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**Carla M. Butler**  
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October 12, 2006

Cheryl Walker  
Oregon Public Utility Commission  
550 Capitol St., NE  
Suite 215  
Salem, OR 97301

Re: UM 1265

Dear Ms. Walker:

Enclosed for filing in the above entitled matter please find an original and (5) copies of Qwest Corporation's Response to and Motion to Dismiss ACLU's First Amended Complaint, along with a certificate of service.

If you have any questions, please do not hesitate to give me a call.

Sincerely,

A handwritten signature in black ink that reads "Carla". The signature is written in a cursive, flowing style.

Carla M. Butler

CMB:

Enclosure

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**BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON**

**UM 1265**

AMERICAN CIVIL LIBERTIES UNION OF  
OREGON,

Complainant,

v.

VERIZON NORTHWEST INC. and QWEST  
CORPORATION,

Defendants.

**QWEST CORPORATION'S RESPONSE  
TO AND MOTION TO DISMISS ACLU'S  
FIRST AMENDED COMPLAINT**

**INTRODUCTION**

Pursuant to OAR 860-013-0050(1)(a), Qwest Corporation ("Qwest") timely files with the Commission its Response to the first amended complaint ("Complaint") that the American Civil Liberties Union of Oregon ("ACLU") filed on September 22, 2006, as follows:

As Qwest previously stated in response to the ACLU's original complaint on June 14, 2006, Qwest continues to have no comment or other response to the substance of the claims in the ACLU's First Amended Complaint at this time.

In addition, pursuant to ORCP 21(8), OAR 011-0000(3) and OAR 860-013-0050(1)(a), Qwest respectfully moves to dismiss the Complaint on grounds that the Complaint fails to state ultimate facts sufficient to constitute a claim against Qwest. This is especially so because the ACLU's *sole factual basis* for its claims against Qwest is that the ACLU sent a letter to Qwest requesting information as to whether it disclosed call information, and Qwest did not answer the questions contained in the ACLU's letter. 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.

## ARGUMENT

ORCP 21 provides that a responding party may file a motion to dismiss a complaint or other pleading for a variety of reasons, including the complaint's "(8) failure to state ultimate facts sufficient to constitute a claim."<sup>1</sup> Here, the Complaint fails to state ultimate facts sufficient to constitute a claim.

For example, the ACLU makes extensive allegations about the National Security Agency ("NSA") and the alleged NSA "Program," exclusively based on alleged "information and belief." (Complaint, ¶¶ 1, 6, 8-15, 16-17; see also ¶ 30-31, 37, 42, 48.)<sup>2</sup> However, all of the ACLU's allegations are apparently based on several articles in the national media (the *New York Times* and *USA Today*). Further, the allegations are based on previous claims that the particular newspapers themselves have *admitted they cannot confirm*. (See Complaint, ¶ 16; Exhibit 5.)<sup>3</sup>

More importantly, even if the media articles that form the sole factual basis for the ACLU's complaint in general were a sufficient basis to state a claim, these same media articles upon which the ACLU exclusively relies *do not make any statements that Qwest disclosed any*

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<sup>1</sup> Qwest reserves any other defenses under ORCP 21(8), including those based on lack of jurisdiction and standing. Qwest also notes, for example, that a number of courts and state commissions have dismissed similar claims by the ACLU because of jurisdictional grounds. As an example, just last week, the Washington Utilities and Transportation Commission recently deferred similar issues to a federal court. In addition, the United States Department of Justice has filed motions to dismiss and/or brought suits against several state commissions that have attempted to compel telephone companies into disclosing information about national security matters.

<sup>2</sup> The charging allegations are based merely on what the ACLU has apparently read in media articles by the *New York Times* (Complaint, ¶¶ 6, 16, 17) and *USA Today* (Complaint, ¶¶ 16, 17), as well as a transcript of a December 9, 2005 presidential news conference (Complaint, ¶ 7). The ACLU then makes numerous allegations about the alleged NSA "Program." (Complaint, ¶¶ 8-15.) However, it is unclear on what basis the ACLU makes these claims, which are essentially nothing more than legal conclusions. The Complaint does not attribute these claims to any source, but merely states that these allegations about the NSA and the NSA Program are so.

