

EXHIBIT G

1 BEFORE THE PUBLIC SERVICE COMMISSION
2 OF THE STATE OF DELAWARE
3 VOLUME 1
4

5 IN RE: IN THE MATTER OF :
6 THE REQUEST OF TEN CUSTOMERS :
7 TO INITIATE AN INVESTIGATION :
8 INTO WHETHER VERIZON DELAWARE, : PSC DOCKET NO. 06-179
9 INC., AND AT&T COMMUNICATIONS :
10 OF DELAWARE, LLC, HAVE :
11 IMPROPERLY SHARED TELEPHONE :
12 RECORDS (FILED MAY 25, 2006) :

13 Public Service Commission Hearing taken
14 pursuant to notice before Gloria M. D'Amore, Registered
15 Professional Reporter, in the offices of the Public
16 Service Commission, 861 Silver Lake Boulevard, Cannon
17 Building, Suite 100, Dover, Delaware, on Tuesday, June
18 20, 2006 beginning at approximately 1:05 p.m., there
19 being present:

20 APPEARANCES:

21 On behalf of the Public Service Commission:
22 ARNETTA McRAE, CHAIR
23 J. DALLAS WINSLOW, COMMISSIONER
24 JAY LESTER, COMMISSIONER
 JOANN CONAWAY, COMMISSIONER
 JEFFREY CLARK, COMMISSIONER

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1 APPEARANCES CONTINUED:

2 On behalf of the Public Service Commission Staff:
GARY A. MYERS, ESQUIRE

3
4 On behalf of the Public Service Commission Staff:
REGINA A. IORII, ESQUIRE

5 On behalf of the Public Service Commission Staff:
BRUCE H. BURCAT, EXECUTIVE DIRECTOR
6 KAREN J. NICKERSON, SECRETARY

7 On behalf of the Office of the Public Advocate:
G. ARTHUR PADMORE

8
9 On behalf of the
AMERICAN CIVIL LIBERTIES UNION OF DELAWARE:
JULIA M. GRAFF, ESQUIRE

10 DREWRY FENNELL, ESQUIRE

11 On behalf of AT&T & TCG DE VALLEY:
DAVID W. CARPENTER, ESQUIRE

12 WENDIE C. STABLER, ESQUIRE

13 On behalf of VERIZON DELAWARE, INC.:
LEIGH A. HYER, ESQUIRE

14 ANTHONY E. GAY, ESQUIRE

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1 CHAIR McRAE: Moving onto the next
2 matter, which is the complaint of various parties brought
3 by the ACLU against Verizon and AT&T.

4 Would the parties come forward?

5 MR. MYERS: Madam Chair. It's a strange
6 world to see AT&T and Verizon at the same table.

7 CHAIR McRAE: Yes. We ought to have had
8 a photograph so we can post it on the Commission wall.

9 I understand Julia Graff is representing
10 the ACLU.

11 Would you all indicate who you are for
12 the record.

13 MS. GRAFF: I'm Julia Graff representing
14 the ACLU.

15 MS. FENNELL: I'm Drew Fennell also
16 representing the ACLU.

17 MR. GAY: Anthony Gay, as I'm sure you
18 Commissioners know.

19 I would like to introduce Leigh A. Hyer,
20 who is new Mid-Atlantic General Counsel for Verizon.

21 CHAIR McRAE: Welcome.

22 MR. CARPENTER: David Carpenter
23 representing AT&T.

24 MS. STABLER: Wendie Stabler. Local

1 counsel representing AT&T.

2 CHAIR McRAE: Since the ACLU is the
3 Complainant, you might want to begin.

4 MS. GRAFF: I would like to start by
5 thanking the Commissioners for taking the time to give
6 us, as well as counsel for Verizon and AT&T, the
7 opportunity to speak here today.

8 I would also like to thank my colleagues
9 from other phone companies, as in some cases, traveling
10 great distances to be here today so all viewpoints might
11 be aired.

12 I hope my comments will be of assistance
13 to the Commission in its deliberations.

14 Let me start by clarifying what the ten
15 complainants and the 110 Delawareans who submitted their
16 names in support of our complaint are not asking of this
17 Commission.

18 They're not asking for an investigation
19 into the legality of the NSA Domestic Surveillance
20 Program.

21 They're not asking you to sift through
22 reams of top-secret government information, which in the
23 hands of Al Qaeda Operatives, might jeopardize national
24 security.

1 We are not here today to talk about
2 foreign intelligence surveillance, although AT&T and
3 Verizon might like you to think that we are.

4 We are talking about the surveillance of
5 domestic phone calls where both parties are in the United
6 States, and at least one of them is right here in
7 Delaware.

8 Delaware telephone customers have a
9 right to know whether information about their phone use
10 is not being kept private.

