ORDER NO. 08-001

ENTERED 01/03/08

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1265

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

DISPOSITION: COMPLAINANT'S MOTION TO LIFT ABEYANCE ORDER DENIED

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 alleged "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]

By Order No. 06-673, entered December 11, 2006, the Commission dismissed the Complaint as to Qwest. With respect to the Complaint against Verizon, the Commission concluded that "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…these proceedings should be held in abeyance until such time as the Ninth Circuit provides clear direction as to appropriate Commission action." (Order, p. 7.)

[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.

The ACLU Motion. On December 6, 2007, ACLU filed a Motion to Lift Abeyance Order (Motion), arguing that recent developments in the case provide good cause for reactivating the proceedings. We treat the Motion as a petition to amend and order pursuant to ORS 756.568.

First, ACLU states that the recent disclosure of additional information by the Director of National Intelligence about telecommunication companies' cooperation with the U.S. Government's electronic surveillance program negates any pleas of national security.[3]

Next, ACLU notes that the July 24, 2007, Order of the U.S. District Court for the Northern District of California (U.S. District Court) now overseeing the consolidated cases pending Ninth Circuit Court of Appeals (Ninth Circuit) review, ruled that the Supremacy Clause of the U.S. Constitution does not require dismissal of the various civil actions (a conclusion the Commission reached in Order No. 06-673) and that the government had conceded that some of the questions posed in the investigations fell outside of the privilege scope.[4]

ACLU also states that, on October 12, 2007, Verizon provided responses to congressional committees in which it disclosed certain particulars with respect to the data it had provided federal authorities and argues that Verizon cannot therefore claim that any investigation or discussion of its activities would jeopardize national security.[5]

Finally, ACLU cites the October 31, 2007, Vermont Public Service Board (VPSB) ruling allowing discovery to proceed within certain specified guidelines.[6]

The Verizon Response. Verizon Northwest Inc.'s Response (Response) was filed on December 21, 2007. Verizon asserts that, contrary to ACLU's claims, there have been no events warranting the lifting of the Commission's Order—the federal courts have not yet resolved the fundamental questions at issue in the proceeding, including the applicability of the state secrets privilege.[7] With respect to the first three grounds raised by ACLU, Verizon responded *seriatim* as follows:

First, contrary to ACLU's claim, the Director of National Intelligence only acknowledged the interception of *content* of one-end foreign telephone calls, not a program involving telephone *records*. Thus, the Director's interview provided no new information as a basis for reconsideration of the Commission's Order.[8]

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[3] ACLU cites an interview by the Director published in the *El Paso Times* on August 23, 2007, as the basis for its argument that the government has effectively waived its argument that any discussion would harm national security or violate official secrecy (Motion, pp. 2-3).
[4] Motion, pp. 3-4.
[5] *Id.*, p. 4.
[6] *Id.*, pp. 5-6 and citations therein.
[7] Response, p. 1.
[8] *Id.*, pp. 2-3.

Second, the ACLU's claim that the U.S. District Court determined that state PUC investigations could proceed was incorrect. The court rejected the contentions of the United States that the state defendants, e.g., PUCs, were disabled from pursuing their investigations. However, it deferred consideration of whether state investigations could proceed in light of the government's assertion of the state secrets privilege until the scope issue was resolved by a decision from the Ninth Circuit.[9]

Third, Verizon's letter to congressional committees does not constitute a new disclosure; it was fully consistent with Verizon's prior positions and does not address any of ACLU's allegations, as it is barred by federal law from doing so. Lawful disclosure relating to customers to government agencies in emergencies without court order pursuant to federal statutes does not constitute a new "disclosure."[10] Since ACLU concedes that some portion of discovery is barred, the Commission "should not transform the complaint proceeding into a free-floating fishing expedition concerning Verizon's disclosure of information to government officials generally in the absence of *any* allegations that any such disclosures outside the intelligence context have violated state or federal law." Furthermore, it is not appropriate for the Commission, "without guidance from the federal courts, to make difficult determinations regarding what information, at the margins, is and is not covered by the privilege" where state commissions lack the requisite information and expertise to make judgments concerning whether certain disclosures would or would not harm national security. [11]

Although Verizon did not address the VPSB decision to move forward with the discovery process on a limited basis, its Response at page 7 citing the U.S. District Court for the District of Maine's injunction against the Maine commission, *United States v. Adams,* 473 F. Supp 2d 108, 121 (D.Me. 2007) indicates a belief that the actions of the VPSB are ill-advised.

The ACLU Reply. On December 28, 2007, ACLU filed Complainants' Reply in Support of Motion to Lift Abeyance Order (Reply). ACLU faults Verizon for failing to address two of its arguments: first, for failing to discuss the VPSB decision or provide an explanation "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 demands from a state official to provide information…and the command of the federal government that any such disclosure would violate federal law.'" (Reply, pp. 1-2). Secondly, ACLU contends that it seeks only non-privileged information at this time. "What the ACLU wants to know is whether Verizon has provided interstate customer proprietary network information ('CPNI') without legal justification…. The discovery sought by the ACLU does not require Verizon to disclose anything about its lawful cooperation with government authorities." (Reply, p. 5.)

[9] *Id.*, pp. 3-5 and citations therein.
[10] *Id.*, pp. 5-6 and citations therein.
[11] *Id.*, pp. 6-7 and citations therein, emphasis in text.

Discussion. In our earlier Order No. 06-673, we related the procedural history of this proceeding and the context in which it was being considered, including the pendency of numerous other cases with identical issues arising out of the same allegations. Those cases which had reached the federal courts were consolidated for consideration by the U.S. District Court for the Northern District of California.

As we noted in that Order, AT&T and the United States appealed certain rulings of the U.S. District Court to the Ninth Circuit. We stated, at page 7, "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." The Ninth Circuit has yet to provide the direction that we find essential to guide our actions in this matter.

The ACLU cites the state of Vermont's actions as its most persuasive reason for us to move forward as well. Vermont is the only state choosing to go forward, and it is doing so on a limited basis. We see no good reason to proceed in such a questionable piecemeal fashion. There has been no change in the critical factor that caused us to suspend these proceedings in the first instance.

ORDER

IT IS ORDERED that:

1. The Motion to Lift Abeyance Order filed by the American Civil Liberties Union of Oregon, Inc., and American Civil Liberties Union Foundation of Oregon, Inc., is DENIED.

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

Made, entered and effective JAN 0 3 2008.

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.