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Washington Utilities and Transportation Commission
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Docket #UT-060856
Answering Comments by American Civil Liberties Union of Washington

Dear Chairman Sidran and Commission Members:

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The American Civil Liberties Union of Washington (ACLU-WA) welcomes this opportunity to respond to several issues raised in comments submitted to the Commission by AT&T, Verizon, and the Public Counsel.

Relevance of New Jersey Subpoenas

Both AT&T and Verizon place great weight on proceedings in New Jersey, where the United States has asked a federal court to quash subpoenas issued by the New Jersey Attorney General. Both companies cite those proceedings for the proposition that it will be impossible for the Commission to conduct an investigation.

The ACLU-WA agrees that the New Jersey proceedings are instructive, but we differ on the lessons to be learned. First, it teaches us that the Commission should focus its investigation on the actions of telecommunications companies alone. As we suggested in our previous comments, there is no need for the Commission to ask for any information related to the NSA. If telephone records were disclosed without customer consent, it is irrelevant to whom the records were disclosed or what the receiving party did with the records after receiving them. All that the Commission need discover is whether or not records were released, and what the authorization for release was.

In contrast to this limited discovery of information, the New Jersey Attorney General instead asked for broad information related to the "Provision of Telephone Call History Data *to the National Security Agency*." Complaint, *United States v. Farber*, Civil Action No. 3:06cv02683, at 9 (emphasis added). The requested information included documents concerning "any written or oral contracts, memoranda of understanding, memoranda of agreement, other agreements by or on behalf of Verizon and the NSA," and "any communication between Verizon and the NSA" related to the provision of telephone records. It

is not surprising that the United States believes that responses to those broad subpoenas threaten to reveal classified information revealing the functions of the NSA.

Even so, the second lesson to be learned from the New Jersey proceeding is that one should not assume that the United States would assert the state secrets privilege in response to a state investigation. Contrary to claims made by Verizon, Comments at 7-8, the United States did *not* assert the state secrets privilege in *Farber*. The complaint did discuss the privilege at some length, and said it had been asserted in *Hepting* (discussed below)—but it did so only as background to illustrate the sensitivity of information at risk. *Farber* Complaint at 6-9.

If the Commission tailors its investigation to ask only for information about telephone companies, not the NSA, there is no reason to believe that the United States will even attempt to stop the investigation, let alone be successful in so doing. The United States has apparently not yet even expressed concerns about a possible Commission investigation, as it has not submitted comments.

Relevance of *Hepting*

Another proceeding referenced by several commenters is *Hepting v. AT&T Corp., et. al*, Case No. C-06-0672-VRW (N.D. Cal.). In that case, the United States has indeed intervened and actually asserted the state secrets privilege. This is largely irrelevant to the possibility of a Commission investigation, however.

The claims in *Hepting* go far beyond telephone records, and focus on AT&T allegedly providing facilities to the NSA for the interception of the contents of telephone and Internet communications. Even the claims involving records directly implicate the NSA, alleging not merely the disclosure of records, but a coordinated effort between AT&T and the NSA to engage in real-time traffic monitoring and datamining. As with *Farber*, it is not surprising that the United States is attempting to protect the details of this alleged NSA operation from disclosure—and also not a reason to believe the United States will try to shield information from a Commission investigation into disclosure practices of telephone companies.

Even in *Hepting*, the Court has not yet issued a ruling as to whether and how the state secrets privilege applies, despite it being over three weeks since full briefing and oral arguments on the issue were held. While it is quite possible that some or all of the government's assertion of privilege will eventually be recognized, it also seems clear that this is not an open and shut issue. This is all the more reason to doubt both the likelihood and validity of an assertion of state secrets privilege in a Commission investigation limited to the potential improper disclosure of telephone records by telecommunications companies.

AT&T attempts to similarly blur communications and records to obscure the issue before this Commission. For example, AT&T discusses "an NSA program concerning 'intercepts of contents of communications' involving al-Qaeda," the Attorney General's characterization of that as "the most classified program that exists in the United States government," and then claims that it would be unable to provide any information about the program to the Commission. AT&T Comments at 5. But we are only asking for a Commission investigation of the disclosure of telephone *records*, not communications, so there is no need to provide any information about "the program." AT&T also cites CALEA for the proposition that federal law has preempted state regulation. *Id.* at 7. In actuality, CALEA does not address telephone records at all—the provisions cited by AT&T are directed only to the surveillance of communications, not records, and thus, like the "NSA program" of intercepting communications, are irrelevant to the current proceeding.

