BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN RE: ACLU REQUEST FOR AN INVESTIGATION OF UNLAWFUL DISCLOSURE OF PRIVATE TELECOMMUNICATION CUSTOMER INFORMATION (CPNI)	**DOCKET NO. UT-060856**

ANSWERING COMMENTS OF PUBLIC COUNSEL

July 17, 2006

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I. INTRODUCTION

1. The Public Counsel Section of the Washington State Attorney General's Office (Public Counsel) files these answering comments with the Washington Utilities and Transportation Commission (WUTC or Commission) in response to the June 2, 2006, Notice of Comment Opportunity in the above captioned docket.

II. DEVELOPMENTS SINCE JUNE 30, 2006

A. *USA Today's* Clarification.

2. On June 30, 2006, *USA Today* published a "note to its readers" regarding its May 11, 2006, story reporting that the National Security Agency (NSA) had secretly amassed a database containing the domestic calling records of millions of Americans. *USA Today* concluded that, contrary to its May 11 report, the newspaper "cannot confirm that BellSouth or Verizon *contracted with* the NSA to provide bulk calling records to that database."[1] (Emphasis added).

3. In a separate article, also published June 30, *USA Today* reported that while members of the House and Senate intelligence committees confirmed that the NSA had compiled a "massive database of domestic phone call records," some of those officials said that company participation in building the database "was not as extensive as first reported."[2]

4. Like the May 11, 2006, story, *USA Today* again reported AT&T's unwillingness to confirm or deny participation in the program, including an assertion by the company that the

[1] Note to Readers, USA Today, June 30, 2006.
[2] Leslie Cauley, John Diamond, et. al., *Lawmakers: NSA database incomplete*, USA Today, June 30, 2006.

Department of Justice requested that it not comment on the matter.[3] The article reported that BellSouth and Verizon denied they have "*contracted* with the NSA to turn over phone records." (Emphasis added).[4]

5. While the *USA Today* clarification states that the paper cannot confirm the existence of "contracts" between BellSouth or Verizon and the NSA, the non-existence of contracts does not dispose of the issues raised here. The fundamental question remains whether records were turned over to the NSA under *any* circumstances. As discussed in our Initial Comments, if the federal statutory and constitutional questions are resolved by the courts such that the NSA program is found to be unlawful, the Commission may proceed to develop a more complete factual record regarding participation by telecommunications carriers in Washington.

B. MCI's Participation in the NSA Program Prior to Its Merger with Verizon.

6. The June 30, 2006, USA Today story also reported that lawmakers confirmed that MCI did turn over call records to the NSA.[5] This statement, together with statements made by Verizon could easily lead to a conclusion that MCI participated in the program.

7. Initially, Verizon took the position that it could not "confirm or deny" whether it had any "relationship" to NSA program.[6] However, in the same statement the Company was careful to focus on Verizon as constituted "until just four months ago," i.e., prior to the merger with MCI.[7]

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[3] *Id.*

[4] *Id.* The story also noted that even if BellSouth or Verizon did not participate in the NSA program, a local exchange customer of these phone companies could still have his or her records released by AT&T if that customer has been receiving long distance service through AT&T.

[5] *Id.*

[6] Verizon Communications Inc., "Verizon Issues Statement on NSA and Privacy Protection," May 11, 2006, Press Release, available online at: http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=93446&PROACTIVE_ID=cecdc6cbc7c8cacecc5cecfcfcfc5cecdcecbcec7cdccc6c7c5cf.

Verizon's press release stated:

> From the time of the 9/11 attacks until just four months ago, Verizon had three major businesses – its wireline phone business, its wireless company and its directory publishing business. It also had its own Internet Service Provider and long-distance businesses. Contrary to the media reports, Verizon was not asked by NSA to provide, nor did Verizon provide, customer phone records from any of these businesses, or any call data from those records. *None of these companies* – wireless or wireline – provided customer records or call data.

(Emphasis added).[8]

8. The careful omission of MCI from this statement is significant, and could be interpreted as an implicit admission that confirms the lawmaker statements reported in *USA Today*. While Verizon specifically refused to comment on whether MCI participated in the program, Verizon confirmed that the Company has taken steps to ensure that MCI complies with Verizon's privacy policies.[9]

C. Hamdan v. Rumsfeld, Slip Opinion No. 05–184, 548 U.S.___(June 29, 2006).

9. The other significant development since Public Counsel filed its Initial Comments is the Supreme Court's decision in *Hamdan v. Rumsfeld*.[10] On June 29, 2006, the Supreme Court held, *inter alia*, that the Bush Administration's use of military commissions to try those detained at

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[7] *Id*. *See generally*, *In The Matter of The Joint Application of Verizon Communications Inc. and MCI, Inc*., Docket No. UT-050814, Order No. 07 (Final Order) (December 23, 2005). Verizon, having merged with MCI, now speaks for both companies with regard to whether records were turned over.

