

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

|                                  |   |                           |
|----------------------------------|---|---------------------------|
| Amy Miller, Legal Director and   | ) | Application No. FC-1322   |
| Representative of the American   | ) |                           |
| Civil Liberties Union, Nebraska, | ) |                           |
|                                  | ) |                           |
| 941 O Street, Suite 706          | ) |                           |
| Lincoln, NE 68508                | ) |                           |
| (402)476-0891,                   | ) |                           |
|                                  | ) | MOTION TO DISMISS GRANTED |
| Complainant,                     | ) |                           |
|                                  | ) |                           |
| vs.                              | ) |                           |
|                                  | ) |                           |
| AT&T,                            | ) |                           |
| Lincoln, Nebraska,               | ) |                           |
|                                  | ) |                           |
| Defendant.                       | ) | Entered: January 17, 2007 |

BY THE COMMISSION:

By Complaint filed July 25, 2006, Amy Miller, Legal Director and Representative of the American Civil Liberties Union (ACLU), Nebraska seeks an order of this Commission granting the ACLU specific relief pertaining to the alleged disclosure of customer records by AT&T, the Defendant,<sup>1</sup> to federal authorities without customer consent. An answer and motion to dismiss was filed by the Defendant on August 17, 2006. Although given leave, neither party filed briefs in this matter.

The U.S. Department of Justice (DOJ) filed a letter on October 16, 2006, subsequent to the oral argument on this matter, advising the Commission to refrain from opening an investigation and threatening to file a lawsuit against the Commission if this case moved forward to discovery, but no formal intervention was filed. No appearance was entered on behalf of the DOJ and the DOJ was never made a party to this proceeding. Accordingly, no consideration will be given to the DOJ's letter advising the Commission of its opinion on this case.

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<sup>1</sup> The ACLU complaint was filed against "AT&T." For the purposes of this Complaint, the Commission treats this as a complaint filed against AT&T Corp. and its affiliates, including AT&T Communications of the Midwest, Inc. which was the entity which answered the Complaint. For the purposes of this Order, the Commission will continue to refer to the Defendant as AT&T.

Argument on the Motion to Dismiss was held on October 3, 2006.<sup>2</sup> Appearances were entered by Amy Miller of the ACLU, and Loel Brooks and David Carpenter for AT&T.

The Complaint alleges violations of Neb. Rev. Stat. §§ 86-290, 86-292, 86-293, 86-295, 86-299, 86-2,101, 86-2,105 and 86-2,106.<sup>3</sup> The Complaint also alleges customers were not given the opportunity to control the release of their telephone records which could be a violation of Verizon's privacy and customer security policies.<sup>4</sup>

The Answer filed by AT&T states 39 defenses. Inter alia, AT&T states the Commission lacks jurisdiction to investigate or resolve allegations concerning AT&T's alleged cooperation with the National Security Agency (NSA),<sup>5</sup> the Commission is preempted from acting on the claims in the Complaint, that the military and state secrets privilege bar the Complainant's claims, and that it is prohibited by federal law from providing any information concerning its alleged cooperation with the NSA program.<sup>6</sup> In its Motion to Dismiss, AT&T states that the government in other federal court proceedings relative to this matter has invoked the state secrets privilege which bars discovery of AT&T's alleged disclosure of customer records to the NSA.<sup>7</sup>

At the oral argument, the Complainant argued that Defendants cannot assert the state secrets privilege on behalf of the federal government. Such a privilege could only be invoked by the Department of Justice in limited circumstances. Ms. Miller argued "[t]he US Department of Justice and the US Attorney's Office are perfectly well-equipped to come and appear before this tribunal and let you know whether or not they wish to raise some of the defenses that have been raised here."<sup>8</sup> The Complainant argued there is nothing which prohibits the Commission from investigating whether the Defendant did disclose customer information. The ACLU seeks remedies according to the Complaint pursuant to the wiretapping and intercept statutes. At the oral argument, the ACLU stated in the very least it seeks an order from the Commission which allows limited investigation of whether Nebraska customers were affected and if so the extent to which Nebraska customer records were disclosed.

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<sup>2</sup> The argument on the Motion to Dismiss was consolidated with Formal Complaint No. FC-1324, as the ACLU filed a similar complaint against Verizon.

<sup>3</sup> Complaint (July 25, 2006) at 1-2.

<sup>4</sup> *Id.*

<sup>5</sup> Answer to Complaint (August 17, 2006) at 3.

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

<sup>7</sup> Motion to Dismiss (August 17, 2006) at 9-12.

<sup>8</sup> Transcript at 25:9-14.

AT&T reiterated the arguments in its Motion to Dismiss. AT&T first argued that the Commission would be foreclosed from investigating the issues raised in the Complaint as Verizon would be unable to respond to the Commission and would be precluded from presenting any information by federal law. Verizon stated it would be criminally liable if it disclosed any existence or nonexistence of classified information. AT&T cited to the Federal Communications Commission's (FCC) decision not to investigate and to a number of state commissions who have also decided that states lack the necessary authority to investigate these issues. AT&T also argued the Commission lacks jurisdiction to adjudicate the issues raised in the Complaint. AT&T further argued the Commission's authority if such authority did exist would be preempted by the federal law.

