May 31, 2006

Washington Utilities and Transportation Commission
P.O. Box 47250
1300 S. Evergreen Park Dr. SW
Olympia, WA 98504-7250

Dear Chairman Sidran and Commission Members:

The American Civil Liberties Union of Washington (ACLU-WA) welcomes this opportunity to comment on a possible investigation of improper sharing of telephone records. The ACLU-WA is an organization of over 25,000 members in Washington, dedicated to defending civil liberties, including the right to personal information privacy. For more than two decades, we have advocated in judicial, regulatory, and legislative arenas for the protection of telephone records in order to preserve the privacy of telephone users. These records contain sensitive information about people, potentially revealing their associations, interests and a host of personal details about their lives.

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
705 2ND AVENUE, 3RD FL.
SEATTLE, WA 98104
T/206.624.2184
F/206.624.2190
WWW.ACLU-WA.ORG

TIMOTHY KAUFMAN-OSBORN
BOARD PRESIDENT

KATHLEEN TAYLOR
EXECUTIVE DIRECTOR

As the Utilities and Transportation Commission considers an investigation of telephone company practices concerning calling records, we offer these thoughts on some threshold questions:

JURISDICTION

The most basic threshold question that must be addressed is whether the Commission has jurisdiction to launch any investigation. An affirmative answer is provided by the Commission's authorizing statutes.

The Commission has jurisdiction to investigate potential violations of state regulations, including WAC 480-120-202, by telecommunications companies

In Washington, the Utilities and Transportation Commission has jurisdiction over landline telephone communications. (Wireless communications are regulated solely by the Federal Communications Commission.) The Commission may regulate the "the rates, services, facilities, and *practices* of … telecommunications companies." RCW 80.01.040(3) (emphasis added).

The Commission has taken steps to regulate the practices of telecommunications companies regarding consumer privacy by promulgating regulations dealing with "customer proprietary network information" (CPNI)[1]. The Commission first

[1] CPNI is defined as:

> (A) information that relates to the quantity, technical configuration, type, destination, location, and 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

promulgated a rule dealing with CPNI in 1997, and updated the rule in 1999 and 2002 in response to federal actions. There has never been any question that the Commission was within its authority to regulate in this area. When the specific opt-in provisions of the 2002 regulation were challenged, and overturned in *Verizon Northwest, Inc. v. Showalter*, 282 F. Supp. 2d 1187 (W.D. Wash. 2003), the Commission promulgated the current CPNI rule, WAC 480-120-202. Again, there was no question that it was within the Commission's authority to do so.

The Commission has the power both to initiate and adjudicate complaints involving any acts done by telephone companies "in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission." RCW 80.04.110(1). Accordingly, it is entirely appropriate for the Commission to investigate potential unauthorized disclosures of CPNI, in violation of WAC 480-120-202.

The Commission has jurisdiction to investigate potential violations of federal law, including 47 U.S.C. § 222 and 18 U.S.C. § 2702, by telecommunications companies

The Commission's jurisdiction extends to all telecommunication company acts done "in violation, or claimed to be in violation, of any provision of law." RCW 80.04.110(1). By using the simple term "law" rather than "state law," the Legislature gave the Commission jurisdiction over all possible sources of law—ranging from local ordinances to international law. There is no reason to believe that federal law was exempted from this broad grant of jurisdiction. The plain language of the statute comports with reasonable expectations. As the organization within the state most familiar with telecommunication companies, it is logical that the Commission be charged with investigation of potentially illegal practices by those companies.

Federal law may itself, however, limit the Commission's adjudicatory jurisdiction. The two federal statutes most obviously at issue, as discussed below, are 18 U.S.C. § 2702 and 47 U.S.C. § 222. In each case, a cause of action for violation of the statute is explicitly provided in statute (18 U.S.C. § 2707 and 47 U.S.C. § 207, respectively). In the former statute, the potential adjudicatory fora are not explicitly listed, but would appear to include bodies such as the Commission, since it contemplates determinations by an "appropriate department or agency." 18 U.S.C. § 2707(d). In contrast, 47 U.S.C. § 207 explicitly limits actions to either a federal district court or the Federal Communications Commission. The Washington Utilities and Transportation Commission accordingly has no jurisdiction to *adjudicate* a dispute involving violation of the federal CPNI statute, 47 U.S.C. § 222.

