

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

Cynthia Johnson,)	
)	
Plaintiff)	
)	Case No. W-13-CA-022
v.)	
)	
ONCOR ELECTRIC DELIVERY CO., LLC;)	
)	
TXU ENERGY RETAIL COMPANY LLC, and)	
)	
ENERGY FUTURE HOLDINGS CORP.,))	
)	
Defendants)	

**PLAINTIFF'S RESPONSE TO JOINT MOTION TO DISMISS
BY DEFENDANTS TXU AND EFH**

This is plaintiff Cynthia Johnson's response to the Motion to Dismiss by defendants TXU and EFH. Plaintiff asks this court to deny all of TXU's and EFH's requests to dismiss this case.

I. Introduction

1. Plaintiff is Cynthia Johnson; Defendants are ONCOR ELECTRIC DELIVERY COMPANY, LLC (“Oncor”), TXU ENERGY RETAIL COMPANY LLC. (“TXU”), and ENERGY FUTURE HOLDINGS CORP. (“EFH”).
2. Plaintiff filed her original petition in this Court on January 25, 2013.
3. Defendants, all three (3), were served with process on March 11, 2013.
4. Defendants TXU and EFH made their first appearances in this case on March 22, 2013 by filing a motion to dismiss based on FRCP 12 (b)(1) (lack of subject-matter jurisdiction) and FRCP 12

(b)(6) (failure to state a claim).

5. This document will respond to TXU and EFH's motion and show why it has no merit and should be denied.

II. Response to TXU's & EFH's Claims of "Failure to State a Claim"--Rule 12 (b)(6)

6. A pleading that states a claim must contain:
 - a. a short and plain statement of the grounds for the court's jurisdiction...;¹
 - b. a short and plain statement of the claim showing that the pleader is entitled to relief;²
and
 - c. a demand for the relief sought, which may include relief in the alternative or different types of relief.³
7. Plaintiff Johnson is a pro se litigant. As a result, the allegations in her complaint must be liberally construed.⁴
8. A motion to dismiss under FRCP 12 (b)(6) is appropriate only if the plaintiff has not provided fair notice of its claim and factual allegations that—when accepted as true—are plausible and rise above mere speculation.⁵
9. When there are nonconclusory factual allegations in a petition, the court must assume that they are true.⁶
10. The court must indulge all inferences in favor of the plaintiff.⁷

1 Fed.R.Civ.P. 8

2 *Id.*

3 *Id.*

4 See *Torres v. Oakland Scavenger Co.*, 487 U.S.312 (1988); *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

5 See *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949-50 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

6 *Iqbal*, 556 U.S. at _____, 129 S.Ct. At 1950.

7 *al-Kidd v. Ashcroft*, 580 F.3d 949, 956 (9th Cir.2009), cert. granted in part, 131 S.Ct. 415 (2010); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir.2000).

11. If factual allegations are plausible, the court cannot decide disputed fact issues—that is, the court must assume that all plausible facts contained in the complaint are true.⁸
12. Generally, motions to dismiss for failure to state a claim are viewed with disfavor.⁹
13. Plaintiff's petition has definitely and clearly provided substantial fair notice of her claims and facts alleged sufficiently show a plausible claim for relief.
14. Plaintiff's original petition (page 2, para. 6-7) states the basis for this Court's jurisdiction--that it's based on all three defendants' violations of 18 U.S.C. §2511, Federal Wiretap Act.
15. The elements of wiretap are:
 - a. Plaintiff made a wire, oral, or electronic communication;¹⁰ and
 - b. Defendant did any one of the following:
 - i. Intentionally intercepted or solicited another to intercept the plaintiff's communication;¹¹
 - ii. Intentionally disclosed the plaintiff's communication to another person when the defendant knew or had reason to know the information was obtained through an illegal interception;¹²
 - iii. Intentionally used the contents of the plaintiff's communication when the defendant knew or was reckless about whether the information was obtained through an illegal interception;¹³
16. Plaintiff alleges specific, plausible facts that satisfies the elements of wiretap. See *Plaintiff's*

Original Petition... in this case: Elements for TXU--pages 19-20, para. 113-122 and Elements

⁸ See *Tellabs, Inc. v. Makor Issues & Williams*, 490 U.S. 319, 326-27 (1989).

⁹ *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000).

