

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

MEMORANDUM OPINION AND ORDER

Adopted: August 6, 2019

Released: August 6, 2019

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. Complainant Alex Nguyen (Nguyen) filed a formal complaint under section 208 of the Communications Act of 1934, as amended (Act),1 alleging that Verizon Wireless (Verizon) violated the Act, and various Commission rules and orders, by: (a) unlawfully interfering with customers’ ability to use devices or applications of their choice on Verizon’s network; (b) interfering with edge providers’ ability to develop devices and applications of their choice; and (c) failing to adequately disclose its network management practices. In this Memorandum Opinion and Order, we deny Nguyen’s Complaint for failure to satisfy its burden of proving by competent evidence that Verizon violated the Act or the Commission’s rules or orders. Rather than support its claims with sworn affidavits from witnesses with personal knowledge of the facts, the Nguyen Complaint rests almost entirely on unverified news reports and blog posts.

1 47 U.S.C. § 208. Complaint, Proceeding Number 16-242; Bureau ID Number EB-16-MD-003 (filed July 26, 2016) (Complaint); Answer of Cellco Partnership d/b/a Verizon Wireless, Proceeding Number 16-242; Bureau ID Number EB-16-MD-003 (filed Sept. 22, 2016) (Answer); Reply and Legal Analysis, Proceeding Number 16-242; Bureau ID Number EB-16-MD-003 (filed Oct. 31, 2016) (Reply). Nguyen filed his complaint pro se and was granted relief from certain procedural requirements, discussed below. Letter from Rosemary McEnery, Deputy Chief, Market Disputes Resolution Division, to Alex Nguyen, and David Haga, Verizon (dated Feb. 2, 2016); see, e.g., In the Matter of David S. Poole and Michigan Multimedia & Telecommunications, Inc. v. Michiana Metronet, Inc. and Lucas J. Caruso, Memorandum Opinion and Order, 15 FCC Rcd 9944, 9947, para. 8 (1999) (affording to a pro se complainant “considerable flexibility with respect to the procedural rules governing formal complaint proceedings”). The Notice of Complaint stated that although certain claims in the Complaint alleging violations of 47 CFR §§ 8.3, 8.5 and 8.11 were subject to the procedural rules at 47 CFR §§ 8.12-16, in the interest of simplicity, staff would utilize the section 208 procedural rules in this proceeding. Notice of Complaint, Bureau ID Number EB-16-MD-003 (dated Aug. 4, 2016).

II. BACKGROUND

A. Legal Framework

2. We briefly review here the various rules, statutory provisions and orders at issue in this Complaint. These include the Commission's C Block rules,² which prohibit, *inter alia*, certain 700 MHz C Block licensees (including Verizon) from limiting or restricting consumers' ability to use the applications and devices of their choice, subject to reasonable network management practices, and from disabling features on handsets or configuring handsets they provide in a manner that prohibits that handset from being used on another provider's network.³ In adopting these rules, the Commission emphasized that it was "not requiring wireless service providers to allow the unrestricted use of *any* devices or applications on their networks" and affirmed that "[w]ireless service providers may continue to use their own certification standards and processes to approve use of devices and applications on their networks so long as those standards are confined to reasonable network management."⁴ In 2012, Verizon entered into a *Consent Decree* with the Commission's Enforcement Bureau in which Verizon agreed to implement various programs to ensure compliance with the Commission's C Block rules regarding customers' ability to use devices and applications of their choice on the licensee's C Block network.⁵

3. In 2015, the Commission released an order that, *inter alia*, classified mobile broadband Internet service providers as common carriers subject to Title II of the Act.⁶ The *Title II Order* made mobile broadband Internet service providers subject to Section 201(b) of the Act, which prohibits unjust and unreasonable practices by common carriers, and Section 202(a) of the Act, which bars unjust and unreasonable discrimination.⁷ In addition, the Commission adopted rules prohibiting mobile broadband providers from blocking or throttling "lawful content, applications, services, or non-harmful devices, subject to reasonable network management"⁸ and from unreasonably interfering with or unreasonably disadvantaging: (i) end users' ability to select, access, and use broadband Internet access service or lawful content, applications, services, or devices; or (ii) edge providers' ability to make lawful content,

² 47 CFR § 27.16 (C Block rules). Formal complaints alleging violations of the C Block rules are governed by the Commission's formal complaint rules. *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Second Report and Order, 22 FCC Rcd 15289, 15374, para. 229, n.517 (2007) (*700 MHz Order*); see 47 CFR §§ 1.720-1.736. On July 12, 2018, the Commission revised the formal complaint procedural rules. *Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, Report and Order, 33 FCC Rcd 7178 (2018) (*Rule Consolidation Order*). The references in this order to the formal complaint procedural rules mean the rules in effect when Nguyen filed the Complaint on July 26, 2016.

³ See 47 CFR § 27.16(b), (e); *700 MHz Order*, 22 FCC Rcd at 15364, paras. 203-04.

⁴ *700 MHz Order*, 22 FCC Rcd at 15371, para. 223 (emphasis in original).

⁵ See Consent Decree, *Cellco Partnership d/b/a Verizon Wireless*, 27 FCC Rcd 8934 (EB 2012) (*2012 Consent Decree*). Because the Complaint does not meet the burden of showing that Verizon has violated any provision of the *2012 Consent Decree*, we need not address Verizon's defense that the *2012 Consent Decree* expired in July 2014 and imposed no continuing obligations on Verizon after that date. Answer, Legal Analysis, at 20.

