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BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UM 1265

AMERICAN CIVIL LIBERTIES UNION
OF OREGON, INC. and AMERICAN
CIVIL LIBERTIES UNION
FOUNDATION OF OREGON, INC.,

Complainants,

v.

VERIZON NORTHWEST, INC., and
QWEST CORPORATION,

Defendants.

COMPLAINANTS' REPLY IN SUPPORT
OF MOTION TO LIFT ABEYANCE
ORDER

The American Civil Liberties Union of Oregon and the American Civil Liberties Union Foundation of Oregon, Inc. (hereinafter referred to jointly as "ACLU") reply to the response filed by Verizon Northwest, Inc. ("Verizon"). While Verizon contends that some of the recent developments cited by the ACLU in its Motion to Lift Abeyance Order are inconsequential, Verizon did not address the fact that the Vermont Public Service Board ordered that discovery proceed as to complaints similar to those raised herein by the ACLU. Moreover, Verizon has not explained how the narrow discovery sought by the ACLU will in any way force Verizon into the Hobson's choice it describes as being "unable simultaneously to comply with

1 demands from a state official to provide information concerning its alleged
2 cooperation with federal intelligence activities and the command of the federal
3 government that any such disclosure would violate federal law.” (Verizon’s response
4 at 1). To the contrary, the ACLU’s requests do not require the disclosure of any
5 information about Verizon’s “alleged cooperation with federal intelligence activities”
6 nor would the disclosure of information sought by the ACLU “violate federal law.”
7 For these reasons, the ACLU’s Motion to Lift Abeyance Order should be granted.

8 The ACLU also requests that the PUC issue an order requiring the
9 preservation of evidence and prohibiting the destruction or alteration of any
10 evidence, particularly if the PUC decides to retain the present abeyance order.

11 **I. VERIZON MAY CONTEST THE SIGNIFICANCE OF SOME RECENT EVENTS**
12 **BUT IT HAS NOT ADDRESSED TWO KEY FACTS.**

13 Contrary to Verizon’s argument, the ACLU submitted five reasons the PUC
14 should lift the Abeyance Order: (1) Director McConnell’s public statements; (2) Judge
15 Walker’s July 24, 2007 order; (3) Verizon’s public submission to the U.S. Congress;
16 (4) the Vermont Public Service Board’s decision to allow discovery to go forward in a
17 similar case involving telecommunication companies; and (5) the ACLU seeks only
18 non-privileged information at this time. Verizon argues that the first three events
19 are insignificant, but does not address the last two important points.

20 The significance of the first three points can easily be determined by the PUC
21 by simply examining the evidence submitted by the ACLU. What is clear is that
22 Director McConnell’s statements and Verizon’s submission to Congress add to the
23 mounting pile of evidence of telecommunication companies’ cooperation with the
24 government. In addition, Judge Walker’s order unambiguously ruled that neither
25 the supremacy clause nor the foreign affairs power prevented the civil actions
26 against the telecommunication companies from moving forward. That truth is made

1 clear by the recent action of the Vermont Public Service Board to allow its
2 investigation to move ahead.

3 **A. Judge Walker Denied the Government's Motion for Summary**
4 **Judgment Which Sought to Enjoin State Investigations.**

5 The context of Judge Walker's July 24, 2007 ruling is important to understand
6 its significance. As the PUC may recall, the government sought to enjoin state
7 officials from Missouri, Maine, New Jersey, Connecticut and Vermont from
8 investigating telecommunication carriers concerning their alleged disclosure of
9 customer telephone records to the National Security Agency. The government
10 claimed that it was entitled to an injunction based on the Supremacy Clause of the
11 U.S. Constitution, the foreign affairs power of the federal government, and the state
12 secrets privilege.

13 In a thorough and well written opinion, Judge Walker concluded that neither
14 the Supremacy Clause nor the foreign affairs powers of the federal government
15 barred the states' investigations. The import of that determination cannot be
16 clearer: neither the Supremacy Clause nor the foreign affairs powers of the federal
17 government bar the ACLU's investigation of Verizon's compliance with Oregon law.

18 With respect to the state secrets privilege, it is worth noting that in each of the
19 state investigations the states were seeking information about carrier provision of
20 interstate or international phone call information to the NSA. That is clearly
21 distinguished from the case here where the ACLU is only interested in Verizon's
22 compliance with Oregon law and its possible disclosure of intrastate phone calls
23 without proper legal justification. As a consequence and as explained below, the
24 ACLU does not seek, at the present time, information about Verizon's cooperation
25 with the NSA. Moreover, it bears repeating: Verizon does not have standing to assert
26 the state secrets privilege so the privilege cannot be an obstacle to the present case

1 proceeding forward. *U.S. v. Reynolds*, 345 US 1, 7 (1953).