This should not foreclose an investigation of such violations, however. The Commission may "initiate and/or participate in proceedings before federal administrative agencies in

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> (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; information the phone company obtains when it provides phone service including the types of services purchased, the usage of those services, and the related billing of those services.

47 U.S.C. §222(h)(1). Call detail records, or any other records of telephone numbers called by subscribers, fall within the definition of CPNI.

which there is at issue the authority, rates or practices for transportation or utility services ... and [may] similarly initiate and/or participate in any judicial proceedings relating thereto." RCW 80.01.075. In so doing, the Commission has full investigative powers, as it may "do all things necessary in its opinion to present to such federal administrative agencies all facts bearing upon such issues." *Id.*

Thus, whether or not the Commission has jurisdiction to adjudicate complaints regarding potential violations of federal law by telecommunications companies, it is clearly empowered to investigate such practices.

The Commission's investigatory jurisdiction extends to "competitive telecommunications companies"

Many, perhaps all, of the providers of interstate long distance telephone service in Washington have been classified as "competitive telecommunications companies" pursuant to RCW 80.36.320. This means that they are "subject to minimal regulation." RCW 80.36.320(2). This should not, however, be interpreted as meaning these companies are beyond the reach of a Commission investigation. The decrease in regulation is primarily in the area of rates, originally allowing the use of price lists in place of tariffs, and now removing even the requirement of price lists. Regulation is only removed for those areas in which "competition will serve the same purposes as public interest regulation." *Id.* There is no reason to believe that competition will affect a company's choice to either share or refuse to share telephone records—especially when such sharing is done secretly. Competitive telecommunications companies are therefore as subject to a Commission investigation of records sharing as noncompetitive companies. The continuing vitality of Commission authority to investigate practices of competitive companies is confirmed by the language of the statute, which requires competitive companies to "[c]ooperate with commission investigations of customer complaints." RCW 80.36.320(2)(d).

The Commission has jurisdiction to investigate deceptive practices by telecommunications companies

Many, perhaps all, telecommunications companies have privacy policies that state how the companies handle personal customer information. For example, the AT&T policy states that it does not sell the personal information of its customers, it provides information in response to "court orders or subpoenas," and "abides by the federal and/or state CPNI rules that apply to all telecommunication carriers." Verizon has a similar policy restricting the disclosure of information and provides that information may be disclosed "if disclosure is required by law … Verizon must disclose information, as necessary, to comply with court orders or subpoenas." These policies constitute binding promises by the companies, and violation of the policies would be a deceptive business practice. The Commission is authorized to determine what company policies are, and whether the companies have abided by those policies.

The Commission should exercise its jurisdiction in order to protect the privacy interests of Washingtonians

Washington State has a long history of concern for personal privacy, starting with the inclusion of a strong guarantee of privacy in Article 1, Section 7 of the Washington Constitution, and continuing through the current day in a variety of state statutes, *see, e.g.*, the Privacy Act, RCW 9.73, and court decisions, *see, e.g., State v. Jackson*, 150 Wn.2d 251, 76 P.3d 217 (2003) (right to be free of GPS tracking without a warrant). Our state Supreme Court has recognized that customers have a constitutional right to privacy in their telephone records. *See State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

The Commission has acknowledged the need to protect customer privacy, and promulgated regulations restricting the disclosure of CPNI. This protection is necessary because "the potential harm from use and disclosure, without consent, of individually identifiable call detail information is significant." Docket No. UT-990146, General Order No. R-505.

