

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

ALEX NGUYEN

Complainant,

v.

CELLCO PARTNERSHIP & AFFILIATED
ENTITIES d/b/a VERIZON WIRELESS

Defendant.

Proceeding No. 16-242
File No. EB-16-MD-003

REPLY TO DEFENDANT’S OPPOSITION TO APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the Commission’s rules, I hereby submit this Reply to Defendant’s Opposition to Application for Review¹ in the above-captioned proceeding.

Verizon insinuates that the Order didn’t really claim I offered no first-hand or reliable evidence, even though that’s what the Order explicitly claimed. As I asserted in my Application for Review,² Paragraph 13 of the Order³ indicates the Enforcement Bureau overlooked material evidence about Verizon’s pricing and accounting. Verizon declares one dependent clause in Paragraph 9 of the Order is somehow evidence that the Bureau reviewed the entire record, but a *claim* that the Bureau reviewed the entire record isn’t evidence that the Bureau reviewed the entire record.

Although *other* paragraphs of the Order admit my assertions about matters other than Verizon’s pricing and accounting don’t exclusively rely on secondary sources, Paragraph 13 of the Order falsely but explicitly claims that “Nguyen offers *no* reliable, first-hand evidence about the pricing plans Verizon offered to customers during the period at issue; instead, Nguyen’s pricing allegations are based on selected news articles and web postings”⁴ (which directly implies these assertions were exclusively based on secondary

¹ Opposition to Application for Review, Proceeding No. 16-242 (September 18, 2019) (“Opposition”)

² Application for Review at 3–8, Proceeding No. 16-242 (September 5, 2019) (“Application”)

³ Memorandum Opinion and Order, DA 19-674 (August 6, 2019) (“Order”)

⁴ *Id.* at 6 ¶ 13 (emphasis added)

sources like *The Wall Street Journal*, *The Verge*, and *Reuters* that the Order declares unreliable⁵).

Staff are fallible, and the Commission's rules acknowledge the possibility of erroneous findings, prejudicial procedural errors, *etc.* by providing for Commission and judicial review. Although I dispute the Order's dismissal of evidence as capricious, I *don't* dispute that the Bureau took at least a *pro forma* pass at evidence it actually mentioned in its Order or that "no evidence" means "no evidence." With no apparent sense of irony, Verizon admits in a footnote that there is no evidence to contradict that Paragraph 13 indicates the Order overlooked my bills from Verizon, disclosures on Verizon's own Web site, FCC documents, Verizon's SEC filings, statements to investors by Verizon's CFO, *etc.*⁶ Verizon's insinuation in its Opposition that the Order doesn't really mean what it explicitly says is improper.

Verizon and the Order misunderstand the standard for showing that charges and conditions discriminated against devices outside of those provided by Verizon. They erroneously claim I didn't show Verizon imposed discriminatory charges or conditions, because I didn't show what other Verizon subscribers were charged, they claim: "But those bills only show what Mr. Nguyen was charged at certain points in time; they do not show what others were charged or why – much less that any pricing to Mr. Nguyen or any other customer was discriminatory."⁷ However, I didn't claim Verizon discriminated between me or any other customer based on our identities; I asserted Verizon imposed discriminatory charges and conditions based on whether customers used devices provided by Verizon or devices outside of those provided by Verizon. I used both devices provided by Verizon and also devices outside of those provided by Verizon, and my bills show what Verizon charged when I was using a device provided by Verizon (my bills dated July 20, 2015 and earlier) and when I was using a device outside of those provided by Verizon (my bills dated August 20, 2015 and later). In particular, my bills show Verizon denied the "Month to Month Line Access Discount" after I used a device outside of those provided by Verizon, even though I continued to meet the two requirements (a

5 Verizon falsely claimed that the Order never "stated" that I relied exclusively on secondary sources. See Opposition at 9 ('But the Bureau never stated that Mr. Nguyen had relied "exclusively" on such material.')

6 Opposition at 12 note 17 ("While the Order does not specifically mention the Verizon bills and website information referenced in the Application in deciding these particular claims,...")

7 Opposition at 11 and Order at 6 ¶ 13

month-to-month requirement and a data allowance requirement) Verizon disclosed. If Verizon had additional requirements for month-to-month line access discounts (*e.g.*, using devices provided by Verizon), then Verizon clearly failed to disclose them.

Citing a Verizon employee's declaration without specificity, Verizon insists that it explained why its pricing was not discriminatory (without specifying the explanation), that the disclosures on Verizon's Web site support "that explanation," and that I misunderstood the disclosures (without specifying how I misunderstood them). What may be true and correct to the best of a Verizon employee's knowledge, information, and belief isn't the same as what is true and correct, especially when FCC documents, accounting of equipment revenue and service revenue detailed in Verizon's SEC filings audited by Ernst & Young, and statements to investors by Verizon's CFO verify the fact that the base monthly charges I cited reflected the cost of device subsidies. See Application at 6–8.

Sections II.B–E of Verizon's Opposition rely on scare quotes. Even though I cited Google (a primary source for information about Android and the Nexus 6) and set forth a *prima facie* case that Verizon violated 47 CFR § 27.16(d)(2) by providing a false basis for denying attachment of my Nexus 6,⁸ Section II.B repeats false claims that I didn't cite reliable sources and employs scare quotes to play up that I provided "just one example for this section [Section III.B of my Application]." As I explained in my Application, I provided just one example in that section because I provided other examples that set forth a *prima facie* case that Verizon violated the Communications Act and the Commission's rules in Sections III.A and III.C–F.

