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June 16, 2006

Thomas F. Ahern, Administrator
Division of Public Utilities and Carriers
89 Jefferson Boulevard
Warwick, RI 02888

Re: Rhode Island American Civil Liberties Union Informal Complaint

Dear Mr. Ahern:

As requested in your letter to Donna Cupelo dated May 25, 2006, I am responding to the informal complaint filed with you on May 24, 2006, by the Rhode Island American Civil Liberties Union ("RI ACLU") based on recent press coverage concerning Verizon's alleged cooperation with certain classified intelligence gathering activities by the National Security Agency ("NSA"). The Division should reject the request by the RI ACLU to open an investigation concerning whether Verizon Rhode Island disclosed records to, or otherwise cooperated with, the NSA in connection with any national security surveillance activities and whether such cooperation, if any, violated any state law. The FCC already has rejected a similar request, concluding that "the classified nature of the NSA's activities make us unable to investigate the alleged violations" at issue. *See* Letter from Kevin Martin, Chairman FCC, to Congressman Edward Markey (May 22, 2006) (attached hereto as Exhibit 1).[1/]

More recently, the Department of Justice filed suit in federal court in New Jersey requesting injunctive relief and a declaratory judgment that subpoenas issued by the New Jersey Attorney General that sought information relating to the alleged provision of call records to the NSA "may not be enforced by the State Defendants or responded to by the

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1/ The only other state commission to decide to date whether to entertain the ACLU's complaint also concluded that it could not address the ACLU's claims. *See* Letter from David Lynch, General Counsel, Iowa Utils. Board to Mr. Frank Burdette (May 25, 2006) (attached hereto as Exhibit 2).

Carrier Defendants because any attempt to obtain or disclose the information that is the subject of these Subpoenas would be invalid under, preempted by, and inconsistent with" federal law. *See* Complaint, *United States v. Farber, et. al* at 13 (D.N.J. filed on June 14, 2006) ("New Jersey Complaint") (attached hereto as Exhibit 3). In addition, the Department sent a letter to Verizon, as well as several other carriers, in which it stated that "responding to the subpoena[] would be inconsistent with and preempted by federal law." *See* Letter from Peter D. Keisler, Asst. Attorney General to John A. Rogovin, Counsel for Verizon, *et al.* at 2 (June 14, 2006) (attached hereto as Exhibit 4).

For many of the same reasons given by the FCC and the Department of Justice, the Division should similarly reject the RI ACLU's request.[2] In particular, (i) the Division will be unable to adduce any facts relating to these claims and thus will be unable to resolve the issues raised in the RI ACLU request; and (ii) any potential relief would implicate issues of national security and is beyond the Division's power to grant.[3/]

1. The President and the Attorney General have acknowledged the existence of a counter-terrorism program aimed at al Qaeda involving the NSA.[4/] They have also made it plain, however, that the NSA program is highly classified, including the identities of any cooperating parties, the nature of such cooperation (if any), and the existence and content of any written authorizations or certifications relating to the program. As a result, the Division will be unable to obtain any information concerning whether Verizon had any role in the program. Nor will the RI ACLU or other parties be able to provide the Division with anything more than newspaper articles as a foundation for their concerns. In short, the Division will have no basis on which it can determine whether the news media's characterizations of the NSA's activities are correct.

2. As Verizon has already stated, it can neither confirm nor deny whether it has any relationship to the classified NSA program. *See Verizon Issues Statement on NSA Media Coverage*, News Release (May 16, 2006) (attached hereto as Exhibit 5). However, Verizon has further noted that media reports have made claims concerning Verizon that are false. In

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2 The RI ACLU notes "that other public utilities commissions in New England have already begun investigating these matters." RI ACLU Complaint at 3. This assertion is not correct. The Maine Public Utilities Commission received a complaint on May 8, 2006, from ten customers concerning the NSA program to which Verizon responded on May 19. The Maine commission has not determined whether to proceed with an investigation. Likewise, neither the Vermont Public Service Board nor Department of Public Service has yet decided to open investigations.

3/ Indeed, by submitting this response, Verizon is not suggesting that the Division has jurisdiction over the issues raised by the ACLU request.

4/ *See, e.g.*, Department of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (Jan. 19, 2006); Press Conference of President Bush (Dec. 19, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html; Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html.

particular, Verizon has responded to these reports by explaining that it has not turned over data on local calls to the NSA and in fact does not even make records of such calls in most cases because the vast majority of customers are not billed on a per-call basis for local calls. *See id.* As Verizon has also made clear, to the extent it provides assistance to the government for national security or other purposes, it "will provide customer information to a government agency only where authorized by law for appropriately-defined and focused purposes." *See Verizon Issues Statement on NSA and Privacy Protection*, New Release (May 12, 2006) (attached hereto as Exhibit 6). Verizon "has a longstanding commitment to vigorously safeguard our customers' privacy," as reflected in, among other things, its publicly available privacy principles. *See id.*

3. Verizon is prohibited, however, from providing any information concerning its alleged cooperation with the NSA program. Indeed, it is a felony under federal criminal law for any person to divulge classified information "concerning the communication intelligence activities of the United States" to any person that has not been authorized by the President, or his lawful designee, to receive such information. *See* 18 U.S.C. § 798. Further, Congress has made clear that "nothing in this . . . *or any other law* . . . shall be construed to require disclosure of . . . any function of the National Security Agency, [or] of any information with respect to the activities thereof." 50 U.S.C. § 402 note (emphasis added). As the courts have explained, this provision reflects a "congressional judgment that, in order to preserve national security, information elucidating the subjects specified ought to be safe from forced exposure." *The Founding Church of Scientology of Washington, D.C., Inc. v. Nat'l Security Agency*, 610 F.2d 824, 828 (D.C. Cir. 1979). Similarly, if there were activities relating to the NSA program undertaken pursuant to the Foreign Intelligence Surveillance Act ("FISA"), that fact, as well as any records relating to such activities, must remain a secret under federal law. *See* 50 U.S.C. §§ 1805 (c)(2)(B) & (C). The same is true of activities that might be undertaken pursuant to the Wiretap Act. *See, e.g.*, 18 U.S.C. §2511(2)(a)(ii)(B).

4. The United States Government has made it clear that it will take steps to prohibit the disclosure of this information. For instance, the Department of Justice ("DOJ") has invoked the "state secrets" privilege in connection with a pending federal court action against AT&T concerning its alleged cooperation with the NSA. Under that well-established privilege, the government is entitled to invoke a privilege under which information that might otherwise be relevant to litigation may not be disclosed where such disclosure would be harmful to national security. *See United States v. Reynolds*, 345 U.S. 1, 7-11 (1953). When properly invoked, the state-secrets privilege is an absolute bar to disclosure, and "no competing public or private interest can be advanced to compel disclosure. . . ." *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983). Further, if the subject matter of a litigation is a state secret, or the privilege precludes access to evidence necessary for the plaintiff to state a prima facie claim or for the defendant to establish a valid defense, then the court must dismiss the case altogether. *See, e.g., Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 547-48 (2d Cir. 1991); *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978); *Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982).

In the AT&T case, the Department of Justice has invoked the state secrets privilege and set forth its view that claims that AT&T violated the law through its alleged cooperation with the NSA program "cannot be litigated because adjudication of Plaintiffs' claims would put at risk the disclosure of privileged national security information." *See* Memorandum of the United States in Support of the Military and State Secrets Privilege and Motion to Dismiss or, in the Alternative, for Summary Judgment, filed on May 13, 2006, in *Hepting v. AT&T*, No. C-06-0672-VRW (N.D. Cal.) (attached hereto as Exhibit 7). The district court ruled on June 6, 2006 that if the government is correct in asserting that "litigation would inevitably risk . . . disclosure" of state secrets, then the case should be dismissed. *Hepting v. AT&T*, No. C-06-0672-VRW (N.D. Cal., Order issued June 6, 2006) at 2 (attached as Exhibit 8). A hearing on the DOJ's motion is now scheduled for June 23, 2006. The DOJ's rationale applies equally to Verizon's alleged cooperation with the NSA and, as the DOJ's New Jersey Complaint makes clear, to investigations by state officials such as what the ACLU seeks here. *See, e.g.*, New Jersey Complaint ¶¶ 30-33. Indeed, the government has indicated in a recent filing in support of a motion by AT&T, Inc. to stay another case pending against it, *Terkel v. AT&T, Inc.*, 06 C 2837 (E.D. Ill.), that it "intends to assert the military and state secrets privilege" in all of the similar cases pending against telecommunications companies. Statement of Interest of the United States in Support of AT&T's Motion for a Stay Pending Decision by the Judicial Panel on Multi-District Litigation at 2, *Terkel v. AT&T, Inc.*, 06 C 2837 (E.D. Ill. filed June 6, 2006) (attached as Exhibit 9). At a minimum, therefore, the Division should not go forward without consulting with the DOJ, especially in light of the DOJ's action in New Jersey described above.

5. Finally, as noted above, Verizon has made it very clear that it cooperates with national security and law enforcement requests entirely within the bounds of the law. The assumptions in the popular press that the alleged assistance in connection with the NSA program violates the law are without any basis. None of the federal statutes governing the privacy of telecommunications and customer data forbids telecommunications providers from assisting the government under appropriate circumstances. The Wiretap Act, FISA, the Electronic Communications Privacy Act, and the Telecommunications Act all contain exceptions to the general prohibitions against disclosure and expressly authorize disclosure to or cooperation with the government in a variety of circumstances.[5/] Further, these laws provide that "no cause of action shall lie" against those providing assistance pursuant to these authorizations[6/] and also that "good faith reliance" on statutory authorizations, court orders, and other specified items constitutes "a complete defense against any civil or criminal action

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5/ *See, e.g.*, 18 U.S.C. §§ 2511(2), 2511(3), 2518(7), 2702(b), 2702(c), 2703, 2709; 50 U.S.C. §§ 1805(f), 1843. For example, 18 U.S.C. § 2709 requires a telephone company to disclose certain information if it receives a "national security letter." Similarly, Section 2511(2)(a) expressly authorizes companies to provide "information, facilities, or technical assistance" upon receipt of a specified certification "notwithstanding any other law."

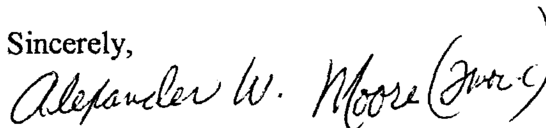
6/ *See, e.g.*, 18 U.S.C. §§ 2511(2)(a)(ii), 2703(e), § 3124(d)); 50 U.S.C. §§ 1805(i), 1842(f).

brought under this chapter or any other law."[7] To the extent that state laws do not contain similar exceptions or authorizations, they are preempted. *See, e.g.*, *Camacho v. Autor. de Tel. de Puerto Rico*, 868 F.2d 482, 487-88 (1st Cir. 1989) (Puerto Rico's constitutional prohibition on wiretapping "stands as an obstacle to the due operation of . . . federal law" and is preempted by the Wiretap Act.).

For similar reasons, the Division lacks the authority or jurisdiction to investigate or resolve the RI ACLU's allegation that the activities alleged are unauthorized and, therefore, unlawful. Reaching a conclusion as to that question would require the Division to investigate matters relating to national security and to interpret and enforce the federal statutes described above authorizing disclosures to federal agencies in various circumstances. These areas fall outside the Division's jurisdiction and authority. *See, e.g.*, New Jersey Complaint ¶¶ 38-44.

In sum, there is no basis to assume that Verizon has violated the law. Further, Verizon is precluded by federal law from providing information about its cooperation, if any, with this national security matter. Verizon accordingly cannot confirm or deny cooperation in such a program or the receipt of any government authorizations or certifications, let alone provide the other information the RI ACLU suggests that the Division request. As a result, there would be no evidence for the Division to consider in any investigation. Moreover, neither the federal nor state wiretapping and surveillance statutes authorize or contemplate investigations or enforcement proceedings by the Division to determine criminal culpability. Nor does the Division possess the practical tools and ability to construe and enforce state and/or federal criminal statutes, consistent with all constitutional rights and protections. Accordingly, even if the Division could inquire into the facts – and as discussed above it cannot – the Division lacks the authority or jurisdiction to investigate or resolve the RI ACLU's allegations. Instead, ongoing Congressional oversight through the Senate and House Intelligence committees, as well as the pending proceedings in federal court that will consider the state secrets issues, are the more appropriate forums for addressing any issues related to this national security program.

Sincerely,



Alexander W. Moore

Enclosures
cc: Ms. Donna Cupelo
Mr. Steven Brown ✓

[7] *See, e.g.*, 18 U.S.C. §§ 2520(d), 2707(e); § 3124(e).