

James E. Green  
Sr. Staff Consultant -- Regulatory



November 20, 2008

Mail Code OR030156  
20575 NW Von Neumann Drive,  
Suite 150  
Hillsboro, OR 97006

Phone 503-629-2338  
Fax 503-629-0592

Email address:  
james.e.green@verizon.com

**VIA ELECTRONIC FILING AND HAND DELIVERY**

Public Utility Commission of Oregon  
Attention: Filing Center  
550 Capitol Street NE, #215  
Portland, OR 97308-2148

***Re: UM 1265 -- Verizon Northwest Inc.'s Reply to the ACLU's Response in  
Opposition***

Dear Filing Center:

Enclosed is Verizon Northwest Inc.'s Reply to the ACLU's Response in Opposition in Docket No. UM 1265.

If you have any questions, please give me a call.

Sincerely,

A handwritten signature in black ink, appearing to read "James E. Green".

James E. Green

JEG:pl

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

AMERICAN CIVIL LIBERTIES UNION OF	)	
OREGON, INC. and AMERICAN CIVIL	)	
LIBERTIES UNION FOUNDATION OF	)	
OREGON, INC.,	)	
	)	
<i>Complainants,</i>	)	Docket UM 1265
	)	
v.	)	
	)	
VERIZON NORTHWEST INC., and	)	
QWEST CORPORATION,	)	
	)	
<i>Defendants.</i>	)	

**VERIZON NORTHWEST INC.'S REPLY TO THE  
ACLU'S RESPONSE IN OPPOSITION**

Verizon Northwest Inc. ("Verizon") hereby replies to the ACLU's Response In Opposition to Verizon's Motion To Dismiss received by Verizon on November 12, 2008 ("ACLU Opposition"). The ACLU takes the position that the new Section 803 of the Foreign Intelligence Surveillance Act amendments ("FISA Amendments") does not preempt the Complaint because, among other things, "the ACLU is not a state" (ACLU Opposition at 2) and the matter is styled as a "complaint," not an "investigation." (ACLU Opposition at 2-3).<sup>1</sup> These non sequiturs miss the point. Section 803 of the FISA Amendments forecloses the ability of any state agency to act on any issue related to a carrier's alleged assistance to an element of the intelligence community. That is the

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<sup>1</sup> The ACLU also seems to claim that Verizon could seek to have the matter dismissed under Section 802 of the FISA Amendments, which is applicable to civil actions in a "Federal or State court." ACLU Opposition at 4 (noting, however, that if Verizon seeks dismissal under that section, the ACLU will "assert that such provisions are unconstitutional"). Verizon does not address the ACLU's arguments regarding Section 802 here, as the Commission need not consider them to reach the conclusion that Section 803 preempts this proceeding.

case whether the state agency is adjudicating a complaint or conducting its own investigation. Accordingly, Verizon respectfully urges the Commission to grant the motion to dismiss and close this docket.

### DISCUSSION

The ACLU's entire argument rests on the claim that, while Section 803 of the FISA Amendments preempts state agency "investigations" regarding a carrier's alleged cooperation with the intelligence community, it does not preempt complaint proceedings concerning the same subject. ACLU Opposition at 2-3. That is false.

Section 803(a)(2) expressly prohibits a state agency from requiring through "regulation or *any other means*" the disclosure of information about an electronic communication service provider's alleged assistance to an element of the intelligence community. 50 U.S.C. 1885b(a)(2) (emphasis added). Such means would include compelling discovery in an adjudicatory docket. If a state agency cannot compel discovery on the only issues relevant to a complaint, it cannot adjudicate such a complaint.

Further, Section 803(a)(3) prohibits a state agency from imposing "any administrative sanction" on a provider for providing assistance to an element of the intelligence community. 50 U.S.C. 1885b(a)(3). Thus, a state agency may not impose any sanction based on a complaint at the conclusion of a hearing. If a state agency cannot provide any remedy on a filed complaint, adjudicating the complaint would be pointless.

