[Service Date September 27, 2006]

BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of: AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON Petition for Investigation	DOCKET NO. UT-060856 ORDER 02 ORDER OPENING AND DEFERRING INVESTIGATION PENDING RESOLUTION OF FEDERAL ISSUES; DIRECTING TELECOMMUNICATIONS COMPANIES TO PRESERVE RECORDS

I. SUMMARY

1 This docket involves a claim that telecommunications companies offering intrastate telecommunications services in this state have violated WAC 480-120-202, and/or other laws and other rules of the Washington Utilities and Transportation Commission (Commission), by unlawfully providing private customer calling information to the federal government.

2 The Commission has received comments[1] from several interested persons recommending various courses of action including: (1) open an informal investigation;[2] (2) institute a formal complaint for violations of Commission laws and rules;[3] or (3) await final resolution of federal issues identified in this docket, that are currently pending in the federal courts.[4]

---

[1] We use the generic term "comments" to cite the written comments, though the comment documents often use different terms.
[2] *E.g.,* Comments of ACLU (June 30, 2006) at 8; Comments of David E. Griffith (June 30, 2006) at 3; Comments of Senator Kohl-Welles (June 30, 2006); Comments of Representative Upthegrove (June 27, 2006).
[3] *E.g.,* Comments of Stephen Gerritson and Michele Spencer (June 20, 2006) at 2; Comments of Laurie A. Baughman (June 30, 2006) at 5.
[4] *E.g.,* Comments of Public Counsel (June 30, 2006) at 56-57. This is consistent with the comments of AT&T and Verizon, which assert that the Commission can do nothing because federal law bars the companies from providing information to the Commission. *E.g.,* Comments of AT&T (May 26, 2006) at 10; Comments of Verizon (June 30, 2006) at 8-9. If the federal courts rule to the contrary, the Commission would seem to be free to pursue violations.

3 For reasons explained below, we open an investigation but defer further action pending final resolution of the federal issues by the federal courts. Meanwhile, all telecommunications companies offering intrastate wireline telecommunications services in this state are directed to preserve relevant records and we address the statute of limitations in order to preserve our jurisdiction.

II. INTRODUCTION

4 Like many state regulatory agencies and the Federal Communications Commission (FCC), the Commission has promulgated rules designed to protect the privacy of information regarding a customer's telephone use. Protected information includes the duration of the call, the person called, and type of call. This information is commonly referred to as "Customer Proprietary Network Information," or CPNI.[5]

5 Specifically, the Commission has adopted WAC 480-120-202, which in turn adopts the privacy safeguards for CPNI adopted by the FCC in 47 C.F.R. §§ 64.2003 through 2009.[6] In general, the effect of WAC 480-120-202 is to prevent telecommunications companies[7] that provide intrastate wireline telecommunications services to Washington customers from providing CPNI to third parties, except with the customer's consent or as otherwise permitted or required by law or rule.[8]

6 The Commission opened this docket on May 25, 2006, upon receiving a request from the American Civil Liberties Union of Washington (ACLU). The ACLU asked the Commission to investigate whether telecommunications companies violated Commission laws and rules by unlawfully releasing CPNI to the federal government.[9]

---

[5] CPNI is defined as "(A) information that relates to the quantity, technical configuration, type, destination, location, amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier." *WAC 480-120-202, adopting by reference 47 C.F.R. § 64.2003, which adopts this definition of CPNI found in 47 U.S.C. § 222(h)(1).*

[6] The Commission notes that the FCC has declined to investigate the same matters at issue in this docket. *See* Comments of AT&T (June 30, 2006), Attachment G, Letter from FCC to Representative Markey (May 22, 2006).

[7] In general, the Commission regulates companies offering intrastate telecommunications services: *i.e.,* telecommunications services between points in the state of Washington. The Commission does not regulate companies that provide exclusively interstate telecommunications services, nor the interstate services of companies that also provide intrastate services in this state.

[8] *See also* 47 U.S.C. § 222(c)(1): telecommunications companies may not divulge CPNI except "as required by law or with the approval of the customer."

[9] ACLU request (May 23, 2006) at 4.

