

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Petition of the 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, Inc.) Case No. 18-3231-PET

MOTION TO STRIKE PORTIONS OF JOINT PREFILED TESTIMONY OF DEPARTMENT WITNESSES GOLDSTEIN AND KEENER

Consolidated Communications of Vermont Company LLC (formerly Telephone Operating Company of Vermont LLC) d/b/a Consolidated Communications (“Consolidated”) moves pursuant to Public Utility Commission (“Commission” or “PUC”) Rule 2.216(C) to strike portions of the Department of Public Service’s (“Department” or “DPS”) Joint Prefiled Testimony of Fred Goldstein (“Goldstein”) and Barlow Keener (“Keener”) filed April 26, 2019 (the “Testimony”).

Memorandum

I. Introduction

Department witnesses Goldstein and Keener state as their expert opinion what Consolidated “customers” purportedly believe about several topics based solely on one or, at most, a few public comments. Consolidated has no objection to the Commission’s consideration of public comments provided in this Case. However, the DPS experts’ attempt, through their prefiled testimony, to bolster the significance of those comments or report them as the views of Consolidated customers more generally is improper and inadmissible. Accordingly, through this Motion, Consolidated seeks to strike certain portions of the Testimony of Goldstein and Keener for the following three reasons: 1) the opinions of Goldstein and Keener regarding Consolidated “customers” views fail to meet the reliability standards required by Vermont Rules of Evidence

(“V.R.E.”) 702 and 703, as they have no basis in reliable facts, data, or studies, and Goldstein and Keener demonstrate no personal knowledge to support their opinions; 2) the proposed Testimony seeks to introduce and bolster hearsay from isolated public comments concerning Consolidated’s operations, sometimes based on multiple layers of hearsay; and 3) the Testimony fails to meet the exception to the admissibility standards of 3 V.S.A. § 810, as the hearsay relied on by Goldstein and Keener for the basis of their opinions is not the type of information “commonly relied upon by reasonably prudent persons in the conduct of their affairs.”

II. Description of the Testimony to be stricken

The portions of the Department’s April 26, 2019 Testimony of Goldstein and Keener that should be stricken are summarized below:¹

1. Question and Answer #37, Page 51 (opining that “customers agree” that out-of-state workers are not as efficient as in-state-workers without identifying any facts, data, or studies supporting the opinion and relying solely on a single public comment made on November 26, 2018 in which a customer describes an experience where a Consolidated technician from Massachusetts had trouble determining the location of the facility needing repair);
2. Question and Answer #38, Page 52 (without any reference to opinion polls or customer surveys, opining that Consolidated “customers” do not believe Consolidated’s full-time-workers are efficient and timely in making repairs based solely on single public comment where the customer described one instance where an unspecified Consolidated worker was unfamiliar with the location of an off-road facility needing repair);
3. Question and Answer #47, Page 60-61 (without reference to any study, survey, or report, opining that Consolidated’s “customers believe” there is workforce diversion and relying solely on unreferenced comments made at “public hearings and public comments”...“that indicate a limited number of technicians are available to respond to troubles and requests for installation”);
4. Question and Answer #48, Page 61 (without reference to any study, survey, or report, purporting to illustrate what Consolidated “customers believe” regarding workforce diversion by noting two public comments based on purported hearsay statements of technicians);

¹ For the Commission’s convenience, the referenced Q&A’s from the Testimony are provided here as Attachment A.

5. Question and Answer #53, Page 69 (opining that public sentiment supports the assertion that Consolidated’s service quality performance is worse in areas of the State lacking competitive alternatives without any reference to statistics, data, or studies, and instead referencing generally “comments from public hearings, public comments filed with the Commission in this proceeding and complaints received by CAPI”); and
6. Question and Answer #54, Page 69-70 (opining that public sentiment supports the assertion that Consolidated’s service quality performance is worse in areas of the State lacking competitive alternatives without any reference to statistics, data, or studies, and instead referencing a single letter dated February 9, 2019 to the Commission from Representative Laura Sibilgia based on information she reports to have received from her constituents).

