**BEFORE THE**

**WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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| In the matter of American Civil Liberties Union of Washington (ACLU) Request for Investigation of Possible Unlawful Disclosure of Private Customer Information by Telecommunications Companies to the National Security Agency (NSA) | ) ) ) ) ) ) | Docket No. UT-060856 |

**VERIZON COMMENTS**

Verizon Northwest Inc. ("Verizon") files these comments in response to the Commission's June 2, 2006 Notice seeking comment on "threshold legal and jurisdictional issues" raised by the ACLU's request for an investigation of alleged telephone company cooperation with the National Security Agency ("NSA").

Before turning to the specific questions posed by the Commission, Verizon notes several relevant actions by the Department of Justice ("DOJ") that have occurred since the Commission held its Open Meeting on May 31, 2006 and issued the Notice. On June 14, 2006, the DOJ filed suit in federal court in New Jersey seeking injunctive relief and a declaratory judgment that subpoenas issued by the New Jersey Attorney General seeking 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 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. Zulima v. Farber, et. al* at 13 (D.N.J. filed on June 14, 2006) (attached as Exhibit 1). 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 as Exhibit 2). Likewise, the DOJ sent a letter to the New Jersey Attorney General explaining, among other things, that "compliance with the subpoenas 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 that enforcing compliance with these subpoenas would be inconsistent with, and preempted by, federal law." (attached as Exhibit 3.) To Verizon's knowledge, none of the carriers named as defendants in the lawsuit have responded to the New Jersey Attorney General's subpoenas.

As the DOJ filing makes clear, and as explained further in response to the Commission's questions below: (i) any disclosure by Verizon concerning its alleged cooperation with the NSA would violate federal statutes; (ii) the federal government views the information at issue to be subject to the state secrets privilege; and (iii) the Commission lacks the authority and jurisdiction to initiate an investigation into these alleged national security activities. Indeed, it is for such reasons that 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 4).

Likewise, four state commissions – the only ones to decide to date whether to entertain the ACLU's petitions on this issue – have joined the FCC in determining not to pursue any investigation at this time. The Iowa Utilities Board 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 5). Similarly, the New York Public Service Commission "decline[d] to initiate any investigation into the alleged cooperation of AT&T and

Verizon with the National Security Agency" in response to a request by the New York Civil Liberties Union. Letter from William M. Flynn, Chairman, to New York Civil Liberties Union dated June 14, 2006 (attached hereto as Exhibit 6) at 1. In making this determination, the New York PSC observed that the FCC also has declined to conduct an investigation, and it noted the assertion of the state secrets privilege by the United States in *Hepting v. AT&T,* discussed below. *See id.* at 1-2. The General Counsel for the Virginia Commission also declined the ACLU's request because, among other things, it did not appear there were any "actions that the Commission could take — within its jurisdiction — to resolve the matters raised" by the ACLU. Letter from William H. Chambliss, General Counsel, Virginia State Corporation Commission to Kent Willis, Executive Director, ACLU of Virginia, dated June 1, 2006 (attached hereto as Exhibit 7). Finally, at an open meeting on June 20, 2006, the Delaware Commission decided to hold the ACLU complaint in abeyance for six months pending resolution of the federal issues in a federal forum. Transcript of Delaware Commission Meeting (June 20, 2006) (attached hereto as Exhibit 8). The Commission should similarly decline to initiate an investigation.

1. Does WAC 480-120-202 or any other state law or regulation prohibit a regulated telephone company or its affiliated interests from providing customer telephone calling information to the National Security Agency (NSA)?

Neither WAC 480-120-202 nor any other Washington statute or regulation could prohibit a telephone company from providing information to federal national security or law enforcement officials or otherwise assisting such officials in accordance with federal law. Federal laws generally limiting the disclosure of information concerning customers and their communications – the Wiretap Act, the Foreign Intelligence Surveillance 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/] To the extent that Washington laws do not contain similar exceptions or authorizations or purported to prohibit telephone companies from cooperating in accordance with such federal authorizations, those state laws 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.).

2. Does the Commission have the legal authority to compel a regulated telephone company or its affiliates to disclose whether it has provided customer calling information to the NSA?

The Commission does not have legal authority to compel Verizon to disclose classified information, including information concerning any cooperation with the NSA. 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. §

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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).

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 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).