⁶ *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5725-26, para. 288 (2015) (*Title II Order*).

⁷ See *Title II Order*, 30 FCC Rcd 5601, para. 288 (applying Sections 201(b) and 202(a) to broadband Internet access services). Section 201(b) of the Act requires that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable." 47 U.S.C. § 201(b). Section 202(a) makes it "unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service." 47 U.S.C. § 202(a). See *Title II Order*, 30 FCC Rcd at 5638, para. 92.

applications, services, or devices available to end users.⁹ The Commission also amended a previously adopted rule requiring mobile broadband providers (such as Verizon) to be transparent in disclosing network management practices.¹⁰

4. On January 4, 2018, the Commission restored broadband Internet access service to its pre-2015 Title I information service classification, revised the transparency rule, and eliminated the conduct rules adopted in the *Title II Order* as well as the procedural rules adopted in the *2010 Open Internet Order*.¹¹ We are assuming for the purposes of this proceeding that the substantive rules adopted in the *Title II Order* apply to the period at issue in the Complaint.¹²

B. Nguyen's Complaint

5. Verizon is a wireless broadband service provider that holds various Commission licenses, including in the 700 MHz bands.¹³ Nguyen was a Verizon customer at the time of the Complaint.¹⁴

6. Nguyen alleges that Verizon violated the C Block rules,¹⁵ Sections 201(b) and 202(a) of the Act, the *Title II Order* rules,¹⁶ and the *2012 Consent Decree*¹⁷ by interfering with: (a) customers' ability to use various mobile devices and applications of their choice, and (b) the ability of edge providers to make those devices and applications available to customers. The Complaint also alleges that Verizon has taken an unreasonable amount of time to certify devices purchased from third parties for use on Verizon's network;¹⁸ has imposed discriminatory pricing on devices purchased from third-parties;¹⁹ and has failed to provide accurate disclosures concerning whether various devices are compatible with its network.²⁰ Although the Complaint addresses approximately 22 different devices, it did not attach an affidavit or other verified evidence describing efforts by Nguyen or anyone else to use any of these devices on Verizon's network.

7. Nguyen also alleges that Verizon unlawfully failed to "preload" certain applications,

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⁸ 47 CFR §§ 8.5 (no blocking); 8.6 (no throttling) (2016). The Commission stated that for broadband Internet access services, it would "evaluate whether a practice is unjust, unreasonable, or unreasonably discriminatory" using the "no-unreasonable interference/disadvantage standard." *Title II Order*, 30 FCC Rcd at 5729, para. 295.

⁹ 47 CFR § 8.11 (2016). We refer to the former Part 8 rules, 47 CFR §§ 8.1-8.19 (2016), as the "*Title II Order*" rules. The *Title II Order* also adopted a rule prohibiting broadband Internet access providers from engaging in "paid prioritization" that favored some traffic over other traffic. See 47 CFR § 8.9. We refer to the former rules 8.5, 8.6, 8.9 and 8.11 collectively as "conduct rules."

¹⁰ 47 CFR § 8.3 (2016). The *Title II Order* left largely unchanged a set of procedural rules governing complaints against broadband Internet service providers that the Commission had adopted in its *2010 Open Internet Order*. See *Preserving the Open Internet; Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, 17988, para. 157 (2010) (*2010 Open Internet Order*), *aff'd in part, vacated and remanded in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014). The *Title II Order* extended electronic filing requirements to Part 8 complaints. *Title II Order*, 30 FCC Rcd at 5716, para. 259.

¹¹ *In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (Jan. 4, 2018) (*Restoring Internet Freedom Order*).

¹² As indicated in n.1 above, rather than applying the procedural rules at 47 CFR §§ 8.12-16 to the specific complaint allegations asserting violations of the *Title II Order's* conduct rules, staff simplified the process by directing in the Notice of Complaint that all the claims in the Complaint would be subject to the section 208 procedural rules.

¹³ Answer at 8-9, paras. 1-3.

¹⁴ Complaint at 1, para. 1.

and/or disabled certain applications or capabilities, on the devices Verizon sells.²¹ The Complaint does not allege that Nguyen used or sought to use any of these applications on Verizon's network nor does it provide an affidavit or other verified evidence describing any customer's efforts to use any of these applications on Verizon's network. The Complaint further alleges that Verizon unlawfully disabled (or compelled manufacturers to disable) certain functionalities on devices sold by Verizon—namely, FM radio chips and embedded (built-in) SIM²² cards in Apple iPad devices²³—but provides no affidavit or other verified evidence from anyone with first-hand knowledge of this alleged conduct.

8. Nguyen asks the Enforcement Bureau to initiate an investigation of Verizon's conduct and to impose a forfeiture penalty of \$81 billion.²⁴ Nguyen also seeks damages of approximately \$1,700 and other relief.²⁵

III. DISCUSSION

9. We deny Nguyen's Complaint because he did not meet his burden to adduce evidence sufficient to demonstrate that Verizon violated the Act or any Commission rule or order.²⁶ A complainant has the burden in a formal complaint proceeding under section 208 of the Act, and under the *Title II Order* and C Block rules, to demonstrate by a preponderance of the evidence that the alleged conduct occurred and that it violated the Act or a Commission rule or order.²⁷ Reviewing the entire record here, we find that Nguyen failed to meet that burden by providing reliable evidence in support of the violations alleged in the Complaint.

