BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN RE: ACLU REQUEST FOR AN INVESTIGATION OF UNLAWFUL DISCLOSURE OF PRIVATE TELECOMMUNICATION CUSTOMER INFORMATION (CPNI)	**DOCKET NO. UT-060856**

SUPPLEMENTAL COMMENTS OF PUBLIC COUNSEL

September 6, 2006

I. INTRODUCTION

The Public Counsel Section of the Washington State Attorney General's Office (Public Counsel) files these supplemental comments with the Washington Utilities and Transportation Commission (WUTC or Commission) in response to the invitation contained in the August 25, 2006, Notice of Further Opportunity To Comment. These comments address the Commission's Question No. 2 contained in the Notice, and supplement the oral comments made on all three Commission questions at the Open Meeting on August 30, 2006.

II. RESPONSE TO COMMISSION QUESTION NO. 2

Question No. 2: Does The Information Currently In the Record Constitute Probable Cause That Verizon or AT&T Violated Washington Laws and Rules?

There is little guidance in Title 80 or the Washington Administrative Procedures Act (APA) on the probable cause standard. The Commission Notice of August 25 cites 80.01.060 and RCW 34.05.458 as referencing probable cause. Neither, however, by its terms requires a probable cause finding prior to the filing of an own-motion agency complaint. The referenced statutes address ALJ powers and separation of functions. When the Commission issues a complaint on its own motion, it does so under RCW 80.04.110 "setting forth any or thing done or omitted to be done by any public service company in violation, or claimed to be in violation, of any provision of law, or of any order or rule of the Commission." The complaint statute also does not refer to a probable cause requirement.

It is true that as a matter of Commission practice, orders initiating own motion complaints often contain a finding of probable cause. *See, e.g. WUTC v. Puget Sound Energy*, PG-030080, PG-030128, Complaint, Section V (alleged pipeline safety violations). This is not uniformly the case, however. *See, e.g., WUTC v. Advanced Telecom Group, Inc., et al.*, Complaint and Notice of Prehearing Conference (September 8, 2003)(Qwest "Secret Agreement" case, no probable cause finding stated). Public Counsel has not found a definition of probable cause for administrative law purposes in either Title 80 or Title 34.

In the realm of administrative law, the courts have long held that probable cause in the criminal law sense is not required for agency investigative action. *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950)(administrative subpoena); *Steele v. State*, 85 Wn. 2d 585, 594 (1975) (adopting *Morton Salt* standard). An agency may conduct an inspection, for example, based either on specific evidence of an existing violation, or upon reasonable legislative or administrative standards for the inspection. *Marshall v. Barlow's, Inc.*, 436, U.S. 307, 320 (1978); .*Seattle v. Leach*, 29 Wn. App. 81, 84 (adopting *Barlow's* standard). In *Morton Salt*, the United States Supreme Court opined that an administrative agency has a legitimate right to satisfy itself that corporate behavior is consistent with the law and the public interest, even if the inquiry is "nothing more than official curiousity." *Morton Salt*, 338 US at 652.

Professor Charles Koch, Jr.'s treatise on administrative law observes that administrative agencies have extremely broad discretion, akin to prosecutorial discretion, in deciding whether to initiate an enforcement action. Koch, *Admininistrative Law and Practice*, Second Edition, §3.10 (power to initiate an investigation), §5.30 (adjudication, initiation by the government). The decision to bring an adjudication is essentially unreviewable, so long as it is not an abuse of discretion. *Id.* In *Federal Trade Commission v. Standard Oil of California*, 449 U.S. 232 (1980), Standard Oil sought dismissal of an FTC action on the ground that it had been initiated without the requisite statutory finding of "reason to believe." The Supreme Court rejected the challenge, holding that the decision to issue the complaint was not a final agency action and was only reviewable after a final agency decision.

In sum, so long as the inquiry is within the authority of the agency, and there is some reasonable basis for the action (i..e, the agency action is not an abuse of discretion), an administrative agency has a broad range of discretion as to whether it initiates enforcement activity. *See generally*, Washington Administrative Law Practice Manual, §§8.02-8.04, 9.03.

Here, the Commission has been presented with information in this docket about the NSA "data mining" program, including statements by public officials, allegations involving national companies which have operations in Washington state, a statement by the Washington

Independent Telephone Association, and national news media reports. *See inter alia*, Initial Comments of Public Counsel, ¶¶15-31; Answering Comments of Public Counsel, ¶¶2-8. In the recent *Hepting* decision, the federal district court for the Northern District of California noted that a declaration filed by AT&T employee Klein with that court alleged the installation of special surveillance equipment on AT&T premises in a number of western cities, including Seattle. *Hepting v. AT&T Corporation*, No. C-060672 VRW, Order, July 20, 2006, slip op., p. 24.

Given the liberal standards for agency enforcement action discussed above, based on the information now before it, the Commission could determine that it had a reasonable basis ("probable cause") to file an own-motion complaint. Such a decision would not be an unreasonable exercise of its discretion. As the Commission has noted, filing a complaint for purposes of tolling the statute of limitations, and then staying further proceedings pending federal court resolution of the issues is an option available to it. Since only one regulated telecommunications carrier in Washington (AT&T) has agreed to voluntarily toll the statute, and then only in a limited fashion, the complaint would be useful in that regard in protecting customer rights and Commission jurisdictional options.[1]

Respectfully submitted

DATED this 6th day of September, 2006.

ROB MCKENNA
Attorney General

Simon ffitch
Assistant Attorney General
Public Counsel

[1] As we indicated at the Open Meeting, it is Public Counsel's recommendation that any Commission action in this docket not be limited only to Verizon and AT&T, but should extend to Washington regulated telecommunications carriers generally.