

August 11, 2006

Susan M. Hudson, Clerk  
Vermont Public Service Board  
112 State Street, Drawer 20  
Montpelier, VT 05620-2701

Re: Docket Nos. 7183, 7192 and 7193, Department of Justice letter

Dear Mrs. Hudson:

Please accept this letter as the Department of Public Service response to the letter dated July 28, 2006 from Assistant Attorney General Keisler on behalf of the United States Department of Justice (“DOJ letter”) urging the Board to close the above-referenced Dockets due to national security concerns.<sup>1</sup> The DPS urges the Board to reject the recommendations in the DOJ letter for the reasons explained herein.

First, the United States government has specifically declined to participate as a party in these proceedings in spite of the Board’s direct invitation to intervene.<sup>2</sup> Accordingly, the DOJ letter cannot be considered a formal filing in the Docket and the Board should not give it any consideration or weight in deciding the pending dismissal motions.

Second, the DOJ letter fails to properly acknowledge the true scope of the Board’s proceedings.<sup>3</sup> The investigations at hand go beyond whether or not Verizon or AT&T

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<sup>1</sup> The DOJ letter was not served on the DPS. DPS obtained a copy of the letter through counsel for ACLU.

<sup>2</sup> DOJ letter at 1.

<sup>3</sup> The letter actually appears to be a form letter that DOJ is sending to various state commissions, changing only the information necessary to place the letter in a state-specific context. Attachment 1 is a copy of the same letter sent to the Maine PUC. Accordingly, it is not surprising that the DOJ letter overlooks the specifics of the issues presented for the Board’s consideration as well as the extent of the Board’s jurisdiction

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turned over bulk customer calling records to the National Security Agency (“NSA”). The investigations seek information on Verizon’s and AT&T’s policies and practices with respect to maintaining and protecting private customer information, and whether the companies have violated Vermont or federal disclosure laws, or the companies’ own policies, with respect to this information. As detailed in the DPS’ oppositions to Verizon’s and AT&T’s dismissal motions,<sup>4</sup> these inquiries extend to matters beyond those described in the DOJ letter.

Third, because the federal government has not intervened in the proceedings, the state secrets privilege has not been properly invoked, so even if one assumes it could apply to some portion of the subject matter of the investigations, the Board is without a basis to consider whether its assertion is valid under the circumstances.<sup>5</sup> Additionally, even a properly invoked privilege does not require automatic dismissal of the Dockets. The Board would need to engage in a careful analysis to determine whether or not the circumstances at hand warrant application of the privilege.<sup>6</sup> No such claim or analysis has taken place and the privilege cannot be used as a basis for dismissal.

Fourth, Verizon and AT&T in fact can answer questions regarding their handling of customer records without running afoul of federal law. For example, the companies could respond to a question that asks whether they disclosed any customer information that is deemed protected under state or federal law to any state or federal agency in the absence of a warrant, subpoena, court order or other applicable written authorization allowing the release of such information. Answering such an inquiry would determine whether any unlawful disclosures occurred without confirming or denying the existence or non-existence, or the companies’ participation or lack of participation, in any particular national security investigation or program.

Lastly, Verizon has already made certain representations about its participation or non-participation in the alleged NSA data gathering program when it issued press releases in response to an article in *USA Today*. In those press releases Verizon states:

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under Vermont law.

<sup>4</sup> The DPS’ opposition to AT&T’s motion was filed August 11, 2006.

<sup>5</sup> United States v. Reynolds, 345 U.S. 1, 7-8 (1953) (state secrets privilege belongs to the government and may not be asserted by private parties).

<sup>6</sup> Id.

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- Verizon never entered into an arrangement with the NSA whereby it provides the agency data from its customers' domestic calls.
- Verizon was not asked by the NSA, nor did any Verizon company, wireless or wireline, provide the NSA with customer phone records or any call data from those records.
- No local call data has been provided to the NSA.
- All Verizon disclosures of customer information are authorized by law.
- Verizon will provide customer information to a government entity only where authorized by law and only for appropriately defined and focused purposes.
- Verizon does not and will not provide any government agency unfettered access to customer records or provide information to the government under circumstances that would allow a "fishing expedition."<sup>7</sup>

In spite of Verizon's refusal to confirm or deny whether it turned over customer call data to the NSA, the company has already publicly stated that it has not done so. The Hepting court specifically stated that a disclosure by the government or a company alleged to be involved in a NSA program could have the effect of rendering a state secrets privilege claim moot.<sup>8</sup> Accordingly, the DOJ letter may very well be without legal basis as regards Verizon's public denials. In fact, the Maine Public Utilities Commission just issued an order in response to complaints from a number of Verizon customers that the company may have provided the NSA or other government agency unwarranted access to its facilities or records. In response, Verizon made the same assertions that are found in the two press releases. The Maine PUC directed Verizon to submit sworn affirmations from a corporate officer with decision-making authority and knowledge that the representations are in fact true and accurate.<sup>9</sup> The Maine PUC, which received from the

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<sup>7</sup> The two press releases are included as Attachments 2 and 3.

<sup>8</sup> Hepting v. AT&T Corp., Docket No. C-06-672 VRW (N.D. Cal. July 20, 2006) at 42.

<sup>9</sup> Request for Commission Investigation into Whether Verizon is Cooperating in Maine With the National Security Agency's Warrantless Domestic Wiretapping Program, State of Maine Public Utilities Commission, Docket No. 2006-274, Order of 8/9/06 at 2-

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Department of Justice, the same letter the Board received, apparently saw no problem with requiring Verizon to repeat under oath the same representations it had already made publicly.

For the foregoing reasons, the Board should not give the DOJ letter any consideration in deciding the dismissal motions filed by Verizon and AT&T in Dockets 7183, 7192 and 7193. Thank you for your attention to this matter. Please feel free to contact me should you have any questions.

Cordially,

John J. Cotter, Special Counsel

cc: Service Lists Docket 7183, 7192 & 7193  
Leslie Cadwell, Esq.  
Peter D. Keisler, Esq.

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3. A copy is included as Attachment 4.