

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 REPLY TO CONSOLIDATED COMMUNICATIONS OPPOSITION
TO DEPARTMENT MOTION FOR JUDICIAL NOTICE**

The Department of Public Service (“Department”) replies to the opposition filed by Consolidated Communications of Vermont Company, LLC and Consolidated Communications of Northland Company (“Consolidated”) to the Department’s January 21, 2022 Request for Judicial Notice.

I. Consolidated has mischaracterized the intent of the IRP and in turn failed to capture the larger policy implications of alternative forms of regulation that include striking a regulatory bargain

Consolidated is correct that similar to past IRP proceedings, it has proposed rates for regulated Basic Local Exchange Service (“BLES”) to be set for a new IRP to ensure that customers without competitive alternatives have continued access to the regulated BLES rate.¹ The Department appreciates Consolidated’s commitment to provide reasonable rates to its BLES customers. That said, Consolidated has neglected to recognize the larger policy implications at play with respect to alternative forms of regulation like the IRP and in turn, has failed to see the intent behind the Department’s recommendation and request for judicial notice with respect to host-remote isolation.

¹ Consolidated Opposition at 1.

Alternative forms of regulation like the IRP are intended to strike a regulatory bargain to better serve the public interest than traditional rate-of-return regulation.² In this bargain, an incumbent local exchange carrier (“ILEC”) is granted a certain degree of regulatory flexibility to respond to emerging competition and pursue profitable opportunities while some regulatory oversight is maintained to ensure continued quality of service and protect against unreasonable price increases for customers without a true service alternative.

To that end, Section 226b of Title 30 explicitly states that alternative forms of regulation must also, in addition to providing an alternative to traditional methods of regulation based on cost of service, rate base and rate of return, promote the general good of the state³ and be consistent with the public’s interests as they relate to quality telecommunications services.⁴ Alternative forms of regulation like the IRP must also be consistent with state telecommunications goals of providing high-quality, reliable telecommunications services for Vermont residents and businesses.⁵ Additionally, alternative forms of regulation are required to be consistent with the State Telecommunications Plan under Section 202d, which tasks the Department with obtaining both stable and predictable rates for consumers and a technologically advanced telecommunications network that serves all areas of the state.⁶ Simply put, with respect to an alternative form of regulation like the IRP, there is much more at stake than BLES rates alone.

When a consumer experiences a host-remote isolation event, they are unable to dial 911 because they cannot dial any numbers outside of their exchange. This kind of isolation

² QSI Consulting, Inc., Department of Public Service pf. at 17-18.

³ 30 V.S.A. § 226b(c)(1).

⁴ 30 V.S.A. § 226b(c)(2).

⁵ 30 V.S.A. § 202c(b)(4).

⁶ 30 V.S.A. § 202d(a).

vulnerability and the corresponding lack of redundancy in the network raise legitimate public safety concerns that must be addressed. Here, in exchange for granting Consolidated more regulatory flexibility in the form of deregulation in competitive Tier 2 Areas and modification of certain service quality metrics, the Department has recommended that Consolidated work to further resolve outstanding host-remote isolation vulnerabilities in its network. This “give-and-take” construct is consistent with incentive regulation theory, Vermont state telecommunications policy and past IRP proceedings. Resolution of continuing isolation events will promote the general good of the state and adequate service quality pursuant to Section 226b, and ensure high-quality, reliable telecommunications services for consumers consistent with state telecommunications policy under Sections 202c and 202d. Thus, this recommendation is not “puzzling” at all because it goes to the very heart of incentive regulation.

Further, despite Consolidated’s assertions to the contrary,⁷ there is no reason the parties cannot explore solutions to mitigate host-remote isolation vulnerabilities in Consolidated’s network in this docket. This is because Case No. 19-0869-PET was opened as a workshop to investigate the current state of host-remote isolation events in the state. While stakeholders in that case can absolutely discuss potential solutions to isolation vulnerabilities where they still exist, it would be inappropriate to impose obligations on carriers in a workshop setting. Carriers like Consolidated have also made clear that they are unlikely to resolve remaining host-remote vulnerabilities on their own. Thus, a logical alternative is to explore solutions in other dockets. In this case, in its role as the public interest representative, the Department has recommended that Consolidated make a concerted effort to reduce the number of host-remote isolation events that many communities in Consolidated’s territory still experience.

⁷ Consolidated Opposition at 5.

II. The Status Report remains judicially cognizable, material to the Commission's decision and is an efficient use of time and resources, all of which merit taking judicial notice

Despite Consolidated's assertions to the contrary, it is reasonable to take judicial notice of the Status Report because the facts contained therein are judicially cognizable. As stated in the Department's original request, there is no contested evidence that would require presentation of evidence to a trier of fact and it qualifies as criteria not subject to reasonable dispute.

Relatedly, Consolidated has mischaracterized the purpose of judicial notice "to save the time and trouble that it would take to present evidence of matters, the truth of which no one can legitimately challenge."⁸ First, the primary objective in filing the request was to save the parties time and trouble of vetting what has already been discussed in Case No. 19-0869-PET.⁹ Second, the Status Report – not the Department's recommendation – is not subject to dispute or challenge. Consolidated has every right to take issue with the Department's recommendations in this case, but the recommendation is not to be disputed for purposes of judicial notice.¹⁰

Finally, the Commission has a long history of taking judicial notice of certain matters at the request of parties and on its own motion as recently as 2021.¹¹ The Commission has recognized the value of bringing information from other proceedings into the fold where the information is material to its decision as it is here.¹² To that end, Consolidated is wrong in asserting that the Status Report is immaterial to the Commission's decision. As explained herein,

⁸ 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)).

⁹ That said, an alternative is for the Department to serve discovery inquiries on Consolidated and obtain the relevant host-remote isolation information, which will certainly require additional time and trouble.

¹⁰ Consolidated Opposition at 7.

¹¹ See *Petition of Mhg Solar LLC.*, No. 20-1261-NMP, Order of 9/17/21 at 4 (taking judicial notice of planning documents that were relevant to the Commission's evaluation of the project under 30 V.S.A. § 248).

¹² See *Id.* See also *Petition of Vermont Gas Sys., Inc.*, Docket 8643, Order of 9/13/16 at 5; *In re Vermont Elec. Power Co., Inc.*, Docket 6860, Order of 10/06/04 at 3.

the Department's recommendation to reduce the number of host-remote isolation events still present in Consolidated's network is consistent with the intent behind Section 226b and the Commission's obligation to find that, among other things, the IRP promotes the general good of the state and is consistent with state telecommunications goals.

DATED at Waterbury, Vermont this 18th day of February, 2022.

VERMONT DEPARTMENT OF PUBLIC SERVICE

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