MB Docket No 10-263

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

FILED/ACCEPTED
DEC 22 2010
Federal Communications Commission
Office of the Secretary

In the Matter of	)	
	)	
Zoom Telephonics, Inc.	)	File No. CSR-____
Complainant	)	
	)	
v.	)	
	)	
Comcast Cable Communications, LLC	)	
Defendant	)	

REPLY TO OPPOSITION TO MOTION TO DISMISS

Comcast Cable Communications, LLC ("Comcast") files this reply in response to Zoom Telephonics, Inc.'s ("Zoom's") Opposition to Comcast's Motion to Dismiss Zoom's Complaint.[1] Zoom's Opposition is without merit. Accordingly, Comcast renews its request that its Motion to Dismiss be granted.

As Comcast described in its Motion to Dismiss, Zoom and its attorneys omitted key correspondence between the parties from its Complaint (which appended much of the parties' *other* correspondence), misled the Commission regarding the status of the parties' business discussions about Physical and Environmental ("P&E") testing of Zoom's DOCSIS 2.0 modem, and failed to disclose to the Commission material facts regarding the various compromises that Comcast has offered in response to Zoom's business concerns prior to Zoom's filing of its

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[1] *See In re Zoom Telephonics, Inc. v. Comcast Cable Communications, LLC*, Complaint, File No. CSR. ___ (Nov. 29, 2010) ("Complaint"); *In re Zoom Telephonics, Inc. v. Comcast Cable Communications, LLC*, Motion to Dismiss, File No. CSR ___ (Dec. 7, 2010) ("Motion to Dismiss"); *In re Zoom Telephonics, Inc. v. Comcast Cable Communications, LLC*, Opposition to Motion to Dismiss, File No. CSR ___ (Dec. 16, 2010) ("Opposition").

Complaint.[2] As such, Zoom failed to satisfy the Commission's requirements that a complaint be accurate and complete and detail "all steps taken . . . to resolve the problem," and also failed to comply with the Commission's general duty of candor in adjudicatory proceedings.[3] Zoom's blatant disregard of the Commission's rules constitutes "extraordinary circumstances" justifying the filing of Comcast's Motion to Dismiss.[4]

In its Opposition, rather than addressing its noncompliance with the Commission's rules, Zoom attempts to excuse its actions (or inaction in this case) by claiming it was somehow constrained from disclosing to the Commission material facts relevant to its Complaint. The heart of Zoom's Opposition is that the correspondence between the parties immediately prior to the filing of the Complaint consisted of "confidential settlement discussions" and that Zoom had an affirmative duty not to disclose the correspondence.[5] Zoom is incorrect as a matter of fact and law. It was never Comcast's understanding that the parties were engaging in settlement discussions when the parties exchanged the correspondence. When Comcast engages in such discussions, it typically will execute a non-disclosure agreement with the other party making clear that the discussions are confidential and for settlement purposes only. No such agreement was executed between the parties here, nor did either party ever request such an agreement. In

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2 *See generally* Comcast Motion to Dismiss.

3 *See id.* at 4 (citing 47 C.F.R. § 76.7(a)(4)(ii)).

4 47 C.F.R. § 76.7(d).

5 *See* Opposition at 3-6.

addition, Comcast gave no indication in its correspondence with Zoom that Comcast believed the discussions should be treated confidentially.[6]

Furthermore, Comcast viewed the exchange of correspondence as part of ongoing *business* discussions with Zoom, not "for settlement purposes." As Comcast explained in its Answer,[7] Comcast agreed to move forward with testing of Zoom's new DOCSIS 2.0 modem on October 6, 2010, and began making arrangements for the testing shortly thereafter. When Zoom raised concerns about P&E testing, Comcast responded promptly with proposals to address those concerns and keep the testing and certification process for Zoom's device moving forward. In short, these were purely business discussions, similar to those Comcast has with hundreds of other vendors or their representatives. Comcast's expectation was that the parties would work through the testing issues, as they had done with respect to Zoom's earlier DOCSIS 3.0 modem, and that testing of the Zoom device would begin once the device received CableLabs' certification.

Zoom's suggestion that Rule 408 of the Federal Rules of Evidence is somehow relevant here[8] is without merit. As an initial matter, the Federal Rules of Evidence do not generally apply to agency proceedings.[9] Where the Commission has adopted those rules, it has done so

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[6] Only one of Zoom's many communications with Comcast even indicated that it might consider any of the discussions confidential or for purposes of settlement.

[7] *See In the Matter of Zoom Telephonics, Inc. v. Comcast Cable Communications, LLC*, Answer of Comcast Cable Communications, LLC, File No. CSR. __ ¶¶ 30-37 (Dec. 20, 2010) ("Answer").

[8] *See* Opposition at 4.

[9] *See Angstadt v. FAA*, 348 F. App'x 589, 590 (D.C. Cir. 2009) (noting that "[a]gency proceedings are not governed by the Federal Rules of Evidence").

expressly,[10] and even then it has made clear that "[s]uch rules may be relaxed if the ends of justice will be better served by so doing."[11] In contrast, Part 76 of the Commission's rules makes no reference to the Federal Rules of Evidence, and the specific Commission rule at issue -- Section 76.7 -- expressly *requires* disclosure of "*all* steps taken by the parties to resolve the problem."[12] Hence, Rule 408 did not excuse Zoom from complying with the Commission's rules, nor did it prohibit the filing of Comcast's Motion to Dismiss.

