

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UM 1265

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

Complainants,

Defendants.

INTRODUCTION

19 Qwest Corporation’s (“Qwest”) Motion To Dismiss the First Amended
20 Complaint (“FAC”) filed by the American Civil Liberties Union of Oregon, Inc. and the
21 American Civil Liberties Union Foundation of Oregon, Inc. (collectively “ACLU”)
22 should be denied because the FAC states ultimate facts sufficient to constitute a
23 claim and the Commission has authority to grant the relief requested therein.

24 The FAC contains allegations of fact which if proven would establish that
25 Qwest disclosed legally protected telecommunications content and/or data without a
26 lawful subpoena, warrant, court order or compliance with applicable federal law,

1 including 18 U.S.C. § 2510-2522, 18 U.S.C. § 2701-2712, and 50 U.S.C. § 1801-
2 1811. Notwithstanding these allegations Qwest seeks dismissal of the FAC pursuant
3 to ORCP 21 A (8) on the basis that the ACLU does not have an adequate foundation
4 upon which to base its factual allegations against Qwest. In essence, Qwest
5 complains that at the present time the ACLU has inadequate proof. But that motion
6 is premature as the ACLU need not, at the present time, prove any element of its
7 case—that will happen only after discovery has been completed.

8 It is also noteworthy that Qwest does not seek dismissal based on a denial of
9 ACLU's allegations, i.e., that Qwest did not do what is alleged in the FAC. Indeed,
10 Qwest's refusal to deny the allegations contained in the FAC forms an additional
11 foundation upon which to base the ACLU's claims.

12 Furthermore, because the facts asserted in the FAC, if proven to be true,
13 impact nearly every Oregonian, the Commission should be particularly mindful of
14 the reasonable inferences the ACLU is entitled to on a motion to dismiss.
15 Accordingly, the Commission should deny Qwest's Motion to Dismiss.

16 **ARGUMENT**

17 **I. AS A MATTER OF LAW ACLU IS ENTITLED TO ALL INFERENCES THAT CAN
18 REASONABLY BE DRAWN FROM THE FACTS ALLEGED**

19 When assessing the sufficiency of factual allegations on a motion to dismiss
20 pursuant to ORCP 21 A (8), courts "are guided by ORCP 12A, which states that '[a]ll
21 pleadings shall be liberally construed with a view of substantial justice between the
22 parties.' In construing these complaints, 'we must assume the truth of all well-
23 pleaded facts and give the plaintiff[s] the benefit of the inferences that can properly
24 and reasonably be drawn from those facts.'" See, *Hornbuckle v. Harris*, 69 Or App
25 272, 274 (1984); citing to and quoting *Davidson v. Wyatt*, 289 Or 47, 64 (1980);
26 *McWhorter v. First Interstate Bank*, 67 Or App 435, 437 (1984). Moreover, "[a]

1 pleading survives a motion to dismiss if it contains even vague allegations of all
2 material facts." *Sustina Ltd. v. Pacific First Federal*, 118 Or App 126, 128 (1993).

3 Qwest also ignores the clear mandate of ORCP 12B which provides that "[t]he
4 court shall, in every stage of an action, disregard any error or defect in the pleadings
5 or proceedings which does not affect the substantial rights of the adverse party."
6 Simply put, so long as the FAC, when liberally construed, sets forth facts and
7 inferences that can be drawn from those allegations sufficient for the ACLU to state
8 a claim, Qwest's motion must be denied. Further, Qwest cannot argue that the FAC
9 is insufficient as a matter of law to fully inform Qwest of the nature and basis of the
10 claims being asserted against it. Pleading factual proof is never required in a
11 Complaint and tribunals must always permit allowable inferences, particularly when
12 the Complaint is based upon covert or undisclosed conduct by the defendant.

13 A. It Can Be Reasonably Inferred From the Allegations That QWEST
14 Disclosed Private Telecommunications Content and/or Data Without a
Subpoena, Warrant, Court Order or Applicable Certification.

15 The FAC sets forth in great detail a "Program" pursuant to which telephone
16 companies shared phone call data and content to the U.S. Government. The facts of
17 that program are described in detail in paragraphs 6-17 of the FAC and in the
18 voluminous exhibits thereto.¹ The National Security Agency has never disclosed the
19 identity of which phone companies participated in the Program nor has Qwest ever
20 denied participating in the Program.

