Dan Foley
General Attorney and
Assistant General Counsel

AT&T Services, Inc.
645 E. Plumb Lane, B132
P.O. Box 11010
Reno, NV 89520

T: 775.333.4321
M: 775.544.0847
F: 775.333.2175
dan.foley@att.com

July 17, 2006

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

Re: ACLU Request for Investigation, Docket Number UT-060856

AT&T Communications of the Pacific Northwest, Inc. ("AT&T") respectfully submits these reply comments pursuant to the Commission's Notice of Opportunity to Comment of June 2, 2006.

In its letter of May 23, 2006, the ACLU requested that the Commission investigate whether "telephone companies have regularly shared consumer telephone records with the National Security Agency without legal process" in connection with the NSA's Terrorist Surveillance Program.[1] AT&T addressed the issues raised by this request in its letter of May 26, 2006 as well as in its comments and answers to five questions posed by the Commission that were filed on June 30, 2006 ("AT&T Comments").

In these filings, AT&T explained that it vigorously protects the privacy of its customers and that when it provides assistance and information to law enforcement and intelligence officials, it does so *only* pursuant to legal authorizations. At the same time, AT&T explained that it cannot confirm or deny whether it has provided information in connection with the antiterrorist surveillance program of NSA. As the United States has made explicit, this is classified information, and federal law prohibits disclosure of this information to state or federal utility commissions or others. For this reason, the Federal Communications Commission ("FCC") and other state commissions have concluded that they cannot investigate the ACLU's claims. For this same reason, if this Commission were to attempt to conduct such an investigation here, the sole consequence would be to place AT&T in the middle of a confrontation between federal and state officials that federal officials are certain to win under the Supremacy Clause of the Federal Constitution.

[1] *See* Letter from Kathleen Taylor and Doug Klunder to the Washington Utilities and Transportation Commission, at 1 (May 23, 2006).

And while state and federal utility commissions cannot investigate these matters, they are within the jurisdiction of the select intelligence committees of Congress. In addition, the ACLU's claims also have been raised in over 30 pending federal class action cases where a federal court will determine if the United States has properly asserted that these claims are covered by its state secrets privilege. Finally, there is a pending federal court lawsuit in which the United States has sought to enjoin an investigation of these issues by the New Jersey Attorney General on the ground that the investigations violate controlling federal law.

In its June 30, 2006 comments, the Public Counsel section of the Washington State Attorney General's office ("Public Counsel") thus suggested that the Commission should take no action at least until the legal issues raised by the ACLU's request are resolved by the courts. But comments in support of the ACLU's request were nonetheless submitted by the ACLU, Washington State Senator Jeanne Kohl-Welles, Washington State Representative Dave Upthegrove, David E. Griffith, Stephen Gerritson, and Laurie A. Baughman.[2] These latter commenters have made no serious attempt to address the profound procedural and jurisdictional issues raised by the ACLU's request.

For example, the ACLU has asserted that the fundamental legal prohibitions on the proposed investigation can somehow be avoided by narrowing the issue to the policies and practices of telecommunication companies. *See* ACLU Comments at 4. In particular, the ACLU asserts that the Commission need only to inquire whether the telecommunication companies provided customer information to any third party, and if so whether the company obtained consent from the customer, or alternatively withheld disclosure in the absence of consent. *See id.* at 4-5. This claim proceeds from a fundamental misapprehension of the controlling law. Telecommunications carriers are legally authorized to disclose customer information to government officials in an array of conditions in which the customers have not consented: *e.g.*, where a court order, an administrative subpoena, or a certification from the Attorney General of the United States or other senior governmental officials has been issued. 18 U.S.C. § 2703(e); *see* 18 U.S.C. §§ 2511(e)(a)(ii). As the ACLU has thus elsewhere recognized, the fundamental question in any investigation would be whether AT&T has provided customer records to NSA pursuant to such governmental authorizations. But *that* is classified information that cannot be disclosed without violating federal law. This also is one of the precise factual matters that the United States has asserted to be a state secret. This dramatically underscores the unfairness to AT&T – and the futility –of any attempt to institute the investigation that the ACLU has requested.

---

[2] The comments of Senator Kohl-Welles and Representative Upthegrove urge the Commission to conduct an investigation but do not address the questions posed by the Commission. Rather, they state, in general, that the Commission has jurisdiction over the services provided by telecommunications companies. While this is true as a general matter, as explained in these reply comments and AT&T's other submissions, the issues raised here go well beyond the Commission's jurisdiction as they involve exclusively federal issues. With respect to the comments of Laurie A. Baughman it is difficult to ascertain the exact grounds for her support of the ACLU except to say that they appear to be based on general concepts of democracy and liberty. They do not, however, address the legal issues raised here in a way that can be effectively and efficiently responded to.