III. Standard

Pursuant to PUC Rule 2.216(C), a party may object to the admissibility of witness prefiled testimony within 30 days of the date it was filed. Section 810(1) of the Vermont Administrative Procedures Act (“APA”) generally governs the admissibility of evidence in PUC proceedings, and incorporates the rules of admissibility set forth in the V.R.E.²

Pursuant to Rule 702 of the V.R.E., “a witness qualified as an expert by knowledge, skill, experience, training, or education,” may testify concerning matters within their expertise “in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” Pursuant to V.R.E. 703, where a witness qualified as an expert under Rule 702 seeks to rely on inadmissible evidence, such as hearsay, in forming their expert opinions, that evidence must be “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.” This Commission has

² See 3 V.S.A. § 810(1); *Petition of Chelsea Solar LLC, Pursuant to 30 V.S.A. S 248, for A Certificate of Pub. Good*, No. 17-5024-PET, 2018 WL 3955818, at *2 (Vt. P.U.C. Aug. 13, 2018) (discussing applicability and setting forth standards for admissibility of witness testimony under V.R.E. Rules 401, 602, and 702–04); *Petition of Georgia Mountain Cmty. Wind, LLC*, Docket No. 7508, 2011 WL 840854, at *3-4 (Vt. Pub. Serv. Bd. Mar. 3, 2011) (excluding portions of prefiled testimony as inadmissible hearsay); see also *Joint Petition of Northstar Decommissioning Holdings, LLC*, Docket No. 8880, 2018 WL 835319, at *2 (Vt. P.U.C. Feb. 8, 2018) (applying the V.R.E., including rules 702 and 703 governing expert testimony, and 801-803 concerning hearsay, to prefiled testimony in PUC proceeding).

previously applied the Rule 702 requirements to determine admissibility of an expert witness's testimony.³

V.R.E. 802 states the general "hearsay rule": "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court or by Statute." The Vermont APA provides one such exception. See 3 V.S.A. § 810(1). Section 810(1) allows the Commission to deviate from the Vermont Rules of Evidence, including the hearsay rule as follows:

Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The Rules of Evidence as applied in civil cases in the Superior Courts of this State shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.

3 V.S.A. § 810(1).

IV. Argument

1. The Opinions And Conclusions Of Goldstein And Keener Purportedly Reporting Views Of "Customers" Should Be Excluded As They Fail To Meet The Reliability Requirements Of V.R.E. 702 And 703 Because They Are Not Based On Sufficient Facts And Data, Were Not Reached Through Application Of Reliable Principles And Methods, And Are Not Based On Any Personal Knowledge Or Experiences.

Goldstein and Keener have failed to demonstrate that their opinions described above regarding Consolidated "customers'" beliefs meet the Rule 702 standards. Keener and Goldstein's opinions are devoid of sufficient facts or data supporting their sweeping conclusions as to Consolidated "customers," and were apparently arrived at with no consideration of reliable

³ See *Petition of Dairy Air Wind, LLC*, Docket No. 8887, 2018 WL 2149944, at *3 (Vt. P.U.C. May 7, 2018) (excluding witness from testifying concerning matters for which she lacked personal knowledge and had not demonstrated expert qualifications); see also *Investigation into: (1) Petition of AARP, for the Establishment of Reduced Rates for Low-Income Consumers of Green Mountain Power Corp. & Cent. Vermont Pub. Serv. Corporation; & (2) As Expanded to Possibly Include Gen. Applicability to All Vermont Retail Elec. Utilities.*, Docket No. 7535, 2010 WL 2811079, at *11 (Vt. Pub. Serv. Bd. May 5, 2010) (concluding that witnesses satisfied the reliability standards in V.R.E. 702 and admitting the expert opinion testimony).

principles or methods. They identify no reports, surveys, or applicable statistics that support their conclusions about customers' opinions or Consolidated's service quality performance. The sole evidence offered for each of their overbroad opinions described above are one or two isolated public comments by a third-party recounting some past event or reported conversation with Consolidated employees or customers. Moreover, while the Testimony purports to report the view of Consolidated "customers," Goldstein and Keener have described no efforts to verify that these third-party statements are the opinions of Consolidated customers throughout Vermont.⁴

Public comments are an important part of the public process and should be considered by the Commission as a means to raise new issues or perspectives that the Commission should consider. While public comments are valuable to both Consolidated and the Commission, they cannot be used as a substitute for the sound and reliable analysis required for expert opinions under Rule 702 and 703 of the V.R.E. As the Vermont Supreme Court has explained, conclusions and opinions "connected to existing data only by the *ipse dixit* of the expert," should be excluded as there is "too great an analytical gap between the data and the opinion proffered."⁵ In other words, the expert's opinion "must be based on the methods and procedures of science rather than on subjective belief or unsupported speculation; the expert must have good grounds for his or her belief."⁶ Therefore, "when an expert opinion is based on data, methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony."⁷ Here, the opinions of Goldstein and Keener regarding the purported views of Consolidated "customers," derived from one or

⁴ Goldstein and Keener also have not demonstrated any personal knowledge of the events described in the third party statements, and apparently undertook no efforts to develop facts or data to verify their broad and conclusory opinions.

