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Washington Utilities and Transportation Commission
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Docket #UT-060856
Supplemental Comments by American Civil Liberties Union of Washington

Dear Chairman Sidran and Commission Members:

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The American Civil Liberties Union of Washington (ACLU-WA) wishes to provide a few comments on three court decisions issued after the date of our last comments, dealing with legal challenges to alleged disclosures of telephone records. The first case, much discussed in previous comments, is *Hepting v. AT&T Corp., et. al*, Case No. C-06-0672-VRW (N.D. Cal.) (order attached as Exhibit A). The second case has not been previously discussed with the Commission; it is a request for declaratory and injunctive relief against AT&T, filed in Illinois. *See Terkel v. AT&T Corp.*, Case No. 06-C-2837 (N.D. Illinois) (order attached as Exhibit B). The final case is also new to the Commission, and is similar in nature to *Hepting*. *See ACLU v. NSA*, Case No. 06-CV-10204 (E.D. Mich.) (opinion attached as Exhibit C). The decisions in all of these cases support our request for a Commission investigation into potential improper disclosure of telephone records in Washington.

Totten **Bar Is Inapplicable**

In each case, the United States argued that *Totten v. United States*, 92 U.S. 105 (1875), required dismissal of the action—just as AT&T has argued in its comments here that *Totten* serves as a bar to a Commission investigation. Both courts rejected this argument. Each found that *Totten* was intended to limit litigation amongst parties to an espionage agreement, rather than cutting off all judicial review of any issue where an espionage agreement might possibly be implicated. *See Hepting* at 28; *Terkel* at 14; *ACLU* at 11.

The *Terkel* court distinguished *Totten* by observing that the contract at issue there—if it existed—was unquestionably legitimate. In contrast, the entire concern in the present case was the legitimacy of the alleged contract, so it would be improper to cut off at its inception any potential judicial review. *See Terkel* at 14-16.

Finally, the *Hepting* court pointed out that both AT&T and the United States have admitted, for all practical purposes, that there are a variety of classified espionage-related agreements between the two. As such, the entire purpose of the *Totten* bar is inapplicable, and the action need not be dismissed—at best, some portions of the case will be limited under the state secrets privilege. *See Hepting* at 29-31; *see also Terkel* at 16.

The ACLU-WA urges the Commission to follow the lead of these three federal courts, and find that *Totten* does not preclude a Commission investigation.

Section 6 of the National Security Act

Both AT&T and Verizon have argued that the Commission is barred from proceeding by Section 6 of the National Security Act, codified as 50 U.S.C. § 402 note § 6. The United States similarly argued for dismissal of each of these three cases based upon that statute. All three courts denied that claim, for a variety of reasons.

First, it is quite possible that some information about records disclosure is not classified and is not within the scope of § 6. *See Hepting* at 43-44. Second, the statutory privilege is intended only to protect authorized and lawful activities of the NSA; it is not intended to "allow the federal government to conceal information regarding blatantly illegal or unconstitutional activities simply by assigning these activities to the NSA." *Terkel* at 11. Finally, all three courts decided the question was not controlling; the scope of the statutory privilege is roughly coterminous with the state secrets privilege, and thus the issues are better analyzed under that provision. *See Hepting* at 44; *Terkel* at 11; *ACLU* at 15 n. 11.

State Secrets Privilege

All three courts considered whether the state secrets privilege required dismissal of those actions. (It should be noted that the privilege had been properly invoked in each case, unlike the silence thus far of the United States with regard to a potential Commission investigation.) Each properly evaluated the states secrets privilege as what it is, merely an evidentiary privilege, and decided the dismissal motions based on what the effect of losing potential evidence would be. That case-specific approach accounts for the varying results reached by the courts—no dismissal in *Hepting*, dismissal of the entire action in *Terkel*, and dismissal of only some claims in *ACLU*.

The *Hepting* opinion was issued first, and its analysis was used by each of the other courts. The court expressed significant skepticism as to whether the existence or non-existence of a record disclosure program is necessarily a state secret. The possibility of records disclosure is unlikely to affect a terrorist who is already aware that the *contents* of his calls may be intercepted, under the publicly

acknowledged "terrorist surveillance program"—especially when some companies have publicly denied disclosing records, and would thus seem to be safe choices to a terrorist who was concerned about the risk. Nonetheless, the court reluctantly decided that the states secrets privilege precluded discovery of information *at this point* related to disclosure of telephone records to the NSA. *Hepting* at 41-42.

The *ACLU* court largely followed the *Hepting* analysis of state secrets. The only significant difference is that in *ACLU* there was no ongoing case; summary judgment was being granted on the primary claim related to interception of communications contents. As such, the court could not leave the datamining claim pending for future development, but instead dismissed it as no evidence yet existed, and discovery was precluded by the state secrets privilege. *ACLU* at 11-15.

Most significant in the *Hepting* opinion is that the court foresaw the possibility of further information coming to light that would allow the question to be revisited, and defeat future application of the state secrets privilege. *Hepting* at 42. The most likely way for such information to come forward is in broad-ranging investigations by bodies such as this Commission. Unlike judicial actions in which there are specific defendants, a Commission investigation is able to develop broader information, ranging across the industry, to determine what types of record disclosures have occurred and continue to occur.

This view is supported by the *Terkel* opinion, which followed the same basic analysis as *Hepting* and similarly determined that no discovery was presently permissible regarding AT&T's alleged disclosure of records to the NSA. However, rather than ending the inquiry at that point, the court further considered whether "more generalized questions would avoid implicating the state secrets privilege." *Terkel* at 36. The court ultimately concluded that the plaintiffs did not have standing to pursue such generalized questions, and therefore dismissed the case.

The Commission is not faced with the same question of standing. It is statutorily empowered to investigate all potential violations of law by telecommunications providers within the state of Washington. If such an investigation were impossible or injurious to national security either court could have (and would have) clearly stated so, and summarily dismissed all claims related to record disclosure, without looking for alternatives or leaving claims pending. After all, both courts had full access to the secret declarations filed by the United States, and both said that such declarations did not sway their opinions.

In accordance with these federal court opinions, the ACLU-WA continues to urge the Commission to commence an investigation of all telecommunications companies doing business in Washington State. The Commission should ask generalized questions, not implicating state secrets, in order to discover whether

any of the companies have disclosed customer records without customer consent or legal process. We support the Public Counsel's suggestion that the Commission should order each company to preserve evidence and disclose the number of instances of CPNI disclosure. That is a generalized question that does not implicate state secrets. We also believe that, at a minimum, each company should be asked to declare under oath whether or not they have disclosed broad records to any governmental entity, and if so, what legal authorization existed for disclosure. It seems likely that many companies will deny such disclosure, following in the footsteps of WITA and BellSouth. Perhaps other companies will believe they are unable to confirm or deny disclosure—and that information, by itself, is useful in determining where the Commission should direct its further investigatory efforts.

Sincerely,

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