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VIA EMAIL

Ms. Carole J. Washburn
Executive Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive SW
P.O. Box 47250
Olympia, WA 98504

Re: Supplemental Comments of Verizon Northwest Inc. in Docket UT-060856

Dear Ms. Washburn:

Please accept this letter as supplemental comments of Verizon Northwest Inc. ("Verizon") in this docket, as well as Verizon's responses to the three questions posed by the Commission in the Notice of Further Opportunity to Comment issued on August 25, 2006.

There have been a number of legal developments related to the ACLU's request for an investigation since Verizon filed its reply comments on July 17, 2006. The supplemental comments submitted by AT&T on August 25 described and attached a number of the relevant documents, including federal court orders in *Terkel v. AT&T*, No. 06-C-2837 (N.D. Ill. July 25, 2006), *Hepting v. AT&T*, Docket No. C-06-672 VRW (N.D. Cal. July 20, 2006) and *ACLU v. NSA*, No. 06-CV-10204 (E.D. Mi. Aug. 17, 2006). All three decisions confirm that the state secrets privilege bars discovery of Verizon's alleged disclosure of customer records to the NSA -- the very subject of the ACLU's request for investigation in this docket. *Terkel* Order at 3-4 (dismissing the complaint because "the state secrets privilege covers any disclosures that affirm or deny the activities alleged in the complaint. As a result, the information at issue is unavailable in its entirety"); *Hepting* Order at 40-42 (finding that the existence of an alleged NSA program related to communications records had not been disclosed, and therefore, refusing to permit *any* discovery at this time as to AT&T's alleged disclosure of such records); *ACLU v. NSA* Order at 14 (dismissing claims against the United States based on an alleged intelligence program

involving the disclosure of telephone records on the grounds that the state secrets privilege barred such claims).

Two other state commissions joined the four cited previously by Verizon in declining ACLU requests to investigate this matter. On August 22, an ALJ in Pennsylvania dismissed the ACLU's complaint, concluding that "the Commission does not have the authority to compel respondents to disclose that information [concerning their alleged cooperation with the NSA] over their claims of national security prohibitions." Order, *ACLU v. AT&T*, No. C-20066397 (Aug. 22, 2006) ("*Pennsylvania Order*") (attached hereto as Exhibit 1). On August 23, the Colorado Commission rejected for a second time an ACLU investigation request. *See* Letter from Doug Dean, Director of the Colorado Public Utilities Commission to Mr. Taylor Pendergrass (August 23, 2006) (attached hereto as Exhibit 2) (stating that "the PUC will not conduct an investigation at this time, but will instead await a definitive ruling from the federal courts regarding a state public utility commission's authority to investigate such matters.").

With regard to the few state public utility commissions attempting to investigate these matters, the United States took decisive steps to prevent disclosure of the types of information sought by the ACLU. These steps included filing suit in federal courts to prevent disclosure to the Maine and Missouri commissions, and sending a letter to the Vermont commission urging dismissal of an ACLU complaint. *See* Complaint, *United States v. Adams, et. al,* (D. Me filed on August 21, 2006) (attached to AT&T's supplemental comments as Exhibit 5) (stating at 1-2 that responding would "place Verizon in a position of having to confirm or deny the existence of information that cannot be confirmed or denied without causing exceptionally grave harm to national security," and that any "attempts to obtain such information are invalid under the Supremacy Clause of the United States Constitution and are preempted by the United States Constitution and various federal statutes"); Complaint, *United States v. Gaw, et. al* (E.D. Mo. filed on July 25, 2006) (attached to AT&T's supplemental comments as Exhibit 4); Letter from Peter D. Keisler, Asst. U.S. Attorney General, to Chairman James Volz, Chairman of Vermont Public Service Board (July 28, 2006) (attached to AT&T's supplemental comments as Exhibit 6) (in which the United States pointedly noted that "[r]esponding to any such requests for information, including disclosing whether or to what extent any responsive materials exist, moreover, would violate specific provisions of federal statutes and executive Orders.").

These legal developments confirm that Verizon would be unable under federal law to provide the Commission with any information concerning its alleged cooperation with the NSA. Because it would thus be unable to evaluate the legality of any alleged disclosures to the NSA, the Commission should not initiate an investigation nor pursue a formal complaint against Verizon.

Turning now to the questions posed recently by the Commission, Verizon responds as follows:

1. If the Commission decides not to issue a complaint now, will Verizon and AT&T waive the statute of limitations until the federal courts finally resolve the legal issues presented in this docket?

It appears that a statute of limitations period of not less than two years applies to any enforcement action the Commission might initiate against Verizon alleging that Verizon violated

WAC 480-120-202 through impermissible disclosure of phone record information to the NSA. To the extent that any potential ambiguity on the length of the limitation period is of concern to the Commission, Verizon will not assert that a period of less than two years applies to any such action. Given that fact, any further discussion of potential timing limitations would be premature at this point.