Against this background, AT&T will address again each of the five questions that the Commission has raised and demonstrate once again that the advocates of an investigation have no substantial response to the points that have been made by AT&T.

1. 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 question of whether and under what circumstances a telecommunications company or its affiliates may provide calling information to the NSA (or any other federal agency) is one governed exclusively by federal law. Neither WAC 480-120-202 nor any other state law or regulation can impair, impede, or otherwise regulate the circumstances under which telecommunications carriers may cooperate with intelligence or national security activities conducted by the federal government. None of the comments provide any argument to the contrary. Indeed, the comments acknowledge that there is no violation of this statute unless the information is provided in the absence of legal process, and none provide any basis to suggest that the Commission has jurisdiction to determine whether there is legal process in these circumstances. And it clearly does not.

The ACLU does not directly address this point, but argues that the relevant question is "whether disclosure of customer telephone calling information to any third party without customer consent or legal process is a violation of law," and that the Commission should investigate not only potential state law violations but federal law violations as well. ACLU Comments at 2. The ACLU also argues that even if the Commission is without jurisdiction to adjudicate potential violations of federal law, it is empowered to investigate these claims. *See id.* at 4. Likewise, the comments of David Griffith and Stephen Gerritson seem to assume that information was provided to the NSA by telecommunications companies absent any legal process and thus that the only question is whether this violates state or federal law. *See* Griffith Comments at 1; Gerritson Comments at 1. These comments do not address the question presented here, which is whether Washington state law can prohibit a telecommunication company from providing cooperation to the NSA in connection with its mission to ensure national security. The answer to this question is that state law does not and cannot prohibit a telecommunication company from providing customer telephone calling information to the NSA because it would interfere with an exclusive federal function.

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

As explained in the AT&T Comments, controlling federal law prohibits the disclosure of this information. There are explicit federal law prohibitions on the disclosure of this information, and state law cannot require what federal law prohibits. In addition, the proposed investigation here involves matters of foreign intelligence, foreign affairs, military, and national security matters that are exclusively the province of the federal government. Any state law,

regulation, or state governmental activity that would have a tendency to conflict, impair, impede, defeat, or affect such federal activities is wholly preempted under the Supremacy Clause of the United States Constitution. Art. VI, cl. 2. None of the comments provide any argument to the contrary.

Indeed, the ACLU acknowledges that there are "colorable" arguments in this regard and suggests that the Commission can avoid this fundamental legal issue by recasting the question "to instead ask simply whether the Commission has the authority to compel a telephone company to disclose whether or not it has released customer calling information outside the company." ACLU Comments at 4. The ACLU argues that by simply asking telephone companies to provide information with regard to (1) whether information was released to any third party, (2) how were customers notified in advance of the proposed disclosure, and (3) how was consent obtained, and how was CPNI segregated for those who did not consent, there is no viable claim that classified information would be disclosed. *See id.* at 5. This argument misses the mark. First, the question presented is whether the Commission has authority to compel a telephone company to disclose whether it had provided information to the NSA and not just to a third party. As explained in detail in AT&T's prior submissions, even to confirm or deny the existence of any such relationship between the telephone companies and the NSA would disclose classified information in violation of federal law. Moreover, as explained above, the ACLU's suggestion ignores that customer calling information can be disclosed to government agencies in certain circumstances without the knowledge or consent of customers. Thus, providing responses to the questions presented by the ACLU would not address the issue that has been raised.

Likewise, the comments of David Griffith and Stephen Gerritson merely note the Commission's general authority to investigate potential violations of law and the fact that regulated companies are generally obligated to cooperate in this regard. *See* Griffith Comments at 2; Gerritson Comments at 1. But the issue here is whether the Commission has the authority to compel the disclosure of classified information relating to matters of national security. As the Federal Communications Commission and others have recognized, the state and federal regulatory commissions have no such authority.[3]

The Public Counsel takes the position that the assertion of the state secrets privilege by the United States means that the Commission cannot conduct any proceedings at least until the state secrets issue is resolved by the courts. Public Counsel Comments at 55-56. AT&T agrees. In addition, it notes that even if a court were to rule that the state secrets privilege has not been properly invoked, the proposed investigation cannot proceed. Separate and apart from the state secrets privilege, federal statutes preempt the Commission's authority to compel the disclosure of classified information. 18 U.S.C. § 798 makes it a felony to "knowingly and willfully communicate[], furnish[], transmit[], or otherwise make[] available to an unauthorized person, or publish[], or use[] in any manner prejudicial to the safety or interest of the United States, . . . any classified information . . . concerning the communication intelligence activities of the United

[3] Letter from Kevin J. Martin, Chairman Federal Communications Commission to the Honorable Edward J. Markey, at 1 (May 22, 2006) (Exh. G to AT&T's May 26, 2006 letter).