The expertise of and the historic role taken by the Commission argues strongly in favor of exercising jurisdiction here. This Commission is best suited to act in the public interest and represent the rights and desires of the Washington public. The mere existence of proceedings in other fora, including federal district courts, should not deter the Commission from acting in the public interest and investigating these serious allegations. It is "the duty of the commission to enforce the provisions of this title and all other acts of this state affecting public service companies, the enforcement of which is not specifically vested in some other officer or tribunal." RCW 80.04.470.

LAW

Before launching an investigation, it is useful to review the law that may have been violated, in order to determine which facts will either support or refute the allegations of wrongdoing. There are two basic sets of law at issue here, one dealing with the broader realm of CPNI, and one dealing specifically with disclosure of telephone records to a governmental entity.

CPNI statutes and regulations prohibit disclosure of telephone records without consent

Both state and federal law regulates the disclosure of CPNI. The current state regulation "adopts by reference the Federal Communications Commission's rules" for use and disclosure of CPNI by "all telecommunications carriers providing wireline, intrastate telecommunications service in Washington." WAC 480-120-202. Since state law incorporates federal law in this area, only the federal law need be discussed.

The law on disclosure of CPNI is quite simple; companies are prohibited from disclosing CPNI "[e]xcept as required by law or with the approval of the customer," or as necessary to provide telecommunications services. 47 U.S.C. § 222(c)(1). Disclosure without customer consent is clarified by 47 C.F.R. § 64.2005 as being limited to some marketing

activities, "provision of inside wiring installation, maintenance, and repair services," and protection against fraudulent use of services.

Although opt-out approval is sufficient for some disclosures of CPNI for marketing purposes, for other purposes, "a telecommunications carrier may only use, disclose, or permit access to its customer's individually identifiable CPNI subject to opt-in approval." 47 C.F.R. § 64.2007(b)(3). Opt-in approval requires "affirmative, express consent" after "appropriate notification" of the intended disclosure. 47 C.F.R. § 64.2003(h).

Accordingly, the ACLU-WA asks the Commission to reaffirm that disclosure of telephone records to a third party without explicit customer consent is a violation of both state and federal law.

18 U.S.C. § 2702 prohibits disclosure of telephone records to a governmental entity without either legal process or customer consent

The Federal statutes most directly on point are part of the Stored Communications Act, 18 U.S.C. § 2701 et seq., which regulate access not only to stored communications but also communications records. A provider of telephone service "shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service ... to any governmental entity." 18 U.S.C. § 2702(a)(3).

There are several statutory exceptions to this prohibition, found in 18 U.S.C. §§ 2702(c) and 2703(c). These are much the same as the exceptions on disclosure of CPNI. First, disclosure is allowed pursuant to legal process, including warrants, court orders, and administrative subpoenas, 18 U.S.C. § 2703(c). Next, disclosure is allowed with customer consent. 18 U.S.C. § 2702(c)(2); 18 U.S.C. § 2703(c)(1)(C). Although not further defined, it is reasonable to believe that, as with CPNI, this requires explicit affirmative assent by the customer. Disclosure is also allowed "incident to the rendition of service" or to protect the company's property. 18 U.S.C. § 2702(c)(3). Again, this tracks the CPNI provision, and should be limited to disclosures actually necessary to provide telephone service or protect against fraud. Finally, disclosure of records may be allowed in an emergency, 18 U.S.C. § 2702(c)(4); the exact parameters of this section have changed with recent legislation, but both new and old versions require an emergency threatening death or serious physical injury, and are limited to threats to specific individuals.

Hence, the ACLU-WA asks the Commission to reaffirm that bulk disclosure of telephone records to a governmental entity with neither legal process nor explicit customer consent is a violation of federal law.

FACTS

At this point, the public does not know for a fact whether any telephone company improperly disclosed telephone records. There have been conflicting media reports and company statements; the combination has served more to confuse the situation than to clarify it. It is therefore essential for the Commission to undertake a fact-finding investigation.

