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May 8, 2018

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VIA ECFS and Email

Ms. Sandra Gray-Fields
Enforcement Bureau
Federal Communication Commission
445 12th Street, SW
Washington, D.C. 20554

Re: *CenturyLink Communications, LLC f/k/a Qwest Communications Company, LLC v. Verizon Services Corp., et al.*, Docket No. 18-33, File No. EB-18-MD-001

Dear Ms. Gray-Fields:

Pursuant to 47 C.F.R. § 1.727(c), CenturyLink Communications, LLC ("CenturyLink") hereby opposes the motion for leave to file a sur-reply (the "Motion") filed by defendant Verizon on May 3, 2018, in the above-captioned proceeding.[1] Verizon's motion is both procedurally and factually flawed. First, the Commission's formal complaint rules do not allow for such a sur-reply. Verizon could have sought a waiver to permit a sur-reply prior to commencement of the pleading cycle, but did not, and its late submission violates both the Commission's rules and the scheduling order already established for this proceeding.[2] Second, Verizon is simply wrong when it claims CenturyLink raised new matters in its Reply; the matters of which Verizon now complains were either raised years ago, or for the first time by Verizon in its Answer. In any event, unlike Verizon, CenturyLink had specifically obtained a waiver to address any such new matters that Verizon raised for the first time in its Answer.[3] That CenturyLink responded to Verizon's new claims as part of CenturyLink's Reply fulfilled the purpose of that waiver grant and contributed to the efficiency of this proceeding. This caused no unfairness to Verizon.

As it should in this case, the Commission routinely denies sur-replies for the simple reason that its rules do not allow them.[4] This is because the Commission recognizes that the

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1 "Verizon" refers to defendants Verizon Services Corp., Verizon Virginia LLC, Verizon Washington, DC, Inc.; Verizon Maryland LLC; Verizon Delaware LLC; Verizon Pennsylvania LLC, Verizon New Jersey Inc.; Verizon New York Inc.; Verizon New England Inc.; Verizon North LLC, and Verizon South Inc. CenturyLink is separately opposing Verizon's motion to strike.

2 *See* March 13, 2018 Notice of Formal Complaint, at 2-3.

3 *See* February 9, 2018 Letter Order, at 2.

4 *See, e.g., In the Matter of Long Distance/USA Inc.*, 10 FCC Rcd. 1634, 1637, 1995 WL 59778 (1995) ("The Commission's rules do not provide for the filing of a surreply, and we therefore deny the complainants' motion."); *see also* Order, *Staton Holdings, Inc. v. MCI Worldcom Commc'ns, Inc.*, 19 FCC Rcd 8699, ¶ 14 (EB 2004)

complainant has the burden of proof and should have the last opportunity to satisfy that burden.[5] Instead, in advance of establishment of the pleading cycle, a party may seek a waiver to include the filing of a sur-reply as a specific addition to the standard section 208 pleading cycle.[6] This ensures that the parties complete the primary pleading cycle before turning to subsequent matters such as joint statements in advance of the initial status conference.[7]

Verizon has known of the pleading cycle in this proceeding for months, including the necessity for the parties to move on to additional matters after that cycle ended. Yet Verizon's late, lengthy, and unauthorized sur-reply now seeks to go back and contest prior matters well into the period that the parties should instead be "devot[ing] substantial effort to developing comprehensive and detailed joint statements" as directed by the Commission's March 13, 2018 Notice of Formal Complaint. As part of that process, the parties should be attempting to develop a joint statement of stipulated facts as well as address matters such as discovery.[8] Verizon's attempt to file a sur-reply well into that period is of obvious prejudice to the requirement that the parties develop such joint submissions based on what should have been a closed pleading cycle and set discovery requests.

Indeed, Verizon's proposed sur-reply includes not only additional legal argument and disputed facts, but four (4) new "proposed" interrogatories to CenturyLink. Verizon cites no authority for seeking additional interrogatories in excess of those it was allowed to seek under 47 C.F.R. § 1.729(a), and appears to instead be requesting the Commission order additional interrogatories under 47 C.F.R. § 1.729(h) (discovery).[9] Discovery issues are one of the matters the parties should be discussing so that they can submit a joint proposal to the Commission, which serves to highlight the procedural impropriety of Verizon's requests. The parties in fact held a meet and confer on May 1, 2018, after the filing of CenturyLink's Reply, and Verizon raised none of these issues. Verizon's proposed sur-reply and interrogatories would complicate rather than streamline this proceeding, and would create significant inefficiencies rather than resolve them. Its motion for leave to file should be denied on those grounds alone, and the

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(rejecting pleading that was "filed in violation of the Commission's formal complaint rules and procedures because there is no accommodation for such a filing in the pleading schedule …").