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¹⁵ 47 CFR § 27.16.

¹⁶ 47 CFR §§ 8.3, 8.5, 8.11 (2016).

¹⁷ *2012 Consent Decree*, 27 FCC Rcd 8934.

¹⁸ Complaint at 14-24; Reply at 18-33; Complaint at Count One, paras. 132-55. As discussed below, in connection with the certification allegation, the Complaint alleges that Verizon prevents its SIM cards from being used in mobile devices sold by other carriers (that Verizon has yet to certify for use on its network). Complaint at Count One, paras. 132-55; Complaint at Count Two, paras. 156-74.

¹⁹ Complaint at 25-29; Reply at 33-37; Complaint at Count Two, paras. 156-74.

²⁰ Complaint at 49-50; *id.* at Counts Five and Six, paras. 222-36.

²¹ Complaint at 29-49; Reply at 38-59; Complaint at Counts Three and Four, paras. 175-221.

²² The Subscriber Identity Module, or "SIM," is a card with a microchip that can either physically be inserted, or built into a device implemented into the software, and identifies, for example, the caller to a mobile network as being a legitimate user. Harry Newton, *Newton's Telecom Dictionary* at 1153-54 (31st ed. 2018).

²³ Complaint at 29-33. The parties requested and exchanged discovery in this proceeding. On March 10, 2017, Nguyen filed responses to Verizon's interrogatories. Reply to Defendant's First Set of Interrogatories, Proceeding Number 16-242; Bureau ID Number EB-16-MD-003 (filed Mar. 10, 2017) (Nguyen Interrogatory Responses). On April 21, 2017, Verizon filed its responses to Nguyen's interrogatories. Verizon's Responses to Complainant's First Set of Interrogatories, Proceeding Number 16-242; Bureau ID Number EB-16-MD-003 (filed Apr. 21, 2017) (Verizon Interrogatory Responses). See Letter from Rosemary McEnery, Deputy Chief, Market Disputes Resolution Division, to Alex Nguyen, and David Haga, Verizon (dated Mar. 22, 2017) (Second Status Conference Order). On

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10. The Commission’s rules governing this proceeding require facts in a complaint to be “supported by relevant documentation or affidavit.”²⁸ Under these rules, “the complaint, answer, and any necessary reply may serve as the principal basis upon which the Commission will make a decision on the merits of the complaint[,]” but argument alone, absent reliable factual evidence, is insufficient.²⁹

11. Here, Nguyen’s allegations in the Complaint and the Reply are supported almost entirely by unverified information from Internet blogs, webpages, and news reports. Rather than providing sworn testimony from witnesses with personal knowledge of relevant facts, the Complaint and Reply cite news articles and blogposts containing unverified information.³⁰ Many of the blog posts on which Nguyen relies have anonymous authors,³¹ and some of the posts even acknowledge that the author is speculating or expressing opinion.³² This material does not constitute reliable evidence sufficient to support the factual assertions for any of the alleged violations.³³

12. Nguyen has submitted no affidavits or declarations providing firsthand factual information that, if true, could establish the violations of the Act and the Commission’s rules alleged in the Complaint.³⁴ Further, the Complaint allegations are unsupported by contemporaneous business records.³⁵ Although Nguyen asserts that he purchased some of the mobile devices addressed in the Complaint,³⁶ and states in his unsworn interrogatory responses that he used or attempted to use a number of these devices on Verizon’s network at various times,³⁷ the record contains no affidavit or other reliable evidence providing firsthand information substantiating his allegations about Verizon’s unlawful conduct with respect to these devices.³⁸ For example, Nguyen’s allegation that Verizon employed an unnecessary device certification process to block customers from using third party devices on its network is unsupported by affidavits or business records reflecting Verizon’s certification process or its interactions with device makers regarding the testing or certification of particular devices.³⁹ Rather, Nguyen’s factual support is based almost entirely on unsworn hearsay in blogs and news articles.⁴⁰

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May 30, 2017, the parties jointly advised Commission staff that briefing in this case is not necessary. Joint Report in Response to May 10, 2017 Letter Order, Proceeding Number 16-242; Bureau ID Number EB-16-MD-003 (filed May 30, 2017). After the pleading cycle established by Commission Staff was complete, and the parties had indicated briefing was not necessary, Nguyen attempted to file additional documents in this record (without requesting leave to do so). *See, e.g.*, Letter from Alex Nguyen to Marlene H. Dortch, FCC, Proceeding Number 16-242; Bureau ID Number EB-16-MD-003 (dated Oct. 31, 2017); *see also* Update, Proceeding Number 16-242; Bureau ID Number EB-16-MD-003 (filed July 3, 2018). The documents filed after the pleading cycle was complete are improperly filed out of time and are not part of the record of this proceeding.

²⁴ Complaint at 108-09, para. 276. Forfeitures are paid into the U.S. Treasury, rather than to individual complainants, and are not an available remedy in formal complaint proceedings. *See, e.g., In the Matter of JMJ Associates, Inc.*, Request for Reconsideration, 14 FCC Rcd 15398, 15400, para. 6 (1999) (“Forfeitures and other Commission-initiated enforcement actions are not, however, available as remedies to complainants in informal or formal complaint proceedings.”); 47 U.S.C. § 504.

