at&t

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BY OVERNIGHT MAIL

Thomas F. Ahern, Administrator
Division of Public Utilities and Carriers
89 Jefferson Boulevard
Warwick, RI 02888

Re: Complaint and request for investigation of Verizon and AT&T

Dear Mr. Ahern:

Pursuant to your letter to Mr. William [Leahy], dated May 25, 2006, this letter is to respond on behalf of AT&T to the informal complaint of the Rhode Island Affiliate, American Civil Liberties Union ("RI-ACLU") filed on May 24, 2006 ("Complaint") with the Rhode Island Division of Public Utilities and Carriers ("Division"). The Complaint makes certain allegations regarding Verizon and AT&T's putative sharing of telephone records with the National Security Agency ("NSA") and asks the Division to investigate and, if appropriate, take remedial action. As described in more detail below, the Division's examination of these issues is neither appropriate nor even possible in light of the national security concerns that have already been raised by the United States and, as the Federal Communications Commission ("FCC") has already indicated, in view of the federal government's state secrets privilege. For this reason and for all the reasons set forth below, we urge the Division to decline to initiate any proceedings relating to alleged NSA surveillance activities.

The litigation against AT&T and other carriers arises primarily from press reports concerning certain alleged activities of the NSA. On December 19, 2005, in response to a report in the New York Times, President Bush acknowledged the existence of a counterterrorism program involving the interception of international telephone calls made or received by suspected al Qaeda agents.[1] The United States Department of Justice subsequently published a

[1] *See* Press Conference of President Bush (Dec. 19, 2005), available at http://www.whitehouse.gov/news/ releases/2005/12/20051219-2.html; Press Conference of Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for

written explanation of the legal authority for the program acknowledged by the President and defended by the Attorney General.[2] On May 11, 2006, USA Today published a story suggesting that the NSA's intelligence activities may also have included some form of access to domestic call records databases.[3] The Administration has neither confirmed nor denied these more recent reports.

AT&T has consistently declined either to confirm or deny any participation in these programs. As a matter of policy, AT&T declines comment on matters related to national security. AT&T has, however, affirmed that any cooperation it affords the law enforcement or intelligence communities occurs strictly in accordance with law.

On January 31, 2006, following publication of the original New York Times story, a nationwide class action lawsuit was filed against the AT&T Defendants in the United States District Court for the Northern District of California. *See Hepting v. AT&T*, No. C-06-0672-VRW (N.D. Cal.). That lawsuit alleges that one or more of the AT&T Defendants cooperated with various NSA national security surveillance activities and, in so doing, violated the First and Fourth Amendments of the U.S. Constitution and various provisions of the Foreign Intelligence Surveillance Act ("FISA"), the Electronic Communications Privacy Act ("ECPA"), the Communications Act of 1934, and California state law. Following publication of the USA Today story on May 11, a series of additional class actions were filed, in both state and federal courts, making similar allegations. To date, more than twenty such actions have been filed against the AT&T Defendants and other carriers in courts around the country. On May 24, 2006, a petition was filed with the Judicial Panel on Multidistrict Litigation seeking to consolidate these actions before a single federal district court for pretrial proceedings.[4] Among other reasons, the MDL petition cites the unique national security concerns involved in these cases and the possible need to share highly classified information with federal judges as justifications for consolidating all of the pending actions in a single federal judicial district for joint consideration.

To date, the only lawsuit that has proceeded past the filing of the complaint is the original *Hepting* matter in the Northern District of California. In *Hepting*, the AT&T Defendants responded by filing a motion to dismiss the suit, on various grounds including that the maintenance of any claim or cause of action is prohibited by a number of well-established

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National Intelligence (Dec. 19, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html.

[2] *See* United States Department of Justice Memorandum, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, (January 19, 2006) (Attachment A).

[3] Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA Today, May 11, 2006, at A1.

[4] *See* Defendants Verizon Communications Inc., Verizon Global Networks Inc., and Verizon Northwest Inc.'s Motion for Transfer and Coordination Pursuant to 28 U.S.C. § 1407, *In re National Security Agency Litigation*, Judicial Panel on Multidistrict Litigation (May 24, 2006) (Attachment B).

statutory and common-law immunities. Telecommunications carriers enjoy these broad immunities when acting at the direction and with the assurances of the government to provide facilities, assistance or information to the government in connection with national security-related surveillance and intelligence activities.[5]

Shortly after the AT&T motions were filed, the United States intervened in the *Hepting* case and sought dismissal of the action in its entirety "because adjudication of Plaintiffs' claims risks or requires the disclosure of protected state secrets and would thereby risk or cause exceptionally grave harm to the national security of the United States."[6] The state secrets privilege that the United States has invoked is a well-established, constitutionally-based privilege belonging exclusively to the federal government that protects any information whose disclosure would result in "impairment of the nation's defense capabilities" or "disclosure of intelligence-gathering methods or capabilities." *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983). The invocation of state secrets must be made formally through an affidavit by "the head of the department which has control over the matter, after actual personal consideration by the officer." *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953). As the United States noted in its motion, when the entire subject matter of a controversy is a state secret, then the matter must be dismissed outright, and no balancing of competing considerations is allowed or sufficient to override the privilege. *See, e.g., Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998).