21 The facts pled in the FAC are clear: the United States revealed the existence of
22 a covert Program pursuant to which phone companies disclosed phone call data and
23

24 ¹ The legality of the Program is the subject of extensive litigation in many United
25 States Courts but is not the focus of the present case. Perhaps the most publicized
cases wherein the legality of the program is being litigated are: *ACLU v. National*
Security Agency/Central Security Service, et al, E. Dis. Mich., Case No. 06-CV-10204
before; *Hepting v. AT&T Corporation, et al*, N. Dist. Cal., Case No. C-06-672; and
Terkel v. AT&T Corp., N. D. Ill., Case No. 06 C 2837.

1 content. The legality of the Program is in doubt. Qwest has not formally denied
2 participation in the Program². If Qwest disclosed information without legal
3 justification it would have violated Oregon law. Those allegations alone would be
4 sufficient. But to further support reasonable inferences that can be drawn from
5 those facts, the ACLU allowed Qwest an opportunity to deny that it had unlawfully
6 disclosed legally protected telecommunications content and/or data.

7 Indeed, on September 8, 2006, prior to filing the FAC, ACLU's counsel sent
8 Qwest a letter seeking information critical to the decision about whether Qwest
9 should remain a defendant in this action. Specifically, the September 8, 2006 letter
10 asked Qwest whether it had ever, "disclosed, provided or revealed to any person or
11 entity, public or private, or enabled any person or entity, public or private, to obtain
12 the contents of Oregon telecommunications customers' intrastate
13 telecommunications, voice or data, other than in the following circumstances: a. in
14 strict compliance with a warrant, subpoena, or other court order; or b. in strict
15 compliance with federal law, including 18 U.S.C. § 2510-2522, 18 U.S.C. § 2701-
16 2712, and 50 U.S.C. § 1801-1811." A second similarly worded question asked
17 whether Qwest had disclosed "information about or data describing the intrastate
18 telecommunication activity of Oregon telecommunications customers . . ." (A copy of
19 the September 8, 2006 letter is attached hereto as Exhibit No. 1).

20 The September 8, 2006 letter did not inquire about any counter-terrorism
21 program, did not seek information about the NSA and did not require the disclosure
22 of any information protected by the state secrets privilege. Therefore, there was no
23 legal impediment to Qwest providing truthful and complete responses, i.e. "yes" or
24 "no."

25
26 ² However, Qwest has been identified as a potential defendant in proceedings in
other jurisdictions.

1 Qwest responded to ACLU's letter on September 18, 2006 stating that "[o]n
2 June 14, 2006, Qwest filed its response with the Oregon Public Utility Commission
3 in docket UM 1265, in which Qwest stated it had 'no comment or other response to
4 Complainant's Complaint at this time.' Qwest continues to have no comment on
5 these issues, and thus declines to comment on your letter or answer any questions
6 raised in your letter." (A copy of which is attached hereto as Ex. No. 2).

7 The FAC alleges that "Qwest's blanket refusal to respond to the questions
8 asked by the ACLU provides the basis for the reasonable belief Qwest knowingly and
9 unlawfully disclosed or enabled a third party to obtain protected information about
10 the contents of or data describing the intrastate telecommunications activities of
11 Oregonians including the ACLU and its members. Had Qwest not disclosed nor
12 enabled access to such content or data, or had it done so lawfully, it could have
13 answered the ACLU's questions in the negative." *See* FAC at ¶ 27. The question
14 presented to Qwest was not based on pure conjecture, but rather upon a platform of
15 established fact that the United States engaged in the covert Program with
16 telecommunications companies. Qwest's failure to deny that it had engaged in
17 unlawful activity certainly supports the reasonable inference that it did in fact
18 engage in the conduct alleged in the FAC.

19 In construing the FAC, this Commission "must assume the truth of all well-
20 pleaded facts and give the plaintiff[s] the benefit of the inferences that can properly
21 and reasonably be drawn from those facts." *See Hornbuckle*, 69 Or App at 274.
22 Here, the ACLU is entitled to the inference that Qwest did in fact unlawfully disclose
23 or enable access to telecommunication content and/or data. As set forth in the
24 FAC, if Qwest had not unlawfully disclosed or enabled access to telecommunication
25 content and/or data, it could have simply answered "no" to the questions in the
26 September 8 letter.

1 Because the FAC contains more than “vague allegations of all material facts” it
2 must survive Qwest’s Motion to Dismiss. *See Sustina Ltd.* 118 Or App at 128.

3 **II. THIS COMMISSION HAS AUTHORITY TO ISSUE DECLARATORY RULINGS AND**
4 **INJUNCTIONS**

5 Qwest makes an ambiguous argument to the effect that the FAC should be
6 dismissed because it seeks declaratory rulings and an injunction. Because the
7 Commission is expressly authorized by ORS 756.450 to issue declaratory orders,
8 Qwest’s motion should be denied.