11 All the complainants are asking this
12 Commission to do is investigate whether Verizon and AT&T
13 handed over the private call records of Delaware
14 subscribers without a subpoena, a court order, or other
15 lawful authority. If they did so with no lawful
16 authority from the Federal government, then they may have
17 violated Delaware privacy and Consumer Protection Laws.

18 Furthermore, the complainants request
19 that this Commission take action within its power to
20 ensure that such violations do not continue to take place
21 in the future.

22 We respectfully suggest that this could
23 take the form of issuing regulations governing the
24 privacy of the customers call records of regulated

1 utilities, and we are prepared to submit a model
2 regulation should the Commissioner so desire.

3 In their responses to the ACLU's request
4 for a Commission investigation, Verizon and AT&T have
5 attempted to hide behind a misreading of the Commission's
6 authority and a misapplication of an evidentiary
7 privilege.

8 In support of my client's position, I
9 offer the following.

10 First, the Commission has both the
11 authority and the obligation to investigate whether and
12 to what extent Verizon and AT&T, if their actions in
13 Delaware, impinge on the privacy rights of Delaware's
14 telephone subscribers violate Delaware law.

15 Second, the statutory immunities that
16 AT&T cites in its response only apply where a
17 telecommunications company relies in good faith on a
18 warrant, subpoena, court order, or other lawful authority
19 which may include the written certification of the
20 Attorney General of the United States, and where the
21 underlying investigation is not conducted, as it is here,
22 solely on the basis of activities protected by the First
23 Amendment activities.

24 Third, Verizon and AT&T cannot assert

1 the state secrets privilege to shield themselves from
2 this investigation.

3 If you'll permit me, I can outline these
4 arguments in further detail to aid the Commission in its
5 deliberations.

6 The Commission has both the authority
7 and the obligation to investigate whether these companies
8 have put the rights and well-being of their Delaware
9 subscribers at risk.

10 The Commission's grant of authority from
11 the Legislature is broad and robust, and evidences an
12 intent by the Legislature that this Commission should
13 actively investigate and regulate public utilities in the
14 State of Delaware.

15 The jurisdictional statute for the
16 Public Service Commission states in Title 26, Section
17 201(a) that the Commission shall have exclusive original
18 supervision and regulation of all public utilities.

19 Public utilities, like Verizon and AT&T,
20 willingly submit to the authority of the members of this
21 Commission as a condition of being allowed to do business
22 in this State.

23 The only reason these companies even
24 have this caller information is because the members of

1 this Commission have permitted these companies to operate
2 in this State. For them to now argue that this
3 Commission lacks the power to oversee how they are using
4 that license to operate is deeply troubling to those of
5 their customers in Delaware who look to this Commission
6 to regulate and supervise utilities doing business here.

7 Section 206 states that the Commission
8 may investigate upon its own initiate or upon complaint
9 in writing any matter concerning any public utility.

10 Section 207 of the Legislature grants
11 the members of the Commission access at all times and the
12 right to inspect and examine any and all books, accounts,
13 records, memorandum, property, plant, facilities and
14 equipment of all public utilities.

15 This Commission's own Regulation No.
16 10 800 020 No. 3.1 on the Availability of Records states,
17 All books, accounts, papers, records, memorandum required
18 by these rules or which are necessary for the
19 administration thereof, shall be open and available for
20 examination by the Commission or its authorized
21 representatives at all times.

22 The power to investigate and regulate
23 public utilities, such as Verizon and AT&T, was upheld by
24 the Delaware Court of Chancery in the 1985 case called

1 Lipstein versus Diamond State Telephone in which the
2 Court of Chancery confirmed that the 1974 revision of
3 Section 201(a) demonstrated a legislative intent to
4 invest in the Commission exclusive jurisdiction over all
5 matters concerning supervision and regulation of public
6 utility rates and services.

7 Under Section 209(a) of Title 26, the
8 Commission is empowered to fix just and reasonable
9 practices and services by order after the hearing.

10 As I mentioned before, this could take
11 the form of issuing regulations to ensure that customer
12 privacy is not compromised in the future. And I have a
13 copy of the model regulations, if you would like that.

14 Like all other public utilities in the
15 State of Delaware, Verizon and AT&T are subject to
16 special regulation and oversight by the State. These
17 companies are not free to declare when that regulation
18 and oversight does and does not apply. Because this
19 Commission has exclusive jurisdictional authority,
20 jurisdictional authority with respect to the challenged
21 activities.

22 Furthermore, similar investigations are
23 being opened by other State Public Utility Commissions,
24 such as Washington and Vermont. Maine has begun to look

1 into the matter.

2 My second point with respect to the
3 immunities claim by AT&T in its response.

4 AT&T, in its response, cites several
5 Federal statutes pertaining to national security and
6 classified information, and states that these statutes
7 offer the company immunity, even if the company did
8 violate Delaware and Federal law by handing over private
9 information.

