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UTILITY AND TRANSPORTATION
COMMISSION

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Washington Utilities and Transportation Commission
P.O. Box 47250
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Olympia, WA 98504-7250

Docket #UT-060856
Supplemental Comments by American Civil Liberties Union of Washington

Dear Chairman Sidran and Commission Members,

We are writing to alert the Commission to an important development that may affect your investigation of telecommunication companies' improper sharing of our telephone records with the National Security Agency (NSA). In light of these new facts we hope you will urge our Congressional delegation to oppose proposals from the Bush Administration to grant immunity to telecommunications companies that have colluded with the NSA. Such immunity would severely impair any possibility of a future investigation by the UTC.

As you know, USA Today revealed last year that since shortly after 9/11 at least two major phone companies—AT&T and Verizon—have been voluntarily granting the NSA direct, mass access to their customers' calling records, and that the NSA had compiled a giant database of those records. Subsequently confirmed by 19 lawmakers, this program extends to all Americans, not just those suspected of terrorist or criminal activity.¹

The revelations of improper telecommunication companies' collusion with the NSA led the Utilities and Transportation Commission to open an investigation docket last year (no. UT-060856). The Commission also ordered telecommunication providers in Washington to preserve relevant documents, even though an active investigation was deferred until federal courts resolved federal legal issues—especially the state secrets privilege.

Throughout the course of the hearings the Commission held on this matter last year, and throughout regulatory investigations elsewhere in the country, the telecommunications companies and the NSA have disingenuously maintained that their program is so secret that any investigation or even discussion of it would jeopardize national security. They have also claimed that federal law precludes them from even confirming or denying that any records have been provided to the NSA. And they have asserted that the state

¹ Leslie Cauley, "NSA Has Massive Database of Americans' Phone Calls," *USA Today*, May 11, 2006; Susan Page, "Lawmakers: NSA Database Incomplete," *USA Today*, June 30, 2006.

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secrets privilege, which shields matters of national security from being used as evidence in court, would pose an insurmountable barrier to investigation and inevitably lead to dismissal of any lawsuit.

Despite the claims that utmost secrecy is required, the Director of National Intelligence, Mike McConnell, recently officially confirmed the substance of the allegations. In an interview with the El Paso Times, McConnell described the Bush Administration's rationale for changes to the Foreign Intelligence Surveillance Act (FISA), including the need to seek immunity for telecommunications companies. He stated, "[n]ow the second part of the issue was under the president's program, the terrorist surveillance program, the private sector had assisted us. Because if you're going to get access you've got to have a partner and they were being sued."²

With this interview Director McConnell has cast serious doubt on the supposed barriers to further investigation by both the federal courts and the Commission. After all, your investigation would only determine whether telecommunications companies have agreed to share information with the NSA, and if so, whether there is a legal basis for that cooperation. Director McConnell's interview has confirmed that cooperation and hence any investigation can do no more harm than his interview. Further, the state secrets privilege only applies to government activities and programs that are maintained in secrecy. By granting this interview, Director McConnell lifted the veil of that official secrecy and increased the likelihood that court cases—both those brought by regulators and by private parties—will go forward.

We know that the Commission is waiting to learn how and to what extent the federal courts will allow its investigation to go forward. We believe that McConnell's interview gives your investigation a significant boost. But, more importantly, we worry that Congress will act before you can. As Director McConnell noted in his interview, the Administration recently pushed to place full telecom immunity into the recently passed revisions to the FISA law and plans to renew those efforts this Fall.

We hope that you will alert our Congressional delegation to the adverse impact that immunity provisions could have, at least until you have had the opportunity to conduct a full and fair investigation—one aimed at learning the full extent of telecom spying and the damage to Washingtonians' privacy.

Thank you for your consideration.

Sincerely,



Kathleen Taylor
Executive Director



Doug Klunder
Privacy Project Director

² Chris Roberts, "Transcript: Debate on the foreign intelligence surveillance act," *El Paso Times*, August 22, 2007 (link: http://www.elpasotimes.com/news/ci_6685679).