

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.	
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**CONSOLIDATED'S MOTION FOR LEAVE TO FILE SURREPLY  
AND SURREPLY**

Consolidated Communications of Vermont Company, LLC (formerly Telephone Operating Company of Vermont LLC) d/b/a Consolidated Communications (“Consolidated”) respectfully moves for leave to file a surreply in response to the Reply Brief of the Department of Public Service (“Department”). The Department’s Reply Brief contains legal arguments not included in the Department’s Initial Brief and set forth for the first time by the Department in its Reply Brief. Consolidated therefore requests leave to submit the following surreply. *See Macri v Cooke's Letters, Inc.*, No. 4460912, 2014 WL 3798138 at \*1 n.1 (Vt. Super. Jan. 10, 2014) (noting that a surreply is appropriate “to allow a party to respond to new issues raised in the memorandum in opposition”).

**SURREPLY**

The Department’s Reply Brief raises the following legal arguments that Consolidated has not previously had the opportunity to address.

First, the Department contends that its prospective bill credit remedy comports with the Docket 5903 service quality standards and the requirements of 30 V.S.A. § 30 because the hearing requirement has been satisfied under Section 30. This is incorrect both because the hearing requirement has not been satisfied, and even if it was, the Public Utility Commission

(“Commission”) does not have discretion under Section 30 to mandate payments for future events. The hearing requirement has not been satisfied here because the Department’s proposed bill credit rule would apply prospectively and impose a \$5 penalty on Consolidated *without* a hearing on the imposition of that penalty. Moreover, even if the hearing requirement was satisfied, the bill credit remedy for future outages proposed by the Department is not in accordance with Section 30, which imposes penalties for violations that occurred in the past. For these reasons, the Department’s contention that Section 30, and therefore the Docket 5903 requirements, have been satisfied should be rejected by the Commission.

Second, the Department claims that its enhanced bill credit request is consistent with Section 30 of Title 30 because the Commission has discretion *not* to impose a penalty in certain situations even after finding a violation. The Commission’s discretion to forego the imposition of a penalty, however, does not equate to broad discretion to substitute a remedy that conflicts with the express terms of Section 30. The Docket 5903 standards require that “any penalties assessed ... be assessed in accordance with 30 V.S.A. § 30.”<sup>1</sup> Accordingly, the Department’s statement that it is not “incumbent upon the Commission to impose penalties strictly in compliance with the remedy outlined in Docket 5903,”<sup>2</sup> contradicts the plain language of the regulatory requirements the Department purports to be enforcing. Moreover, neither the Commission’s discretion to forego a penalty nor the cases cited by the Department support the Department’s alternative remedy of enhanced bill credits on a prospective basis.

Third, the Department claims that Consolidated is attempting to “strong-arm the Commission” by proposing a \$25,000 commitment to plant improvements in lieu of a penalty

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<sup>1</sup> *Investigation into Service Quality Standards, Privacy Protections, and other Consumer Safeguards for Retail Telecommunications Service*, Docket 5903 (Vt. Pub. Serv. Bd. Jul. 2, 1999)(hereinafter “5903 Final Order”), Attachment 1, Service Quality Stipulation, ¶ 8.

<sup>2</sup> Department Reply at 2.

paid into the general fund, arguing that it is “paradoxical”<sup>3</sup> for Consolidated to propose its own alternative remedy while also opposing the Department’s alternative as unlawful. This argument misses the fundamental point that Consolidated is the party subject to the penalty, and therefore, only Consolidated may waive its legal rights under the applicable regulations and statutes. The Department offers no legal support for its suggestion that the Commission is without authority to order the alternative proposal submitted here by Consolidated for further plant upgrade investment in lieu of a penalty paid into the general fund.

Fourth, the Department’s argument that the enhanced bill credit “does not constitute a change to the rule itself”<sup>4</sup> must be rejected. Rule 7.609 is the rule that governs credits for service outages. Any change in the credits owed for outages must be treated as a revision to the controlling Rule.<sup>5</sup> To the extent the Department is claiming that it wants a separate rule applicable only to Consolidated, that would require a modification to the Docket 5903 standards that dictate the service quality metrics that apply to Consolidated. This case does not involve either a request for rulemaking or request to reopen and modify the Docket 5903 standards.

Fifth, the Department incorrectly suggests that because Consolidated operates under an incentive regulation plan (“IRP”), the enhanced bill credit request does not violate ratemaking provisions of Title 30. The fact that Consolidated operates under an IRP, which states the Docket 5903 standards continue to apply and that certain ratemaking sections “shall not apply” only highlights the point Consolidated has made in its Initial Brief: The Department cannot seek

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<sup>3</sup> Department Reply at 2 n. 3.

<sup>4</sup> Department Reply at 3.

<sup>5</sup> See *Investigation into Establishing Rates for Power Sold to the Purchasing Agent Pursuant to Pub. Serv. Bd. Rule 4.100, 16 U.S.C. S 824a-3 & 30 V.S.A. S 209(a)(8)*, Docket No. 8010 (Vt. Pub. Serv. Bd. Feb. 9, 2015) (“[T]he Board does not have authority to ... amend or effectively repeal a duly-promulgated rule. To do so would violate the Vermont Administrative Procedure Act's requirements for the adoption of rules.”) at 30 (citing 3 V.S.A. §§ 836-848 (outlining process for adoption and repeal of rules)).

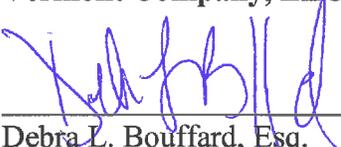
a bill credit rule enhancement because implementation of such a rule absent compliance with applicable ratemaking regulations is unlawful.<sup>6</sup>

For the foregoing reasons and those set forth in its Initial and Reply Briefs, Consolidated respectfully requests that the Commission issue an Order approving Consolidated's proposal to resolve this proceeding and close this Investigation.

DATED at Burlington, Vermont this 3<sup>rd</sup> day of December, 2019.

**RESPECTFULLY SUBMITTED**  
**Consolidated Communications of**  
**Vermont Company, LLC**

By: \_\_\_\_\_

  
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<sup>6</sup> Consolidated Initial Brief at 27-28.