10 The companies may, as AT&T argued, be
11 shielded from liability for violating State and Federal
12 laws. AT&T's response includes a footnote that cites
13 several Federal statutes, such as 18 USC Section 2511(2),
14 which provide absolute immunity from the claims in the
15 ACLU complaint.

16 However, that statute requires that
17 before complying with the Federal request for assistance,
18 the telecommunications company must receive a
19 certification in writing from the U.S. Attorney General
20 that no warrant or court order is required by law, and
21 that all statutory requirements are met and that the
22 specified assistance is required.

23 We are not asking this Commission to
24 penalize AT&T or Verizon for providing information

1 required under lawful authority.

2 We are requesting that the Commission
3 merely investigate whether this information was handed
4 over under lawful authority.

5 If the companies did do so, after
6 receipt of a certification in writing, then let them
7 prove that to the Commission.

8 Similarly, as indicated in one of AT&T
9 exhibits, Electronic Communications Privacy Act also
10 confers absolute immunity on communication providers
11 acting with government authorization. This is in Section
12 2703 of Title 18.

13 Again, we do not dispute this. We
14 merely want to know whether such authorization did,
15 indeed, come from the Federal Government or whether the
16 companies volunteered private customer information
17 without lawful authority.

18 Again and again the statutes cited by
19 AT&T in its response, Section 1805, Section 2702, Section
20 3124, all of these statutes only extend absolute immunity
21 if the company received a certification for foreign
22 intelligence surveillance, not domestic, or for providing
23 assistance pursuant to court order or a request for
24 emergency assistance or for providing investigative

1 assistance on demand of lawful authority.

2 Third, as for the state-secrets
3 privilege that Verizon and AT&T --

4 CHAIR MCRAE: Excuse me. How many
5 arguments do you have there? Are you, basically,
6 reading? We do have your documents, as well.

7 MS. GRAFF: I am just responding to some
8 information in their responses that I did not allude to
9 in my complaint. I will be brief.

10 The state-secrets privilege that Verizon
11 and AT&T asserts is misused in the case.

12 First, as the case cited by AT&T,
13 Ellsberg, makes it clear the privilege may be asserted
14 only by the government itself. Neither a private party
15 nor an individual official may seek its aid. To my
16 knowledge, the government has not intervened in this
17 case.

18 Second, the privilege must first be
19 formally claimed by the head of the department that has
20 control over the matter.

21 Third, the Supreme Court has made it
22 clear that this privilege is not to be lightly invoked.
23 The privilege may not be used to shield any material, not
24 strictly necessary to prevent injury to national

1 security, and, whenever possible, sensitive information
2 must be disentangled from nonsensitive information to
3 allow for the release of the latter.

4 In this case, the government has not
5 shown how it is even remotely plausible that the fact of
6 public awareness of whether these companies violated
7 Delaware law by handing over their private records
8 without court order would jeopardize national security.

9 As I've stated before, we are not asking
10 this Commission to delve into the precise methods which
11 this information was recorded, or what the National
12 Security Agency may or may not have done with it once it
13 received it.

14 You have before you a very limited
15 inquiry. Did either of these companies turn over the
16 confidential records of their Delaware customers without
17 a subpoena? That's all we want to know.

18 If the allegations contained in our
19 complaint are true, then the company are cooperating in a
20 surveillance program of the privacy of Delaware telephone
21 customers under the legal and regulatory guardianship of
22 this Commission.

23 We are here simply to make the point
24 that the citizens of Delaware are entitled to know

1 whether regulated utilities in their state are violating
2 their privacy. The only state secret at issue in this
3 case is whether regulated utilities violated Delaware
4 law, and they are now hiding their misconduct behind an
5 evidentiary privilege that does not belong to them.

6 CHAIR McRAE: Thank you.

7 COMMISSIONER CLARK: Madam Chair, I
8 have some general questions.

9 You mentioned three Public Service
10 Commissions or Public Utility Commissions that are
11 currently looking at the issue.

12 How many complaints, such as this, were
13 filed across the company? Do you know?

14 MS. GRAFF: There are 25 ACLU affiliates
15 before Public Utility Commissions.

16 COMMISSIONER CLARK: And three of them
17 are actively or semi-actively undertaken a review?

18 MS. GRAFF: To my knowledge Washington,
19 Vermont and Maine.

20 COMMISSIONER CLARK: Just one other
21 question.

22 How many courts is it working its way
23 through now at the same time?

24 MS. GRAFF: I believe this was alluded

1 to in the AT&T material. They would be more able to
2 answer this question. But several courts. I think,
3 maybe, 20 that have been consolidated.

