

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

In the Matter of

ALEX NGUYEN
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Complainant,

v.

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

Defendant.

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

REPLY

October 31, 2016

SUMMARY

Pursuant to Section 1.726 of the Commission's rules, I, Alex Nguyen, hereby reply to the Answer filed by Cellco Partnership & Affiliated Entities d/b/a Verizon Wireless (“Verizon”).

In the Complaint I filed on July 26, 2016, I set forth a *prima facie* case that Cellco Partnership & Affiliated Entities d/b/a Verizon Wireless (“Verizon”) violated 47 USC §§ 201(b) and 202(a); 47 CFR §§ 8.3, 8.5, 8.11, and 27.16; and a 2012 Order and Consent Decree (“2012 Order and Consent Decree”)¹ by abusing its position as gatekeeper to interfere with my ability to use the devices and applications of my choice and edge providers' ability to make the devices and applications of their choice available to me.

Verizon's bloated² eight-page summary of its Answer perfectly epitomizes Verizon's inability to defend bald-faced violations of the Commission's openness requirements:

Unable to defend documented abuse of its position as gatekeeper,³ Verizon resorts to impugning reporting from publishers it doesn't own as “third-party.” Contrary to Verizon's baseless accusation that “virtually all of the allegations in the Complaint are made on information and belief, based on excerpts from third party websites and blogs,”⁴ in fact, the vast majority of the assertions in the Complaint are based on verifiable sources: Of the 305 footnotes in the Complaint that cite external sources:⁵

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- 1 Cellco Partnership d/b/a Verizon Wireless, File No. EB-11-IH-1351, Acct. No. 201232080028, FRN 0003290673, Order and Consent Decree, 27 FCC Rcd. 8932 (2012)
 - 2 47 CFR § 1.49(c) [“For pleadings and documents exceeding twenty-five pages in length, the summary should seldom exceed two and never five pages.”]
 - 3 Walt Mossberg. *Mossberg: Samsung's New Galaxy S7 Phones Are Beautiful*. <https://recode.net/2016/03/08/mossberg-samsungs-new-galaxy-s7-phones-are-beautiful/> [“Samsung says Verizon barred including Samsung's browser and Samsung Pay out of the box.”]
 - 4 Answer at 2.
 - 5 Of the 358 footnotes in the Complaint, 6 are internal comments and 47 are cross-references.

- 62 footnotes (20.3%) cite Verizon: 47 cite first-party Verizon sources, 6 cite official letters posted on third-party sites, 3 cite posts by Verizon employees on Reddit, 2 cite SEC filings by Verizon, 2 cite official statements on Twitter, 1 cites a video of Verizon's Developer Conference on YouTube, and 1 cites AOL's policy on advertising and analytics.
- 54 footnotes (17.7%) cite FCC rules, orders, and other documents.
- 12 footnotes (3.9%) cite news articles from Android Police, a publication of Illogical Robot LLC. (7 footnotes cite pricing information.)
- 11 footnotes (3.6%) cite The Verge, a publication of Vox Media.
- 10 footnotes (3.3%) cite court cases.
- 10 footnotes (3.3%) cite Droid Life, a publication of DRD Life Inc.
- 9 footnotes (3.0%) cite The Wall Street Journal.
- 8 footnotes (2.6%) cite Recode, a publication of Vox Media.
- 6 footnotes (2.0%) cite news articles from Android Central, a publication of Mobile Nations.
- 6 footnotes (2.0%) cite posts by Verizon customers on Reddit.
- 5 footnotes (1.6%) cite Ars Technica, a publication of Condé Nast.
- 5 footnotes (1.6%) cite the National Association of Broadcasters.
- 4 footnotes (1.3%) cite CNET, a publication of CBS Interactive.
- 4 footnotes (1.3%) cite T-Mobile.
- 3 footnotes (1.0%) cite AT&T.
- 3 footnotes (1.0%) cite Fierce Wireless, a publication of Qwestex LLC.
- 3 footnotes (1.0%) cite Gizmodo, a publication of Univision Communications.
- 3 footnotes (1.0%) cite Jeff Jarvis, professor and director of the Tow-Knight Center for Entrepreneurial Journalism at the City University of New York's Graduate School of Journalism.
- 3 footnotes (1.0%) cite Microsoft.
- 3 footnotes (1.0%) cite The New York Times.
- 3 footnotes (1.0%) cite Samsung.
- 3 footnotes (1.0%) cite The Washington Post.
- 3 footnotes (1.0%) cite ZDnet, a publication of Ziff Davis.
- 3 footnotes (1.0%) cite the Communications Act of 1934.

Verizon's blanket dismissal of facts corroborated by reporting from publishers it doesn't own as "third-party" is presumptuous and ironic, given Verizon's history of first-party publishing.⁶

Unable to support its allegations, Verizon resorts to making up support for its allegations.

6 David Carr. *Journalism, Independent and Not*. <http://www.nytimes.com/2014/11/03/business/media/journalism-independent-and-not.html> ["Of the many attempts at new approaches to publishing — native advertising, custom content, sponsored content — SugarString sets a new low."]