²⁵ Complaint at 105-08, paras. 269-74. The claimed damages are for the allegedly excessive price of certain devices and services that Nguyen purchased. *See id.* Nguyen also requests that Verizon be required to modify its practices regarding pricing and SIM card availability and advertising. In addition, Nguyen asks the Commission to evaluate Verizon’s basic qualifications to be a licensee. *See id.* at 101-04, paras. 260-68.

²⁶ Because we find that Nguyen failed to adduce sufficient evidence in support of his claims, we need not and do not address Verizon’s affirmative defense that allegations in the complaint fail to state a claim for a violation of the Act or any Commission rule. Answer at 92. In addition, we note that the Complaint describes certain conduct that pre-dates the 2010 *Open Internet Order* rules, the Commission’s 2015 changes to the rules (including the Title II

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13. Likewise, no verified evidence in the record supports Nguyen's allegation that Verizon engaged in discriminatory pricing. Nguyen asserts that Verizon imposes discriminatory "effective line access charges" and activation fees on customers seeking to use devices purchased from third parties on Verizon's network.⁴¹ Nguyen's discriminatory pricing claim is grounded on Verizon's practice, for a limited time, of waiving certain charges for customers financing devices through Verizon (a practice that Verizon admits).⁴² 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 that were critical of various pricing plans offered by Verizon and other carriers.⁴³ Moreover, Nguyen provides no reliable evidence that Verizon's waiver of fees for customers financing devices through Verizon ultimately resulted in Verizon charging discriminatory fee amounts over the course of any financing arrangement.⁴⁴ Nguyen has failed to show that the net price that Verizon charged customers who financed their devices through Verizon was more favorable than the price Verizon charged customers who brought their own devices, when all the financing charges and the service charges are taken into account. Thus, we find that Nguyen failed to meet his burden to prove by a preponderance of the evidence that Verizon violated the Act or the Commission's rules.

14. Nguyen also provides no first-hand evidence supporting his allegation that Verizon violated the transparency requirements under the *Title II Order* and C-Block rules by failing to clearly inform device and application providers of the criteria for obtaining access to Verizon's network.⁴⁵ Nguyen cites no affidavit or declaration from a device or application provider indicating that Verizon did not clearly explain the criteria for accessing its network or that it denied or delayed access for a particular device or application without an adequate explanation.⁴⁶

15. Similarly, Nguyen provides no direct and verified evidence for his allegation that Verizon compels device providers to alter built-in tethering features, citing instead an article posted on a website.⁴⁷ Nor does Nguyen provide verified first-hand evidence supporting its allegation that Verizon blocked Samsung from offering the application, Pay with Paypal, as a separate download on Samsung phones, relying instead on articles posted on websites.⁴⁸ Likewise, Nguyen's allegation that Verizon compelled

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classification of broadband Internet access services), and the *2012 Consent Decree*. See, e.g., Complaint at 5, nn. 12, 13, 15 (citing articles dated from 2009). Because we find the Complaint lacks merit on other grounds, we need not reach the question of whether some of the claims in the Complaint are based on conduct that pre-dates the rules or the Consent Decree provisions Nguyen relies on, and thus are not subject to them.

²⁷ See, e.g., *Directel, Inc. v. American Telephone and Telegraph Company*, Memorandum Opinion and Order, 11 FCC Rcd 7554, 7560-61, paras. 14-15 (1996); see also, e.g., *Consumer.net, LLC v. Verizon Communications, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 2737, 2740, para. 10 (EB 2010) ("It is well established that the Complainant has the burden of proof in a formal complaint proceeding under section 208 of the Act. Thus, to prevail, a Complainant must demonstrate by a preponderance of the evidence that the alleged violation of the Act or the Commission's rules actually occurred.") (citations omitted). See *Title II Order*, 30 FCC Rcd at 5713, para. 252 ("Generally, complainants bear the burden of proof and must demonstrate by a preponderance of the evidence that an alleged violation has occurred. A complainant must plead with specificity the basis of its claim and provide facts and documentation, when possible, to establish a *prima facie* rule violation.") (citations omitted). We note that Section 27.16(f) of the C Block rules provides in part that "[o]nce 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." 47 CFR § 27.16(f). Because Nguyen failed to provide evidence establishing a *prima facie* case that Verizon refused to attach a device or application in violation of the requirements Section 27.16, the burden never shifted to Verizon to demonstrate that it adopted reasonable network standards and reasonably applied those standards in Nguyen's case. In any event, even if Nguyen had satisfied his initial burden to establish a *prima facie* case, he has failed to rebut the evidence that Verizon submitted in its defense.

handset suppliers to disable chips for receiving FM radio broadcast signals in devices that Verizon sells is unsupported by any testimony or business records from a device supplier or anyone else with direct knowledge of Verizon's interactions with handset suppliers.⁴⁹ Instead, Nguyen supports this claim almost entirely by citation to material on the websites of third parties that are not device suppliers.⁵⁰

16. Verizon, in contrast, submitted un rebutted evidence supporting its denials of the Complaint allegations. Specifically, Verizon submitted seven sworn declarations from Verizon employees with knowledge of the disputed matters, and three certifications supporting information contained in its interrogatory responses.⁵¹ Nguyen's Complaint and Reply, on the other hand, contained no sworn declarations or other evidence demonstrating firsthand knowledge of any of the facts alleged in the Complaint.⁵² Where, as here, a complainant offers no verified, reliable, firsthand evidence showing a violation of the Act or any rule or order of the Commission, and the defendant provides sworn testimony supporting its denial of the complaint allegations, we must conclude that the complainant has failed to meet his burden of proof.

