ORDER NO. 06-673

ENTERED 12/11/06

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1265

In the Matter of	)	
	)	
AMERICAN CIVIL LIBERTIES UNION OF OREGON,	)	
	)	
Complainant,	)	
v.	)	
	)	ORDER
	)	
VERIZON NORTHWEST INC. and QWEST CORPORATION,	)	
	)	
	)	
Defendants.	)	

DISPOSITION: COMPLAINT AGAINST QWEST CORPORATION DISMISSED; PROCEEDINGS HELD IN ABEYANCE WITH RESPECT TO VERIZON NORTHWEST INC.

Procedural Background. Pursuant to a July 31, 2006, Ruling by the Administrative Law Judge, the American Civil Liberties Union of Oregon, Inc., and American Civil Liberties Union Foundation of Oregon, Inc. (ACLU), filed a First Amended Complaint (Complaint) on September 22, 2006, against Verizon Northwest Inc. (Verizon) and Qwest Corporation (Qwest).[1] The Complaint alleges "the unlawful systematic release by Defendants of protected information about the intrastate telephone calls of thousands of Oregonians in violation of 18 U.S.C. § 2511(1), 18 U.S.C. § 2702, OAR 860-032-0510, each Defendant's written privacy policy and thousands of Oregonians' right to privacy."[2]

On October 12, 2006, Verizon and Qwest each filed a Response to and Motion to Dismiss ACLU's First Amended Complaint. On October 27, 2006, ACLU filed Oppositions to both the Verizon and Qwest Motions, and supplemented its opposition to the Verizon Motion with a Request for Judicial Notice in Support of Complainants' Opposition to Verizon's Motion to Dismiss (ACLU Request) and a Declaration of Laura Caldera Taylor in support of Complainants' Request for Judicial Notice Regarding Opposition to Verizon's Motion to Dismiss (Declaration of Counsel).

[1] Simultaneously with the filing of the Complaint, ACLU filed a Notice of Voluntary Dismissal of an earlier named defendant, Embarq Communications, Inc., formerly known as United Telephone Company of the Northwest, dba Sprint "from this proceeding for all purposes."

[2] Complaint, p. 1.

I. THE QWEST MOTION TO DISMISS

Positions of the Parties. Qwest asks that the Complaint against it be dismissed for failure to state ultimate facts sufficient to constitute a claim. Qwest notes that ACLU's sole factual basis for its claim is that it sent a letter to Qwest that Qwest did not answer. "Not answering questions contained in a complainant's letter does not constitute a sufficient basis that a defendant engaged in illegal conduct as a matter of law."[3] Qwest asserts that ACLU's allegations are based on newspaper articles that ACLU admits it cannot confirm and those same media stories do not state that Qwest engaged in any of the alleged acts. ACLU's legal theory rests on the fact that Qwest declined to respond to ACLU's questions in the negative. Qwest contends that Oregon law requires more than a refusal to comment to sustain a complaint; there must be some reliable information that the defendant engaged in the conduct complained of. Qwest is aware of no case that would support such a legal theory based on a presumptive interpretation of a refusal to comment.[4]

ACLU responds that its allegations of fact, if proven, "would establish that Qwest disclosed legally protected telecommunications content and/or data without a lawful subpoena, warrant, court order or compliance with applicable federal law…."[5] ACLU claims that when asserting sufficiency of facts, ORCP 21 A (8) requires courts to "assume the truth of all well-pleaded facts and give the plaintiff[s] the benefit of the inferences that can properly and reasonably be drawn from those facts….if it contains even vague allegations of all material facts."[6] ACLU argues that a reasonable inference can be drawn because "Qwest has not formally denied participation" in a covert program whose legality is in doubt and where Qwest was under no legal impediment to providing truthful and complete responses.[7]

Discussion. ORCP 21 provides that a responding party may file a motion to dismiss a complaint for a variety of reasons including the complaint's "(8) failure to state ultimate facts sufficient to constitute a claim." OAR 860-013-0015(2) requires that the complainant "set forth the specific acts complained of in sufficient detail to advise the parties and the Commission of the facts constituting the grounds and the exact relief requested." We apply these two standards in reviewing Qwest's Response and ACLU's Opposition.