⁵ *Estate of George v. Vermont League of Cities & Towns*, 2010 VT 1, ¶ 16, 187 Vt. 229 (internal citations and quotation omitted).

⁶ *Id.* at ¶ 36 (internal citations and quotation omitted).

⁷ *Id.* (quoting *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 266 (2d Cir. 2002)).

several third-party hearsay comments are not sufficiently reliable to satisfy Rule 702 and should be excluded.⁸

Consolidated acknowledges the Commission's prior observation that the "gatekeeping" concerns identified in *Daubert* and its progeny are less pronounced in an administrative proceeding.⁹ However, that the Commission is an expert tribunal whose experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence, also supports excluding the objectionable opinions offered here. The Commission is more than capable of considering public comments without Goldstein and Keener cloaking them in their purported expert conclusions as to what these comments mean.

Additionally, the referenced opinions regarding customers' views are beyond the scope of either Mr. Goldstein or Mr. Keener's expertise. Pursuant to V.R.E. 702, in order to offer expert opinion testimony on a particular subject, the witness must be qualified as an expert in that subject "by knowledge, skill, experience, training, or education."¹⁰ As the United States Supreme Court has explained regarding an expert's qualifications, "the word 'knowledge' connotes more than subjective belief or unsupported speculation."¹¹ While Mr. Keener and Mr. Goldstein may be experts in certain aspects of telecommunications, they have identified no "knowledge, skill, experience, training, or education" in analyzing customer opinion. In fact, their testimony is not based on any customer opinion surveys or studies of any kind. Nor have the witnesses provided

⁸ See *Estate of George*, 2010 VT 1, ¶ 21 (finding expert's opinion of more probable than not supported by only two of eight studies inadmissible under Rule 702); see also *Trotier v. Bassett*, 174 Vt. 520, 523, 811 A.2d 166 (2002) (stating that an expert opinion "cannot be based upon speculation.").

⁹ *Petition of Chelsea Solar LLC, Pursuant to 30 V.S.A. S 248, for a Certificate of Pub. Good*, Docket No. 17-5024-PET, 2018 WL 3955818, at *10-11 (Vt. P.U.C. Aug. 13, 2018).

¹⁰ See V.R.E. 702; see also *Northstar Decommissioning Holdings*, Docket No. 8880, 2018 WL 835319, at *4 (Vt. P.U.C. Feb. 8, 2018) (holding that witness with expertise in areas of nuclear safety, environmental issues, and decommissioning, could not testify on potential health risks associated with radiation exposure because such testimony was beyond witness's area of expertise).

¹¹ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993) (quoting Webster's Third New International Dictionary 1252 (1986)).

any support for their apparent assertion that either customer opinion or the efficiency of technicians can be reliably assessed based on isolated public comments. In short, these opinions are simply speculation.¹²

Accordingly, the portions of the Department's prefiled Testimony referenced above should be excluded.

2. The Department Cannot Introduce Into Evidence as Purported Expert Conclusions Hearsay Statements of Non-Testifying Third Parties Offered For The Truth Of The Matter Asserted.

The proposed Testimony described here as inadmissible consists of hearsay on top of hearsay. In support of the objectionable conclusions, Goldstein and Keener recite statements by third parties in which those third parties recount experiences and conversations they had at some past time, and statements made to them during those past conversations (hearsay upon hearsay). These hearsay statements are offered as the sole source of evidence for Goldstein and Keener's opinions on Consolidated "customers" views. This hearsay is offered for the truth of the matter asserted, and thus inadmissible under V.R.E. 801-03. While a witness qualified as an expert may rely on hearsay in forming his or her opinions under V.R.E. 703, that does not render the hearsay statement itself admissible.¹³

Goldstein and Keener ignore the prohibition on hearsay. They describe public comments by customers made months ago in which the customers discussed their own previous conversations and experiences, and also recount and directly quote statements Representative Sabilia made in a February 2019 letter to the Commission in which she describes conversations

¹² *Northstar Decommissioning Holdings*, Docket No. 8880, 2018 WL 835319, at *4 (Vt. P.U.C. Feb. 8, 2018) (finding inadmissible testimony that strayed into speculative territory).

