

June 30, 2006

Ms. Carole J. Washburn, Executive Secretary  
Washington Utilities & Transportation Commission  
1300 S. Evergreen Park Drive SW  
P.O. Box 47250  
Olympia, WA 98504-7250

Re: Docket No. UT-060856- ACLU Request for Investigation  
Comments of David E. Griffith

Dear Ms. Washburn:

Attached are my comments in response to the Commission's Notice of Opportunity to Comment in Docket No. UT-060856, American Civil Liberties Union of Washington (ACLU) Request for Investigation into possible violations of law or rule. The ACLU's letter, filed May 25, 2006, called attention to recently publicized allegations that some telephone companies have released certain customer calling information to, and at the request of, the United States Government. I am commenting in support of the ACLU's request.

David E. Griffith  
P. O. Box 19479  
Seattle WA 98109-1479

cc: Chairman Mark Sidran  
Commissioner Patrick Oshie  
Commissioner Philip Jones

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
COMMISSION**

June 30, 2006

Docket No. UT-060856

AMERICAN CIVIL LIBERTIES UNION OF  
WASHINGTON Request for InvestigationComments of:  
DAVID E. GRIFFITH

I am providing the comments to the Washington Utilities and Transportation Commission (Commission) in response to the Commission's Notice of Opportunity to Comment (Notice), in Docket No. UT-060856, American Civil Liberties Union of Washington (ACLU) Request for Investigation into possible violations of law or rule,

In its Notice of June 2, 2006, the Commission, requested comments on a number of jurisdictional questions. Below are my answers to these questions.

- *Does WAC 480-120-202 or any other state law or regulation prohibit a regulated telephone company or its affiliated interests from providing customer telephone calling information to the National Security Agency (NSA)?*

The Commission's Customer Proprietary Network Information (CPNI) rule, WAC 480-120-202, adopts by reference the Federal Communications Commission's (FCC) rules on CPNI<sup>1</sup> for regulated telecommunications companies doing business in Washington. While the FCC rules do not specify the NSA or other government agencies, they do refer to independent contractors and other parties. At section 64.2007 (b) (2) (ii), disclosure is permitted to other parties only "under force of law."<sup>2</sup> News accounts (*USA Today*, etc.) imply that the NSA did not seek a warrant from the FISA court prior to its request for customer telephone calling information. Thus, the NSA

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<sup>1</sup> 47 CFR §§ 64.2003 – 64.2009

<sup>2</sup> 47 CFR § 64.2007 (b) (2) (ii)

request was not under force of law, and therefore is prohibited under the FCC rules.

While the ACLU's comments indicate that the Commission does not have "jurisdiction to *adjudicate* a dispute involving violation of the federal CPNI statute,"<sup>3</sup> Mr. Klunder appropriately articulates that the Commission may still investigate violations of the FCC's CPNI rules.

- *Does the Commission have the legal authority to compel a regulated telephone company or its affiliates to disclose whether it has provided customer calling information to the NSA?*

RCW 80.04.110 (1) Gives the Commission authority to investigate complaints made by "any person or corporation... any body politic or municipal corporation, or by the public counsel of the office of the attorney general." The complaint should set "forth any act or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission." Since the RCW uses the term "law" and not "state law," the Commission has authority to investigate complaints that result from acts involving federal agencies.

- *Does the Commission have the legal authority to compel regulated telephone companies or their affiliates to release relevant information about such allegations?*

RCW 80.01.040 (3) Gives the Commission the authority to "Regulate in the public interest." Certainly allegations of misuse of customer telephone information raise questions concerning customer privacy, which is in the public interest.

Under its authority in RCW 80.36.320 (2) (d) to review customer complaints, the Commission may ask the companies that it regulates for certain information regarding the complaint. At a minimum the Commission could ask companies whether they received requests from the NSA for customer data, and whether the companies complied with those requests.

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<sup>3</sup> Testimony on behalf of the ACLU from Doug Klunder, May 31, 2006, page 2.

- *Would an assertion of the military and state secrets privilege by the United States Government preclude the Commission from taking action against a regulated telecommunications company?*

At this time, it is not clear whether any remedial action is required against any of the regulated telecommunications companies in Washington. The ACLU is only requesting an investigation into what actions and communications may have taken place in response to specific requests for customer information.

Furthermore, RCW 80.04.075 gives the Commission “the authority as petitioner, intervenor or otherwise to initiate and/or participate in proceedings before federal administrative agencies in which there is at issue the authority, rates or practices for transportation or utility services affecting the interests of the state of Washington.”

- *If the Commission decides to investigate the matter raised in the ACLU’s May 25, 2006, letter, which procedural options would be most appropriate? (e.g., informal investigation, formal investigation, complaint).*

The Commission should begin this process as part of an informal investigation. The informal approach would reduce the amount of resources needed to collect and process a limited but meaningful amount of information from the regulated telecommunications companies in Washington. At a minimum the information sought should include a company’s participation in the NSA inquiry and the degree of customer information requested and provided to federal authorities. At this time it is difficult to determine the extent of the government’s data collection, and whether the quantity and extent of detail of the data collected justify further action.

RECOMMENDATION

I recommend that the Commission conduct an investigation as proposed by the American Civil Liberties Union of Washington into possible violations of law or rule based on recently publicized allegations that some telephone companies have released certain customer calling information to, and at the request of, the United States Government. I urge the Commission to continue its historic practice of protecting the privacy of utility consumers.

DAVID E. GRIFFITH  
P.O. Box 19479  
Seattle, WA 98109