

August 8, 2006

Vermont Public Service Board  
112 State Street  
Drawer 20  
Montpelier, VT 05602

**Re: Docket 7183:  
Petition of Eight Ratepayers for an investigation of possible disclosure  
of private telephone records without customers' knowledge or consent  
by Verizon New England Inc., d/b/a Verizon Vermont**

Dear Sue:

This letter is ACLU-VT's comment on Assistant Attorney General Keisler's July 28, 2006 letter to individual members of the Board. ACLU-VT asks that the Board deny the government's request that it close its investigation into Verizon's possible disclosure of private telephone records without customers' knowledge.

In its Procedural Order, the Board invited the government to intervene and extended the intervention deadline to facilitate the government's involvement.<sup>1</sup> The government has refused to intervene or to submit to the jurisdiction of the Board. (DOJ Letter at 1). The government's letter demonstrates a disregard for the Board's authority and an insistence on playing by its own rules.<sup>2</sup>

The Board has always been liberal in granting intervention under Rule 2.209; here, as noted, it even invited the government in! PSB Rule 2.210, which refers to the Vermont Rules of Civil Procedure, would require joinder of a person who claims an

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<sup>1</sup> "USG is invited to intervene in this proceeding in order to protect the interests of the United States and those of respondent Verizon." Docket Nos. 7183 & 7192, Procedural Order at 5, 7/12/2006.

<sup>2</sup> The government did not even serve its letter on the parties as required by PSB Rule 2.204(C) and V.R.C.P. 5(a). Today's U.S. government seems to have a penchant for acting outside not only established norms, but the law itself. It is self-evident that the core issues in this case wouldn't be as compelling if the current Justice Department and "National Security Community" [Mr. Negroponte's term] had not abused the law by circumventing the minimal due process requirements of FISA and CALEA.

interest that may be affected by the proceeding. (Rule 19(a) of the Vermont Rules of Civil Procedure bears directly on this situation.) The government cannot at once assert its interest in the case and separate itself from the proceedings. The Board should not allow the government to dictate the outcome of a proceeding in which it refuses to take part.

Furthermore, the government has put forth no valid basis for dismissal. The Board should not dismiss this case based on the state secrets privilege -- the privilege has not been properly asserted. The Board recognized that the state secrets privilege belongs to the government, rather than Verizon, and must be asserted by it. (Procedural Order at 3). In order to assert the privilege, the government can't simply lob a letter to individual Board members; it must intervene in the case. This it has refused to do.

Even if the Board gives weight to the government's views, the state secrets privilege does not mandate dismissal of these proceedings. First, the government objects only to the requests of the Department of Public Service. (DOJ Letter at 2). The ACLU's request for information differs from that of the Department of Public Service, but the government makes no mention of the ACLU or the seven other individual petitioners. The government, therefore, has not asserted the state secrets privilege with respect to the ACLU's request.

Second, the mere invocation of the state secrets privilege is not adequate grounds for dismissal of the Board's investigation. Rather, the Board must evaluate whether and to what extent the privilege applies to these proceedings. "The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so

without forcing a disclosure of the very thing the privilege is designed to protect.”<sup>3</sup> The Supreme Court noted the difficulty inherent in this task; however, it did not consider the difficulty so insurmountable as to require the case to be dismissed out of hand.

Finally, Verizon’s refusal to confirm or deny its cooperation with the federal government should not lead to this inquiry’s dismissal. Rather, this information should serve to inform the Board in its evaluation of Verizon’s compliance with the Consumer Protection Standards.<sup>4</sup> The fact that Verizon will neither confirm nor deny its cooperation with the NSA is evidence, in and of itself, that Verizon has violated Vermont’s Consumer Protection Standards. Verizon’s Privacy Principle 2 promises that “Verizon informs customers how information Verizon obtains about them is used, as well as their options regarding its use.”<sup>5</sup> Verizon’s refusal to inform Vermont customers whether their calling records were disclosed to an outside party directly contradicts its promise. This privacy principle violates Vermont’s fair marketing practices provision because it fails to explain “clearly, conspicuously, and in close proximity to the words stating the offer” that Verizon will sometimes use customer information without the customers’ knowledge or consent.<sup>6</sup> The Board should apply a similar analysis to determine the extent to which Verizon’s refusal to confirm or deny its disclosure of customer records constitutes a breach of its privacy policies and violation of Vermont law. This analysis requires neither the cooperation of the U.S. government nor the application of the “state secrets” privilege.

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<sup>3</sup> *U.S. v. Reynolds*, 345 U.S. 1, 7 (1953).

<sup>4</sup> Vermont Public Service Board, Docket No. 5903, Attachment 2, 7/2/99.

<sup>5</sup> Verizon Privacy and Customer Security Policies, General Privacy Principles, found at [www.verizon.com](http://www.verizon.com).

<sup>6</sup> Consumer Protection Standards, Docket No. 5903, Attachment 2, 7/2/99.

The Board has a responsibility to Vermont consumers to assure that Verizon and other regulated companies comply with Vermont law. The Board should press forward with its investigation to the fullest extent possible.

Thank you for your consideration.

Sincerely yours,

Richard H. Saudek

Cc Combined Service List  
PSB Dockets 7183 and 7192