7 The ACLU bases its request on reports contained in national news publications stating that Verizon, AT&T, and perhaps other telecommunications companies, have released information to the federal National Security Agency (NSA), without lawful authority. Based on these press reports, the ACLU argues that the Commission should open an investigation into the activities of several telecommunications companies operating in Washington to determine whether any unlawfully released CPNI and if so, to pursue violations of Commission laws and rules.[10]

III. PROCEDURE

8 This matter first came before the Commission at its open meeting on July 12, 2006. The Commission deferred action pending receipt of additional comments and information solicited by the Commission from interested persons. At the Commission's open meeting on August 30, 2006, the Commission acknowledged receipt of additional written comments, and oral comments were presented by ACLU, AT&T, Verizon and Public Counsel. Attorneys from the Utilities and Transportation Division of the Attorney General's Office responded to specific questions from the commissioners.

9 The Commission again decided to defer action, pending receipt of additional comments and information by September 6, 2006. Written comments were filed by, among others, the Public Counsel Section of the Attorney General Office, AT&T, Verizon, and the Washington Independent Telephone Association (WITA).

10 This matter came before the Commission at its September 27, 2006, open meeting for deliberation by the commissioners. At that meeting the Commission made the decisions expressed in this order.

IV. DISCUSSION

11 The threshold legal issues here are matters of federal law and are pending before many commissions and in more than 30 court cases filed across the country.[11]

[10] *Id.* at 1-4.
[11] *E.g.,* Comments of AT&T (June 30, 2006) at 3. The federal court system has responded to this large number of federal cases involving essentially the same issues. On August 9, 2006, 16 cases from various federal district courts were consolidated with *Hepting v. AT&T Corp.,* Case No. C 06-0672-VRW, which is currently pending before the District Court for the Northern District of California. *See* MDL Docket No. 1791, *In re National Security Agency Telecommunications Records Litigation,* Transfer Order (August 9, 2006). More cases may be consolidated.

A. Substantial federal legal issues currently pending in the courts need to be resolved

12 A major issue presented is whether the "state secrets" privilege bars telecommunications companies from disclosing whether they have provided CPNI to the federal government.[12] AT&T and Verizon argue that they cannot divulge their relationship, if any, with the NSA without committing a felony.[13] They also claim that telecommunications companies are required by statute to cooperate with the federal government in these matters, and are immune from lawsuits when they do so.[14] Moreover, they contend the Commission is preempted by federal law from taking any action in this matter.[15] These legal arguments are contested or questioned by other commenters.[16]

13 Where these issues have been joined in other jurisdictions, a clear and consistent pattern has emerged: When a case is presented before a court or a commission in which a telecommunications company is asked to state whether it provided CPNI to the NSA, the United States Department of Justice has filed a lawsuit in federal court to prevent the company from providing that information, and/or to prevent the state commission from obtaining that information.[17]

14 Although most of the cases have arisen by means of customer complaint in federal court, recent events in the state of Missouri provide a typical example of how the federal government has acted to protect its interests when a state agency seeks to investigate such matters.

15 In June 2006, two members of the Missouri Public Service Commission issued subpoenas to AT&T, asking for specific information about AT&T's involvement with the NSA telephone surveillance program. AT&T declined to produce the records, and the two commissioners

---

[12] *E.g.,* Comments of AT&T (May 26, 2006) at 2-4, and the legal pleadings attached to those Comments (Attachments A, C, D and F); Comments of AT&T (June 30, 2006) at 1-4 and 9-10 and the legal pleading and correspondence attached to those Comments (Items A, B and C); Comments of Verizon (June 30, 2006) at 1 and 3-5 and 7-8, and the pleading and correspondence attached to those Comments as Exhibits 1, 2, 3, 9 and 10.
[13] *Id.*
[14] *E.g.,* Comments of AT&T (May 26, 2006) at 5, citing 18 U.S.C. §§ 2511(1), 2511(3), 2520(d), 2702(b), (c) & (e), 2703, 2709, 3124(d) & (e); 50 U.S.C. § 1805(f) & (i), 1842(f), and 1843; Comments of AT&T (June 30, 2006) at 3; Comments of AT&T (July 17, 2006) at 2-3; Comments of Verizon (July 17, 2006) at 4-5.
[15] *E.g.,* Comments of Verizon (June 30, 2006) at 3-4, 6; Comments of Verizon (July 17, 2006) at 2-5; Comments of AT&T (June 30, 2006) at 4-9; Comments of AT&T (July 17, 2006) at 4-5.
[16] *E.g.,* Comments of ACLU (June 30, 2006) at 2-5 and 7-8; Comments of Public Counsel (June 30, 2006) at 54; Comments of David A. Griffith (June 30, 2006) at 1-2; Comments of Stephen Gerritson and Michele Spencer (June 20, 2006) at 2; Comments of Laurie A. Baughman (June 30, 2006) at 1-2 and 4.
[17] This pattern is also noted in the Comments of AT&T (August 25, 2006) at 2 and Comments of Verizon (August 29, 2006) at 2.

