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

Dear Chairman Sidran:

The American Civil Liberties Union is troubled by recent media reports claiming that telephone companies have regularly shared consumer telephone records with the National Security Agency without legal authority. If true, these companies have seriously violated the privacy of their customers by disclosing information that reveals their associations, interests and a host of personal details about their lives.

We appreciate the Utilities and Transportation Commission's past efforts to protect consumer privacy in telephone records, and on behalf of the more than 25,000 ACLU members in Washington, we ask the Commission to investigate these very serious allegations. As the state body charged with safeguarding consumers from wrongdoing by utilities, the UTC is the proper agency to conduct such an investigation. Because the media reports are incomplete and disputed, we believe a Commission investigation should examine all companies providing telecommunications services within Washington to determine whether any of them have unlawfully disclosed telephone records.

A May 11th article in *USA Today* reported that three phone companies—AT&T, BellSouth and Verizon—have provided the NSA with the personal calling details of customers, including telephone numbers called, time, date, and duration of calls (Leslie Cauley, "NSA Has Massive Database of Americans' Phone Calls"). *USA Today* reported that the phone companies made available to the government information relating to billions of telephone calls made by millions of residential phone customers. According to sources in the article, these companies provided this information neither with the consent of their customers nor under the compulsion of a warrant, court order, or other legal process from the government.

Such customer information can be easily matched with other databases to obtain the name and residence of each caller. This information would enable the government to track every phone call made by every Washington residential

customer, including the identity of the people they have called and the length of each conversation.

We are aware that each of these companies has issued statements in recent days regarding their participation in this record-sharing program. While BellSouth has denied any participation, Verizon has issued ambiguous statements about its and its subsidiaries' actions, and AT&T has not disavowed cooperation with the NSA. It is worth noting, however, that Federal law allows agency heads (including the Director of the National Security Agency) to immunize any public company—including these telecommunication companies—from some liability for false statements made in concealing matters of national security (15 U.S.C. 78m(b)(3)). We do not know whether such immunization has been issued in this case.

The *USA Today* story is far from the only source of allegations. Joe Nacchio, the former CEO of Qwest, has confirmed that the NSA approached Qwest for customer records in 2001 (Katherine Shrader, "Former Qwest exec rejected NSA request," *Seattle Post-Intelligencer*, May 13, 2006). In addition, the *New York Times* has run a series of articles describing a broader program of wiretapping by the NSA and alleging cooperation by "the leading companies" in the telecommunications industry (Eric Lichtblau and James Risen, "Spy Agency Mined Vast Data Trove, Officials Report," *New York Times*, December 24, 2005). Further, numerous outlets have reported that a former AT&T employee stated that he has witnessed the installation of special information gathering equipment by the NSA in AT&T's switching network.

The seriousness of the allegations, the inconsistency of telecommunications company statements, and the varied reports all underscore the need for an independent review by the Utilities and Transportation Commission to uncover the truth. Such a review should not be limited to the companies named in the *USA Today* article. It seems likely that the NSA would be equally interested in records from other telecommunications companies, in order to amass as complete a database of calling records as possible.

We appreciate that the Commission is mindful of Washington State's long history of concern for personal privacy. In framing the Washington Constitution, the state's founders included a strong guarantee of privacy; Article 1, Section 7 was deliberately worded to provide more protection for privacy than the Fourth Amendment of the United States Constitution. 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). In that same year, Congress passed the Electronic Communications Privacy Act, prohibiting governmental access to telephone records without a court order (18 U.S.C. 2703(c)). As a result, for the past twenty years Washingtonians have expected and

known that their telephone records were not disclosed to government agencies without a court order—until these recent shocking revelations.

The Commission has taken steps to protect consumer privacy in telephone records by promulgating regulations dealing with "customer proprietary network information" (CPNI)[1]. The Commission first promulgated a rule dealing with CPNI in 1997, and updated the rule in 1999 and 2002 in response to federal actions. The Commission consistently adopted a position of providing maximum privacy to CPNI, requiring customers to affirmatively "opt in" to any company use or disclosure of that information (except as necessary to provide service). When the opt-in requirement was eventually overturned by a federal court, in *Verizon Northwest, Inc. v. Showalter*, 282 F. Supp. 2d 1187 (W.D. Wash. 2003), the Commission promulgated yet another rule, WAC 480-120-202, which continues to require customer consent (in the form of an opt-out) prior to using or disclosing information. Sharing records with the NSA is a violation of this state law.

The Commission has acknowledged the need to protect customer privacy, saying "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 Commission documented not only potential harms, but also the widespread sentiment of telephone customers that their information should be private.

> With striking consistency, they [customers] stated that they view the relationship as a limited one in which they pay the company to provide telephone service and, to the extent they must provide information to establish service or to complete a call (dial a number), they consider that the relationship does not entitle the company to do anything with that information but use it to provide service. (*Idem*).

Those views are equally valid today, and the harm is even more significant today than it was in 2002.

The sharing of phone record information also seems to violate the companies' own customer privacy agreements. 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

[1] As you know, CPNI is 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. The telephone records provided to the NSA fall within the definition of CPNI.

be disclosed "if disclosure is required by law … Verizon must disclose information, as necessary, to comply with court orders or subpoenas."

In summary, Washington residents have a well-founded reason to believe that telecommunications companies in our state have violated their customers' privacy rights and their own customer service agreements. These actions violate WAC 480-120-202, 47 U.S.C. 222, and 18 U.S.C. 2702. The Commission has jurisdiction and the power to investigate the practices of telecommunications companies under RCW 80.01.040(3). The ACLU of Washington urges the Commission to continue its historic protection of consumer privacy by investigating the disclosure of telephone records and ordering a halt to such disclosure absent a court order.

We look forward to your response. Thank you very much.

Sincerely,

Kathleen Taylor
Executive Director

Doug Klunder
Privacy Project Director

cc: Commissioners Patrick Oshie and Phillip Jones