¹⁰ 18 U.S.C. §2511 (1)(a)

¹¹ 18 U.S.C. §2511 (1)(a)

¹² 18 U.S.C. §2511 (1)(c)

¹³ 18 U.S.C. §2511 (1)(b)

for EFH—pages 26-27, para.169-177.

17. In their *Motion to Dismiss...*, TXU & EFH do nothing but try to argue the merits of the case.

They fail to make even one citation to Plaintiff's original petition. They fail to give any specifics about how Plaintiff fails to state a claim.

III. Response to Oncor's Claims of "No Subject-Matter Jurisdiction"--Rule 12 (b)(1)

18. The above paragraphs are incorporated herein.

19. The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.¹⁴

20. When a federal court reviews the sufficiency of a complaint, the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.¹⁵

21. Even if it appears on the face of the pleadings that a recovery is very remote and unlikely, that is not the test.¹⁶

22. In passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.¹⁷

23. In resolving a motion to dismiss for lack of subject matter jurisdiction, courts look at whether the motion is a facial or factual attack.

24. If an FRCP 12(b)(1) motion challenges the sufficiency of the allegations of jurisdiction (i.e. the complaint simply does not allege sufficient facts on which subject-matter jurisdiction can be

14 28 U.S.C. §1331.

15 See *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), overruled on other grounds; *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

16 *Id.*

17 *Id.* See also *Lunney v. U.S.*, 319 F3d 550, 554 (2d Cir.2003).

based), then it is a facial attack.¹⁸ In a facial attack, the court will accept all material allegations in the complaint as true and construe them in the light most favorable to the nonmovant.¹⁹ In a facial attack, the court will not look beyond the allegations in the complaint.²⁰

25. If an FRCP 12(b)(1) motion denies or controverts the allegations of jurisdiction (i.e., the facts alleged in the complaint are not true), then it is a factual attack.²¹
26. In analyzing TXU & EFH's motion to dismiss, they make their argument for lack of subject-matter jurisdiction (FRCP 12(b)(1)) on pages 2-5. Instead of pointing out how Plaintiff's original petition is deficient, they spend those pages trying to argue the merits of the claim. Plaintiff is more than prepared to point out how wrong their arguments are, in facts and in law. However, Plaintiff believes arguing the merits of the case, either in a response to a motion to dismiss or in a petition, is inappropriate and disallowed and will, therefore, save her arguments for more appropriate places.
27. TXU & EFH do claim that Plaintiff has alleged no facts in support of "agency" or "aiding and abetting". But they completely ignore Plaintiff's claim in her original petition (pages 19-20, paragraphs 113-122) that TXU is committing their own tort by violating the Federal Wiretap Act. So regardless of any issues with Plaintiff's claims of liability under aiding/abetting/agency, Plaintiff's petition has adequately alleged facts that establish this Court's jurisdiction over this subject-matter.
28. As discussed in the previous paragraph, Plaintiff's claim against EFH for their own individual violation of the Federal Wiretap Act is completely ignored in the motion to dismiss. In

18 *Kerns v. U.S.*, 585 F.3d 187, 192 (4th Cir.2009); see *Apex Digital, Inc. v. Sears, Roebuck, & Co.*, 572 F.3d 440, 444 (7th Cir.2009).

19 *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), overr'd on other grounds; see *Kerns*, 585 F.3d at 192.

20 *Apex Digital*, 572 F.3d at 443.

21 *Kerns*, 585 F.3d at 193; *U.S. v. Ritchie*, 15 F.3d 598 (6th Cir.1994).

Plaintiff's original petition (page 26-27, para. 169-177), she alleges facts of EFH's own violation, independent of joint liability claims, giving this Court appropriate jurisdiction over this claim.

29. TXU & EFH's motion to dismiss makes not one assertion of a *facial* attack (i.e. they don't say anything about Plaintiff's petition failing to state enough facts on which to base subject-matter jurisdiction). Even if they did make that assertion, Plaintiff's petition clearly states sufficient facts to establish jurisdiction (see discussion in previous paragraphs).

30. Also in TXU & EFH's motion to dismiss, they make not one assertion of a *factual* attack (i.e. they don't make even one assertion that the facts alleged in the complaint are not true).