[8] *Id*.

[9] Verizon Communications Inc., "Verizon Issues Statement on NSA and Privacy Protection," May 11, 2006, Press Release, available online at: http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=93446&PROACTIVE_ID=cecdc6cbc7c8cacecc5cecfcfcfc5cecdcecbcec7cdccc6c7c5cf.

[10] http://www.supremecourtus.gov/opinions/05slipopinion.html.

Guantanamo Bay exceeded Congress' authorization under the Uniform Code of Military Justice (UCMJ) and violated the Geneva Conventions.

10. Relevant to the instant matter is the Supreme Court's discussion of Congress' 2001 Authorization for Use of Military Force ("AUMF"). Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (Sept. 18, 2001) (reported as a note to 50 U.S.C.A. § 1541).[11] In *Hamdan,* the Bush Administration argued that Congress, when it enacted AUMF, implicitly authorized military commissions that did not comply with the requirements of the Code of Military Justice. *Hamdan*, Slip Opinion, at 29 ("The Government would have us dispense with the inquiry that the *Quirin* Court undertook and find in either the AUMF or the DTA specific, overriding authorization for the very commission that has been convened to try Hamdan").

11. Regarding this docket, and as discussed in Public Counsel's Initial Comments, the Administration has argued that the AUMF authorizes the President to conduct domestic surveillance and data gathering without following the requirements of the Foreign Intelligence Surveillance Act (FISA), the Electronic Communications Privacy Act (ECPA) and the Omnibus Crime Control and Safe Streets Act (Title III). The Administration's assertion that AUMF implicitly amended these three laws is central to the lawfulness of the NSA's phone record collection program.

12. In *Hamdan,* the Supreme Court held that because the AUMF was silent on the question of the pre-existing requirements of the UCMJ with respect to military commissions, there was no basis for concluding that the AUMF was intended to implicitly amend the UCMJ. *Hamdan,* Slip Opinion at pp. 29-30. As the Court stated, "there is nothing in the text or legislative history of

[11] *See* ¶ 67, Public Counsel Initial Comments.

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the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ." *Id.*, citing *Ex parte Yerger*, 8 Wall. 85, 105 (1869) ("Repeals by implication are not favored"). Therefore, the Court held there was no lawful basis for the Administration to act contrary to the requirements of the UCMJ.

13. Indeed, in footnote 23 of the opinion, the Court says: "Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." *Id.* at p. 29, citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 637 (1952) (Jackson, J., concurring). Therefore, setting aside whether the President could convene military commissions pursuant to his own war powers, without an act of Congress, the fact that Congress did act limits the President's authority.

14. If a consistent analysis is applied to the NSA programs, the Administration's argument that AUMF "implicitly" amended FISA, ECPA and Title III would also likely be rejected. While the exact implications of the *Hamdan* decision are far from clear, the decision clearly adds further questions about the legal justifications for the NSA programs. Therefore, the *Hamdan* decision further supports Public Counsel's recommendation that the Commission keep the docket open until federal legal issues are resolved.

D. The Bush Administration's Agreement for Judicial Review of the NSA Programs.

15. On July 14, 2006, the *Washington Post* indicated that the Bush Administration has agreed, at least in principle, to subject the legality of the NSA program to judicial review through

the FISA court.[12] In exchange, the Administration has negotiated an agreement with Senate Judiciary Chairman, Arlen Specter (R-Pa.), which would, *inter alia*, allow the government to send all lawsuits challenging the NSA program's legality to the FISA court. The Administration's agreement is reportedly contingent on passage of legislation implementing the transfer of cases to the FISA court, and other commitments made by Senator Specter.[13]

III. ADDITIONAL ANSWERING COMMENTS

16. Our Initial Comments addressed many of the issues raised by the commenting parties and we will not repeat those comments here. The instant comments address a few points.

A. Nothing Argued By Other Commenters Contradicts the Appropriateness of Public Counsel's Recommendations in the Initial Comments.

17. The commenting parties have not argued anything that would contradict the propriety of any of Public Counsel's recommendations.[14] To summarize, Public Counsel recommended:

- The Commission should monitor ongoing legal developments and keep the docket open as an investigation until the federal issues are resolved. If the federal statutory and constitutional questions are resolved by the courts such that the NSA program is found to be unlawful, the Commission should initiate its own complaint and convert the proceeding to an adjudication.

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[12] Charles Babington and Peter Baker, *Bush Compromises on Spying Program*, Washington Post, July 14, 2006.

[13] *Id*.

[14] The ACLU suggests in its comments that Section 207 of the Communications Act of 1934 limits the WUTC's authority to act in this area. ACLU June 30 Comments, p. 3. Public Counsel disagrees with this reading. As we discussed in our Initial Comments, the Commission has concurrent jurisdiction over CPNI regulation under Section 222 of the Telecommunications Act of 1996. Initial Comments, pp. 3-6, fn. 57. On the basis of that jurisdiction, it can bring or entertain complaints, and conduct rulemakings or investigations under its Title 80 powers.