2 **B. The Vermont Public Service Board Order Allowing Discovery Shows**
3 **That Discovery Can Proceed Without Violating Federal Law and**
4 **That the Multi-District Court Has Not Enjoined Their Investigation.**

5 Following Judge Walker's July 24, 2007 Order, the Vermont Public Service
6 Board ("VPSB") ordered that discovery proceed in three cases brought against
7 telecommunications companies regarding their alleged cooperation with federal
8 intelligence activities. (See Exhibit "D" to Dubanevich Declaration). According to a
9 recent scheduling order issued by the VPSB, the parties have already exchanged a
10 first round of discovery requests and responses. (See VPSB Order dated November
11 20, 2007 submitted herewith as Exhibit "F" to Dubanevich Supplemental
12 Declaration). It is noteworthy that there has apparently been no effort by the
13 government to block the present discovery process even though the Vermont
14 investigation is much broader than the investigation sought by the ACLU here.

15 That such discovery can take place in Vermont without violating any privileges
16 makes complete sense given: (1) the government's concession that "some questions
17 posed in these investigations fall outside the [state secrets] privilege's scope"
18 (see Judge Walker's July 24, 2007 Order, Exhibit B to Dubanevich Declaration, at
19 page 35); and (2) given the narrow scope of discovery being pursued in Vermont (see
20 VPSB October 31, 2007 Order, Exhibit D to Dubanevich Declaration, at pages 10-
21 11).

22 The ACLU is asking for no more than has been ordered in Vermont. Indeed,
23 the ACLU here is seeking much less than what was allowed in Vermont.
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1 **C. The ACLU's Requests Are Narrowly Drawn and Do Not Require**
2 **Disclosure of Any Lawful Compliance with Government**
3 **Investigations.**

4 First, it is important to note what the ACLU is not seeking. The ACLU is NOT
5 seeking information about Verizon's production of interstate or international
6 telecommunications information, and the ACLU is NOT seeking information about
7 Verizon's disclosure of telecommunication information if done in response to a
8 warrant, subpoena, or court order, or in strict compliance with federal law.

9 What the ACLU wants to know is whether Verizon has provided intrastate
10 customer proprietary network information ("CPNI") without legal justification. See
11 OAP 860-032-0510(3)(d). If Verizon has provided intrastate CPNI to the U.S.
12 Government or some other entity pursuant to proper legal authority, then the
13 ACLU's inquiry has been satisfied. However, if Verizon has disclosed intrastate CPNI
14 without proper legal authority, then Verizon is violating Oregon law and it is thus
15 incumbent upon the ACLU and the PUC to investigate further. (See ORS §
16 756.040(1): "the commission shall represent the customers of any . . .
17 telecommunications utility and the public generally [and] shall make use of the
18 jurisdiction and powers of the office to protect such customers and the public
19 generally").

20 The discovery sought by the ACLU does not require Verizon to disclose anything
21 about its lawful cooperation with government authorities. Indeed, the ACLU's
22 requests specifically seek information about only whether Verizon has provided
23 phone call content or data to any person or entity without proper legal justification.
24 In essence, Verizon should not be allowed to use the absence of legal authority for it
25 to disclose intrastate CPNI to, in turn, shield itself broadly from discovery and any
26 potential liability. On the other hand, if Verizon's conduct was in full compliance
with the law, it has nothing to fear and should accordingly respond to the ACLU's

1 inquiry.

2 Second, the discovery allowed by the VPSB, and sought by the ACLU here,
3 does not require the disclosure of Verizon's cooperation with federal intelligence
4 activities. To argue the contrary is simply without foundation and serves only to
5 raise greater suspicion. For example, in Vermont the VPSB ordered inquiries into
6 such innocuous things as: the carriers' written policies; the carriers' actual practices
7 in determining whether to comply with requests from the government for the release
8 of customer records; the carriers' record-keeping practices; the frequency with which
9 the carriers have actually released customer records information to the government;
10 and the accuracy and sufficiency of the carriers' existing customer privacy notices
11 regarding release of customer record information. (See VPSB October 31, 2007
12 Order, Exhibit D to Dubanevich Declaration, at pages 10-11). None of these areas
13 require the disclosure of Verizon's actual compliance with any specific government
14 intelligence activity. To the contrary, these requests are narrowly drawn so as to
15 avoid any such "conflict."