Even assuming arguendo that the Federal Rules of Evidence were relevant in this case, case law is clear that Rule 408 is inapplicable where, as here, the correspondence in question was not made with the intent to settle a claim. Correspondence constitutes a confidential settlement communication only where the "statements or conduct were intended to be part of the negotiations for compromise" of a disputed claim.[13] That was not the case with the correspondence at issue here. Zoom had not yet filed its Complaint, so there was no dispute that required compromise. Moreover, Comcast was unaware that Zoom was even considering filing a complaint when Comcast received Zoom's November 18, 2010 correspondence, which Zoom had unilaterally labeled as "confidential -- for settlement purposes only."[14] And Zoom's filing of

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[10] *See* 47 C.F.R. § 1.351 (2009).

[11] *Id.*

[12] *Id.* § 76.7(a)(4)(ii) (emphasis added).

[13] *Fiberglass Insulators, Inc. v. Dupuy*, 856 F.2d 652, 654 (4th Cir. 1988) (internal citation and quotation marks omitted).

[14] *See* Opposition Ex. 1; Answer Ex. 17. None of the other correspondence between Comcast and Zoom was marked in this way, and the first indication Zoom was even contemplating contacting the Commission was not made until November 24, 2010, five days before the Complaint was filed. *See* Answer Ex. 19 (E-mail from Matthew Berry, Patton Boggs LLP, to Joe Waz, Comcast (Nov. 24, 2010, 4:08 p.m.)). In any event, Zoom largely repeated its "confidential" proposal as its request for relief in the Complaint, but conveniently omitted all of Comcast's correspondence concerning how Comcast attempted to address Zoom's concerns.

its Complaint just a short time later -- notwithstanding Comcast's efforts to address its concerns about P&E testing -- simply underscores that Zoom's correspondence was unrelated to good-faith settlement discussions.[15]

Even if the parties' correspondence constituted settlement discussions, neither Zoom's inclusion of the correspondence (had it done so) nor Comcast's disclosure of the correspondence would be prohibited by Rule 408 or be in any way "unethical." Rule 408 bars the use of statements made during settlement negotiations in order to prove "liability for, invalidity of, or amount of" a disputed claim.[16] By its terms, however, Rule 408 "does not require exclusion if the evidence is offered for purposes not prohibited."[17] Plainly, Comcast's correspondence with Zoom had nothing to do with "prov[ing] the validity, invalidity, or amount of a disputed claim,"[18] and Zoom would not have been using the correspondence for any purpose other than satisfying the Commission's requirement to be forthcoming about the parties' interactions. For this reason alone, Comcast's disclosure of all the material facts related to the Complaint was consistent with Rule 408, and nothing in Rule 408 excused Zoom from complying with the Commission's rules.

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15 *See, e.g., Raybestos Prods. Co. v. Younger*, 54 F.3d 1234 (7th Cir. 1995) (holding that a party's communication was not covered by Rule 408 because it was intended to intimidate the opposing side, not to form the basis of a settlement). Zoom filed its *117-page* Complaint just 11 days after sending Comcast its November 18 proposal and just five days after its November 24 proposal, suggesting that Zoom had no particular interest in resolving its differences with Comcast. Obviously, Zoom had been drafting its Complaint even while Comcast was making good-faith efforts through the Thanksgiving holiday to work with Zoom.

16 Fed. R. Evid. 408(a) ("Rule 408").

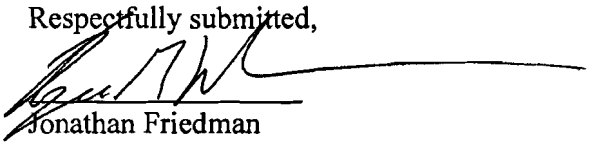
17 *Id.* 408(b).

18 *Id.*, Advisory Committee Notes on 2006 Amendment; *see, e.g., Athey v. Farmers Ins. Exch.*, 234 F.3d 357 (8th Cir. 2000) (admitting evidence of settlement negotiations for purpose of proving insurer's bad faith).

Finally, it bears noting that Zoom entirely sidesteps the issue of its non-compliance with the basic requirement in Section 76.7 that the complainant detail "all steps taken . . . to resolve the problem." The Commission has repeatedly underscored its strong preference for parties to resolve their differences voluntarily, rather than entangling the Commission in time-consuming, complex adjudication.[19] The requirement in Section 76.7 advances that policy, while also ensuring the accuracy and completeness of the record. Zoom's withholding of material facts from the Commission frustrates these core objectives. Zoom should be held accountable for flouting the Commission's rules in this way.

For the reasons set forth herein and in Comcast's Motion to Dismiss, Comcast urges the Commission to dismiss Zoom's Complaint. In the alternative, Comcast asks that the Commission deny Zoom's Complaint for the reasons set forth in Comcast's Answer.

Respectfully submitted,



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December 22, 2010

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[19] *See, e.g., In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity of Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd. 3359, ¶ 124 (1993); *In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity of Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd. 2642, ¶ 25 (1993).

VERIFICATION

I, Ryan Wallach, do hereby declare and state under penalty of perjury as follows:

1. I am Special Counsel at Willkie Farr & Gallagher LLP and

2. I have read the foregoing Reply to Opposition to Motion to Dismiss of Comcast Corporation ("Reply"). To the best of my personal knowledge, information, and belief, the statements made in this Reply other than those of which official notice can be taken, are well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. This Reply is not interposed for any improper purpose.

December 22, 2010

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CERTIFICATE OF SERVICE

I, Robin Smith, hereby certify that, on December 22, 2010, copies of the attached "Reply To Opposition to Motion to Dismiss" were served by hand delivery to the following except for those marked by (*), who were served by First-Class Mail.

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