The remaining two subsections of Section 803(a) confirm that a state agency is foreclosed from acting in any way on the issue of a carrier's alleged cooperation with an element of the intelligence community. Section 803(a)(4) does not permit a state agency

to commence or maintain a civil action or other proceeding to enforce a requirement that a provider disclose information concerning alleged assistance to an element of the intelligence community. 50 U.S.C. 1885b(a)(4). In other words, a state agency may not file or maintain any proceeding on its own or in any court to require the disclosure of any information that would be relevant to the complaint; as a result, there would be no information to be considered by the Commission to rule on any claim for relief stated in the complaint.

Finally, Section 803(a)(1) specifies that a state may not “conduct an investigation” into alleged assistance by a provider to an element of the intelligence community. The ACLU seizes on the word “investigation” and asserts that adjudicating a “complaint” is distinct from an “investigation” and that therefore Section 803 permits the ACLU’s complaint to go forward. But a state agency self-evidently could not act on a complaint without first “investigating” the allegations contained in the complaint to determine their accuracy. And where the allegations are that a provider improperly assisted the intelligence community, any investigation of those allegations is precisely what the statute by its terms expressly prohibits. This is only further reinforced by the other provisions of 803 that, as noted above, preclude a state agency from requiring the disclosure of any information relating to those allegations or from providing a remedy. In addition, the ACLU’s semantic games would lead to the nonsensical result that a state agency would be foreclosed from investigating alleged assistance on its own initiative through an investigation, but could hear a complaint that would require it to investigate and adjudicate the very same subject.

Congress did not make any such distinction. Rather, its express intent was to preempt any and all involvement of state public utility commissions with allegations of provider assistance to the intelligence community involvement. As the Senate Select Committee on Intelligence report (“Senate Report”) accompanying the FISA Amendments stated, Section 803 “reflects the Committee’s view that, although states play an important role in regulating electronic communication service providers, they should not be involved in regulating the relationship between electronic communication service providers and the intelligence community.” Senate Report No. 110-209, at 12 (2007). The term “investigation” generically refers to all such involvement, whether undertaken on a state agency’s own initiative or in response to a complaint. Indeed, the Senate Report specifically describes the pending litigation in the Northern District of California as concerning five state commission “investigations of electronic communication service providers for their alleged provision of assistance to the intelligence community.” *Id.* at 7. Two of those five referenced state commission “investigations” that Congress was “prohibiting,” *id.* at 24, were in fact complaint proceedings.<sup>2</sup>

The ACLU attempts to take refuge in a procedural ruling issued at the outset of this docket to support its tortured interpretation. ACLU Opp. at 1-2. But that ruling is inapposite. It required the ACLU to specify whether it was filing a complaint or a request for investigation to confirm the relevant commission procedures (such as the order for presenting evidence and the burden of proof) under which the ACLU was requesting that the matter be heard. *See, e.g.*, Ruling (Issued July 31, 2006), Docket UM

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<sup>2</sup> *See United States v. Adams*, No. 07-1323 (filed in D. Maine and transferred to N.D. Cal); *United States v. Palermino, et al.*, No. 07-1324 (filed in D. Conn. and transferred to N.D. Cal).

1265 (“Procedural Ruling”) at 3. The ruling clearly had nothing to do with the interpretation of Section 803, which did not even exist at the time. And, in any event, as the Commission rules reflect, any complaint proceeding, regardless of the order of evidence or which party bears the burden of proof, necessarily involves an investigation into the facts as part of an adjudication – the very action that even the ACLU concedes Section 803 prohibits.<sup>3</sup>

Thus, the plain language and intent make clear that Section 803 of the FISA Amendments preempts Commission resolution of the complaint. As Verizon previously explained, that is precisely the conclusion reached by the Washington Utilities and Transportation Commission (“Washington Commission”) when it dismissed its proceeding concerning similar allegations. As occurred here, the Washington Commission had held its proceeding in abeyance pending federal court resolution of various federal law issues.<sup>4</sup> After passage of the FISA Amendments, the Washington Commission recognized that “the pending federal issues have been resolved through a change in federal law, not by the courts.” Order 03 (October 17, 2008), Docket UT-060856 (“Washington Order”) at 3. Specifically, the Washington Commission found that the FISA Amendments preempted “state authority to investigate, begin or maintain a

