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VIA FACSIMILE: (401) 941-9207

VIA ELECTRONIC MAIL

Thomas Ahern, Administrator
Rhode Island Division of Public Utilities and Carriers
89 Jefferson Boulevard
Warwick, RI 20888

Re: Complaint and Request for Investigation of Verizon and AT&T

Dear Mr. Ahern:

Last Thursday, the United States District Court for the Northern District of California issued an order denying the respective motions of the Government and AT&T Corp. ("AT&T") to dismiss the complaint in *Hepting, et al. v. AT&T Corp., et al.*, Case No. C 06-0672-VRW (N.D. Cal.) ("*Hepting Order*"). We write, out of an abundance of caution, to underscore a point that we believe should be obvious: that the *Hepting Order* provides no grounds for reconsideration of this Commission's recent decision not to investigate the ACLU's allegations that AT&T has unlawfully provided calling records to NSA. That is so for two separate reasons.

First, Judge Walker held in the *Hepting Order* that information relating to the allegations of the plaintiffs regarding the provision of *calling records* is a state secret, and will continue to remain a state secret unless and until the Government makes public disclosure of the relevant facts. *See Hepting Order*, pp. 41-42. Because the only allegation that the ACLU has made here is that AT&T has unlawfully divulged calling records to NSA, the matters that the ACLU is asking the Commission to investigate have not only been claimed to be state secrets by the United States, but also have been held to be state secrets by the only Court that has ruled on the matter.

It is true that Judge Walker rejected the broad assertion of state secrets for a different NSA program: the "terrorist surveillance program," which allegedly involved interceptions of the *contents* of communications. *See id.* at 28-32. But even if the state secrets privilege controlled the question whether state commissions can investigate these matters, this aspect of Judge Walker's Order is irrelevant to the issue before this Commission. The Commission has been asked to investigate the disclosure of calling records, *not* the disclosures of the contents of

communications, and the alleged disclosure of calling records has been held to be a state secret. As Judge Walker recognized in the *Hepting Order*, these are “two different types of alleged NSA surveillance programs.” *Id.* at 19.

Second, regardless of whether state secrets are involved, the Commission lacks jurisdiction to investigate the allegations of the ACLU. As AT&T has elsewhere explained at length in documents previously provided to the Commission, federal law prohibits an investigation of these matters for two related reasons. In the first place, the Commission is preempted by federal law from obtaining the relevant information. The United States has stated that whether AT&T is providing calling records to the United States is classified information. As AT&T has previously explained at length in its submissions to this Commission, federal law prohibits the divulgence of such information to state (or federal) utility commissions. Indeed, it is a federal felony for any person to divulge classified information “concerning the communication intelligence activities of the United States” to any person not authorized to receive such information. 18 U.S.C. § 798. There are also independent statutory prohibitions on divulging information or records pertaining to surveillance activities undertaken pursuant to FISA or ECPA, as well as the activities of the NSA. *See* 50 U.S.C. §§ 1805(c)(2)(B), (C); 18 U.S.C. § 2511(2)(a)(ii)(B); 50 U.S.C. § 402 note; *Founding Church of Scientology v. NSA*, 610 F.2d 824, 828 (D.C. Cir. 1979) (50 U.S.C. § 402 note reflects congressional judgment that information pertaining to activities of NSA “ought to be safe from forced exposure”). Collectively, these federal enactments preclude the possibility that state officials can or should undertake responsibility for investigating a telecommunications carrier’s role, if any, in the NSA’s intelligence activities.

That is the reason why the FCC (and a number of other state public utility commissions) have determined that they lack the ability and the authority to investigate these issues.¹ That is also one of the legal grounds for the lawsuit that the Department of Justice filed against the New Jersey Attorney General and against AT&T and other carriers when the New Jersey Attorney General attempted to compel disclosure of whether calling records has been provided to NSA by telecommunications carriers..

Moreover, again regardless of whether or not state secrets are involved, the activities at the heart of any investigation would involve an exclusively federal function: the National Security

¹ *See* Letter from Kevin J. Martin, Chairman Federal Communications Commission to the Honorable Edward J. Markey, at 1 (May 22, 2006); Letter from David Lynch, General Counsel, Iowa Utilities Board to Mr. Frank Burdette (May 25, 2006); Letter from William H. Chambliss, General Counsel, Virginia State Corporation Commission, to ACLU of Virginia (June 22, 2006); Letter from William M. Flynn, Chairman, New York Public Service Commission to Donna Lieberman, Executive Director, New York Civil Liberties Union (June 14, 2006); Letter from Thomas F. Ahern, Administrator, Rhode Island Division of Public Utilities and Carriers to Steven Brown, Executive Director, Rhode Island Affiliate, American Civil Liberties Union (July 14, 2006); Letter from Richard Hinckley, General Counsel, Public Utilities Commission of Nevada to Gary Peck, American Civil Liberties Union of Nevada (July 18, 2006) ; Delaware PSC Order No. 6965, issued July 11, 2006, in PSC Docket No. 06-179, *In the Matter of the Request of Ten customers To Initiate an Investigation Into Whether Verizon Delaware Inc. and AT&T Communications of Delaware, LLC, Have Improperly Shared Telephone Records (Filed May 25, 2006* (holding proceeding in abeyance for six months).

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Agency's counterterrorism and intelligence activities and the conditions under which the NSA is using telecommunications carriers. As the United States has explained at length in documents that AT&T previously provided to the Commission, these are federal functions that state commissions and other state officials may not investigate or regulate, directly or indirectly.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Jay E. Gruber".

Jay E. Gruber