17. In addition, we reject Nguyen's claim that Verizon violated former rule 8.3, which required broadband Internet access service providers to disclose information "sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings."⁵³ The record shows that on December 28, 2015, Nguyen advised Verizon by letter that its website inaccurately stated that Apple iPhone 6 and 6 Plus devices purchased from third parties were not compatible with Verizon's network.⁵⁴ Verizon acknowledges the inaccuracy and asserts that "after Mr. Nguyen alerted Verizon [on December 28, 2015] that Verizon's 'Apple iPhone FAQ' page needed to be updated, it took action promptly to update its page [and notified Mr. Nguyen of the correction on January 18, 2016]."⁵⁵ We cannot determine from the record how long the inaccurate information was posted. Because the record does not show that the

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²⁸ Both rules 1.720(c) and 8.13(a)(3) in effect at the time the Complaint was filed state that facts contained in a complaint or other pleading "must be supported by relevant documentation or affidavit." 47 CFR §§ 1.720(c), 8.13(a)(3).

²⁹ *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22508, para. 22 (1997) (*Formal Complaints Order*). See also *id.* at 22529, para. 71 (stating that a "principal goal" of the rulemaking proceeding that led to adoption of the formal complaint rules was "to improve the utility and content of the complaint and answer by requiring complainants and defendants to exercise diligence in compiling and submitting full legal and factual support in their initial filings with the Commission."); *id.* at 22508, para. 24 ("By requiring initial pleadings to contain complete information and documentation, the parties and the Commission will be better prepared to resolve disputed issues at an early stage of the complaint process."); *id.* at para. 81 ("[T]he complaint, answer, reply, and any other required pleading are required to include full statements of relevant, material facts with supporting affidavits and documentation."); *id.* at 22550, para. 120 (explaining that unlike the notice pleading rules used in federal court, the Commission's fact pleading rules "[r]equire[] that a complainant know the specific facts necessary to prove its claim at the time of filing"); *id.* at 22610, para. 278 ("[A] complainant that fails to properly support a statement of material fact may have such statement treated as an unproven assertion."); see also Order on Reconsideration, 16 FCC Rcd 5681 (2001) (*Formal Complaints Recon Order*) at para. 32 (under the Commission's formal complaint rules, "the parties' initial pleadings should not merely provide bare notice of their claims and defenses, but rather should set forth in detail *all* of the parties' supporting facts, legal arguments, affidavits, and documentation. . . . [T]he parties' initial pleadings should contain every allegation, fact, argument, affidavit, and supporting paper that the parties can muster at that time. Moreover, the parties should support each and every factual statement in their initial pleadings (and in their replies and briefs) with a specific citation to an affidavit(s) and to all other relevant portions of the record.").

³⁰ For example, Nguyen relies entirely on blog posts to assert that Verizon blocks Microsoft Surface 3 devices purchased from third parties. See, e.g., Complaint at 24, n.93 (citing a blog post from "BrianFranklin," which is responding to a blog post from "u/fanoffanless"); Reply at 32, n.89 (citing the same blog post). Verizon generally

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inaccuracy existed for an unreasonable period of time, and further shows that Verizon promptly investigated and corrected its website after Nguyen notified Verizon of the inaccuracy, we find no violation of rule 8.3.⁵⁶ In any event, Nguyen failed to provide reliable evidence showing that this incorrect information on Verizon's FAQ page caused him to suffer damages.⁵⁷

18. We also find insufficient support in the record for Nguyen's claim that Verizon inaccurately states on its website that third party iPhone 5/5c/5s devices cannot be used on Verizon's network.⁵⁸ Verizon asserts that this information is accurate because those devices did not support Verizon's CDMA network and, therefore, cannot be used on Verizon's network.⁵⁹ Nguyen provides no reliable record evidence that rebuts this assertion; therefore, we do not find that Nguyen has met his burden to prove that Verizon's disclosures were inaccurate and violated rule 8.3.⁶⁰

19. For all of these reasons, we deny the Complaint. Finally, we note that although the information Nguyen cites is insufficient to support a formal complaint entitling Nguyen to damages and other relief, Nguyen's Complaint expressly "ask[ed] the Enforcement Bureau to initiate its own investigation of Verizon's conduct and impose forfeitures payable to the Treasury."⁶¹ Mr. Nguyen's complaint was in fact investigated by the Enforcement Bureau's Spectrum Enforcement Division, which did not take enforcement action.⁶²

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responds that "the Microsoft Surface 3 devices purchased from third parties are not compatible with the Verizon network." Answer at 31, para. 57 (citing the sworn declaration of Verizon employee Vijay Paulrajan at para. 5). In reply, Nguyen references only the Complaint's (unverified) assertion that the device is compatible with Verizon's network. Reply at 32, para. 57. On this record, we are unable to find that Nguyen has supported his assertions regarding the Microsoft Surface 3 device with reliable evidence.