4 MR. CARPENTER: I'll respond.

5 COMMISSIONER CLARK: All right. Thank
6 you.

7 CHAIR McRAE: Very good. Now, is it
8 AT&T? Which order?

9 MS. STABLER: Mr. Carpenter will speak.

10 MR. CARPENTER: Madam Chair and Members
11 of the Commissioners.

12 First, to respond to your question,
13 there are currently 34 nationwide class action Federal
14 Court lawsuits that have been brought against AT&T,
15 Verizon, and other telecommunication carriers challenging
16 the same conduct that the ACLU has challenged here.

17 In addition, there is a lawsuit that the
18 United States Government has brought against the one
19 state that is attempting to investigate these matters,
20 and that's New Jersey.

21 And in that suit, the Federal government
22 is asserting that this investigation is something that
23 the states have no jurisdiction over for Federal law.
24 Both because the subject matter of the case is national

1 security, which is an exclusively federal function, and
2 because federal statutes prohibit the carriers from
3 providing the kind of information about the
4 certifications and the other things to which Ms. Graff
5 refers. And that because Federal law prohibits the
6 disclosure of this information to state authorities.

7 Any efforts by state authorities to
8 obtain this information are preempted. And in this
9 lawsuit, accordingly, the United States seeks to enjoin
10 the State Attorney General from conducting the
11 proceeding, and seeks to enjoin AT&T, Verizon and the
12 other carriers, who are the subject of that subpoena
13 there, from responding to the subpoena.

14 So, this is a real situation where the
15 carriers here are caught in the middle.

16 Federal law prohibits us from providing
17 the information that you would need to conduct any sort
18 of meaningful investigation. And that's why we would
19 submit that the investigation shouldn't proceed. And
20 that what you should do is dismiss the case now, or, at
21 the very minimum, exercise your authority under Rule 16
22 to defer proceedings until these many Federal proceedings
23 are concluded.

24 One thing you'll get an answer to,

1 particularly, as a result of this lawsuit, the United
2 States has brought against the New Jersey authority and
3 against the carrier, is whether you have any authority at
4 all to proceed.

5 I think it's quite clear, and I'll go
6 into this in a little more detail, why a Federal law
7 would preempt you from this proceeding. But if you have
8 any doubt that, there's a case pending right now where
9 that question is teed up and is going to be decided.

10 And I would submit that you should
11 dismiss the case. But at a minimum, you should defer
12 proceeding and see what the outcome is in that case.

13 But that's a response to your question.

14 And as you probably don't know, I'm one
15 of the lawyers who is representing AT&T in what is truly
16 a nationwide, federal litigation, arising from these
17 allegations, allegations that AT&T, Verizon and other
18 carriers have acted unlawfully in been providing calling
19 record information to the National Security Agency in
20 connection with the Anti-terrorist Surveillance Program
21 that it initiated following 9/11.

22 We've provided very, I guess,
23 comprehensive information.

24 CHAIR McRAE: Three trees.

1 MR. CARPENTER: Pardon me?

2 CHAIR MCRAE: Three trees.

3 MR. CARPENTER: Yes. Unfortunately, we
4 did some damage to our nation's forest.

5 And I'm not going to endeavor here to
6 repeat all of this. But I just want to highlight the
7 basic facts about this litigation because I think
8 Ms. Graff's claims here really proceed from a
9 misapprehension of the nature of the Federal interest
10 that have been involved. And, particularly, a
11 misapprehension of the prohibition that simply precludes
12 carriers from providing you with information that you
13 need to conduct the information, and that preclude you
14 from conducting any meaningful investigation.

15 This Commission, obviously, has plenty
16 of authority over carriers that can be exercised in
17 almost any other imaginable situation.

18 But in this particular situation,
19 Federal law precludes you from proceeding. And to
20 attempt to do so would be really an exercise in futility
21 that would put carriers in an impossible position where
22 we can be caught between the competing demands of State
23 authorities and Federal authorities. And because under
24 the Federal Constitution, Federal law is Supreme, we're

1 going to have to comply with the demands from the Federal
2 authorities.

3 But the history of this is something I
4 can just layout. It's, probably, worthwhile to take a
5 minute to layout.

6 The basic disclosures about this
7 Anti-terrorist program were made in a New York Times
8 article that appeared last December.

9 The President then acknowledged that,
10 indeed, the NSA is conducting a Wanted List Terrorist
11 Surveillance Program, which is targeted at communications
12 to and from suspected Al Qaeda agents.

13 At the same time the President made
14 these disclosures, the Justice Department submitted a
15 lengthy legal justification for the program to Congress,
16 which was placed before the House and Senate
17 Subcommittees on Intelligence.

18 Then last January, the first of what are
19 now 34 Federal Court consumer class action lawsuits were
20 brought against AT&T, defendant.

