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 (both d/b/a "Consolidated Communications") for approval of a Successor (2022-2024) Incentive Regulation Plan, pursuant to 30 V.S.A. § 226b	

CONSOLIDATED COMMUNICATIONS' OPPOSITION TO THE DEPARTMENT OF PUBLIC SERVICE'S MOTION FOR JUDICIAL NOTICE

Consolidated Communications of Vermont Company, LLC and Consolidated Communications of Northland Company (both d/b/a "Consolidated Communications" hereafter "Consolidated") oppose the Department of Public Service's ("Department") Request for Judicial Notice filed on January 21, 2022 (the "DPS Motion"). Through its Motion, the Department asks the Public Utility Commission ("Commission") to take judicial notice of a Consolidated filing made in another case to support a condition the Department requests in this proceeding. The DPS Motion should be denied because the request does not meet the legal framework for judicial notice and would allow consideration of a proposed condition unrelated to the narrow scope of this proceeding and without an adequate investigation or evidentiary support. In support of this Opposition, Consolidated submits the following incorporated Memorandum of Law.

MEMORANDUM OF LAW

I. Background

This case is about whether the Commission should approve an Incentive Regulation Plan ("IRP") pursuant to 30 V.S.A. § 226b. An IRP is an alternative to traditional rate regulation "based upon cost of service, rate base, and rate of return." 30 V.S.A. § 226b(a). In this case, as in prior IRP's, Consolidated proposes that rates for regulated Basic Local Exchange Service

("BLES") be set pursuant to an IRP in order to ensure that customers without competitive alternatives have continued access to the regulated BLES rate.

In support of its Petition in this Case, Consolidated presented evidence that existing regulation is harmful because the telecommunications market is now highly competitive, which has "eroded the regulatory bargain" contemplated under traditional regulation of a utility with a monopoly in the market.[1] As a result of market changes that have drastically reduced the number of traditional voice customers, including BLES subscribers, the cost to provide BLES to customers, particularly in rural parts of the State, continues to grow because network costs are defrayed by fewer and fewer customers.[2] At the same time, Consolidated is no longer receiving the same level of government funding support for these services that once existed.

Consolidated worked hard to develop a proposed IRP that it believes balances the needs of those BLES subscribers in non-competitive areas of the State (utilizing Department data) while also recognizing that regulation in highly competitive areas of the State is no longer needed and harms Consolidated through impeding its ability to compete. Leveling the competitive playing field for Consolidated is critically important because Consolidated relies on revenue generated from non-regulated services to cover the revenue loss for providing regulated services.

In testimony submitted in this Case, the Department recognizes the reality for Consolidated, explaining the market has "experienced consolidation and retraction" from traditional voice service. While Consolidated's predecessors Verizon/FairPoint "were once the

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1 Prefiled Testimony of Sarah Davis ("Davis pf.") at 4.
2 *Id.*

[dominant] carrier … Consolidated is a minor player in the market for residential voice and telephony service."[3] At the same time, the Department appears to ignore the necessary consequence: An IRP is the only regulatory method to provide low cost BLES to rural customers because traditional cost of service ratemaking would spread network costs for BLES over fewer and fewer customers, significantly increasing the cost of BLES for subscribers.

Simply put, providing low-cost basic telephone service in sparsely populated areas is not a sustaining business model and is the reason why no competition exists in the most rural parts of Consolidated's service territory. Nonetheless, the Department postures in this Case as if Consolidated's proposed IRP secures great value to Consolidated, which is simply not accurate. Further, and consistent with its upside-down view of this Case, the Department proposes to condition approval of an IRP on *additional investments* that increase the cost of service. In particular, it proposes that Consolidated be subject to a mandate that would require multi-million-dollar network investments to resolve remaining "host-remote isolation" in several communities.

The only evidence the Department offers in support of this condition proposed in this Case is its Request for Judicial Notice of Consolidated's November 5, 2021 status report filed in Case No. 19-0869-PET. Case No. 19-0869-PET was opened at the request of the Department and involves an investigation to examine and review host-remote isolation vulnerabilities in the wireline networks of Vermont telecommunications service providers. As stated on page 2 of the April 16, 2019 Order opening that investigation, among other things, the Department asked for

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3 Prefiled Direct Testimony of Clay Purvis ("Purvis pf.") at 7–8.

the proceeding to be opened to identify "potential solutions and corresponding costs for the resolution or mitigation of the identified host-remote isolation vulnerabilities."

Consolidated's November 5, 2021 filing in Case No. 19-0869-PET sets forth a summary of actions that have been taken to reduce the number of Vermont communities susceptible to host-remote isolation by 57%, the status of physical diversity in the remaining 26 communities, and the cost-prohibitive network investments that would be needed to eliminate susceptibility to host-remote isolation altogether. A review of other filings in Case No. 19-0869-PET makes clear that host-remote isolation is a long-standing issue that is not unique to the Consolidated network and therefore is an issue most appropriately addressed in a proceeding that can involve all impacted stakeholders and necessary parties such as the E-911 Board.