The New Jersey complaint filed by the DOJ — *i.e.*, the agency that could *prosecute* Verizon for disclosing classified material without authorization — confirms that any disclosure by Verizon would violate federal statutes. *See, e.g.*, New Jersey Complaint ¶¶ 16-21, 48 ("Providing responses to the Subpoenas would be inconsistent with and would violate federal law including, but not limited to, Executive Order 12958, 18 U.S.C. § 798, and 50 U.S.C. § 402 note, as well as other applicable federal laws, regulations, and orders."). The Commission cannot force Verizon to violate federal law by requiring it to disclose information under authority of state law. *See, e.g.*, *English v. Gen. Elec. Co.*, 496 U .S. 72, 79 (1990) (noting that "the Court has found pre-emption [of state law] where it is impossible for a private party to comply with both state and federal requirements"); *see also Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963) ("A holding of federal exclusion of state law is inescapable and

requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce.").

3. Does the Commission have the legal authority to compel regulated telephone companies or their affiliates to release relevant information about such allegations?

For the same reasons as given in response to question 2, the Commission does not have such authority. The Commission lacks the authority or jurisdiction to investigate or resolve the ACLU's allegations that the activities alleged are unauthorized and, therefore, unlawful. Reaching a conclusion as to that question would require the Commission to investigate matters relating to national security and to interpret and enforce the federal statutes described above authorizing disclosures to federal national security and law enforcement officials in various circumstances. These areas fall outside the Commission's jurisdiction and authority. *See, e.g.*, *American Insurance Association v. Garamendi*, 539 U.S. 396, 427 (2003) (holding that subpoenas issued under state statute were invalid and preempted because the disclosure they sought would interfere with the President's conduct of foreign affairs); *Mite Corp. v. Dixon*, 633 F .2d 486, 491 (7th Cir. 1980) ("In the realms of national security and foreign affairs, state legislation has been implicitly preempted because both areas are of unquestionably vital significance to the nation as a whole."). Indeed, the DOJ has cited that lack of authority as one of the principal grounds for its suit in New Jersey. *See, e.g.*, New Jersey Complaint ¶¶ 38-43 ("The State Defendants' authority to seek or obtain the information requested in these Subpoenas is fundamentally inconsistent with and preempted by the Federal Government's exclusive control over all foreign intelligence gathering activities.").

4. Would an assertion of the military and state secrets privilege by the United States Government preclude the Commission from taking action against a regulated telecommunications company?

The DOJ has invoked the "state secrets" privilege in its New Jersey suit as one of the grounds that prohibit the New Jersey attorney general from inquiring into telephone companies' alleged cooperation with the NSA, as well as in pending federal litigation against telephone companies arising out of such alleged cooperation.[4/] *See, e.g.*, New Jersey Complaint ¶¶ 30-33. That well-established privilege entitles the United States to prohibit the disclosure of information that might otherwise be relevant to litigation 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).

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[4/] Numerous class action suits have been filed against Verizon in various federal and state courts concerning its alleged cooperation with the NSA program. The government has indicated in a recent filing in support of a motion by Verizon to stay one of the cases pending against it, *Bissitt v. Verizon Communications Inc.*, C.A. No. 06-220T (D.R.I.), 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 Verizon's Motion for a Stay Pending Decision by the Judicial Panel on Multi-District Litigation at 2, 4 (filed June 22, 2006) (attached as Exhibit 9). At a minimum, therefore, the Commission should not go forward without consulting with the DOJ, especially in light of the DOJ's action in New Jersey described above.

In a case against AT&T, the DOJ 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 10). 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 11). The United States' invocation of the privilege in the New Jersey complaint makes clear that the United States believes the states secret privilege applies to state investigations as well as lawsuits.

5. If the Commission decides to investigate the matter raised in the ACLU's May 25, 2006, letter, which procedural options would be most appropriate? (*e.g.*, informal investigation, formal investigation, complaint).

For the reasons described above, the Commission should not, and indeed cannot, launch an investigation into the matters raised by the ACLU under any procedural option. Federal law bars Verizon from providing information about its cooperation, if any, with this national security matter. The Commission should not put Verizon in the untenable position of attempting to satisfy conflicting commands from its state and federal sovereigns. Moreover, neither the federal wiretapping and surveillance statutes nor state law authorize or contemplate investigations or enforcement proceedings by the Commission to determine criminal culpability. Indeed, the Commission lacks the authority or jurisdiction to investigate or resolve the ACLU's allegations. Instead, ongoing Congressional oversight through the Senate and House Intelligence committees,

as well as the pending proceedings in federal court, are the more appropriate forums for addressing any issues related to this national security program. Accordingly, the Commission should dismiss the ACLU's complaint.

DATED this 30th day of June, 2006.

VERIZON NORTHWEST INC.

By /s/

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