16 There is nothing in the ACLU's requests that intrudes upon the state secrets
17 privilege, as that privilege presumably covers only lawful cooperation with the
18 government pursuant to FISA or some other legal authority. Verizon has cited no
19 contrary authority. Moreover, not only does Verizon have no standing to assert the
20 state secrets privilege, *U.S. v. Reynolds*, 345 US 1, 7 (1953), it is unclear how such
21 privilege would apply to purely intrastate communications in any event. As a
22 consequence, because the limited inquiry proposed by the ACLU does not intrude
23 upon the state secrets privilege, and Verizon has no standing to assert the state
24 secrets privilege, the order of abeyance should be lifted.

1 **II. THE PUBLIC UTILITIES COMMISSION SHOULD PROHIBIT THE**
2 **ALTERATION OR DESTRUCTION OF EVIDENCE DURING THE PENDENCY**
3 **OF THIS ACTION.**

4 Verizon is seeking to hide its conduct from public view by the broad brush
5 strategy of hiding behind a privilege that it is not entitled to invoke. If Verizon is
6 ultimately successful and this matter is dismissed, neither party will have need for
7 documents and information relevant to this dispute. However, if this matter
8 proceeds at some point, the ACLU will have a substantial need of obtaining evidence
9 regarding Verizon's activities and conduct. In sum, Verizon should not be allowed to
10 benefit from delay by destroying or altering evidence that is relevant to this dispute.

11 The Honorable Judge Walker agreed that such an order was appropriate in the
12 Multi-District Cases pending before him and thus, he issued an order that requires
13 all parties to preserve evidence and take steps to prevent the alteration or
14 destruction of evidence. (*See In Re National Security Agency Telecommunications*
15 *Records Litigation*, MDL Docket No 06-0791-VRW, Order dated November 6, 2007,
16 attached to Dubanevich Supplemental Declaration as Exhibit "G"). The ACLU
17 requests a similar order here.

18 **III. CONCLUSION.**

19 The ACLU requests that it be allowed to initiate limited discovery into non-
20 privileged matters. The ACLU also requests that the PUC issue an order requiring
21 the preservation of evidence and further requiring that Verizon not alter or destroy
22 any evidence relevant to the claims asserted by the ACLU.

23 DATED this 28th day of December, 2007.

24 Respectfully submitted,

25 GARVEY SCHUBERT BARER

26 By 

Keith S. Dubanevich, OSB #975200

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Attorneys for Complainants American
Civil Liberties Union of Oregon, Inc.
and American Civil Liberties Union
Foundation of Oregon, Inc.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **COMPLAINANTS' REPLY IN SUPPORT OF MOTION TO LIFT ABEYANCE ORDER** was served on:

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E-Mail:
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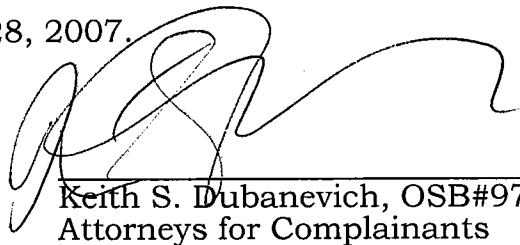
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Portland, OR 97205
E-Mail: dockets@oregoncub.org

by mailing to them a copy of the original thereof, contained in sealed envelopes, addressed as above set forth, with postage prepaid, and deposited in the mail in Portland, Oregon, on December 28, 2007.



Keith S. Dubanevich, OSB#975200
Attorneys for Complainants

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BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UM 1265

AMERICAN CIVIL LIBERTIES UNION
OF OREGON, INC. and AMERICAN
CIVIL LIBERTIES UNION
FOUNDATION OF OREGON, INC.,

Complainants,

v.

VERIZON NORTHWEST, INC., and
QWEST CORPORATION,

Defendants.

SUPPLEMENTAL DECLARATION OF
KEITH S. DUBANEVICH IN SUPPORT
OF COMPLAINANTS' REPLY IN
SUPPORT OF MOTION TO LIFT
ABEYANCE ORDER

1. My name is Keith Scott Dubanevich. I am one of the attorneys for the
Complainants. I am over the age of eighteen, have personal knowledge of every
statement contained herein and they are all true and correct.

2. Attached hereto as exhibit "F" is a true and correct copy of the Vermont
Public Service Board's Order dated November 20, 2007.