The Department's attempt to impose a condition on Consolidated in this IRP proceeding to remedy a longstanding, statewide network issue, which is currently under consideration in another docket is puzzling to say the least. In any event, taking judicial notice of Consolidated's filing in Case 19-0869-PET in this IRP proceeding would circumvent the Commission's process, unnecessarily inject unrelated matters into this IRP case, and raise more questions than are answered by Consolidated's November 5, 2021 letter. For example, the Department presents no evidence about the cost of its proposed condition. It claims a customer could be left without access to 911 service but offers no assessment of the extent of that risk. It offers no cost-benefit analysis that would support a conclusion that the investment is reasonable. And importantly, the Department provides no evidence about what its proposal would cost per customer under traditional rate principles. In short, Consolidated's November 5, 2021 status report filed in Case No. 19-0869-PET should not be considered at all in this docket, and to the extent the Department wants to further explore potential solutions and corresponding costs for the resolution or mitigation of the identified host-remote isolation vulnerabilities, those matters should be addressed in Case No. 19-0869-PET.

The IRP proposed by Consolidated promotes the general good of the state by continuing to require Consolidated to provide low-cost BLES to rural customers. A proposal to condition that IRP—with significant resulting costs—cannot be supported by summarily referencing a document submitted in another Commission case. Nor is judicial notice of the November 5, 2021 filing in Case No. 19-0869-PET appropriate under the applicable legal framework, as set forth in more detail below.

II. The Department's Request Should Be Denied Because Judicial Notice Cannot Be Extended to the Truth of Matters Asserted in Other Judicial Proceedings.

The Department's Request for Judicial Notice does not merely seek acknowledgement that Consolidated made the November 5, 2021 filing in Case No. 19-0869-PET, the substantive content of that filing "serves as the foundation of one of the Department's recommendations…."[4] This is an inappropriate use of judicial notice under Vermont Law.

In proceedings before the Commission, Vermont Law 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

[4] DPS Motion at 1.

evidence.[5]

"In applying Section 810(4), 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.'"[6]

The Commission has rejected motions for judicial notice of filings from other matters, noting that, "[i]t is well-recognized that judicial notice does not extend to the truth of the matters asserted in other judicial proceedings," and holding that, "[u]nder Vermont law, it is 'improper to judicially notice the content of testimony in another proceeding.'"[7]

The Commission should deny the Department's Request for Judicial Notice in this Case because the Department asks the Commission to take judicial notice of the content of the November 5, 2021 filing in Case No. 19-0869-PET rather than the mere fact that it was filed. Because it is well established that it is improper to notice the content of testimony in another proceeding,[8] the Commission must deny the Department's request.

III. The Department's Request Should Be Denied Because Judicial Notice of the November 5, 2021 Filing Does Not Support the Department's Recommendation and is Immaterial In This Case.

The purpose of judicial notice 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.'"[9]

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5 3 V.S.A. § 810(4).

6 *Amended Petition of Entergy Nuclear Vermont Yankee, LLC,* Docket No. 7862, 2013 WL 1384886, at *5 (Vt.P.S.B. Mar. 29, 2013)(quoting *In re Handy*, 144 Vt. 610, 612 (1984)).

7 *Id.* (quoting *Jakab v. Jakab*, 163 Vt. 575, 579 (1995)).

8 The fact that the November 5, 2021 filing is not sworn testimony should only reinforces this principle.

9 *Pet. of Chelsea Solar LLC for A Certificate of Pub. Good, Pursuant to 30 V.S.A. S 248, Authorizing the Installation and Operation of A 2.0 Mw Solar Electric Generation Facility at 500 Apple Hill Rd., Bennington,*

"Accordingly, when a matter is judicially noticed, it is accepted as true without formal evidentiary proof."[10] The Commission has denied motions for judicial notice where the information is immaterial to the Commission's decision.[11] Here, the Department's Request for Judicial Notice thwarts the intent of judicial notice, which is to save time and trouble. Moreover, judicial notice here is not evidentiary support for the Department's proposed condition anyway, so the information is not material to the Commission's approval of an IRP under 30 V.S.A. § 226b.

First, the Department's request does not save and time and trouble or present an issue about which there is no legitimate dispute. On the contrary, Consolidated disputes the Department's proposed condition in this case and disagrees with both the legal and factual basis for that proposal, including reliance on the November 5, 2021. Judicial notice of the November 5, 2021 filing opens the door to a complex issue: Should millions of dollars be invested to mitigate the risk of remote-host isolation? What are the related costs for required vegetative maintenance and work in state/national park areas? What are the risks associated with the host-remote isolation issue? How many customers are exposed to that risk? Is elimination of remote-host isolation altogether the most cost-effective mitigation solution? If the investments are required for BLES service, what would the cost impacts be for customers? The Department's proposal raises all these questions and answers none of them. Opening the door to those issues in

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Vermont., Docket No. 8302, 2017 WL 1425504, at *14 (Vt.P.S.B. Apr. 14, 2017)(quoting *Amended Petition of Entergy Nuclear Vermont Yankee, LLC,* Docket No. 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)).

