BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1265

AMERICAN CIVIL LIBERTIES UNION OF OREGON, Complainant, v. VERIZON NORTHWEST, INC., UNITED TELEPHONE COMPANY OF THE NORTHWEST, dba SPRINT, and QWEST CORPORATION, Defendants.	AMERICAN CIVIL LIBERTIES UNION OF OREGON'S SUPPLEMENTAL MEMORANDUM IN RESPONSE TO VERIZON'S SUBMISSION DATED JULY 26, 2006

Verizon's letter submission dated July 26, 2006 raises interesting, but largely irrelevant, issues. This supplemental memorandum will explain why.

The decisions described in Verizon's letter, *Hepting v. AT&T,* No. C-06-672 VRW (N.D. Cal. July 20, 2006) and *Terkel v. AT&T*, No. 06-C-2837 (N.D. Ill. July 25, 2006) both involve a thorough discussion of the *Totten/Tenet* bar and the state secrets privilege which were raised in cases in which the U.S. Government intervened, asserted the *Totten/Tenet* bar and the state secrets privilege and submitted proof in support of its assertions. Not only has that not happened here, but as explained in the ACLU's reply on page 9, private companies such as Verizon

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cannot claim either the *Totten/Tenet* bar or the state secrets privilege. *U.S. v. Reynolds*, 345 U.S. 1, 7 (1953). As a consequence, while interesting reading, the decisions in *Hepting* and *Terkel* are largely irrelevant at the present time.

Verizon also misconstrues the relief sought by the ACLU. To put the two decisions cited by Verizon into context, it is important to understand both what is being sought by the ACLU and what the ACLU is not requesting. As indicated in its original Complaint (page 4) and in its Reply (page 14-15), the ACLU is seeking an investigation into telecommunications companies' handling of legally protected customer information, both content and data (communications records). The ACLU seeks an investigation of only intra-state communications and the ACLU seeks an investigation of the possible disclosure of information to any person or entity, not just to the National Security Agency ("NSA"). The ACLU has not sought an investigation of telecommunications companies' handling of interstate or international telephone calls nor does the ACLU seek an investigation into the Government's terrorist surveillance program.

It is also critically important to understand that the investigation that the ACLU wants the Commission to undertake has a very different role than discovery in a civil lawsuit—one of the key issues in *Hepting* and *Terkel.* The Commission is a regulator tasked with investigating violations of Oregon law for Oregon consumers' benefit; therefore, it sits in a different posture from a civil litigant looking to prove his case. As such, when the Commission is facing a potential violation, it has an obligation to be as aggressive as possible in pursuing all available leads and avenues to the truth. If such an investigation in a private civil lawsuit was impossible or injurious to national security, the court in *Hepting* could have (and would have) dismissed the case in its entirety. The court did not do so despite having full access to *in camera* submissions by the Government.

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Should the Commission even consider the *Hepting* and *Terkel* decisions, it should recognize that the courts in those two cases reached their decisions only after the Government intervened, claimed the *Totten/Tenet* bar and the state secrets privilege (something Verizon has no standing to do in this case), submitted proof in support of its assertions, and the courts conducted rigorous examinations of the Government's assertions. Moreover and as explained hereafter, to a great extent the courts in *Hepting* and *Terkel* rejected most of the Government's claims.

The allegations in *Hepting* are much broader than the issues presented to the Commission. In *Hepting*, the plaintiffs sought damages for violations of the First and Fourth Amendments, alleged violations of the Foreign Intelligence Surveillance Act, and alleged violations of multiple other federal statutes as well as the California Unfair Competition Law. In addition, the plaintiffs in *Hepting* asserted allegations involving "foreign communications." The ACLU has made none of these claims nor has it asserted any of these allegations.

In *Hepting*, AT&T and the U.S. Government both filed motions to dismiss. The Government intervened, asserted the *Totten/Tenet* bar and the state secrets privilege, and claimed that the plaintiffs could not proceed with their case and could not conduct any discovery. The court denied each of the motions to dismiss and ruled that "Plaintiffs appear to be entitled to some discovery." Slip op. at 34.