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3. Attached hereto as exhibit "G" is a true and correct copy of the November 6, 2007 Order in MDL Docket No 06-1791 VRM, *In re National Security Agency Telecommunications Records Litigation.*

DATED this 28th day of December, 2007



Keith S. Dubanevich, OSB #975200
E-Mail: kdubanevich@gsblaw.com

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that the foregoing **SUPPLEMENTAL DECLARATION OF**
3 **KEITH S. DUBANEVICH IN SUPPORT OF COMPLAINANTS' REPLY IN SUPPORT**
4 **OF MOTION TO LIFT ABEYANCE ORDER** was served on:

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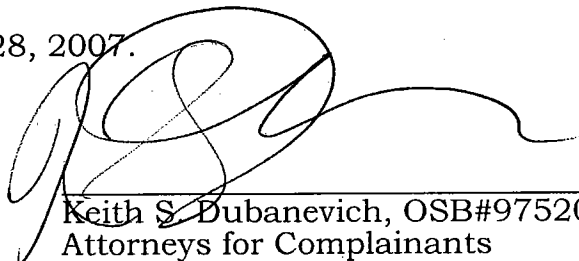
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24 610 SW Broadway, Ste. 308
25 Portland, OR 97205
26 E-Mail: dockets@oregoncub.org

by mailing to them a copy of the original thereof, contained in sealed envelopes,
addressed as above set forth, with postage prepaid, and deposited in the mail in
Portland, Oregon, on December 28, 2007.



Keith S. Dubanevich, OSB#975200
Attorneys for Complainants

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STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7183

Petition of Eight Ratepayers for an investigation)
of possible disclosure of private telephone)
records without customers' knowledge or)
consent by Verizon New England Inc., d/b/a)
Verizon Vermont)

Docket No. 7192

Petition of Vermont Department of Public)
Service for an investigation into alleged)
unlawful customer records disclosure by)
Verizon New England Inc., d/b/a Verizon)
Vermont)

Docket No. 7193

Petition of Vermont Department of Public)
Service for an investigation into alleged)
unlawful customer records disclosure by AT&T)
Communications of New England, Inc.)

Order entered: 11/20/2007

PROCEDURAL ORDER

BACKGROUND

These dockets were opened in June of 2006 and concern alleged disclosure of customer record information by two Vermont carriers to the National Security Agency ("NSA"). Dockets 7183 and 7192 concern Verizon New England Inc., d/b/a Verizon Vermont ("Verizon"). Docket 7193 concerns AT&T Communications of New England, Inc. ("AT&T").

We issued an Order on October 31, 2007, reactivating these dockets, establishing their current scope, and establishing a schedule for the next few months.

On November 7, 2007, the Department of Public Service ("Department") filed a Motion for Clarification and Modification of the October 31 Order. Among other requests,¹ the Department asked to correct the description of a discovery event in that schedule, which had been incorrectly described as "third round of discovery on petitioners" and should have said "third round of discovery on carriers."

On November 13, 2007, AT&T filed a motion to extend the deadline for AT&T to respond to the First Set of Information Requests of the Department from November 23, 2007, to November 30, 2007. No opposition has been filed. AT&T reports that the Department has no objection, provided the remaining schedule is appropriately adjusted.

On November 14, Verizon filed a Motion to Modify the Schedule. No opposition has been filed. Verizon reports that the Department has no objection, Mr. Michael Bandler requested further information, and ACLU-Vt did not express a formal position.

SCHEDULE

We grant AT&T's motion to extend the deadline for AT&T to respond to the First Set of Information Requests of the Department of Public Service from November 23, 2007, to November 30, 2007. AT&T correctly observes that the discovery seeks wide-ranging information, and the answers will take some time to compile. The matter is further complicated by the Thanksgiving holiday.

We adopt Verizon's proposed revisions to the schedule, which reflect the likely effects of the upcoming holidays, a matter not adequately considered when we issued our October Order.

We also grant a correction requested by the Department to substitute "carriers" for "petitioners" in the line regarding the third round of discovery.

The revised schedule is as follows:

1. The motion included three requests. We intend to decide the other two separately. We request the parties to respond to the other parts of the motion by November 29, 2007.

November 9, 2007	First round of discovery on carriers, copies served on all parties and Department of Justice ²
November 29, 2007	Parties respond to DPS motion of November 7, 2007
November 30, 2007	First round of discovery responses due
December 14, 2007	Second round of discovery, copies served on all parties and DOJ
January 4, 2008	Responses due
January 25, 2008	Petitioners file testimony
February 8, 2008	First round of discovery on petitioners
February 22, 2008	Responses due
March 7, 2008	Second round of discovery on petitioners
March 21, 2008	Responses due
April 4, 2008	Carriers file rebuttal testimony
April 11, 2008	Third round of discovery on carriers
April 25, 2008	Responses due

SO ORDERED.

