BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
Flat Wireless, LLC, for and on behalf of its Operating Subsidiaries,	)	EB Docket No. 15-147 File No. EB-15-MD-005
Complainant,	)	
v.	)	
Cellco Partnership d/b/a Verizon Wireless, and its Operating Subsidiaries,	)	
Defendant.	)	

VERIZON'S OPPOSITION TO MOTION TO STRIKE

The Bureau should reject the motion of Flat Wireless, LLC ("Flat") to strike both the Declaration of Dr. Hal J. Singer (the "Singer Declaration") and Verizon's Modified Opposition to Interrogatories.[1] The Singer Declaration and Opposition to Interrogatories were timely and complied with the modified procedures for this case. In any event, Flat did not suffer any prejudice. And Verizon does not object if Flat now would like additional time to respond further to the Singer Declaration.

The parties agreed to a revised schedule for submission of Verizon's Answer that gave Verizon until October 9, 2015 to file the Legal Analysis portion of that Answer. The Commission staff approved that schedule, and Verizon complied with it. Verizon submitted the Singer Declaration as part of and in support of its Legal Analysis. The Singer Declaration

[1] Motion to Strike Singer Declaration and Modified Version of Verizon's Opposition to Interrogatories, EB Docket No. 15-147, File No. EB-15-MD-005 (filed Oct. 19, 2015) ("Motion to Strike").

addresses the economic principles that support Verizon's Legal Analysis, particularly the principles relevant to retail pricing and MVNO rates as compared to roaming rates. Just like the rest of Verizon's Legal Analysis, the Declaration relies upon and analyzes facts in the Answer—which were not made part of the record until Verizon actually filed the Answer—and facts publicly available. It does not constitute new facts, and the schedule did not require Verizon to include it with the Statement of Facts and supporting factual materials and declarations that Verizon filed with the earlier sections of its Answer on September 15, 2015. Similarly, Verizon's Modified Opposition to Flat's Interrogatories simply included updated references to Verizon's Legal Analysis for the convenience of the Commission; it did not introduce new facts not previously in the record. Verizon reasonably believed the parties, in jointly proposing the modified schedule, each understood what portions of Verizon's response to Flat's Complaint were required in mid-September versus early October. Flat's objections are a surprise to Verizon.

The Bureau also should deny Flat's motion because Flat has failed to show that it suffered prejudice from Verizon's filing of the Singer Declaration or the Modified Opposition to Interrogatories. There is therefore no basis to strike from the record significant analysis and cross-references to that analysis that may be helpful to the Commission in resolving the issues. Regardless, to the extent Flat may require additional time to respond to these submissions, Flat is free to request such relief, and Verizon does not object to a reasonable request for additional time.

DISCUSSION

On September 2, 2015, the parties jointly asked the Commission to revise the schedule in this proceeding to permit Verizon to file its Answer in two parts, with the Legal Analysis section

of the Answer due on October 9, 2015.[2] The Bureau granted the revised scheduling request. Under the Bureau's revised scheduling order and the Commission's rules,[3] Verizon filed its Answer and the related Statement of Facts and supporting materials, other than the Legal Analysis, on September 15, 2015. And Verizon filed its Legal Analysis, including the supporting economic analysis in the Singer Declaration, on October 9, 2015, all in accordance with the revised schedule agreed to by Flat and approved by the staff.

The Singer Declaration is an economic analysis submitted in support of Verizon's Legal Analysis and it relies entirely on facts in the record or facts that are publicly available. Verizon therefore appropriately filed it as part of the Legal Analysis section of Verizon's Answer. Flat mischaracterizes the Singer Declaration as containing new facts.[4] It does not. The Singer Declaration relies on facts included within Verizon's Answer filed on September 15, 2015, including Verizon's Statement of Facts, Verizon's Response to Flat's Interrogatories—all of which were not made part of the record until that time—and publicly available information. It is common for expert reports to consider and analyze facts already in the record to assist the factfinder in understanding the facts and putting them in context.[5] For that reason, the Federal Rules of Civil Procedure treat expert reports as separate and distinct from fact discovery.[6]

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[2] Joint Motion to Revise Scheduling Order and Consent to Amended Complaint, EB Docket No. 15-147, File No. EB-15-MD-005 (filed Sept. 16, 2015).

[3] 47 CFR § 1.724.

[4] Motion to Strike ¶¶ 1-5.

[5] *See, e.g.*, *United States v. Schiff*, 538 F. Supp. 2d 818, 884 n.26 (D.N.J. 2008) ("Expert testimony may 'assist the trier of fact to understand the facts already in the record, even if all it does is put those facts in context.'" (quoting 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 702.03[1] (2d ed. 2006))), *aff'd*, 602 F.3d 152 (3d Cir. 2010).

[6] *See* Fed. R. Civ. P. 26 (distinguishing between fact witnesses and document discovery, on the one hand, and expert reports, on the other hand, including in the timing of scheduling pretrial proceedings in civil litigation).

Flat also seeks to have the Commission strike Verizon's Modified Opposition to Interrogatories because it contains updated cross-references to Verizon's Legal Analysis and the supporting Singer Declaration. Flat argues that these cross-references demonstrate that the Singer Declaration constitutes new facts.[7] This argument, too, is groundless. There was nothing improper or untimely in Verizon's filing a Modified Opposition that did not change the substance of the previous filing but merely updated references to the Legal Analysis that Verizon filed in accordance with the revised schedule approved by the Bureau and agreed to by Flat.

The parties worked amicably together to jointly propose the modified schedule. Based on those discussions, Verizon reasonably believed the parties each understood what portions of Verizon's response to Flat's Complaint were required in mid-September versus early October. Flat's objections thus are a surprise to Verizon. And consistent with the parties' prior dealings and Verizon's accommodations for Flat in this case, even if there were a misunderstanding about the schedule, Verizon expected Flat first to approach Verizon to discuss a reasonable resolution before moving to strike.

In any event, Flat has not demonstrated prejudice by Verizon's filing of the Singer Declaration along with its Legal Analysis on October 9, 2015, as opposed to with the earlier sections of Verizon's Answer on September 15, 2015.[8] Flat asserts that it was not possible for Flat to generate its own expert opinion in the time it had to file a reply to Verizon's Legal Analysis.[9] But nothing prevented Flat from retaining an economic expert at an earlier point in

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[7] Motion to Strike ¶ 6.

[8] *See, e.g., Galentine v. Holland Am. Line-Westours, Inc.*, 333 F. Supp. 2d 991, 998 (W.D. Wash. 2004) (denying motion to strike expert declaration that was filed 11 days after deadline because "any prejudice that Defendants may suffer by admitting [expert's testimony] can be ameliorated by less severe means than excluding [the expert's] testimony").

[9] Motion to Strike ¶ 5.

this proceeding. And if Flat were truly disadvantaged by the need to present economic analysis in response to the Singer Declaration, the preferred recourse would be for Flat to request additional time in the schedule to prepare such an analysis, rather than for the Commission to strike the Singer Declaration. Verizon will consent to a reasonable extension of time for that purpose.

Striking the Declaration from the record, in contrast to the alternative of simply giving Flat additional time to respond to it, will have significant downsides for the Commission in rendering a decision in this proceeding. If Flat's motion is granted, the Commission would lose the benefit of having a full presentation and analysis of the issues raised by Flat's arguments.

CONCLUSION

For these reasons, the Singer Declaration and Verizon's Modified Opposition to Interrogatories should remain part of the record in this proceeding. The Commission should deny Flat's Motion to Strike.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October, 2015, copies of the foregoing letter and all attachments thereto were delivered by U.S. mail and electronic mail to the following individual:

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