be Judicially Noticed

The Department seeks judicial notice of the Status Report and information therein that details the extent to which there remain host-remote isolation vulnerabilities in Consolidated's wireline network. Specifically, the Department seeks judicial notice of information detailing that 26 communities remain subject to host remote isolation and of those 26 communities, 11 do not have route or physical diversity and 17 have partial diversity.

IV. The Facts at Issue are Judicially Cognizable and Therefore Merit Judicial Notice

Here, it is reasonable to take judicial notice of the Status Report because the facts contained therein are judicially cognizable. The host-remote isolation information that is the subject of Case No. 19-0869-PET is neither controversial nor is it contested. This is because the case is a workshop proceeding initiated to determine the extent to which host-remote isolation vulnerabilities in the state are outstanding. Because there is no contested evidence that would require presentation of that evidence to a trier of fact, it qualifies as criteria not subject to reasonable dispute. Further, the Status Report contains information based on analysis from Consolidated's network architecture team.⁶ The Department maintains that such analysis qualifies the information as data capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.⁷ Finally, the Commission has previously taken judicial notice of information in comparable circumstances.⁸

⁶ Status Report at 2-3.

⁷ Although those areas that still experience host-remote isolation events have not been independently verified by Department staff, the proceeding has been collaborative in nature and thus, the Department does not dispute the data presented in the Status Report.

⁸ See *Petition of Mhg Solar LLC.*, No. 20-1261-NMP, Order of 9/17/21 at 4; Docket 6860, Order of 10/06/04 at 3; and *In Re Vermont Elec. Power Co., Inc.*, Docket. 6860, Order of 8/9/04 at 3.

To the extent any party disputes taking judicial notice of the Status Report and the Department and the party are unable to resolve the dispute, the Department seeks an opportunity to present additional information for the Commission's consideration specific to the disputed information in connection with this Request.

V. Conclusion

For the above-stated reasons, the Department respectfully requests that the Commission take judicial notice of the November 5, 2021 Status Report as filed in Case No. 19-0869-PET.

DATED at Waterbury, Vermont this 21st day of January, 2022.

VERMONT DEPARTMENT OF PUBLIC SERVICE

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