³¹ Complaint at n.55 (citing "Crouching Dragon"); *id.* at n.75 (citing "mattaz02"); *id.* at n.76 (citing "memarkaz"); *id.* at nn. 80, 81, 109, 135, 139, 142, 233 (citing "Kellex"); *id.* at n.105 (citing "aokusman"); *id.* at n.110 (citing "ab2525"); *id.* at n.112 (citing "oneders65"); *id.* at n.136 (citing "jonnyg100"); *id.* at n.164 (citing "Tim-o-tato"); *id.* at n.166 (citing "Sparky1306"); *id.* at n.175 (citing "Daniel P."); *id.* at n.190 (citing "horizontalrain"); *id.* at n.195 (citing "TeK9samurai"); *id.* at n.252 (citing "coonwhiz,"); *id.* at n.253 (citing "_under_green_"); *id.* at n.298 (citing "rigormortis"); *id.* at n.299 (citing "melgax"); *id.* at n.307 (citing "Nextbit"). See Reply at n.54 (citing "jonpablo"); *id.* at n.75 (citing "memarkaz"); *id.* at n.76 (citing "mattaz02"); *id.* at n.77 (citing "fanoffanless"); *id.* at n.78 (citing "mrredcat43"); *id.* at n.101 (citing "oneders65").

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³² See, e.g., Complaint at 18-19, para. 46 and n.71 (citing an online author's comment that "While it's hard to prove that Verizon has kept the Nexus 7 in certification limbo just so it can sell its own tablet uncontested, that's exactly what it looks like from the outside"); *id.* at 2-3, para. 5 (citing comment by online author that a Verizon employee's statements about a security issue "appeared only to be an afterthought in comparison with Verizon's profitability needs"); *id.* at 31, para. 74 (citing an online author's assertion that "LG's unlocked G5s [smartphones] should all ship with FM radio enabled as far as I know. . . . Unfortunately, I already know Verizon has disabled it on their G5, but it does appear to be active on Sprint's (you'll apparently have to download an app to use it, though).")

³³ See 47 CFR § 1.720(c) (requiring that facts in a pleading "must be supported by relevant documentation or affidavit"). In response to a request from Nguyen, Commission Staff waived certain procedural requirements in rules 1.721(a)(5), (6), (10) and 1.735(c), 47 CFR §§ 1.721(a)(5), (6), (10) and 1.735(c), but did not waive the pleading requirement regarding supporting materials. Letter from Rosemary McEnery, Deputy Chief, Market Disputes Resolution Division, to Alex Nguyen, and David Haga, Verizon (dated Feb. 2, 2016) (affirming that "all material facts be supported by relevant affidavits and documentation"). Nguyen's requirement to provide support for his factual assertions (by relevant affidavits or documentation) is not met by providing hearsay assertions contained in blogs and news articles. See, e.g., *Applications of CBS, INC. (WCAU-TV), Philadelphia, PA. for Renewal of Broadcast License; First Delaware Valley Citizens Television, Inc., Philadelphia, PA for Construction Permit for New Television Broadcast Station*, Memorandum Opinion and Order, 49 FCC2d 743, 744, para. 4 (1974) (holding that newspaper articles which contain hearsay information do not constitute sufficient documentation to support factual assertions).

³⁴ See 47 CFR § 1.720(b).

³⁵ For example, although the Complaint contains a number of allegations concerning Verizon's interactions with makers of devices and applications, Nguyen provides no business records or correspondence establishing the existence or substance of such interactions.

³⁶ Complaint at 107, para. 271.

³⁷ Nguyen's interrogatory responses indicate that his attempt to use two of the devices identified in the Complaint occurred after the Complaint was filed. See Nguyen Interrogatory Responses at 2-8. Further, Nguyen's interrogatory responses provide very little information about his actual experience using or attempting to use these devices on Verizon's network during any periods at issue in the Complaint, and the few documents he submitted with his responses provided no useful detail. Nguyen Interrogatory Responses at 2-5. Specifically, the attachments to the Reply, referenced in Nguyen's interrogatory responses, consist of: (1) several unverified online articles, all but one of which are dated after the Complaint was filed; (2) a screenshot of a verizonwireless.com page, dated after the Complaint was filed, that concerns ringtones; and (3) a screenshot of Nguyen's Verizon account, dated over three months after the Complaint was filed, apparently showing that he operates a "NON VZW" iPhone 6 device on Verizon's network, but not indicating when that device was first used on Verizon's network. Reply at Tab 2. None of these documents constitute reliable evidence supporting Nguyen's claims.

³⁸ Nguyen asserts in his unsworn interrogatory responses that Verizon would not let him order a SIM card for various devices purchased from third parties. Nguyen Interrogatory Responses at 2-3,7. Verizon does not dispute that it only provisions SIM cards for third party devices that it has certified for use on its network. See, e.g., Answer at 31, para. 56 ("Verizon does not offer Verizon SIM cards to customers for third party devices that have not been certified."). Nguyen does not assert that at the time he wished to obtain a SIM card for these devices, Verizon had already certified the devices for use on its network. Thus, Nguyen's complaint about Verizon's denial of a SIM card for certain devices is essentially a challenge to Verizon's requirement that third-party devices be subjected to its certification process. Nguyen has not provided any direct evidence showing that Verizon's certification requirement was unnecessary or implemented in an unreasonable manner.