- In the meantime, the Commission should use the docket to monitor and collect factual information within the public domain. This should include requiring all licensed telephone companies in Washington to provide the Commission with information regarding their privacy policies.
- The Commission should immediately order all telecommunications companies in Washington to preserve all evidence related to the disclosure of CPNI to the NSA or any other law enforcement agency, including all records and witnesses.[15]

18. With regard to keeping the docket open, AT&T discusses, with approval, the decision by the Delaware Public Service Commission to defer an investigation for six months pending the outcome of other legal developments. *See*, AT&T Initial Comments, p. 3 ("…on June 20, 2006, the Delaware Commission announced that it will defer proceedings on the ACLU complaint that was filed before it for a period of at least six months, which is a period of time that this commission thought would be sufficient to allow the New Jersey action and the 34 pending private actions to progress to or near an initial resolution."). It would be inconsistent for AT&T to argue now that the WUTC should close this docket when the Company has discussed Delaware's actions in a positive light.

19. In their comments, AT&T and Verizon cited decisions made by the Iowa, New York and Virginia public utility commissions refusing to take up the issue. *See*, Verizon Comments, Exhibits 5, 6, and 7. These citations are unpersuasive. The Iowa commission based its decision not to act on the fact that it deregulated the carrier at issue. In New York, the commission believes that its "policy statement" regarding privacy lacks the force of law. Similarly, Virginia

[15] *See* Initial Comments, pp. 56-59.

could find no provision of law or regulation to support the action requested. None of these limitations apply to the WUTC. As noted before, the WUTC's jurisdiction over this issue is undisputed. The Commission's rule, WAC 480-120-202 – with its incorporation of 47 CFR §§ 64.2003 through 64.2009 – is enforceable by Commission complaint, by an outside complaint or through a formal or informal investigation.

20. Moreover, nothing discussed by any of the commenters would preclude the WUTC from monitoring ongoing non-classified factual and legal developments about this matter, issuing an order directing telecommunications companies registered in Washington to provide details of their privacy policies and issuing an order directing all telecommunications companies registered in Washington to preserve evidence for potential future use. Public Counsel reiterates the call for these actions.

B. Further Elaboration of Public Counsel's Recommendations Regarding the Preservation of Evidence.

21. In Public Counsel's Initial Comments, recommendations were made to safeguard evidence related to the release of CPNI to the NSA pending resolution of federal legal questions. As part of that preservation, Public Counsel urges the Commission to order companies to reveal the number of "instances" in which CPNI was disclosed to third parties without consent.

22. The number of "instances" of disclosure is not classified. One cannot infer from an "instance" of disclosure that the disclosure was made to the NSA. An instance or multiple instances of disclosure very well could have been made subject to administrative subpoenas or search warrants. Thus, ordering the disclosure of instances without reference to the presence or absence of an associated legal process could not reveal participation in the NSA program.

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23. Moreover, disclosing "instances" of release is not the same as disclosing the number of records released. A company reporting a release of one million records would likely be admitting to participating in the NSA program. Such is not the case here, where, the release of millions of records (if it occurred) likely occurred in a small number of "instances."

24. By reporting instances, generally, the companies are merely reporting a closed universe of CPNI disclosures to third parties without consent regardless of whether they were made by subpoena or search warrant or NSA request. Reporting this information will assist a future commission investigation by freezing the basic parameters of disclosures at this time. The content can be examined later if permitted.

25. Finally, by disclosing "instances" of release, companies would be complying with the requirements of the CPNI rule, 47 CFR § 64.2009, adopted by the Commission. Section 64.2009 requires that telecommunications carriers must "maintain a record of all instances where CPNI was disclosed or provided to third parties, or where third parties were allowed access to CPNI." *Id*.

26. Public Counsel's further elaboration of its proposals protecting evidence allows the Commission to obtain the greatest amount of information possible under current conditions.

IV. CONCLUSION

27. Developments since June 30, 2006, and the initial comments filed by interested parties have not altered the analysis and recommendations contained in Public Counsel's June 30, 2006, comments. Rather, these developments make it even more important for the Commission to be prepared to act, in due course, after federal law is clearly established.

28. The revised *USA Today* story shows 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.

29. The Supreme Court's *Hamdan* decision supports the view that there appears to be a substantial basis to question the lawfulness of the NSA's request for telephone records and the carrier's cooperation with the program.

30. The Bush Administration's apparent agreement with Senator Specter to subject the NSA programs to judicial review reveals that the legal framework is changing rapidly.

31. Therefore, Public Counsel continues to recommend that the Commission keep the docket open to collect publicly available information like that found in the *USA Today* story, track ongoing legal developments like *Hamdan* and the Administration's apparent agreement with Senator Specter, and safeguard evidence by obtaining the greatest amount of non-classified information possible.

DATED this 17th day of July, 2006.

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