

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	
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Order entered: 03/08/2022

ORDER DENYING REQUEST FOR JUDICIAL NOTICE

This case involves a petition filed with the Vermont Public Utility Commission (“Commission”) by Consolidated Communications of Vermont Company, LLC, and Consolidated Communications of Northland Company (collectively “Consolidated”) for approval of a new incentive regulation plan pursuant to 30 V.S.A. § 226b. In this order, we deny the Vermont Department of Public Service’s (“Department”) request for judicial notice.

I. PROCEDURAL HISTORY

On January 21, 2022, the Department filed a motion requesting judicial notice of a status report submitted by Consolidated in Case No. 19-0869-PET (the “19-0869-PET Status Report”).

On February 4, 2022, Consolidated filed a response opposing the Department’s motion.

On February 18, 2022, the Department filed a reply in support of its motion.

II. POSITIONS OF THE PARTIES

The Department

One of the Department’s recommendations in this proceeding would require Consolidated to reduce the number of telephone exchanges vulnerable to host-remote isolation as a condition of approval of any successor incentive regulation plan. Host-remote isolation vulnerabilities are the subject of an ongoing investigation proceeding in Case No. 19-0869-PET, in which both the Department and Consolidated are participants.

Host-remote isolation can affect wireline telephone networks with host-remote architectures. Host-remote architectures use a host-switching unit to control a remote-switching unit over a physical connection to complete telephone calls. In some networks, the loss of the

physical connection between the host and remote units can result in the isolation of the remote telephone exchange. If this occurs, telephone users on the remote exchange are unable to make calls outside of their exchange, which can include 911 calls.

The Department states that the 19-0869-PET Status Report serves as the foundation for the Department's recommendation regarding the reduction of host-remote isolation vulnerabilities in Consolidated's network. The Department specifically references Consolidated's statement in the 19-0869-PET Status Report that host-remote isolation vulnerabilities exist for 26 communities in Consolidated's network, with 11 of those communities lacking route or physical diversity and the remaining 17 having partial diversity. Although the Department specifically identifies only the limited subset described above, the Department asks the Commission to take judicial notice of the entire document.

Consolidated

Consolidated opposes the Department's request for the Commission to take judicial notice of the 19-0869-PET Status Report. Consolidated disagrees with the Department's proposed reduction of the remote-host vulnerabilities in its network as a condition of approval of a successor incentive regulation plan and argues that the contents of the 19-0869-PET Status Report are not the type of undisputed facts that are amenable to judicial notice. Consolidated states that taking judicial notice of the 19-0869-PET Status Report would introduce unrelated matters into the proceeding and raise more questions than the report answers. Consolidated also notes that the 19-0869-PET Status Report contains a variety of factual conclusions beyond those identified by the Department that would be taken as true if the Commission took judicial notice of the entire document.

III. DISCUSSION

Judicial notice assumes that certain matters are not controversial and need not be established for legal purposes by presenting contested evidence to a trier of fact. Vermont's administrative procedure act provides for judicial notice as follows:

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.¹

The Vermont Supreme Court has explained that a "judicially cognizable" 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."² When a matter is judicially noticed, it is accepted as true without formal evidentiary proof.³

The 19-0869-PET Status Report was provided by Consolidated as an update on the participants' discussions in the Commission's investigation into the existence of host-remote isolation vulnerabilities in Vermont's landline voice networks. The report was filed in response to the hearing officer's request for a status update on the participants' ability to resume the proceeding, which had been stayed due to the COVID-19 pandemic. The 19-0869-PET Status Report is procedural in nature and was submitted in a letter format by counsel for Consolidated.

We decline to take judicial notice of the 19-0869-PET Status Report. Although the 19-0869-PET Status Report does contain factual representations about Consolidated's network, the report is an informal document and was not intended to be a submission of admissible evidence. In addition to the facts that the Department has identified, the 19-0869-PET Status Report contains a variety of other assertions that are not capable of accurate or ready determination. We view the 19-0869-PET Status Report as comparable to a legal brief, which the Commission has explained "fall[s] outside the scope of 'judicially cognizable' facts within the meaning of Section 810(4) and V.R.E. 201(b)."⁴ Even if not viewed as a legal brief, "[i]t is well-recognized that judicial notice does not extend to the truth of the matters asserted in other judicial proceedings."⁵

Although we will not take judicial notice of the 19-0869-PET Status Report, we disagree that the information identified by the Department is unrelated to this proceeding as Consolidated suggests. The Commission is required to consider a broad range of factors when evaluating proposed incentive regulation plans under 30 V.S.A § 226b, and the issues related to host-remote isolation vulnerabilities raised by the Department may be relevant to some of those

¹ 3 V.S.A. 810(4)

² *In re Handy*, 144 VT 610, 612 (1984)(citing Vermont Rule of Evidence 201(b)).

³ *Petition of Chelsea Solar LLC for a certificate of public good*, Docket 8302, Order of 4/14/17 at 18.

⁴ *Amended Petition of Entergy Nuclear Vermont Yankee, LLC, et al.*, Docket 7862, Order of 3/29/13 at 8.

⁵ *Id.* at 6.

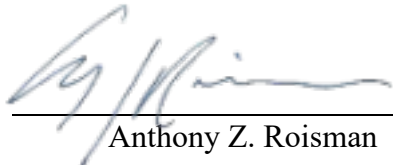
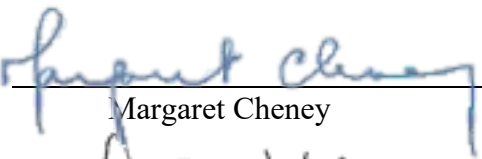
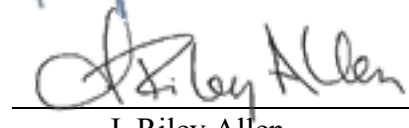
considerations.⁶ As noted in the Department's reply, the Department can obtain the same facts identified in its request for judicial notice through discovery in this proceeding.⁷ The Department has one more round of discovery scheduled on March 16, 2022, and can easily include additional requests targeting the information identified in the Department's judicial notice motion.

SO ORDERED.

⁶ See 30 V.S.A. § 226b(c). These factors include whether the incentive regulation plan promotes the general good of the State and is consistent with State telecommunications purposes, the State Telecommunications Plan, and the public's interests relating to appropriate quality telecommunications services.

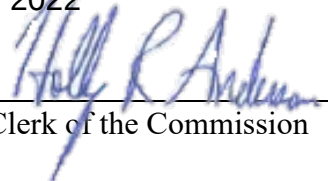
⁷ Department Reply at 4 n. 9.

Dated at Montpelier, Vermont, this 8th day of March, 2022.

	)	
Anthony Z. Roisman	)	PUBLIC UTILITY
	)	
	)	
Margaret Cheney	)	COMMISSION
	)	
	)	
J. Riley Allen	)	OF VERMONT

OFFICE OF THE CLERK

Filed: March 8, 2022

Attest: 
Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

PUC Case No. 21-4060-PET - SERVICE LIST

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