³⁹ See, e.g., Complaint at 19, para. 46, n.71 (citing an online review of Verizon's tablets stating, "[w]hile it's hard to prove that Verizon has kept the Nexus 7 in certification limbo just so it can sell its own tablet uncontested, that's exactly what it looks like from the outside"). In its Answer, Verizon explains that its certification process was delayed when Google, Asus, and Verizon discovered a "systems issue" that led Google and Asus to ask Verizon to suspend its certification process until Google's new operating system was available. See Answer at 24-25, para. 43. Nguyen offers no evidence rebutting Verizon's assertion that a systems issue arose, leading the manufacturer and

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software provider to request suspension of the certification process and resulting in delayed certification. Instead, Nguyen claims without reliable support that Verizon apparently was motivated to discriminate in order to “sell the similarly-sized Verizon Ellipsis 7.” Complaint at 18-19, para. 46; *see also* Reply at 25, para. 46. There is no reliable record evidence, however, showing that the Nexus 7 certification delay was tied to the marketing of a “similarly-sized” device.

⁴⁰ For example, Nguyen relies entirely on third party blogs and online articles as support for an allegation that Verizon unlawfully blocked customers from ordering new SIM cards for Nexus 6 smartphone devices purchased from third parties for more than 29 weeks after Google began accepting pre-orders for these devices. *See* Complaint at 21-23, paras. 52-54. In its Answer, Verizon admits that there was a delay in certifying third party Nexus 6 devices for use on its network. Verizon explains that because the third-party devices initially lacked Google software upgrades when they were launched, they were not fully functional on Verizon’s network, even with a Verizon SIM card. *See* Answer at 29-30, para. 52. Verizon states that it ultimately resolved this issue by working with Google to ensure that third party Nexus 6 devices received the software upgrades that would allow them to function properly on Verizon’s network. *See id.* at para. 52. Nguyen provides no first-hand evidence from Google, or any other source, that rebuts this explanation. *See* Reply at 29-30, para. 52.

⁴¹ Complaint at 62-67, paras. 156-74. Nguyen argues that this pricing conduct violates Section 202(a) of the Act, Sections 8.5, 8.11, and 27.16(b) of the Commission’s rules then in effect, and the *700 MHz Order*. *See id.*

⁴² Complaint at 62, para. 157-59; *id.* at 64, para. 162; Answer at 35-37, paras. 67-69; 68, para. 171.

⁴³ *See, e.g.*, Complaint at 25, paras. 59-60 and nn. 94-95; *id.* at 26, paras. 61-62 and nn. 96-97; *id.* at 27, para. 65 and n.101; *id.* at 28, para. 67 and nn. 103, 105; *id.* at 28-29, para. 69 and n.110. Verizon disputes the accuracy of Nguyen’s allegations concerning its pricing plans. *See, e.g.*, Answer at 64-65, paras. 157-59. Further, Verizon maintains that any pricing discounts it provided were permitted incentives to customers financing devices through Verizon. *See* Answer at 35-37, paras. 67-69, Legal Analysis at 14-18. *See also* Answer at 36, para. 67 (arguing that Verizon’s line access charges represent only the cost of the service, and are not based on any device cost or subsidy). Because Nguyen adduced no reliable, verifiable evidence to support his allegations of pricing discrimination, we do not reach Verizon’s arguments regarding the lawfulness of its pricing discounts.

⁴⁴ Nguyen admits to relying on unsworn sources for his evidence regarding discriminatory pricing. *See, e.g.*, Reply at 34, paras. 60-61 (admitting to relying on articles from The Verge and the Wall Street Journal).

⁴⁵ Complaint at 88, paras. 230-31.

⁴⁶ We note that the transparency rule never required a wireless service provider to supply technical explanations to the general public as to why certain providers’ devices did not complete the certification process or took longer than expected to complete certification. *See 2010 Open Internet Order*, 25 FCC Rcd at 17937, para. 55 (discussing the then-applicable transparency rule) (“The rule does not require public disclosure of competitively sensitive information or information that would compromise network security or undermine the efficacy of reasonable network management practices”). Nor do the rules require wireless service providers to publish to the general public proprietary network certification information. *See* Answer at 59, para. 148 (“Verizon must be careful not to disclose any confidential or proprietary information it learns about a third party device in the certification process – especially as its dealings with device manufacturers often are subject to confidentiality agreements or non-disclosure agreements (‘NDAs’).”).

⁴⁷ *See, e.g.*, Complaint at 79-80, para. 207 (quoting a 2011 DSLReports.com article as support). *See also id.* at 34, n.130 (citing the same July 2011 online article, which pre-dates a 2012 Commission consent decree described in the accompanying text at paragraph 82 of the Complaint).

⁴⁸ *See, e.g.*, Complaint at 35-36, paras. 87-90 (quoting articles on the droid-life.com and pocketnow.com websites).

⁴⁹ *See, e.g.*, Complaint at 29-31, paras. 70, 72-74. *See also, e.g.*, Reply at 38, para. 70, n.101.

⁵⁰ *See, e.g.*, Complaint at 30, paras. 70-71 (citing a post by “oneders65” on forum.xdadevelopers.com website); *id.* at para. 72-73 (citing article on nab.org website); *id.* at 31, para. 74 (citing articles on androidcentral.com and androidpolice.com websites).

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⁵¹ Answer, at Exhibits A-G; Verizon Interrogatory Responses at 11-12.

⁵² The citation in the Reply to a declaration by Lowell Feldman (filed in another proceeding in which Verizon was not a party), is unavailing because there is no indication that Mr. Feldman had personal knowledge of the matter on which he opined, namely that “AT&T and Verizon, for their own internal reasons, will not allow a Hotspot Function from the Nexus 7.” See, e.g., Reply at 8, n.15; see *Worldcall Interconnect v. AT&T Mobility*, Order, 31 FCC Rcd 10531 (EB. 2016) (subsequent history omitted).