9 The Commission is also expressly “vested with power and jurisdiction to
10 supervise and regulate every public utility and telecommunications utility in this
11 state, and to do all things necessary and convenient in the exercise of such power
12 and jurisdiction.” ORS § 756.040 (2). The Commission interprets ORS § 756.040(2)
13 as authorizing it to order utilities or other entities under its jurisdiction to do or
14 refrain from doing acts. For example, in *Rio Communications, Inc. v. U S West*
15 *Communications, Inc.*, 1999 OR PUC LEXIS 276 (OR PUC 1999), the Commission
16 recognized that although it “does not issue temporary restraining orders and
17 preliminary injunctions per se, or other explicitly injunctive relief, it is clear that we
18 do have the authority to order utilities or other entities under our jurisdiction to do
19 or refrain from doing acts. We do this frequently in our orders and we regard our
20 directives as having the force of law. See ORS 756.180.” *See also Shared*
21 *Communications Services, Inc. v. U.S. West Communications, Inc.*, 1997 OR PUC
22 LEXIS 152 (OR PUC 1997) (“USWC questions our authority to issue a ‘cease and
23 desist’ order, and cites ORS 756.180(1) as requiring the Commission to apply to
24 circuit court for an injunction. However, a court injunction is not a prerequisite to
25 this Commission’s regulation of the quality and character of telecommunications
26 services under ORS 756.040. The Commission may issue an order regulating

1 service that will promote the public interest and protect the public from unjust or
2 unreasonable practices, or that will obtain adequate delivery of services at fair
3 prices. ORS 756.040. We conclude that we may issue cease and desist orders to
4 fulfill our regulatory mandate.”).

5 It is clear, therefore, that the Commission has the authority to grant the relief
6 sought by the ACLU.

7 **CONCLUSION**

8 The FAC states ultimate facts sufficient to constitute a claim. The
9 Commission is authorized to grant ACLU the relief requested. Therefore, the
10 Commission should deny Qwest’s Motion to Dismiss.

11 DATED this 27th day of October, 2006.

12 Respectfully submitted,

13 GARVEY SCHUBERT BARER

14 By _____
15

Keith S. Dubanevich, OSB #97520
E-Mail: kdubanevich@gsblaw.com
Mark E. Friedman, OSB #73094
E-Mail: mfriedman@gsblaw.com
Laura Caldera Taylor, OSB #99378
E-Mail: ltaylor@gsblaw.com
Telephone: (503) 228-3939
Facsimile: (503) 226-0259

20 Attorneys for Complainants American
21 Civil Liberties Union of Oregon, Inc.
22 and American Civil Liberties Union
23 Foundation of Oregon, Inc.
24
25
26

G A R V E Y S C H U B E R T B A R E R

P O R T L A N D O F F I C E
e l e v e n t h f l o o r
1 2 1 s w m o r r i s o n s t r e e t
p o r t l a n d , o r e g o n 9 7 2 0 4 - 3 1 4 1
T E L 5 0 3 2 2 8 3 9 3 9 F A X 5 0 3 2 2 6 0 2 5 9

O T H E R O F F I C E S
b e i j i n g , c h i n a
n e w y o r k , n e w y o r k
s e a t t l e , w a s h i n g t o n
w a s h i n g t o n , d . c .
G S B L A W . C O M

Please reply to MARK E. FRIEDMAN
mfriedman@gsblaw.com TEL EXT 3126

September 8, 2006

Alex M. Duarte
Qwest Corporation
421 SW Oak Street, Suite 810
Portland, OR 97204

Dear Mr. Duarte:

The ACLU of Oregon appreciates your cooperation in agreeing to an extension of time for its response to Administrative Law Judge Arlow's July 31, 2006 ruling. As we stated in our motion for extension of time, as an alternative to immediately proceeding before the PUC, we are suggesting an informal approach. Kindly respond in writing to the questions we are raise in this letter. Your clear responses may be helpful for us in determining whether it is necessary for our client to proceed before the PUC.

The questions in this letter address some of our client's principal concerns related to activities of certain telecommunications companies in Oregon, including your client/employer. We were granted an extension to September 22, 2006. Therefore, we would appreciate having your letter response by no later than September 18.