[10] *Id.* (citing *Carson v. Department of Employment Security*, 135 Vt. 312, 315 (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.")).

[11] *In Re Alpine Haven Water Co., Inc.*, Docket No. 5947, 2000 WL 1505333, at *1 (Vt.P.S.B. Aug. 31, 2000).

this proceeding would require an extensive factual analysis and require a great deal more time and testimony in order to resolve in this Case. Moreover, as noted above, remote-host isolation issues are not unique to Consolidated. The appropriate forum to deal with such issues is in the context of the pending docket that involves all of the needed stakeholders.

Second, judicial notice here is immaterial because judicial notice of the November 5, 2021 filings means the content therein is "accepted as true." The November 5, 2021 filing states that the work needed to eliminate host-remote isolation is "prohibitively expensive."[12] If taken as true, that fact resolves the issue: The Department's proposed condition is unreasonable because it is prohibitively expensive. If that statement is disputed, that resolves the Department's motion because judicial notice is inappropriate where the facts are not "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[13] Thus, judicial notice of the November 5, 2021 is immaterial because it (1) either defeats the Department's proposed conditions based on its own content, or (2) exposes a contested factual dispute that cannot be resolved by judicial notice.

IV. The Department's Request Should Be Denied Because It Does Not Provide Necessary Information.

Under V.R.E. 201(d), "A court shall take judicial notice if requested by a party and supplied with the necessary information." The Commission has denied motions for judicial notice where the motion fails to specify what facts are to be noticed.[14] In *Petition of Adelphia Communications,* the Department sought judicial notice of "a plethora of facts," but "fail[ed] to

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12 Consolidated's November 5, 2021 letter submitted in Case 19-0869-PET, at page 3.

13 *Amended Petition of Entergy Nuclear Vermont Yankee, LLC*, Docket No. 7862, 2013 WL 1384886, at *5 (Vt.P.S.B. Mar. 29, 2013)(quoting *In re Handy*, 144 Vt. 610, 612 (1984)).

14 *Pet. of Adelphia Commun. Corp.*, Docket No. 5247, 1988 WL 546313 (Vt.P.S.B. July 22, 1988).

specify which of these facts [were] to be noticed, and therefore … failed to provide the Board with the 'necessary information' on which to make a ruling."[15]

The Department's request in this case suffers from a similar defect. The November 5, 2021 filing is a four-page, single-spaced document that asserts a variety of factual conclusions. The Department requests notice of "information therein that details the extent to which there remain host-remote isolation vulnerabilities in Consolidated's wireline network,"[16] but provides the Commission no information about what to do with the remainder of the document. The Department's silence about how to treat the remainder of the November 5, 2021 filing is fatal for several reasons.

First, as noted above, judicial notice of the entire document would render the whole debate moot because the November 5, 2021 filing—if accepted as true—demonstrates that the Department's proposed condition should be rejected because it is "prohibitively expensive."[17] Second, if the whole document is not judicially noticed, the Department's request can only be construed as a motion for *selective* judicial notice of only the facts the Department agrees with. This kind of one-sided use of judicial notice undermines the very core of the judicial notice rule, which is premised on the taking of judicial notice of only those facts which are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[18] The fact that the Department's request cherry-picks only those facts that the

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15 *Id.*
16 DPS Motion at 3.
17 Consolidated's November 5, 2021 letter submitted in Case 19-0869-PET, at page 3.
18 *Amended Petition of Entergy Nuclear Vermont Yankee, LLC,* Docket No. 7862, 2013 WL 1384886, at *5 (Vt.P.S.B. Mar. 29, 2013)(quoting *In re Handy,* 144 Vt. 610, 612 (1984)).

Department prefers to be true while presumably questioning the veracity of the remainder of the document, demonstrates that judicial notice of the November 5, 2021 filing is inappropriate.

V. Conclusion

For the foregoing reasons, the Commission should deny the Department's Request for Judicial Notice. Not only does the Department raise a complex issue that would substantially increase the cost of network service for BLES without any other supporting evidence, it seeks to selectively cherry-pick certain facts while denying other facts in the November 5, 2021 filing. The Department's proposed condition opens the door to significantly complicate and delay review and approval of the proposed IRP. If the Department insists upon having that debate, it is the kind of dispute that should be explored though testimony that is tested on cross-examination—not judicial notice— and in a proceeding where this longstanding and statewide issue can be resolved in a case that involves all of the relevant stakeholders.

DATED at Burlington, Vermont, this 4th day of February, 2022.

RESPECTFULLY,

CONSOLIDATED COMMUNICATIONS OF VERMONT COMPANY, LLC AND CONSOLIDATED COMMUNICATIONS OF NORTHLAND COMPANY

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