States." *Id.* Likewise, Section 6 of the National Security Agency Act of 1959, Pub. L. No. 83-36, § 6, 73 Stat. 63, 64 (codified at 50 U.S.C. § 402 note), prohibits the disclosure of any information regarding the activities of the NSA. Specifically, the Act provides that "nothing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of persons employed by such agency." 50 U.S.C. § 402 note.

Contrary to the ACLU's claim, *Doe* v. *Gonzales*, 386 F. Supp. 2d 66 (D. Conn. 2005) does not hold that telecommunications companies have a First Amendment right to disclose the kind of information at issue here. Indeed *Doe* is no longer even good law. In *Doe*, the court invalidated a statute (18 U.S.C. § 2709(c)) insofar as it barred recipients of a National Security Letter (which is a specialized form of subpoena) from consulting with counsel about whether to comply, and because Congress amended the statute to expressly authorize such consultations, the decision in *Doe* was vacated on appeal. *See Doe* v. *Gonzales*, 449 F.3d 415 (2nd Cir. 2006), *vacating as moot, Doe* v. *Gonzales*, 386 F.Supp.2d 66 (D. Conn. 2005). But even if *Doe* had been upheld on appeal, its holding is narrow, and it does not remotely hold that carriers have a First Amendment right to provide classified information to state officials relating to the existence of NSA surveillance activities, their scope, the targets of surveillance, and the identity of the carriers who are and are not participating. But those are the disclosures that would be required to investigate the ACLU's claim.

Moreover, the proposed investigation is not merely barred by the federal statutes that prohibit disclosure of classified information. Under the complex and comprehensive statutory scheme discussed in the AT&T Comments, Congress has occupied the entire field with respect to the cooperation of telecommunications carriers with the federal government's intelligence-gathering and surveillance activities. *See Hillsborough County* v. *Automated Med. Labs.*, 471 U.S. 707, 713 (1985) (federal law preempts an entire field of state law when "the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation") (internal quotation marks and citation omitted). Given that such activities implicate responsibilities exclusively belonging to the federal government, there is no room for state regulatory authority to be employed in any manner that would alter or affect these federally-regulated and authorized activities. Indeed, in the realm of national security, even state laws that do not necessarily conflict with the purpose of a similar federal law are preempted. *See Commonwealth of Pennsylvania* v. *Nelson*, 350 U.S. 497, 478-79 (1956) ("The precise holding of the court, and all that is before us for review, is that the Smith Act of 1940 . . . which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribes the same conduct."). In *Nelson*, the Court noted that once Congress determines that a particular area of law is a "matter of vital national concern, it is in no sense a local enforcement problem." *Id.* at 482. Thus, any relationship between a telecommunications company and the federal government in connection with national security and foreign intelligence gathering is governed exclusively by federal law.

Accordingly, the Commission does not have the legal authority to compel AT&T to disclose whether it has provided customer calling information to the NSA.

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

None of the comments cast even address the overriding fact that federal law prohibits the disclosure of information regarding the NSA program and that the Commission is clearly without authority to compel the release of facts regarding these allegations. For its part, the ACLU simply ignores that disclosure of even the existence or non-existence of relationship between AT&T and NSA is prohibited by federal law. Rather, it baldly suggests that "the basic facts of whether disclosure has occurred, and under what authority, should be available to the Commission, and those facts are sufficient to determine whether the law has been violated." ACLU Comments at 6. But that is wrong on *these* facts for the reasons that AT&T has repeatedly stated and that the ACLU ignores. Likewise, David Griffith and Stephen Gerritson again merely note the Commission's general authority to investigate complaints without addressing either the federal law prohibitions on the disclosures of the NSA information at issue here or the federal government's exclusive authority over issues of national security and foreign intelligence gathering. *See* Griffith Comments at 2; Gerritson Comments at 1.

4. 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?

