BEFORE THE

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the matter of American Civil Liberties Union of Washington (ACLU) Request for Investigation of Possible Unlawful Disclosure of Private Customer Information by Telecommunications Companies to the National Security Agency (NSA)	))))))	Docket No. UT-060856

VERIZON REPLY COMMENTS
July 17, 2006

As Verizon Northwest Inc. ("Verizon") explained in its initial comments, federal law precludes Verizon from disclosing any information relating to the National Security Agency ("NSA") program referred to by the President, including any information relating to Verizon's alleged cooperation with that program. Specifically, the federal government has made clear that it views the information at issue to be barred from disclosure under federal statutes and subject to the state secrets privilege and has filed suit seeking a declaratory ruling that state officials may not require telephone companies to disclose such information. As a result, any Washington law or regulation on which the Commission would rely to attempt to require Verizon to disclose potentially relevant information would be preempted by federal law. Accordingly, the Commission should follow the lead of the FCC and four other state commissions and decline to launch an investigation into the matters raised by the ACLU. Nothing in the comments filed by the other parties begins to refute these key points. Indeed, for many of these same reasons, the Public Counsel concludes that "the Commission may not bring a complaint or seek information from telephone companies related to release of CPNI to the NSA." (Public Counsel Comments at 56.)

Of the commenters, only the ACLU purports to offer any substantive arguments in support of the Commission opening an investigation into this matter. The ACLU, however, glosses over — or ignores outright — the binding effect of federal law in this context, rendering its comments largely irrelevant.

First, the ACLU asserts that Washington law — in particular WAC 480-120-202 — can regulate or even prohibit disclosure of information to the NSA absent express consent or "legal process." (ACLU Comments at 2-3.) That assertion, however, fails to recognize that the Commission would be unable to evaluate whether any alleged disclosure by Verizon was authorized by federal statutes that, if applicable, would preempt any conflicting state law. (*See* Verizon Comments at 3-4.) The Commission's incapacity to evaluate compliance with federal statutes on this point stems from its inability to collect relevant information, as Verizon would be prohibited from disclosing information to the Commission about any alleged cooperation with the NSA program.

Second, the ACLU claims that the Commission is authorized to adjudicate, or at least investigate, alleged violations of Washington (or even federal) law by telephone companies. (ACLU Comments at 3-6.) That the Commission ordinarily has the authority to investigate alleged violations of WAC 480-120-202 is beside the point. In this particular case, as Verizon has explained, the evidence that would be necessary to evaluate whether such a violation had occurred is forbidden from disclosure by federal law, including, for example, 18 U.S.C. § 798 and 50 U.S.C. § 402 note. And the Commission cannot require Verizon to violate federal law by seeking to compel it to disclose information under authority of state law. (Verizon Comments at 4-5.)

The ACLU grudgingly admits that there is a "colorable" argument that federal law prohibits the Commission from compelling disclosure of information concerning Verizon's alleged cooperation with the NSA, but suggests the Commission could evade these prohibitions by "reframing" the questions it asks. (ACLU Comments at 4-5.) The re-wording of a question, however, would not change Verizon's inability to provide information about its alleged cooperation with the NSA. In order to investigate the ACLU's allegations, the Commission would have to determine much more than simply whether Verizon has "released customer calling information outside the company" and whether customers consented to such release. (*Id.*) Rather, in order to determine whether any violation occurred, the Commission would have to inquire into, *inter alia*, what information was released, the circumstances of the alleged disclosure, and the content of any authorizations or certifications Verizon may have received. As the federal government has made clear, all such information is highly classified and barred from disclosure under federal law.

Third, the ACLU contends that invocation of the state secrets privilege would not bar the Commission from launching an investigation. (ACLU Comments at 6-8.) Although the ACLU is correct that only the federal government may assert that privilege (*id.* at 6-7), that point is a red herring. As Verizon explained in its initial comments, the federal government already has asserted that privilege in other proceedings concerning telephone companies' alleged cooperation with the NSA, including its lawsuit seeking to enjoin the New Jersey state attorney general from compelling telephone companies to disclose information concerning such alleged cooperation.[1/]

[1/] The ACLU's suggestion that the federal government has not "assert[ed] the privilege" in the New Jersey suit (ACLU Comments at 7) is misleading at best. The government made clear its intention to do so in both its complaint and in a concurrent letter it sent to the New Jersey Attorney General stating that the state subpoena "conflicts with the assertion of the state secrets

(Verizon Comments at 7.) Moreover, contrary to the ACLU's claims, the information that the Commission would need to examine in order to conduct an investigation would go to the core of the state secrets privilege, which encompasses, among other things, the sources the government uses to acquire intelligence. That protection extends to the *existence* of any coordination that may have occurred between the government and the telephone companies, as well as any details concerning such coordination. *See, e.g., Halkin v. Helms*, 690 F.2d 977, 994-97 (D.C. Cir. 1982).

At bottom, the responses submitted by the ACLU to the Commission's questions fail to address the core issue. As Verizon has explained, it would be unable under federal law to provide the Commission with any information concerning its alleged cooperation with the NSA. Thus, the Commission would not be in a position to evaluate the legality of any alleged disclosures. Questions regarding the applicability of disclosure prohibitions — and exceptions to those prohibitions — of the various federal statutes at issue here will be addressed by the United States District Court hearing the New Jersey declaratory judgment case, as well as the other ongoing federal litigation in which the state secrets privilege is being litigated. Moreover, as Verizon previously noted, Congress is the appropriate body to oversee national security programs, and recent press reports have indicated that Congress and the Executive are in the

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privilege by the Director of National Intelligence." (Verizon Comments, Exhibit 3 at 5 & Exhibit 1, ¶¶ 30-33.) Although the government has not yet formally filed declarations in support of the privilege in the New Jersey case, that presumably is due to the fact that the only pleading that has been filed in the case to date is the complaint. In any event, as the ACLU concedes, the government has formally asserted the privilege in the *Hepting* case, and it has also done so in at least two other, similar cases. *See* Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment, *ACLU v. NSA*, No. 2:06-CV-10204 (E.D. Mich.); Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment, *Terkel v. AT&T*, No. 06 C 2837 (N.D. Ill.).

midst of negotiations concerning the appropriate means for such oversight.[2/] The Commission, by contrast, lacks the authority or jurisdiction to resolve the ACLU's allegations. Accordingly, the Commission should decline the ACLU's invitation to initiate an investigation and should dismiss the complaint.

DATED this 17th day of July, 2006.

VERIZON NORTHWEST INC.

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[2/] *See, e.g.*, Charles Babington & Peter Baker, "Bush Compromises on Spying Program," *Washington Post* at A1 (July 14, 2006).