Dated at Montpelier, Vermont, this 20th day of November, 2007.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: November 20, 2007

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

2. Copies of discovery requests shall be filed with Carl J. Nichols, Deputy Assistant Attorney General, Civil Division, United States Department of Justice, Washington D.C. 20530.

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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: MDL Docket No 06-1791 VRW
NATIONAL SECURITY AGENCY ORDER
TELECOMMUNICATIONS RECORDS
LITIGATION

This Document Relates To:
ALL CASES

Plaintiffs have moved for an order prohibiting the alteration or destruction of evidence during the pendency of this action. MDL Doc # 384. The United States has filed papers opposing the motion, Doc # 386, and has prepared and lodged with the court a confidential submission designed for ex parte, in camera review. Doc # 387. Telephone company defendants AT&T, Cingular, Bellsouth, Sprint and Verizon have joined in the United States's opposition to plaintiffs' motion. Doc # 365, 388, 390.

Upon careful review of the non-confidential papers submitted in support of and in opposition to the motion, the court

1 has determined that (1) no hearing on the motion is necessary; (2)
2 an order requiring the preservation of evidence is appropriate; and
3 (3) an interim order shall forthwith enter requiring the parties to
4 take steps to prevent the alteration or destruction of evidence as
5 follows:

6 A. Until the issues in these proceedings can be further
7 refined in light of the guidance and directives anticipated to be
8 received upon appellate review of the court's decision in Hepting v
9 AT&T Corporation, 439 F Supp 974 (N D Cal 2006) and of the Oregon
10 district court's decision in Al-Haramain Islamic Foundation, Inc v
11 Bush, 451 F Supp 2d 1215 (D Or 2006), the court reminds all parties
12 of their duty to preserve evidence that may be relevant to this
13 action. The duty extends to documents, data and tangible things in
14 the possession, custody and control of the parties to this action,
15 and any employees, agents, contractors, carriers, bailees or other
16 non-parties who possess materials reasonably anticipated to be
17 subject to discovery in this action. Counsel are under an
18 obligation to exercise efforts to identify and notify such non-
19 parties, including employees of corporate or institutional parties.

20 B. "Documents, data and tangible things" is to be
21 interpreted broadly to include writings, records, files,
22 correspondence, reports, memoranda, calendars, diaries, minutes,
23 electronic messages, voicemail, e-mail, telephone message records
24 or logs, computer and network activity logs, hard drives, backup
25 data, removable computer storage media such as tapes, disks and
26 cards, printouts, document image files, web pages, databases,
27 spreadsheets, software, books, ledgers, journals, orders, invoices,
28 bills, vouchers, checks, statements, worksheets, summaries,

1 compilations, computations, charts, diagrams, graphic
2 presentations, drawings, films, digital or chemical process
3 photographs, video, phonographic, tape or digital recordings or
4 transcripts thereof, drafts, jottings and notes. Information that
5 serves to identify, locate, or link such material, such as file
6 inventories, file folders, indices and metadata, is also included
7 in this definition.

8 C. "Preservation" is to be interpreted broadly to
9 accomplish the goal of maintaining the integrity of all documents,
10 data and tangible things reasonably anticipated to be subject to
11 discovery under FRCP 26, 45 and 56(e) in this action. Preservation
12 includes taking reasonable steps to prevent the partial or full
13 destruction, alteration, testing, deletion, shredding,
14 incineration, wiping, relocation, migration, theft, or mutation of
15 such material, as well as negligent or intentional handling that
16 would make material incomplete or inaccessible.

17 D. Counsel are directed to inquire of their respective
18 clients if the business practices of any party involve the routine
19 destruction, recycling, relocation, or mutation of such materials
20 and, if so, direct the party, to the extent practicable for the
21 pendency of this order, either to

- 22 (1) halt such business processes;
23 (2) sequester or remove such material from the business
24 process; or
25 (3) arrange for the preservation of complete and accurate
26 duplicates or copies of such material, suitable for later discovery
27 if requested.

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The most senior lawyer or lead trial counsel representing each party shall, not later than December 14, 2007, submit to the court under seal and pursuant to FRCP 11, a statement that the directive in paragraph D, above, has been carried out.

The clerk is directed to vacate the hearing now scheduled for November 15, 2007 in this matter.

IT IS SO ORDERED.



VAUGHN R WALKER
United States District Chief Judge

United States District Court
For the Northern District of California