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.⁷ In fact, Paragraphs 77 and 78 do not cite Reddit at all. Of the 4 paragraphs that actually cite Reddit, 3 cite statements by people who work for Verizon. Only 1 of the paragraphs on which Verizon relies cites the accounts of Verizon customers, and their assertions are corroborated by my firsthand knowledge and the verifiable sources cited in the Complaint:

- Paragraph 67 cites an indirect sales consultant for Verizon who leaked accurate information about changes to Verizon's MORE Everything plans on Reddit.
- Paragraph 77 does NOT cite Reddit; it cites the National Association of Broadcasters.
- Paragraph 78 does NOT cite Reddit; it cites a letter from Verizon Assistant General Counsel Ann Rakestraw to me.
- Paragraph 99 cites a letter from the Executive Office of Verizon Wireless posted on Reddit. The letter has language consistent with a Verizon statement cited by Paragraph 98 of the Complaint.
- Paragraph 102 cites a news article from Recode, a letter from Verizon Assistant General Counsel David Haga to me, and a letter from Verizon Executive Relations posted on Reddit. (Both letters have consistent language.)
- Paragraph 182 cites the accounts of Verizon customers complaining that Verizon disabled built-in tethering features. These assertions are corroborated by my firsthand knowledge and the verifiable sources cited in the Complaint.

Unable to offer a coherent defense, Verizon resorts to throwing procedural gimmicks at the wall and hoping something sticks. Contrary to Verizon's claim that “Mr. Nguyen does not allege that he personally experienced or was harmed by” Verizon's conduct,⁸ I affirm all material facts in the Complaint are supported by firsthand knowledge and/or documentation. Even though Congress explicitly stated, “No complaint shall at any time be dismissed because of the absence of direct damage to the complainant,”⁹ to the extent the Complaint wasn't already clear, I make more explicit in the Reply that I have firsthand knowledge that the facts contained in the

⁷ Answer, Legal Analysis at 3.

⁸ Answer at 2.

⁹ 47 USC § 208.

Complaint are true.

Having established that the vast majority of assertions in the Complaint are supported by firsthand knowledge and verifiable sources and that paragraphs on which Verizon relies to prop up its spurious accusations are imaginary, to the extent any non-imaginary paragraph in the Complaint cites “hearsay,” such accounts can be substantial evidence. In *Richardson v. Perales*, the Supreme Court ruled against prohibiting “administrative reliance on hearsay irrespective of reliability and probative value”¹⁰ and found that “Hearsay, under either Act [the Administrative Procedure Act or Social Security Act], is thus admissible up to the point of relevancy.”¹¹ See also *Calhoun v. Bailar* (“We too reject any *per se* rule that holds that hearsay can never be substantial evidence.”¹²) and *Johnson v. United States* (“Not only is hearsay admissible, but under the appropriate circumstances, it may constitute substantial evidence.... We have rejected a *per se* approach that brands evidence as insubstantial solely because it bears the hearsay label.... Instead, we evaluate the weight each item of hearsay should receive according to the item's truthfulness, reasonableness, and credibility.”¹³). In any case, I object to Verizon's belief that it can hide abuse of its position as gatekeeper behind private “commercial discussions” then dismiss facts corroborated by firsthand knowledge and reporting from publishers it doesn't own as third-party “hearsay.”

Unable to counter the arguments in the Complaint, Verizon resorts to distorting the arguments in the Complaint. In its Legal Analysis at 5, Verizon absurdly alleges that I'm asking the Commission to “rewrite the regulations” on which the Complaint relies. On the contrary, I'm

10 402 U.S. 389, 407–408 (1971)

11 *Id.* at 410.

12 626 F.2d 145, 149 (9th Cir. 1980)

13 628 F.2d 187, 190 (D.C. Cir. 1980)

asking the Commission to enforce the regulations it has already adopted pursuant to notice-and-comment rulemaking. For example, in every country in which Apple has retail stores and most of the developed world,¹⁴ *except* the United States, Apple directly sells iPhones through its Web site “SIM-free” only. Even though AT&T, T-Mobile, and many other carriers worldwide that collectively serve billions of customers provision subscriber identity modules (SIMs) separately from devices, Verizon insists blocking customers from activating SIMs for devices it doesn't whitelist is “reasonable network management.” However, to the extent Verizon *could* follow international standards by provisioning SIMs separately from devices but Verizon *elects* to deviate from international standards by blocking customers from activating SIMs separately from devices, the Commission has the authority to order Verizon to *not* block customers from activating SIMs separately from devices.

Verizon's *ipse dixit* isn't enough: The Commission's openness rules do *not* permit Verizon to hide abuse of its position as gatekeeper behind a claim of “reasonable network management.”¹⁵ I respectfully urge the Commission to draw all adverse inferences against Verizon and take enforcement action to deter the carrier from continuing an over decade-long pattern of abusing its position as gatekeeper to limit consumer choice, freedom of expression, end-user control, competition, and the freedom to innovate without permission.

14 Apple. Choose your country or region. <https://www.apple.com/choose-your-country/> [Australia, Austria, Belgium, Brazil, Canada, China, the Czech Republic, Denmark, Finland, France, Germany, Hong Kong, Hungary, Ireland, Italy, Japan, Luxembourg, Malaysia, Mexico, the Netherlands, New Zealand, Norway, the Philippines, Poland, Portugal, Russia, Singapore, South Korea, Spain, Sweden, Switzerland, Taiwan, Thailand, Turkey, the United Arab Emirates, the United Kingdom.]

15 47 CFR § 27.16(f) [“Once a complainant sets forth a *prima facie* case that the C Block licensee has refused to attach a device or application in violation of the requirements adopted in this section, the licensee shall have the burden of proof to demonstrate that it has adopted reasonable network standards and reasonably applied those standards in the complainant's case.”]

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