went to court to compel compliance with the subpoenas. On July 25, 2006, the Department of Justice filed a lawsuit in federal district court in St. Louis to bar such disclosure. That lawsuit is pending.

16 Based on the comments filed by AT&T and Verizon in this docket, these companies will continue to assert, among other things, that federal law bars them from providing information surrounding any disclosure of CPNI to the federal government, even to state whether or not they provided CPNI to the federal government.[18]

17 It is also clear that the federal legal issues presented in this docket are pending in the federal courts. One such case is *Hepting v. AT&T Corp.,* Case No. C 06-0672-VRW, which is being tried in the federal district court for the Northern District of California. That court, like those in Washington state, is in the Ninth Circuit.

18 Consequently, absent strong countervailing considerations directly impairing the public interest, it is not prudent for the Commission to try to resolve these issues now, because ultimately the federal courts will decide them. If the Commission were to investigate or issue a complaint, there can be no reasonable doubt the Commission would be sued in federal court and enjoined from requiring the companies to supply information about whether they provided CPNI to the federal government until the underlying constitutional, national security, and related legal issues have been determined by the federal courts.

19 Under these circumstances, we agree with Public Counsel that it makes more sense to await final resolution of these federal legal issues before taking action.[19]

---

[18] *See, e.g.,* Comments of AT&T (June 30, 2006) at 2 and 6; Comments of AT&T (July 17, 2006) at 2 and 6-7, and Exhibit A attached to those comments.

[19] *E.g.,* Comments of Public Counsel (July 17, 2006) at 7-11. This same conclusion has been reached by at least two other commissions, in the same or substantially similar circumstances: the Colorado Public Utilities Commission and the Delaware Public Service Commission.

The Colorado Commission stated that "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." *See* Comments of Verizon (August 23, 2006), Exhibit 2, Letter from Colorado Public Utilities Commission Director to ACLU (August 23, 2006) at 2.

The Delaware commission decided to defer action for at least six months, pending court developments. As Delaware Commissioner Clark stated: "in the end, this is going to be decided in the Federal Courts, since it is going to be a Federal preemption and Federal privilege issue. So, for us to be out in front of it in a situation where in another jurisdiction they are going to have to make a decision whether or not this issue can go forward, I don't think that is a position that, at least at this stage, I feel comfortable asserting ourselves into." *See* Comments of AT&T (June 30, 2006), Exhibit G, Transcript in Docket 06-179 (Delaware Public Service Commission, June 20, 2006), at TR. 35, lines 15-23.

B. Other considerations

20 In making this decision, we identify three concerns that must be addressed: (1) whether the statute of limitations is tolled; (2) whether there would be a sufficient basis for issuing a complaint; and (3) whether telecommunications companies will retain relevant records.

1. Statute of limitations

21 If we await final resolution of the federal issues before taking action, a telecommunications company may argue that the statute of limitations has run on any Commission complaint.[20] The applicable limitations period for a penalty action in this context appears to be two years. *RCW 4.16.100(2).*[21] The time it may take to resolve the federal legal issues could be two years, or longer. Consequently, if there were violations, companies could respond that expiration of the limitation period had foreclosed the Commission's legal ability to issue penalties.

22 We believe the statute of limitations will not bar future Commission penalties if the resolution of the federal issues allows such action. The Commission asked AT&T and Verizon to waive the statute of limitations pending final resolution of the federal issues that apply in this case.[22] AT&T has agreed to do so.[23] We accept AT&T's waiver.[24]

23 Verizon on the other hand, asserts that this issue is "premature."[25] However, at the Commission's August 30, 2006, open meeting, Verizon's counsel acknowledged the nature of the alleged violations and that the legal bars Verizon asserted foreclose Commission action at this time. These legal bars make information relevant to determining whether Verizon violated Commission laws and rules unavailable to the Commission. In this context we believe the "discovery rule" applies.