In seeking dismissal of the *Hepting* lawsuit, the United States indicated that "no aspect of this case can be litigated without disclosing state secrets."[7] In particular, the United States has asserted the state secrets privilege with respect to "the existence, scope, and potential targets of alleged intelligence activities, as well AT&T's alleged involvement in such activities."[8] In support of this assertion, the United States submitted a classified declaration from Director of National Intelligence John D. Negroponte, in which Ambassador Negroponte, "who bears statutory authority as head of the United States Intelligence Community to protect intelligence sources and methods, . . . formally asserted the state secrets privilege after personal consideration of the matter."[9] Supported by a classified declaration from Director of the National Security Agency General Keith B. Alexander, Ambassador Negroponte "demonstrated the exceptional

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[5] *See* Motion of Defendant AT&T Corp. to Dismiss Plaintiffs' Amended Complaint; Supporting Memorandum, *Hepting, et al. v. AT&T Corp., et al.*, Case No. C 06-0672-VRW(N.D. Cal.) (April 28, 2006) (Attachment C).

[6] Notice of Motion and Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States of America, at 29, *Hepting, et al. v. AT&T Corp., et al.*, Case No. C 06-0672-VRW (N.D. Cal.) (May 12, 2006) (Attachment D).

[7] United States' Response to Plaintiffs' Memorandum of Points and Authorities in Response to Court's May 17, 2006 Minute Order, *Hepting, et al. v. AT&T Corp., et al.*, Case No. C 06-0672-VRW, at 1 (N.D. Cal.) (May 24, 2006) (Attachment E).

[8] Notice of Motion and Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States of America, *supra* note 6, at 16.

[9] *Id.* at 12. The public version of Ambassador Negroponte's declaration is Attachment F.

harm that would be caused to U.S. national security interests by disclosure" of information pertaining to the alleged surveillance activities and any information tending to confirm or deny AT&T's claimed participation in those activities.[10] By separate filings on May 24, 2006, both the United States and AT&T urged the district court to review the classified versions of the United States' briefs and declarations prior to oral arguments on the motions to dismiss, which are now scheduled for June 23, 2006.[11] In a June 6 Order, the district court agreed that the litigation cannot proceed and that no discovery can occur until the court conducts an *ex parte* and *in camera* review of the classified memorandum and classified declarations of Ambassador Negroponte and General Alexander and determines whether the states secrets privileges has been properly asserted. The Court held that the potential for "exceptionally grave damage to the national security of the United States" precluded any disclosure of information about the alleged surveillance until the threshold states secret issue has been resolved.[12]

In parallel with this litigation, certain members of Congress urged the Federal Communications Commission to investigate the reports that AT&T and other telecommunications carriers had shared call record data with the NSA or otherwise violated the privacy protections in the Communications Act. After reviewing the matter, including the submissions of the United States in *Hepting*, the FCC concluded that "it would not be possible for us to investigate the activities addressed in your letter without examining highly sensitive classified information."[13] Because "[t]he Commission has no power to order the production of classified information," and because section 6 of the National Security Act of 1959 independently prohibits disclosure of information relating to NSA activities, the Commission informed the Congress that it lacked authority to compel the production of the information necessary to undertake an investigation and would not do so.[14] Finally, while the Chairman of the Senate Judiciary Committee had at one time suggested that he might conduct hearings into the activities of telecommunications carriers, he has announced that no such hearings will occur now. These issues are within the jurisdiction of the House and Senate Select Committees on Intelligence, which are constituted to prevent disclosure of classified information.[15]

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[10] *Id.* at 13. The public version of General Alexander's declaration is Attachment G.

[11] *See* United States' Response to Plaintiffs' Memorandum of Points and Authorities in Response to Court's May 17, 2006 Minute Order, *supra* Note 7; Reply Memorandum of Defendant AT&T Corp. in Response to Court's May 17, 2006 Minute Order, *Hepting, et al. v. AT&T Corp., et al.*, Case No. C 06-0672-VRW, N.D.Ca (May 24, 2006) (Attachment H).

[12] June 6 Order, *Hepting, et al. v. AT&T Corp., et al.*, Case No. C 06-0672-VRW, N.D.Ca (June 6, 2006) (Attachment I).

[13] Letter from Kevin J. Martin, Chairman Federal Communications Commission to the Honorable Edward J. Markey, at 1 (May 22, 2006) (Attachment J).

