

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE REQUEST OF TEN)
CUSTOMERS TO INITIATE AN INVESTIGATION)
INTO WHETHER VERIZON DELAWARE INC. AND) PSC DOCKET NO. 06-179
AT&T COMMUNICATIONS OF DELAWARE, LLC,)
HAVE IMPROPERLY SHARED TELEPHONE RECORDS)
(FILED MAY 25, 2006))

ORDER NO. 6965

This 11th day of July, 2006, the Commission determines and Orders the following:

1. Ten Delawareans, all customers of "Verizon," have filed a complaint (see 26 Del. C. § 207) asking the Commission to exercise its discretion to open an investigation. The inquiry would be to find out if "Verizon" or "AT&T" has been supplying federal intelligence agencies with information about who its customers are calling, either by providing customer call record data or by granting the federal agencies network access to cull such data. If it turns out that either carrier has been passing call information, complainants ask the Commission to then determine whether Verizon and AT&T have acted legally: did they have a legal basis for providing, or allowing the mining of, such customer calling information?¹ By a subsequent submission, 110 other residents endorse the call for a Commission investigation.

¹As for the scope of the legality inquiry, complainants allege facts that may constitute violations of Delaware law governing: (1) deceptive trade practices; and (2) electronic surveillance, stored wire and electronic communications, and transactional record access. See 6 Del. C. §§ 2531-2536; 11 Del. C. §§ 2401-2412, 2421-2427. In response, AT&T argues that federal law preempts this Commission from investigating the ACLU's allegations, noting that several federal statutes prohibit the disclosure of classified information, that the United States has invoked the Military States Secrets Privilege to ensure

2. AT&T and Verizon (in the guise of Verizon Delaware Inc.) have each informally responded. Both carriers assert that because the Director of National Intelligence and the Director of the National Security Agency have claimed that information regarding federal anti-terrorism programs is classified, the carriers are barred from disclosing (or even discussing) what each has done (or not done), what data might (or might not) be flowing to the federal intelligence agencies, and what "legal" justifications support the carrier's actions, or the government's demands or requests. As AT&T paints it, if the carriers cannot (because of federal statutes and Executive Orders) tell anything, then there is little to be gained by the Commission asking. Any inquiries from this Commission would be met with silence from the carriers, given the criminal sanctions) that attach under federal laws for disclosure of classified information.²

3. Anyone that reads, or listens, to the news knows that the crux of the filed complaint is not a Delaware-only controversy. Telephone subscribers in more than twenty other jurisdictions have filed complaints with their state utility commissions or Attorney Generals asking for investigations about what customer call data is flowing to federal intelligence agencies. In addition, several class action lawsuits are

that there is no disclosure of the information at issue here, and that the United States sued state officials and carriers to prevent disclosure of this information through state subpoenas.

²Chairman Martin of the Federal Communications Commission ("FCC") has said that these invocations of national security secrecy - as they would displace any authority that the FCC normally would have to compel information from the carriers - preclude any FCC investigation whether carriers might be violating the provisions of 47 U.S.C. § 222 by providing customer proprietary network information to federal intelligence agencies. Letter of K. Martin, FCC Chair to Hon. E. Markey, Ranking Member (May 22, 2006).

pending throughout the country, challenging carriers' alleged participation in the transfer of customer calling information to the National Security Agency and other intelligence bodies.³ And in those cases, the federal government has invoked the powers assigned to it by the Constitution to conduct war and foreign relations as grounds to bar any inquiry into the carriers' actions and the government's surveillance methods.⁴

4. After hearing from the parties on June 20, 2006, the Commission believes that, in the present context, it is appropriate to suspend any further action in this matter for six months. The complaint and the carriers' responses pose questions of the highest magnitude. The courts are better equipped, in both resources and expertise, to assay the competing claims of customers' statutory rights of privacy and the needs of national security. Within six months, rulings from the federal District Courts, if not Courts of Appeal (or even the Supreme Court), might give a better picture concerning whether the federal government's concerns of national security justify an all-encompassing blanket of secrecy. Once the courts have moved forward on that threshold question, the Commission can better discern whether there can exist room for any investigation by a state utility commission.

³See, e.g., Hepting v. AT&T Corp., No. C-06-0672 VRW (N.D. Cal.).

⁴In particular, the federal government is now seeking to enjoin subpoenas issued by the Attorney General of New Jersey that seek information about AT&T, Verizon, and other carriers disclosing calling information related to customers in that State. The federal government asserts that the federal war-making and foreign relations powers preempt any inquiry by a State officer seeking to enforce State law dictates. United States v. Zulima v. Farber, et al., Civ. Action No. 3:06 cv 02683-SRC-TJB (D. N.J.) (filed June 14, 2006).

5. One additional caution. The six-month suspension should not be read as a commitment by the Commission that it will undertake an investigation if the courts find some form of disclosure allowable. The Commission is simply suspending any decision on whether to initiate an investigation until the threshold issues of whether information will or will not be available is sorted out in the judicial fora.

Now, therefore, **IT IS ORDERED:**

1. That proceedings in this matter, resulting from the petition or complaint filed by Helen K. Foss, Enno Krebbers, Phyllis Levitt, Lawrence Hamermesh, Marion Hamermesh, Judith Mellen, Joy Mulholland, Gilbert Sloan, Sonia Sloan, and Serena Williams on May 26, 2006, are hereby held in abeyance for a period of six months from the date of this Order. After such time, the complainants can ask the Commission to revisit this matter to determine whether to initiate an investigation under 26 Del. C. § 207.

2. That the Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

Chair

Commissioner

Commissioner

PSC Docket No. 06-179, Order No. 6965 Cont'd.

Commissioner

Commissioner

ATTEST:

Secretary