

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

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

ONCOR ELECTRIC DELIVERY CO., LLC's
REPLY IN SUPPORT OF ITS MOTION TO DISMISS

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Comes now ONCOR ELECTRIC DELIVERY CO., LLC (hereinafter "ONCOR"), a Defendant in the above-entitled and numbered cause, and files its Reply in Support of its Motion to Dismiss pursuant to Rule 12(b)(1) and, alternatively, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure [replying to Doc. 17] and shows unto the Court as follows:

1) In her Response Plaintiff does not even attempt to explain how the transmission of information from the smart meter to ONCOR, a purpose of the meter, is an "interception" coming within the Wiretap Act. Receipt of information by a party to the communication does not, as a matter of law, constitute an "interception." 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); *Crowley v. CyberSource Corp.*, 166 F.Supp.2d 1263, 1268 (N.D.Cal.2001). Moreover, "absent an interception, neither the disclosure nor use of the contents of the communication violates the Wiretap Act." See *Ideal Aerosmith, Inc. v. Acutronic USA, Inc.*, No. 07-Civ-1029, 2007 WL 4394447, at *4 (E.D.Pa. Dec. 13, 2007).

2) Furthermore, “[t]he Court need not accept a conclusory allegation that conduct alleged in the complaint constituted an interception under the Wiretap Act.” *See Crowley v. CyberSource Corp.*, 166 F.Supp.2d at 1268; *Conte v. Newsday, Inc.*, 703 F. Supp. 2d 126, 139 (E.D.N.Y. 2010). The only non-conclusory allegations---relating to the receipt and use of information communicated by the smart meter to ONCOR---on their face do not constitute “interceptions” under the Wiretap Act as ONCOR is a party to the communication.¹

3) Plaintiff indicates that she can cite to laws and regulations that show that ONCOR is not allowed “to do most of what they are doing regarding smart meters,” but that she elects to hold those claimed authorities in reserve for another time. *See* Response [Doc. 17] at p. 7. Two salient points should be made in reply to this assertion. First, responding to a motion to dismiss would appear to be an imminently reasonable time to put one’s cards on the table regarding the legal basis for a claim. Second, although Plaintiff makes the conclusory assertion that ONCOR is not allowed “to do most of what they are doing regarding smart meters,” which is erroneous, the relevant question is not one of generality as to the propriety of smart meters. The sole question is whether the Plaintiff’s allegations fall within the Wiretap Act.

4) Even assuming that Plaintiff’s action could somehow be construed to be marginally capable of invoking the Wiretap Act, “federal courts are without power to entertain claims otherwise within their jurisdiction if they are ‘so attenuated and unsubstantial as to be absolutely devoid of merit.’ ” *Hagans v. Lavine*, 415 U.S. 528, 536-37, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974) (quoting *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579, 24

¹ Furthermore, as a practical matter, 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.

S.Ct. 553, 48 L.Ed. 795 (1904)). *See also Williamson v. Tucker*, 645 F.2d 404, 412-15 (5th Cir. 1981).

5) Finally, even assuming arguendo that the Court should take jurisdiction over the Wiretap Act allegation, the Plaintiff's allegations fail to state a claim upon which relief may be granted. Plaintiff has not pled an "interception" under the Wiretap Act. Indeed, what she has pled establishes exactly the opposite. *See In re Vistaprint Corp Mktg. & Sales Practices Litig., supra; Crowley v. CyberSource Corp.*, 166 F.Supp.2d at 1268; *Ideal Aerosmith, Inc. v. Acutronic USA, Inc.*, No. 07-Civ-1029, 2007 WL 4394447, at *4.

Again, this Court "need not accept a conclusory allegation that conduct alleged in the complaint constituted an interception under the Wiretap Act." *See Crowley v. CyberSource Corp.*, 166 F.Supp.2d at 1268; *Conte v. Newsday, Inc.*, 703 F. Supp. 2d at 139.

WHEREFORE, ONCOR respectfully requests that the Court grant its motion to dismiss and dismiss the Plaintiff's action against it, including the pendant state claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of April, 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 party:

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