

**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. )

ORDER

DISPOSITION: MOTION GRANTED; COMPLAINT DISMISSED  
WITH PREJUDICE; DOCKET CLOSED

**Procedural Background**

Pursuant to a July 31, 2006, Ruling by the Administrative Law Judge, the American Civil Liberties Union of Oregon, Inc., and the 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).<sup>1</sup> 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.”<sup>2</sup>

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, the 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.

<sup>1</sup> Simultaneously, with the filing of the Complaint, the 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.”

<sup>2</sup> Complaint at 1.

For the reasons set forth in Commission Order No. 06-673, entered December 11, 2006, the Complaint was dismissed as to Qwest and held in abeyance as to Verizon. By Order No. 08-001, entered January 3, 2008, the Commission denied an ACLU Motion to Lift Abeyance Order. On January 11, 2008, the ACLU filed a Motion for Reconsideration. The Commission denied the ACLU's Motion by Order No. 08-041, entered on January 22, 2008, and continued to hold the proceedings in abeyance, awaiting guidance from the Ninth Circuit Court of Appeals.

### **The Foreign Intelligence Surveillance Act (FISA) Amendments Act of 2008**

On July 10, 2008, the President of the United States signed into law the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 (FISA Amendments), P.L. 110-261, 122 Stat. 2436. Title II of the Act added to the FISA a new section 803 (§ 803), which provides in pertinent parts (a) and (d) as follows:

(a) In General

No State shall have authority to—

- (1) conduct an investigation into an electronic communication service provider's alleged assistance to an element of the intelligence community;
- (2) require 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;
- (3) impose any administrative sanction on an electronic communication service provider for assistance to an element of the intelligence community; or
- (4) commence or maintain a civil action or other proceeding to enforce a requirement that an electronic communication service provider disclose information concerning alleged assistance to an element of the intelligence community.

\* \* \* \* \*

## (d) Application

This section shall apply to any investigation, action, or proceeding that is *pending on* or commenced after the date of the enactment of the FISA Amendments Act of 2008. (Emphasis added.)

**Verizon's Motion to Dismiss**

On October 28, 2008, Verizon filed a Motion to Dismiss, citing the above federal statutory language recently enacted, and asserting “[t]his federal legislation unambiguously forecloses any investigation by a state agency into allegations that Verizon provided assistance to the National Security Agency (“NSA”), the subject of the complaint \* \* \*. These provisions make clear that a state agency such as the Commission is preempted from attempting to resolve the issues alleged in the complaint.”<sup>3</sup> Verizon attaches to its motion as Exhibit 1 a copy of Order 03 in Docket UT-060856, issued by the Washington Utilities and Transportation Commission (WUTC) on October 17, 2008, dismissing the ACLU’s petition filed in Washington and closing its investigation docket.

On November 11, 2008, the ACLU filed a Response in Opposition to Verizon’s Motion to Dismiss (ACLU Response). At the core of the ACLU Response is the assertion that “this case is not an investigation initiated or performed by any state agency.” Rather, the ACLU argues that this is a complaint proceeding. Furthermore, “[e]ven if the ACLU had asked the state to investigate Verizon, the 2008 FISA Amendments would not bar the investigation because the amendments are unconstitutional and even if constitutional, Verizon has not satisfied the criteria for dismissal contained in the 2008 FISA Amendments.”<sup>4</sup>

The ACLU distinguishes the WUTC case cited by Verizon, asserting that the Oregon proceeding is not a state investigation, but a complaint in which the ACLU is a party with the burden of proof. The Commission is being asked to adjudicate a dispute, an action not proscribed by the statute and pursuant to the doctrine that the express mention of one thing excludes all others. For these reasons, the ACLU maintains that the proceeding must be allowed.<sup>5</sup>

The ACLU also points out that Verizon has not availed itself of the provisions of § 802(a) to have a civil action dismissed for cooperating with the NSA. Finally, the ACLU asks the Commission to lift the abeyance order for the reasons stated in its motion filed almost a year ago. Since the FISA Amendments were signed by the President on July 10, 2008, Verizon had ample time to file earlier. The ACLU should be allowed discovery, and the case should proceed.<sup>6</sup> In support of its Response, the ACLU attaches a copy of its Opposition to Motion to Dismiss in a companion case in the District

---

<sup>3</sup> Verizon Motion to Dismiss at 3.

<sup>4</sup> ACLU Response at 1-2.

<sup>5</sup> *Id.*, at 3.

<sup>6</sup> *Id.* at 4-5.

Court of Northern California, San Francisco Division, challenging the constitutionality of the FISA Amendments.

On November 20, 2008, Verizon filed its Reply to the ACLU's Response in Opposition (Verizon Reply). Verizon asserts that § 803 forecloses the ability of a state agency to act on any issue regarding assistance to the intelligence community whether it is adjudicating a complaint or conducting its own investigation. It therefore urges the Commission to dismiss the complaint and close the docket.<sup>7</sup>

## Decision

Neither party disputes the fact that this matter was pending on July 10, 2008, the date of enactment of the new FISA Amendments section 803. Thus, pursuant to sub § (a)(4), § 803 applies to the instant proceeding. As noted above, the language of § 803(a)(2) expressly prohibits a state agency from "requir[ing] 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. (Emphasis added.) "Any other means" when reasonably construed, must include all forms of discovery and evidence gathering, including the required production and examination of documents, cross-examination of witnesses, entry upon premises, and the like. Under § 803(a)(3), no sanction may be imposed for failure to disclose such information. Under § 803(a)(4), the Commission may not "maintain a civil action *or other proceeding* to enforce a requirement that an electronic communication service provider disclose information concerning alleged assistance to an element of the intelligence community." (Emphasis added.)

Regardless of whether the Commission undertakes an investigation of its own or a complainant seeks relief, no information regarding an electronic communication service provider's alleged assistance to an element of the intelligence community can be elicited from either the object of an investigation or the defendant in a complaint that the questioned party does not freely volunteer.

The ACLU characterized the essence of its Complaint as follows: "Simply put, the citizens of Oregon want to know whether telecommunications companies doing business in Oregon, and thus regulated by the Commission, provided intra-state telephone call information to any person or entity, and if they did, under what authority."<sup>8</sup> Verizon has on numerous occasions clearly noted its unwillingness to cooperate in any way with the ACLU's quest for information regarding the alleged activities. The Commission has no authority to compel Verizon to provide any such information or to sanction it for failing to do so, and it can therefore provide no remedy to the ACLU. The Complaint must be dismissed.

---

<sup>7</sup> Verizon Reply at 1-2.


<sup>8</sup>Reply to Responses of Qwest, United Telephone Company of the Northwest, d/b/a Embarq, and Verizon Northwest Inc. at 2, ll. 9-12 (July 20, 2006).

**ORDER**

IT IS ORDERED that:

1. Verizon Northwest Inc.'s Motion to Dismiss is GRANTED.
2. The Complaint filed by the American Civil Liberties Union of Oregon, Inc., and the American Civil Liberties Union Foundation of Oregon, Inc., against Verizon Northwest Inc. is DISMISSED WITH PREJUDICE.
3. This docket is CLOSED.

Made, entered, and effective DEC 08 2008

  
\_\_\_\_\_  
**Lee Beyer**  
Chairman

  
\_\_\_\_\_  
**John Savage**  
Commissioner

  
\_\_\_\_\_  
**Ray Baum**  
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.