¹³ See V.R.E. 703; *Chickanosky v. Chickanosky*, 2011 VT 110, ¶ 19, 190 Vt. 435 (discussing that expert's reliance on inadmissible hearsay "as a basis for his expert opinion . . . does not make that hearsay suddenly admissible for its substance.").

she had with constituents.¹⁴ These statements are all clear hearsay offered by Goldstein and Keener solely for the truth of the matter asserted. Moreover, and even more concerning, Goldstein and Keener go on to extrapolate from this hearsay purported conclusions about the views of Consolidated customers more generally. Goldstein and Keener’s opinion testimony relying on these hearsay statements is, therefore, inadmissible under V.R.E. 703 and 802,¹⁵ and should be stricken.¹⁶

3. The Hearsay Testimony Is Not Admissible Under Section 810 Of The APA Because It Is Not Of The Type Commonly Relied Upon By Reasonably Prudent Persons In The Conduct Of Their Affairs.

Even under the more flexible evidentiary standards afforded to Commission proceedings by 3 V.S.A. § 810(1), the identified portions of the Testimony should be stricken. Section 810 of the Vermont APA provides, in relevant part, that “[w]hen necessary to ascertain facts not reasonably susceptible of proof under [the V.R.E], evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.” 3 V.S.A. § 810(1). The hearsay statements that form the basis of Goldstein and Keener’s opinions do not meet this exception.

First, the opinions of the Department’s experts as to views of customers are susceptible of proof; however, the Department witnesses have failed to undertake any effort to produce such

¹⁴ Like the customer comments describing conversations with Consolidated technicians, the letter also contains double hearsay as it is itself a hearsay statement recounting statements made to Representative Sibia by a third party at some prior time.

¹⁵ See *Petition of Georgia Mountain Cmty. Wind, LLC, for A Certificate of Pub. Good*, Docket No. 7508, 2010 WL 619641, at *2 (Vt. Pub. Serv. Bd. Feb. 2, 2010) (excluding exhibits and prefiled testimony containing hearsay statements when none of the exceptions in V.R.E. 803 applied); see also *Investigation Pursuant to 30 V.S.A. ss 30 & 209 & Pub. Serv. Bd. Rule 5.110(d) into Alleged Lack of Adequate Notice & Violations of Certificate of Pub. Good #nmp-7438 Concerning the Constr. of A Grp. Met-Metered Solar Elec. Generation Facility in Guilford, Vermont.*, Docket No. 8843, 2017 WL 3843482, at *5 (Vt. Pub. Serv. Bd. Aug. 22, 2017) (excluding portions of prefiled testimony of intervenor concerning statements made during conversations with witness as inadmissible hearsay).

¹⁶ Consolidated does not contend the Commission should not consider public comments filed in this proceeding, but rather challenges the Department’s attempt to introduce such statements as the sole basis for its experts’ opinions.

information. Instead, they attempt to forgo having to collect data to support their position on customers' views by offering the purely speculative testimony of expert witnesses. Second, no reasonably prudent business person, let alone an expert qualified under V.R.E. 702 and 703, would base sweeping conclusions about the performance of utility technicians or the opinions of its customers based on isolated and unverified statements from one or two customers or third-parties. Furthermore, Goldstein and Keener do not report to have personal knowledge of the facts supposedly underlying the hearsay statements.¹⁷ Accordingly, their testimony, which attempts to elevate one or two public comments to purportedly represent the general view of customers, cannot be admitted under the guise of expert opinion or Section 810 because their conclusions are not based on sufficient indicia of reliability.

V. CONCLUSION

Wherefore, for the above reasons, the cited portions of the Testimony should be stricken from the record.

DATED at Burlington, Vermont, this 23rd day of May, 2019.

CONSOLIDATED COMMUNICATIONS OF
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By: _____


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¹⁷ See *Northstar Decommissioning Holdings*, Docket No. 8880, 2018 WL 835319, at *6 (Vt. P.U.C. Feb. 8, 2018) (holding that portion of expert's prefiled testimony quoting an email he was not a recipient of and for which he demonstrated no personal knowledge of its origin, was hearsay and failed to satisfy requirements of Section 810 and thus would be excluded).