No other informal consumer complaints have been filed with the Commission relative to the issues raised by the ACLU by any AT&T customers in Nebraska.

#### O P I N I O N      A N D      F I N D I N G S

Initially, we note that the state secrets privilege which was argued by AT&T as a basis for dismissal was not convincing. The Commission agrees with the ACLU that the DOJ may, upon an appropriate basis, be able to invoke such a privilege but AT&T could not. It would have only been an appropriate ground for dismissal had the DOJ intervened in this case and had a representative of the DOJ appeared before the Commission to invoke such a privilege. However, the letter referenced above threatening the Commission into taking certain action was not presented in a manner the Commission could reasonably consider.

Nevertheless, based on the pleadings and arguments of the parties in this matter, the Commission grants the motion of AT&T and hereby dismisses this Complaint for lack of jurisdiction and ability to resolve the issues raised by the ACLU relative to AT&T's alleged participation in the NSA program.

The Commission first considers whether it has the jurisdiction to address the statutory basis cited by Complainant to resolve the Complaint. While the Commission has general authority over the landline operations of telecommunications carriers,<sup>9</sup> the Commission does not possess authority to enforce the statutes cited by the ACLU as the basis of its authority in its Complaint. The wiretapping and intercept statutes cited by the ACLU in its Complaint are enforceable jointly by county

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<sup>9</sup> See generally *Neb. Rev. Stat. § 86-103 et seq.*

attorneys and Nebraska Attorney General's Office. In addition, the proper venue for enforcing an alleged violation of *Neb. Rev. Stat. §§ 86-290 et seq.* would be a court of general jurisdiction and not the Commission. Accordingly, we find the Commission lacks jurisdiction to take action relative to the wiretapping and intercept statutes cited by the ACLU in its Complaint.

Next, we address the argument raised by the Complainant relative to the existence of a customer privacy policy. The customer privacy policy listed by AT&T on its website exempts, among other things, disclosure of information where required by law as well to comply with other legal or regulatory requirements and to protect other users.<sup>10</sup> The determination as to the "lawfulness" of any alleged disclosure of customer information has been consolidated to a federal court proceeding in the Northern District of California.<sup>11</sup> The Federal Judicial Panel on Multidistrict Litigation consolidated seventeen actions to the Northern District of California since similar action was first filed in that court.<sup>12</sup> This case is unique inasmuch as the issue of lawfulness of the alleged disclosure of call records or content has already been raised in federal court.

The Commission has expressed concern and previously investigated the proposed release of customer proprietary network information as it related to Qwest; however, no federal issues were implicated by that investigation and use was not demanded from an outside party. Qwest also voluntarily agreed not to release the customer information to its affiliate company resolving that investigation prior to hearing.<sup>13</sup>

Although it possesses great interest in the outcome, the Commission finds it is not the appropriate agency or body to determine the lawfulness of the alleged disclosure to the federal authorities without court order or attorney general opinion. That would require the Commission to investigate and interpret the authority of a federal agency. The Commission has no such jurisdiction. The Commission sees no justification in moving this Complaint forward to discovery to determine whether such Nebraska consumer calling or content information was

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<sup>10</sup> See <http://www.att.com/privacy/policy/#15>

<sup>11</sup> See *In re National Security Agency Telecommunications Records Litigation*, 444 F. Supp. 2d 1332, 2006 WL 2347798 (JPML).

<sup>12</sup> *Id.* at 1335.

<sup>13</sup> In this case, according to news reports which sparked this controversy nationwide, a former Qwest officer denied involvement in the NSA program. In the oral argument, the parties were questioned about Qwest's denial. The news articles, including the article published in the *USA Today* on May 11, 2006, were referenced generally by the ACLU and Verizon in the informal complaint filed May 24, 2006, and the Response of Verizon filed August 17, 2006 and cited in the materials attached to the Response of Verizon.

released if it cannot resolve the ultimate issue of lawfulness. The issues raised by the ACLU in its Complaint are appropriate for a federal court to decide. Such issues are currently pending in federal court and will be resolved by that tribunal. To resolve these issues, the federal tribunal will wade through the specific facts and allegations as to whether and the extent to which any customer calling records or content were disclosed unlawfully. We also understand from recent reports that Congress may be poised to take action in the near future to further protect the privacy of telephone records. Such decisions will be closely monitored by the Commission so that it may promulgate rules regarding customer proprietary information where it is not preempted and where jurisdictionally appropriate, but a formal investigation will not be initiated at this time.

Accordingly, based on the pleadings and arguments provided by all parties to this matter, the Commission is of the opinion and finds that it lacks the necessary jurisdiction to move this Complaint forward to a resolution. The Motion to Dismiss should be granted.

#### O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the Motion to Dismiss filed by the Defendant in this matter be and it is hereby granted.

MADE AND ENTERED at Lincoln, Nebraska this 17<sup>th</sup> day of January, 2007.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director