The Commission's fact-finding can be limited

The above review of relevant law demonstrates how few facts are necessary to determine whether or not the law regarding customer records has been violated. These facts are entirely within the telephone companies' knowledge, and reflect only the companies' own practices.

To determine whether CPNI law has been violated, only three facts need to be determined. First, has the company disclosed CPNI to a third party? Second, if so, how were customers notified in advance of the proposed disclosure? Third, how was consent obtained from the customers for the disclosure, and how was CPNI segregated for those that did not consent?

Similarly, to determine whether 18 U.S.C. § 2702 was violated, only a few questions need be answered. First, were telephone records disclosed to a governmental entity? Second, if so, what was the authorization for disclosure? Did customers consent to the disclosure; if so, how was the consent obtained? If customers did not consent, what legal document (e.g., warrant, court order, or subpoena) was provided to the company to authorize disclosure?

Finally, the Commission may want to obtain privacy policies from the telephone companies, in order to determine whether those policies provide greater privacy protection than state and federal statutes. That may, in turn, lead to further facts necessary to determine whether privacy policies have been violated.

The Commission need not and should not examine state secrets

As discussed above, only a very few facts need be discovered, and these facts are related only to the companies' own practices. Some of the telephone companies have nonetheless stated that an investigation will inevitably be stopped by the state secrets privilege. AT&T Response at 4. This argument is flawed in a number of respects.

First, the response conflates the acknowledged NSA eavesdropping program with an unacknowledged program of gathering telephone records. All of the statutes cited in the response deal only with interception of electronic communications, not with the disclosure of records, and are thus irrelevant to the requested Commission investigation.

Second, the Commission need not be concerned in any way with any governmental practices whatever; all that is at issue is the telephone company practices. For purposes of CPNI regulation, it is entirely irrelevant to whom CPNI is disclosed; for purposes of 18 U.S.C. § 2702, all that is relevant is whether or not the recipient of records is a governmental entity—not *which* governmental entity received records. In neither case is the purpose of the disclosure or subsequent use of the records of any legal significance whatever.

Finally, the state secrets privilege may only be asserted by the Federal government, and even then only by the head of a department; no private company may assert the privilege. It is simply speculation that the United States will attempt to assert the privilege to block a Commission investigation, and certainly should not deter that

investigation unless and until the privilege is actually asserted by a qualified person. As described above, no state secrets are actually at risk from a Commission investigation, so it is quite possible that the privilege will not be asserted.

The Commission has a variety of methods available to determine facts

There are a variety of methods the Commission may choose to use to uncover the limited facts necessary. First would be a simple request of information from every licensed telecommunications company in the state. It should be remembered that even minimally regulated competitive companies are required to "[c]ooperate with commission investigations of customer complaints." RCW 80.36.320(2)(d).

In some cases, more formal discovery may be appropriate. The Commission has full subpoena power, and the ability to audit books and records of companies. If a preliminary investigation provides basis for a formal complaint, the entire range of discovery options will also be available.

In addition to obtaining information directly from telephone companies, the Commission can also pursue information from other sources. One obvious possibility that springs to mind is the former Qwest CEO, Joe Nacchio, who has already spoken publicly about the situation. There are certainly other people knowledgeable about any disclosure of records, and the Commission should solicit that information from all such sources.

REMEDIES

It is premature to talk about potential remedies before an investigation has even begun. Any potential remedy is likely to be dependent on the specific facts discovered, and the violations of law represented by those facts, if any. It is worth noting, however, that the Commission has a wide range of potential remedies at its disposal, including issuance of orders, promulgation of new regulations, imposition of penalties, and initiation of and participation in federal proceedings.

In summary, Washington residents have a well-founded concern that telecommunications companies in our state may improperly disclosed telephone records, in violation of their customers' privacy rights, their own customer service agreements, and both state and federal law. The ACLU of Washington urges the Commission to continue its historic protection of consumer privacy by investigating the disclosure of telephone records, and taking appropriate action depending on the facts uncovered.

Thank you very much.

Sincerely,

Doug Klunder
Privacy Project Director