<sup>3</sup> The ACLU acknowledges that the only newspaper that reported alleged telephone company involvement in these matters (*USA Today*) later admitted that "it could not establish the existence of an actual contract between any phone company and the NSA." (Complaint, ¶ 16; Ex. 5.) The ACLU makes much of the fact that this same newspaper self-servingly said that "it stood by the core allegations of its earlier story." (Complaint, ¶ 6.) Nevertheless, despite *USA Today's* apparent attempt to save face, given that the alleged "contract" between the NSA and the telephone companies is what this entire complaint revolves around, *USA Today's* self-serving standing by "the core allegations of its earlier story" (whatever that means) simply cannot form the basis for a complaint about that same alleged (and unproven) contract between the NSA and any telephone company, *much less Qwest*.

call information to the NSA. (See e.g., Exhibits 3-6.) Indeed, while these media articles make certain statements about certain specific telephone companies, they do *not* make *any such statements* against Qwest. (*Id.*)<sup>4</sup>

Accordingly, despite the ACLU's reliance upon the media articles that did not include Qwest as one of the telephone companies that allegedly provided call information to the NSA, the *only basis* for the ACLU's complaint against Qwest is Qwest's *September 18, 2006 response* to the ACLU's September 8th letter, in which Qwest advised the ACLU that it had no comment or other response to the ACLU's complaint. (See Complaint, ¶¶ 21-23, 27.)<sup>5</sup> The fact that the entire ACLU complaint against Qwest comes down to Qwest's September 18th letter is made clear in the ACLU's claim that Qwest's "blanket refusal" to respond to the ACLU's questions "provides for the *reasonable belief* [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[,] including the ACLU and its members." (Complaint, ¶ 27 (emphasis added).)<sup>6</sup> Indeed, the ACLU sums up its *entire legal theory* against Qwest as follows: "Had Qwest not disclosed nor enabled access to such content or data, or had done so lawfully, it could have answered the ACLU's questions in the negative." (*Id.*) In other

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<sup>4</sup> In fact, the ACLU seems to try to back away from its extensive claims about the NSA and its alleged "Program" (Complaint, ¶¶ 6-17) by arguing that its September 8, 2006 letter "did not inquire about any counter-terrorism program, did not seek information about the NSA and did not inquire the disclosure of any information protected by the state secrets privilege." (Complaint, ¶ 23.) Nevertheless, despite the ACLU's attempts to couch this matter as anything other than its purported concerns about the NSA and its alleged activities, the entire predicate for the ACLU's complaint is precisely because of its allegations about counter-terrorism programs and the NSA. (Complaint, ¶¶ 6-17.) Indeed, without such claims, there would be no complaint against Qwest (or any other telephone company) to begin with. Moreover, the *entire basis* for the ACLU's complaint against Qwest is that Qwest did not comment on the matters addressed in the ACLU's September 8th letter or its original complaint, which, like its amended complaint, is based on its extensive *claims about the NSA and counter-terrorism programs*.

<sup>5</sup> Paragraphs 24 to 26 pertain to Verizon, and not to Qwest.

<sup>6</sup> The ACLU cannot show, however, that Qwest's September 18th response leads the ACLU to a "reasonable belief" 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[,] including the ACLU and its members." (Complaint, ¶ 27.)

words, according to the ACLU, Qwest engaged in illegal conduct because it did not answer the ACLU's questions.

