

**PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17105-3265**

American Civil Liberties Union of Pennsylvania, et al
v.
AT&T Communications of Pa LLC, et al.

PUBLIC MEETING
June 5, 2008
MAY-2008-OSA-0150*
Docket No. C-20066397 et al

MOTION OF COMMISSIONER KIM PIZZINGRILLI

Before the Commission for disposition are the exceptions of the American Civil Liberties Union of Pennsylvania (ACLU) and the reply exceptions of AT&T Communications of PA, LLC (AT&T), Verizon Pennsylvania and Verizon North (collectively, Verizon) to the Initial Decision (ID) of Administrative Law Judge Charles E. Rainey, Jr. (ALJ). The ID granted the preliminary objections of AT&T and Verizon and dismissed the Complaint. For the reasons set forth below, I move that the exceptions be denied and the ID adopted.

The Complaint¹, filed by ACLU, joined by several other complainants, alleged that named respondents² violated certain provisions of the Public Utility Code by disclosing customer calling information to the National Security Agency (NSA) without a warrant, court order or other authorization. Complaint at 2. The ACLU Complaint is based largely upon newspaper articles about a database of telephone calling information assembled by the NSA. Complaint at 8-9. The Communications Workers of America (CWA) also filed a complaint against AT&T and Verizon alleging that the companies may have engaged in “unreasonable utility practices” if they participated in the NSA wiretapping program. These complaints were consolidated by the ALJ pursuant to 52 Pa. Code § 5.81.

AT&T and Verizon filed preliminary objections arguing that issues of national security are implicated by the complaints and note that the Federal Communications Commission (FCC) declined to investigate similar complaints because to do so would require the production and evaluation of highly classified information. The FCC concluded that it does not have the power to compel the production of such documents. AT&T P.O. at 2-3; Verizon P.O. at 2. Additionally, Verizon argued that it:

[I]s precluded by federal law from providing information about its cooperation, if any, with this national security matter.

Verizon...cannot confirm or deny cooperation in such a program or the receipt of any government authorizations or certifications or any other information requested by complainants.

¹ Filed on May 24, 2006.

² The named respondents are AT&T, Verizon, CTSI, LLC and ARC Networks, Inc.

Id. at 8-9. Respondents further state that they were contacted by the U.S. Department of Justice which advised that disclosing their participation (or lack thereof) in any NSA initiated surveillance program would be a violation of federal law. AT&T P.O. at 8; Verizon P.O at 2-3.

In dismissing the preliminary objections, the ALJ held that the statutory authority bestowed upon the Commission is not a grant of exclusive jurisdiction over all matters involving regulated public utilities. Virgilli v. Southwestern Pennsylvania Water Authority, 427 A.2d 1251 (1981). The ALJ stated:

[A]lthough the complaints are narrowly drawn to test Pennsylvania regulatory authority, the questions involved in this matter are in fact larger in scope than just whether the telecommunications carriers...violated the Public Utility Code and Commission Regulations. Matters of national security are implicated in this proceeding. There is no indication in the Public Utility Code or the Commission's regulations governing the protection of customer information, that the...Legislature intended that the Commission would decide matters of national security.

Initial Decision at 14-15. The ALJ continued that the threshold matter in this case is "whether the Commission has the authority to determine whether or not the respondents' refusal to comment on whether they are providing customer calling information to the NSA is a matter of national security." Id. at 15

In granting the preliminary objections and dismissing the complaints, the ALJ held that the Commission is not authorized to make this determination since to do so would require an interpretation of federal law governing national security. The ALJ dismissed the complaints without prejudice to the Complainants right to refile once a federal court has determined: (1) that the issues raised do not implicate national security; (2) that the respondents may be compelled to disclose the extent to which they provided customer calling information to the NSA and (3) that the states may determine whether any state law was violated if customer information was provided.

In its exceptions, ACLU avers that the ID should be reversed because its claims are based upon Pennsylvania law and therefore, are properly before the PUC and that the assertion of national security does not preclude the Commission from inquiring into whether respondents disclosed customer information. ACLU also states that it is not seeking information related to NSA but whether the respondents provided call information to "any governmental entity without court order or warrant and whether this action complied with Pennsylvania Public Utility Law". Exceptions at 3. In its reply exceptions AT&T argued that ACLU is attempting to reframe its complaint and that the only violations alleged in the complaint relate to the alleged disclosure of information to NSA. Reply Exceptions at 5.

In reviewing these exceptions, I am mindful that the Commission may only exercise the authority granted to it by the Legislature. The General Assembly has granted the Commission the authority to regulate the rates and services of public utilities providing service in the Commonwealth. See 66 Pa. C.S. §§ 101-3316; City of Philadelphia v. Philadelphia Electric Company, 473 A.2d 997 (Pa 1984). There is no statute or regulation, applicable to this Commission that confers the authority to investigate issues that implicate national security. The issues raised on exception do not provide a legally sustainable basis upon which the Commission could determine matters of national security and thus, do not support reversal of the ID.

The ALJ disposes of the issues raised by the parties in a well-reasoned manner. I concur with the ALJ that there is no statutory or regulatory language that would enable the Commission to make the preliminary determination required to evaluate the allegations raised in the complaints namely, whether the respondents' refusal to comment on whether they are providing call information to the NSA implicates national security. Accordingly, I move that the exceptions be denied and the Initial Decision be adopted. The dismissal of the complaints is without prejudice to the Complainants' right to refile their complaints following a federal court ruling that the disclosure of the information sought by Complainants does not involve questions of national security.

THEREFORE, I MOVE THAT:

1. The exceptions of ACLU be denied;
2. The Initial Decision be adopted; and
3. The Office of Special Assistants prepare an Order consistent with this Motion.

June 5, 2008
Date

KIM PIZZINGRILLI, COMMISSIONER