24 Under the discovery rule, "a cause of action does not accrue until an injured party knows, or in the exercise of due diligence should have discovered, the factual bases of the cause of

---

[20] Nothing in this order constitutes a Commission decision that any telecommunications company has violated any Commission rule, or that the Commission would issue a penalty, if the Commission found such a violation occurred. These decisions must await a future complaint, if any, based on the record to be developed at that time.
[21] The issue of the applicable limitations period has not been briefed by the parties. The Commission has not made a final decision on this issue, and we do not decide this issue here.
[22] *Notice of Further Opportunity to Comment* (August 25, 2006), at 2, Question 1.
[23] Comments of AT&T (August 29, 2006) at 1-2.
[24] The Commission does not accept AT&T's reservations, which will be addressed in the future, if necessary.
[25] Comments of Verizon (August 29, 2006) at 2-3.

action."[26] In other words, the discovery rule "tolls" the statute of limitations that might otherwise apply. Whether the court will apply the discovery rule in a specific case is based on a balancing test: "[T]he possibility of stale claims must be balanced against the unfairness of precluding justified causes of action."[27]

25 Verizon clearly asserts a legal bar to any Commission attempt to discover the relevant facts surrounding any disclosure of CPNI to the federal government which might give rise to a cause of action. It is equally clear that the federal government would take legal action to bar such disclosure.

26 In these circumstances we believe the balance favors tolling the statute against Verizon. Verizon knows the nature of the claims that might be asserted and can protect against "staleness" in its defense should it choose to do so. The Commission, on the other hand, by Verizon's own argument cannot proceed at present.

2. Basis for a complaint

27 Another consideration is whether the Commission has a sufficient basis for initiating a complaint. Under WAC 480-120-202 the Commission has jurisdiction over telecommunications carriers offering intrastate wireline services in this state. So far, no information has been brought to the Commission's attention that would tend to show the existence of any disclosure of CPNI to the federal government that is related to Washington intrastate telecommunications.

28 Public Counsel observes that "it would be extremely difficult, even from publicly available materials, for the Commission to make an adequate factual record until the federal issues are resolved."[28] Given the information before us, this most likely is an understatement.

29 The information cited by the ACLU consists of uncorroborated newspaper reports that are not specific to Washington intrastate telecommunications. The ACLU, AT&T and Verizon all agree that uncorroborated newspaper reports do not constitute probable cause for a complaint proceeding.[29]

---

[26] *In re Estates of Hibbard,* 118 Wn.2d 737, 744, 826 P.2d 690 (1992).
[27] *U.S. Oil v. Dep't of Ecology,* 96 Wn. 2d 85, 93, 633 P.2d 1329 (1981).
[28] Comments of Public Counsel (July 17, 2006) at 11.
[29] Comments of ACLU (August 29, 2006) at 1; Comments of AT&T (August 29, 2006) at 2-3; Comments of Verizon (August 29, 2006) at 3-4.

30 On the other hand, the Commission routinely investigates telecommunications companies for compliance with Commission laws and rules. The Commission conducts audits and provides technical assistance or other measures as may be required to provide incentives to comply. The Commission does not need to make a finding of probable cause that a violation has occurred before conducting such investigations.

31 Public Counsel argues that an administrative agency has wide discretion regarding when it will take action, and that "probable cause" is not the minimum standard for agency complaints or investigations.[30] We agree with Public Counsel. Regardless of the legal standard for initiating a complaint or an investigation, however, it would not be productive to do so now for the reasons previously discussed. Any complaint or investigation should await a determination in the federal courts that such a proceeding is lawful.

3. Retention of relevant information

32 By not proceeding now, there is some risk that relevant information now possessed by or known to telecommunications companies may not be preserved until the federal issues are resolved.

33 AT&T and Verizon state they are bound to retain this information under the civil litigation in which they are currently involved.[31] We have no basis for taking issue with these statements; however, we have no say in how that litigation may address document retention relevant to our potential future jurisdiction. Further, we do not know whether other companies subject to our jurisdiction that may not be parties to pending federal court litigation possess relevant information.