Section II.C insists a declaration from another proceeding that swears Verizon required Google to allow Verizon to deny, limit, and restrict tethering is irrelevant to the discussion of tethering in this proceeding, purely because the declaration is from another proceeding. Verizon employs scare quotes to play up that I included in my Application source code from Google's source repository accessed "[a]t the time of writing" and that I didn't include "this source code" in earlier filings. First, after Verizon's September 22, 2016 Answer falsely claimed tethering is a proprietary "service" developed by Verizon, I rebutted this false

⁸ Verizon falsely claimed Google couldn't use the Internet to deliver software to Google Nexus devices sold by Google.

claim in my October 31, 2016 Reply by including multiple links to Google’s source code repository.⁹ The source code I included in my September 5, 2019 Application wasn’t directly included in my October 31, 2016 Reply, but anyone familiar with navigating source code should be able to follow the links, read the messages logged by engineers from Google and other edge providers, and reach the same conclusions. Verizon says these conclusions are “not clear from the discussion” and that the discussion is not comprehensible without the help of testimony from an expert. I won a programming contest held by the Association for Computing Machinery chapter at UCLA,¹⁰ earned a Bachelor of Computer Science degree from UCLA, and work as an engineer.¹¹ If I assumed that what is familiar to me would be familiar to everyone else (before or after the investigation the Bureau said it conducted) but wasn’t, I apologize. Second, the source code I included in 2019 (“[a]t the time of writing”) doesn’t significantly differ from the corresponding source code in 2016. See the log for `/src/com/android/settings/TetherSettings.java` in <https://android.googlesource.com/platform/packages/apps/Settings>.

Section II.D employs scare quotes around “first-hand evidence” to play down that I could listen to FM radio on my HTC One M8 until Verizon pushed a software update that made the features stop working. A software update pushed by Verizon can disable previously-working features enabled by an included FM chip but obviously can’t erase an included FM chip from existence. Even though I cited Verizon (a primary source), Section II.D just ignores that Verizon’s own Web site falsely blamed device manufacturers for not including FM chips (even though they included FM chips but Verizon disabled them) and repeats the Order’s declaration upon *ipse dixit* that a handset supplier like HTC can be a reliable primary source but an FM radio application provider like NextRadio that directly worked with handset suppliers (including HTC) can’t.

Section II.E employs scare quotes to spin the narrative (that the Order repeats) to dismiss secondary sources like “recode.net” as “unverified third party Internet blog[s].” To rebut the Order’s false claim that I didn’t cite device suppliers, my Application cited Apple, Samsung, and Google (each of which is a primary

9 Reply at 8 (October 31, 2016), <https://ecfsapi.fcc.gov/file/1101257296056/2016-10-31-reply.pdf#page=13>

10 UCLA ACM, <https://web.archive.org/web/20100730224659/http://acm.cs.ucla.edu/node/178>

11 Complaint at 1, Proceeding No. 16-242, <https://ecfsapi.fcc.gov/file/10726214500114/2016-07-26-complaint.pdf#page=6> (July 26, 2016)

source for information about its hardware and software) and supplemented primary sources with information corroborated by multiple reliable secondary sources, including journalists like Walt Mossberg (*The Wall Street Journal*, *All Things Digital*, *The Verge*),¹² Ina Fried (*The Orange County Register*, *CNET*, *Recode*, *Axios*),¹³ and Jason Del Rey (*The Star-Ledger*; *Inc.*, *Newsday*, *Recode*).¹⁴ See also my October 31, 2016 Reply Summary, which debunks the narrative spun by Verizon and repeated by the Order. Excluding the citations to secondary sources that Verizon imagined but that I didn't actually cite, of the 305 footnotes in my Complaint that cite external sources, the most-cited source is Verizon at 62 footnotes.¹⁵

Verizon fails to rebut that its disclosures were inconsistent with its own policies. My Application at 17–18 notes that Verizon certified Apple iPhone 6 and 6 Plus devices sold by competing sources on August 13, 2015. The Open Internet Transparency Rule requires network providers to maintain timely and accurate disclosures, and Verizon should have updated its disclosures to be consistent with its own policies on August 13, 2015. Section II.F of Verizon's Opposition simply fails to rebut this fact.

I. Conclusion

Clearly, the Bureau overlooked first-hand evidence and dismissed primary sources and authoritative evidence that contradicted Verizon's claims. The Commission should reverse the Order in whole.

Respectfully submitted,
/s/ Alex Nguyen

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- 12 Walt Mossberg, Samsung's New Galaxy S7 Phones Are Beautiful, But software and carrier intrusion undermine the experience, <https://www.theverge.com/2016/3/8/11176606> ("Samsung says Verizon barred including Samsung's browser and Samsung Pay out of the box.")
- 13 Ina Fried, <https://www.vox.com/2016/3/22/11587182> ("Verizon, meanwhile, will require a separate SIM card and disable the built-in embedded Apple SIM on the iPads it sells.")
- 14 Jason Del Rey, <https://www.vox.com/2015/10/21/11619830> ('A Samsung Pay executive said this summer at a press briefing that the holdup with Verizon was over "economics," but declined to comment further.')
- 15 Reply Summary at 1–4, Proceeding No. 16-242 (October 31, 2016), <https://ecfsapi.fcc.gov/file/1101257296056/2016-10-31-summary.pdf#page=2> ('Verizon alleges I "repeatedly" rely on "anonymous postings on Reddit" and cites 6 of the 282 paragraphs in the Complaint to prop up its accusation. In fact, Paragraphs 77 and 78 do not cite Reddit at all.')