State secrets privilege

Both AT&T and Verizon have claimed that assertion of the state secrets privilege would preclude a Commission investigation—and implied, in the process, that the Commission should not even begin an investigation because of the possibility of assertion of the privilege. There are two flaws in this claim, both discussed above, but worth reiterating.

First, there is simply no evidence that the United States will assert the state secrets privilege to this Commission. The privilege "belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party." *United States v. Reynolds*, 345 U.S. 1, 8 (1953). Such an assertion is not undertaken lightly; the privilege may only be asserted by "by the head of the department which has control over the matter, after actual personal consideration by that officer." *Id.* Neither AT&T nor Verizon is in a position to evaluate the merits and wisdom of asserting the privilege. Assuming the Commission investigation is structured to have limited scope, as suggested above, no state secrets will be at risk from the investigation; in such a case, there will be no reason for a department head to take the weighty step of asserting the privilege. Remember, even in *Farber*, where the NSA was directly referenced by subpoenas, the United States has not asserted the state secrets privilege.

Second, there is a huge jump from assertion of the state secrets privilege to recognition of the privilege. Although the United States has asserted the privilege in *Hepting*, and has indicated its intention to do so in other class action lawsuits, no court has yet accepted that assertion. It is now more than three weeks since the *Hepting* court heard arguments on this subject, and the court has not yet issued a ruling—and that is in a case that primarily involves claims directly referencing the NSA and its activities, going far beyond disclosure of telephone records. There is no reason to believe that a court, even if faced with the issue, would

decide that the state secrets privilege precludes a Commission investigation of telecommunications company practices.

AT&T further argues that *Totten v. United States*, 92 U.S. 105 (1875), serves as a bar to a Commission investigation. AT&T Comments at 10. This radical view of *Totten* is without merit. The *Totten* bar, reiterated in *Tenet v. Doe*, 544 U.S. 1 (2005), refers only to *enforcement* of an alleged espionage agreement; it does not refer to actions in which the existence of an alleged espionage agreement is at best tangentially involved. In the present instance, the existence or nonexistence of a contract between telecommunications companies and the NSA is immaterial—disclosure of telephone records is prohibited in the absence of customer consent or legal process; a contract cannot constitute legal authorization.

Investigations in other states

AT&T and Verizon point to a lack of investigation by several other state commissions. AT&T Comments at 3; Verizon Comments at 2-3. This selective listing of states fails to give an accurate picture of what is happening around the country. As the Public Counsel discussed, ACLU affiliates have asked more than 20 state utilities commissions to investigate improper disclosure of telephone records. Public Counsel Comments at 19-21. A very few of these have declined to investigate, as shown by Verizon, but others have requested comments, proceeding much like the Commission. And, since the last round of comments was submitted, one state has ordered an investigation. Here is a more comprehensive list of current activity.

The three states that have rejected investigations have done so simply because of state-specific lack of jurisdiction. Iowa's commission no longer has any regulatory authority over Verizon or AT&T, which were the only companies they were asked to investigate. Verizon Comments, Exhibit 5. New York's commission declined to investigate because there is no state law covering telephone records, and thus no authority for the commission to investigate practices concerning records. Verizon Comments, Exhibit 6. Similarly, Virginia's commission declined to investigate because no provision of state law was identified in the request. Verizon Comments, Exhibit 7. None of these reasons apply here in Washington, where all landline telecommunications companies remain under the Commission's authority, and where state law, WAC 480-120-202, prohibits unauthorized disclosure of telephone records.

Delaware decided to defer an investigation for six months, in the hope that some of the federal questions will be resolved by federal courts in that time period. Verizon Comments, Exhibit 8. It is worth noting that the Delaware commission opted for deferral rather than dismissing the proceeding outright as urged by both Verizon and AT&T.

Maine is proceeding very similarly to Washington, inviting multiple rounds of comments. In the latest round, the Maine Public Advocate submitted comments, attached as Exhibit A, urging an investigation. Considering many of the same issues facing this Commission, the Public Advocate argues that "[n]either the federal statutes cited by Verizon in its Response, nor the 'state secrets' privilege, prevent the Commission from obtaining the critical information that is relevant to the investigation requested by the Complainants." Exhibit A at 2.

Connecticut has also gone through two rounds of comments. The Connecticut Attorney General submitted comments, attached as Exhibit B, urging the commission "to conduct a thorough investigation concerning whether [AT&T and Verizon] have improperly disclosed confidential customer information." Exhibit B at 1. With respect to national security concerns, the Attorney General advised the commission to "not rely upon the Companies' self serving claims that national security reasons trump any Department review of the Companies misconduct." *Id.* at 3.

Finally, Vermont has moved farthest down the path. In response to petitions by the Vermont Department of Public Service, the Vermont Public Service Board has ordered investigations into alleged unlawful disclosure of customer records by AT&T and Verizon. Exhibits C and D.

