

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554**

In the Matter of	)	
	)	
NTCH, Inc.,	)	
	)	
Complainant	)	
	)	File No. EB-13-MD-006
v.	)	
	)	Docket No. 14-212
Cellco Partnership d/b/a Verizon Wireless	)	
	)	
Defendant	)	

**Motion to Strike Singer Declaration**

NTCH, Inc. (“NTCH”) hereby moves the Commission to strike the untimely and inappropriate attempt by Verizon to introduce new material into the record via a “Declaration” submitted by Dr. Hal Singer, a paid economist retained by Verizon, which was appended to Verizon’s Response Brief filed on October 9, 2015. As will be set forth below, the Singer Declaration constitutes entirely new evidence which was required to be filed in Verizon’s Answer no later than August 4, 2014.

1. Verizon’s Answer in this case was filed more than a year ago on August 4, 2014. The Commission’s rules (47 C.F.R. Section 1.724) require the Defendant’s Answer to advise the Commission “fully and completely of the nature of any defense” (1.724(b)). Most significantly for our purposes here, the rule specifically requires the defendant to attach to the Answer “copies of all affidavits, documents, data compilations and tangible things in the defendant’s possession, custody or control, upon which the defendant relies or intends to rely to support the facts alleged

and legal arguments made in the answer.” (1.724(g)). Thus, all affidavits or declarations on which Verizon intended to rely had to be filed by August 4 of last year.

2. Dr. Singer’s “Declaration” is by definition in the category of factual material which the rules require to be submitted at the Answer stage. Not only is it self-described as a “Declaration,” but it represents the presumably expert opinion of Dr. Singer. Expert opinions are deemed factual matters for purposes of the rules of evidence. See Federal Rule of Evidence 702. This is why such evidence is subject to challenge, preliminary qualification, rebuttal, and cross examination in an ordinary hearing context, just like any other piece of evidence. An expert’s proffered opinion is in no sense the sort of legal analysis of the facts and law pertinent to the case that is presented in a “brief.” The whole point of a “brief” is to analyze the legal import of the factual and legal material that has been presented to the adjudicator after the close of the record. If new evidence could be adduced at this late stage of the proceedings, proceedings would never come to an end.

3. Of course, Dr. Singer does not even purport to offer legal analysis; he is an economist, not a lawyer. His statement includes a treatment of economic theories, not legal principles. His declaration has no place in a document which was correctly denominated as a “Response Brief.” Apparently realizing that its case was insufficient, Verizon has attempted to sneak new evidence into the record under the guise of a responsive brief. This patent abuse of the pleading process should not be countenanced, not only on fairness grounds but because it violates the hearing procedures established by Section 1.724 that require the facts in the case to be submitted at a very early stage of the hearing process, not trickling in a year later as the Defendant assesses the infirmities in its case.

4. While Dr. Singer’s Declaration as an expert “opinion” itself constitutes new evidence in its entirety, he also relies on his “understanding” of other “facts” regarding the state of competition

in the retail market, the availability of other roaming sources, the development of CDMA-based carriers, Verizon expenditures on LTE development, Verizon's ARPA, and other facts which are found nowhere else in the record. Verizon has simply used Dr. Singer's declaration as a back door path to introduce material which it was required to file much earlier in the process but did not.

5. Verizon's ploy is particularly offensive because it comes almost at the tail end of the pleading cycle. Verizon has had well over a year since the original due date of this Declaration to generate the evidence. It would be impossible for NTCH to generate a responsive expert opinion in the brief two-week period which the agreed schedule afforded NTCH to respond to Verizon's Response Brief. And to do so would further prolong and delay an already protracted proceeding for no valid reason other than Verizon's desire to belatedly shore up its position.

For the reasons set forth above, the Singer Declaration and all reliance by Verizon on it should be stricken in its entirety from the record.

Respectfully submitted,

NTCH, Inc.



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

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October 23, 2015

**CERTIFICATE OF SERVICE**

I, Jonathan R. Markman, do certify that I sent the foregoing MOTION TO STRIKE OF NTCH, INC., on this 23rd day of October, 2015, addressed to the following (by agreement of the parties) via email:

Christopher M. Miller  
Andre J. Lachance  
Tamara Preiss  
Verizon Wireless

Rosemary McEnery  
Deputy Chief, Market Disputes Resolution Division  
Enforcement Bureau  
Federal Communications Commission

Lisa Boehley  
Market Disputes Resolution Division  
Enforcement Bureau  
Federal Communications Commission



By: \_\_\_\_\_  
Jonathan R. Markman