1. Has Qwest Corporation ever disclosed, provided or revealed to any person or entity, public or private, or enabled any person or entity, public or private, to obtain the contents of Oregon telecommunications customers' intrastate telecommunications, voice or data, other than in the following circumstances:

- a. in strict compliance with a warrant, subpoena, or other court order; or
- b. in strict compliance with federal law, including 18 U.S.C. §§ 2510-2522, 18 U.S.C. §§ 2701-2712, and 50 U.S.C. §§ 1801-1811?

If that has ever occurred, under what authority were such intrastate telecommunications contents disclosed, provided or revealed to or obtainable by any person or entity, public or private?

Alex M. Duarte
September 8, 2006
Page 2

2. Has Qwest Corporation ever disclosed, provided or revealed to any person or entity, public or private, or enabled any person or entity, public or private, to obtain information about or data describing the intrastate telecommunication activity of Oregon telecommunications customers, voice or data, other than in the following circumstances:

- a. in strict compliance with a warrant, subpoena, or other court order; or
- b. in strict compliance with Or. Admin. R. 860-032-0510; or
- c. in strict compliance with federal law, including 18 U.S.C. §§ 2510-2522, 18 U.S.C. §§ 2701-2712, and 50 U.S.C. §§ 1801-1811?

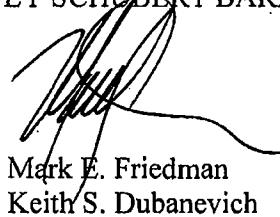
If that has ever occurred, under what authority was information about or data describing the intrastate telecommunication activity of Oregon telecommunications customers disclosed, provided or revealed to or obtainable by any person or entity, public or private?

Thank you very much for your considered responses to these questions.

Sincerely,

GARVEY SCHUBERT BARER

By



Mark E. Friedman
Keith S. Dubanevich

MEF:mkf

cc: ACLU of Oregon

PDX_DOCS:378856.7
09/8/06 2:49 PM



Qwest
421 Southwest Oak Street
Suite 810
Portland, Oregon 97204
Telephone: 503-242-5623
Facsimile: 503-242-8589
e-mail: alex.duarte@qwest.com

Alex M. Duarte
Corporate Counsel

September 18, 2006

Mark E. Friedman
Keith S. Dubanevich
Garvey Schubert Barer
121 SW Morrison St., 11th Floor
Portland, OR 97204-3141

Gentlemen:

Thank you for your September 8, 2006 letter in which you ask Qwest to respond in writing to certain questions raised in the letter.

On June 14, 2006, Qwest filed its response with the Oregon Public Utility Commission in docket UM 1265, in which Qwest stated it had "no comment or other response to Complainant's Complaint at this time." Qwest continues to have no comment on these issues, and thus declines to comment on your letter or answer any questions raised in your letter.

Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read "AMD".

Alex M. Duarte

AMD:cmb

1
2 **CERTIFICATE OF SERVICE**

3 I hereby certify that the foregoing OPPOSITION TO QWEST'S MOTION TO
4 DISMISS was served on:

5 Alex M. Duarte
6 Corporate Counsel
7 Qwest Corporation
8 421 SW Oak Street, Ste. 810
9 Portland, OR 97204
10 E-Mail: alex.duarte@qwest.com

11 Jason Eisdorfer
12 Energy Program Director
13 Citizens' Utility Board of Oregon
14 610 SW Broadway, Ste. 308
15 Portland, OR 97205
16 E-Mail: Jason@oregoncub.org

17 Gregory Romano
18 General Counsel
19 Verizon Corporate Services
20 MC WA0105RA
21 1800 41st Street
22 Everett, WA 98201
23 E-mail: Gregory.m.romano@verizon.com

24 Renee Willer
25 Manager Regulatory &
26 Government Affairs
27 Verizon Corporate Services
28 MC: OR030156
29 20575 NW Von Neumann Dr., Ste 150
30 Hillsboro, OR 97006-4771
31 E-mail: renee.willer@verizon.com

32 Citizens' Utility Board of Oregon
33 OPUC Dockets
34 610 SW Broadway, Ste. 308
35 Portland, OR 97205
36 E-Mail: dockets@oregoncub.org

37 Heather Zachary
38 Wilmer Cutler Pickering
39 Hale and Dorr LLP
40 1875 Pennsylvania Avenue, NW
41 Washington, DC 20009
42 E-Mail: heather.zachary@wilmerhale.com

43 by mailing to them a copy of the original thereof, contained in sealed envelopes,
44 addressed as above set forth, with postage prepaid, and deposited in the mail in
45 Portland, Oregon, on October 27, 2006.

46 
47 Mark Friedman
48 Of Attorneys for Complainants

49 PDX_DOCS:381404.4 [30186-00114]