Whatever the inference that the ACLU wishes to make about Qwest's September 18th response, the fact remains that such September 18th response to the ACLU's September 8th letter cannot possibly constitute a sufficient basis that Qwest engaged in any illegal conduct. This is especially so because the entire factual basis of the ACLU's complaint is based on media articles that identify certain telephone companies, *but not Qwest*, as having allegedly cooperated with the NSA. In short, Qwest's response to the ACLU's questions do not (and cannot) state ultimate facts sufficient to constitute a claim by the ACLU against Qwest. Oregon pleading requirements require much more than the mere "blanket refusal to respond to the questions asked by the ACLU" in order to state ultimate facts sufficient to constitute a claim.

Further still, Qwest notes that it is not aware of any case in Oregon where one party's refusal to respond to another party's questions is sufficient to thereafter state a claim that the non-responding party somehow engaged in illegal conduct. Obviously, a complainant must have some reliable information that the defendant engaged in the conduct complained of, and such information must be much more than simply the defendant's refusal to communicate about the substantive conduct. In fact, although Rule 311 of the Oregon Rules of Evidence (ORS 40.135) recognizes numerous legal "presumptions", there is no presumption that a party's refusal to answer another's questions constitutes guilt, liability or illegal conduct. In other words, a "no comment" response cannot be enough to constitute a claim against another party. Indeed, the Commission's own complaint rules (OAR 860-013-0015) require *facts* ("specific acts"), and not merely a fishing expedition in the hopes of later finding "specific acts."

Nor should this Commission allow the ACLU to bring a complaint against Qwest without more, simply because the ACLU is dissatisfied with Qwest's response to its September 8th letter.

Not only do Oregon pleading requirements require more, but it would be bad public policy to allow a mere refusal by one party to answer another party's questions to be sufficient for the dissatisfied party to state a claim against the non-responding party.

Finally, Qwest notes that the Administrative Law Judge's July 31, 2006 ruling required the ACLU to decide whether its filing was a complaint, a request for investigation, or a request for a declaratory ruling, all of which have different rules and procedures. The Administrative Law Judge also noted that "OAR 860-013-0015(2) further 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.'" ALJ Ruling, p. 2. fn. 2. See also ORS 756.500(3). The ACLU styles its amended filing as a "complaint," yet still does not state any "specific acts" by Qwest, but only the ACLU's apparent presumption (its alleged "reasonable belief") that Qwest somehow must have engaged in illegal conduct because it did not answer the ACLU's questions. Moreover, despite styling its new filing as a "complaint," the relief that the ACLU seeks is essentially a declaratory ruling. (See e.g., Complaint, pp. 9-15, First through Fifth Claims for Relief (seeking various "declarations" of violations of law or breaches), and Complaint, p. 16, Sixth Claim for Relief (seeking a permanent injunction).) Thus, it does not appear that the ACLU followed the Administrative Law Judge's directions in its amended complaint.

In short, the ACLU has not (and cannot) state a viable claim against Qwest. In the absence of specific facts by Qwest that the ACLU complains about, Qwest's mere refusal to answer the ACLU's questions is not a basis for the ACLU to bring a complaint against Qwest.

**CONCLUSION**

Accordingly, the ACLU's first amended complaint fails to state ultimate facts against Qwest sufficient to constitute a claim against Qwest. Thus, pursuant to ORCP 21(8), Qwest respectfully submits that the Commission should dismiss the ACLU's first amended complaint against Qwest in its entirety and with prejudice.

DATED: October 12, 2006

Respectfully submitted,



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Attorney for Qwest Corporation

## CERTIFICATE OF SERVICE

UM 1265

I hereby certify that on the 12<sup>th</sup> day of October 2006, I served the foregoing **QWEST CORPORATION'S RESPONSE TO AND MOTION TO DISMISS ACLU'S FIRST AMENDED COMPLAINT** in the above entitled docket on the following persons via U.S. Mail, by mailing a correct copy to them in a sealed envelope, with postage prepaid, addressed to them at their regular office address shown below, and deposited in the U.S. post office at Portland, Oregon.

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DATED this 12<sup>th</sup> day of October, 2006.

**QWEST CORPORATION**



By: \_\_\_\_\_

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