

Discussion. The ACLU letter is styled as a Complaint, both as a Qwest customer and on behalf of other persons, separately named, who are subscribers to telecommunications services provided by Qwest, Verizon and Sprint. At the same time, the ACLU has asked the Commission to open an investigation into the allegations that those carriers, regulated by the Commission, have unlawfully provided customer proprietary network information to the NSA. Under Oregon’s statutes, complaints and investigations are different types of proceedings with different procedural requirements, different discovery and data gathering methods and different burdens and standards of proof.¹ For the reasons set forth below, as the ACLU submission currently stands, it is not readily classifiable as either a statutorily sufficient complaint or a motion to open an investigation. The ACLU should therefore clarify its pleading by resubmission if it intends to pursue this matter.

ORS 756.500(3) sets forth the pleading requirements of a complaint including “all grounds of complaint on which the complainant seeks relief or the violation of any law claimed to have been committed by the defendant, and the prayer of the complaint shall pray for the relief to which the complainant claims the complainant is entitled.”² The relief that the ACLU seems to request is the conduct of an investigation; no request has been made for a billing adjustment, change in service offerings or injunctive relief for the prohibition of future alleged violations of statutes and rules.

By contrast, an investigation may be opened by the Commission either pursuant to a motion or *sua sponte* to investigate “any matter relating to any public utility or telecommunication utility...subject to the commission’s regulatory jurisdiction....”³ In the case of an investigation, the Commission first investigates to see if sufficient grounds exist to warrant a hearing being held, and then notifies the utility in question.⁴ The case then proceeds as in the manner of a complaint “as though complaint had been filed with the commission thereto.”⁵ Unlike a complaint, where the complainant is automatically a party, in an investigation, an interested person, other than the Citizens’ Utility Board, must file a petition to intervene and be found to have met specific criteria before it may actively participate and file pleadings in the proceeding, issue subpoenas, offer evidence or seek disclosure of information from other parties.⁶

¹ ACLU also requested that “if the Commission discovers such violation, we urge you to issue a declaratory ruling under ORS 756.450...” (Complaint, p. 5). Declaratory Rulings are generally used by a person to seek a ruling as to whether a proposed action would be subject to agency regulation, proscribed or permitted given a particular set of circumstances and is inapposite to the current contested proceeding. (*Oregon State Denturist Assn. v. Board of Dentistry*, 172 Or App 693, 702, 19 P3d 986 (1981).

Furthermore, in the absence of any facts having been established, such a contingent request is premature.
² 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 of complaint and the exact relief requested.”

³ ORS 756.515(1).

⁴ ORS 756.515(2).

⁵ ORS 756.515(3).

⁶ OARs 860-012-0001, 860-014-0040—860-014-0070.

The Commission's order of procedure further distinguishes complaints from investigations. In a complaint proceeding, the complainant presents evidence first, followed by the defendant and then the Commission staff.⁷ In an investigation, the respondent begins with the presentation, followed by the Commission staff and then other participants.⁸ Likewise, in a complaint proceeding, the burden of convincing the trier of fact that the alleged fact is true (*i.e.*, the burden of persuasion) rests solely with the complainant.⁹

Thus, the decision facing the ACLU as to how it wishes to proceed is a significant matter and one that will not be lightly assumed by the Commission. The ACLU should be accorded sufficient time to evaluate the circumstances and have the opportunity to refile in the manner they intend to proceed.

RULING

1. The American Civil Liberties Union of Oregon shall have thirty (30) days from the date of this Ruling in which to refile a pleading as enumerated in OAR 860-013-0005 in this matter.
2. Upon receipt of a clarified pleading, the Commission will schedule further proceedings as necessary.

Dated at Salem, Oregon, this 31st day of July, 2006.

Allan J. Arlow
Administrative Law Judge

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⁷ OAR 860-014-0035(1).

⁸ OAR 860-014-0035(2).

⁹ ORS 183.450(2). *See Marvin Wood Products v. Callow*, 171 Or App 175, 179, 14 P3d 686 (2000).