Other state commissions have deferred consideration of these matters pending ultimate resolution through the federal courts notwithstanding potential timing limitations. For example, as explained above, the Colorado Commission is "await[ing] a definite ruling from the federal courts regarding a state public utility commission's authority to investigate such matters." Similarly, the Oregon attorney general declined an investigation request by the ACLU by noting that "[u]ntil a definitive ruling is obtained by the United States from the United States Supreme Court, the validity of the United States' claims under the "state secrets" privilege as a bar to state consumer protection investigations will remain in doubt." *See* Letter from Hardy Myers, Attorney General of the State of Oregon, to Keith S. Dubanevich and Andrea Meyer of the ACLU of Oregon (August 4, 2006) (attached hereto as Exhibit 3). Attorney General Myers decided to hold off on an investigation because he was not "aware of any reason to believe that immediate action is required to prevent the destruction of records that would be relevant to your complaint." The Commission also should not be concerned about any destruction of records here, particularly in light of Verizon's commitment in response to Question #3 below. And as discussed above, an ALJ in Pennsylvania dismissed the ACLU's complaint there last week, concluding that "the Commission does not have the authority to compel respondents to disclose that information [concerning their alleged cooperation with the NSA] over their claims of national security prohibitions" and finding that any such issues must be resolved in the first instance in the federal courts. *Pennsylvania Order* at 16-17.

2. Does the information currently in the record constitute probable cause that Verizon or AT&T violated Washington laws and rules?

No. There is no basis to assume that Verizon has violated Washington laws and rules, much less "probable cause" for such an assumption. In the criminal law context governing police officers in Washington, "probable cause" exists "where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed." *State v. Terrovona*, 105 Wn. 2d 632, 643 (Wash. 1986). Here, there is no "reasonably trustworthy information" on facts and circumstances that could lead the Commission to believe that its rules were violated. The only information cited by the ACLU was a media report, key portions of which the publisher later clarified that it could not confirm. In fact, although Verizon cannot and will not confirm nor deny whether it has a relationship with the classified NSA program, it has noted that the media reports relied upon by the ACLU have made claims concerning Verizon that are false. Thus, the media reports cited by the ACLU do not provide "reasonably trustworthy information" that would lead the Commission to a reasonable belief that Verizon violated a Commission rule. Moreover, the Commission will be unable to obtain *any* information concerning whether Verizon had any role in the classified NSA program,

and thus will have no basis on which it can determine whether the news media's characterizations of the NSA's activities are credible.

As Verizon has also explained in previous comments, the assumptions in the popular press that the alleged assistance in connection with the NSA program violates the law are without any basis. Federal and state statutes and rules governing the privacy of telecommunications and customer data do not forbid 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.[1/] Further, these laws provide that "no cause of action shall lie" against those providing assistance pursuant to these authorizations[2/] 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 brought under this chapter or any other law."[3/] Given these myriad lawful ways in which telecommunications providers may assist the government under particular circumstances, there is no reasonable basis for the Commission to find that probable cause of a rule violation exists. Moreover, because Verizon would be unable under federal law to provide the Commission with any information concerning its alleged cooperation with the NSA, the Commission would not be in a position to evaluate the legality of any alleged disclosures.

3. If the Commission decides not to issue a complaint now, will Verizon and AT&T agree to maintain records, if any, documenting all instances in which they provided customer proprietary network information of a Washington customer to the federal government without a warrant or other legal process, and without the customer's consent?

The United States has explained repeatedly that Verizon is prohibited from providing any information concerning its alleged cooperation with the NSA program. Thus, as it has stated consistently, Verizon cannot confirm or deny cooperation in such a program, nor acknowledge whether any records exist that would be responsive to this request. Nonetheless, if requested by the Commission, Verizon would agree not to destroy relevant records, if any exist, until underlying issues are resolved. Such a commitment is consistent with various obligations to retain relevant information that Verizon already faces as a party to ongoing litigation on this subject.

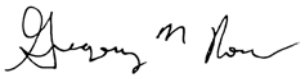
1/ *See, e.g.*, 18 U.S.C. §§ 2511(2), 2511(3), 2518(7), 2702(b), 2702(c), 2703, 2709; 50 U.S.C. §§ 1805(f), 1843. For example, 18 U.S.C. § 2709 requires a telephone company to disclose certain information if it receives a "national security letter." Similarly, Section 2511(2)(a) expressly authorizes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

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

3/ *See, e.g.*, 18 U.S.C. §§ 2520(d), 2707(e); § 3124(e).

We appreciate the further opportunity to comment on this matter.

Sincerely,



Gregory M. Romano

Enclosures