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<sup>3</sup> The terms “complaint” and “investigation” are virtually interchangeable as they relate to the substantive point that the Commission necessarily considers questions of fact in its dockets. The Commission’s rules describe a complaint as “a written pleading filed with or by the Commission requesting or instituting a formal *investigation* or hearing.” OAR 860-013-0015 (emphasis added). And in the Procedural Ruling, the Commission noted that investigations are launched by the Commission to determine if sufficient grounds exist to warrant a hearing being held; after such an investigation, the “case then proceeds as in the manner of a complaint ‘as though complaint had been filed with the commission thereto.’” Procedural Ruling (citing ORS 756.515(2) and (3)). It would make no sense if the Commission were preempted by Section 803 from investigating facts on alleged cooperation by a provider with the intelligence community, but could investigate and adjudicate the same facts in response to a complaint.

<sup>4</sup> Order 02 (September 27, 2006), Washington Utilities and Transportation Commission, Docket No. UT-060856 at 2 (“we ... defer further action pending final resolution of the federal issues by the federal courts.”); Order No. 06-673 (December 11, 2006) (“we conclude that these proceeding should be held in abeyance until such time as the Ninth Circuit provides clear direction as to appropriate Commission action.”).

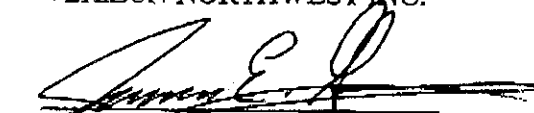
proceeding or seek sanctions for the violation of state laws or rules relating to the disclosure of information about an electronic communication service provider's alleged assistance to an element of the federal intelligence community." Washington Order at 2. The ACLU's only response is to note that the Washington Commission dismissed an investigation, whereas this docket is a complaint. ACLU Opposition at 2-3. But, as discussed above, that distinction is immaterial to the preemptive effect of Section 803.

Accordingly, Verizon respectfully renews its request that the complaint be dismissed and the docket closed.

DATED this 20<sup>th</sup> day of November, 2008

Respectfully submitted,

VERIZON NORTHWEST INC.

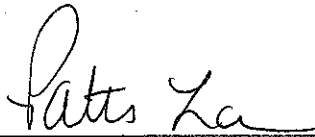


James E. Green, Bar #91291  
Senior Staff Consultant -- Regulatory

**CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of Verizon Northwest Inc.'s Reply in Docket UM 1265, by US Mail and electronic mail, to the parties on the attached service list.

Dated this 20<sup>th</sup> day of November, 2008.

A handwritten signature in cursive script that reads "Patti Lane". The signature is written in black ink and is positioned above a horizontal line.

Patti Lane



UM 1265 Service List

Andrea Meyer  
Legislative Director/Counsel  
American Civil Liberties Foundation of  
Oregon  
P.O. Box 40585  
Portland, OR 97240  
[ameyer@aclu-or.org](mailto:ameyer@aclu-or.org)

Keith S. Dubanevich  
Attorney  
Garvey Schubert Barer  
121 SW Morrison St 11<sup>th</sup> FL  
Portland, OR 97204-3141  
[kdubanevich@gsblaw.com](mailto:kdubanevich@gsblaw.com)

Jason Eisdorfer  
Legal Counsel  
Citizens' Utility Board of Oregon  
610 SW Broadway Suite 308  
Portland, OR 97205  
[jason@oregoncub.org](mailto:jason@oregoncub.org)

Alex M. Duarte  
Corporate Counsel  
Qwest Corporation  
421 SW Oak St Ste 810  
Portland, OR 97204  
[alex.duarte@qwest.com](mailto:alex.duarte@qwest.com)

OPUC Dockets  
Citizens' Utility Board of Oregon  
610 SW Broadway Suite 308  
Portland, OR 97205  
[bob@oregoncub.org](mailto:bob@oregoncub.org)