In response to this question, the ACLU asserts that even if the United States were to assert and prevail on a claim of state secrets in this proceeding, the Commission could nonetheless proceed with an investigation because the necessary facts include only those that "are related[] to the companies' own practices, and do not implicate state secrets at all." ACLU Comments at 8. This argument, once again, ignores the fact that the relevant question is whether any information was provided to the NSA, and if so, whether there was legal authority to do so.[4] This question cannot be answered without disclosure of classified information.

In *Hepting*, the United States asserted this privilege over all details of the NSA program at issue here, including the identities of any carriers who may or may not be participating in it

[4] The comments of Stephen Gerritson do not directly answer the Commission's question, but rather state that the assertion of this privilege requires a court order or warrant, and it is within the Commission's jurisdiction to determine if there "was such a lawful court order or warrant." Gerritson Comments at 2. This comment seems to suggest that the Commission should determine whether any request for information by the NSA (and any subsequent provision of information) was in fact lawful. As set forth above, the Commission's jurisdiction to consider this question is preempted by federal law which prohibits disclosure of any information regarding the NSA program. Likewise, the comments of David Griffith do not answer this question and simply state that it is unclear if any action is warranted and that the ACLU request is asking only for an investigation. Griffith Comments at 3. For the reasons discussed above, even an investigation of these allegations is prohibited by federal law.

and their roles and responsibilities, if any.[5] This position was reiterated by the United States in its June 14, 2006 letter to the New Jersey Attorney General in connection with the New Jersey Action. In that letter, the United States asserted that "[i]n seeking information bearing upon NSA's purported involvement with various telecommunications carriers," New Jersey sought "the disclosure of matters with respect to which the DNI has already determined that disclosure, including confirming or denying whether or to what extent such materials exist, would improperly reveal intelligence sources and methods."[6] The Justice Department then made clear that, as a legal matter, the state's effort to investigate matters covered by the privilege "conflicts with the assertion of the state secrets privilege by the Director of National Intelligence" and, as such, "would contravene the DNI's authority and the Act of Congress conferring that authority."[7]

More recently, in connection with subpoenas issued by two Missouri Public Service Commissioners seeking similar information, the General Counsel for the Office of the Director of National Intelligence, sent a letter to counsel for AT&T stating that "[c]ompliance with the subpoenas by these entities would place them in a position of having to confirm or deny the existence of information that cannot be confirmed or denied without harming national security. Further enforcement of the subpoenas would be inconsistent with, and preempted by, federal law."[8] The letter further states that "the Director of National Security recently asserted the state secrets privilege with respect to the very same topics and types of information sought by the subpoenas. This underscores that any such information cannot be disclosed."[9] Accordingly, the AT&T entities that received these subpoenas have objected to them and informed the Missouri Commissioners that they are unable to provide the requested information.[10]

Thus, contrary to the ACLU's argument, an assertion of the state secrets privilege in this proceeding would clearly prohibit the disclosure of any information that would be necessary for the Commission to conduct the investigation requested by the ACLU. Moreover, even if the United States did not invoke the state secrets privilege in this proceeding, this emphatically would not mean that classified information may be disclosed here. State secrets is a privilege that is asserted in judicial proceedings where Article III judges review classified materials on an *ex parte, in camera* basis. *See United States* v. *Reynolds*, 345 U.S. 1, 7 (1953). As set forth above and in more detail in the AT&T Comments, in other contexts, the federal statutory prohibitions on the disclosure of classified information prevent carriers from providing this information.

---

[5] *See* Notice of Motion and Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States of America, at 16, *Hepting, et al.* v. *AT&T Corp., et al.,* Case No. C 06-0672-VRW (N.D. Cal.) (May 12, 2006) (Exh. D to AT&T's May 26, 2006 letter).

[6] *See* Exh. B to the AT&T Comments, at 5.

[7] *Id.* at 5-6.

[8] *See* Letter from Benjamin A. Powell, General Counsel, Office for the Director of National Intelligence to Edward R. McNicholas (July 11, 2006) (Exh. A hereto).

[9] *See id.*

[10] On July 12, 2006, the Commissioners filed suit in Missouri state court seeking to enforce these subpoenas. This action is likely to result in a response by the United States similar to that in New Jersey.

Further, as explained in the AT&T Comments, a separate but related bar to this proceeding is the so-called *Totten* rule, which provides that "the existence of a contract for secret services with the government is itself a fact not to be disclosed" and thus bars any adjudication of claims (state or federal) that relate to the existence of alleged espionage relationships with the United States. *See Tenet* v. *Doe*, 544 U.S. 1 (2005); *Totten* v. *United States*, 92 U.S. 105, 107 (1875). The ACLU request presents precisely the sort of claim that cannot be examined or adjudicated without attempting to establish the existence or non-existence of a secret espionage relationship between the United States and private parties. Accordingly, this federal rule of law preempts state law under these circumstances and, for this reason as well, this proceeding cannot proceed.