First, we note that, while ACLU makes extensive allegations about the National Security Agency (NSA) and its covert data gathering program based upon reports in news media, none of the information on which it relies as the basis for its allegations regarding Qwest, refers to Qwest's participation in any way. Thus, there are no "specific acts" that may have been gleaned from media reports by ACLU upon which

[3] Qwest Response, p. 1.
[4] *Id.*, pp. 2-4.
[5] ACLU Opposition, p. 1.
[6] *Id.*, pp. 2-3, and cases cited therein.
[7] *Id.*, pp. 4-5, citing *Hornbuckle v. Harris*, 69 Or App. 272, 274 (1984).

it might base its "information and belief." While other telecommunications companies were named specifically, including Verizon, as discussed below, Qwest is conspicuous by its absence.

To support ACLU's desire to include Qwest as a defendant in this proceeding, the only "specific act" to which the ACLU makes an allegation is a nonoccurrence: Qwest's failure to provide answers posed to it in a letter from the ACLU. On that basis, ACLU asks the Commission to draw an inference favorable to ACLU's allegations sufficient to permit the proceeding to go forward.

However, the inference cannot be "properly and reasonably drawn" from that single fact. No presumption arises under the Oregon Rules of Evidence that a party's refusal to answer another's questions outside of a legal proceeding constitutes an admission or inference. Quite simply, Qwest is under no obligation to answer any inquiry not required by statute, rule, tariff or case law. No factual inferences can properly be drawn from its refusal to respond. Consequently, there is no support for ACLU's claim that it has a *reasonable belief*, rather than mere suspicion, that "Qwest knowingly and unlawfully disclosed or enabled a third party to obtain protected information about the contents of or data describing the intrastate telecommunications activities of Oregonians...." The Complaint must be dismissed as to Qwest.

II. THE VERIZON MOTION TO DISMISS

Verizon argues three distinct grounds justifying the dismissal of the ACLU Complaint. First, Verizon claims that ACLU lacks standing to assert its claims against Verizon; second, Verizon asserts that ACLU's claims are preempted and barred by federal law; and finally, resolution of the Complaint would require the discussion of matters covered by the state secrets privilege.

The Issue of Standing. Verizon asserts that ACLU must show a legally recognized interest at stake and that the relief it seeks has a practical effect on that interest rather than "the abstract interest of a busybody in the question presented."[8] ACLU only states that it is a Qwest customer and doesn't allege that any of its members are Verizon customers or subject to Verizon's privacy or record-keeping policies.[9]

ACLU notes that in paragraph 4 of the Complaint, it does indeed allege that Verizon provides telecommunications services to its members and is entitled to an assumption of well-pleaded facts and that inferences may properly be drawn from those facts.[10] ACLU also submits Declarations of Jann Carson and Jossi Davidson, ACLU members with Verizon service. ACLU further states that its employee, Jann Carson, "utilized her Verizon phone service to conduct ACLU business, including having confidential telephone conversations with ACLU members and persons seeking

[8] Verizon Response, p. 7, and cases cited therein.
[9] *Id.*, pp. 7-8.
[10] ACLU Opposition to Verizon Response, p. 3, citing *Hornbuckle*, supra.

information from the ACLU," and that Jossie Davidson, a member of ACLU Foundation's Lawyer Committee, "is a Verizon customer at both his residence and his office" and "has used his Verizon accounts to engage in communications covered by the attorney-client privilege, including matters for the ACLU Foundation."[11]

Discussion. ACLU represents that its business has been conducted over Verizon facilities and that ACLU Foundation matters involving attorney-client privilege have also been conducted over Verizon facilities. Consequently, ACLU has clearly demonstrated that it has a legally recognized interest at stake and that the relief it seeks has a practical effect upon ACLU specifically, and its members generally, sufficient to give it standing to bring the instant Complaint against Verizon.