21 This first case is called
22 Hepting v. AT&T. It was filed in the Federal Court in
23 San Francisco. And one of the main allegations there is
24 the same allegation here, that AT&T has been providing

1 access to calling records without lawful authorization.

2 The allegation that Ms. Graff referred to.

3 AT&T moved to dismiss the case on a
4 number of grounds. One of which is one that relies on
5 these statutory immunities that Ms. Graff discussed.

6 The main one being if we have a certain
7 certification from the Attorney General that we are
8 immune from suit.

9 Now, the key fact is that the United
10 States then moved to intervene in the case and moved to
11 dismiss by invoking what's known as the Military State
12 Secrecy Privilege. This is not an evidentiary privilege.
13 This is a constitutionally-based doctrine that entitles
14 the United States to prevent the litigation, the factual
15 claims, when that would require in the judgment of the
16 senior officials of the United States, disclosure of
17 information that would risk harming the national security
18 or the intelligence gathering capabilities of the United
19 States.

20 As Ms. Graff correctly says, this is a
21 privilege that can only be invoked by the United States,
22 and under the Supreme Court decision, has to be invoked
23 by the head of a department.

24 Here the privilege was invoked by

1 Ambassador Negrem Ponte, the Director of National
2 Intelligence.

3 He said that any disclosure of
4 information involving the potential subjects of the
5 surveillance activities, whether AT&T is participating or
6 not in these surveillance activities, and the scope of
7 the activities is all projected by the State Secrets
8 Doctrine.

9 In particular, certification that
10 Ms. Graff says this Commission should investigate whether
11 AT&T and Verizon has received are things that the United
12 States specifically identify as information that can't be
13 disclosed without revealing state and military secrets.

14 So, in that lawsuit, when discovery was
15 sought on the issue of whether AT&T has the
16 certification, the government opposed it, and the
17 District Court ruled that no discovery can proceed. That
18 AT&T cannot disclose any evidence about certification.
19 The evidence that Ms. Graff says that you should be
20 trying to get from us until there has been a
21 determination of this threshold issue whether the
22 Military State Secrets Doctrine is properly invoked.

23 If the District Court finds it has been
24 properly invoked, which is determination that the

1 District Court will make under the law reviewing
2 classified documents that have been submitted by
3 Ambassador Negrem Ponte and the head of the NSA, General
4 Alexander, then it is the District Court's role or job in
5 Supreme Court cases to dismiss the suit.

6 Now, Hepting is not the only case, as I
7 mentioned before in response to the question about the
8 number of cases. There have been 34 other cases that
9 have been filed. And a petition has been filed with the
10 Judicial Panel on Multi District Litigation to
11 consolidate all these 35 floor cases, and also cases that
12 have been brought against the United States Government
13 before a single court for consolidated proceedings.

14 And one of the reasons for this proposed
15 consolidation is that it will centralize review of what
16 the Government represents to be highly sensitive,
17 classified information in order to minimize the risk that
18 it has disclosed too broadly.

19 Now, members of Congress responded to
20 the U.S.A. Today article that was published on May 11th,
21 and, basically, lead to all of these lawsuits.

22 Members of Congress responded by asking
23 the FCC to exercise its general regulatory authority,
24 which as the Interstate Services, is the same as this

1 Commission's authority over Intrastate Services.

2 Congress asked the FCC to investigate
3 whether AT&T had violated Federal statute by providing
4 access -- whether Verizon and AT&T violated Federal
5 statute -- by providing access to this calling record
6 information.

7 The FCC decided that it had no
8 authority, and no ability to do so. It determined that
9 Federal law prohibits the carriers from providing even
10 the FCC with information about these activities. And
11 because it couldn't collect the information, it couldn't
12 possibly conduct an investigation.

13 Now, this Commission faces that same
14 fundamental problem, that same fundamental, procedural
15 obstacle this in trying to respond to the ACLU's request.

16 Because just as Federal law prohibits
17 carriers from giving FCC access to information about
18 these classified activities, so, too, is it going to
19 prohibit this Commission from obtaining any of that
20 information.

21 Carriers, obviously, can't waive the
22 State Secrets Privilege. And Federal statutes make it a
23 felony for AT&T to provide this information to this
24 Commission, or to any state commissions, or even to the

1 FCC.

2 And for other reasons, which are alluded
3 to in these papers and discussed --

4 CHAIR McRAE: Actually, they are rather
5 explicitly set forth, more than alluded to.

6 MR. CARPENTER: Explicitly set forth.

7 The Federal Supreme Court decisions hold
8 that state tribunal can't investigate national security
9 activities and can't make demands of private companies to
10 collect information that's relevant to these national
11 security issues.

12 So, this Commission faces a much more
13 fundamental barrier than trying to investigate these
14 issues than even the FCC did.

15 And the futility of this exercise is
16 illustrated by the events that I referred to at the
17 outset that recently occurred in New Jersey.