Finally, contrary to the ACLU's suggestions (ACLU, at 6), it is irrelevant that the United States has not formally invoked the state secrets privilege in this state administrative proceeding. State secrets is a privilege that is asserted in judicial proceedings where Article III judges review classified materials on an *ex parte, in camera* basis. *See United States* v. *Reynolds*, 345 U.S. 1, 7 (1953). In other contexts, the federal statutory prohibitions on the disclosure of classified information prevent carriers from providing information and bar investigation of the issues by regulatory commissions. Thus, while the United States did not assert the state secrets privilege in the earlier proceedings before the FCC, the FCC determined that it had no ability or authority to conduct an investigation because federal law prohibited the carriers from providing the relevant information. Similarly, in New Jersey and in Missouri, the United States did not invoke the states secret privilege. Rather, it responded to the investigation by filing a federal court action or taking other action to enforce the federal law prohibitions on disclosure of classified information. In these regards, the significance of the fact that the United States has asserted the states secret privilege in the federal court class action proceedings is that this dramatically demonstrates that the information at issue is highly classified national security information that cannot be disclosed and that the United States will act vigorously – as it has acted vigorously – to prevent state officials from attempting to investigate this matter. That is why it is certain here that any attempt to investigate these issues would lead to a federal-state confrontation that federal authorities are certain to win – with AT&T and other telecommunications carriers placed in the middle.

5. If the Commission decides to investigate the matter raised in the ACLU's May [23], 2006, letter, which procedural options would be most appropriate? (*e.g.*, informal investigation, formal investigation, complaint).

For all of the reasons set forth above and in AT&T's earlier submissions, there is no procedure under which these matters may be investigated by this Commission. Federal law prohibits the disclosure of the information that would be required to conduct any investigation,

and federal law bars state tribunals from investigating national security matters even when they can acquire some relevant information.

Sincerely,

AT&T Communications of the Pacific Northwest, Inc.

Dan Foley
General Attorney and Assistant General Counsel
AT&T Services Inc.

Enclosure: Exhibit A (Letter from Benjamin A. Powell, General Counsel, Office for the Director of National Intelligence to Edward R. McNicholas (July 11, 2006) (ref. in footnote 8)

EXHIBIT A

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

WASHINGTON, DC 20511

July 11, 2006

VIA FACSIMILE (202) 736-8711
AND FIRST CLASS MAIL

Edward R. McNicholas
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005

Dear Mr. McNicholas,

We understand that subpoenas duces tecum issued by two Missouri Public Service Commissioners were served upon TCG Kansas City, Inc., TCG St. Louis Holdings, Inc., SBC Long Distance, L.L.C., SBC Advanced Solutions, Inc., Southwestern Bell Telephone, L.P., and AT&T Communications of the Southwest, Inc. on June 19, 2006, and June 22, 2006. The subpoenas seek materials and information allegedly disclosed to the National Security Agency, and materials and information related to the alleged release of customer proprietary information.

Compliance with the subpoenas by these entities would place them in a position of having to confirm or deny the existence of information that cannot be confirmed or denied without harming national security. Further enforcement of the subpoenas would be inconsistent with, and preempted by, federal law.

The subpoenas infringe upon federal operations, are contrary to federal law, and accordingly are invalid under the Supremacy Clause of the United States Constitution. Responding to the subpoenas, including disclosing whether, or to what extent, any responsive materials or information exist, would violate various specific provisions of federal statutes and Executive Orders. Further, the Director of National Intelligence recently asserted the state secrets privilege with respect to the very same topics and types of information sought by the subpoenas. This underscores that any such information cannot be disclosed. Finally, the United States recently filed a lawsuit against the Attorney General and other officials of the State of New Jersey, and several telecommunication carriers, seeking a declaration that the defendant state officials do not have the authority to enforce similar subpoenas, and that the defendant telecommunication carriers cannot respond to the subpoenas. For these reasons, please be advised that it is our position that enforcing compliance with, or responding to, the subpoenas would be inconsistent with, and preempted by, federal law.

Please do not hesitate to contact me or Michael Castelli of my office should you have any questions in this regard.

Sincerely,

Benjamin A. Powell

Benjamin A. Powell
General Counsel