The Issue of Federal Preemption. Verizon asserts that "ACLU's state-law claims are preempted because they seek to interfere with the national security activities of the federal government." If Verizon were cooperating with the NSA and ACLU sought to enjoin that cooperation, ceasing cooperation would interfere with the federal counter-terrorism program implemented by the NSA. The federal government is supreme within its sphere of action including "paramount federal authority in safeguarding national security." Verizon argues that a long line of precedent, running from the Constitution's inception, supports the "extraordinary pre-emptive power" of the federal government in the arena of national security.[12] Finally, Verizon asserts that federal law also preempts ACLU's action because the National Security Agency Act specifically supersedes any other law requiring disclosure of information relative to the activities of the NSA.[13]

In reply, ACLU notes that the Vermont Public Service Board rejected the argument that there exists for NSA a "Midas Touch" for anything or party its work touches. Furthermore, the ACLU does not seek information on lawful disclosures to the NSA, only redress for unlawful disclosure of protected data to any third party.[14] Furthermore, ACLU argues, federal law has not "occupied the field" of intrastate telecommunications regulation and thus state law applies to the extent it does not actually conflict with federal law. The Telecommunications Act of 1996 expressly preserves state authority over "regulations for or in connection with intrastate communication service by wire or radio of any carrier" with only a few exceptions not relevant to this case.[15]

ACLU also states that Verizon has cited no federal law with which state law and these proceedings conflict; the ACLU does not allege that Verizon violated any Oregon laws by virtue of compliance with the Foreign Intelligence Surveillance Act (FISA) or the Federal Wire Tap Act. ACLU alleges the opposite—that Verizon disclosed

[11] *Id*., pp. 3-4.
[12] Verizon Response, pp. 8-11, and cases cited therein.
[13] *Id*., pp. 14-15, and cases cited therein.
[14] ACLU Opposition, pp. 5-6, and September 18, 2006, Order of the State of Vermont Public Service Board cited therein.
[15] *Id*., p. 6, and case law and regulations cited therein.

protected content to persons or entities public or private in violation of the law, including FISA and the Federal Wiretap Act.[16]

Finally, ACLU argues that the Electronic Communications Privacy Act (ECPA) neither preempts any Oregon law nor precludes the remedies that the ACLU seeks. The Telecommunications Act of 1996 reserves to the states the right to "impose requirements necessary to…safeguard the rights of consumers," such that OAR 860-032-0510, regarding disclosure of CPNI aligns state rules with federal rules. ACLU notes that Verizon's assertions that the Commission lacks authority to preserve the confidentiality of customer information run counter to its participation in the rulemaking proceeding that resulted in the adoption of OAR 860-032-0510 upon which the Complaint is based. [17]

Discussion. Verizon's assertions of a sweeping federal preemption merely by raising the name of the NSA go far beyond any objective reading of the case law on federal preemption. Unlike some of the other proceedings cited by Verizon, the United States has not yet petitioned to intervene in this case[18]; neither has Verizon provided any supporting materials—such as an affidavit from the NSA—to bolster its assertion that it is entitled to a dismissal of the Complaint. Verizon contends that we must dismiss merely upon its say-so. We find that federal law does not preempt OAR 860-032-0510, and we decline to dismiss this proceeding on those grounds.

The Issue of Whether Resolution of the Complaint Would Require the Discussion of Matters Covered by the State Secrets Privilege. Verizon states:

> ACLU's claims also cannot be adjudicated because the United States has consistently invoked the state secrets privilege with regard to the issue at hand. [Footnote omitted.] Assertion of that privilege by the government will prevent the Commission from obtaining any information concerning whether Verizon cooperated with the NSA. Nor will the ACLU be able to provide the Commission with anything more than newspaper articles as a foundation for its concerns. In short, the Commission will have no basis on which it can determine whether the complaint's characterizations of the NSA's activities are correct.[19]

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[16] *Id*., p. 7.
[17] *Id*., pp. 8-9.
[18] With respect to the Initial Decision of the Administrative Law Judge in *ACLU of Pennsylvania, et al., v. AT&T Communications of PA, LCC, et al.*, on which Verizon relies and in which the United States did not intervene, the ALJ dismissed the case "without prejudice to their right to file new complaints if they should obtain a federal court decision, that is binding on the Commission…" (*Initial Decision,* pp. 16-17, 20), citing the pending Ninth Circuit case *Hepting, et al., v. AT&T Corp, et al.*, discussed *infra*. While Pennsylvania chose to dismiss without prejudice, as discussed below, we have decided to hold the proceedings in abeyance in order to prevent a wasteful duplication of pleadings to arrive at the same point.
[19] Verizon Response, p. 16.

