IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

CYNTHIA JOHNSON	§	
	§	
v.	§	
	§	**CIVIL ACTION**
ONCOR ELECTRIC DELIVERY CO., LLC;	§	**NO. W-13-CA-022**
TXU ENERGY RETAIL COMPANY, LLC	§	
AND ENERGY FUTURE HOLDINGS CORP.	§	

JOINT MOTION TO DISMISS OF TXU ENERGY COMPANY, LLC AND ENERGY FUTURE HOLDINGS CORP.

To The Honorable United States District Judge:

Come Now TXU Energy Retail Company, LLC (hereinafter "TXU") and Energy Future Holdings Corporation (hereinafter ("EFH"), named Defendants in the above-entitled and numbered cause, and file this their Joint Motion to Dismiss pursuant to Rule 12(b)(1) and, alternatively, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and show unto the Court as follows:

1. Background.

- ONCOR Electric Delivery Co., LLC (hereinafter "ONCOR") is a Transmission and Distribution Service Provider ("TDSP") under Texas law.
- TXU is a Retail Electric Provider ("REP") under Texas law.
- EFH is the parent company of ONCOR and TXU.
- As a TDSP, ONCOR does not sell electricity, rather it owns, installs and maintains the facilities through which electricity is delivered to the customer, including lines,

poles and meters. *See* 16 T.A.C. Sections 25.5 (139) and 25.214 (d) (1) at Sections 4.2.2 and 5.2.2. As shown by the Complaint, ONCOR is the TDSP that serves Plaintiff.

- As an REP, TXU sells electricity, but does not own, install, or maintain transmission and distribution facilities such as lines and meters. *See* 16 T.A.C. Sections 25.5 (115) and (139) and 25.214 (d) (1) at Sections 4.2.2 and 5.2.2. As shown by the Complaint, TXU is the REP that serves Plaintiff.

- EFH is not a TDSP or a REP and has no involvement in the distribution or provision of electricity to the Plaintiff.

- Electric utilities were authorized to begin installing Advanced Meters (aka "Smart Meters") as part of a federal and state agenda to reduce energy consumption by giving customers and REPs real time usage data. The meters are part of an Advanced Metering System that relays data on electricity usage to the TDSP. It is required by law that the data be accessible to the customer, the REP, and certain other organizations via a web portal. *See* 16 T.A.C. Section 25.130 (g) (1) (E) & (G).

- The Smart Meter Texas web portal was created to allow customers and REPs to access usage data in accordance with Texas Public Utility Commission's regulations.

- The Plaintiff has previously filed a lawsuit against ONCOR in state court making similar allegations, and now seeks to renew her attacks in federal court.

2. Plaintiff's Action Should Be Dismissed Pursuant to Rule 12 (b) (1).

Plaintiff's alleged basis for federal question jurisdiction is the Wiretap Act (18 U.S.C. Sections 2510-2522). In essence, Plaintiff alleges that since the meter serving her transmits data to ONCOR (her TDSP) and the data is made accessible to TXU (her REP) and the Smart Meter

Texas web portal, there has been an illegal interception and use of the data.[1] However, the ***very function*** of the meter is to communicate data to ONCOR (her TDSP) and for the data to be made available to TXU (her REP) and Plaintiff herself via methods such as the Smart Meter Texas web portal. *See* 16 T.A.C. Section 25.130 (g) (1) (E) & (G). Plaintiff is not challenging the constitutionality of the laws providing for such data to be gathered and used.

Assuming that the Wiretap Act even applies to the transmission of data from a meter to a utility company, on the very face of the Wiretap Act it is made clear that the Act does not apply to a party to the communication or where one of the parties to the communication has given consent. *See* 18 U.S.C. Section 2511 (2) (d).

Obviously, ONCOR was/is a party to the communication of the data. ONCOR's "interception" *or provision* of the data does not violate the Wiretap Act as a matter of law.[2] The restrictions on the distribution of Advanced Meter data are matters of state law. When the alleged "interceptor" of the transmission is a party to the transmission there is no federal law involvement.[3] Furthermore, since the meter at the Plaintiff's property automatically sends the information to ONCOR, there is no "interception" in the first instance. *See Crowley v. CyberSource Corp.*, 166 F. Supp. 2d 1263, 1269 (N.D. Cal. 2001). In addition, by her continued use of electricity after installation of the meter the Plaintiff effectively consented to the gathering and use of the information in accordance with Texas regulations—which authorize and require the same. *See* 16 T.A.C. Section 25.130 (g) (1) (E) & (G). Such does not constitute

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[1] Plaintiff surmises that her data may have been provided or "sold" to other entities but does so in a conclusory and speculative manner with no reference to any factual support. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

[2] "Interception" is really a misnomer since the data is automatically generated and transmitted ***to*** ONCOR.

[3] Plaintiff's only allegations having some degree of specificity relate to the provision of information that is authorized and required by state law to be gathered and provided.

"interception." *See* 18 U.S.C. § 2511(2)(d); *Crowley v. CyberSource Corp.*, 166 F. Supp. 2d at 1269. Access to the data by TXU, the REP, as required by state law is clearly not an "interception" of data. Furthermore, a *party* to the communication has provided for TXU to have that access. EFH does not gather or access the data as it is not the TDSP or the REP.

