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Carole J. Washburn
Executive Secretary, Washington Utilities
and Transportation Commission
1300 S. Evergreen Park Drive SW
P.O. Box 47250
Olympia, WA 98504-7250

Dear Ms Washburn:

Re: ACLU Request for Investigation, Docket Number UT-060856

AT&T Communications of the Pacific Northwest, Inc. ("AT&T") respectfully submits these comments pursuant to the Commission's Notice of Further Opportunity to Comment (issued August 25, 2006).

QUESTION NO. 1: IF THE COMMISSION DECIDES NOT TO ISSUE A COMPLAINT NOW, WILL VERIZON AND AT&T WAIVE THE STATUTE OF LIMITATIONS UNTIL THE FEDERAL COURTS FINALLY RESOLVE THE LEGAL ISSUES PRESENTED IN THIS DOCKET?

As the Commission recognizes, federal statutory prohibitions and the positions taken by the United States Government mean that AT&T would not be able to respond to requests for information if the Commission were to attempt now to file a complaint or otherwise to institute an investigation of the ACLU's calling record allegations. As the Commission also recognizes, there are now pending federal court decisions that are addressing not only whether challenges to the alleged disclosure of calling records can be litigated in federal court but also whether state authorities are altogether preempted from investigating such matters. If the Commission decides to await the outcome of these pending cases and declines to issue a complaint or otherwise to investigate these allegations now, AT&T will agree to waive the operation of the statute of limitations during the period required for the federal courts finally to resolve these legal issues. In particular, AT&T will agree that the applicable statute of limitations is tolled between January 31, 2006, the date on which the complaint in *Hepting, et al. v. AT&T, et al.*, Case No. C 06-0672-VRW (N.D.Ca) was filed, and the time that AT&T provides written notification to the Commission of an event in the pending federal court litigation that AT&T believes should cause the tolling period to end. This agreement shall not revive any cause of action or other claim of the Commission that had lapsed at the

time the *Hepting* case was filed. Similarly, to the extent other claims arose before *Hepting* was filed and were not time barred then, the statute of limitations will have begun to run when the claims arose and will be suspended only during the period covered by the tolling agreement.

QUESTION NO. 2: DOES THE INFORMATION CURRENTLY IN THE RECORD CONSTITUTE PROBABLE CAUSE THAT VERIZON OR AT&T VIOLATED WASHINGTON LAWS AND RULES?

In light of AT&T's agreement to toll the statute of limitations, this issue should be moot. However, if it is not, the information currently in the record consists only of media reports concerning the NSA's alleged calling records program and does not constitute probable cause that Verizon or AT&T violated Washington laws and rules. As the Commission notes, "The facts upon which the Commission is being encouraged by some commenters to act are taken from articles in certain newspapers." Notice at 2. For example, in its letter to the Commission dated May 23, 2006, the ACLU cited articles in *USA Today*, the *Seattle Post-Intelligencer*, and the *New York Times* as the *sole* basis of its request for an investigation.¹

Although Washington statutory law does not define the term "probable cause" for purposes of the Commission's determination of the sufficiency of a complaint, in the context of criminal law the Washington courts have defined probable cause as "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty." *See, e.g., State v. Scott*, 93 Wash.2d 7, 11, 604 P.2d 943, 944-945 (1980) (citations omitted); *Clark v. Baines*, 114 Wash. App. 19, 27-28, 55 P.3d 1180, 1184 (2002).² Furthermore, information must be *reliable* in order to be considered in determining whether probable cause exists. *See, e.g., State v. Osborne*, 18 Wash. App. 318, 323, 569 P.2d 1176, 1180 (Div. 2 1977).³ Thus, a "bare suspicion" that the law has been violated is

¹ *See* letter from Kathleen Taylor and Doug Klunder, ACLU, to The Honorable Mark Sidran, dated May 23, 2006, at 1-2.

² *See also, e.g.,* R.C.W.A. § 46.04.455 ("Reasonable grounds," when used in the context of a law enforcement officer's decision to make an arrest, constitute probable cause"); *State v. Rios-Gonzales*, 130 Wash. App. 1016, 2005 WL 2858081 (Wash. App. Div. 2, Nov. 1, 2005), at *3 (probable cause to arrest exists "where the totality of the facts and circumstances known to the officers at the time of arrest would warrant a reasonably cautious person to believe an offense is being committed"); *State v. Rice*, 123 Wash. App. 1051, 2004 WL 2345088 (Wash. App. Div. 2, Oct. 19, 2004), at *2 (probable cause exists "when facts and circumstances within the arresting officer's knowledge are sufficient to cause a person of reasonable caution to believe that a crime has been committed"). Similarly, in the context of the search warrants, the courts have stated that probable cause exists if the State can cite "objective facts and circumstances which, if believed, would lead a neutral and detached person to conclude that more probably than not, evidence of a crime will be found if a search takes place." *See, e.g., Peterson v. State*, 145 Wash.2d 789, 797, 42 P.3d 952, 957 (2002).