V. DECISION

34 For the reasons stated above, we decline to issue a complaint or begin an active investigation at this time of possible violations of WAC 480-120-202 and/or other Washington laws or Commission rules.

35 However, we find it necessary to ensure that relevant information is preserved that will enable a later Commission investigation, should such be permitted by the courts. Therefore, we direct the Secretary to open an investigation docket on this matter, and direct every telecommunications company offering intrastate wireline telecommunications services in this state to retain information about any approach by or on behalf of the federal government

[30] Comments of Public Counsel (September 6, 2006).
[31] Comments of AT&T (August 29, 2006) at 4; Comments of Verizon (August 29, 2006) at 4.

to provide CPNI. Each company must preserve all records and information about any such request and the information provided, until further order of the Commission. If any current or former company official or employee has personal knowledge of any such information, the company is directed to retain the name of the person, the nature of the information she or he possesses, and the last known contact information for the person. The provisions of CPNI subject to this order are those associated with Washington intrastate telecommunications provided by wireline carriers. The order shall make clear the nature of the allegations, and that each telecommunications company should assume, for purposes of notice and information retention purposes, that the allegations may apply to them.

36 If the courts bar any state action for violations of rules such as WAC 480-120-202 or other relevant laws and Commission rules, the investigation docket will be closed and the document retention directive will be withdrawn.

37 If the courts allow state investigations into these issues, the Commission will determine further appropriate action at that time.

38 From the foregoing findings, the Commission makes the following conclusions of law:

CONCLUSIONS OF LAW

39 Based on the written and oral record in this docket and on the foregoing discussion, the Commission makes the following conclusions of law:

40 1. The Commission has jurisdiction over the practices of telecommunications companies offering intrastate wireline telecommunications services in this state, which are subject to the provisions of WAC 480-120-202, regarding the privacy protections for customer proprietary network information (CPNI).

41 2. Claims that telecommunications companies violated WAC 480-120-202, and/or any other Commission laws and rules, by unlawfully providing CPNI to the federal government raise predicate issues of federal law which must be resolved by federal courts before the Commission can meaningfully conduct an investigation or pursue a complaint.

42 3. Judicial economy warrants waiting for the final resolution of the federal legal issues already pending in federal courts before taking further action to investigate claims raised in this docket.

43 4. In order to preserve relevant evidence that may currently exist until such time as the federal legal issues are resolved and the Commission can determine whether to investigate or file a complaint in this matter, it is necessary to enter a protective order.

44 5. In order to preserve the Commission's jurisdiction to assess penalties until such time as the federal legal issues are resolved and the Commission can determine whether to investigate or file a complaint in this matter it is necessary to determine the applicability of the relevant statute of limitations.

45 6. AT&T has waived any applicable statute of limitations by stipulation in comments dated August 29, 2006.

46 7. Any applicable statute of limitations is tolled as to Verizon from no later than August 30, 2006, because on or before that date Verizon knew the nature of the claim sufficiently to preserve its defense and asserted the Commission should not and could not proceed to assert its jurisdiction until federal legal issues are resolved.

ORDER

47 Based on the foregoing discussion and conclusions of law, the Commission enters the following order:

48 1. The Secretary is directed to open an investigation docket in this matter.

49 2. The Secretary shall issue an administrative order to each telecommunications company offering Washington intrastate wireline telecommunications services directing the company to:

50 a. Preserve all records and information, if any exist, about any request by or on behalf of the federal government to provide CPNI and any records or information provided in response, until further order of the Commission, and;

51 b. Retain the name of any current or former company official or employee who has personal knowledge of any request by or on behalf of the federal government to provide CPNI and any records or information provided in response, the nature of that person's knowledge, and the last known contact information for that person.

52 c. The order shall make clear the nature of the allegations, and that each telecommunications company should assume, for purposes of notice and information retention purposes, that the allegations may apply to them.

53 3. The provisions of CPNI subject to this order are those associated with Washington intrastate telecommunications. The carriers subject to this order are telecommunications companies providing intrastate wireline service in Washington.

54 The Commission retains jurisdiction in this matter to effectuate this Order.

DATED this 27th day of September, 2006.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner