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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

Dear Ms. Washburn:

AT&T Communications of the Pacific Northwest, Inc. ("AT&T") respectfully submits this letter to provide the Commission with copies of relevant legal decisions and other documents issued since AT&T filed its reply comments in this proceeding on July 17, 2006.

Foremost, during this interim period, three different federal district courts have held that the question of whether AT&T and other telecommunications carriers are disclosing calling records to the National Security Agency ("NSA") is a "state secret" and information relating to these allegations cannot be discovered or otherwise revealed even in federal court proceedings. First, in *Terkel & ACLU v. AT&T Corp., et al.,* Case No. 06 C 28a (N.D. Ill.), as here, the only allegation was that AT&T had unlawfully provided calling records to the NSA. In an order issued on July 25, 2006, the court concluded that "requiring AT&T to confirm or deny whether it has disclosed large quantities of telephone records to the federal government could give adversaries of this country valuable insight into the government's intelligence activities. Because requiring such disclosures would therefore adversely affect our national security, such disclosures are barred by the state secret privilege." See Order, at 32 & 16-39 (Exh. 1).

Second, the same ruling has now also been made in the *Hepting* case that was discussed in AT&T's prior pleadings. While the court there permitted other claims to proceed, it likewise concluded that disclosure of information relating to the alleged calling record program could increase the risk of future terrorist attacks and that "for present purposes AT&T should not be required to disclose what relationship, if any, it has with this alleged program." Order, *Hepting v. AT&T Corp.,* Case No. C 06-0672-VRW, N.D.Ca, at 40-42 (July 20, 2006) (Exh. 2).

A third federal court also recently reached this same conclusion. *See* Order, *ACLU. v. NSA*, Case No. 06-cv-10204, E.D. Mich., at 14 (Aug. 17, 2006) (Exh. 3). Even while holding that the government's program of acquiring the contents of certain one-end foreign communications is unlawful, the court there ruled that claims that calling records were

unlawfully obtained by NSA are foreclosed by the state secrets doctrine, and the court granted summary judgment against the ACLU on its calling records claims. *Id.* In short, each of the three federal courts to consider the issue has now held that there can no discovery and no litigation of claims that carriers unlawfully provided calling records to NSA.

Similarly, in AT&T's prior pleadings, it noted that where states have ordered investigations of carriers' alleged provision of calling records to NSA, the United States has sought to enjoin the investigations under federal law. In the period since July 17, 2006, the United States has instituted two additional such suits to prevent compliance with (1) subpoenas issued by commissioners of the Missouri Public Service Commission (*see* Complaint, *United States v. Gaw, et al.* (E.D. Mo.) (Exh. 4). and (2) an order of the Maine Public Utilities Commission that a carrier provide information relating to its alleged provision of calling records. *See* Complaint. *United States v. Adams, et al.* (D. Me.) (Exh. 5). In this same vein, while the Vermont Public Service Board has not actually ordered responses to information requests, the Department of Justice has sent it a letter explaining that any discovery directed to the alleged provision of calling records to NSA would "place the carriers in a position of having to confirm or deny the existence of information that cannot be confirmed or denied without harming national security," and "would be inconsistent with, and preempted by, federal law." *See* Exh. 6.

Finally, AT&T's prior pleadings discussed the motions that had been filed to consolidate the over 30 federal court cases involving the alleged NSA program in a single district court. On August 9, 2006, the Judicial Panel on Multi-District Litigation ordered these cases transferred to the United States District Court for the Northern District of California. The Panel found that consolidation of the cases in this Court was appropriate, *inter alia*, in order to protect classified information and "prevent inconsistent trial rulings (particularly with respect to matters involving national security)." *See* MDL Docket No. 1791, *In re National Security Agency Telecommunications Records Litigation*, Transfer Order issued August 9, 2006, at 2-3 (Exh. 7).

Sincerely,

AT&T Communications of the Pacific Northwest, Inc.

Dan Foley
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AT&T Services Inc.

Enclosures