³ *See also, e.g., State v. Dennis*, 16 Wash. App. 417, 422, 558 P.2d 297, 300 (1976) (police had probable cause to arrest defendant, since they had information from a reliable informant that narcotics were sold in apartment and defendant confirmed that he lived there).

plainly insufficient to constitute probable cause. *E.g., State v. Rios-Gonzales*, 130 Wash. App. 1016, 2005 WL 2858081 (Wash. App. Div. 2, Nov. 1, 2005), at *3.

The parties proposing an investigation here have cited no reliable facts that would allow a finding of probable cause that Verizon or AT&T have acted in violation of law. The ACLU's assertion in its May 23rd letter that it is "troubled by recent media reports" regarding the alleged provision of data to the NSA (ACLU May 23, 2006, letter, at 1) is precisely the type of "bare suspicion" that has been held insufficient to constitute probable cause. Indeed, these very media reports have been held to be "nothing more than unconfirmed speculation" regarding the NSA's alleged calling records program. *See Order, Terkel, et al. v. AT&T et al.*, Case No. 06 C 28a, at 27 (N.D. Ill.) (July 25, 2006) (Exh. 1 to AT&T's August 25, 2006 letter); *see also Order, Hepting, et al. v. AT&T et al.*, Case No. C 06-0672-VRW, N.D.Ca, at 24-27 (July 20, 2006) (Exh. 2 to AT&T's August 25, 2006 letter) (concluding that the media reports are unreliable). Other courts have similarly held that media reports do not constitute probable cause. As the U.S. Court of Appeals for the Seventh Circuit has stated:

We need not belabor the point that all newspaper reports are not of sufficient reliability to form the basis of Fourth Amendment probable cause determination. Indeed, the Supreme Court has recognized that the publication of "factual error" frequently occurs in newspapers. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

Donovan v. Federal Die Casting Co., 655 F.2d 793, 797 (7th Cir. 1981). Thus, in *Donovan*, the court held that an OSHA inspection warrant – which relied on two newspapers articles describing an industrial accident – did not satisfy the applicable probable cause standard for OSHA citations (*i.e.*, that the warrant present specific evidence that OSHA had been violated). *Id.* at 795-798.⁴

Even if the newspaper articles were otherwise reliable evidence (and they are not), they do not constitute probable cause that would warrant an investigation by *this* Commission. As the Commission indicates, the articles discuss the alleged provision of customer data only in a general sense. *None* of these articles states or suggests "that the calling data of any Washington customers are at issue." Notice at 2.

The Commission's probable cause requirement reflects a policy that it should not conduct investigations merely on the basis of mere suspicions or unreliable evidence such as allegations in newspaper reports. The record is totally devoid of any evidence which would support a finding of probable cause.⁵ Thus, there is no basis for the issuance of a complaint.

⁴*See also, e.g., Pierce v. Lake Stevens School District No. 4, Snohomish County*, 84 Wash.2d 772, 788, 529 P.2d 810, 819 (1975) (Hale, C.J., dissenting) (notice of nonrenewal of contract issued to teachers "would supply the teacher with less information and less basis for probable cause than a general newspaper account that the school district would lay off a specific number of teachers").

⁵*Compare, e.g., Docket Nos. PG-030080 and PTG-030128, Washington Utilities and Transportation Commission v. Puget Sound Energy, Inc.*, Complaint dated June 29, 2004 (finding that probable cause existed to issue complaint

QUESTION NO. 3: IF THE COMMISSION DECIDES NOT TO ISSUE A COMPLAINT NOW, WILL VERIZON AND AT&T AGREE TO MAINTAIN RECORDS, IF ANY, DOCUMENTING ALL INSTANCES IN WHICH THEY PROVIDED CUSTOMER PROPRIETARY NETWORK INFORMATION OF A WASHINGTON CUSTOMER TO THE FEDERAL GOVERNMENT WITHOUT A WARRANT OR OTHER LEGAL PROCESS, AND WITHOUT THE CUSTOMER'S CONSENT?

As the Commission is aware, there are well over 20 pending putative nationwide class action lawsuits challenging AT&T's alleged provision of calling records to NSA. When the first of these actions was brought, AT&T became required by law to preserve documents (if any) relevant to these allegations, and AT&T will continue to be required to do so during the pendency of these putative nationwide class actions (which include Washington subscribers in the purported nationwide classes). Thus, if the Commission decides to await the outcome of the pending federal court cases and declines to issue a complaint or otherwise to investigate these allegations now, AT&T agrees that it will preserve such documents until 30 days after the Commission is provided notice of a final resolution of the calling record allegations in the pending class action lawsuits.

Sincerely,

AT&T Communications of the Pacific Northwest, Inc.



Dan Foley
General Attorney and Assistant General Counsel
AT&T Services Inc.

alleging that pipeline had failed to comply with Commission rules and regulations, based on safety inspection of pipeline's facilities and operations conducted by Commission's Pipeline Safety Staff); Docket Nos. UG-020230 and UG-020232, *Washington Utilities and Transportation Commission v. Basin Frozen Foods, Inc.*, Complaint dated August 28, 2002 (same).