18 Just by way of clarification. New
19 Jersey is the only state that is trying to investigate
20 this. Washington, Vermont, Maine, they are conducting
21 proceedings in which they are deciding whether to
22 investigate this.

23 The only state that has tried to
24 investigate this and collect the relevant information

1 from the carriers is New Jersey.

2 In mid-May, the New Jersey Attorney
3 General issued a subpoena to AT&T and Verizon and to
4 several other carriers directing them to provide
5 information about whether they were unlawfully providing
6 this calling information to NSA. And the return date for
7 the subpoena was June 15th.

8 On June 14th, the United States brought
9 the lawsuit I alluded to. Asserted all of the reasons
10 why Federal law preempted the state from conducting the
11 investigation and preempted the carriers and barred the
12 carriers from responding to any of the request for
13 information.

14 CHAIR McRAE: You do not need to go
15 through that because they are here in the material.

16 MR. CARPENTER: Fine, Your Honor. I
17 will make one further point.

18 In light of all of this activity, there
19 is no compelling reason for this Commission to go out on
20 a limb and try to investigate this.

21 And we would submit that you dismiss
22 this complaint, or at a minimum defer proceedings pending
23 the outcome of all of this federal litigation that I
24 referred to.

1 Thank you.

2 COMMISSIONER WINSLOW: Madam Chair, I
3 have a question.

4 Has the U.S. Attorney's Office in
5 Delaware been notified by any of the parties or this
6 Commission that this activity is occurring on this agenda
7 today?

8 MR. CARPENTER: No, Your Honor. I'm not
9 aware of AT&T having notified them. Because at this
10 moment, all you are doing is deciding whether to conduct
11 a proceeding.

12 The time in which we would feel any need
13 to tell any Federal authorities about this is if you
14 actually decided to conduct the investigation and were
15 making demands on the carriers that we couldn't adhere to
16 without also violating Federal law.

17 And the mere fact that you're
18 considering holding an investigation itself doesn't
19 require us to do anything that would violate Federal law.
20 So, there really has been no occasion for us to talk to
21 the authorities in the U.S. Attorney's Office in
22 Delaware.

23 COMMISSIONER WINSLOW: As you pointed
24 out, you are the party in the middle. The aggrieved

1 party would be the United States Government; wouldn't it?

2 MR. CARPENTER: Yes. That's right, Your
3 Honor. That's why the United States, when they brought
4 this lawsuit, they sued not only the state authorities
5 that were conducting the investigation, but the carriers.
6 Because we have the information that the government says
7 can't be disclosed to state authorities or anyone else
8 consistent with overriding national security interest and
9 requirements of Federal law.

10 CHAIR McRAE: Additional questions?

11 COMMISSIONER CLARK: Yes. It seems like
12 ultimately this is going to have to be a decision decided
13 by the Federal Court, the extent that it's privileged
14 and what has to be disclosed.

15 You talked about a case being teed up.
16 When do you reasonably expect, at least, at the District
17 Court level, to have decisions come forward in this case?

18 MR. CARPENTER: It is hard to predict
19 how fast the case will move.

20 The New Jersey Attorney General is
21 currently making no attempts to enforce the subpoena.
22 So, there is no motion for a preliminary injunction
23 that --

24 COMMISSIONER CLARK: It doesn't look

1 like it was even pled. It was just a declaratory action.

2 MR. CARPENTER: Declaratory judgment.

3 And simultaneously, the United States sent a letter,
4 which was included in this voluminous material that set
5 out the reasons why the New Jersey Attorney General
6 should reconsider her actions, and ask that, at a
7 minimum, she take no actions to enforce the subpoena
8 pending the resolution of the case.

9 And she has, at least, told us for the
10 next 30 days, we have no obligation under the subpoena.

11 And so, it's possible her posture will
12 be we can wait for the outcome of the lawsuit. But maybe
13 she will decide after 30 days that really she wants to
14 enforce the subpoena and things be brought to a head.

15 But in terms of these other Federal
16 lawsuits, which are going to be making the determination
17 whether this state secrets privilege has been properly
18 invoked, they are moving on a pretty fast track.

19 In the Hepting case in San Francisco,
20 the United States' motion to dismiss is fully briefed,
21 and it is being orally argued on June 23rd, later this
22 week.

23 So, there is a real prospect that there
24 could be a decision, at least by a Federal District

1 Court, in one case fairly soon.

2 In a second case, the Terkel case, which
3 is in Chicago, involves just the calling records. But
4 the Hepting case involves allegations about traditional
5 wire taps, as well as access to calling records.

6 But in the Terkel case in Chicago, the
7 judge has set a schedule that would have Motion to
8 Dismiss, including the Motion to Dismiss the United
9 States argued on July 13rd.

