

STATE OF VERMONT  
PUBLIC UTILITY COMMISSION

Case No. 18-3231-PET

Petition of the 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.                             )

**DEPARTMENT OF PUBLIC SERVICE OPPOSITION TO  
CONSOLIDATED MOTION TO STRIKE PORTIONS OF JOINT PREFILED  
TESTIMONY OF DEPARTMENT WITNESSES GOLDSTEIN AND KEENER**

**I. Introduction**

The Vermont Department of Public Service (“Department”) hereby opposes the May 23, 2019 Motion to Strike Portions of Joint Prefiled Testimony of Department Witnesses Goldstein and Keener (“Motion”) filed by Consolidated Communications of Vermont, LLC d/b/a Consolidated Communications (“Consolidated”). The Department opposes the Motion because (1) the testimony is relevant to the central issue of this proceeding; (2) Goldstein and Keener’s testimony relies on facts and data provided to them; (3) it is premature to exclude the testimony before a technical hearing takes place; and (4) Consolidated’s objections to the testimony concern the weight that should be given to it, not the admissibility. For these reasons, the Department respectfully requests that the Public Utility Commission (“Commission”) deny Consolidated’s Motion.

**II. Argument**

- a. Portions of Goldstein and Keener’s testimony should be admitted into the evidentiary record because they are relevant to the question of whether Consolidated is meeting its service quality obligations.**

The Vermont Rules of Evidence provide that relevant evidence is generally admissible. V.R.E. 402. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” V.R.E. 401. The Vermont Administrative Procedures Act provides an even more relaxed standard for the admissibility of evidence than is found in the Vermont Rules of Evidence. Section 810(1) of Title 3 provides that in contested cases, agencies may admit certain evidence excluded by the Vermont Rules of Evidence, and directs the exclusion of “irrelevant, immaterial, or unduly repetitious evidence.” The Commission has held that “relevant evidence in some degree must advance the inquiry and thus have probative value.” *Northstar Decommissioning Holdings*, Docket 8880, Order of 2/8/18 at 3.

The portions of the Goldstein and Keener testimony Consolidated wishes to strike bear directly on the issue at hand in this proceeding and should therefore be admitted into evidence. Specifically, the testimony is relevant and material to the question of whether Consolidated is meeting its service quality obligations. To strike testimony that would clearly advance the inquiry and have probative value regarding the central issue before the Commission would be inappropriate and likely constitute reversible error.

**b. Goldstein and Keener’s reliance on public comments in forming their opinion is permissible under the Vermont Rules of Evidence.**

V.R.E. 703 provides that Goldstein and Keener’s testimony may rely on facts or data provided to them. To the extent that Consolidated suggests that Goldstein and Keener lack personal knowledge of certain facts upon which their testimony is based, this is allowable under V.R.E. 703 and is therefore not a reason to strike any portion of their testimony. Specifically, Goldstein and Keener rely on public comments that are part of the public record in this

proceeding. Public comments that go to service quality issues are of a type reasonably relied on by telecommunications experts when forming opinions or inferences as to whether a telecommunications provider is meeting its service quality obligations, and are therefore sufficient and acceptable bases for Goldstein and Keener's testimony.

**c. It is premature to exclude portions of Goldstein and Keener's testimony before technical hearings are held.**

Section 801 of the Vermont Administrative Procedure Act applies to "contested cases" that are defined as proceedings "in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." 3 V.S.A § 801(b)(2). The Commission has stated that "[t]he format of a technical hearing is most useful for at least the admission of testimony and exhibits, and it would be most unusual...that the [Commission's] staff would have no questions about the final details." *Petition of Cross Pollination, Inc.*, Docket 7645, Order of 12/3/10 at 1.

As a quasi-judicial body, the Commission's objective in employing the rules of evidence has more to do with "promoting an orderly development of the evidentiary record, and less toward ensuring the rigorous application of evidentiary rules that are intended for use in adjudicating individual cases before trial judges and juries in civil and criminal courts." *Investigation into AARP*, Docket 7535, Order of 5/5/10 at 6, FN 24. Accordingly, in order to promote orderly development of the evidentiary record, it is vital that *all* testimony, including those portions of Goldstein and Keener's testimony that Consolidated wishes to strike, come before the Commission at the hearing stage. Were the Commission to exclude portions of Goldstein and Keener's testimony before a technical hearing is held, it would contravene

Commission procedure and effectively be prejudicial to the Department and its involvement in this proceeding.

**d. Consolidated's assertions address the weight given to Goldstein and Keener's testimony, not the admissibility.**

In ruling on an objection to the admissibility of testimony, the Commission does not determine the persuasive weight to be given to that testimony. *Petition of Dairy Air Wind, LLC*, Docket 8887, Order of 4/12/18 at 1. Rather, the Commission decides “the more narrow question of whether the testimony may be admitted into the evidentiary record pursuant to the Vermont Rules of Evidence and 3 V.S.A. § 810(1)...” *Id.* In its capacity as an expert body engaged in a “legislative, policy-making process,” *In re Amended Petition of UPC Vermont Wind*, 2009 VT 19 ¶ 2 (citing *In re Vt. Elec. Power Co.*, 2006 VT 69, ¶ 6), the Commission serves as the trier of fact and there is no jury to protect from exposure to unreliable evidence. *Petition of Barton Solar LLC for a certificate of public good*, Docket 8148, Order of 5/9/14 at 2. Furthermore, “the extent of [one’s] expertise will affect the weight that the [Commission] places on [one’s] testimony, as is the case with any witness offering expert opinions.” *Investigation into Petition Filed by Vermont Department of Public Service Re: Energy Efficiency Utility Structure*, Docket 7466, Order of 9/3/09 at 5.

Consolidated asserts that because the opinions of Goldstein and Keener are derived from a limited number of public comments, portions of their testimony are unreliable. However:

The main goal of the trial court in considering the admission of expert testimony under V.R.E. 702 is to avoid the possibility of misleading the jury by allowing a witness to enjoy a greater credence than his qualifications would otherwise allow. Where an expert’s limitations are made clear, both on direct testimony and cross-examination, the court may not be said to have abused its discretion in allowing the testimony.

*Cappiallo v. Northrup*, 150 Vt. 319, 319, 552 A.2d 415, 217 (1988).

The Commission is a highly sophisticated and technically specialized quasi-judicial body that can make accurate judgments as to the credibility and weight to be afforded a witness. There is no possibility of misleading a lay jury. The Commission therefore knows that experts, in forming their opinions and recommendations, may rely on public comments. Public comments are not part of the evidentiary record but are nonetheless crucial in determining whether or not service quality obligations are being met. Accordingly, Consolidated's concerns should be addressed via cross-examination that goes to the weight of the testimony, not its admissibility.

### **III. Conclusion**

For the foregoing reasons, the Department respectfully requests that the Commission deny Consolidated's Motion and allow for the portions of Goldstein and Keener's testimony to be admitted because the testimony attests to the issue of whether Consolidated is meeting its service quality obligations.

DATED at Montpelier, Vermont this 6<sup>th</sup> day of June, 2019.

VERMONT DEPARTMENT OF PUBLIC SERVICE

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