Verizon also notes that the United States has been upheld in the past when it sought to invoke the state secrets privilege as an absolute bar to disclosure and that this claim has been upheld with respect to ACLU complaints relating to this particular matter, NSA "data mining," in three recent federal court decisions.[20]

ACLU argues that Verizon, as a private telecommunications company, cannot invoke the state secrets privilege and has no authority to speculate on whether the United States will intervene in the proceeding. "Only if the United States seeks leave to intervene…and…the Commission allows intervention, will the Commission need to determine whether the United States can assert any claimed privileges…. Moreover, even if the United States intervenes in this case, the Commission is not precluded from testing the assertion of the privilege."[21]

Discussion. After the article appearing in *The New York Times* named Verizon and other telecommunications companies as cooperating with the NSA on a project involving "data mining" of the telephone records of their subscribers, ACLU filed complaints[22] and public service commissions initiated their own investigations seeking the disclosure of information relative to the project. The United States brought civil declaratory actions against several commissions seeking to prevent the disclosure of information.[23]

On February 22, 2006, a suit by aggrieved individual subscribers was filed in the U.S. District Court for the Northern District California against AT&T Corp., one of the companies named in *The New York Times*.[24] On July 20, 2006, Judge Vaughn R. Walker issued an Order (Hepting Order) that included discussion specifically relating to the issue of "data mining." While rejecting AT&T's arguments with respect to standing and immunity, he held that the Court would have to determine "step-by-step whether the [state secret] privileges prevent plaintiffs from discovering particular evidence. But the mere existence of these privileges does not justify dismissing this case now."[25]

The judge also set forth procedures to review the classified material. While asking for comment on some of his proposed methods for handling the classified materials,[26] he also indicated that he would not automatically hold the selection of an expert in abeyance pending an appeal to the Ninth Circuit Court of Appeals.[27]

On August 9, 2006, the Judicial Panel on Multidistrict Litigation transferred 15 civil actions to the U.S. District Court for the Northern District of

[20] *Id.*, pp. 17-18, and cases cited therein.
[21] ACLU Opposition, p. 13.
[22] *See, e.g., ACLU v. AT&T of Michigan and Verizon,* Case No. U-14985, Michigan Public Service Commission.
[23] *See, e.g., United States of America v. Kurt Adams, et al* (Dist. Ct. Me), *United States of America v. Steve Gaw, et al.* (Dist. Ct. Mo).
[24] *Tash Hepting, et al,. v. AT&T Corp., et al.* (Dist. Ct. N. Ca), Case No. C-06-0672-VRW.
[25] *Hepting Order*, p. 44.
[26] *Id.*, pp. 69-70.
[27] *Id.*, p. 70.

California for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C.§ 1407. At least 16 additional actions have been transferred since that time.

On November 7, 2006, the Court of Appeals granted the United States' and AT&T's petitions for permission to appeal.[28] Thus, the issue central to the Commission deciding whether and under what circumstances, the Complaint may go forward is now in the hands of the Ninth Circuit. In light of the present state of litigation on this matter, we conclude that these proceedings should be held in abeyance until such time as the Ninth Circuit provides clear direction as to appropriate Commission action.

ORDER

IT IS ORDERED that:

1. The First Amended Complaint of the American Civil Liberties Union of Oregon, Inc., and American Civil Liberties Union Foundation of Oregon, Inc., against Qwest Corporation is DISMISSED.

2. There shall be no further proceedings scheduled in this matter until further notice.

Made, entered and effective DEC 1 1 2006.

Lee Beyer
Chairman

Ray Baum
Commissioner

John Savage
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.

[28] *Tash Hepting, et al. v. United States of America and AT&T Corp., et al.,* Case Nos. 06-80109 and 06-8110.