[14] *Id.* at 2.

[15] CNN, *Specter won't ask telcos to testify on taps,* CNN.Com, June 6, 2006, available at http://money.cnn.com/2006/06/06/news/companies/telco_nsa.

In light of the foregoing, we respectfully submit that the Division should decline to initiate any proceedings relating to alleged NSA surveillance activities. The alleged cooperation of telecommunications carriers with the United States Intelligence Community is currently under review in the federal courts and in the United States Congress. The Federal Communications Commission has already recognized that administrative review by telecommunications regulators is infeasible and inappropriate. Moreover, any such investigation would be duplicative and unnecessary and would increase the risk of inadvertent disclosure of highly classified information.

In any event, given the state secrets and classified information at the core of these alleged intelligence activities, the Division could not adduce any evidence on which to base any informed conclusions. The United States' state secrets assertion in *Hepting* covers all details of the alleged NSA activities at issue, including the identities of any carriers participating in it and their roles and responsibilities, if any. All carriers are disabled from responding to requests for information on this subject. The state secrets privilege cannot be waived by a private party, *see United States v. Reynolds*, 345 U.S. 1, 7 (1953), and AT&T could therefore neither confirm nor deny any participation in any alleged intelligence activities of the NSA. In addition, 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.

These points are dramatically underscored by recent events that occurred in New Jersey. On May 17, 2006, the New Jersey Attorney General had served AT&T and other carriers with a subpoena that sought documents and other information relating to AT&T's alleged activities under the NSA program. The return date for this subpoena was June 15, 2006. On June 14, 2006, the United States filed suit in the United States District Court for the District of New Jersey against the New Jersey Attorney General, AT&T, and other carriers, seeking a declaratory judgment that federal law prohibits New Jersey from enforcing the Subpoenas and prohibits AT&T from providing the requested information to state officials.[16] In this lawsuit, the United States maintains that state attempts to force carriers to disclose information about their activities, if any, under the NSA Program relate to exclusively federal functions and are preempted by a number of different provisions of federal law.

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[16] *See* Complaint, *United States of America v. Zulima V. Farber, et al.*, Civil Action No._____, Prayer for Relief ¶ 1, (D.N.J.) (June 14, 2006) (Attachment K).

The United States explained these allegations in greater detail in a letter that was simultaneously sent to the New Jersey Attorney General.[17] There, the United States stated that state subpoenas seeking information relating to the NSA Program "intrude upon a field that is reserved exclusively to the Federal Government and in a manner that interferes with federal prerogatives" and that "[r]esponding to the subpoenas," and even merely "disclosing whether or to what extent any responsive materials exist, would violate various specific provisions of federal statutes and Executive Orders," including provisions that carry criminal sanctions.[18] The United States also explained that the subpoenas "seek the disclosure of matters with respect to which the D[irector of] N[ational] I[intelligence] already has determined that disclosure, including confirming or denying whether or to what extent such materials exist, would improperly reveal intelligence sources and methods" in contravention of the United States' state secrets privilege.[19]

At the same time the United States filed this lawsuit, it sent a letter to AT&T that specifically advised that "[r]esponding to the subpoenas - including by disclosing whether or to what extent any responsive materials exist - would violate federal laws and Executive Orders."[20] Accordingly, AT&T is advising the New Jersey Attorney General that it cannot disclose any of the requested information regarding AT&T's activities, if any, under the NSA program, pending the final resolution of these issues in the federal judicial system. This underscores that state commission efforts to investigate the allegations against AT&T cannot proceed in view of the positions taken by the United States.

In closing, we wish to emphasize that the press reports on which the various complaints have been based provide no basis for assuming illegality on the part of any carrier. There are numerous avenues by which the cooperation of telecommunications carriers such as AT&T with federal law enforcement, investigative, or intelligence agencies is not only authorized but required, and, as noted, federal law accordingly provides absolute immunity from suit to carriers in such circumstances and a broad "good faith" defense even to actions that survive that immunity.[21]

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[17] Letter from Peter D. Keisler to the Honorable Zulima V. Farber, at 1, 5 (June 14, 2006) (Attachment L).

[18] *Id.* at 2-3.

[19] *Id.* at 5.

[20] Letter from Peter D. Keisler to Bradford A. Berenson, Esq., et al., at 1 (June 14, 2006) (Attachment M).

[21] *See, e.g.,* 18 U.S.C. §§ 2511(2), 2511(3), 2520(d), 2702(b), 2702(c), 2707(e), 2703, 2709, 3124(d) & (e); 50 U.S.C. §§ 1805(f) & (i), 1842(f), 1843.

AT&T therefore respectfully requests that the Division take no further action in this matter.

Sincerely,

Jay E. Gruber

cc: William P. Leahy, Vice President, External Affairs – Atlantic Region, AT&T

Enclosures