10 So, there is a real prospect that there
11 will be clarity quite soon, at least in terms of the
12 decision by the District Court.

13 So, I think there are lots of reasons
14 for the Commission, while we would just urge it to
15 dismiss this case, there are lots of reasons for the
16 Commission to defer, at a minimum, defer proceedings here
17 and see what happens in this Federal litigation.

18 CHAIR McRAE: Can we hear from Verizon
19 to the extent it is not duplicative? It would be
20 appreciated.

21 MS. HYER: I will be very brief, and I
22 will try not to duplicate too many of the points.

23 We agree with the synopsis that
24 Mr. Carpenter has put forth.

1 And we agree, also, that even though
2 Ms. Graff is seeking to narrow down what it is that the
3 ACLU is, in fact, trying to get access to, that
4 necessarily requires this Commission to conduct an
5 investigation of the activities of the National Security
6 Agency and alleged cooperation by telephone companies
7 with the NSA and its Anti-terrorist Program. There's no
8 way around that.

9 And the President has explained that the
10 NSA and its Anti-terrorist Program is highly classified.
11 And that includes the identities of any cooperating
12 parties, and it includes the nature of the cooperation.
13 It includes any process that may or may not have been
14 provided. The scope of what might have been requested.
15 All of that is highly classified information.

16 And because of that, as we said in our
17 press release that you have before you, we can't confirm
18 or deny, as a matter of Federal law, whether we have any
19 relationship whatsoever with that NSA program.

20 It is a Federal felony to divulge
21 classified information concerning the communication
22 activities of the United States to any person that has
23 not been authorized by the President or his lawful
24 designee to obtain that information.

1 And this Commission has not been
2 authorized by the President to proceed with any
3 information regarding classified activities of the
4 National Security Agency.

5 Other provisions of Federal law that are
6 cited in AT&T's papers, that Mr. Carpenter alluded to
7 also prohibit the disclosure of any information regarding
8 the NSA activities, or any cooperation with them, or the
9 scope of what might have been requested, or the scope of
10 what may or may not have been turned over. All of that
11 information is classified.

12 As Mr. Carpenter also set forth, the
13 Justice Department has asserted the state secrets
14 privilege.

15 It is not the case that in Washington,
16 Maine, or Vermont that those commissions are actually
17 conducting an investigation at this time. They are only
18 considering whether to conduct that investigation.
19 Vermont is considering that issue tomorrow. And Verizon
20 has not even responded in anyway to the allegations in
21 that proceeding.

22 Same thing with Washington. Same thing
23 with Maine. Maine is still at the briefing stage. No
24 decision has been made by any of those commissions to

1 move forward with an investigation.

2 Therefore, the absence of the Department
3 of Justice here today says nothing whatsoever about what
4 their actions may or may not be if the commission were to
5 move forward. And I am fairly competent if the
6 commissions were to make a decision to go forward that
7 their reaction would be similar to the reaction in
8 response to the New Jersey Attorney General subpoena.
9 And that reaction was fast and swift.

10 And as Mr. Carpenter indicated, the
11 defendants in the lawsuit that was brought by the DOJ
12 include the telephone companies. They are seeking to
13 enjoin us from responding to any inquiry by the New
14 Jersey State Government.

15 CHAIR McRAE: You mentioned a number of
16 times, as Mr. Carpenter indicated.

17 Do you have some additional comments
18 separate and apart from what Mr. Carpenter has already
19 indicated?

20 MS. HYER: Nothing of substance to add,
21 other than to state that Verizon's position is also that
22 the Commission should move to dismiss, or should dismiss,
23 excuse me, this proceeding and do so without prejudice.
24 But we think it should be dismissed.

1 But if the Commission chooses not to
2 dismiss at this time, you should definitely defer any
3 proceeding and wait for the outcome of the Federal cases
4 that will decide the threshold issues in this case about
5 whether or not any investigation by a State agency is
6 proper.

7 Thank you.

8 CHAIR McRAE: Now, I do believe in your
9 comments you attempted to respond to the various claims
10 that you knew were coming from AT&T and Verizon.

11 Is there something additional that you
12 want to add or put forth before us? Not a review, please
13 but if there was some response that you did not
14 anticipate.

15 MS. GRAFF: Yes, Your Honor. Thank you
16 very much.

17 I would like to respond, with due
18 respect, to the very difficult position in which the
19 carriers find themselves.

20 I would like to remind this Commission
21 that the Government has not intervened in this particular
22 case. Although, Mr. Carpenter is absolutely correct that
23 the private carrier cannot waive the state secrets
24 privilege, they also cannot establish, it has been

1 established or asserted yet in this case which is before
2 you today.

3 To my knowledge, the information that we
4 are seeking has not been certified as classified
5 information under Title 18 Section 798. If it has, then
6 someone should be letting this Commission know about
7 that.