Plaintiff makes conclusory allegations of agency and aiding and abetting against TXU and EFH. However, as noted on the face of the Plaintiff's Complaint the Defendants are separate legal entities, and Plaintiff has alleged no facts in support of "agency" or "aiding and abetting". But more importantly, the provision under which Plaintiff sues, 18 U.S.C. Section 2520, does not provide a private cause of action against an "aider and abettor" and is limited to an action against the "interceptor." *See Peavy v. WFAA-TV, Inc.*, 221 F. 3d 158, 168-69 (5th Cir. 2000).

Because the inapplicability of the Wiretap Act is apparent from the face of the Act and the Complaint, Defendants' position is that this Rule 12(b)(1) motion is not based on the merits. However, even if this were not so, an action can be dismissed under Rule 12(b)(1) if it is insubstantial and frivolous or immaterial and made solely for the purpose of obtaining jurisdiction. *See Williamson v. Tucker*, 645 F. 2d 404, 412-15 (5th Cir. 1981). "In the absence of any cognizable federal claim, federal question subject matter jurisdiction does not exist and the action must be dismissed. A claim invoking federal question jurisdiction may also be dismissed for want of subject matter jurisdiction if it is not colorable, that is, if it is 'immaterial and made solely for the purpose of obtaining jurisdiction' or is 'wholly insubstantial and frivolous.' *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006)." *See Jackson v. Crystal*, EP-12-CV-85-PRM, 2012 WL 930800 (W.D. Tex. Mar. 19, 2012).

Plaintiff's action is clearly insubstantial and frivolous. Furthermore, she has made similar allegations in a previous state court proceeding and now seems to be forum hopping to take another shot. Therefore, it is requested that the Plaintiff's action under the Wiretap Act be dismissed pursuant to Rule 12 (b)(1) of the Federal Rules of Civil Procedure, and that her "pendant" state law claims also be dismissed as the Court cannot exercise supplemental jurisdiction where original jurisdiction is lacking.

3. Alternative Rule 12 (b) (6) Dismissal.

The foregoing paragraphs are incorporated herein. If the Court determines that analysis under Rule 12 (b) (6) for failure to state a claim upon which relief may be granted is more appropriate, Defendants alternatively move for dismissal of Plaintiff's Wiretap Act action for failure to state a claim as:

- No claim can be stated under the Wiretap Act against any of the defendants because ONCOR was a party to the transmission/communication. "The ECPA provides specifically, … that it is not a violation of the statute 'for a person not acting under color of law to intercept a wire, oral or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception ….' 18 U.S.C. § 2511(2)(d)." *See In re Vistaprint Corp Mktg. & Sales Practices Litig.*, MDL 4:08-MD-1994, 2009 WL 2884727 (S.D. Tex. Aug. 31, 2009) aff'd sub nom. *Bott v. Vistaprint USA Inc.*, 392 F. App'x 327 (5th Cir. 2010);

- No "interception" occurred where the information was automatically sent ***to*** ONCOR. *See Vistaprint Corp Mktg. & Sales Practices Litig.*, *supra*; *Crowley v. CyberSource Corp.*, 166 F. Supp. 2d at 1269;

- By her continued use of electricity after installation of the meter the Plaintiff effectively consented to the gathering and use of the information in accordance with Texas regulations—which authorize and require the same—and there could be no "interception". *See* 16 T.A.C. Section 25.130 (g) (1) (E) & (G); 18 U.S.C. § 2511(2)(d); *Vistaprint Corp Mktg. & Sales Practices Litig., supra*; *Crowley v. CyberSource Corp.*, 166 F. Supp. 2d at 1269;

- There is no private action for aiding and abetting under Section 2520. *See Peavy v. WFAA-TV, Inc.*, 221 F. 3d at 168-69; *In re Toys R US, Inc. Privacy Litigation*, 2001 W.L. 34517252 (N.D. Cal. 2001); and

- Plaintiff has made no factual allegation showing a basis for ***agency*** liability. *See In re Parkcentral Global Litig.*, 3:09-CV-0765-M, 2010 WL 3119403 (N.D. Tex. Aug. 5, 2010) (conclusory allegation of agency failed to state a claim); *Show Services, LLC v. Amber Trading Co. LLC*, 3:09-CV-2385-D, 2010 WL 4392544 (N.D. Tex. Oct. 29, 2010) (conclusory allegations of agency, joint enterprise and alter ego failed to state a claim).

In addition, the Court is requested to dismiss the supplemental state law actions based on the dismissal of the federal action. *See Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 585 (5th Cir. 1992) ("Our general rule is to dismiss state claims when the federal claims to which they are pendent are dismissed."); *Perches v. Elcom, Inc.*, 500 F. Supp. 2d 684, 696 (W.D. Tex. 2007) (The general rule in the Fifth Circuit is to dismiss state law claims when the federal claims they supplement are disposed of before trial.).

Respectfully submitted,

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ATTORNEY FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of March, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system and I hereby certify that this instrument has been served using the CM/ECF system on the following counsel of record:

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