5 *In the Matter of Amendment of Rules Governing Procedures to Be Followed Where Formal Complaints Are Filed Against Common Carriers.*, 3 F.C.C. Rcd. 1806, 1808 (1988) (declining to remove rule allowing replies in formal complaints, "since the complainant bears the burden of proof, the reply may provide it with a last opportunity to satisfy its burden and to respond to matters raised in defendant's answer.") The Commission's current NPRM also does not propose to allow such sur-replies. *See In the Matter of Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enf't Bureau*, EB Docket No. 17-245, 32 F.C.C. Rcd. 7155 (2017).

6 *See* Letter Order, *Level 3 Communications, LLC v. AT&T Inc.*, Proceeding No. 17-227, Bureau ID No. EB-17-MD-003 (August 31, 2017), at 2 (granting joint waiver request to include sur-reply as part of pleading schedule).

7 *See* March 13, 2018 Notice of Formal Complaint, at 2-3.

8 47 C.F.R. § 1.733(b)(1).

9 Motion, at 2 n. 7.

Commission should refuse to consider the proposed sur-reply submitted without prior authorization.[10]

Verizon is also wrong when it claims CenturyLink submitted "new arguments" in its Reply. The issues of which Verizon complains have either long been debated in this proceeding, or were raised for the first time by Verizon in its Answer. For example, Verizon alleges that CenturyLink made a "new" argument that the Service Agreements allow CenturyLink to recover overcharges even if those overcharges are not treated as "Billing Credits."[11] CenturyLink has said this for years.[12] CenturyLink reaffirmed this position in its Formal Complaint.[13] That Verizon dislikes CenturyLink's longstanding position and wants yet another bite at the apple in no way necessitates or justifies the filing of a sur-reply.

Verizon is similarly wrong when it claims CenturyLink seeks "new" overcharges with respect to dispute Category 1.[14] CenturyLink has always sought to recover overcharges based on Verizon's errors in dispute Category 1. However, as specifically explained in CenturyLink's Reply, Verizon never previously provided the DS1 circuit level detail to allow CenturyLink the ability to audit the DS1s at the circuit level.[15] Despite its awareness of these disputes since 2014, Verizon's Answer was the first time that Verizon provided circuit level information for the circuits in Category 1. Accordingly, CenturyLink's updated overcharge calculations for Category 1 were based on the new information Verizon provided in its Answer. Although Verizon suggests CenturyLink did something untoward in responding to Verizon's new information, Verizon's anticipated gamesmanship was precisely why CenturyLink sought and obtained a waiver of 47 C.F.R. § 1.726(a) to "ensure [CenturyLink] is able to properly respond to specific factual allegations … Verizon may make for the first time in its answer that are not specific to affirmative defenses, resulting in a more complete record and a more efficient

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10 Verizon also erroneously suggests it should be permitted additional interrogatories because CenturyLink has served more than Verizon. Motion, at 2 n. 7. But the Commission's rules specifically permit CenturyLink to file up to fifteen interrogatories, while limiting Verizon to fewer. 47 C.F.R. § 1.729(a) (permitting complainant a total of fifteen interrogatories, and allowing defendant to only seek up to ten). As those unauthorized "proposed" interrogatories have not been properly filed, there is no operative response period under Section 1.729(c) or (d). Nonetheless, for the avoidance of doubt, CenturyLink also opposes each of those purported interrogatories on numerous grounds.

11 Verizon Sur-Reply Legal Analysis, at 1-2.

12 *See, e.g.,* CenturyLink Reply to Verizon Response to Notice of Informal Complaint, File No. EB-16-MDIC-0015 (November 18, 2016), at 14-15 ("Contrary to Verizon's unduly-restrictive reading of the agreements' dispute-resolution provisions, they acknowledge numerous instances in which amounts owed due to Verizon's errors can and should be refunded to [CenturyLink], whether or not defined as "billing credits." … "…[T]he very same provision expressly contemplates resolution of 'disputes raised after the determination of the Billing Credits' whereby 'amounts may be credited to [CenturyLink] if [CenturyLink] prevails.'").