8 Furthermore, I would suggest, again,
9 with all due respect, that this Commission just as easily
10 as dismissing or deferring could actually initiate an
11 investigation in deferring enforcement or defer the
12 response time and any interrogatories that you issue
13 until after the pending cases, if that would make the
14 Commissioners feel more comfortable.

15 But what is clear is that someone in
16 this room needs to be looking out for the privacy and
17 consumer protection rights of Delaware telephone
18 subscribers.

19 And the companies in this room feel that
20 they are unable to do so at the moment.

21 CHAIR McRAE: Thank you. Commissioner
22 Winslow.

23 COMMISSIONER WINSLOW: Madam Chair, out
24 of curiosity, I hear over here that they can't say yes or

1 no, to answer your question. But it's off the record,
2 but my recollection is, the "GNAP" (phonetic)
3 organization is not terribly concerned about the possible
4 felony prosecution because they came out immediately and
5 said, No, if I recall correctly, we're not doing that.

6 Has there been any action against them
7 by the Federal Government to enforce any type of criminal
8 penalty?

9 MS. GRAFF: To my knowledge, no criminal
10 prosecution has taken place against request.

11 COMMISSIONER CLARK: I can tell you my
12 thoughts on it, for discussion purposes.

13 I mean, it seems like it's a pretty
14 important issue that you're asking us to look into. And
15 it seems like in the end, this is going to have to be
16 decided in the Federal Courts, since it is going to be a
17 Federal preemption and Federal privilege issue.

18 So, for us to be out in front of it in a
19 situation where in another jurisdiction they are going to
20 have to make a decision whether or not this issue can go
21 forward, I don't think that's a position that, at least
22 at this stage, I feel comfortable asserting ourselves
23 into.

24 I don't have any objection, and I will

1 put it in the form of a motion, of deferring the
2 proceeding for six months to come back, and at that time,
3 if you choose to, to re-invigorate the docket to come
4 forward with what some of the Federal cases have decided
5 in this issue. And at that point, if it is appropriate,
6 to go ahead and investigate the matter at that time. I
7 don't know what the rest of the Commission would want to
8 do.

9 CHAIR McRAE: Put it in the form of the
10 motion.

11 COMMISSIONER CLARK: I would like to
12 move at this time that for the aforementioned reasons
13 that I stated that the matter be deferred for a period of
14 six months and at which can be brought back at the
15 request of the litigants and brought forward at that
16 time.

17 COMMISSIONER WINSLOW: At the request of
18 the litigants or the complainants.

19 COMMISSIONER CLARK: The complainants.

20 COMMISSIONER CONAWAY: I will second
21 that motion.

22 CHAIR McRAE: It has been moved and
23 seconded.

24 I would just call for the comment that

1 an additional reason why that would be advisable in our
2 circumstance because we are resource constrained. And it
3 would be, to some extent, duplicative to put the staff
4 and other parties that work on this, when, in fact, the
5 same issue was going to be addressed in a number of other
6 jurisdictions in one way or another.

7 COMMISSIONER CLARK: Just along those
8 same lines, too, it is a situation, too, with the Federal
9 Communications Act, where the FCC, itself, didn't want to
10 examine this issue at this time based on that privilege.
11 And they got a pretty broad purview to look into these
12 issues, also, under the Federal statutes, and they've
13 declined to do it. And for that reason, at this time, we
14 should decline, too, and revisit the issue should you
15 want to bring it forward in the future.

16 CHAIR McRAE: As Commissioner Clark
17 said, it is not to minimize the importance of the issue.
18 It is the practicabilities of the moment that drive this
19 process. And certainly, if there is some developments in
20 six months or sooner, I would even say, the Commission's
21 door is not closed.

22 We do have a motion on the floor at this
23 point.

24 CHAIR McRAE: All those in favor.

1 Yea.

2 COMMISSIONER LESTER: Yea.

3 COMMISSIONER WINSLOW: Yea.

4 COMMISSIONER CONAWAY: Yea.

5 COMMISSIONER CLARK: Yea.

6 CHAIR McRAE: Opposed? Thank you.

7 (The Public Service Commission Hearing

8 was concluded at, approximately, 1:45 p.m.)

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C E R T I F I C A T E

STATE OF DELAWARE:

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NEW CASTLE COUNTY:

I, Gloria M. D'Amore, a Registered Professional Reporter, within and for the County and State aforesaid, do hereby certify that the foregoing Public Service Commission Hearing, was taken before me, pursuant to notice, at the time and place indicated; that the statements of said parties was correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the Public Service Commission Hearing is a true record of the statements given by the parties; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.

WITNESS my hand and official seal this 22nd day of June A.D. 2006.

GLORIA M. D'AMORE
REGISTERED PROFESSIONAL REPORTER
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