THE HONORABLE BARBARA ROTHSTEIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Verizon Northwest, Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, NYNEX Long Distance d/b/a Verizon Enterprise Solutions, Verizon Select Services, Inc., and Verizon Services Corporation, Plaintiffs, v. Marilyn Showalter, Chairwoman; Patrick Oshie and Richard Hemstad, Commissioners, in their official capacities as members of the Washington Utilities and Transportation Commission, and Washington Utilities and Transportation Commission, Defendants.	NO. CV02-2342R DEFENDANTS' MOTION TO CONTINUE CONSIDERATION OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND TO COMPEL LIMITED INITIAL DISCOVERY AND MEMORANDUM IN SUPPORT OF MOTION NOTE ON MOTION CALENDAR: Friday, DECEMBER 20, 2002

I. MOTION

Pursuant to Federal Rules of Civil Procedure (F.R.C.P.) 1, 6(b), 7, 26(d), Local Rule 7, as well as the inherent power of the Court, defendants Washington Utilities and Transportation Commission (WUTC) and its Commissioners move (1) to continue

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consideration of plaintiff Verizon's motion for a preliminary injunction pending an opportunity to conduct limited initial discovery and (2) to compel such discovery. This motion is based on the files and records in this case, and on the declaration of Jeffrey D. Goltz, filed with this motion.

II. BACKGROUND

On Thursday, November 21, 2002, Verizon Northwest, Inc., and other Verizon companies filed a complaint challenging the validity of rules of the Washington Utilities and Transportation Commission (WUTC) adopted on November 7, 2002 (Washington Privacy Rule). Concurrently with the complaint, the Verizon companies filed a motion for a preliminary injunction supported by a declaration of Ms. Maura Breen, a vice-president of Verizon Services Corporation, one of the named plaintiffs.

The Verizon companies argue that to obtain a preliminary injunction, they must demonstrate that one of two alternative tests are met. They must show either (1) probable success on the merits and the possibility of irreparable injury or (2) that serious questions on the merits are raised and the balance of harms "tips sharply" in their favor. *E.g.*, *Stuhlberg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839-40 (9th Cir. 2000). Verizon Motion and Memorandum at 7-8.[1] Consistent with that burden, Ms. Breen testifies to the injury that the Verizon companies allegedly will suffer should the Washington Privacy Rule take effect. As we will describe in more detail when we respond to plaintiffs' motion on December 9, 2002, we take issue with many of her allegations.

For example, she states that certain product development by the Verizon companies "would be effectively banned" if the new Washington Privacy Rule takes effect (Declaration of Maura Breen ¶8), and that the effect of the new rules would be to "silence the commercial

[1] The Verizon companies offer one formulation of the test for granting a preliminary in junction. The Ninth Circuit also has articulated a test that includes a "public interest" component. *See, e.g., Burlington Northern R. Co. v. Department of Revenue*, 934 F.2d 1064, 1074 (9th Cir. 1991).

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and non-commercial speech of [the Verizon companies] in the State of Washington." *Id*. ¶21.

In order to test and clarify those statements, we sought to depose Ms. Breen. However, Verizon companies referred to F.R.C.P. 26(d), which states that parties may not seek discovery until the parties have conferred pursuant to F.R.C.P 26(f) unless the parties otherwise agree or unless the court allows such discovery by order. The Verizon companies would not so agree. Accordingly, we file this motion for court approval to conduct limited discovery. Declaration of Jeffrey D. Goltz ¶ 6.

III. ARGUMENT

Inclusion of deposition testimony in support or in opposition to motions for preliminary injunction is appropriate. *See, e.g.*, Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, 11A *Federal Practice & Procedure* §2949, at 219-20 (1995). The WUTC and its Commissioners would be severely disadvantaged if they were not permitted to take the deposition of Ms. Breen, whose fifteen page declaration contains many broad and unsubstantiated allegations concerning the harm Verizon claims would result to it if the relief it seeks is not granted. The Federal Rules of Civil Procedure that structure the discovery process should not be applied to limit the ability of a governmental party whose regulatory actions are sought to be enjoined from presenting to the Court a balanced presentation of facts of potential harm.

To further test and clarify the claim of the Verizon companies that their commercial and non-commercial speech will be "silenced," by this motion we also seek to take the deposition of a representative or representatives of the Verizon companies pursuant to F.R.C.P. 30(b)(6) who can testify to the current, planned future, and potential future marketing, advertising, and other commercial speech activities of the Verizon companies in Washington.

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Granting the relief we request may result in postponing consideration of plaintiffs' motion for a preliminary injunction until after the new Washington Privacy Rule takes effect on January 1, 2003. However that possibility should not deter the Court from granting our requested relief for three reasons. First, any delay would be brief. Second, as will be elaborated upon in our response to the motion for a preliminary injunction, any damage to Verizon's commercial speech activity, if it exists at all, is slight. Finally, Verizon could have avoided this delay by making Ms. Breen available as originally requested for a deposition the week of December 2, 2002.

III. CONCLUSION AND REQUEST FOR RELIEF

Accordingly, the defendants request this Court to:

1. Order the plaintiff Verizon companies to make available for deposition Ms. Maura Breen in Seattle or Olympia, Washington, for deposition by the defendants.

2. Order plaintiff Verizon companies to make available for deposition by the defendants in Seattle or Olympia, Washington, pursuant to F.R.C.P. 30(b)(6), a representative or representatives who can testify to the current, planned future, and potential future marketing, advertising, and other commercial speech activities of the Verizon companies in Washington.

3. Continue the hearing on plaintiffs' motion for a preliminary injunction currently noted for consideration on December 13, 2002, and reschedule consideration of that matter as follows:

a. Defendants' supplemental response to the motion, incorporating information learned from the depositions would be due five business days after completion of the depositions.

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b. Plaintiffs' response to defendants' supplemental response would be due no later than four business days after filing and service of defendants' supplemental response.

DATED this 5th day of December, 2002.

CHRISTINE O. GREGOIRE
Attorney General

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