⁵³ Complaint at 49-50, para. 123; 85-87, paras. 222-26; 47 CFR § 8.3 (2016). The Commission revised its transparency rule in 2018 to state: “[a]ny person providing broadband Internet access shall publicly disclose accurate information regarding the network management practices, performance characteristics, and commercial terms of its broadband Internet access services sufficient to enable consumers to make informed choices regarding the purchase and use of such services and entrepreneurs and other small businesses to develop, market, and maintain Internet offerings. Such disclosure shall be made via a publicly available, easily accessible website or through transmittal to the Commission.” 47 CFR § 8.1(a).

⁵⁴ Complaint at 49-50, para. 123; 85-87, paras. 222-26; Exhibit 4 (citing a Verizon’s relevant “FAQ” page, dated December 28, 2015); *id.* (Letter from David Haga, Verizon, to Alex Nguyen (dated Jan. 18, 2016); Answer at 51-52, para. 123 (“... Verizon admits that, in a January 18, 2016 letter to Mr. Nguyen, it acknowledged that its website needed to be updated to reflect that the more recent iPhone models sold by other carriers (iPhone 6 and later) could be used on the Verizon network with the insertion of a Verizon SIM card That letter speaks for itself, as does the updated version of the Verizon website, which was updated to state that if you have iPhone 6 or newer, you’ll be able to use it on the Verizon Wireless network.”). Verizon continues to maintain that “iPhone 5s or earlier versions used with other carriers can’t be used on the Verizon Wireless network because they’re not the same as the similar models built to work on the Verizon Wireless network.”). *Id.*

⁵⁵ Answer, Legal Analysis at 26 (citations omitted).

⁵⁶ In the *Title II Order*, the Commission held that a provider has a duty to update its disclosures in a manner that is “timely” but declined to “adopt a specific timeframe concerning the updating of disclosures following a material change.” *Title II Order*, 30 FCC Rcd at 5671, para. 161, n.392.

⁵⁷ Nguyen asserts that “if Verizon hadn’t inhibited competition in the market for devices . . . I estimate that I could’ve saved . . . \$100 on an iPhone 6 (64 GB) I purchased in August 2015” Complaint at 107, para. 271. Nguyen arrived at this estimate by “extrapolating from historical prices of Nexus 6 devices sold by sources other than [sic] Verizon. . .” *Id.* at 106-07, para. 271. Nguyen does not, however, provide any reliable evidence supporting his assertion that the pricing of Nexus 6 devices over time was impacted by Verizon’s alleged efforts to “inhibit competition.” Nor does Nguyen provide any evidence to support his suggestion that the pricing of iPhone devices was affected by, or can be predicted with reference to, the historical pricing of Nexus 6 devices. Thus, even if Nguyen could establish that Verizon violated former rule 8.3, he has failed to show that Verizon’s alleged inaccurate disclosures regarding the Apple iPhone 6 and 6 Plus devices caused him any measurable damages. See *All American Tel. Co. v. FCC*, 867 F.3d 81, 91-92 (DC Cir. 2017) (A complainant in an FCC proceeding has “the burden of showing both a violation of the law and ‘actual damages suffered as a consequence of such violation.’”) (quoting *New Valley Corp. v. Pacific Bell*, 15 FCC Rcd. 5128, 5134, para. 14 (2000)). See also 47 CFR § 1.721(a)(7); 1.722(h); *Formal Complaints Order*, 12 FCC Rcd at 22579, para. 190 (“We require that a complainant seeking damages must file in its complaint or supplemental complaint either a detailed computation of damages or a detailed explanation of why such a computation is not possible at the time of filing.”).

⁵⁸ Complaint at 87, para. 226.

⁵⁹ Answer at 30-31, para. 55 (citing declaration of Verizon employee Christopher Schmidt at para.3); *id.* at 51-52, paras. 122, 124; Answer, Legal Analysis at 26-27; Verizon Interrogatory Responses at 2.

⁶⁰ Nguyen states without any citation to supporting evidence that “an iPhone 5 sold by NorthwestCell is the *same* (not just similar) A1429 model as the iPhone 5 sold by Verizon.” Complaint at 50, para. 124 (emphasis in the original); see also Reply at 31, para. 55, 32, para. 58, 60, para. 124. Verizon responded that it “lacks knowledge or information sufficient to form a belief as to the truth of the averments (made without citation or support) regarding

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IV. ORDERING CLAUSE

20. Accordingly, **IT IS ORDERED** that, pursuant to sections 4(i), 4(j), 201, 202, and 208 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201, 202, and 208, and sections 0.111, 0.311, 1.720-1.735, 8.3 (2016), 8.5 (2016), 8.11 (2016), and 27.16 of the of the Commission's rules, 47 CFR §§ 0.111, 0.311, 1.720-1.735, 8.3 (2016), 8.5 (2016), 8.11 (2016), and 27.16, and the *2012 Consent Decree*, 27 FCC Rcd 8934 (2012), the Complaint **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Rosemary C. Harold
Chief
Enforcement Bureau

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the iPhone 5 sold by NorthwestCell.” Answer at 52, para. 124. Without more, we are unable to rely on Nguyen’s unsupported assertions regarding the iPhone 5.

⁶¹ Complaint at 108-09, para. 276.

⁶² Although the Enforcement Bureau does not generally publicly acknowledge investigations that do not lead to enforcement actions, an exception in this case is warranted.