First, the court rejected the assertion of the "categorical *Totten/Tenet* bar" (referencing *Totten v. United States*, 92 U.S. 105 (1876) and *Tenet v. Doe*, 544 U.S. 1 (2005)), because the "general contours of the 'terrorist surveillance program'" had already been disclosed to the public and were not a secret. Slip op. at 31. Next, the *Hepting* court rejected the Government's assertion of the state secrets privilege and allowed the plaintiffs to proceed with their case because the court had already concluded that the terrorist surveillance program was not a state secret and

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because the court did not agree with the Government that the "existence of a certification (a request to phone companies for information or surveillance assistance) regarding the 'communication content' program is a state secret." Slip op. at 39. As a consequence, the court rejected two of the grounds for dismissal asserted by Verizon here.

The recent *Terkel* case is informative on some issues, but is generally inapplicable to the issues presently before the Commission.[1] At the outset, it is important to recognize the procedural posture of the case. AT&T moved to dismiss asserting that Terkel had not adequately pled standing. That motion was denied. The U.S. government intervened, asserted the *Totten/Tenet* bar and the state secrets doctrine and asserted that the plaintiffs had no standing because they could not prove any injury. The court found that the application of the *Totten/Tenet* bar "would be particularly inappropriate." Slip op. at 16. However, the court granted the Government's motion, in part because the plaintiffs sought only prospective relief (declaratory judgment and injunctive relief) which carries a high burden of proof of injury. See Slip op. at 37.

Here, the ACLU has not sought any prospective relief, thus it has no burden of proof of injury. Plus, as an Oregon entity with 15,000 members in Oregon, the ACLU has adequate standing to request the PUC to conduct an investigation.

There are additional reasons why *Terkel* is not conclusive of the issues before the Commission:

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[1] The *Terkel* court apparently agrees with the argument asserted by the ACLU (reply pp. 12-14) that there is vagueness in the telecommunications companies' statements about nondisclosures that are at best unsatisfying (Slip op. at 23, FN 6). While the *Terkel* court is not necessarily in a position to clear things up when telecommunications companies issue ambiguous statements, the Commission can and should do so in this matter.

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- The plaintiffs in *Terkel* did not challenge the interception of the contents of communications; rather their challenge was limited to the alleged disclosure to the NSA of records regarding customer communications. (Slip op. at 2). Here, the ACLU seeks an investigation of disclosures of both communications contents and records to any third party.
- The plaintiffs in *Terkel* sought discovery of whether AT&T had disclosed information on any telephone calls, including interstate and international calls, whereas the ACLU here is only seeking an investigation of purely intra-state communications.
- The U.S. Government intervened in *Terkel*, unlike the present case.

If the Government intervenes here and asserts the state secrets privilege, it will have to convince the Commission that divulging the existence of a program to capture intra-state communications data or to obtain the content of intra-state communications would somehow jeopardize national security. Until that time, the Commission need not concern itself with an analysis of the state secrets privilege.[2]

By no means are the *Hepting* and *Terkel* decisions dispositive on the issue of whether or not the Commission should investigate. As explained in its Complaint and Reply, the Commission should launch an inquiry because only if the

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[2] Although academic at this point, given the fact that the Government has not intervened and asserted the state secrets privilege and Verizon has no standing to assert the privilege, the ACLU does not concede that the state secrets privilege can be asserted in a purely state regulatory proceeding.

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Commission initiates an investigation can the citizens of Oregon learn whether telecommunications companies operating in Oregon have complied with the law.[3]

DATED this 28th day of July, 2006.

Respectfully submitted,

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[3] Verizon referenced two cases from other states, New Jersey and Missouri, in which the Government seeks to quash discovery requests, neither of which are dispositive of any issue before the Commission. First, the Government's efforts in those cases are contrary to the court's decision in *Hepting* which allowed discovery by a private litigant to move forward. Second, the discovery sought by the New Jersey Attorney General and the Missouri Public Utility Commission included information regarding interstate and international telephone calls and was targeted at disclosures to the NSA. The ACLU's request is clearly distinguishable.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **AMERICAN CIVIL LIBERTIES UNION OF OREGON'S SUPPLEMENTAL MEMORANDUM IN RESPONSE TO VERIZON'S SUBMISSION DATED JULY 26, 2006** was served on:

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by mailing to them a copy of the original thereof, contained in sealed envelopes, addressed as above set forth, with postage prepaid, and deposited in the mail in Portland, Oregon, on July 28 2006.

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