

STATE OF COLORADO

PUBLIC UTILITIES COMMISSION

Gregory E. Sopkin, Chairman
 Polly Page, Commissioner
 Carl Miller, Commissioner
 Doug Dean, Director

Department of Regulatory Agencies
 Tambor Williams
 Executive Director



Bill Owens
 Governor

August 23, 2006

Mr. Taylor Pendergrass, Esq.
 American Civil Liberties Union of Colorado
 400 Corona Street
 Denver Colorado 80218-3915

Dear Mr. Pendergrass:

Thank you for your faxed letter of August 18, 2006 requesting that the Colorado Public Utilities Commission ("PUC") go forward with an investigation as to whether certain telephone service providers under the PUC's jurisdiction provided information to the National Security Agency ("NSA"). I appreciate your interest in PUC matters; however, it remains my belief that an investigation into this issue is not warranted at this time.

You indicate in your letter that the PUC relied on the pendency of a federal government motion to dismiss in the case of *Hepting v. AT&T Corp.*, No. C06-0672-VRW (N.D. Cal.), before determining whether to proceed with an investigation. While you state that the matter in *Hepting* was resolved when the court refused to dismiss the lawsuit, it is my understanding that Judge Walker nonetheless stayed the case pending an appeal to the 9th Circuit Court of Appeals. It would appear that the matter is in fact not finally resolved.

Of more concern is the matter of *ACLU v. National Security Agency*, Case No. 06-CV-10204, (E.D. Mich. 2006) (order issued August 17, 2006). There, the court, while finding for Plaintiffs on the state secrets privilege defense with regard to warrantless wiretapping, nonetheless dismissed Plaintiff's data-mining claims. The court found that the ACLU could not sustain its data-mining claims without the use of privileged information and further litigation would force the disclosure of the very information the privilege is designed to protect. As you are aware, the PUC's jurisdiction does not extend to the adjudication of constitutional or tort claims. The matters which you urge the PUC to investigate are directly related to the data-mining claims dismissed by the federal court in Michigan. Since the data-mining issue may be the only claim the PUC could proceed under at this time and the same claim has been dismissed by the Michigan court, I disagree that any "green light" has been given by the federal courts..

1580 Logan Street, Office Level 2, Denver, Colorado 80203, 303-894-2000

www.dora.state.co.us/puc
 Permit and Insurance (Outside Denver) 1-800-888-0170
 TTY Users 711 (Relay Colorado)
 Consumer Affairs 303-894-2070

Consumer Affairs (Outside Denver) 1-800-456-0858
 Hearing Info 303-894-2025
 Transportation Fax 303-894-2071
 Fax 303-894-2065

Based on this information, it remains my determination that it would be imprudent of the PUC to expend scarce taxpayer money and PUC resources in an investigation that may yet be preempted and rendered moot by national security interests. Consequently, the PUC will not conduct an investigation at this time, but will instead await a definitive ruling from the federal courts regarding a state public utility commission's authority to investigate such matters.

Thank you very much for your interest in this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Doug Dean".

Doug Dean
Director

STATE OF COLORADO

PUBLIC UTILITIES COMMISSION

Gregory E. Sopkin, Chairman
Polly Page, Commissioner
Carl Miller, Commissioner
Doug Dean, Director

Department of Regulatory Agencies
Tambor Williams
Executive Director



Bill Owens
Governor

June 19, 2006

Mr. Taylor Pendergrass, Esq.
American Civil Liberties Union of Colorado
400 Corona Street
Denver, Colorado 80218-3915

Dear Mr. Pendergrass:

Thank you for your letter of May 24, 2006 requesting a Colorado Public Utilities Commission ("PUC") investigation into disclosure of customer proprietary network information ("CPNI") by various telecommunications providers to the National Security Agency ("NSA"), as reported in the May 11, 2006 of *USA Today*.

After reviewing the matter carefully and conferring with our legal counsel, it is my determination that an investigation by the PUC is not warranted at this time. While you interpret various PUC rules and Colorado statutes in your letter as providing that the PUC has jurisdiction to investigate this matter, it is my opinion that current activities by the federal government require that the PUC defer any action at this time.

For example, the activities at issue are currently the subject of a court action in the United States District Court for the Northern District of California. See, *Hepting v. AT&T Corp.*, No. C06-0672-VRW (N.D. Cal.). That matter directly deals with the issues you raise in your letter, specifically, whether the NSA gained access to various telecommunications providers' CPNI records. It is my understanding that the federal government has intervened to dismiss that action on the basis of the military and state secrets privilege.

Additionally, it has come to my attention that the New Jersey Attorney General has issued subpoenas to several telecommunications providers to determine whether any of them violated New Jersey's consumer protection laws by providing CPNI to the NSA. However, the U.S. Department of Justice has filed a lawsuit in the United States District Court in New Jersey in that matter to block the subpoenas. The Department of Justice's action sets the stage to determine the extent of a state's power in this matter over the federal government's national security powers and their

1580 Logan Street, Office Level 2, Denver, Colorado 80203, 303-894-2000

www.dora.state.co.us/puc
Permit and Insurance (Outside Denver) 1-800-888-0170
TTY Users 711 (Relay Colorado)
Consumer Affairs 303-894-2070

Consumer Affairs (Outside Denver) 1-800-456-0858
Hearing Info 303-894-2025
Transportation Fax 303-894-2071
Fax 303-894-2065

Mr. Taylor Pendergrass
Page 2

preemptive effective over state authority. The Department of Justice has asserted that New Jersey, and all states, stray into federal matters when they assert authority over telecommunications providers in matters that involve national security.

Given the two above mentioned matters, I have determined that it would be imprudent of the PUC to expend scarce taxpayer money and PUC resources at this time in an investigation that may be preempted and rendered moot by national security interests. Consequently, the PUC will not conduct an investigation at this time, but will instead await a definitive ruling from the United States District Courts regarding a state's authority to investigate such matters.

Again, thank you very much for your interest in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Doug Dean". The signature is written in dark ink and is positioned above the typed name.

Doug Dean
Director