13 *See, e.g.*, Formal Complaint, ¶ 109; Legal Analysis in Support of Formal Complaint, at 22-23.

14 Verizon Motion, at 2; Sur-Reply Legal Analysis, at 4-5.

15 Reply Declaration of Tiffany Brown, ¶ 53.

proceeding."[16] Verizon agreed to that waiver. Moreover, Verizon has always had this information and, as previously discussed, if it thought it would need to file a sur-reply Verizon should have sought a timely waiver of its own. Verizon is simply mistaken that it should be permitted another opportunity to address information that Verizon already discussed in its Answer, or that CenturyLink's Reply response was impermissible or somehow does not "relate back" to its longstanding causes of action based on Verizon's overcharges.[17]

In short, every item raised by the Verizon's proposed sur-reply has either been extensively briefed already, or was raised for the first time in Verizon's Answer and then rebutted in CenturyLink's Reply.[18] Verizon already had ample opportunity to address all of them, in a manner that was consistent with the Commission's rules and the pleading cycle established for this proceeding. Verizon may not like that CenturyLink filed a robust Reply in response to Verizon's Answer and Verizon's new information, but that does not permit Verizon to ignore the Commission's rules, or excuse Verizon's failure to timely seek a waiver before the parties completed the pleading cycle. There is simply nothing in the sur-reply that will promote an efficient resolution of this proceeding. To the contrary, its filing will only further complicate and impede this proceeding under its set schedule. Accordingly, CenturyLink respectfully requests that the Commission deny Verizon's Motion, and allow the parties to instead focus on

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16 *See* February 9, 2018 Letter Order (emphasis added). CenturyLink in fact expected that after providing new information Verizon would then attempt to walk back its latest argument regarding Category 1, and so also expressly reserved its rights to address this issue should Verizon continue to change its arguments. *See* Reply Legal Analysis, at 47 n. 150; *see also* Reply Declaration of Tiffany Brown, ¶ 57 & n. 59 ("By updating these calculations based on Verizon's arguments and new information provided in Verizon's Answer, I am not waiving, withdrawing, or otherwise dismissing CenturyLink's disputes and claims.") (emphasis added). None of these issues are time barred.

17 *See* 47 C.F.R. § 1.718 (formal complaint relates back to informal complaint in relevant part if it is "based on the same cause of action as the informal complaint.") (emphasis added). Updating the total overcharges for Category 1 based on new information in Verizon's Answer does not alter CenturyLink's causes of action against Verizon for violations of Sections 201 and 203 of the Act. *See, e.g.,* Formal Complaint, ¶¶ 6, 127-147 (Counts I & II).

18 None of the other issues Verizon attempts to pad via "supplemental" declarations is truly new or supportive of any need for a sur-reply. Contrary to Ms. Mason's allegations, the analysis regarding dispute Category 5 is not new, and CenturyLink has consistently maintained that Verizon classified the DS0 circuits incorrectly as DS1 circuits in its monthly billing. CenturyLink also already explained in its Formal Complaint that Verizon had misled it with regarding to the impact of the FMS conversion, and that issue is not new either. *See* Formal Complaint, Declaration of Tiffany Brown, ¶ 125 & n. 216 (citing CTL Ex. 53.05). Finally, the issue of fractional disconnected circuits discussed in the Reply Declaration of Tiffany Brown was based on Verizon's new assertion in its Answer that CenturyLink had received a "windfall" on fractional discounts. *See, e.g.*, Answer, ¶ 36 & n. 54 (citing Ms. Mason for the allegation that the "damages amount asserted in the Complaint fails to take into account that CenturyLink benefited in offsetting ways from many of the errors it alleges, including with respect to Verizon's treatment of disconnected circuits"); Reply Declaration of Tiffany Brown, ¶¶ 68-70 (rebutting same and explaining that Verizon "does not give any detail on the windfall it believes CenturyLink received."). Verizon in fact agreed with CenturyLink that the months in dispute were counted in error, but attempted to negate that fact by citing an alleged "windfall" from other months that are not involved in the disputes. Since those other months are not involved in the dispute for this issue, CenturyLink did not adjust for the alleged "windfall" dollar amounts for this issue. In any event, Verizon should not be permitted to try to cure its failure to support the allegations in its Answer with an unauthorized sur-reply.

complying with the schedule already established by the Notice of Formal Complaint and related letter orders.

Respectfully submitted,

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cc: Curtis L. Groves, Verizon
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