



Cathryn L. Hazouri, Executive Director • Mark Silverstein, Legal Director

May 24, 2006

Director Doug Dean
Chairman Greg Sopkin
Colorado Public Utilities Commission
1580 Logan Street, OL 2
Denver, CO 80203
VIA FACSIMILE: 303-894-2065

Re: Colorado Public Telephone Utilities Disclosure of Coloradans'
Personal Information to the NSA in Violation of Colorado Law

Dear Director Dean and Chairman Sopkin:

I am writing on behalf of the ACLU of Colorado and its twelve thousand members to request an investigation into the Colorado public telephone utilities' practice of sharing Coloradans' private telephone records with the National Security Agency ("NSA").

On May 11, 2006, *USA Today* reported that three phone companies, AT&T, Verizon, and BellSouth,¹ have provided the NSA with the personal calling details of customers, including telephone numbers called, times, dates, and directions of calls.² In doing so, these companies have systematically and flagrantly violated the privacy rights of their customers by sharing information that reveals Coloradans' personal associations, interests, and a host of other personal details about their lives.

USA Today described the information that companies made available to the government as relating to billions of telephone calls made by millions of residential phone customers.³ According to sources in the story, these records were provided voluntarily, neither with the consent of their customers nor under the compulsion of a warrant, court order, or other legal process from the government.⁴ Using this information, the NSA or other agency accessing the database can easily determine the names and addresses associated with these calls by cross-referencing other, readily accessible databases.⁵ This information

¹ CPUC has authorized AT&T, BellSouth, and Verizon to provide telephone services in the State of Colorado, and has regulatory responsibility for these companies.

² Leslie Cauley, "NSA has massive database of Americans' phone calls," *USA Today* (May 11, 2006).

³ *Id.*

⁴ John Markoff, "Questions Raised for Phone Giants in Spy Data Furor," *New York Times* (May 13, 2006).

⁵ *Id.*

would enable the government to track every phone call made by every Colorado residential customer, including the identities of the people called and the length of each conversation.

Experts agree that there is little reason to believe that Verizon, AT&T, and BellSouth are the only companies providing this information to the NSA.⁶ Several reports suggest that there is an even broader NSA program of wiretapping that may implicate all “the leading companies” in the telecommunications industry.⁷ It has been widely reported that a former AT&T employee has come forward as part of a lawsuit filed by the Electronic Frontier Foundation stating that he has witnessed the installation of special information gathering equipment by the NSA in AT&T’s switching network.⁸

Verizon, BellSouth and AT&T have all issued statements in recent days regarding their participation in this record-sharing program. While BellSouth has denied any participation, Verizon and AT&T have issued ambiguous statements about their and their subsidiaries’ involvement with the NSA program. Facing a firestorm on Capitol Hill, angry customers and shareholders, and billions of dollars in potential legal liability, public telephone utilities clearly have an incentive to deny participation in these programs. Furthermore, a recently issued Presidential Memorandum may give the Director of National Security the power to immunize these telecommunications companies from some liability for false statements they make in concealing matters of national security,⁹ making any denials inherently untrustworthy. These allegations are far too serious and well-founded to be dismissed without a full investigation.

Pursuant to C.R.S. § 40-7-101, “it is the duty of the commission to see that the provisions of the constitution and statutes of this state affecting public utilities...are enforced and obeyed and that violations thereof are promptly prosecuted.” The CPUC has the responsibility to enforce applicable law over hundreds of public telephone utility companies that have been granted license by the CPUC to operate telephone services in Colorado.¹⁰ The recent revelations regarding the NSA program raise serious questions that require immediate investigation in order to determine the extent to which public telephone utilities in CPUC’s jurisdiction have engaged in these unlawful practices. The facts of the NSA program implicate CPUC’s own regulations and our Colorado Constitution.

As you know, the information gathered by the public telephone utilities including the number called, the time, date, and direction of the call, and other details is

⁶ Associated Press, “Experts suspect NSA is gathering more info,” (May 12, 2006).

⁷ Eric Lichtblau and James Risen, “Spy Agency Mined Vast Data Trove, Officials Report,” *New York Times* (December 24, 2005).

⁸ Ryan Singel, “Whistle-Blower Outs NSA Spy Room,” *Wired News* (April 7, 2006).

⁹ 71 Fed. Reg. 27941.