The foregoing actions demonstrate that it is simply inaccurate to characterize the climate around the country as one of refusing investigations. Instead, state utilities commissions are taking these requests very seriously, and investing time and resources to determine how best to proceed. Far more states are still examining the question than have rejected investigations.

Investigation is necessary to discover facts

In order to answer the Committee's questions, the Public Counsel assumed a set of facts. Public Counsel Comments at 21. The ACLU-WA is puzzled by this approach. Unlike the Public Counsel, we make no such assumption about facts. As we stated in our original request, the allegations of record disclosure reported in the media concern us, but at this point they are only allegations. Even then, the reports were disputed and incomplete; since then, even more conflicting reports have emerged. That is precisely why an investigation is needed, and why it is necessary to include all telecommunications companies doing business in Washington State. We simply cannot assume that telephone companies have disclosed customer records in violation of statute or regulation—but we also cannot turn a blind eye to credible allegations of such misconduct. The function of an investigation is to determine the facts; only then is it possible to determine the legal consequences of those facts.

Not only has the Public Counsel gone ahead of the known facts, it would also appear to have become somewhat sidetracked. While the Public Counsel presents a good overview of legal arguments for and against the constitutionality of NSA wiretapping, Public Counsel Comments at 27-42, those arguments are irrelevant. The Commission is not asked to investigate the NSA, nor is it asked to examine allegations of wiretapping. We only ask the Commission to investigate practices of telecommunications companies with respect to disclosure of customer records.

Similarly, perhaps due to its assumption of facts, the Public Counsel appears to conclude the Commission must resolve complex questions of federal law in order to proceed with an investigation. Public Counsel Comments at 51-54. The ACLU-WA respectfully disagrees. Because the Commission is not asked to investigate the NSA or any governmental entity, it need not—and should not—even consider arguments as to whether possible government actions are authorized by federal law, let alone resolve those questions.

The Commission's need to resolve questions of the state secrets privilege is also quite limited. As discussed above, the privilege has not been and may well not be asserted; there is no need to worry about a hypothetical assertion unless and until it happens. Even in such a hypothetical case, the Commission need only determine a question of *state* law: the extent to which the privilege applies in Commission proceedings.

Even if an investigation ultimately leads to an area in which federal law becomes predominant, or which must be resolved in a federal forum, the Commission's efforts will not have been wasted. The Commission may "initiate and/or participate in proceedings before federal administrative agencies in which there is at issue the authority, rates or practices for transportation or utility services ... and [may] similarly initiate and/or participate in any judicial proceedings relating thereto." RCW 80.01.075. An investigation will help the Commission decide whether or not it should pursue a complaint in a federal forum.

Investigation should not be short-circuited based on hypothetical issues

The foregoing discussion illustrates the surreal nature of the debate as to whether the Commission can and should proceed with an investigation. AT&T and Verizon both urge the Commission to dismiss the inquiry, based on the *potential* that national security will somehow be threatened, or that the investigation requires access to classified information, or that the United States will swoop in to assert the state secrets privilege. They both point to other lawsuits, involving different issues, and imply that similar complications will face the Commission if it commences an investigation. Yet neither company actually says that they are barred from answering a few simple questions as to whether they have disclosed customer records without consent or authorization—only that they are prevented from sharing classified information with the Commission.

The veiled claim that federal law prevents a telephone company from confirming or denying disclosure of customer records is belied by the comments submitted by the Washington Independent Telephone Association (WITA). WITA has simply denied that any of its members have disclosed telephone records to government agencies except with specific subpoenas or warrants. *See* WITA Letter (June 8, 2006). WITA does not appear to fear federal prosecution for making such a denial—nor should WITA, since there is no federal law preventing it. Why are AT&T and Verizon unable to make similar denials, or at least explain their different stance?

Taken to its extreme, the argument advanced by Verizon and AT&T amounts to an assertion of general immunity from Commission oversight. Without presenting any evidence to support the claim, these telecommunications companies argue that the Commission should abandon an investigation simply because it *might* impinge on national security or classified information. If the Commission accedes to this argument, without supporting evidence, what will prevent a company from making similar arguments in the future to shield illegal actions, whether or not the actions are actually connected in any way to intelligence activities? Surely something beyond a bare assertion of potential complications is necessary.

The ACLU-WA continues to urge the Commission to commence an investigation of all telecommunications companies doing business in Washington State, in order to discover whether any of them have disclosed customer records without customer consent or legal process. Once the facts have been determined, the Commission can then decide what, if any, further actions are appropriate.

Sincerely,

Doug Klunder
Privacy Project Director