31. TXU & EFH also allege that Plaintiff's claim under the Federal Wiretap Act is immaterial, insubstantial, frivolous, and made solely for the purpose of obtaining jurisdiction. Yet they make not one specific reference or citation to Plaintiff's petition or her claim to say what is frivolous or how it's frivolous. As discussed above, Plaintiff's petition states specific factual allegations that are plausible to state a claim on which relief can be granted and that give this Court subject-matter jurisdiction, so there's nothing frivolous or immaterial about Plaintiff's claims or petition.

IV. TXU & EFH's Other Miscellaneous Statements

32. In their motion to dismiss, TXU & EFH make a variety of other statements & allegations that Plaintiff does not believe are relevant to a motion to dismiss, but Plaintiff will briefly address them.

33. TXU & EFH's motion to dismiss (page 4) claims that Plaintiff "...[H]as made similar allegations in a previous state court proceeding and now seems to be forum hopping to take another shot." Plaintiff has previously sued Oncor on completely different claims than the ones included in

this lawsuit. Plaintiff has never previously sued TXU & EFH, so there is no relevance to them making that statement. To see the explanation of the previous Oncor lawsuit, please see *Plaintiff's Response to Motion to Dismiss by Defendant Oncor* (page 6, para. 31).

34. In TXU & EFH's motion to dismiss (page 1), they state that Oncor is a “Transmission and Distribution Service Provider (“TDSP””, yet they cite 16 T.A.C. Section 25.5 (139) (which is the same thing as the Substantive Rules of the Public Utilities Commission of Texas 25.5(139)). That rule defines a “Transmission and Distribution Utility” (“TDU”). Throughout the Substantive Rules, TDU is the term used. Plaintiff is unclear about the reason TXU and EFH are emphasizing Oncor's designation as TDSP instead of TDU.
35. In TXU & EFH's motion to dismiss (page 2) in the section titled “Background”, one paragraph begins, “Electric utilities were authorized to begin installing Advanced Meters...” The paragraph makes some vague statements that seem to be an attempt to legally justify everything TXU & EFH have done regarding installation of smart meters and the use of the data they collect. Plaintiff has no problem writing a specific, step-by-step, well-cited argument that shows with an abundance of Federal laws, state laws, and regulatory rules that in no way allow TXU & EFH to do most of what they are doing with regard to smart meter data. But Plaintiff believes that is not appropriate to do in this document, so will save it for an appropriate venue, like a trial.

V. Prayer

Plaintiff respectfully asks this court to deny TXU & EFH's entire motion to dismiss this case. Plaintiff also asks that, if this court deems it appropriate, that she be allowed to amend her complaint and/or be given appropriate time for discovery and presenting evidence before any motion to dismiss is granted.

Respectfully submitted,

/s/ Cynthia Johnson

Cynthia Johnson
Pro Se
2608 N. Main St. #B-166
Belton, TX 76513
Email: tworeallyota@nativeweb.net
Phone: 206-337-7694
Fax: 206-984-1541

CERTIFICATE OF SERVICE

I certify that on April 5, 2013, I electronically filed this document with the Clerk of Court using the CM/ECF system and I certify that this instrument has been served using the CM/ECF system on the following parties:

Michael Dixon
510 N. Valley Mills Dr.
Suite 600
Waco, Texas 76710
mdixon@haleyolson.com

Carol Payne
3500 Maple Ave., Suite 1100
Dallas, TX 75219
cpayne@estesokon.com

/s/ Cynthia Johnson
Cynthia Johnson

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION**

Cynthia Johnson,)
)
Plaintiff)
)
v.)
)
ONCOR ELECTRIC DELIVERY CO., LLC;)
)
TXU ENERGY RETAIL COMPANY LLC, and)
)
ENERGY FUTURE HOLDINGS CORP.,)
)
Defendants)

Case No. W-13-CA-022

ORDER DENYING JOINT MOTION TO DISMISS BY TXU AND EFH

Upon considering the Joint Motion to Dismiss of TXU ENERGY RETAIL COMPANY LLC (“TXU”) and ENERGY FUTURE HOLDINGS CORP. (“EFH”), seeking dismissal for lack of subject-matter jurisdiction and failure to state a claim upon which relief can be granted, and the Plaintiff’s response, this Court DENIES the motion and retains the case on the court’s docket.

SIGNED on _____, 2013

Walter S. Smith, Jr.
U.S. District Judge