¹⁰ Colorado Public Utilities Commission Website,
<<http://www.dora.state.co.us/puc/telecom/TelecomAbout.htm>>

also known as “customer proprietary network information,” or CPNI.¹¹ The CPUC has adopted specific rules to “regulate the collection and disclosure of personal information obtained by providers and to identify procedures for protecting the personal information of the providers’ customers.”¹² The CPUC has incorporated by reference several provisions of the Federal Code of Regulations in order to protect the privacy rights of all Coloradans. Reports show that public telephone utilities may have provided CPNI information to the NSA without customer notification or approval and in lieu of compulsion of legal process, in violation of Colorado regulations. Each day such unlawful activity continues amounts to a separate and distinct violation of Colorado law.¹³

As a matter of constitutional law, Article II, Section 7 of the Colorado Constitution provides even greater protection of Coloradans’ privacy than the Fourth Amendment to the U.S. Constitution. In decisions that apply directly to this case, the Colorado Supreme Court has ruled that that telephone customers in our state have a legitimate expectation of privacy in the records of telephone numbers they dial.¹⁴ Consequently, government law enforcement officers cannot obtain that information in the absence of a warrant, exigent circumstances or the express consent of the subscriber.¹⁵ The Colorado Supreme Court has explained that similar protections apply to a customer’s billing records that reflect long-distance calls.¹⁶ If telephone companies have agreed to serve as government agents in collecting and providing such records to the NSA on an ongoing basis, they may be doing so in violation of the Colorado Constitution.

Several other states have already reached the conclusion that an immediate and thorough investigation is necessary to discover the true scope and extent of these practices. For example, the Governor of Vermont has already ordered the state’s Commissioner of Public Service to investigate whether Verizon violated the state’s laws, and the commissioner has declared that “[i]t is entirely inappropriate for Verizon, or any other telecommunication company” to release phone records “without abiding by the proper legal process.”¹⁷ On May 15, 2006, the Maine Public Utilities Commission began an investigation into customer complaints about NSA spying. The commission ordered Verizon to address “the extent to which the actions alleged in the complaint and in the *USA Today* article implicate the privacy rights of Maine telephone service subscribers.”¹⁸ On the national level, Commissioner Michael J. Cops has called for a Federal

¹¹ Colorado Code of Regulations at 4 C.C.R 723-2 Rule 2361(a), incorporating by reference 47 USC § 222(h)(1).

¹² Code of Colorado Regulations, 4 C.C.R. 723-2, “Collection and Disclosure of Personal Information: Basis, Purpose, and Statutory Authority.”

¹³ C.R.S. § 40-7-105(3).

¹⁴ *People v. Sporleder*, 666 P.2d 135, 142 (Colo. 1983).

¹⁵ *Id.* at 144.

¹⁶ *Id.* at 142.

¹⁷ David Gram, “Candidate asks if NSA phone sweeps violate state law,” *Associated Press* (May 12, 2006).

¹⁸ State of Maine Public Utilities Commission, “Procedural Order,” Docket No. 2006-274.

Communications Commission investigation into whether the telephone companies have violated federal law.¹⁹ The residents of the State of Colorado deserve a similar investigation in order to determine the extent and scope of any violations of their state constitution, laws or regulations by any public telephone utility in the CPUC's jurisdiction.

The ACLU of Colorado, on behalf of itself and its twelve thousand members, requests that the CPUC fully investigate the actions of all public telephone utilities in its jurisdiction regarding these practices, and that the CPUC invoke its authority pursuant to C.R.S. § 40-7-101 to request that the Colorado Attorney General aid in the investigation and the prosecution of any violations of Colorado law. The ACLU of Colorado also requests that CPUC exercise its authority pursuant to C.R.S. § 40-7-104 to direct the Attorney General to seek an injunction for the purpose of having such violations immediately stopped and prevented.

Very truly yours,

A handwritten signature in black ink, appearing to read 'T. Pendergrass', with a stylized flourish at the end.

Taylor Pendergrass
Staff Attorney

cc. Governor Bill Owens
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Denver, CO 80203
VIA FACSIMILE: 303-866-2003

Attorney General John Suthers
1525 Sherman St., 5th floor
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¹⁹ FCC News Release, "Commissioner Michael J. Copps Calls for the FCC to Open an Inquiry Into the Lawfulness of the Disclosure of America's Phone Records," (May 15, 2006).